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**ARBITRATION, DEMOCRACY AND THE RULE OF LAW: SOME REFLECTIONS  
ON OWEN FISS'S THEORY**

INTRODUCTION

In this paper, I will explore some themes of Owen Fiss's scholarly work in order to shed light on an increasingly important legal institution: arbitration. Fiss has written extensively about courts, democracy and the rule of law. Although he has paid less attention to arbitration, his general ideas can be applied to it in interesting ways. So what I invite you to do here is to walk through the arbitration field with his guidance.

Before we get into that, however, I need to say a few introductory words about different types of arbitration, to better frame the discussion that will follow.

THE VARIETIES OF ARBITRAL EXPERIENCE

Arbitration is a key institution in our legal world. Private parties often choose to resolve their disputes through arbitrators, instead of using regular courts. The most salient feature of arbitration is that it is based on consent. The parties usually express their consent to arbitrate before the controversy arises. It is also possible, though less common, for parties to agree to arbitrate after the dispute has erupted. Courts, in contrast, exercise a "governmental power" over litigants. When a plaintiff brings a suit to the competent court, the consent of the defendant is irrelevant to establish the foundation of that court's authority to render a binding decision.

A second feature to highlight is that arbitrators are chosen and paid by the parties, whereas courts are permanent institutions set up and run by the state. The procedures are also different. Parties are empowered to design or choose the procedures that arbitrators will employ, whereas the same measure of flexibility is not offered to them when it comes to courts.

There are several reasons why parties may prefer arbitration over adjudication. There is, first, the advantage of specialization. When parties resort to arbitration, they can choose experts in particular fields to resolve their disputes. When they go to court, in contrast, the judges they encounter have a more generalist legal training. A second advantage is related to speed: by means of the arbitral procedure, the parties don't have to wait in line for their case to be decided by the competent court. The arbitrators they appoint can focus on it soon (unless they are very busy). The arbitral award, moreover, is usually final: the grounds upon which courts are authorized to vacate an award tend to be extremely limited.

These advantages apply to arbitration generally. When arbitration is "international", moreover, it exhibits some additional strengths.<sup>1</sup> If the parties to a contract are nationals of different states, for example, each is reluctant to submit potential disputes to the domestic courts of the other party's country. Arbitration quickly enters the picture, for it provides a neutral forum for the resolution of controversies. (As we will see later, this feature raises deep issues about the meaning and possibilities of impartiality in our world). Another advantage that arbitration brings to the table derives from the existence of an important international instrument that helps ensure that courts in different countries will comply with the arbitral agreements and will enforce the awards: the New York Convention of 1958.

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<sup>1</sup> One of the most comprehensive treatments of this type of arbitration is Gary Born, *International Commercial Arbitration* (The Netherlands: Kluwer Law International, 2009).

There is a specific modality of arbitration that deserves separate treatment, for it has raised considerable controversy: “investor-state arbitration”. When a foreign company or individual makes an investment in a country, the risk exists that the local authorities will exercise their governmental powers in ways that unduly reduce or eliminate the value of the investment. A response to this problem has been found in public international law, both at the substantive level and at the procedural level.<sup>2</sup>

From a substantive perspective, international law has developed some customs that protect foreign investors. States, for example, are under the duty to provide foreigners with full protection and security, must accord them fair and equitable treatment, and cannot take their property without paying adequate compensation. In addition to customary law, states have entered into international treaties of various kinds, to further specify and sometimes extend these principles. Two states, for example, may subscribe a bilateral investment treaty (BIT) that grants citizens and companies that are nationals of those states a collection of rights as foreign investors. Or two states may agree upon a broader treaty on free trade that includes a chapter on investments. The international instruments may also be multilateral (as is the case with NAFTA, MERCOSUR, and the Energy Charter, for example).

From a procedural perspective, public international law helps investors through the creation of a forum where their disputes with host governments can be resolved: investment arbitration. To a large extent, what has pushed developments in this direction is distrust of local courts. In this field, distrust of the local judiciary does not merely come from the fact that one of the parties to the dispute (the investor) is a foreigner. It also derives from the fact that the other party is the government (not a private party). The fear is that the government will press the

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<sup>2</sup> For an overview, see Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (New York: Oxford University Press, 2012).

domestic courts to rule in its favor. Because the private and public interests at stake in these controversies are usually very large, the risk of bias is especially pronounced.

There are different arbitration forums where investment controversies may be brought. Chief among these is ICSID (the International Center for Settlement of Investment Disputes), which was created by the Washington Convention of 1966, under the auspices of the World Bank.<sup>3</sup> This arbitration house is open to states that have ratified the ICSID Convention. An investor can bring a complaint against a state before the arbitral bodies that are set up under the ICSID framework. A state can also bring a claim against an investor, but this is extremely rare in practice.

For a state to be brought to an ICSID arbitration tribunal, it is necessary, of course, to obtain the agreement of both parties to the dispute. The investor can easily consent by filing a request for arbitration. The state's consent, in turn, is normally expressed before the dispute arises. Sometimes, the contract between the government and the investor includes the pertinent arbitration clause. Other times, the national law (whether a statute or the Constitution) provides that the state agrees to arbitrate particular classes of disputes with foreign investors. Most frequently, however, consent on the part of the state is to be found in an international treaty (a BIT, for example) that the state has signed with the other state (the home state) the investor comes from.

What makes ICSID arbitration remarkable is that the award issued by the arbitrators can only be reviewed by a committee within ICSID. No national court is authorized to check the validity of the award. National courts, moreover, cannot refuse to enforce it –the New York

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<sup>3</sup> On the origins of ICSID, see Antonio R. Parra, *The History of ICSID* (Oxford: Oxford University Press, 2012). For a detailed analysis of the ICSID Convention, see Christoph H. Schreuer, *The ICSID Convention. A Commentary* (Cambridge: Cambridge University Press, 2009).

Convention of 1958, which enumerates some grounds for denying enforcement under national law, does not apply here. The reason is that the ICSID arbitral process is not seated in any domestic legal system, but is instead anchored in the self-contained sphere of public international law. The decision it generates is thus immune from national checks.<sup>4</sup>

ICSID arbitration is an important instance of the gradual empowerment of private actors under public international law. In the domain of human rights, we have witnessed the emergence of legal regimes that entitle private individuals to sue a state before an international tribunal. The European Court of Human Rights is the most prominent example in this regard. Similarly, the ICSID Convention has opened a forum where private actors, in their capacity as foreign investors, can bring a claim against a state. The international tribunal in this area, however, is of an arbitral nature.

With all this background information in mind, let us now turn to Owen Fiss's theory of adjudication.

#### ADJUDICATION, ARBITRATION AND SETTLEMENT, IN OWEN FISS'S WORK

The legal landscape of any modern state includes three institutions: adjudication, arbitration and settlement. How should we understand them? What is distinctive of each, and what are the links between them? According to Owen Fiss, it is a mistake to view these institutions as different mechanisms to achieve the same goal –the resolution of disputes. For

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<sup>4</sup> If only the host state or the home state, but not both, is a party to ICSID, there is then the possibility of using the ICSID Additional Facility Rules, which are of a different nature. The arbitration process is then located within a domestic legal system. The courts of the seat that has been chosen get the authority to review the award, in light of national arbitration laws. The enforcement of the award, moreover, can be denied by local courts, on the basis of the legal grounds mentioned in the New York Convention.

Fiss, each performs a radically different function. There is, moreover, a certain normative hierarchy among them. Fiss stresses the importance of adjudication in a political community that strives for justice. Although he is not really “against” arbitration or settlement, he wants to secure for adjudication a central place in society, in order to realize the values that the law incorporates.

“Adjudication”, Fiss writes, “is the social process that enables judges to give meaning to public values”.<sup>5</sup> The public values Fiss refers to are those expressed in legislative and constitutional texts, as well as those that judges develop through the common law. Although judges are fallible, they have institutional incentives to interpret and develop the law in the right direction. There are various features of the adjudicative process that push them to be “objective”, to seek the “true meaning” of public values. Fiss insists on two features: the judiciary’s obligation to participate in a dialogue of a particular kind, and its independence. As to dialogue, Fiss writes:

“Judges are entitled to exercise power only after they have participated in a dialogue about the meaning of the public values. It is a dialogue with very special qualities: (1) judges are not in control of their agenda but are compelled to confront grievances or claims they would otherwise prefer to ignore; (2) judges do not have full control over whom they must listen to; they are bound by rules requiring them to listen to a broad range of persons or spokespersons; (3) judges are compelled to speak back, to respond to the grievance or the claim, and to assume individual responsibility for the response; and (4) judges must also justify their decisions”.<sup>6</sup>

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<sup>5</sup> Owen Fiss, “The Forms of Justice”, in Owen Fiss, *The Law As It Could Be* (New York: New York University Press, 2003), p. 3.

<sup>6</sup> *Ibid.*, p.11.

This last point –the need to justify decisions- is particularly important. Judges must offer reasons to support their judgments, and those reasons must transcend “transient beliefs”. The values that judges announce and develop in their opinions are to endure long enough for public morality to acquire “inner coherence”.<sup>7</sup>

The second institutional property that Fiss emphasizes is judicial independence. He distinguishes three different forms of judicial independence.<sup>8</sup> The first is “party detachment”, which refers to the extent to which judges are independent from the parties to the controversy. The second form is “individual autonomy”, which concerns the power of one judge over another. The third is “political insularity”, which means independence from political institutions and the public in general.

According to Fiss, the right degree of judicial independence varies along these three dimensions. Independence as party detachment is uncompromising in its demands. “The more detachment from the parties the better”, he writes.<sup>9</sup> The second dimension, in contrast, is more nuanced. There is no threat to judicial independence if lower judges are controlled by higher courts through regular appellate procedures, or if they are constrained by precedents laid down by earlier courts (as is the case in common law jurisdictions, for example). Bureaucratic modalities of control, in contrast, exercised by judges acting in their administrative or disciplinary capacities, are more troublesome. Finally, independence understood as political insularity poses the greatest challenge, since political insularity is necessary, but too much of it may be a bad thing. Fiss explains:

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<sup>7</sup> Ibid., p.12.

<sup>8</sup> “The Right Degree of Independence”, in Owen Fiss, *The Dictates of Justice. Essays on Law and Human Rights* (Dordrecht, Republic of Letters, 2011), pp. 13-29.

<sup>9</sup> Ibid., p. 13.

“We want to insulate the judiciary from the more popularly controlled institutions, but at the same time recognize that some elements of political control should remain. We must accommodate two values –not just judicial legitimacy, but popular sovereignty as well- and this requires us to optimize, rather than to maximize, this form of independence. In contrast to party detachment, it is simply not true that in a democracy the more political insularity the better. What we need is the right degree of insularity”.<sup>10</sup>

Fiss enumerates some of the ways in which judges in the United States are subject to political control: the political branches have a say in the appointment process; they exercise power over judicial finances; they can reverse judicial rulings through legislative or constitutional amendments; and they can create obstacles to the enforcement of judicial decisions.

In sum, Fiss expects judges to do a good job of interpreting the values that the political community commits itself to. This expectation is based on the type of dialogue judges participate in, and on the measure of institutional independence they enjoy, which is compatible with the existence of democratic checks on their performance.

On the basis of this theory, Fiss goes on to argue that it is wrong to understand the judicial function as that of resolving disputes. “Dispute resolution may be one consequence of the judicial decision”, he explains, but the role of the judge is “to give the proper meaning to our public values”. The judge does this “by enforcing and thus safeguarding the integrity of the existing public norms or by supplying new norms”.<sup>11</sup>

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<sup>10</sup> Ibid., p. 20.

<sup>11</sup> “The Forms of Justice”, op. cit., p. 25.

Actually, Fiss contends that dispute resolution is such a marginal aspect of adjudication that it is an “extravagant use of public resources” for judges to hear cases that do not “threaten or otherwise implicate a public value”, as when disputes are confined to the interpretation of the words of a contract, for example. It is in this context that arbitration enters the picture. Fiss maintains that “it seems quite appropriate for those disputes to be handled not by courts but by arbitrators”.<sup>12</sup> Here is how he contrasts arbitration and adjudication:

“Arbitration is like adjudication in that it, too, seeks the right, the just, and the true judgment. There is, however, an important difference in the two processes arising from the nature of the decisional agency –one private, the other public. Arbitrators are paid by the parties, chosen by the parties, and enjoined by a set of practices (such as a reluctance to write opinions or generate precedents) that localizes or privatizes the decision. The function of the arbitrator is to resolve a dispute. The function of the judge, on the other hand, must be understood in wholly different terms: The judge is a public officer, paid for by public funds, chosen not by the parties but by the public or its representatives, and empowered by the political agencies to enforce and create society-wide norms”.<sup>13</sup>

In his discussion on arbitration, Fiss cites an article by William Landes and Richard Posner, which distinguishes two types of services that the court system provides: dispute resolution and rule formulation.<sup>14</sup> Landes and Posner argue that a private market can supply the first service, but not the second. Public intervention is necessary to produce rules, since private arbitrators do not have the right incentives to do so. The argument, in a nutshell, is that arbitrators are paid by the parties to decide a given case, not to think deeply about the rule that

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<sup>12</sup> Ibid., p. 26.

<sup>13</sup> Ibid., p. 26.

<sup>14</sup> William M. Landes and Richard A. Posner, “Adjudication as a Private Good”, 8 *Journal of Legal Studies*, 235 (1979).

should apply generally. Actually, arbitrators may fear that a very clear holding will make them less likely to be hired as arbitrators in later disputes, if such a holding disfavors a class of people that may be potential clients. Even if the rules arbitrators formulated were “balanced” ones, their effect would be to reduce future litigation. But arbitrators are not particularly interested in that: they want more, not less, arbitration business. So we cannot expect arbitrators to give us much in terms of precedents, which are technically “public goods”. (A precedent creates positive externalities for people who have contributed nothing to the process through which the precedent has been generated).

It is interesting to note, in this connection, that Owen Fiss is critical of Lon Fuller’s theory of adjudication, which is based on the axiom of individual participation: the affected party is given the opportunity to present proofs and reasoned arguments in court for a decision in his favor. Fiss argues that one of the implications of Fuller’s individualist conception, if taken seriously, is that it would be unacceptable for courts to generate public norms through judicial precedents. A precedent, after all, binds future parties that have not been heard by the court that establishes the precedent. For it to be legitimate, adjudication would have to be reduced to a form of arbitration. Fiss comments: “It is no mere happenstance that Fuller spent a great deal of his professional life as an arbitrator”.<sup>15</sup>

Arbitration, finally, needs to be distinguished from settlement. In his influential article, “Against Settlement”, Fiss argues that society pays a price when settlements are reached: parties

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<sup>15</sup> “The Forms of justice”, op. cit., p. 36. Of course, Fuller accepted that the production and evolution of norms is part of the judicial task. It would be wrong to read him to endorse the thesis that the only function of courts is to settle disputes. For a convincing reconstruction of Fuller’s conception, see Robert G. Bone, “Lon Fuller’s Theory of Adjudication and the False Dichotomy between Dispute Resolution and Public Law Models of Litigation”, 75 *Boston University Law Review*, 1273 (1995).

may well settle “while leaving justice undone”.<sup>16</sup> This departure from justice is often a consequence of the unequal bargaining power of the parties, due to disparities of resources. A settlement can strongly deviate from the decision that judges would have adopted.

So, in Owen Fiss’s legal world, there is a difference between arbitration and settlement: the former is geared to the correct interpretation and application of the law, while the latter is not. But there is a common characteristic that unites them: in both cases no set of public norms (no case law) is created –only the specific disputes are resolved.

In what follows, I want to examine some questions concerning arbitration in light of Owen Fiss’s general theory. In particular, I want to focus on the connection between arbitration, the construction of a system of precedents, and the democratic checks that the political branches should be authorized to exercise. For these purposes, it is crucial to draw a distinction between private law arbitration (whether domestic or international) and investment arbitration.

#### ARBITRATION, PRECEDENTS, AND DEMOCRATIC CHECKS IN THE SPHERE OF PRIVATE LAW

It is quite uncontroversial that for a well-functioning system of precedents to emerge from a collection of decisions, several conditions need to be satisfied: a) the decisions must be expressed in written, reasoned opinions; b) they must be published; and c) there must be a central body with the capacity to harmonize the discordant interpretations of the various decision-makers. Are these conditions met by the arbitral process?

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<sup>16</sup> “Against Settlement”, in Owen Fiss, *The Law As It Could Be*, op. cit., p. 101.

With respect to the first condition, it is important to observe that things have evolved significantly. For a long while, many arbitral awards were “naked” –no reasons were given by the arbitrators. This may have been regarded as an advantage: in cases where the reasons for and against the legal positions advanced by the parties seemed to lead to a tie, arbitrators could easily render “solomonic” judgments. Jon Elster has argued that it is part of reason’s maturity to recognize its own limitations. We should be aware that we have an addiction to reason that needs to be held in check. When the costs of looking for further reasons clearly exceed the benefits, the most rational course of action is to “resist the sirens of reason”.<sup>17</sup> Arbitration may have been regarded as a space that is friendly to this type of rationality.

The tendency in most jurisdictions, however, is for arbitral awards to figure in written opinions that provide reasons. (The law in many places actually requires reasoned awards). The United States has joined this general trend in international commercial arbitration, though naked awards are still very common in the purely domestic sphere. Alan Rau makes the interesting point that the American preference for naked awards in domestic arbitration is to be explained by the fact that American lawyers are rather skeptic about the capacity of reasons to constrain judges. They are more skeptic than their European counterparts, he argues. American legal education “has so carefully honed the skills of deconstructing judicial opinions, and so laboriously trained us [Americans] to debunk their explanatory power, that we can no longer believe in the presence of such opinions as an indispensable element of a just decision”.<sup>18</sup> This, of course, is an unsettling point for anyone working in the Fissian tradition.

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<sup>17</sup> Jon Elster, *Solomonic Judgements. Studies in the Limitations of Rationality* (Cambridge: Cambridge University Press, 1989), p. 117.

<sup>18</sup> Alan Scott Rau, “On Integrity in Private Judging”, 14 *Arbitration International*, 115 (1998), p. 148.

In any case, even if arbitrators supply reasons in their awards, they are not in a good position to contribute to a system of precedents, since the second condition mentioned above (publicity) is not met. Indeed, in the private law domain, publicity is clearly the exception. It is often confidentiality reasons that lead parties to prefer arbitration over adjudication.<sup>19</sup>

Nor is the third condition satisfied: arbitrators may be part of an informal network, but they are not organized in a hierarchical structure. There is no arbitral tribunal at the apex settling interpretive controversies among them.

Should all this matter? Should we be concerned about the “precedential deficit” of the arbitral process? In general, the answer is no. The political community should not be anxious about the under-production of jurisprudential rules by arbitrators, since regular courts are intensely occupied with thousands of cases that raise all sorts of legal issues. Courts have enough controversies to produce precedents from. In almost every field, arbitration does not deprive judges of the necessary raw material.<sup>20</sup>

Actually, there is a potential advantage in arbitrators adjudicating cases without the “burden” of contributing to a system of precedents: they may be more eager to try novel solutions to legal problems, since the effects of their decisions are limited to the specific controversies and do not bind other decision-makers. The new solutions, moreover, cannot be immediately killed by courts, since the standards that the latter apply when reviewing the validity of awards are typically quite relaxed. As a result, some breathing space is opened for arbitrators

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<sup>19</sup> Mark Weidemaier, in “Toward a Theory of Precedent in Arbitration”, 51 *William and Mary Law Review*, 1895 (2010), p. 1921, notes that the publication of the awards is not strictly necessary: their accessibility is sufficient. Thus, in systems where a few arbitrators capture a large share of the arbitration business, awards can be taken into account by the arbitrators, even in the absence of publication. This is a very extraordinary situation, however.

<sup>20</sup> A study conducted in the United States by Christopher Drahozal, for example, concluded that “only in relatively limited areas does it appear that arbitration might completely remove cases from the courts”. See Christopher R. Drahozal, “Is Arbitration Lawless?”, 40 *Loyola of Los Angeles Law Review*, 187 (2006), p. 210.

to experiment with new approaches to legal questions. Regular courts may actually end up embracing them. (In addition, of course, parties are usually allowed to ask the arbitrators to decide their cases, not in accordance with the law, but in light of general notions of fairness, equity and justice: *ex aequo et bono*).

So arbitrators may sometimes make decisions that differ from those courts would have reached. This is not objectionable per se. What matters, arguably, is that the arbitral process be structured in the direction of justice. Arbitrators are to “seek the right, the just, and the true judgment”, as Fiss writes.

Now, in light of this goal, how does the arbitral process fare, in terms of independence? Recall that, with respect to judges, Fiss distinguishes between party detachment, which should be absolute, and political insularity, which should be optimal, but not maximal. How does arbitration fare, if we apply this distinction?

The first form of independence (party detachment) is structurally weaker in arbitration than in adjudication. Whereas the parties do not appoint the judges, they do appoint the arbitrators. Is there cause for concern here?

A debate has developed, in this connection, regarding tripartite arbitral tribunals. The general practice is for each party to choose one arbitrator unilaterally, while the third arbitrator (the presiding arbitrator or chairperson) is jointly appointed by the parties, or by the two co-arbitrators. Although the three arbitrators are normally under the legal duty to be impartial, critics contend that the arbitrators that are unilaterally selected are biased in favor of the party that made the appointment. Only the presiding arbitrator can exhibit genuine neutrality. It is true, the critics concede, that if a party appoints a clearly biased arbitrator, his chances of victory are

reduced, since the chairperson will then be skeptical of that party's case. But even if there are incentives for parties to avoid extreme partisanship in their appointments, the degree of objectivity of the co-arbitrators may be too low. Those who defend the current system sometimes draw a distinction between partiality and sympathy: the co-arbitrators, they say, must not be "partial" to the appointing party, but they are authorized to be "sympathetic" to the interests or views of that party. Critics reply that this subtle distinction is not tenable in practice.<sup>21</sup>

Jan Paulsson, a very prominent arbitrator and professor, has joined the critics. He proposes to end the practice of unilateral appointments. All the arbitrators, he urges, should be jointly appointed by the parties. If they fail to agree, a neutral arbitral institution should then intervene.<sup>22</sup> The independence of arbitrators would be improved if this change were introduced. In addition, he argues, the professional diversity of the tribunal would be richer: arbitrators could be chosen in light of their complementary areas of expertise, instead of their sympathy toward the appointing party.<sup>23</sup>

Actually, one may argue further along these lines and claim that it would be advisable to have a generalist jurist as an arbitrator, to interact with the more specialized experts. The latter may be prey to "cognitive loafing": they may be reluctant to think critically about their narrow understandings, in light of more general principles. (Administrative agencies, for example, have been said to suffer from this bias).<sup>24</sup> To the extent, moreover, that the "separability doctrine"

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<sup>21</sup> For a critique of this distinction, see Alan Scott Rau, "On Integrity in Private Judging", *op. cit.*, pp. 230-231.

<sup>22</sup> Jan Paulsson, *The Idea of Arbitration* (New York: Oxford University Press, 2013), pp. 153-166, and pp. 276-283.

<sup>23</sup> *Ibid.*, p. 280.

<sup>24</sup> See Mark Siedenfeld, "Cognitive loafing, social conformity, and judicial review of agency rulemaking", 87 *Cornell Law Review*, 486 (2002).

empowers arbitrators to rule on the validity of the underlying contract, the arbitral tribunal should include a jurist with the necessary legal background in general contract law.

So moving beyond unilateral appointments, as Paulsson suggests, looks like an appropriate step to take, from a Fissian perspective: the arbitral tribunal's impartiality would be enhanced, and its epistemic capacity to track legal truth would be strengthened.

Now, what about the other side of the coin, independence understood as political insularity? In his discussion of courts, Fiss insists that independence from the political branches should be optimal, but not maximal. In this regard, arbitrators are actually *more independent* than judges, since some of the instruments that the political institutions can use to check courts are not applicable against arbitrators. The political branches, in particular, have no say in the appointment process, and they have no control over arbitral finances. There is still the possibility, however, for the political branches to intervene through the law-making process. Should they?

Insofar as arbitrators produce no case law, no democratic checks through legislation are really necessary. Arbitrators generally follow the law enacted by the political branches, as interpreted and developed by public courts. What the political branches should pay attention to, therefore, is the body of precedents generated by judges. Even if, as indicated earlier, arbitrators sometimes experiment with novel solutions to legal problems, the democratic institutions need not step in. They should wait and see in what directions courts elaborate their doctrines in reaction to arbitral developments. If courts finally embrace the new legal construction advanced by some arbitrators, the political bodies can then intervene through the usual legislative mechanisms.

Of course, if arbitrators deviate from mandatory law (that is, the law that parties cannot contract out of, for reasons of public policy or public order), the political branches ought to be concerned. In this scenario, there are good reasons for courts to be authorized to quash the awards, if there has been a misapplication of mandatory law. The question, however, which I cannot pursue here, is how deferentially judges should review the awards. The answer, arguably, is contextual. We should bear in mind that both arbitration and adjudication are imperfect institutions. The standards of review to be used by courts should be based on a comparative institutional analysis. What kind of procedure arbitrators have followed, for example, is relevant for purposes of the judicial assessment of the decision they have arrived at.<sup>25</sup>

It bears emphasizing that the division of labor between arbitrators and judges I have just described is basically the same, whether the disputes to be resolved are purely domestic, or whether they are instead connected to an international transaction. Indeed, international commercial arbitration is “international” only in the sense that the transaction or the dispute is connected to two or more countries. But the parties usually select the substantive law of a particular country to govern the contract. It is too risky to subject the contract to vague principles of international *lex mercatoria*. The more developed and mature body of law that states have produced offers better protection to the parties.<sup>26</sup> As a result, arbitrators that deal with international transactions are normally asked to apply the set of laws enacted by a given political community.

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<sup>25</sup> Daniel Markovits has argued, in this connection, that if the role of arbitrators is simply to fill the gaps of a contract, any procedure chosen by the parties will do. If, in contrast, arbitrators are asked to perform an adjudicative function that covers non-waivable statutory rights, certain procedural guarantees must then be observed. See “Arbitration’s Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract”, 59 *DePaul Law Review*, 431 (2009-2010), pp. 469-487.

<sup>26</sup> Gary Born, *International Commercial Arbitration*, op. cit., pp. 2236-2237.

In sum, within the sphere of private law, arbitrators cannot be expected to generate precedents. There is no reason to be worried about this deficit, however. Their degree of independence, in terms of party detachment, may need to be enhanced, but their high level of political insularity is not objectionable.

#### ARBITRATION, PRECEDENTS, AND DEMOCRATIC CHECKS IN THE SPHERE OF INVESTMENT LAW

The picture changes significantly, however, in the field of investor/state arbitration. Here we encounter no parliament or regulatory body in charge of producing specific rules. The law in the investment domain consists of international treaties and customary norms that typically embody very open-ended principles (such as the “fair and equitable treatment” standard). The thousands of treaties that have been adopted usually incorporate the same abstract principles. This has the advantage of generating “network effects”. As Santiago Montt has explained, states benefit from the economies of scale that derive from a global regime based on treaties that use the same substantive terms. The first treaty is an esoteric document that nobody knows how it will work. As more treaties are signed, the practice under one treaty has repercussions on the general practice.<sup>27</sup>

There is no permanent judiciary, however, that can generate the necessary case law to specify the meaning of the abstract principles that protect foreign investors. The International Court of Justice, in particular, cannot be counted on for these purposes, given its very marginal role in this area. Arbitration, therefore, has become the center of gravity in the field. There is pressure for arbitrators to understand their role to include the production of legal doctrines, since

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<sup>27</sup> Santiago Montt, *State Liability in Investment Treaty Arbitration* (Oxford: Hart Publishing, 2009), p. 109.

there is a vacuum to be filled. Indeed, most of the arbitral awards are published. They are always reasoned. And they are regularly taken into account by arbitrators in other cases. A system of precedent has gradually emerged, but it is a weak one, since no central arbitral tribunal has been set up to unify the interpretation of the law.<sup>28</sup>

It would seem that any step to strengthen the capacity of the arbitral process to generate precedents in this domain should be welcome. But here we face a problem. The current arbitral regime has been criticized on the ground that it is partial to investors. The objection has been advanced, in particular, that ICSID arbitrators are interpreting and applying the abstract principles that protect investors in ways that are too friendly to the latter. As a consequence, the capacity of democratic governments to regulate matters in the public interest (to protect the environment, for example) is reduced in an unjustified manner. To support the objection, some scholars have pointed out that the generous doctrines espoused by arbitrators are the fruits of an institutional structure that is biased in favor of investors. Arbitrators, it is contended, are interested in making ICSID an attractive arbitration forum. The more cases that are brought to it, the more business and money arbitrators will get. Since, in practice, investors are the claimants, they must be treated well by arbitrators. In contrast, judges are more likely to be balanced in their interpretation of the law, since their future salaries do not depend on who wins a case.<sup>29</sup>

From a Fissian perspective (which is strongly committed to judicial independence, understood as party detachment), this objection, if correct, would be fatal to the legitimacy of the existing arbitral regime. There are reasons to cast some doubts on the objection, however. First,

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<sup>28</sup> See Gabrielle Kaufman-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?", *23 Arbitration International*, 357 (2007), pp. 368-373.

<sup>29</sup> For an objection along these lines, see Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007), pp. 172-175. Van Harten, however, seems to suggest that there is a problem of "perceived bias" (p. 173), but not necessarily of actual bias. He concedes that most arbitral awards are fair and balanced (p. 174).

it is true that arbitrators have an incentive to make arbitration attractive to investors. But they also have a counter-incentive not to make states upset about the system, which is relatively fragile. States are still powerful actors in the international regime. Second, the general practice is that only one of the arbitrators is appointed by the investor. The other is chosen by the state that is a party to the dispute, while the third arbitrator has to be agreed upon. So arbitrators cannot be very hostile to state interests, if they want to maintain or enhance their chances of being hired in the future. (A similar balance would obtain if all arbitrators were jointly appointed by the state and the investor). Third, the available evidence indicates that investors are not successful in a large percentage of cases, and that the amount of damages they are awarded when they win is often much lower than they had originally claimed.<sup>30</sup>

This does not mean that there is no room for improving the doctrinal approaches that arbitrators follow. Thus, a more sophisticated articulation of the standards of review to be applied when assessing the validity of different governmental measures may be necessary.<sup>31</sup> And a higher sensitivity to the constitutional and administrative law of advanced legal systems is to be urged.<sup>32</sup> But the criticism based on a theory of structural bias seems to be a weak one.

Let us now turn to the other aspect of independence, political insularity. In light of Owen Fiss's theory, arbitral independence should be compatible with the existence of mechanisms that the political branches can use to influence or reorient the body of case law that arbitrators (however imperfectly) generate. What avenues are open for the democratic institutions to express their inputs in the interpretive process? There are two possibilities we should explore here.

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<sup>30</sup> One study, for example, found that 57,7% of the awards finally rendered were favorable to the governments, not the investors. See Susan Franck, "Empirically Evaluating Claims About Investment Treaty Arbitration", 86 *North Carolina Law Review*, 1 (2007), p. 49.

<sup>31</sup> See Stephan W. Schill, "Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review", 3 *Journal of International Dispute Settlement*, 577 (2012).

<sup>32</sup> See Santiago Montt, *State Liability in Investment Treaty Arbitration*, op. cit., p. 373.

a) **State-to-state arbitration**

A first possibility, which is very underdeveloped in practice, is for the democratic governments to express their points of view in state-to-state arbitration procedures, which are detached from the specific controversies that may arise between the investors and those governments.<sup>33</sup> Thus, two states that enter an investment treaty may agree to include a clause that remits to arbitration any interpretive dispute they may have in the future with regard to the treaty. If an arbitration tribunal is asked to intervene, it will issue an abstract ruling on the provisions that have triggered the disagreement between the states. The decision rendered in this process is then binding on the arbitrators that have to handle specific disputes between investors and governments.

State-to-state arbitration is potentially useful, not only to clarify the interpretation of the treaty as a response to the contradictory views of different arbitrators in specific cases, but also in order to cabin the more coherent doctrines the latter may have created. Presumably, the tribunal that adjudicates the state-to-state interpretive dispute will fix an interpretation of the treaty that is *within the range of readings advanced by the two states*.

A critical feature to highlight here is that state-to-state arbitration is an “abstract” procedure that is not linked to particular cases. Abstraction brings with it several advantages.<sup>34</sup> Consistency in the application of the law is one of them. The tribunal dealing with the abstract

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<sup>33</sup> For an interesting defense of this type of procedure, see Anthea Roberts, “State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority” (November 5, 2013, unpublished).

<sup>34</sup> The arguments here are similar to those that may be advanced at the domestic level to support the establishment of procedures of abstract review of legislation under the Constitution. I have addressed them in my book, *Constitutional Courts and Democratic Values. A European Perspective* (New Haven: Yale University Press, 2009), pp. 66-70.

procedure is asked to lay down a general rule that will bind arbitrators in future cases. Investors are thus ensured equal treatment (no matter their nationality).

In addition to consistency, abstraction generates a higher level of objectivity. The tribunal asked to rule in the abstract does not know how exactly its holding will favor or disfavor particular investors or particular states in specific controversies that will erupt in the future – under a relatively stable treaty. When interpreting the treaty, the tribunal may be more or less friendly to states as a class, or to investors as a class, but not to a specific state in one case, or to a specific company in another. Abstraction is a veil of ignorance technique. It is true, of course, that the tribunal may be asked to rule on a question that is relevant for a pending case. In order to reinforce objectivity, the ruling should have prospective effects only.<sup>35</sup>

Abstraction is also linked to a systematic approach to legal problems. As Owen Fiss has argued in the constitutional context, courts should take into account the interests of the many people who are affected by a judgment –not only those of litigants. With reference to welfare rights, Fiss has written:

“Because it lays down a rule for a nation and invokes the authority of the Constitution, the Court necessarily must concern itself with the fate of millions of people, all of whom touch the welfare system in a myriad of ways: some on welfare, some wanting welfare, some being denied welfare, some dispensing welfare, some creating and administering welfare, some paying for it. Accordingly the Court’s perspective must be systematic, not anecdotal: The Court should focus not on the plight of four or five or even twenty families but should consider the welfare

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<sup>35</sup> Anthea Roberts, “State-to-State Investment Treaty Arbitration”, *op. cit.*, p. 52.

system as a whole –a complex network embracing millions of people and a host of bureaucratic and political institutions”.<sup>36</sup>

Similar problems may arise in the investment domain. Suppose an investor argues that the restriction imposed by the government on his property rights, in order to protect the environment, was not justified, since the state could have acted differently to reach its goals. Other investors make the same argument. Suppose, however, that the state could have acted differently in a handful of cases only, but not in all the cases altogether, for it lacks the necessary resources. A systematic look at the problem, through an abstract procedure, should be welcome. The accumulation of unconnected judgments rendered in different specific cases may lead to a suboptimal outcome.<sup>37</sup>

There is yet another advantage to a system that includes an abstract procedure of the kind we are examining. The types of experts that are selected to decide the abstract interpretive question may be different from those charged with the task of deciding particular disputes between investors and governments. A concrete controversy involving the construction of a bridge, for example, may call for experts that are familiar with certain factual complexities that are not present when an interpretive issue is framed in the abstract. Or, as Anthea Roberts argues, the kind of interpretive problems that the treaty poses may be more easily dealt with by experts in public international law, whereas the interpretive issues that arise in a specific dispute may be more appropriately tackled by jurists with a strong background in commercial law.<sup>38</sup>

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<sup>36</sup> Owen Fiss, “Reason v. Passion”, in *The Law As It Could Be*, op. cit., pp. 218-219.

<sup>37</sup> Anthea Roberts, “State-to-State Investment Treaty Arbitration”, op. cit, p. 56, footnote 308.

<sup>38</sup> *Ibid.*, pp. 51-54.

**b) Treaty amendments, interpretive notes, and new treaties**

States may intervene in the interpretive process in a more direct way: they may elect to amend the relevant treaty, to specify what they meant by the textual provisions they had originally written. As masters of the treaties, states can make the necessary modifications to clarify their will, if they disagree with the content the arbitrators have ascribed to the original terms.

An alternative, less cumbersome possibility is this: some treaties provide for the establishment of a commission, made up of representatives of the states, which is granted the power to issue interpretive notes on the relevant treaty. Such notes are binding on arbitrators.<sup>39</sup>

These two possibilities, of course, require the consent of the parties to the treaty. In multiparty treaties, it is not easy for all the states to come to an agreement concerning the way in which the abstract principles they wrote in the treaty should be read and implemented.

What is easier is for states to express their views in new treaties, when the earlier ones come to an end, thus helping define new legal trends. An interesting development has taken place in this connection. In the past, powerful capital-exporting nations tended to press weaker capital-importing countries to ratify international treaties that were very protective of investors. At present, however, the contrast between the two groups of states is less stark. More often than was the case in the past, states find themselves in a dual position: they are both exporters and importers of capital. While they are interested in protecting their nationals when the latter invest abroad, they are also interested in safeguarding their governmental capacity to regulate matters in

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<sup>39</sup> The Free Trade Commission under NAFTA is a prominent example. See NAFTA, article 1131. On July 31, 2001, the Commission issued an interpretive note that “responded” to the interpretation reached by arbitrators in the *Metalclad v. Mexico* case.

the public interest when they receive investments from foreigners. This has led to a more balanced regulation of investment guarantees in the new treaties. (The evolution in the United States, concerning its Model BIT, is very revealing. The 2004 and 2012 Models are more nuanced than the earlier 1987 Model).<sup>40</sup> So while states cannot easily change the existing treaties, they can make new ones, and gradually replace the old ones when they expire.

There are thus different possibilities for states to cabin the interpretive powers of arbitrators, or to move the law forward in new directions.

The main problem we face, however, is that the governments that represent the states enter this international scenario wearing two hats. Sometimes they wear the hat of a litigant, when they get involved in a dispute with an investor. Other times, they wear the democratic hat, when they express the will of the citizens at the national level and bring this will to a wider collective conversation at the international level. This dual role generates a deep tension in the system.

On the one hand, to the extent governments are parties to disputes, the system wants to protect the independence of arbitrators. One of the advantages of investment arbitration in its current form is that a dispute between an investor and its host state need not harm the political relationships between the latter and the home state. The home state is not expected to get involved in the procedure to support the investor.<sup>41</sup> The less politicized the arbitral atmosphere, the better.

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<sup>40</sup> On this trend, see José E. Alvarez, *The Public International Law Regime Governing International Investment* (Hague Academy of International Law, 2011), pp. 143-176.

<sup>41</sup> Under the ICSID Convention, the investor actually waives his right to diplomatic protection. Only if the arbitral award is not honored by the host state may the home state exercise that protection. (See article 27 of the ICSID Convention).

On the other hand, it is desirable to subject arbitrators to some democratic constraints. As Owen Fiss argues about courts, we should not want them to enjoy maximal political insularity. But one of the salient features of the world we inhabit is that there is no political community at the global level that can control international tribunals. There is no “demos” there. In the context of his discussion of international courts that deal with human rights violations, Fiss has observed that there are no democratic institutions to which such courts must answer.<sup>42</sup> “There may be mechanisms to hold them accountable, but not to a demos”.<sup>43</sup> In the absence of a genuine political community on the international plane, *it is basically the governments of the different states that can express democratic inputs.*

So the dual character of governments (as litigants and as democratic voices) generates a systemic friction that cannot be easily eliminated. The various mechanisms for checking the performance of arbitrators will always operate on a shaky ground, until the conditions that characterize the political structure of our world undergo a deep transformation in a supranational direction.

## A COMMUNITY OF EQUALS AND THE NEUTRAL FORUM ARGUMENT

A final theme in Owen Fiss’s work that I want to explore in connection with arbitration is the role of courts in protecting foreign citizens. In his essay “The Immigrant as Pariah”, Fiss focuses on immigrants, but what he says is of wider relevance.<sup>44</sup>

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<sup>42</sup> “The Autonomy of Law”, in *The Dictates of Justice*, op. cit., pp. 31-41.

<sup>43</sup> *Ibid.*, p. 39.

<sup>44</sup> The essay figures in Owen Fiss, *A Community of Equals. The Constitutional Protection of New Americans* (Boston: Beacon Press, 1999), pp. 3-21.

Fiss argues that foreigners are protected under the American Constitution, since the principle of equality that the Fourteenth Amendment announces extends to all persons, not only citizens.<sup>45</sup> Given this egalitarian principle, which Fiss reads in light of his theory against group subordination, the government cannot impose social disabilities on immigrants, even if they have entered the country illegally. The power to exclude foreigners at the borders does not entail the power to subordinate those who have managed to cross them. Fiss accepts that some differences between citizens and foreigners are justified -aliens can be denied the right to vote, for instance. But individuals cannot be deprived of the social and economic rights that are necessary in order for them not to be turned into pariahs.

Because of their political vulnerability, Fiss argues, immigrants need the help of courts. Indeed, the judiciary must “scrutinize with a healthy measure of skepticism the work of the elected bodies insofar as it affects immigrants”.<sup>46</sup> Fiss admits that there is no guarantee that the courts will carry out this task well enough. They may fail in a number of ways. But he thinks we have some grounds for hoping that they will make a difference.

Now, it is interesting to note that one of the standard justifications for international arbitration is the “neutral forum” argument. According to this argument, when private parties of different nationalities enter a transaction, they have good reason to attach an arbitration clause to the contract, in order to escape from the jurisdiction of domestic courts. It is reasonable for them to fear that such courts will be biased in favor of local parties. Gary Born, for example, writes in his influential treatise: “One of the central objectives of international arbitration agreements is to provide a neutral forum for dispute resolution”. Domestic courts are distrusted: “If nothing else, an instinctive mistrust of the potential for home-court bias usually prompts parties to refuse to

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<sup>45</sup> Ibid., p. 7.

<sup>46</sup> Ibid., p. 20.

agree to litigate in their counter-party's local courts".<sup>47</sup> Similarly, Jan Paulsson explains that "it is unusual for parties of different nationalities to agree to the jurisdiction of a national court". "Either party is disinclined to accept the courts of the other".<sup>48</sup> As a result, arbitrability (that is, the range of matters that the law allows private parties to submit to arbitration) is often deemed especially broad in connection with international business transactions, "where it is important to avoid nationalistic turf wars".<sup>49</sup> Actually, Jan Paulsson suggests that arbitration agreements should include the requirement that no arbitrator may have the nationality of any party.<sup>50</sup>

Arbitration, of course, cannot dispense with local courts entirely. The danger of favoritism is therefore still present. When a foreign award needs to be enforced by domestic courts, for example, the New York Convention permits the latter to deny enforcement on "public policy" grounds. The risk exists that judges will apply this vague standard in an arbitrary manner, to favor the local party. Public policy exceptions may thus serve as a cover for "xenophobic bias".<sup>51</sup>

Note that the neutral forum argument does not say that the courts in some countries are corrupt. Corruption may actually help foreigners, if they are wealthier than the local parties and are willing to offer bribes. Nor does the argument claim that courts are incompetent to handle cases properly. The argument is more troubling: because of national prejudices, domestic judges are not reliable enough when they are asked to decide a dispute involving a local and a foreigner.

The contrast between Fiss's expectation that courts can perform a key role in pursuing justice for foreigners, on the one hand, and the neutral forum argument that figures so

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<sup>47</sup> Gary Born, *International Commercial Arbitration*, op. cit., pp. 72-73.

<sup>48</sup> Jan Paulsson, *The Idea of Arbitration*, op. cit., p. 174.

<sup>49</sup> *Ibid.*, pp. 102-103.

<sup>50</sup> *Ibid.*, p. 281.

<sup>51</sup> *Ibid.*, p. 206.

prominently in the current justification for international arbitration, on the other, is a stark one. The two intuitions cannot be embraced at the same time. They are in obvious tension.

Now, let us assume that the neutrality argument in favor of arbitration is basically correct. That is, let us assume that there is indeed a significant danger of local favoritism on the part of the domestic judiciary. This assumption should force us to launch a more ambitious critique of the current legal structures. If, indeed, national courts have a propensity to favor the locals, we should acknowledge that the level of civilization we have reached through the law is not very high. What should be done?

We can distinguish two basic strategies to confront this problem. The first strategy, which we may call “external”, seeks to create decision-making institutions that are removed from the local players. Arbitration in the international business sphere would be an example of such a strategy. But arbitration, of course, is only a fragmentary solution to the neutrality problem, since it only covers contractual disputes. Arbitration does not apply to many controversies involving citizens of diverse nationalities. If, for example, a local pedestrian suffers injuries caused by a foreign driver, the action for damages will be decided by domestic courts. (It is extremely rare for arbitration to be resorted to after the controversy arises). With respect to criminal law, local courts will be in charge, since criminal law cannot be arbitrated. The same is true of many other branches of the law.

We should therefore consider the possibility of creating “international courts” to decide matters that cannot be arbitrated. Much in the same way that, in the United States, federal courts have jurisdiction to decide controversies between citizens of different states, it may be advisable

to establish a new set of international courts to decide controversies that confront individuals of different nationalities.

Alternatively, we may want to leave matters in the hands of domestic courts, but put them under the supervision of a supranational court that is made up of judges of different nationalities. Within the framework of the European Union, for example, the prejudice against foreigners is in part counter-acted by European Union law, which protects the principle of no discrimination on grounds of nationality. This principle is to be observed by local courts, but there is a more “neutral” tribunal, the European Court of Justice in Luxembourg, made up of judges of the different 28 member states, that has some capacity to guide such courts into an objective legal outcome.

It is important to notice that, in the field of public international law, progress has usually been associated with the establishment of tribunals whose structure and composition is such that national preferences can be transcended.<sup>52</sup> We should recall, in this regard, the powerful arguments made by Hans Kelsen in favor of a truly impartial International Court of Justice. He was against the idea that judges of the nationality of the states that are parties to a controversy should participate in the decision. He was thus critical of the institution of “ad hoc” judges. He even proposed that the judges of the Court should have their nationality suspended for the duration of their term. They were to be given an international passport, as officers of the international community.<sup>53</sup> The International Court of Justice that was finally set up in 1945 was

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<sup>52</sup> For a general discussion on the independence of international tribunals, with a particular focus on the Inter-American Court of Human Rights, see Aida Torres Pérez, “The Independence of International Human Rights Courts: The Case of the Inter-American Court of Human Rights” (SELA paper, 2013, available at <http://www.law.yale.edu/intellectuallife/SELA.htm>).

<sup>53</sup> Kelsen argued his proposals for a new international court in his book, *Peace Through Law* (Chapel Hill: The University of North Carolina Press, 1944).

not patterned after this Kelsenian model, but this is usually regarded as the unfortunate upshot of the need to accommodate the power of the states.

A completely different approach to attack the problem of national bias is “internal”: it seeks to transform the attitudes and beliefs that lead to local prejudices. Instead of looking for external institutions to realize impartiality, the plan is to introduce the necessary internal changes in order to push national institutions in the direction of impartiality. The idea is that citizens should be educated into the belief that all human beings have an equal moral standing and should therefore be treated equally under the law. Legislatures should be sensitive to this basic moral equality, even if distinctions between locals and foreigners may sometimes be justified. And judges and juries should be taught and urged to be impartial when they interpret and administer the law in specific disputes. The fact that one of the parties to the controversy comes from another country is to be made completely irrelevant when the law needs to be applied.

It is interesting to note, in this regard, that until the XIXth century, “mixed juries”, made up of natives and aliens, were used in Great Britain to try cases involving a national and a foreigner.<sup>54</sup> This institution was finally abolished in 1870, in part because of the difficulty in finding foreign juries, and in part because no reason was thought to exist to question the capacity of British people to act in a fair and open-minded manner. As the Earl of Derby said during the legislative debates at the House of Lords, “it seems to me (...) that it is stigmatizing ourselves as a nation very unjustly to assume that the prejudice against foreigners is such that an alien on his trial will not have a fair trial before British subjects”.<sup>55</sup>

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<sup>54</sup> See Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law and Knowledge* (Chicago: University of Chicago Press, 1994).

<sup>55</sup> Cited by Marianne Constable, *The Law of the Other*, op. cit., p. 145.

An interesting question is whether it is possible to follow the external and the internal strategies at the same time. They may actually be in tension. The more we insist on external tribunals, made up of judges or arbitrators that have a different nationality than that of the parties to a dispute, the more we reinforce the expectation that national bias is inevitable at the domestic level.

What is Fiss to say about all this? It is clear that he takes impartiality in the application of the law to be a cardinal virtue of any decent legal system. “Law requires impersonality, so that the applicability of norms does not turn on the personal identity of the subject”, he writes, when discussing the role of judges in protecting individuals in the context of the war against terrorism.<sup>56</sup> I am inclined to say that Fiss will urge us to concentrate our collective energy on the internal strategy. The external strategy should be pursued with caution, in ways that are least harmful to the internal transformative project.

It is true that Fiss has insisted on the relevance of groups, in the framework of his theory on equality.<sup>57</sup> But this does not mean that he espouses the view that groups have a distinctive identity that shapes the moral values of its members. As Anthony Kronman argues, the ultimate goal that Fiss seeks to achieve is the liberation of the individual, even if he insists, instrumentally, on the need to work out remedies that are sensitive to the social structures that subordinate groups. The individual to be liberated, moreover, is not a person that is expected to strive for the satisfaction of his or her own narrow interests, but someone who is capable of yielding to the higher authority of norms.<sup>58</sup>

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<sup>56</sup> Owen Fiss, “In the Shadow of War”, 58 *University of Miami Law Review*, 449 (2003), p. 451.

<sup>57</sup> Owen Fiss, “Groups and the Equal Protection Clause”, 5 *Philosophy and Public Affairs* 107 (1976).

<sup>58</sup> Anthony Kronman, “Individualism, and Anti-Individualism in the Work of Owen Fiss”, 58 *University of Miami Law Review*, 117 (2003).

Given this moral background, I think Owen Fiss will be reluctant to endorse the assumption that, in order for national prejudices to be transcended, the principal solution is to rely on external, supra-national, institutions. I expect him to favor a reconfiguration of society along cosmopolitan, non-nationalistic lines. The political community should work itself pure through its own laws and courts.

Many of you will be quick to point out that this program of deep, internal transformation encounters lots of obstacles in practice. You may be right. But remember that Owen Fiss is well-known for his deliciously heroic optimism. “Never give up”, he will always tell us.