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- FIRST DRAFT -

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INTRODUCTION

This Chapter is devoted to transnational legal process theories. At the outset, one should note that unlike many other fields of study say, free speech theory or theory of tort remedies, in which individuals understand themselves as engaged in a shared discourse and the object of study is relatively well-defined (- free speech, tort remedies), no such cohesion seems to exist among theories that can be grouped under the titled 'transnational legal process theories.' Theorists are simply looking at too-broad a range of legal subject matters (such as *lex mercatoria*), institutions (such as hybrid international criminal courts) and areas of human activity (regulation of transnational affairs). The field, such as it is, is therefore a reflection of the phenomenon studied: a patchwork. Or, to use the terminology popular in the field, there is a proliferation and fragmentation of transnational legal processes theories.[1] The titled chosen for this chapter – transnational legal process theories in the *plural* – is therefore apt.

The main thrust of the Chapter is that the field of transnational legal process theories has proceeded without the benefit of conceptual clarity regarding the key underlying concept: the concept of a/the 'legal process' and that a myriad of partly-overlapping concepts—such as international adjudication, supranational adjudication, and transnational litigation—are used interchangeably, willy-nilly. This, in turn, may be explained by three observations. First, is that

* Maya Steinitz is an Associate Professor of Law at the University of Iowa College of Law. A special thanks to [x, y, z for their comments] and to Henri Nkuepo for his research assistance. Some disclosures: the author admits a common law and English language bias, though literature in French was also reviewed in authoring this Chapter. Further, given the space limitation, the Chapter seeks to be illustrative rather than exhaustive with respect to the literature discussed.

[1] See, e.g., NYU's Journal of International Law and Policy's symposium issue on the proliferation and fragmentation of international courts and tribunal, 31 N.Y.U. J. Int'l L. & Pol. (1999). And, to keep with the theme of the Book and at the request of the editors, this chapter focuses only on transnational legal process theories as they pertain to international adjudication. But one should note that these are embedded in the larger field of transnational legal process theories of the regulation of international affairs more generally.

the relevant discourse attempts, by design of the field's forefathers, to encompass both transnational *public* adjudication and private transnational commercial adjudication (international arbitration) within a single framework. Second, is the tendency to group together international adjudication—arbitration and litigation in *international* courts and tribunals—and cross-border litigation – litigation with a foreign component in *national* courts. Third, is a theory deficit—little has changed since Harold Koh observed a "void in legal scholarship" and felt haunted by "the image of a crowded bookshelf of domestic legal theory alongside near-empty shelves on international legal theory"[2] back in 1996, despite the fact that the phenomenon of international adjudication has exploded exactly at that moment with a wave (tsunami) of post-Cold War tribunals coming into being.

Specifically, despite the post-Cold War explosion of international adjudication—which consisted not only of the establishment of numerous new international public adjudication mechanisms but also of a growth in use of international commercial arbitration, brought about by globalization and its growth effect on cross-border transactions, and despite a growth of the previously nearly-dormant investment arbitration—theory has not caught up with reality. Particularly glaring, is the near-absence of three of the most prominent theoretical traditions of the day: analytic legal philosophy, critical legal studies (including critical gender, race and queer theories); and economic analysis of the law.

The Chapter opens with both negative and affirmative definitions of the idea of 'transnational legal process(es)' and with a brief note on the origin and history of this concept. In order to provide a representative sample of the field, as well as illustrate the series of observations above, the main section presents some of the leading theories, grouped based upon the underlying perspective of the theorists: The lawyers and legal theorists, the political science and international relations theorists, and the sociologists and socio-legal theorists.[3] In addition to describing these dominant approaches, the Chapter highlights competing methodologies and key themes, including the internationalization of the rule of law and its discontents and the intended and unintended consequences of the transplantation of institutional models. The Chapter concludes with some general observations and with a number of suggestions for further research.

[2] H.H. Koh, 'Transnational Legal Process', 75 Neb. L. Rev. 181 (1996) at 182.

[3] The labels 'lawyers,' 'political scientists,' and so forth are meant to describe the perspective rather than the formal training of the scholars whose scholarship is discussed.

TRANSNATIONAL LEGAL PROCESS THEORIES: A NEGATIVE DEFINITION

Given the conceptual confusion and dearth of conceptual analysis in the field, it is helpful to note that certain, important theories inform and partly overlap with theories of the transnational legal process but are not themselves directly and properly-understood theories of that process. These include theories of international law and international governance; theories that subsume the transnational legal process in the domestic process; purely doctrinal or comparative scholarship of transnational litigation and; theories of non-adjudicatory international dispute resolution mechanisms (such as diplomacy).[4] These are hereby acknowledged but exclude from the discussion.

Similarly, certain important discussions on issues such as the finance of international courts, the desirability of proliferation and fragmentation of international judicial bodies versus harmonization, and international access to justice, discussions that are perhaps better characterized as in the realm of policy rather than theory, are also excluded from the current discussion.[5]

THE ORIGIN AND HISTORY OF THEORIZING ON TRANSNATIONAL LEGAL PROCESSES

The term 'transnational law' was famously coined by Philip Jessup in his Storrs Lectures at Yale in 1955 as he searched for a concept that would capture the legal regulation of actions or

[4] Examples of scholarship in these areas include Peer Zumbansen, Transnational Law, CPLE Research Paper (2008) (global governance); Gary Born, International Civil Litigation in United States Courts: Commentary and Materials (Springer 1994, 1st ed.) (a doctrinal focus on transnational litigation in U.S. courts) and Eric Posner, 'Transnational Legal Process and the Supreme Court's 2003 – 2004 Term: Some Skeptical Observations', 12 Tulsa J. of Comp. & Int'l Law (2004-2005) (advocating that American courts resist enforcing international and foreign norms unless such norms have first been domesticated by the Congress); Gary Born, International Commercial Arbitration: Commentary and Materials (Hotei Publishing 2001, 2nd ed.); and Stephen McCaffrey & Thomas Main, Transnational Litigation in Comparative Perspective: Theory & Application (Oxford University Press 2009) (respectively, doctrinal and comparative scholarship of the transnational legal process).

[5] The Project on International courts and Tribunals (PiCT), for example, is dedicated to this enterprise and provides a wealth of analysis and resources. See, http://www.pict-pcti.org (last accessed 1 July, 2012).

events that transcend national boundaries and that can accommodate both public and private international law. Further, while the traditional concept of 'international law' referred to the law regulating relationships between states, the new term encompassed legal relationships of and amongst individuals, corporations and organization as well as states.[6]

In other words, as early as the 1950s, and thereafter with increased urgency, scholars have been pointing out that the concept of the inter-national, including international law, no longer suffices to explain the reality they were observing; a reality of increasing interrelatedness of various types of social actors interacting in the international sphere. 'International law' no longer contained the multitude of legal relations and of legal disputes, including disputes that were in fact being resolved, such as cross–border business disputes between individuals and/or corporations that were in fact being resolved in international commercial arbitration.

Different scholars have, over time, given somewhat different names to the new reality. For example, they have used 'transnational' or 'cross-border' to connote the traversing of national boundaries. 'Supranational' to emphasize new regional arrangements such as the European Union. 'Global' to invoke the processes, predominantly economic and technological, collectively known as 'globalization.' Irrespective of the name scholars and practitioners were experiencing and explaining the breakdown of old dichotomies and categories; the paradigm shift in international affairs that characterized the twentieth century.

Harold Koh's influential work introduced the notion of 'transnational legal process' as a predicate of 'transnational law.' 'Transnational legal process,' in his telling of the evolution of twentieth century international legal theory, wedded the concept of the 'international legal process' (emphasis on 'process')—the study of law's role in the process of policy decisions in the international realm—and the idea of 'transnational legal problems,' which mixes the public and the private, the domestic and the international, law and policy. By positioning Transnational Legal Process within the larger Legal Process Movement he sought to emphasize that legal issues mainly arise not before courts but rather in the process of making policy decisions, with lawyers playing a more important role than judges, and with consent playing a more important role than command.[7]

[6] See generally, Philip C. Jessup, Transnational Law (Yale University Press 1956). See also, Peer Zumbansen, Transnational Law, Evolving, research paper no. 27 (2011) for a description of the evolution of the idea of transnational law. [Editors: I could not located a published version].

[7] Koh, supra, note 2 at 186, 188.

However, despite the commitment to out-of-court processes of the Legal Process Movement, Koh himself applied the theory to litigation and, in fact, derived it in part through his work in public law litigation.[8] Indeed, once defined as a transubstantive process whereby states and other transnational actors come to internalize legal norms other than domestic law,[9] it is hard to resist employing the theory to describe litigation. And, in fact, around the same time, others in private practice were reaching similar conclusions. In 1989, Gary Born and David Westin published *International Civil Litigation in United States Courts*, a book often credited as the first to identify the interrelationships between different aspects of transnational litigation in domestic courts and the need to analyze, study and teach these different aspects as one cohesive field of practice. "In dealing with the unique problems raised by foreign litigants and transactions, U.S. courts have begun to develop a distinct, cohesive body of law,"[10] they wrote. They identified issues such as jurisdiction over foreign defendants, service of process abroad, forum selection and parallel litigation, sovereign immunity and the act of state doctrine, and the enforcement of foreign judgments as interrelated stages in a certain type—in the Weberian sense of the word—of litigation. In addition, they identified a set of themes that often come up in such litigation. These themes include the need to balance domestic and foreign interests, the role of foreign relations and of governmental division of powers, the effects of and on federalism, the interplay of domestic commercial litigation and public international law, and international comity.[11]

Of course, the primary alternative to transnational litigation, understood as involving a party litigating in the courts of a foreign nation, is international commercial arbitration. These are the two paths open to resolve commercial disputes that cross national boundaries. Given that transnational litigation and international arbitration are alternatives, and given that international arbitration is supported by recourse to domestic courts at certain steps of the process (such as jurisdictional challenges, interim measures and enforcement) or, otherwise stated, that an aspect of international arbitration is transnational litigation, both areas share topics, doctrine and theory.

[8] H.H Koh, 'Transnational Public Law Litigation', 100 Yale L. J. 2347 (1991) 2347–72 (a form of litigation which he characterized as "brought in United States courts by individual and governmental litigants challenging violations of international law." ibid at 2348).

[9] See H.H. Koh, 'Why Transnational Law Matters', 24 Penn State Int'l L. Rev. 745 (2006) at 746; Koh, supra, note 2 at 180, 181-207.

[10] See Born, supra, note 4 at 1.

[11] ibid at 1 – 10.

Indeed some of the most interesting debates that partly overlap with or that inform the theory of the transnational legal process have developed in relation to international commercial arbitration and the body of law associated with it – *lex mercatoria*.[12] This is not surprising given that international commercial arbitration is one of the oldest and the most effective of transnational dispute mechanisms.

However, in a strand of scholarship that can perhaps be described as a scholarship of self-doubt, some scholars of the very same transnational legal processes detail why they believe, in the words of Gertrude Stein, that 'there is no there there.' Scholars writing in this vein are skeptical as to whether, indeed, there is a field distinct from international legal theory and comparative law on the one hand and domestic civil procedure on the other. In her rendition of the development of the field of 'transnational litigation,' or at least of a perception that a distinct field is arising, Linda Silberman observed that transnational litigation has become a field because the discrete pieces of such litigation can only be understood in relation to each other and to the whole and because lawyers who handle transnational cases see themselves as operating in a distinct field.[13] But ultimately, in her view, transnational litigation as a field derives much of its content "from the domestic law of civil procedure, conflict of laws, international sales, economic

[12] See, e.g., Thomas Schultz, 'The Concept of Law in Transnational Arbitral Legal Orders and Some of its Consequences', 2 J. of Int'l Dispute Settlement 59 (2011); Ralf Michaels, 'A Fuller Concept of Law Beyond the State? Thoughts on Lon Fuller's Contributions to the Jurisprudence of Transnational Dispute Resolution—A Reply to Thomas Schultz', 2 J. of Int'l Dispute Settlement 417(2011) and; Peer Zumbansen, 'Debating Autonomy and Procedural Justice: The Lex Mercatoria in the Context of Global Governance Debates—A Reply to Thomas Schultz', 2 J. of Int'l Dispute Settlement 427 (2011).

[13] Linda Silberman, 'Transnational Litigation: Is There A 'Field'? A Tribute to Hal Maier', 39 Vand. J. Transnat'l L. 1427 (2006), at 1430-31 (lawyers who understand themselves as transnational litigators "understand how a case will be shaped in any one of a number of fora and consider strategic steps available to them to ensure that litigation proceeds in the form of their choice… Before litigation is even commenced, they consider where the defendant's assets are or might be in the future in order to assess whether foreign enforcement of the judgment is likely to be required and, if so, how a particular country will treat a foreign judgment. These questions are all interrelated pieces of a large litigation puzzle which is the field of transnational litigation"). See also, Paul R. Dubinsky, 'Is Transnational Litigation A Distinct Field? The Persistence Of Exceptionalism In American Procedural Law', Wayne State University Law school legal studies research paper series number 08-32 (2008) and; James H. Carter, 'Transnational Law: What Is It? How Does It Differ from International Law and Comparative Law', 23 Penn St. Int'l L. Rev. 795 (2004).

and trade law, and public international law."[14]

This skepticism notwithstanding, a multitude of theories that seek to portray and explain the various mechanism of binding, non-domestic dispute resolution, to catalogue the challenges they face or to critique their advent, continue to occupy a significant space in contemporary international legal theory. The next section is devoted to these theories.

TRANSNATIONAL LEGAL PROCESS THEORIES

I) THE LAWYERS AND LEGAL THEORISTS

As noted and illustrated above, transnational legal process theories have emerged to a large extent through the work of lawyers – practitioners and scholars of international dispute resolution -- observing a changing legal environment. Since dispute resolution is a core function of any legal system, transnational dispute resolution, namely litigation and arbitration, received much of the attention of those theorizing about the new global legal order. As students of law *qua* law, they grappled with key aspects of litigation. First and foremost, are the twin challenges of jurisdiction and enforcement. Other components that call for theorizing include the challenges of forum non convenience, parallel proceedings and international choice of law. In asking what are the proper doctrinal solutions to such problems as which law to choose or which territory is to have authority to hear a matter, scholars are also asking the questions of efficacy and coordination, of sovereignty and legitimacy, of judicial independence and the rule of law.

Two themes in particular emerge in reviewing this literature. First, is that the model of international commercial arbitration, one of the oldest and most successful forms of modern dispute resolution, looms large either in the foreground or in the background of much of this scholarship. A second, related, theme, is that many insights emerged from grappling, more generally, with what happens when we adopt, adept and stretch one form of adjudication to fit a new, different, transnational context which the said system was never meant to accommodate. What happens when we model international tribunals on domestic courts? What happens when we model international public law adjudication on contract – based international arbitration? What happened when we model arbitration against a sovereign on commercial arbitration

[14] Silberman, ibid, at 1429.

between private parties? The following paragraphs illustrate this strand of transnational legal process theorizing by examining at the scholarship Harold Koh, Yuval Shany, Jens Dammann & Henry Hansmann and Gas Van Harten.

Koh's work, introduced above, seeks to explain, first and foremost, the critical issue of compliance with international law generally.[15] Like Jessup, his starting point is to broaden the focus beyond states and some of his conclusions are similar. In enumerating what he sees as the four distinctive features of transnational legal processes he first lists the "break down [of] two traditional dichotomies that have historically dominated the study of international law: between domestic and international, public and private" and its nonstatist nature: "the actors in this process are not just, or even primarily, nation-states, but include nonstate actors as well."[16] But to those he adds that the transnational legal process is dynamic, not static: "Transnational law transforms, mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back down again."[17] Finally, for Koh, the transnational legal process is normative in that it is a process of interactions from which new rules of law emerge. These new rules are internalized, enforced, interpreted and reinterpreted, thus beginning the process all over again. So the focus is "not simply upon how international interaction among transnational actors shapes law, but also on how law shapes and guides future interactions: in short, how law influences why nations obey."[18]

Indeed, the main thrust of Koh's theory of the transnational legal process, focused as it is on enforcement and compliance, is internalization through interaction. State and non-state actors obey international law as a result of repeated interaction with other state and non-state actors in the international sphere. (One might add including in, and in the shadow of international courts and tribunals.) The 'process' in 'transnational legal process' is an *iterative* process of interaction and internalization "through which international law acquires its

[15] Koh, supra, note 2 at 183-4. It therefore is also equally part of the significant body of literature on compliance, a literature that overlaps with the transnational legal process theory of dispute resolution. See, e.g., Karen Alter, The New Terrain of International Law (**PUBLISHER?** forthcoming) (pending author's permission).

[16] Koh, supra, note 2, at 203-4.

[17] idem.

[18] idem.

'stickiness,' that nation-states acquire their identity, and that nations define promoting the rule of international law as part of their national self-interest."[19]

Yuval Shany examining the equally central issue of jurisdiction and asks the question of how to regulate jurisdictional relationships between national and international fora. He explicates that looming in the background of jurisdictional competitions are some of the larger, traditional questions in international legal theory. These are the old question of monism versus dualism in international legal theory (namely, between the view that national and international courts are part of a single normative system versus the view that they are two, sharply delineated systems); the question of the proper structure (unified or isolated) and hierarchy within the global judiciary; and the question of the proper role of judges as purely law-applying versus problem solvers who actively promote coordination and harmonization.[20]

Dammann and Hansmann also focus on jurisdiction but as an entry point for a suggestion for reform of global rule of law through institutional competition in the service of global economic development. They use as their starting point the fact that the quality of national judicial systems varies widely from country to country and that such differences affect not only a particular litigant but also nations as a whole given the key role that effective courts, and effective resolution of civil disputes, play in economic development (the same premise that underlies the theory and practice of international commercial arbitration). Since judicial reform is difficult and slow to achieve, and since international arbitration is insufficient to remedy this structural feature of the global economy, they envision and imagine a global system of 'extraterritorial litigation' in which litigants from jurisdictions characterized by dysfunctional court systems may opt to have their domestic and commercial disputes adjudicated in more

[19] Koh, supra, note 2 at 204. For an account applying the social–psychology to explain the process of internalization of international legal norm and of the formation of Self through face-to-face interactions patterned by international courts, see generally, Maya Steinitz, '"The Milosevic Trial-Live!' An Iconical Analysis of International Law's Claim of Legitimate Authority," 3 J. of Int'l Crim. Justice 103 (2005); and Maya Steinitz, 'The International Criminal Tribunal for Rwanda as Theater: The Social Negotiation of the Moral Authority of International Law,' 5 U. Penn. JILP 1 (2006).

[20] Yuval Shany Regulating Jurisdictional Relations between National and International Courts (Oxfrod University Press 2009) at 3 -4, 198-201.

highly functioning foreign courts, for an appropriate fee that compensates the taxpayers of the jurisdiction selected by the foreign litigants. [21]

Straddling the line of public and commercial international affairs and international law is the world of international investment law with its unique dispute resolution mechanism at the International Center for the Settlement of Investment Disputes (ICSID) under the auspices of the World Bank. This unique transnational legal process serves as laboratory that allows for testing what happens when the lines between the public and the private and between the domestic and the international blurs—that celebrated feature of the transnational legal process as defined by the field's forefathers. Gus Van Harten's critique of the ICSID regime locates the origins of many of the problems plaguing the field in the transplantation of the modality and rules of international commercial arbitration, i.e. arbitration between two private parties, into a system of public international arbitration against sovereigns, which in his account undermines some of the core precepts of the rule of law. [22]

In the investment arbitration system, the structure of international commercial arbitration has been adopted for public, regulatory disputes instead of a conventional court model, explains Van Harten. These arbitrations are structurally similar to commercial arbitration even though their contents are that of public law. This means that private arbitrators have the power to resolve regulatory disputes between individuals and multinational corporations (foreign investors), on the one hand, and a state, on the other (but not vice versa) and to ultimately discipline states.[23] Such private arbitration is used in the regulatory sphere to arbitrate disputes between individuals and states without due regard to judicial independence and accountability, basic tenants of the rule of law, and with almost no court supervision—all of which are arguably unnecessary in contract-based international commercial arbitration. In setting up this system "states have enabled privately contracted adjudicators to determine the legality of sovereign acts and to award public funds to businesses that sustain loss as a result of government regulation. This undermines basic hallmarks of judicial accountability, openness, and independence. Above all, the lack of security of tenure of arbitrators in a one-sided system of state liability… makes

[21] Jens C. Damman and Henry B. Hansman, 'Globalizing Commercial Litigation', 94 Cornell L. Rev. 1 (2008) (drawing on economic concepts of information asymmetries and negative externalities but engaging largely in normative argumentation).

[22] See, generally, Gus Van Harten, Investment Treaty Arbitration and Public Law (Oxford University Press 2007).

[23] ibid at 3.

the adjudicator dependent on prospective claims and thus biased… against respondent governments [] because they receive appointments only if investors bring claims."[24]

To remedy the undermining of the rule of law caused by a system in which public law subject matter is arbitrated in a manner designed for commercial disputes between private parties he suggested that a public law adjudication system must be designed to uphold the principals of accountability, openness, coherence and independence. Implicitly, however, one can read this analysis as calling into question more generally whether we should, in all circumstances, celebrate the blurring of the lines of public and private and distinctions between states versus non-state actors as parties in transnational litigations.

II) THE POLITICAL SCIENTISTS AND INTERNATIONAL RELATIONS THEORISTS

Since political science and international relations are the sciences of domestic and international government(s), bureaucracies and administration scholars in this category study how the mechanisms and outcomes of transnational dispute resolution are both produced by and, in turn, produce power-sharing and governance and the particular characteristics of dispute resolution mechanisms that double as administrations and bureaucracies. The following paragraphs illustrate how these two disciplines come to bear on the analysis of transnational legal processes by looking at the scholarship of Anne-Marie Slaughter, Robert Keohane and Andrew Moravcsik and the debated between them, on the one hand, and Eric Posner and John Yoo, on the other. In this debate, politically liberal or conservative underpinnings of theories of transnational legal processes are openly discussed.

As a starting point, there is a shared understanding that transnational legal processes are a form of governance that mimics or, rather, functionally (albeit only partially) replaces the three branches of government which do not exist in the international sphere in the form recognizable at the nation state level. As such, transnational legal processes of binding dispute resolution are recast in terms of an international judicial branch of governance but, importantly, not of government.

[24] ibid at 5.

Slaughter, Keohane and Moravcsik identify and celebrate two new forms of international judicial functions. One, is 'transjudicial communication': a new judicial mechanism that facilitates, at the national judicial level, transnational litigation through new forms of cooperation by international and national courts. The other, is 'supranantional adjudication'– non-statist adjudication (more on that below).

In a book by that name, Anne-Marie Slaughter describes in detail a New World Order, comprised of so-called disaggregated states, in which global governance occurs through networked interactions by non-state actors, such as private individuals and groups, across national polities and within international institutions, with the result being a higher degree of *de facto* regulation of global affairs.[25] For example, in today's interconnected world, judges in different countries, especially on supreme courts, formally and informally interact with each other. In particular, judicial cooperation in the context of transnational litigation is visibly increased, enabled by 'transjudicial communication'—communication among courts, whether national or supranational, across borders. Such communications take the form, for example, of citing with agreement or disagreement one another's cases or of face-to-face meetings in international conferences and at international judges' training programs.[26] Judges are evaluating the quality of fellow judges and are, in turn, being evaluated by peers in other nations; as members of an epistemic community that is as important, psychologically, as is the nation. Judges are negotiating with one another, importantly, to facilitate transnational litigation redefining judicial comity to facilitate the new, global economy.[27]

In addition, Slaughter et al also introduced the concept of supranational adjudication to describe and theorize about international dispute resolution that is distinguishable from traditional, state-to-state international adjudication. In contrast with the latter, supranational adjudication is characterized by a high degree of independence from states, increased access of parties other than states, and by embeddedness - the ability to implement outcomes directly without government's mediation. Conversely, interstate adjudication is characterized by a low

[25] See, generally, Anne-Marie Slaughter, A New World Order (Princeton University Press 2004).

[26] See, generally, Anne-Marie Slaughter, 'Human Rights International Law Symposium: Article: A Typology of Transjudicial Communication', 29 U. Rich. L. Rev. 99 (1994).

[27] Slaughter, supra, note 25, at 86.

levels of all three.[28] Supranational adjudication thus defined, in essence, increases the ability of supranational tribunals to serve as checks-and-balances on national governments as compared with interstate tribunals. It therefore empowers domestic players other than the state. And it facilitates a higher degree of development and the assertion of new legal norms.[29] Last but not least, it allows for a greater degree of effectiveness.[30]

Normatively, the emergence and expansion of supranational adjudication and the development of transjudicial communication, egged on by high technology and increasing economic interdependence, are viewed as a positive development by Slaughter and fellow theorists of the transnational legal process writing in the liberal tradition of international relations and international law. This is because the judicialization of international law in the form of more international bodies that are more court-like enhances the effectiveness of international law, advances the rule of law and increases the legitimacy of international law according to this view.

But not everyone is either convinced that effectiveness is in fact thus enhanced nor enthralled with the prospect that in fact it is. Conservative legal scholars, such as Eric Posner & John Yoo, enter the transnational legal process discourse to sound the alarm over the loss of sovereignty and the debatable legitimacy of transnational legal process as it relates to international courts and tribunals. They recast the call for more, not only better, international adjudicatory bodies as a liberal agenda and a liberal call to arms. This strand of scholarship is properly positioned in the tradition of international relations Realism and in a dualist understanding of international law. It critiques the rise of transnational legal processes that function as governance especially those that do so though adjudication.[31]

Posner and Yoo, specifically, question the value of judicial independence—long a mainstay of the rule of law—when such tribunals are concerned. Arguing against a liberal consensus that the use of independent international tribunal enhances their effectiveness and the

[28] Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational', 54 Int'l Organization 457 (2000) at 458.

[29] See, generally, idem.

[30] See idem; and Slaughter & Helfer, 'Toward a Theory of Effective Supranational Adjudication', 107 Yale L. J. 273 (1997).

[31] John Yoo & Eric Posner, 'Judicial Independence in International Tribunals', 93 Cal. L. Rev. 1 (2005). Posner & Yoo also introduce a game-theoretical perspective in suggesting that international tribunals' usefulness is in allowing states to overcome certain cooperative problems.

spread of the rule of law, these authors argue that it is political unification that makes independent tribunals possible and effective in the spreading of the rule of law whereas in the international realm, where no unification exists, international tribunals cannot be both independent and effective.[32] They offer empirical evidence that the most successful (i.e., effective) international tribunals are dependent tribunals, namely ad hoc tribunals staffed by judges who are controlled by governments. Conversely, independent tribunals are undesirable in this view because they are likely to allow their own (liberal) normative ideals, ideological imperatives and the interests of third parties to influence their decisions.[33]

A different perspective on power and its distribution, that eschews the clear liberal/conservative divide is a focus of sociological and socio-legal theories of transnational legal process. These are presented in the next sub-section.

III) THE SOCIOLOGISTS AND SOCIO-LEGAL THEORISTS

Taking individuals as the constitutive elements of the international order and conceiving of them as socially constructed agents of change or of preservation of the status quo this strand of scholarship views institutions such as international courts and tribunals as emergent of individuals' patterned interactions. The patterns are contingent on variables such as culture and history. Following the trail of power, this tradition asks *qui bono* from transnational dispute resolution thus constituted. The following paragraph illustrates this scholarship of the transnational legal process by looking at the scholarship of Dezaley and Garth as well as of Terris, Romano and Swigart.

Following in the footsteps of the anthropologist and social philosopher Pierre Bourdieu and firmly rooted in the critique-of-capitalism tradition, Yves Dezaley & Bryant Garth employ qualitative empirical methodologies to explore the secretive world of international commercial arbitration. International commercial arbitration is first conceived of as a 'field'— a setting in which agents and their social positions are located. Conceptualizing international commercial

[32] Ibid.

[33] See, Laurence R. Helfer & Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo,' 93 Cal. L. R. 899 (2005) at 899 - 900. Helfer and Slaughter provide a strident critique both of the soundness of Posner and Yoo's empirical work and the validity of its normative underpinnings. Posner and Yoo then provide a counter-reply in 'Reply to Helfer and Slaughter,'93 Cal. L. R. 957 (2005).

dispute resolution as a field means understanding it as a "symbolic terrain with its own networks, hierarchical relationships, and expertise and more generally its own rules of the game… [W]ithin a field, agents and institutions constantly struggle, according to the regularities and rules constitutive of this space of play."[34] A field is the social space in which institutions, such as the International Chamber of Commerce International Court of Arbitration, the leading international arbitration body, are "created, rendered obsolete, or reinvented."[35]

Within this framework, they describe the international arbitration community as a tightly-knit group with "[m]embers of the inner circle and outsiders often referring to this group as a 'mafia' or a 'club.'"[36] They chronicle how an elite cadre of Western transnational lawyers constructed an autonomous legal field, rarified and exclusive, that has given them a central role in the global marketplace and allowed them to charge premium rates for their services. They portray how, in the last four decades, the field has been shaped by struggles for dominance between 'Grand Old Men,' European grand professors who come into international arbitration as the spoils of a long and distinguished academic career, and younger 'arbitration technocrats,' mostly partners in U.S. multinational law firms who practice international arbitration full time (or aspire to do so). The former's symbolic capital is comprised mostly of scholarly achievements; the latter's of their position in powerful multinational firms representing the global business elite. In both cases, the symbolic capital is then converted into cash in the form of arbitral fees.

In the process, this mostly intra-Western competition for appointments, based on rules-of-the-game shaped by and for Western imperialist agendas, has transformed domestic methods of dispute resolution and of an informal, settlement-oriented system into a formalized and litigious one, in the image of Anglo-, and even more so American, litigation. Non-Western lawyers who attempt to gain entry into the 'club' must acquire and traffic in the same symbolic capital. The acquisition of which, for example through studies in the elite universities of the West, involves a process of cooption. These non-Western lawyers thus become moral entrepreneurs who construct international justice out of the competition for transnational business disputes.

[34] Yves Dezaley and Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order, (University of Chicago Press, 1996) at 16 (internal quotation marks omitted).

[35] ibid at 16.

[36] ibid at 11.

In addition, in the development of new frontiers, which take the form of the establishments of regional arbitral institutions and affiliates of international ones, local legal elites "follow their own interests [in becoming insiders and obtaining lucrative engagements and appointments] at the same time they serve the interests of their protectors… Thus, while being agents of symbolic colonialism, these institutional importers also set the stage for third worldism – often becoming, however, its first victims when the movements became radicalized and demanded to exercise power themselves."[37] These takeovers happens when large, U.S.-based or U.K.-based law firms transform the field's periphery attacking local, fragmented justice and in its stead promote universal business justice in which they are more proficient, and more competitive, and which therefore is more profitable for them.

In this telling, international commercial arbitration is understood as privatized justice *cum* symbolic colonialism rather than a neutral mechanism for the impartial resolution of cross-border commercial disputes. Critically, the transnational in this view does not refer only to activity that takes place at the transnational level. Rather, the transnational level is "best understood as a virtual space that provides strategic opportunities for competitive struggles engaged in by *national* actors—struggles, for example, about whether international commercial arbitration should resemble litigation in court, and if so, whose courts, or how much it should reflect a perspective of third-world… the transnational opportunities and struggles [] tend to disrupt the established national categories and, as a result, are significant for their impacts on the national landscapes of business disputing as they are in the creation of an international private justice."[38]

All this is arrived at by mapping, as a point of entry, the kind of *individuals* who are named most often as international arbitrators thus arriving from the particular to the general: to an understanding of the social (as opposed to purely legal) functions of the international commercial arbitration system. Here too, the larger inquiry is an inquiry into international rule of law.[39]

[37] ibid at 284-5 and 13.

[38] ibid at 3 – 4 (italics in the original). (Noting, importantly for a discussion of the present state and future directions of transnational legal process theories, that practitioners are accustomed to thinking in terms of strategies and positions in the legal field but that legal academics tend to resist thinking in terms of internal politics of the field or to acknowledging their role in such politics. idem.)

[39] ibid at 3.

Interesting similarities and differences in methodology, outlook and choice of research object is evident in the work of the historian Daniel Terris, the jurist Cesare Romano and the anthropologist Leigh Swigart on the international judge.[40] Working off of the premise that "the work of international judges has changed the character of the world we inhabit,"[41] they too select as their focal point the individuals who comprise the studied phenomenon, namely international judges. They, too, have embarked on an extensive campaign of not-for-attribution interviews. However, unlike the Dezaly & Garth's external critique, Terris et. al aim to bring the voices of the judges themselves, as such, into the discourse about international adjudication. Their goal is to better explain and more fully portray the human complexities involved in the work on the international bench and to stimulate other social scientists to engage in the study of global legal institutions.[42]

Using this methodology, they hit on some of the major flash points in the popular and academic debates about international adjudication: The tension between the international mandate and the local impact, the realities and perception of both public and state pressures and of conflicting loyalties, the legitimacy of law-making by the judiciary, and the role of material resources in the operation of international courts. Their methodology also enables them to document the familiar problem of a lack of diversity in the international judiciary – a phenomenon traditionally referred to more generally in the words of Oscar Schachter as 'the invisible college of international law.' Men are more than four times more likely to be international judges than are women and the international judiciary is characterized by a certain homogeneity of biographies, such as common patterns of education.[43]

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[40] See, generally, Daniel Terris, Cesare Romano and Leigh Swigart, The International Judge: An Introduction to the Men and Women Who Decide the World's Cases (Oxford University Press 2007).

[41] ibid at xii.

[42] ibid at xvi (as well as a call to arms for the U.S. to more fully engage with the international judiciary (and international law at large) – a theme in American scholarship on international law alluded to above, notes 30 – 31 accompanying text, for the Posner/Yoo – Helfer/Slaughter debate.

[43] ibid at xviii. (Concluding that "[t]here once was a time when the 'invisible college' of international judges consisted of a small band of men, principally Europeans, clustered tightly in The Hague. Today's more extensive network has much more diversity in terms of geography, race, and gender, but the common bonds across space and time… [and t]raining in a relatively small number of key universities ensure significant commonalities in the legal mindset of international judges." ibid. at 223) In international arbitration, only five percent of arbitrators are women. See, Gus Van Harten**,** 'The (lack of) women arbitrators in investment treaty arbitration,' Columbia FDI

Their analysis concludes with some somber predictions on the future of international adjudication. Some signs they identify point towards a slowdown in the growth in the numbers of new courts and tribunals. The resistance to the authority and legitimacy of international courts by some of the world's leading powers may lead to a marginalization of exiting courts. Activist law-making by judges in international courts may create a backlash even as courts remain dependent on nation states and governments for resources, legitimacy and enforcement.[44]

CONCLUSION

Barrowing H.L.A. Hart's metaphor of a core and a penumbra of legal concepts, one can identify the core issues that occupy the theory of adjudication as a transnational legal process. Core procedural issues are clearly the issues of jurisdiction (power) and enforcement (the effect of the power). A paradigmatic transnational legal process is that of international commercial arbitration. Core themes are those of sovereignty, international rule of law, independence and the role of individuals in shaping transnational litigation and international adjudication.[45]

Owing to the fact, however, that the processes in question are tremendously diverse, and given that the intention underlying the project of transnational legal process theorizing has been, very deliberately and from the outset, to craft a concept that *blurs* lines, rather than sharpen distinctions, the penumbra is much larger than the core. It encompasses issues as diverse as the monist / dualist debate, symbolic colonialism in the developing world, and the governmental division of power under American constitutional law.

The concepts in use by transnational legal process theorists, starting with the concept of a transnational legal process itself, are far from clear. Different scholars brand different

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Perspectives, No. 59, 6 February, 2012 (finding that only 4% of arbitrators appointed to international investment arbitration are women that "Th[is] story is also almost entirely that of two women The story is also almost entirely that of two women, Gabrielle Kaufmann-Kohler and Brigitte Stern, who together captured 75% of appointments of women."

[44] ibid at 222.

[45] H.L.A. Hart, The Concept of Law (Oxford University Press 1961) at 134 ("indeed even key terms used in the [English theory of precedent] '*ratio decidendi,*" 'material facts,' 'interpretations,' have their own penumbra of uncertainty.).

transnational dispute resolution processes using a multiplicity of partly-overlapping concepts such as supranational adjudication, transnational litigation, extraterritorial litigation, transnational dispute resolution, and more. These can inelegantly be grouped under the umbrella of 'non-national binding dispute resolution,' to encompass litigation and arbitration in non-domestic courts but to exclude non-dispute related legal processes (i.e. other features of global governance). Either way, the upshot is that there is little by way of a shared discourse (let alone a unifying theory or a set of competing unifying theories) on the important phenomenon of the transnational legal process of adjudication.

A first recommendation, then, for further research in the field is to incorporate analytic legal philosophy, currently almost entirely absent from the debate, to help crisply define a concept of non-national binding dispute resolution. Such an enterprise would aim to define the necessary (though possibly insufficient) attributes of such a process. In addition, legal philosophy is key in developing normative argumentation for and against the legitimacy of any given form of transnational legal process.[46] The field would equally benefit from brining under its big tent other absentee theories, particularly critical studies and law and economics.

For example, what can critical race theory—which developed in the U.S. to explain racism in the context of race relations between black and white Americans—both teach us and learn from African-on-African racial relations as portrayed and constructed in international criminal courts? What can feminist and queer theories— which are adept at studying the de- and re-construction of fundamental social institutions such as 'family'—teach us about de- and re-constructing the idea of 'court' to fit a global society? What can behavioral law and economics teach us about how to fairly price legal claims so as to fairly settle disputes in investment arbitration, where foreign investors are seeking compensation from taxpayers in sometimes-devastated economies? And, what can traditional law and economics teach us about whether or not the level of international litigation is optimal?

Transnational legal process theories have made great strides in the second half of the twentieth century but much more is left to be done.

[46] As the debate revolving Schultz's work, supra note 12 does in respect to international arbitration. International law, more generally, has long been a child of a lesser god as far as analytic jurisprudence is concerned. "Where legal philosophy has addressed internationalization and globalization, it has predominantly remained in the realm of public international law." Ralf Michaels, supra note 12 at 418.

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