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Deconstruction, dissipation and death, and the ‘casting-away of the law’?

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Abstract

In this brief tribute, I pursue the long-promised imaginary conversation with Peter Fitzpatrick and engage two themes: the nature of an abyss and the conversion of Karl Marx from a revolutionary thinker to a best exemplar of evolutionary thought. If these themes make some sense, a good way of being with Peter is a further exploration amidst us all.

Keywords: death; finitude; mythologies; Marx; unsubordinated

It remains difficult to live in a world bereft of Peter Fitzpatrick, whom I affectionately but non-Eurocentrically called ‘Peter-san’. He was not given to thrust and parry of pugnacious polemic, but revelled in a gentle dialogue. We all will miss a friendly soul who, while summoning many, remained in infinite solitude within himself. Sometimes, I said to him: ‘Peter-san, it would be best for me to start an imaginary conversation with you!’ Now, I do, but he would be in the better company of angels.

I do not think that Peter would want to be regarded as a philosopher of finitude, but he often spoke about ‘these death-bound dimensions, the unconditional and the conditioned – to bind them in a combine virtual alternation yet to do this in a way that gives some ultimate force to each without subjecting one to another’. Death, dying, is an ‘ultimate force’ but does not constitute any subject positions, and certainly not as (what Julia Kristeva preciously called) an ‘abject subject’ – a being dismembered by the ‘power of horror’, whether constituted by state or society, or by both (Kristeva, 1982).

He recognised that, for Derrida, this process of alternating and combining invested forms of life – forms of ‘what lets singular beings’ to ‘live together’ (Borradori, 2003, as cited by Fitzpatrick, 2010). But, if ‘the containing barriers of determinacy’ determine our finite existence, so do ‘the abyssal openness of the responsive’. Any ‘ultimate commitment to either is death’. They ‘fuse yet remain distinct in an aporetic generation of a form of life, of law’ (Fitzpatrick, 2004, p. 143). This signified a moment both of determinacy and of abyss. But that ‘determinacy’ assumes the visage of law as ‘less the command that has death as its sanction’, but more as ‘death itself wearing the face of law’; this ‘death is always the horizon of the law’ (Blanchot, 1981). As Peter-san says:

‘The horizon thence becomes not only the condition and quality of law’s contained and distinct existence but also an opening onto all that lies beyond and is other to that existence. It is in this way that, for Blanchot, death “raises existence to being”, that “death becomes being” This death “is man’s possibility, his chance, it is through death that the future of a finished world is still there for us” And this “liberated nothingness”, a nothingness which “is the creator of world in man” Death as horizon here is not only the end but also the beginning, the opening to and making possible of all that can come from being to existence: death is “the Other”.’ (Fitzpatrick, 2010, p. 4)

And, legal fictions that aspire to immortality are fictions of finitude that strive towards immortality. Is death also, like legal fiction, a ‘truth and also indifference to truth’ (Fitzpatrick, 2004, p. 145)?

What we do need to understand a little more circumspectly is the notion of ‘abyss’. If finitude as non-being prevails in death, the abyss is either purgatory (‘Abandon hope all ye who enter here’ – the supposed welcome inscription at the entrance to Hell) or the vertiginous site of future hope for human rights, justice and freedom (the stuff of which all utopias are made). Peter-san, in encouraging the latter belief, thus reinforces intergenerational justice. Death, rather than seen as a ‘constituent’ limit of law, is more crucially held out as a hope; the abyss of freedom must remain intergenerationally and benignly creative.

‘The old order changeth yielding place to new. And God fulfills himself in many ways,’ wrote Alfred Tennyson (1859/1983), but he also concludes: ‘If thou shouldst never see my face again Pray for my soul. More things are wrought by prayer than this world dreams of.’ Is an imagery of the abyssal, then, an act of a prayer? A prayer for a human hope? But we know that ‘hope’s ambivalence, its peril and its promise’ suggest that

‘some forms of hope are helpful while others are not as it “can sustain the work of truth and reconciliation or descend into solipsism and passivity; it can respond creatively to devastation or naively repeat the past; it can nourish the struggle for justice or inadvertently reassert privilege; it can enable transformative solidarity or embody metaphysical arrogance”.’ (Newheiser, 2016, p. 117)

Is, then, the abyssal a Janus-faced cauldron of false hopes or whether ‘true hope’ may be discovered some day? Peter-san was peerless in inviting our attention to deep ethical ambiguities of expectations of emancipation.

Perhaps, the ‘abyssal’ is after all a bridge, not a void. Taking seriously the words of Jacques Ranciere, if politics ‘consists in building a relationship between things that have none’ (1999, p. 40), the abyss of freedom as ‘world-building practice of freedom’ (Zerilli, 2005) – a task in which the absent others can also participate in forging alternate worlds. Death and dying are ultimate non-sovereignty practices and those who are not at the table may still contribute to the great chain of practices of contingent and non-sovereign freedom (Zerilli, 2005, p. 22; 2016).

The Mythology of Modern Law (Fitzpatrick, 1992) is perhaps Peter-san’s most accessible work and my favourite book. I prescribed it as a required text in the core course in the master’s programme at Warwick and students just adored it; they raised some perplexities with him at his regular end-of-semester seminars. Warwick was where I located the Midas touch in him: closely attentive to the class, he was at home amidst (as it were) the raw and the cooked. The book is an enduring archive of the ways in which the autonomous modern law has been placed at the service both of the myths of progress and development on the one hand – and, on the other hand, of racial superiority, ‘development’ and even ‘post-development’ (Fitzpatrick, 2020).¹

In a sense, the book also defines him. Not merely does he wish to disturb the theoretical might of John Austin, H.L.A. Hart and Ronald Dworkin, but his quest for law in ‘transcendent and terrestrial existences’ seeks to ‘render the common ground between them eloquent with sacred meaning’ (Lévi-Strauss, 1968, as quoted in Fitzpatrick, 1992, p. 227). Of course, Peter’s search is for the secular sacred. The autonomy of modern law is a well-cultivated ‘myth’ that can both ‘yet be in time’ and also constitute a ‘presence which implies the totality of its history’; it ‘successfully demands allegiance, not just to all that it was or is but also to all that it will be’ (Fitzpatrick, 1992, p. 10, quoting Goodrich and Hachamovitch, 1991). In this way, then, the ‘plane of myth is not confined to the sacred’ but also

¹The 25th anniversary of the *Mythology* was celebrated in 2017, by an event organised in Australia by Sundhya Pahuja in the presence of Peter and at Warwick as part of the *Critical Legal Conference 2017*.

describes ‘the ... breakthrough of the sacred ... into the world’ (Fitzpatrick, 1992, p. 6, quoting Eliade, 1968). And the mundane triumphs in the project of ‘modernity’ as ‘efforts to develop objective science, universal morality and law and autonomous art according to their inner logic’ (Habermas, 1985, p. 9) serve only the paralogics of the myth.

My affectionate grouse with Peter related to many matters, including Barthes’s (1973) famous remarks on myths as constituting political language. And he perhaps felt that my perplexity about the incommensurability between *mythos* and *logos* was antiquated, as both were ‘non-totalizing’ frames that, rather than making philosophy impossible, make both richer by co-nesting them (or providing the ‘other beginning’ – as Derrida would say).²

But I will engage here only (1) his observation regarding Marx and Engels that their ‘devastating criticism of modern society and its law’ did ‘represent the best in evolutionary attainment so far’ (Fitzpatrick, 1992, p. 105); and (2) that the talk about ‘the progression of subordination’ did not take account of ‘that which remains unsubordinated’ (Fitzpatrick, 1992, p. 50). As for point (1), what was traditionally conceived as revolutionary thought appears merely as ‘evolutionary thought, displacing all thoughtways’ about an ‘epistemic break’ that Marx made! And Peter-san places him among all kinds of motley thinkers, big and small, who preached colonial authoritarianism of law ‘structured around’ the ‘authoritarian legal regime necessary for imperial modes of exploitation’ (Fitzpatrick, 1992, p. 108). Were those millions in colonial societies who voluntarily preferred ‘communism’ as a path to a militant national liberation suffering from false consciousness? Is it the case that Marx altogether failed to rigorously pursue emancipatory interest? Alas, the Cold-War caricatures of Marx still haunt the late post-Marxian era!³

As for point (2), the difficult notion of ‘unsubordinated’ fascinates, but how may these manage to escape the ‘hegemony’ of what Antonio Gramsci first theorised in terms of the power of the subaltern working class and then the ruling hegemonic bloc (Gramsci, 2011, notebook 25)? And Chapter 7 of *Volume One, Capital* (Marx, 1867/1990) shows how an array of bourgeois interests and aims coalesced to secure the reduction in hours of work, which Marx hails as the Magna Carta of the working class (Baxi, 1993, pp. 76–79). Maybe Marx did not accelerate understanding of social heterogeneity of resistance and the fractions of the proletariat. The question persists now in a post-liberal world: have all the ‘unsubordinated’ gone to the wasteland of post-modern history (Chibber, 2013; Baxi, 2018)?

It may not be inapt to conclude with the words of *Act Three, Scene 1*, in which Prince Hamlet soliloquises:

‘But that the dread of something after death,
The undiscovered country from whose bourn
No traveler returns, puzzles the will
And makes us rather bear those ills we have
Than fly to others that we know not of?
Thus conscience does make cowards of us all,
And thus the native hue of resolution
Is sicklied o’er with the pale cast of thought,
And enterprises of great pitch and moment
With this regard their currents turn awry.’ (Shakespeare, 1623/2008, p. 3)

Adieu, Peter-san – never have you been a coward of conscience. Never have you let the ‘enterprises of great pitch and marrow’ go ‘awry’. Together, even though with different accents, we have learnt how

²See now an exciting treatment of Derrida by Anis N. Spitzer (2011); see also Sugarman (1996) for the very pertinent role of the guild practices of ‘invented tradition’ and ‘myth-making’.

³However, in the posthumous publication completing Peter’s intellectual autobiography, Abdul Paliwala *et al.* consider that Peter-san followed a distinct Derridean variety of Marxist understanding (based on Derrida’s *Spectres of Marx* (1993/1994)) (Fitzpatrick *et al.*, 2020).

not to be ‘sicklied o’er with the pale cast of thought’ (Shakespeare, 1623/2008, p. 4). But you, among the handful, have cherished reversing Gramsci: what matters is the optimism of the intellect and perhaps the time has come to meliorate, if not the optimism of the will (Baxi, 2016), and lose the name of action, the progression of subordination and that which remains unsubordinated.

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