BOOKS

THE MYTHOLOGY OF MODERN LAW by Peter Fitzpatrick, London and New York, Routledge, 1992, xv + 235pp, $A39, ISBN 041508263

"Myth is already Enlightenment and Enlightenment reverts to Myth." These words in the introduction to Adorno's and Horkheimer's work the *Dialectic of Enlightenment* (1979 p xvi) set the tenor for one of the most brilliant and destructive critiques of western so-called "rationality". Utilising a whole array of themes, arguments and stratagems borrowed from the likes of Hegel, Marx, Weber and Freud, these authors proceeded to show that western thinking is ensnared in a viscous dialectic of self destruction. This dialectic operates in a similar manner to that elaborated by Freud whereby the subject in "rationally" repressing primal desires simply banishes these forces into the unconscious from which they surreptitiously return to dominate the subject behind its back. Generalising this dialectic of denial and suppression in the name of Reason, Adorno and Horkheimer demonstrate how the Enlightenment's desire to dominate and master the Other of reason, namely nature and myth, only serves, at each turn, to bring back new and more dangerous mythical forces. For, in the restless search for mastery over self and nature via objectification and control, the rational subject unwittingly serves to destroy the natural both within and without itself. In this way, mastery and control in the name of reason has brought the earth to the brink of self-destruction and the subject to the point of total servitude to self-created forces that are now beyond the horizon of its control. Thus they state almost plaintively that "the Enlightenment has always aimed at liberating men from fear and establishing their sovereignty. Yet the fully enlightened earth radiates disaster triumphant" (*Dialectic of Enlightenment* p3).

Transposing these arguments from the language of German philosophy and social theory into that of French post-structuralism, Peter Fitzpatrick puts forward the thesis that modern law is ensnared in a similarly destructive dialectic. Myth, he argues, is the mute ground upon which modern law is constituted: a ground whose muteness is wholly illusory, since modern law is permeated by myth at every level; be it the doctrinal level of legal concepts such as property and contract, or the jurisprudential theories of Hobbes, through Austin to Hart and even Unger. Thus instead of the common picture of modern western law as being the rational institutionalisation of the universal values of freedom and equality, we are presented with a starker reality of a social institution pressed into the service of an intrinsically despotic, destructive and impersonal rationality; one that dominates not only its own subjects, but also persons in other cultures who are sucked into the western vortex. The book is replete with examples, though two will hopefully be sufficient to illustrate the point.

First, Fitzpatrick's arguments concerning the character of the modern legal subject. According to the classical Kantian and Diceyan views, the formal structure of the rule of law (as positivity, publicness, generality and autonomy) is intrinsically geared to guaranteeing the liberty and autonomy of the legal subject. Law provides the social framework in which the free use of one's choice can coexist with the freedom of everyone else, and where coer-

cion is brought to bear in Kant's phrase only as "a hindering of a hindrance to freedom". Fitzpatrick, in contrast, argues that both the ideology and the practical operation of the rule of law is infected by that which it sets itself against; namely, inequality and subjugation. Ingeniously adopting Foucault's insights on the construction of modern subjectivity and concept of "governmentality", we are led to discern a symbiotic relation between a "self-regulated subjectivity" and "modern, liberal legality" (p135). The connection lies in the fact that they both partake in the disciplinary power that operates through the carceral network of normative practices and institutions. From the point of view of legal subjects, they see themselves as free and autonomous in those arenas not directly regulated by law, while at the same time they remain oblivious to the multiplicity of disciplinary practices that create a normative stranglehold in even the farthest capillaries of self and society. And from the point of view of law, the normative archipelago of an administered society "pre-adapts" (p154) legal subjects to willingly accept legal coercion and control.

In this context, Fitzpatrick also argues that once we see the mutually supportive relation between law and administration two further problems are thrown into a fresh light. First, the commonly held view (Hayek, Unger and, here in Australia, de Q Walker) that the administrative explosion undermines the rule of law is demonstrated to be palpably off the mark. Second, the oft-noted ineffectiveness of western-type law in non-western cultures is now seen to be at least partly the result of the lack of administratively moulded self-regulating subjects in those cultures, thereby depriving law of its requisite normative supports.

This mention of the effect of western law on other cultures brings us to the second example of Fitzpatrick's general thesis to which I would briefly like to draw attention. This is the author's claim that the universalistic ideals underpining western law shroud its intrinsically racist structure and operation. This, of course, is most obvious as well as prevalent in the colonial context. Here it is argued that racism and oppression are a direct product of the "identity logic" underpining occidental rationality: a logic, using Derridean terminology, which excludes, marginalises, domesticates, and suppresses the unique singularity of the Other; which, by its appeal to universality and unified order violently annuls difference and plurality. From the synchronic perspective, the normative logic of western law, geared as it is to the maximisation of the possibilities of purportive rational action, systematically undermines the value rational basis of non-western customary and traditional orders. While viewed diachronically, the principles of progress and evolution provide justifications and rationalisations for the desecration of all forms of normative ordering that are judged to be not up to the prevailing level of "civilised" humanity.

Even from the cursory elaboration offered here, it can be seen that Fitzpatrick's book is a damning indictment of western law and, indeed, western culture *tout court*. While there is much to agree, or at least empathise with here, in the end the present reviewer is unable to accept the central thrust of the book. The reasons are many, and at this point only three can be mentioned. First, the theory of myth that is intended to provide the conceptual fulcrum of the book is far too sketchy, idiosyncratic and insufficiently thought through to sustain many of the most important critical arguments and claims sought to be made. The author simply bypasses some of the most substantial writings on myth (and here I have in mind the seminal contributions of Cassirer, Heidegger and Blumemberg) — an omission that would not be so fatal had Fitzpa-

trick been able to provide a creditable original or alternative theory. Second, with the exception of his interesting reading of Foucault, his excursions into post-structuralist theories of language and culture only further obscure his central arguments. And this is not the fault of post-structuralism but, I fear, of Fitzpatrick's again sketchy, metaphorical and, in the case of Derrida, simply dilettantish appropriation of what is, admittedly, highly complex material. In short, his arguments do not meet even the minimum standards of philosophical rigour requisite to undertake the huge task he has apparently set himself: namely, the deconstruction of modern western law. And lastly, though I am sympathetic to Fitzpatrick's aspirations, I would question the validity and utility of a legal theory that seeks to bid adieu to all the normative aspirations of the Enlightenment and modernity. Judged theoretically, such an undertaking is intrinsically problematic, in that to the extent to which it attempts to engage in total critique it deprives itself of any explicit critical standards to fall back on. Whereas, when it does seek to elaborate normative criteria these, when pieced together, are inevitably tainted by just those Enlightenment ideals that were sought to be eschewed. Thus caught between the desire to be critical and the necessity to remain normatively ambiguous the book in the end reads, at best, as a series of unsystematic aperçus and, at worst, as theoretical fairy floss.

ROBERT SHELLY*

HUMAN RIGHTS IN HONG KONG by R Wacks (ed), Hong Kong, Oxford University Press, 1992, xxiii+542pp, $91(HC), ISBN 0 19 585291 5

For most of its history, Hong Kong has exhibited little interest in or concern with human rights (p1). Ironically, it was the pending return of the sovereignty of Hong Kong to her "motherland" — the People's Republic of China — that initiated a concern for human rights and this has been strengthened since the great tragedy of Tiananmen Square on 4 June 1989.

While the struggle in mainland China may have been suppressed for the time being, the fight for democracy and human rights in Hong Kong is being intensified as 1997 approaches. One of the most significant developments has been the enactment in June 1991, three years after the suppression of the democracy movement in China, of the Hong Kong Bill of Rights Ordinance. Although the Ordinance took effect from 8 June 1991, its real intention is to provide legal protection of human rights for people in Hong Kong after 1997. Recent human rights discussions in Hong Kong also express more concern for the future than for the present. Indeed, Tiananmen Square, the 1991 Bill of Rights and 1997 are three of the most common themes in recent human rights discourse and this book is no exception.

Human Rights in Hong Kong contains 14 chapters, of which five are updated papers which originally appeared in *Civil Liberties in Hong Kong* (Ray-

* Lecturer in Law, University of New South Wales.