What Law Do Legal Theorists Need to Know?

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M. Sornarajah, Resistance and Change in the International Law on Foreign Investment (**Cambridge University Press**, 2015).

A question seldom asked is what actual legal knowledge legal theorists require in order to theorize about law, or, indeed, what areas of law they should visit in order to confirm their theories. Without wishing to suggest there might be a mandatory list of legal subjects, or a set of legal treatises that amount to required reading, my present purpose is to draw attention to an area of law and its treatment in a recent book by M. Sornarajah that would not obviously fall within the purview of legal theorists but which offers them particularly stimulating material.

The area of law is international law on foreign investment, an area Sornarajah is well positioned to write about, being commonly regarded as one of the founding expositors of a specialist sub-discipline of international law,[1] whose rapid development in recent decades is a significant manifestation of the fragmentation of international law. This area of law, whose development has centred on the place and role allowed to arbitration on international investment treaties, accordingly provides an extraordinarily accessible set of data regarding the creation, recognition, and development of law.

Sornarajah's principal thesis in writing this book is itself a theoretical one. From a detailed examination of the developments of the law over a period of twenty-five years, he aims to provide an explanation of change that is applicable more widely to international law, and addresses the (undesirable) phenomenon of fragmentation. (P. 8.) His explanation involves the ideological capture of this area of law, amounting to the exclusive promotion of partisan interests, in turn followed by resistance to the unjust condition of the law, holding out the prospect of change towards a more just condition.

The ideology capturing the law was neoliberalism (Pp. 10-15, 43-45, 62-63), and the partisan interests it favoured belonged to multinational corporations at the expense of developing countries. (Pp. 21, 27, 330, 398, 407.) The legal tactics employed to this end are charted meticulously by Sornarajah. They are founded on an interpretive move which allowed investment treaties to be taken beyond the consent of the parties to be serving an overriding interest of investment protection (Pp. 136-43), reaching an "acme of aberrations" (Pp. 168-73) when financial instruments involving government junk bonds acquired in foreign secondary markets were regarded as protected investments under a treaty contemplating investment in the party country. Sornarajah points to the unfounded "extreme adventurism" of this interpretive move: "It is not possible to enter the state as an investor through obligations or economic rights such as securities sold on foreign stock markets." (P. 171.) The tactics extend to innovative uses of devices to consolidate neoliberal gains in the face of emerging opposition, such as the fair and equitable standard (Ch. 5) and the proportionality principle. (Ch. 7.)

Resistance occurred not simply from the affected states (Pp. 5-6, 66-67, 300) but also by dissident arbitrators (Pp. 5, 66, 168, 186, 399) and some academic commentators (Pp. 29, 301) who were alarmed by the transformations the area of law had undergone. The process of change displayed in the more recent approach to "balanced treaties" (P. 5) is currently ongoing. It is a process that is fiercely resisted by the forces of neoliberalism (Pp. 67-68, 417-18), resulting in a "contest between norms" (Pp. 69, 399-404) and a clash between the forces championing them. (P. 7) However, the very existence of conflict and efforts at accommodation are regarded as a manifestation of change, change from the absolute priority accorded to foreign investment. (Pp. 68, 418.)

Ultimately, Sornarajah looks towards a realignment of the field with the general principles of international law. (P. 8.) To some extent this is sought to ensure that interests other than those of investment are not excluded from the picture. (Pp. 8, 29, 76, 303, 418.) There is also a suggestion that a function of international law in "securing [wider] interests of poverty reduction, environmental protection and the promotion of human rights" aligns it with "its moorings in notions of justice." (P. 29.) The author certainly considers interests precluded from the protection of the law by hegemonic power as being supportable by claims of justice, and that the exclusive concentration on the interests of investment is insupportable as clearly unjust—without having to invoke and defend a particular conception or specific principles of justice. (Pp. 22, 71, 417.)

Indeed, there is much to suggest that Sornarajah does not consider his extensive case study to be a celebration of the triumph of justice. Despite proposing a general theory of change for international law based on his study (involving hegemonic power, resistance including an appeal to justice, and change through accommodation or replacement of norms) (P. 420), the driving force which promotes and limits the detailed changes that occur is more often identified as a struggle between competing interests. (Pp. 1, 5, 7-8, 392-93, 418.) And in that struggle, control of the law is paramount. (Pp. 20-21, 26-27, 68-69, 398-99.)

Sornarajah reserves his harshest criticism for the legal officials (arbitrators and lawyers), abetted by academics (Pp. 29, 58-59), who have worked to allow control to be taken by the wrong side. He denounces these arbitrators for "ignor[ing] the higher values of the profession such as neutrality and fidelity to the trust placed in them by the parties." (P. 61.) As for the large law firms, their motivation was "enlarging the market for their services." (P. 65.) Because of the economic gains of arbitrators and lawyers (P. 65), they remain "dominant forces that will resist change," given the huge stakes "in terms of [personal] monetary loss" that change would bring about. (P. 399.) Significantly, he applauds the proposal to exclude or limit the involvement of large law firms. (P. 420.)

It would appear that the business of Judge & Co., excoriated by Bentham, can still be found flourishing. Of greater analytical interest is how the activities of these legal officials, portrayed in Sornarajah's book, shed light on our understanding of the creation and recognition of law. It is difficult to find any evidence showing officials following a rule of recognition here. It is equally difficult to maintain that their internal attitude to the law is morally neutral or based upon a disinterested legal point of view. Rather it appears that an ideologically charged, or self-serving, attitude is essential. There is also clear evidence that in the period of greater conflict in this area of law, there was not a legal point of view to be found but whatever happened to be the point of view of the individual (or majority) arbitrator. (Pp. 62-63, 417.)

Another issue of wider theoretical appeal illuminated by the material in this book is that of the relationship between law and the interests of members of the community. The issue arises in a disagreement between Gerald Postema and Joseph Raz, which can be concisely represented as concerning whether social existence under law emerges as a harmonious order serving the common interests of members of society, or is founded on an imposed order irrespective of the dissonant interests of individual members of society.[2] The material Sornarajah provides certainly speaks to imposition of law over dissonant interests, but it stimulates further theoretical reflection in two respects. First, on the nature of the capture of law by one side of the conflicting interests, and on the resistance by the other side that impacts upon the law, extending beyond a simple picture of the exclusionary authority of law. Secondly, regarding the possibility of law being in a state of conflict itself.

Sornarajah's book is a masterful account of an extraordinary, relatively short, period of dynamic change in the international law on foreign investment. It should obviously excite the interest and commitment of those working in the field. Perhaps, less obviously, it should equally demand the attention of those with interests outside of that field, both practical and theoretical, within international law and law more generally.

1. Sornarajah's classic text, *The International Law on Foreign Investment* was first published in 1994. A third edition came out in 2010. [?]
2. *See* Gerald Postema, *Law's Autonomy and Public Practical Reason*, *in*, The Autonomy of Law: Essays on

Legal Positivism (Oxford: Clarendon Press, 1996); Joseph Raz, *Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment* 4 Legal Theory 1 (1998). Recent discussion of this debate can be found in Margaret Martin, Judging Positivism (Oxford: Hart Publishing, 2014), with further discussion in my review of her book in Andrew Halpin, *Judging Positivism*, 28 Canadian Journal of Law and Jurisprudence 461 (2015). [?]

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