REVIEW

The Mythology of Modern Law

Peter Fitzpatrick
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A characteristic of postmodernist approaches to law, so it is said, is the reintroduction of ontology, not as a solution to the question of the foundation of law, but as the assertion that law has no foundation. Peter Fitzpatrick's, The Mythology of Modern Law (hereafter Mythology) fits this characterisation. Its thesis is that law, in denying its being as myth, denies that which gives it coherent existence.

Law, Fitzpatrick argues, has contradictory existences: as will and as order, as autonomous and as organic, as transcendent and as real. It is myth that holds these contradictions together and the myth is the denial of its own mythological character. Modern law in western societies is claimed, by its celebrants, to be universal, objective and impartial: to be an embodiment of that form of reason which works, hand in glove with scientific knowledge, to establish European cultural pre-eminence over all other places and peoples of the earth. The claim that "we" have reason as and in our law and that "they" have myth, constitutes a devalued other in terms of race and

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nationality, as well as doing service, within Western municipalities, to construct a self-responsible individual which, variously, women, children, the insane and the working class are not.

Noting the difficulty besetting contemporary social theory, the impossibility of a point of view that is outside culture and society on the one hand, and the constraints of theoretical approaches which try to generate authenticated knowledge from within on the other, and rejecting the alternative of adopting a culturally external perspective, Fitzpatrick announces his perspective as seeking to

subvert Western rationalities from within by heightening the contradictions and suppressions involved in their construction. It is an attempt at internal decolonisation (p 13).

Myth, from this perspective, is a "suppressed dimension of modernity" with components which cohere in law as myth. These components are concerns with origins and identity. Agents, forces and centres mediate the sacred and the profane worlds, the former, connected to origins, the latter to life in the here and now. Myths mediate contradictions either internally or in their relationship with other myths.

The suppression of myth begins with ideas of history and science as having truth value which myth lacks. Suppression becomes denigration in Enlightenment paradigms of knowledge which construct the free and sovereign individual as he who dares to know, an identity which distinguishes him from the savage Nereid in her world of ignorance and superstition. Modernity then becomes what myth is not (p 28). Ultimately, in a closure of Western imperialist thought within which truth is unitary but universal, the savage is captured and silenced as the "other" whose speech is necessarily false.

Fitzpatrick’s general endeavour is an attempt to undo this closure. His idea is that by finding myth where, according to this closed figure of European thought, it is not, the figure is, if not sprung open, at least revealed as spurious. Where he departs from many other critical legal theorists engaged in a similar endeavour is in the suggestion that myth as distinct from and more elaborated than ideology is a more potent vehicle for doing this.
The elaboration of the argument sketched out above starts out from Derrida’s characterisation of metaphysics as "white mythology". As Fitzpatrick presents it, the concern here is with the metaphorical origins of metaphysics coupled with the progressive erasure of those origins in the further elaboration of metaphysical thought. By starting here, Fitzpatrick picks out two very broad themes of his argument: the supposed absence of myth in modern Western culture and the metaphysician’s concern with metaphors of foundation and force.

With the Enlightenment endeavour of securing the foundations of its thought thus providing the ground, the argument continues on through the construction of the individual as knowing subject, the hegemony of philosophical dualism (ideal/real) and the ruling ideals and institutions of the eighteenth and early nineteenth century bourgeoisie. Thus far, it would seem, some notion of bourgeois ideology might do as well as myth. Where myth does better, if I understand this part of the argument correctly, is in showing the radical incoherence of the whole elaborate construction: ways of thought lacking secure foundations are devalued within a system of thought which itself lacks such foundations. How it does better, is in picking out progression (with various practical forms such as progress, evolution, development) as the mythic force of modern social ordering. As the supposed rejection of myth, progression is central to modern myth. It constructs or discovers an ordering in narrative form, which tells the story of "our" journey toward realisation, redemption or, in its grandest form, freedom.

Fitzpatrick’s debunking of modernity is not confined to showing its incoherence. It is more cuttingly done in the argument that in setting itself the goal of omniscience, the Enlightenment created at the limits of its appropriative capacities, "monsters of race and nature" (p 45). Law, implicated because its foundations are laid in Enlightenment construction of a European identity distinct from the identity of the other, shares the excoriations. Since his claim that myth provides a more elaborated vehicle for critical engagement with oppressive ways of thought than does ideology, might be thought to rest on this further move, it is worthwhile looking at it more closely.

Within the Enlightenment project, he tells us, meanings cannot be God (or otherwise transcendentally) given any more. They must be found in the

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objects of this world. Such objects are, but cannot be thought to be transient (or truths will not endure). So we get "Eternal Objects" - property, law, society, constructed in ways characteristic of myth (repetition, selection), to mediate the dichotomies of the particular (transient) and the general (truth giving, enduring). Objective natural law (that is law based in nature and not different in essence to [eg physical] laws of nature) briefly eclipses natural law grounded in the will of God. But duality is deeply embedded in the Occident's ideas of law by virtue of its competing deities - a god of creation (known through revelation) and the god contained within the perfection of his creation (known through reason). It emerges in the ideas of law as order and law as duty imposing. While the latter idea, in the political context of Europe of the seventeenth and eighteenth centuries, gains preeminence as the will based law of a secular sovereign, natural law is merely eclipsed. It re-emerges as law takes on deific attributes, creates its own world and attracts its own priesthood. Its deific and mundane characters cannot both be founded terms of what it is. The twist (according to Foucault) of Enlightenment thought from synthesis to differentiation - is to found them in terms of what it is not: not in terms of what it is subordinate or beholden to, but in terms of what is subordinate or beholden to it. It is of course an exercise of power which orders and identifies those subordinates but it has its limits. What it cannot contain, it banishes to pre-civility. "... modern myth is the ascent from savagery, instead of the descent from the Gods" (p 63) and modern European identity and law is forged in its foundational difference to the identity and law (custom) of the "other".

Mythology travels on from here through eighteenth century constructions of nature and race and nineteenth century scientism and evolutionism, nationalism and colonialism. Contradictions, whether in the form of contradictory ideas of, for example, nature, or between theory and practice, as instanced by the savagery of British and French practices of slavery and colonialism and the high ideals of the Enlightenment, are resolved in the emergence of new discourses. Modern racism, for example, with its notion of race founded on certain physical attributes, takes its rise, Fitzpatrick suggests, out of the contradiction between practices of slavery and Enlightenment ideals. Those excluded from knowing, reason, equality and freedom by these practices are rendered in racist terms as qualitatively different (substantial contrary evidence notwithstanding) while the problem of common origins is resolved by the notion of progress. Drawing on Foucault, it remarks the shift from the self-sufficient sovereign subject of the Enlightenment to the subject of Selbstbildung (self-cultivation) and following
through on Foucault's search for the subject, finds the basis for modern law in the transcendent yet bound subject generated by disciplinary power.

The point here is that this mythology works to create "us" and "them" on levels of race and nationality, within which disciplinary power moulds people to acceptance of a hierarchical domestic order. Most significantly, myth and discipline come together in the idea that the unevolved savage remains latent in the civilised subject who must accordingly engage in a constant endeavour of self control (p 131). Law as that which can do anything but does not do everything complements this uncertain subjectivity by leaving spheres of freedom where the subject (as autonomous, powerful) can act, while at other times setting the norms of "civilised" being. The final contradiction resolved in the consolidation of modern law is that between law as progress and law as order. Progression is again the mythic force that reconciles historical change with present systematicity by the idea of an arrived at form of modern law, fully differentiated from morality and custom within which it nonetheless had an embryonic existence.

As mentioned above, myths, for Fitzpatrick, mediate contradictions internally and in the relations between separate myths. They exist in what Levi-Strauss called "a mythical field" (p 146) which determines their full meaning and effect. The relations between administration and popular justice in the form of mediation of disputes by community boards on the one hand and law on the other exemplify such mythic mutuality. In the former case (law and administration) the well rehearsed lament of the subordination of a social order characterised by the rule of law to one characterised by the bureaucratic administration of broad discretionary standards is countered with a view of law retaining an untestable capacity to subordinate administration. In judicial review the courts announce the ability of law to control administration while prudently choosing to accept its dictates. In this way law helps in the administrative construction of what is represented to the subject as reality itself to which there is no alternative but submission. At the limits of this process law is again there in the criminalisation of those who, extra-ordinarily envision and pursue another reality. With popular justice the position is similar. Alternative forms of dispute settlement do what law in its distanced, formal procedures cannot do, namely, get people to accept manipulated outcomes as "their own" solutions.
As another reviewer has remarked one can disagree with Fitzpatrick's broader theoretical approach and genre and still learn and be impressed by *Mythology*. It is a powerful and profound attack on both conceptual and institutional artefacts of modern Western European culture, of which both sociological and formalist ideas of law are instances. Accepting, without sharing, its author's commitment to a postmodernist genre, my only serious criticism of the work is its anti-climactic final chapter - an extended, deconstructive reading of HLA Hart's, *The Concept of Law*. Even if we grant this text status as "the supreme text of jurisprudence" (p 183) and even if its influence is fully acknowledged, to make it the final focus seemed to limit rather than extend Fitzpatrick's argument. Law, as a unitary thing can only be an idea and jurisprudence is the field from which such ideas are articulated and disseminated, but the grip and purchase of positivist ideas, to my mind, lies outside texts.

So I was puzzled by the argument that had Hart remained faithful to the enterprise of linguistic philosophy along Wittgensteinian lines, the meaning of the rule would have been set in its use and context. Well, yes perhaps it would but given an exposure of legal meaning and the meaning of "law" as interpretative and conventional, how does this link back to the project of "internal decolonisation"? Neither hermeneutic nor conventionalist approaches to meaning do more than embroider a margin on a tapestry of legal discourse. I wonder then whether, in a perverse kind of way, the critical intention and potential of Fitzpatrick's work is not being spent in reconciling us to a world we have made by turning itself back onto jurisprudence.

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