STALKING PHAEDRUS

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David Kennedy’s book is like no other international law treatise. He says as much in his opening paragraph: “The approach which I take . . . is somewhat unorthodox. I do not analyze the relationship between international legal materials and their political and interpretive milieu. I am not concerned about context within which arguments are made and doctrines developed. Nor do I concern myself with the meaning and distinctiveness of public international law doctrine” [p. 7]. Kennedy brushes an extraordinary canvass: a clear, unabashed, unflattering picture of international law, painted from the inside looking out, with only text.

There is no context here. Context has no place in a structuralist reading of international law theory. Only arguments matter. Professor Kennedy believes that all arguments are a reflection of doctrines. They show kinds of persuasion. Looking at forms of persuasion means summoning that great scourge of post-modern intellectual life: rhetoric. Rhetoric is a Greek word, and Greek words are much in fashion nowadays among intellectuals. Latin derivatives are too lawyerly, too bourgeois. But all rhetoric means is a study of the principles and rules of composition and speech intended to persuade. That is all. It is not science. But as often as it is now used in legal literature, one would think it was. Now that legal science has been repudiated (it was also too bourgeois), we can take comfort in rhetoric. When ideas do not satisfy, there is always rhetoric.

This study has now been applied to international law theory and doctrine. Kennedy’s book has all the hallmarks of a rhetorical treatment of a subject. One must learn a new vocabulary. Familiar things are given unfamiliar names. Structure wins out over substance. Text

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is divorced from context. All this, to understand the internal cohesion of a system of ideas. Kennedy is an honest scholar and he warns the reader that this is his intellectual enterprise:

I should caution the reader. Setting aside issues of meaning, origin and applicability to explore doctrinal and rhetorical structure is difficult and the results initially seem somewhat counterintuitive . . . . [R]hetorical references follow paths quite unfamiliar to those of us who customarily follow doctrinal developments, interactions and applications. As a result, tracing these references aligns cases and argument in unfamiliar ways [p. 7].

The surprise of this book is Kennedy’s conclusion that international law theory is successful. That does not mean, however, that international law theory is coherent, intelligent, or makes extraordinary sense.

Kennedy thus damning international law with faint praise. I intend to praise his book with only very faint damning. I offer, as a result, a structuralist review of his structuralist treatise, a rhetoric of the gospel of international law according to David Kennedy.

I

Appropriately enough, we begin with one of the favorite artifices of classical rhetoricians, a syllogism. That is a Greek word, too. It means an interconnected argument. Here is Kennedy’s book reduced to a syllogism: international law is rhetoric; rhetoric is dialectical; international law is dialectic. Dialectic is another Greek word. But for some reason it has come to be associated with German thinkers like Hegel and Marx. Marxists use dialectics. Does that make Kennedy a radical because he talks about dialectics in international law? I do not think so, because he is careful never to use that word. That is just as well, because it would trivialize his careful and incisive scholarship by labelling it “radical” or “Marxist”. But Kennedy’s approach does embrace the new critical jurisprudence, and he does make use of dialectic argument. His book shows how all international law doctrines have a thesis (an idea), an antithesis (an opposite principle), and a synthesis (a resolution to these contrary notions). Kennedy knows that the real fun of “doing” rhetoric is that a synthesis never sits still. It becomes just another thesis breeding more discontent and more consensus.

Kennedy’s project, his intellectual mission, is to identify the contrary ideas of international law and make them “lie down peacefully together” [p. 127]. According to Kennedy this is the genius of in-
ternational law. It is an arcadian shepherd which can make the lamb sleep with the wolf. The wolf is the sovereign state and the lamb is the rule of law in this metaphor. Metaphor is as much abused today as rhetoric.

Dialectics are contradiction, and international law is full of contradiction. Kennedy loves them. He finds them everywhere. He has structured his book, unlike those other treatises used for something so prosaic as a citation or an answer, to accentuate and amplify the contradictions. For this, Kennedy resorts to one of the oldest rhetorical tricks around: he structures his argument around three elements, which is also the key to a good syllogism. Things just seem to work better in threes. We can thank the Greeks for that. We can also give credit to Christianity's holy trinity. Does this make Kennedy a religious wolf in a secular sheep's clothing? No, because his trinity is much more clever. Kennedy gives us the sources, procedures, and substance of international law. Each generates its own discourse, and each discourse talks at, and past, the others. International law cannot only "discourse", it can seek "strategies" for "consensual rhetoric" [p. 100]. It can even "maneuver" and "project" [p. 173]. All of this is quite extraordinary for something that is not even human.

Dividing the study of international law into sources, procedures, and substance is nothing new. Most casebooks and treatises are organized in that fashion. Kennedy's insight is that these three categories define the *entire* field of the discipline. They are three inter-penetrating circles on a Venn diagram:

Sources refer us to the states constituted by process and grounded in the violence defined and limited by substance. Process refers us to its origin in sources and its determination in substance. Substance refers us to the boundaries of process, its origins in sources and its resolution in an institutional system of application and interpretation [p. 293].

If this seems circular, that is precisely the point. Each international law division depends on the others for meaning and legitimacy.

Using another metaphor, the categories are the balls in a juggler's show. They are always in motion, and the observer is never entirely certain which is which. One can only admire the force that keeps them all in the air at the same time. That force, Kennedy argues, is rhetoric. We applaud although we are waiting, perhaps even hoping, that the act will be a fraud and the balls will come tumbling to the ground.

Kennedy's book works because each sphere of international law is explored in detail, with carefully-chosen examples and ample au-
thority, all with a view to illustrating how modes of argument are reflected, in different patterns, through each sphere. Kennedy collects the colors that are international law, the spectrum of sources, process, and substance. He passes them through a prism of his own design, a refraction of rhetoric, and the result is light which is white, pure, and bright. Each step is important. Collecting the colors is the hard work of an international lawyer. It is knowing how to use a text. One must read it, understand it, and relate it to coordinate texts. The act of passing colors through the prism is typically an exercise in context, such as applying law to facts, or having an answer to a question. But for Kennedy, these also are textual matters, involving more than just asking another question, more than a recognition that there really is no answer. Rather, the utter subordination of context means that both questions and answers are irrelevant. Only the text is important. All that matters to Kennedy is the argument. He has decided not to explain why we feel the need to argue, what the point of it is, or what results are reached. These matters are beyond the scope of his inquiry. The pleasures of the text have enthralled Kennedy.

And that is my first qualm with his book. It goes to the heart of the syllogism that makes the book work. I do not believe that international law is rhetoric. Or, to be more exact, I do not think that it is susceptible to a rhetorical analysis that depends solely on text. International law is both text and context.

II

Embracing international law as a canon of texts, as Kennedy has done, means reading it as literature. International law makes for lousy literature. Kennedy knows this. His selection of illustrative material was made to show how bad international legal writing is, whether a World Court opinion, a publicist's book, or a treaty. Kennedy's discussion of substantive international law features a long critique of the 1982 U.N. Convention on the Law of the Sea. He attacks the Convention as a creative writing instructor might mark a freshman composition. He looks first at the Convention's preamble. That is a good idea. All too often, we forget to read those first few

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sentences with the high-sounding words and aspirational messages. We are too anxious to get to the "substance" of a legal instrument. Kennedy writes that "[a]s the reader moves from the Preamble into the text he must move with faith, faith in the applicability of principles, the working out in practice, and the redemption of substance by process. If the Preamble is vague, the Convention will render it concrete" [p. 206]. The point that follows, of course, is that there is no real substance in the Convention. All it is "is a magnificent play of internal references," featuring only "an equivocal willingness to repeat itself" [p. 244].

This will come as a surprise to international lawyers who hold up the Law of the Sea Convention as a wonderfully detailed and elaborate legal regime. According to Kennedy, it is bereft of substance. In the same way, the International Court of Justice's decision in the Nuclear Test Cases\(^2\) shows how there can be no doctrine that either admits or denies the legal force of unilateral declarations [pp. 54-66]. Likewise, the North Sea Continental Shelf Cases\(^3\) empty custom of meaning [pp. 80-99]. Two obscure British opinions on recognition,\(^4\) Chief Justice Marshall's sovereign immunity decision in The Schooner Exchange,\(^5\) and the Nottebohm Case\(^6\) on nationality doctrine, allow Kennedy to disassemble, and then to fuse, the contradictory ideas in those procedural theories.

Kennedy's selection of materials was designed to show how impoverished the international law text really is. They also display the author's virtuosity in analyzing those texts. They are dull, incoherent, and lifeless. But Kennedy manages to make sense of them. But the sense, once again, is wrung only through contradiction and dialectic. When Kennedy discusses "source discourse" the argument is between consensual (hard) and non-consensual (soft) legal obligations. These "together account for all possible sources" [p. 30]. Arguments on the sources of international law "reflect the relationship between hard and soft sources as well as their incompatibility and exclusivity."

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\(^3\) In re Harshaw Chemical Company's Patent, 41 I.L.R. 15 (U.K. Comptroller of Patents 1964) and In re Al-Fin Corporation's Patent, [1969] 2 W.L.R. 1405 (Ch.).

\(^4\) 11 U.S. (7 Cranch) 116 (1812).

Although one cannot make both sets of arguments together, the proponent of a given norm must continually switch from one rhetoric to the other" [p. 13]. This dialectic breeds others: treaties and custom, *pacta sunt servanda* and *rebus sic stantibus*, unilateral declarations and *opinio juris*.

In the same way, international law procedures are wracked by the conflict between objective and subjective approaches to delimiting sovereign authority. "An objective approach to participation defines the entities in terms of the way they are treated or act in the system. A subjective approach relies upon their self-definition or true 'essence'" [p. 121]. This argument, in turn, defines the doctrinal patterns of process:

Doctrines of 'participation' abstractly delimit the actors whose interests and nature will be constitutive of international law and whose substantive behavior will be controlled by international law. Doctrines of what might loosely be called 'jurisdiction' abstractly delimit the avenues of legitimate interchange out of which authoritative norms grow and the spheres of activity which will be governed by substantive international law [p. 117].

According to Kennedy, all procedures are either participation or jurisdiction. The process is a state's incorporation in, or withdrawal from, the international system.

"Substance discourse" features, therefore, a related debate between sovereign equality and sovereign autonomy, between "national particularism and community sharing" [p. 196]. The rhetorical tension in substance discourse has its reflection in substance doctrine: the distinction, now somewhat diluted, between the law of peace and the law of war. Like the contradictions in sources and procedures, these "mutually exclusive tendencies in the international social order are able to co-exist and be rhetorically blended with one another. Schemes of sharing can be justified by arguments about sovereign authority and schemes of national ownership by arguments about community solidarity" [p. 197].

Kennedy's point is that international law is a vast web of dialectic oppositions, constantly in a state of flux. The rhetorical emphasis of the book complements this observation. Arguments have two sides. But if we question the major premise that international law is subject to rhetorical analysis, then the conclusion that international law is dialectic must also fail. Why must argument be binary? Why must legal discourse have the "on-off" quality that critical legal scholars
often attribute to it? This absolutist notion of dual order seems essential for a relativist treatment of international law doctrines and ideas. In a sense, of course, it is just another dialectic. But Kennedy accepts it as an article of faith. Is this the one, unchanging, immutable idea that guides the new critical jurisprudence?

III

Rhetoric has always been an endangered discipline. Born in the classical vision of a pluralistic society in ancient Greece, it has always been preyed upon by its intellectual twin, metaphysics, yet another Greek word referring to the science of first principles, of inexorable conditions and properties of thinking. Rhetoric is a study; metaphysics is a science. Rhetoric deals in relatives; metaphysics deals in absolutes.

Kennedy’s jurisprudence of international law, which embraces the text to the exclusion of context, reflects a peculiar, sadly modern, mixture of both. Dialectic is his tool. Text is his first principle. He treats international law as a science, susceptible to reason. But he also plays with it as an art, as something living and self-conscious of multiple meaning and nuance. One can sympathize with Kennedy’s dilemma. Is international law a science or is it an art? If it is a science, he can subject it to tests, expecting results. He can form a hypothesis, conduct an experiment, and record the results. If it is an art, he can embrace uncertainty and revel in contradiction. He can play joyously in a pool of pure text, but with no questions, no answers, and no relevance.

Kennedy’s book is wonderful because it satisfies scientific instincts for order, no matter how disorderly international law may really be. His handling of texts is marvelously supple and sensitive, which makes him also an artist. But he has not completely succeeded at either of these difficult endeavors. As a scientist, he should not have prejudiced the outcome of his experiment. Using rhetoric can be irresistible, but one of its pitfalls is that, more often than not, it gives the answers one desires. As an artist, Kennedy has also misunderstood the subject of his textual analysis. Maybe international law is not really law, but

that does not make it literature, either. In scholarship, as in life, few of us can be outstanding both as physicists and as poets.

*International Legal Structures* is an important book because it shows, in a way that few other scholars have attempted, how international law is both science and art. A critical jurisprudence of international law which employs rhetorical methods challenges more traditional thinkers to choose between those two visions. Such a choice would, however, be futile. The syllogism (or thesis) presented in Kennedy's book may be accepted or refuted, but only on its own terms. That is what makes the treatise so important, so demanding of reflection and response.

Kennedy plays much the same role in international law scholarship as the student who discoursed with Socrates in a particular dialogue by Plato. Their subject was, among other things, rhetoric. The student, in what was undoubtedly the first rhetorical question, asked "[f]or what should a man live if not for the pleasures of discourse?" The reply was, of course, another question: "May not the wolf," Socrates asked, quoting an older proverb, "claim a hearing?" This was a warning, a note of caution. The question put by Socrates should make us pause for a moment and wonder about the value of rhetoric. There is, undoubtedly, pleasure in it. But there is also the discord and the confusion which relativism brings to ideas. It is an invitation, as Socrates said, to the wolf. Rhetoric can be a submission to bad ideas, penned with good intentions and addressed with intellect.

There is also a profound irony in that snippet of socratic dialogue. There is the student who extols rhetoric, and the teacher who questions its morality. Whom should we believe? David Kennedy would undoubtedly savor this reversal of expectation. His book seems innocent enough: serious, well-argued, and innovative. But lurking in it is the critical jurisprudence, an intellectual predator. Kennedy’s work opens a new vision of international law. At the same time, it can devour all that is familiar, certain, and respected in our discipline. That is the platonic irony of rhetoric. The name of Socrates’ young interlocutor was Phaedrus. In Greek, phaedrus means wolf.

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* 1 *The Dialogues of Plato* 262 (B. Jowett ed. 1937).
* 9 *Id.* at 275.