

THOUGHTS ON DUNCAN KENNEDY'S THIRD GLOBALIZATION

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I. INTRODUCTION

Kennedy's characterizations of the First and Second Globalizations are insightful descriptions of American law and philosophy during the relevant periods. I was also fascinated by his description of how the first two globalizations interacted with (and appropriated) colonial cultures and legal regimes. I also agree with Kennedy's observation that something important happened to legal discourse somewhere around 1970. The difficulty comes with trying to say what happened – what is the nature of the Third Globalization and what changes did it bring? In describing it, Kennedy's usually lucid prose becomes opaque. For example, Kennedy is not wrong when he says that the Third Globalization does not have a "discernible large integrating concept" that "mediat(es) between normative projects and subsystems of positive law."¹ He is also not wrong in noting that it incorporates a "brutal" critiques of its predecessors while also borrowing heavily from them.² Indeed his sharpest observations are those that make Third Globalization seem most paradoxical and counter-intuitive. For example, he writes:

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¹ Kennedy, Duncan "Three Globalizations of Law and Legal Thought: 1850-2000." *The New Law and Economic Development. A Critical Appraisal*. Eds. Trubek, David M. and Santos, Alvaro. Cambridge: Cambridge University Press, MA, 2006: 19 ff., at 63. As I understand it, this is exactly what the first two globalizations do have. See below.

² Id.

It produces rules that are ad hoc compromises, rather than the social rules dictated by single social purposes in coherently adaptive new legal regimes. This mode ... is present everywhere, sometimes therefore, surprisingly, coexisting with neoformalism.³

This suggests that the problem is not in the clarity of Kennedy's prose but in the discourse itself. My suggestion in this paper is that the Third Globalization remains opaque to us largely because, unlike the other two globalizations, we are participants within it. This fact creates an ambiguity about Kennedy's project. The issue is whether Kennedy is performing an external critique of someone else's culture, or whether he is formulating an internal interpretation of a contemporary legal culture in which he, himself, plays no small role. Is the culture which produces the Third Globalization composed only of "regular" lawyers, law professors, and judges; or is it a culture that is also composed of critical scholars of various stripes?

II. SITUATED THEORIZING

In reading this paper, I was constantly struggling to define for myself the nature of the thing that Kennedy was describing. Since I was unable to come up with a shorthand description of it, I will refer to it here simply as "the thing."⁴ The nature of "the thing" is important. If, for example, it is a distinctive legal vocabulary, it would be relatively easy to analyze. If, however, it is more hegemonic, then internal and external descriptions become somewhat problematic. Since I lack the benefits of classes, conversations and a close reading of Kennedy's other work, I will pay focus primarily on what he says in this paper.

He too struggles to name "the thing" he is analyzing. On the one hand, "the thing" is decidedly legal. In speaking about it, Kennedy repeatedly refers to legal actors, legal elites, and legal concepts.⁵ On the other hand, it is neither ideology nor jurisprudence. It is not ideology because there are both left and right versions of it. It

³ Id. Kennedy's characterization of contemporary legal rules is spot on, but its coexistence with formalism is not only "surprising" but very implausible. It is as if Kennedy is taking the illogic of someone like Justice Scalia and turning it into an archetype of our legal language.

⁴ I have used the word "thing" in the same way that Kenney does on. P. 22 "The 'thing' that globalized ..."

⁵ See for example, quotation at note 4.

is not jurisprudence since it is compatible with differing views on traditional legal-philosophical questions.⁶ In addition, we should not think of it as one of the “frameworks or contexts for development(s)” because of the fact that there is a dialectical relationship between it and developments on the ground.⁷

Because “the thing” takes no position on ideological and philosophical questions, one is tempted to think of it as a kind of rhetorical repertoire. This reading supported by passages such as:

The mode of thought provided a conceptual vocabulary, organizational schemes, modes of reasoning, and characteristics arguments. These were used in everything from jurists’ writings for lay audiences to legal briefs, judicial opinions, treatises and doctrinal writing and legal philosophy.⁸

as well as by Kennedy’s focus on “langue” as opposed to “parole.” Kennedy, however, also suggests that “the thing” is more than a langue. It is related to something normative -- “a ‘plan’ or a project of those with access to the legal, administrative, and judicial processes.”⁹ This suggests that a globalization is more than a rhetorical repertoire – it is the repertoire plus the projects of the legal elites that are recognized and legitimated by the repertoire. True, there may be those who act outside the repertoire but they are quickly marginalized. Thus, the particular legal rhetoric defines who is or is not a member of the relevant legal elite. This last point is important as it raises a central question – Is the rhetoric capable of self-reference? That is, is Kennedy’s project of identifying and describing the globalization itself a possible project within the globalization or does it require the use of a meta-langue that can describe the globalization as an object-langue?

To answer this question, we must look closely at the ambitions that Kennedy brings to the project. They are:

1. Increasing the ex post intelligibility of recent legal history;
2. Finding confirmatory hypotheses within the relevant legal periods; and

⁶ This is not a very good argument since, in my view, a globalization would count as a philosophy of law if one could show that it constructs the traditional philosophical questions rather than answering them.

⁷ Kennedy, Duncan “Three Globalizations of Law and Legal Thought: 1850-2000.” cit., 19.

⁸ Kennedy, “Three Globalizations, cit., 22.

⁹ Id., 20.

3. Supporting “left or radical left” political interventions.¹⁰

The first of these explicitly embraces the idea of a meta-theory: if one is aiming at increasing the ex-post intelligibility of a globalization, one is by definition operating in an ex-post environment with a presumably ex-post langue.¹¹ The second ambition – the confirmation of globalization hypotheses – is consistent with either reading. Whether Kennedy’s theory is meta-theory or part of the object-theory, it would be useful to look for confirming instances.

Kennedy’s third ambition that is the most important. He describes it this way:

One can also hope that the narrative (describing the Third Globalization) will operate in support of a political interventions, in this case, I hope, of left or radical left interventions. It might do so because, in any given period, the plausibility even to ourselves of our political convictions is, to a limited but important degree, a function of how we understand our history. In this case, my hope is that the “three globalizations” narrative will support the conviction that progressive elites of the periphery can and should devise national progressive strategies, rather than accept the prescription of the center, that they simply “open” their economies and “reform” their legal systems, and accept the consequences for good or ill. But to avoid false advertising, let me emphasize that the connection between narrative and political intuition is tenuous.¹²

I quote the full paragraph because it is here that we see the extent of Kennedy’s quandary. The first hope – that his work will help us to understand legal history – serves the third – that when we reinterpret legal history, our left political convictions will gain plausibility – “even to ourselves.” This way of putting it locates Kennedy’s project at the heart of critical theory. The reality of oppression often seems natural, inevitable, and irresistible. Critical theory facilitates resistance by deconstructing the metaphysical and rhetorical paradigms that contribute to this disempowerment. But it is important to see that, as expressed, this hope is somewhat problematic. The development of a national strategy for “progressive elites of the periphery” is a tall

¹⁰ Id., 24.

¹¹ It is possible that he is using a Second Globalization langue to describe the First Globalization; a Third to describe the Second, and so forth. However, at some point we reach the present where any description of a current Globalization must presume a langue outside the framework of the Globalization itself.

¹² Id., 24.

and somewhat paradoxical order. It is a tall order because, as Kennedy states: “the connection between narrative and political intuition is tenuous.” It is paradoxical for two reasons: first, because it is hard to understand the reference to an elite – even an “elite of the periphery” – without reference to a globalization that constructs it; second, because the word “progressive” is unintelligible when it is used outside of a normative paradigm of history. Does Kennedy mean “progressive” within the context of the Second Globalization or “progressive” in the context of some other theory of history.

Perhaps the clearest reading of this is that the text is addressed to those of us who occupy positions that are traditionally recognized as part of the legal elite and that it is aimed at inspiring us and assisting us in formulating a political strategy that is not simply a reform of existing legal practices but is instead a reordering of the rhetorical universe. Read this way, there are two distinct possibilities for defining the Third Globalization. We are describing something that is either “their thing” or “ours.” If the first, we are attempting external critique; if the second, we are simply redescribing our own legal culture in such a way that left -- or radical left -- intervention becomes both thinkable and doable.

My point is this. As the progressives of the twenties and thirties stood to the First Globalization, we stand to both the First and Second. The question is: How do we stand with respect to the Third. Are we members of a legal elite constructed by the Third Globalization, whose projects are recognized within its rhetorical repertoire or are we outsiders, trying to describe the Third Globalization as an anthropologist might describe a foreign culture. The question is important because if the project is constructed within the globalization, we would expect it to be co-opted in various ways; and, if it is outside the globalization, we would expect it to be marginalized. Kennedy’s position in the academy, his long list of publications, and the fact that we will soon be meeting to discuss his work suggests the former; whereas his list of ambitions – particularly the suggestion that he is providing an ex-post historical explanation -- suggests the latter.

My own view on this is not so equivocal. I believe that rhetorical repertoires are so powerful that external critique is not really possible. My reasons for this are complex. First, I do not believe that the legal rhetorical repertoire can be separated from the rhetorical repertoire of everything else. Second, I believe that any intellectual project that I undertake depends upon a rhetorical repertoire that is constructed by the culture and that my expressiveness is only idiosyncratic in marginal ways. My theories are therefore situated. I am a girl-child of the fifties, a survivor of the Civil Rights Movement of the Sixties; a lefty of the seventies, a good government bureaucrat of the eighties and a law teacher at the turn of the century. All this being true, it is fair to say that I am a part of the Third Globalization – perhaps not part of the dominant group but a part just the same.

Given that I am in the thrall of an inevitably oppressive globalization, I am careful about the kind of theory that I do. There is suffering everywhere and I would like it to stop. I have an impulse to do theory in the hope that I can make sense of it all; that I can find a place to stand against the rising tide of desperation and despair. But I know – really I know – that there is no such place. Because of the hegemonic aspects of language I understand that theory-making – even theory making that aims to make sense of oppression – can have dangerous consequences. Consider, for example, a famous passage from William James:

The philosopher ... is no better able to determine the best universe in the concrete emergency than other men. He sees, indeed, somewhat better than most men what the question always is--not a question of this good or that good simply taken, but of the two total universes with which these goods respectively belong. He knows that he must vote always for the richer universe, for the good which seems most organizable, most fit to enter to complex combinations, most apt to be a member of a more inclusive whole. But which particular universe this is he cannot know for certain in advance; he only knows that if he makes a bad mistake the cries of the wounded will soon inform him of the fact.”¹³

¹³ From James, William, “The Moral Philosopher and the Moral Life.” *International Journal of Ethics* 1 (1891): 330-354. There can be no more stunning demonstration of the fact that “the philosopher ... is no better able to determine the best universe in the concrete emergency than other men,” than James’ apparent inability to conceive of women philosophers.

In thinking about oppression, hearing the cries of the wounded is the essential thing. To hear them, we have to be silent as they are easily muffled by learned rationalizations, Panglossian rhetoric, and an overwhelming amount of intellectual detail. The point of theory must be to make them louder and more distinct. A theory that simply describes a system of oppression from the outside may amplify the sound, but the sound will echo back and forth in an empty, unpopulated universe. The trick is to make the sound vibrate in the hegemon where people live. Thus, I believe that Critical Theory, Critical Race Theory, Feminist Legal Theory, and Queer Theory are all useful and wholesome projects; but they are useful precisely because they are not external.

I am not sure whether this is the kind of project that Kennedy has in mind. If it is not, then much of what I have to say will not seem right to him. In what follows, I argue that a certain kind of alienation is presumed by contemporary legal and political rhetoric. This is a point that is easy to miss if you view yourself as doing external critique. Nevertheless, it is evident in many different kinds of intellectual projects, transcending the divide between left and right political perspectives.

III. "THEM, THE PEOPLE..." THE RHETORIC OF ALIENATION

Even with internal critique, alienation rarely seems like a shared characteristic. It presents itself as isolation and separation. It feels like "mine" and not "ours." Nevertheless, one can see that alienation from the state has become one of the persistent themes of modern law, politics and rhetoric. In the First Globalization, individuals created the state, and it was sovereign as a result of their consent. In the Second Globalization, the state provided the context in which individuals were formed, and its powers were the inevitable consequence of its role in constructing social life. In each of these, it made sense to think of the state as "We the people ...". Because of the close association between state and citizen, the sovereignty of the state was absolute within its borders. This meant that all activities were either state sanctioned and therefore legitimate or prohibited and therefore illegal. An individual was either a citizen possessing rights and powers defined by the state or (s)he was an

outlaw, doing as (s)he wished but constantly running the risk of being apprehended and incarcerated.

In the Third Globalization, our basic conception of government has changed. State powers are no longer unique. The government consists of a series of functions that could be – and increasingly are being -- performed by anyone. Witness, for example, the fact that, under certain circumstances, each of the following functions have been delegated to private actors:

- Conducting diplomacy
- Fighting wars
- Delivering mail
- Regulating markets
- Adjudicating private disputes
- Running prisons
- Building and maintaining toll roads
- Providing“public”education

Some of these functions are self-supporting; others are supported by taxes. When the state provides these services directly, it does so not as a unique sovereign but as a non-profit entity that compensates for market failure. Increasingly, it is the corporations who are sovereign – fully powerful within their globalized but non-geographical spheres. In this context, we do not say “We the people;” we say “We are the 99%.”

What strikes me as interesting in this rhetorical change is its centrality to many different projects. For example, it illuminates the increasing reliance on the concept of international human rights. Prior to the Third Globalization, rights were generally understood as specific dispensations vis a vis the state, but the phrase “human rights” has come to mean something very different. A rhetoric of human rights emphasizes the basic needs of people;¹⁴ and, at the same time, suggests that the whole world should be concerned with their enforcement. Such rights vindicate protected interests not only against the state, but also against individuals, groups, local governments and international agencies. From this perspective, the movement for human rights does not operate within some “neo-formalist paradigm;” it

¹⁴ Needs such as shelter, food, security, health care, clean air and water, etc.

represents a demand for something entirely new – something that can be described as a “right” only in a metaphorical way.¹⁵

It is also true that this concept of the state as being no different than a private actor lies at the heart of the conservative project. Conservatives often speak of “starving the beast” until it is “small enough to be drowned in the bath tub.” If we simply let markets work, they argue, state intervention will not be necessary. Without a legitimate need for state action, state officials are merely “rent seekers” burdening “free” enterprise. In this view, anybody can provide needed services, but only private enterprise can do so with efficiency. Obviously, a person who wants to starve the beast and drown it in the bath tub is not someone who thinks of government as “We the people.”

On the left, Critical Race Theory, Feminist Theory, Queer Theory, etc. are all theories of alienation. Each is focused on the experience of a non-dominant group and the way in which that experience constructs a social reality that is separate from the dominant discourse. People who formulate these theories call themselves “outsiders” – they may be citizens, but they are not full members of the political community. The state is but one feature of a larger reality that was constructed by others for others. In the context of the First Globalization, it would have been hard to characterize oneself as a non-alien outsider without also becoming an outlaw. Thus, it is only the Third Globalization’s demotion of government to a grab bag of non-sovereign activities that makes “outsider” jurisprudence possible.

The rhetoric of alienation is everywhere. Today as I sit writing this I am thinking about the demonstration on Wall Street. When I was young I went to a demonstration whose theme was “Send a message to Wall Street.” At another, we yelled “Shame on Ted” for supporting Lyndon Johnson and “Dump the Hump” for the same reason. We appeared at the trial of the Boston Five in our Baccalaureate gowns telling the press that “if the trial deprived us of our baccalaureate speaker

¹⁵ Kennedy suggests that they “play the same role in contemporary legal consciousness that “private rights” played in CLT and “social rights” played in the Social,” and that they are like private rights except that they belong to “identities” rather than “individuals.” (p.65) I think this is pushing the metaphor too hard.

(William Sloane Coffin) we would come to see him at the Courthouse.” These slogans all presupposed a certain sense of belonging; we were registering discontent with “our” government and its actions. Now we “occupy” Wall Street, San Francisco, and Dewey Square as outsiders whose interests are being ignored by “the powers that be.” It is not “our” government we are addressing but a rich and powerful caste that seems to have expelled us from the political universe.