

## Resenha

# Modern law beyond modernity: Society, modernism and grounds of Law by Peter Fitzpatrick

## Direito moderno para além da modernidade: sociedade, modernismo e fundamentos do Direito por Peter Fitzpatrick

FITZPATRICK, P. 2001. *Modernism and the Grounds of Law*. Cambridge, Cambridge University Press, 272 p.

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## Introduction

After reading Peter Fitzpatrick's<sup>2</sup> previous book entitled *The Mythology of Modern Law*, one would wonder what boundaries could be expanded and what developments could be made after uncovering the mythical foundation of law in modernity<sup>3</sup>. In a way the response was given in *Modernism and the Grounds of Law*<sup>4</sup>.

The book is divided in two parts: Part 1 – "Orientation" and Part 2 – "Instantiation". Fitzpatrick teaches us how to engage in deconstruction and critical theory with reflections on the origin of law and its (dis)placement in modernity (Part 1). Then the author offers a distinguished view on nationalism, imperialism and globalism (Part 2). All of those are related with modernity that persists throughout the Occident's development.

The book starts with reflections attached to psychoanalysis and philosophy where law must be looked at in its social and cultural contexts. Fitzpatrick makes an effort to understand the innumerable developments of law's origins that indicate a continued aftermath in action. A reflection is made on *Totem and Taboo*. Fitzpatrick leads us to understand what is at stake in law when it is "opposed" to categories such as society, savagery, transgression and alterity (chapter 2). To conclude this analysis, the author considers what succeeds the apposition of law's origin by considering its space, time, functionality and limits (chapter 3). Then, in Part 2, Fitzpatrick articulates a critique of nationalism, imperialism and globalism (chapters 4, 5 and 6). All of those are related to the central problem of modern law.

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<sup>3</sup> The idea of writing this review appeared while Daniel Carneiro Leão Romaguera was studying for the London Critical Theory Summer School held at the Birkbeck Institute for Humanities. The summer course was held at Birkbeck from June 29<sup>th</sup> to July 10<sup>th</sup> with names such as Wendy Brown, Slavoj Žižek, Costas Douzinas, David Harvey, Etienne Balibar, among other speakers. It consisted of two weeks of intense discussions with critical academic legal thinkers from all over the world. This experience was essential to Romaguera's research on human rights and decolonial thinking under the guidance of Professor João Paulo Allain Teixeira, coauthor of this book review.

<sup>4</sup> The book *Modernism and the Grounds of Law* has no published translation in Portuguese. Therefore the original title is used in this review.

In *Modernism and the Grounds of Law* one can really start to understand the task of critical legal theory, especially with the connection made between law's origins and authority manifested since modernity.

Fitzpatrick's work combines historical considerations and reflexive philosophy to go beyond jurisprudence which – by the way – reproduces the sense of self-founding in modern law by not addressing law's contradictions. Fitzpatrick's historical inquiry appreciates an eternal return of law related to modern mythology.

In this sense, the author indicates law as a prominent concept for modernity and its advance to a global arrangement. Not only does law continue to take place as essential to occidental societies but does that by denying violence and hiding its impossibility through determinacy/responsiveness. So a paradox can be distinguished as central in Fitzpatrick's book: if on the one hand law must be open and resist whatever is antithetical to it, on the other hand law must respond to antithetical phenomena precisely because of the need to be determinate. Equally the book opposes established dualisms such as: inclusion/exclusion; universal/particular; global/local; national/international; civilization/savagery; law/violence; etc.

As for the writing, a distinctively poetic manner along with keen philosophical reflections is Fitzpatrick's signature. With much eloquence, indeed, his book is a unique contribution to critical theory and legal philosophy. Most importantly, Fitzpatrick's efforts were able to relate all subjects mentioned above as an elaboration of problems inherent in modern law.

## Law's origin

Fitzpatrick starts questioning modern law as self-conscious according to society's origin in *Totem and Taboo*<sup>5</sup>. Freud's fecund text presents a genealogy of law confronted with occidental myths and attempts to locate the origins of society in the primal parricide (Fitzpatrick, 2001, p. 9), addressing "the originary questions of grounds" (Derrida, 1989, p. 60).

While interpreting the parricide, the author identifies two different moments that indicate the origins of law. The first one comes with the end of the savage primal horde existing under the complete power of the father, when the supreme authority is killed and consumed by his sons. That is the first origin, the moment when the conflict among brothers spread.

The second origin is a result of the war for the position of the omnipotent father. After the era of conflict, the sons agree to a social contract which establishes law among them. And this order subsists in opposition to the return of savagery, or, to put it better, the primal horde. It is important to note that this second moment is not considered in Freud's traditional reading as society's origin (Fitzpatrick, 2001, p. 11). So why are these two positions considered origins? And how can they be related with modern law?

For Fitzpatrick there is a double standard demand for law in modernity. It needs to be determined but at the same time must open up new possibilities. More precisely, law should be ever-responsive and indeterminable. The claim to self-assuredness and stability of law is related with the primal horde, but law must also be responsive to all that is beyond position<sup>6</sup>. Therefore only by combining those two opposite positions the origins of law can be understood.

The precise point to understand this reasoning is the killing of the father (totemic death) which determines and invites newness into the world. As much as law is set against savagery and brutality, it has to be necessarily violent to determine itself, therefore it remains savage. One can recall a failure in law's conception that leads to its impossibility, for securing law demands a primal savagery. In that way, savagery inhabits civilization, although it is usually denied or recognized as secondary, knowable and exceptional in civilized society.

It is also important to point out Fitzpatrick's disagreement with Freud's comprehension of "deed" – a central object in Freud's psychoanalytical studies. For Fitzpatrick there is something before desire and there is already a society to perform the deed: "Since the deed originates human culture and our ability to know, and to order and represent what we know, how may Freud so safely know it?" (Fitzpatrick, 2001, p. 12).

Relating deed with savagery means that a state of savagery only exists because there is a civilization to endow it with knowable existence. And that's precisely why its origin can only be represented in a myth<sup>7</sup>. There is no settlement about the occurrence of the deed, which means that we cannot be sure whether it happened or not. This is an inevitable uncertainty (Fitzpatrick, 2001, p. 17).

Fitzpatrick recognizes the elusiveness of the origin and that there is no return to a positive origin that

<sup>5</sup> Freud's myth that accounts for the lost origin of society (Fitzpatrick, 2001, p. 9).

<sup>6</sup> "The modern rule of law, with its avowal of assured stability and ultimacy of determination, seems closer to the condition of the primal horde. For law to rule, it has to be ever-responsive and indeterminate, capable to extending to the infinite variety which often confronts it" (Fitzpatrick, 2001, p. 2).

<sup>7</sup> "Myths are interminable" (Lévi-Strauss, 1968, p. 6).

contains civilization's progress. On the contrary, myth is not about resolving the irresolution of the origin or anything else, but rather a working active force in a process that moves infinitely and intrinsically beyond any origin.

But how can modernity reject myth and still be accountable and self-grounding<sup>8</sup>? By exploring this paradox Fitzpatrick reveals how myth manifests itself in modernity.

For Fitzpatrick post-mythical times in modernity still rely on the duality of myths by mediating its boundaries and fixing a singular reality, but admits no positive solution. The only way of doing that is through a negative mediator, ambiguous and unseen. Freud's myth is fulfilled by "savagery"<sup>9</sup> – Derrida claims that irresolution in the myth of origin is held by savagery (Derrida, 1976, part II, chapter 3); for Žižek savagery is a fantasy filling the space of origin (Žižek, 1991, p. 211).

The author takes an argumentative course to expose an eternal comeback of origin related with society's existence, by exploring the irresolution in Freud's myth through the analyses of society/civilization, individual being and the Oedipus complex related with savagery.

It is remarkable in Fitzpatrick's writing how the dead father becomes stronger than the living one had ever been<sup>10</sup>, just as the identity of the sons and violence are bound together in society's triumph, which indicates the reliance upon savagery. In its normal state, hence, society appeals to violence in an inevitable repetition of the parricide (again and again), whenever the cherished fruit of the crime – appropriation of the paternal attributes – threatened to disappear (Freud, 1960, p. 145). Therefore the return to origin has to be eternal; thus, origin is what is now (Fitzpatrick, 2001, p. 27). Also the Oedipus complex is placed in this analysis as the convergence point that justifies parricide. The affection that was previously pushed back by the usual discourse justifies civilization.

Overall, Fitzpatrick concludes that savagery is within society yet always and ominously apart, there's an opening found in society where origins take place and where savagery continually comes and goes. In subsequent reflections we will see that this space is precisely the point of entry of law. Law is set in between: determinately different and yet maintaining the sameness to what went before (Fitzpatrick, 2001, p. 33).

There is always a return to determination. Fitzpatrick, in a Derridian way, affirms that death is not only dissolution and the loss of everything but an inexorable determination. Therefore the power of the dead father can be responsively extended to anything that is not only within but also beyond present existence.

The term of settlement of the father is manifested against emptiness: "The totem enshrines the terms of settlement emerging from the primal parricide – the 'sacred' taboos 'which could not be broken'" (Freud, 1960, p. 104), but parricide must leave space for an adjustment to changing conditions of life.

Thus for law to occupy the place of origin it must have the persistent force that goes beyond determination, and that is only possible through savagery, as it enshrines the decisive power of the restored father. Freud realized that: "[...] It is precisely as a societal container of savagery that law comes to be set against savagery and identified with Civilization" (Freud, 1985, p. 351).

## Law's connection

The main engagement in this topic is about derivative grounds of law set in modern dynamics, as law is grounded in modernity but inevitably must always go beyond its limits. Fitzpatrick relates law's origins with modernity, for there is a sense of coherence in modernity among origin, society, savagery, law and so on.

The hypothesis is that a pre-modern world – that modernity is so reputedly against – is intensified in modernity rather than eliminated. This is related with origin – situated among reflections of Freud's *Totem and Taboo* which indicate a constant challenge of society's constitution – also heightened in modernity.

This can only be explained by considering some paradoxes: determination/responsiveness; transgression/norm; alterity/sameness; savagery/civilized; individuality/society; etc. All of these apparently opposite sides are invisible and unlikely characteristics of the rule of law, and it is very important to point out law's obscurity in modernity by the connections made by Fitzpatrick (2001, p. 36).

Modern societies acquire content in a negative rejection of what is considered external to them, in this sense social identity descends from transgressions and alterities – alterities are absorbed by modern society

<sup>8</sup> We will see how law tends to occupy the place of origin (Fitzpatrick, 2001, p. 14).

<sup>9</sup> "[...] Freud makes us put our position in question, and keep it in question, but somewhat more through what he fails to do in *Totem and Taboo* than through what he achieves there" (Fitzpatrick, 2001, p. 12).

<sup>10</sup> The begetters of civilization (sons) become its bellicose contrary by assuming the place of the father; that is why he is even stronger when dead (Fitzpatrick, 2001, p. 15).

through continuous transgressions and dissolutions of the norm going beyond its limit.

An important step is made by uncovering the negative side of modernity as we have never been modern in a way that the enlightened world professes (Latour, 1993).

Fitzpatrick is aware of “A preface of transgression” (Foucault, 1977, p. 29-52) and its relevance to expose an inseparable relation between transgression and norm, stretching to the point that continuous transgression – as it goes and comes to – creates a disciplinary normality. Authority is able to affect a specific and determinant position yet be responsively illimitable. So transgression indicates an eternal return in mythical terms too.

Therefore transgression in modernity creates and secures a normalized world (Foucault, 1977, p. 32-35) by the “eternal return” of origin. Law, as Freud said, is not a determined fixity (Fitzpatrick, 2001, p. 15).

A parasitic dimension is seen (Fitzpatrick, 2001, p. 32) as law has an integrally responsive openness but also has to meet a demand for decision and must stand a “fresh judgment” (Derrida, 1992a, p. 23), that is, it cannot be set in a determinant already known. At this moment, however, law must be contained in individual determinacy; and somehow there must be a place of being-in-common (Blanchot, 1992, p. 25).

For Fitzpatrick this reveals a paradoxical price in individuality as modern society imposes itself on a transcendent and social bond above and beyond the “other”. That is only possible because of alterity; in order to define “Us” there must be “Them”, and then we come to recognize ourselves as different (Shore, 1993, p. 782). The author complies with the argument in Said’s distinguished work *Orientalism* (Said, 1985) claiming that modernity crucifies cultural fundamentalism and imposes the occidental view as universal with its mythical progression.

This universality of modernity is not set apart from the other, but creates itself by the otherness. So, this alterity is absolutely excluded but included at the same time. Fitzpatrick reveals a pivotal paradox: “the whole consistency of our position is in fact that we are negating the other” (Lacan, 1989, chapter 9).

In modernity, alterities are necessarily diverse to match innumerable situations, but must also be reduced to sameness. Therefore, only by a process of generating identity modernity’s coherence is built, but with a continuous distance and caution for the excluded not to be too included. Fitzpatrick acknowledges that there is an outside of Europe, immerse and denied in modernity.

Colonialism is the extreme boundary of this modern project, for the colonized is an ultimate alterity that must be redeemed through modernity, but this reveals its own impossibility and denial. A wide-ranging classification from “negro” to white European is seen in the predominant myth of modernity, as those capable of defining identity promote the inclusion/exclusion of “humans”.

Fitzpatrick finishes his second chapter by quoting Walter Benjamin: “laws of fate” are taken over and “elevated by law to measures of the person” (Benjamin, 1979, p. 127). The subaltern is pushed beyond measures, mostly by the infamous legacy of colonialism.

In Chapter 3, the author concludes the conflict of self-founding in modern law as law’s self-grounding is tested against the seemingly imperative grounds of action in time and space; again, law takes the position of origin. This is what Derrida called the paradox of iterability (Derrida, 1992a, p. 43).

To explain those subjects, Fitzpatrick appeals to “deconstruction”. As sameness and difference stand in-between law and justice (Derrida, 1992a, p. 28), one can see time in law beyond significant, but time is also something present in law’s decision. As for space, law is oriented in-between responsiveness and determinacy (universal and particular): “Law’s generality must be specific” (Neumann, 1957, p. 28). On the other hand, violence is not something outside and justified to maintain law when it is threatened. On the contrary, violence is intrinsic to legal action (Derrida, 1992a, p. 39).

Therefore, by stretching legal comprehension, Fitzpatrick conducts a profound analysis of law in modernity among innumerable contradictions – unknown by the rigors of positivist jurisprudence – by relating law’s arrangements with European dominance (Fitzpatrick, 2001, p. 102).

## Nationalism

After reflections on modernity and law, the author examines our recent models of society – nationalism, imperialism and globalism – by investigating the Occident’s expansion and the spectrums of modern law among its mythical origins.

For Fitzpatrick modern law is related with nationalism<sup>11</sup>, and nation shares with law a common ground, particularly placed and universally uncontained. A nation can neither be based on an integral recognition

<sup>11</sup> We must take into account not only the particular nation of blood and soil but also nation as universally inclined beyond its territorially bounded plot (Fitzpatrick, 2001, p. 85).

of its particularity nor be based on boundless universality – Fitzpatrick relates Gellner’s universal claims with Smith’s particularity (Gellner, 1983; Smith, 1986) – and paradoxically a nation approaches universality against particular ways of being by a dominant view (European), as there is a particularization of nations through occidental patterns (Fitzpatrick, 2001, p. 55).

Even though different nations emerge out of different situations, what surrounds them appears to be an immutable scenario: “a spectacular tide of nationalism [...] rising in Europe and on a world scale, submerging everything on its way” (Lowy, 1993, p. 125).

Nation is a crepuscular construct found in the west, not only an enforcement of a particular view from Europe but the realization of universal history<sup>12</sup>. In Hegel’s words: “[...] the history of the world travels from east to west, for Europe is absolutely the end of history, Asia the beginning” (Hegel, 1952, p. 351).

So the apotheosis of nation (homogenization) must be considered among alterities, the insuperable “others”, as for the state of giving birth to nations is antithetical (Balibar, 1991, p. 45). Fitzpatrick recognizes the unknown “negro” as the starting point of Hegel’s spirit of history (Hegel, 1956). On other hand, European cultures are essential to give life to universal history (Chatterjee, 1986, p. 2). For Derrida the capital paradox of universality (Derrida, 1992b, p. 72) is what gives the (im)possibility of nation, as a particular nation brings the universal to itself.

To conclude, somehow, nation identity is the negation of the other yet still integral to it (Fitzpatrick, 2001, p. 129), but that is only possible when law gets in-between universal and particular (Fitzpatrick, 2001, p. 101). There is a “nation of law” and a “law of nation” when sovereignty justifies a general law uniformly in nations’ territories.

So, in law’s “Europeanness” and homogenizing system of rule, the birth of nation comes from making arrangements in nationalism beyond the nation itself, and Fitzpatrick considers imperialism and globalism in similar terms.

## Imperialism

In this chapter Fitzpatrick discusses the aftermath of nationalism as he understands our recent models of society as reworked variants of the modern state.

First of all, imperial history must be related with international law as the Occident entails liberal terms

and colonialism. Fitzpatrick makes a peculiar interpretation of Vitoria’s *De Indis* (Scott, 2013). It is well established in international doctrine that Vitoria is a precursor of humanism and international law. For Fitzpatrick there is a misconception on the interpretation of for Vitoria’s work does not represent a humanistic secularism but rather a scholastic theology in its apotheosis.

There is a “first” natural law, the natural law of all men, that including Indians, but there is also a “second” – rationality – that despises the lack of Europeanness of Indians, who are at best redeemable. In this “second” natural law either they were in a deviant place beyond the reach of natural law or recognized as humans but as inferior.

The Indians were considered initially humans as participant subjects in law and had a right of *dominus*, but in any case of deviation from European ways they were kept outside natural law, for example, the loss of the right of property. In a way that is not much different, Hegel denies sovereignty or a universally valid embodiment of laws to uncivilized people (Hegel, 1952, p. 218-219). This argument sets the right of dominium in international law that intensified the duality between civilized and savage.

Fitzpatrick recognizes the importance of property as a natural right for colonialist expansion in America, indicating that there was a conquest of land and people, not a discovery. The colonial settlement was made as the Indians had – at best – a “right” to *dominium* as long as submitted to natural (European) law.

The author engages in a profound investigation of the distinct doctrine of discovery in modernity, to be understood as *point d’appui* of the sweeping history of –imperial – international law.

Once natural law is related with occidental development it can be understood as imperialism and the liberal *telos* of civilized nations, and natural law led to an obligatory reliance on human conception towards European and colonial dominance (Anghie, 1999).

Fitzpatrick argues that imperialism conducts the affirmation of universal committed to reclaim the colonies and to redeem them as well. Within the occidental constitution the dynamics of colonialism are imposed on “savages”, which – not who – are the irresolution of colonialism. The constitutive negation of their civilization brought exclusion and denial to imperialism in law’s responsive dimension. As every attempt at a different way of being would indicate resistance to natural law, progress, society and rights, it must be contained.

<sup>12</sup> Fitzpatrick explains nationalism considering the historical context of national bourgeoisies and their specialized élite, “[...] [who] in effect tended to replace the colonial force with a new class-based and ultimately exploitative one, which replicated the old colonial structures in new terms” (Said, 1985, p. 269).

Similarly to the critical arrangement of the previous chapter, under a topic called “The Nations of Law and the Laws of Nation”, Fitzpatrick indicates how the political body must be aware of its surroundings in imperialism. There is a need to go beyond its limits, and that is how nations shaped the conception of international law, for internationalism has no room in itself.

Rather than being just a project of some nations, internationalism is an ultimate form of coherence. A universality of nations can only be constituted by the elevation of its included particularity (comes from negation) as exemplary of the universal, so the condition of “nation” is related with the European concept of modern state, contradictorily opposed to savagery and the result of universal progress. In this sense, Fitzpatrick identifies a community of nations set in international law, not through the substitution of nationalism for internationalism, but rather a relation of common dependency between nations (Fitzpatrick, 2001, p. 168). Therefore the recognition of rights – natural rights – is left to a “state” recognized in international law as sovereign.

International law comes from nations but also provides the criteria of “nation” by particular requirements of western patterns of political recognition (Fitzpatrick, 2001, p. 150). A commonality of civilized identities comes into play among liberal declarations, as the other – colonized – is always inferior and a new state of things is accomplished (Zizek, 1992, p. 97).

In this sense, there is an international spread of the modern nation as international law becomes a matter between sovereign and other uncivilized states that are intrinsically contrasted to the former.

## Globalism

We could summarize the last chapter with the analysis of globalization as a “globalized nationalism” (Douzinas, 2000, p. 212). Fitzpatrick, in a skeptical way, doesn’t agree with the idea of globalism as a newly-created world, but rather sees it as a continuance of imperialism, “imperialism without colonies” (Magdoff, 1972).

According to this point of view, globalism reaches the limit of modern universalism; law seems to arrive at an apotheosis with globalization, for it is not attached to a place of determinacy but reaches a vacuity as law transcends national territories in the most rarefied spaces. The universal became integrally tied to the local, there is no longer a mythical transcendent universal but this empirically bounded global product (Friedman, 1973, p. 72).

Globalism is set in a particularity of exclusion but offers a place to universal inclusion that never comes

to an end while it spreads particularities all over the world, with a paradigmatic transition to localized global: “the successful globalization of a given localism” (Santos, 1995, p. 348).

The scenario combines neoliberal economy, mass information and imperative governance, along with human rights, international rule of law and democratization. One can say that the imposition of democracy on the four corners of our world and human rights are now the pervasive criteria of law. Also globalization arrangements since the 20<sup>th</sup> century derive from an emergence in the post-war period of the international human rights regime based on normative agreements and substantive norms with high moral voltage (Santos, 1995, p. 330).

In *Modernism and the Grounds of Law* Fitzpatrick makes a distinctive contribution to critical legal thinking with a profound analysis of law and modernity by considering historical, philosophical and political developments to draw conclusions in the realm of law as myths must be undone.

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Submetido: 30/07/2015

Aceito: 10/12/2015