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Identitarian Anxieties and the Nature of Inter-Tribunal Deliberations
Adeno Addis* and Jonathan Remy Nash**

I. INTRODUCTION

On matters of judicial contacts across territorial boundaries—whether horizontal1 or vertical2—two seemingly opposed trends define our globalized world. On the one hand, communication technologies are making it easier for members of judicial tribunals across the globe to get relatively quick access to each other’s judgments and opinions and to consult them for any help they might offer about similar issues and concerns that they face. And it is increasingly clear that with globalization in the economic, security, and political realms, many of the issues that appear before judicial tribunals are (and will increasingly be) similar, requiring similar—or even joint and coordinated3—responses. Indeed, we take joint and coordinated responses for granted in relation to the executive (and even legislative) branches of government. Finance ministers coordinate; so do foreign ministers.

On the other hand, there is loud and at times fierce resistance, at least in some Western countries, to the proposition that national judicial tribunals may

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1 Horizontal contacts refer to contacts among national courts.
2 Vertical contacts refer to those contacts between national courts on the one hand and regional or international tribunals on the other hand. The term “vertical” is of course not an entirely accurate description of the relationship between national tribunals and international or regional tribunals since it implies a monist notion of a legal landscape, but for present purposes the distinction will do.
3 See People’s Union for Civil Liberties & Anor v Union of India [2004] 1 LRI 1, ¶ 16 (India) (“Where international terrorists are operating globally . . . a collective approach to terrorism is important.”), citing and endorsing the statement from Lord Wolf of the House of Lords, A and Others v Home Department [2002] EWCA (Civ) 1502, [2004] QB 335, ¶ 44 (UK).
consult foreign decisions and texts to see whether they, along with other data, shed light on issues and concerns of a similar nature that are not unambiguously addressed by domestic rules of decision. Put simply, processes of globalization are producing often strident nationalisms, nationalisms that view inter-tribunal dialogues not as deepening and enriching communities, but rather as steps that go to undermine the existence and flourishing of “communities of character,” to borrow a phrase from Michael Walzer. This fear is what we shall refer to as the identitarian anxiety.

This Article attempts to do two things. First, it seeks to specify how inter-tribunal dialogues actually occur. Second, it explores whether dialogues or deliberations should properly raise identitarian anxieties. The Article concludes that identitarian anxieties are premised on faulty assumptions about how identities—communal or national—emerge. The Article further suggests that inter-tribunal dialogues might be a better way to understand the evolving identity of the nation-state which continues to occur in the context of a still-evolving international public space. One will not understand the nature of national identities if one does not fully understand the nature of international public space and vice versa. Identities—individual as well as communal—are shaped in the process of engaging the other. And as indicated below, nations, like individuals, are always growing, always becoming; they are never fully achieved. As such, inter-tribunal dialogues contribute to the development and depth of the community of character rather than undermining it. The Article also argues that refusing to engage others not only will lead to partial understanding of self, but also will result in diminished influence in the shaping of the international public space in which one inevitably will be forced to engage.

4 See, for example, the discussion at notes 21–22.
6 Justice Michael Kirby of the Australian High Court once made a similar observation. See text accompanying note 46.
8 After all, in relation to the US, the Framers knew that the nation was always growing, always becoming. Their intent was to “create a more perfect union.” See note 44 (noting Justice Holmes’s metaphor that the Framers tried to create “an organism”).
The Article proceeds as follows. Section II discusses the salient features of inter-tribunal deliberative processes. Section III evaluates the goals of inter-tribunal deliberation and how deliberative processes are structured to try to achieve those goals.

II. FEATURES OF A DELIBERATIVE PROCESS

Neither proponents nor opponents of inter-tribunal dialogue specify what constitutes dialogue or deliberation and in what sense inter-tribunal contacts or connections could be seen as dialogic or deliberative. Not every contact or connection will, of course, merit the designation of dialogue or deliberation.

For there to be a genuine process of inter-tribunal deliberation or dialogue, the following four factors must be present. First, the parties to the conversation must assume that engaging each other will lead to the clarification of issues and positions, a process that is more likely than not to lead to the correct or the most defensible result. Put simply, at the heart of a genuine deliberative process is the idea that participants' dominant motivation is the cooperative search for the truth or the most defensible result. One might call this the principle of sincerity.

A second important condition for a deliberative process is that participants advance and defend their proposals and propositions with reasons that are acknowledged as such by and are accessible to others. Decisions are based on the sharing of reasons, not simply on the counting of votes or on "the counting of noses," to borrow a phrase. One might call this the reason-giving condition the

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9 For present purposes, this Article uses the terms "dialogue" and "deliberation" interchangeably, employing the term that seems more applicable in the particular context.

10 For an extended account of the requirements of a deliberative process, see generally Amy Gutmann and Dennis Thompson, Why Deliberative Democracy? (Princeton 2004). See also Adeno Addis, Deliberative Democracy in Severely Fractured Societies, 16 Ind J Global Legal Studies (forthcoming 2009, as part of a symposium issue on global governance). The authors here are engaged in a larger project entitled On Judicial Deliberation that explores the special nature of the deliberative process in the adjudicative context.

11 We do not deny that other motivations may enter a judge's decision-making calculus. Future work will defend the notion that, for the judicial function to be met, judges' dominant interest should and will be reaching the most defensible result. See Adeno Addis, 16 Ind J Global Legal Studies (cited in note 10). Consider also Jonathan Remy Nash and Rafael I. Pardo, An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review, 61 Vand L Rev 1745, 1751, n 17 (2008) (arguing that, whether because of their view of themselves or otherwise, judges on lower courts will seek to resolve legal questions "correctly").


13 See Ernest Young, Foreign Law and the Denominator Problem, 119 Harv L Rev 148, 152 (2005) ("The hallmark of persuasive authority is engagement with the reasons for a practice or a decision rather
principle of the common pool of reason. The reason-giving requirement is a central requirement of dialogue or deliberation. In the context of legal opinions, it is what facilitates exchange, and respect, between majority and dissent.\textsuperscript{14}

The requirement of the common pool of reason has an informational component and a procedural component. For there to be genuine deliberation, especially in the context of inter-tribunal dialogue, there has to be some minimal agreement as to what information would be validly before a judicial tribunal and what process would be used to determine both how such information is selected and admitted. That is, for there to be a process of inter-tribunal dialogue, there must first be an agreement on what constitutes a judicial tribunal. It is not just the process of reasoning that would distinguish a judicial tribunal from political and legislative bodies, but also the manner in which the tribunal determines what information would be validly part of its deliberation and by what process that information should be selected and admitted. It is true that there would be some variations among judicial tribunals both in terms of what information is admitted and what procedure is used to determine admissibility, especially across systems and borders. However, as a general matter, there is a commonality among judicial tribunals not only in the manner in which they reason but also in relation to the informational and procedural requirements that form the bases for the deliberative process.

Third, participants of a dialogue treat each other as free and equal with their own commitments and think that they owe one another accessible and acceptable justifications for the conclusions and judgments that they reach. The reasons given by one party, and the reasons offered in response by another, must comply with this principle. One may call this the principle of reciprocity.

Fourth, decisions will lead to further dialogue and revision as participants take into account the views of others and in the process transform their own views and preferences. As such, deliberation transforms identities as it also transforms views and preferences. Discourse constitutes agents as it also constructs meaning. This is what one might refer to as the constitutive dimension of deliberation.\textsuperscript{15}

\textsuperscript{14}See Lewis A. Kornhauser and Lawrence G. Sager, \textit{The One and the Many: Adjudication in Collegial Courts}, 81 Cal L Rev 1, 8 (1993) (noting the persistence, and importance, of respect by dissenting judges for the court on collegial courts).

\textsuperscript{15}Deliberation in relation to the judicial process refers to judges engaging not only fellow panelists, but also other panels and judges, above, across, or below them. They engage those judges or panels through their written opinions. The concern of this Article is the dialogue among judicial tribunals across national or territorial boundaries conducted through engaging texts and judicial decisions of foreign nations or international and regional tribunals.
Having taken the time to expound upon what judicial deliberation entails, it is appropriate and important to explain what judicial deliberation does not entail. First, as the discussion above indicates, judicial deliberation does not entail courts in one system being bound by rulings of courts in another system. Neither does judicial deliberation require that a court (or a judge on a court) in one system agree with, or even accept as relevant, the ruling or reasoning of a court in another system. What it does require is that judgments of other courts on a similar topic not be considered a nullity. A court considering an issue that a court in another system has previously addressed should conceive of itself as part of the audience to which the other court was speaking, and should consider the other court as part of the audience to which it (the first court) is now going to speak. As Sir Basil Markesinis and Jörg Fedtke make clear, while judicial deliberation may result in one country adopting certain legal concepts or views from another, the fact that inter-tribunal deliberation is undertaken does not mean that transplantation of law necessarily will, or should, take place.

As an example, many have assailed Justice Scalia for failing to engage in inter-tribunal deliberation in his dissent in Lawrence v Texas. The reason that this characterization may be apt, however, is not because he disagreed with the reasoning of courts in other jurisdictions, but rather because he failed to confront the reasoning of other courts on the merits. Instead, Justice Scalia dismissed the reasoning of other courts as a nullity, and thus failed to engage in inter-tribunal deliberation.

See note 13.

One can draw a parallel to dialogue and deliberation between the federal and state courts, and among the state courts, in the US: one court system may look to others not (necessarily) for binding precedent, but for ideas as to how to resolve a particular legal issue.


Justice Scalia assailed the majority for looking to foreign courts' decisions decriminalizing sodomy as a ground for its decision:

Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct. The Bowers majority opinion never relied on "values we share with a wider civilization," but rather rejected the claimed right to sodomy on the ground that such a right was not "deeply rooted in this Nation's history and tradition." Bowers' rational-basis holding is likewise devoid of any reliance on the views of a "wider civilization." The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since "this Court...should not impose foreign moods, fads, or fashions on Americans." Foster v Florida, 537 US 990, 990 n * (2002) (Thomas concurring in denial of certiorari).
III. INTER-TRIBUNAL DELIBERATIONS: GOALS AND PROCESSES

A. THE GOALS OF A DELIBERATIVE PROCESS

It is fair to assume that those who seek to engage in inter-tribunal dialogue do so in circumstances where the issue is not or cannot be unambiguously settled by domestic rule of decision. Indeed, Steven Calabresi and Stephanie Dotson Zimdahl have shown that the Supreme Court looks to engage foreign decisions and laws either when the law is ambiguous or in cases where a determination of reasonableness is required. The predominant motivation for those engaged in inter-tribunal dialogue must be the search for the correct or the most defensible result. Under those circumstances, inter-tribunal dialogue—engaging the decisions or texts of other communities—enhances the possibility of arriving at the correct or most defensible reason.

Inter-tribunal judicial deliberation increases the chances that in the long run more courts will arrive at better results through better reasoning. Conversely, such deliberation reduces the likelihood that poor decisions and poor reasoning will become ensconced.

Consider first the likelihood of arriving at better results. The Condorcet Jury Theorem predicts that inter-tribunal deliberation will make this more likely. The Jury Theorem provides that, where there is a question that each voter has a greater than 50 percent chance of making the “correct” decision, then the greater the number of voters, the more likely it is that the selection of a majority of voters will be the “correct” answer. The Jury Theorem has been cited as a justification for staffing courts with more than one judge. The Jury Theorem

\[ \text{Lawrence, 539 US at 598 (internal citations and quotations partially omitted). Absent from Justice Scalia's opinion is an explanation of why, even if foreign judicial authority is not binding on US courts or (standing alone) informative of what lies in the American history and tradition, the reasoning of the foreign cases on which the majority relied was inapplicable to the Court's inquiry.} \]

It is interesting to consider the full statement by Justice Thomas with respect to the denial of certiorari in Foster from which Justice Scalia quoted: “While Congress, as a legislature, may wish to consider the actions of other nations on any issue it likes, this Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.” Foster v Florida, 537 US 990, 990 n * (2002) (Thomas concurring in denial of certiorari). Viewed in full, the statement suggests, insofar as Congress is free to consider the actions of other nations, that the question of valid deliberation is entirely one of separation of powers, not identity.

\[ \text{Steven G. Calabresi and Stephanie Dotson Zimdahl, The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision, 47 Wm & Mary L Rev 743, 891-98 (2005).} \]

\[ \text{See Jonathan Remy Nash, The Uneasy Case for Transjurisdictional Adjudication, 94 Va L Rev 1869, 1916.} \]

\[ \text{See, for example, Nash and Pardo, 61 Vand L Rev at 1748 (2008) (cited in note 11).} \]
also supports having more than one domestic court system opine on a legal issue. And Eric Posner and Cass Sunstein have argued that the Jury Theorem has at least some application to issues that are considered by courts from multiple countries.

How does deliberation affect the applicability of the Jury Theorem? On the one hand, some commentators have suggested that the very availability of deliberation renders the Jury Theorem inapplicable. On the other hand, it is the act of deliberation that may make available to courts the benefit of the Jury Theorem: only by considering the opinions of courts of other systems (here, the relevant voters), after all, can a court consider the result to which a majority of other courts have arrived.

In addition, inter-tribunal deliberation allows the Jury Theorem to apply beyond simply outcomes, but also to reasoning. The purported invocation of the Jury Theorem with respect to the reasoning of courts raises yet another question. An assumption underlying the Jury Theorem is that the question at issue has a "correct" answer. Is there a plausible sense in which one can say that there is a "correct" line of legal reasoning that supplies an answer to a legal question? If not, once again, the Jury Theorem's predictive power is on shaky ground. Still, one suspects that, even if the Jury Theorem is not entirely applicable, a multiplicity of courts opining on an issue will increase the likelihood that better answers will emerge over time. Even if the Jury Theorem's predictive power is not at its height, nonetheless the Jury Theorem's logic suggests a benefit that arises from inter-tribunal deliberation.

On a related point, inter-tribunal deliberation will help free jurisdictions from "stoppages" in legal evolution imposed by bad decisions. Absent inter-tribunal deliberation, a poor decision might persist as precedent under the doctrine of stare decisis. The application of this doctrine (which applies more strongly in common law jurisdictions) tends to bolster the legitimacy of a court

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26 This is because the Condorcet Jury Theorem in its pure form assumes that each voter casts an independent vote. See, for example, id at 144–45.
27 One can raise a similar question even with respect to the application of the Condorcet Jury Theorem to legal questions faced by appellate courts. See, for example, Maxwell L. Stearns, The Condorcet Jury Theorem and Judicial Decisionmaking: A Reply to Saul Levmore, 3 Theoretical Inquiries L 125, 144–46 (2002) (arguing that the Condorcet Jury Theorem is of limited applicability to the appellate-court setting because appellate panels bear little resemblance to juries). Another implicit assumption is that various tribunals confront legal questions that are, if not identical, at least analogous or closely related.
system. At the same time, as Robert Schapiro has explained, the doctrine has a downside: it may tend to ensconce poorly reasoned decisions and undesirable legal rules. This may especially be a problem for a jurisdiction’s high court, which is technically subject to overruling only by itself and the relevant legislative body (and by constitutional amendment). Inter-tribunal deliberation may provide an “escape valve” of sorts from stringent application of stare decisis. An understanding that high courts in other systems have reached a different conclusion (or the same conclusion based upon different reasoning) may encourage a high court to overrule itself; even if it would eventually have overruled itself anyway, inter-tribunal deliberation may facilitate this step. Indeed, one might even say that such deliberation may give “cover” to a high court, and allow it to overrule earlier decisions and reasoning without putting at risk its legitimacy.

**B. THE DELIBERATIVE PROCESS AND THE COMMON POOL OF REASON**

The principle of the common pool of reason has two dimensions, and both must be present in the context of inter-tribunal dialogue. First, there is a common pool of reason to the extent that dialogues among tribunals are conducted within a structure where the form and nature of the argument is generally familiar to participants of the dialogue. Unlike much of the political conversation that goes on across national boundaries—which might at times be posturing with no intention of persuading dialogue partners—structures within which inter-tribunal dialogues are conducted are primarily intended to persuade dialogue partners. It is standard, though not universal, practice for courts to provide not just a ruling in a case, but the reasoning on which the ruling is justified. Indeed, in some jurisdictions such as France, judges are subject to a

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29 See Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-Erie World*, 46 WM. & Mary L. Rev. 1399, 1422 (2005) (“The existence of parallel, non-intersecting lines of authority means that a blockage or error in one will not affect the other.”). But see John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. Cal. L. Rev. 353, 363 (1999) (“[T]he development of appellate hierarchy with collegial courts at the appellate levels can be understood as a strategy to ensure that no single judge can, by her actions alone, inflict too much damage on the judiciary as a whole, by making aberrant or overly courageous judgments.”).

30 Consider Nash, 94 Va. L. Rev. at 1918 (cited in note 22).

statutory reason-giving requirement. They are obligated to write opinions that give reasons detailing why they came to their final conclusions.

Second, when judges across jurisdictions and territorial boundaries engage each other that encounter is likely to lead to an increase in the common pool of reason. As Aharon Barak, the former President of the Israeli Supreme Court, correctly noted, “The benefit of comparative law is in expanding judicial thinking about the possible arguments, legal trends and decision-making structures.” That is, the value of inter-tribunal dialogue is to open up two possibilities that would otherwise have been unavailable: alternative ways of being a good judge and alternative approaches to the specific issue at hand which is likely to have triggered the initiation of the inter-tribunal dialogue.

C. RECIPROCITY AND THE DELIBERATIVE PROCESS

As noted above, the principle of reciprocity is essential for effective dialogic process. Reciprocity manifests itself in a number of ways. First, it is a disposition, an attitude. Dialogue partners have to start with the assumption that each party is free and equal, and is owed accessible and acceptable justification for judgments and conclusions other partners reach. Second, reciprocity may manifest itself in that willingness and openness of one court to engage the works of another country’s court (or an international tribunal) will incline the latter to reciprocate.

There is an element of reciprocity to inter-tribunal dialogue and deliberation. All other things being equal, one would expect that courts that engage in dialogue with courts in other systems would, in return, have their opinions considered by courts in other systems. There are two reasons that justify this expectation: one grounded in international law, and the other derived from domestic judicial experience.

First, commentators have observed that reciprocity pervades certain aspects of international law. For example, Thomas Merrill makes the argument with respect to international law governing transboundary pollution. Notions of reciprocity appear in international treaties and customary international law. They

\[32\] Mathilde Cohen, Reason-Giving in Court Practice: Decision-Makers at the Crossroads, 14 Colum J Eur L 77, 81 (2008) (“In France, all judges, administrative judges included, are subjected to a statutory reason-giving requirement.”). See also Nash, 56 Stan L Rev at 86 n 38 (cited in note 31) (noting that, through its history, the state of Louisiana has at different times (i) required each Justice on the state supreme court to write a separate opinion in each case, and (ii) banned the filing of dissents).

\[33\] Cohen, 14 Colum J Eur L at 81 (cited in note 32).

\[34\] Barak, 116 Harv L Rev 16 at 111 (cited in note 7).

are also featured in domestic legal provisions that offer benefits to other countries provided that similar benefits are being received in return.

Second, consider the experience of inter-tribunal dialogue between and among domestic courts. For example, procedural devices that foster direct dialogue between state courts and federal courts function best when the procedural device in question sensibly apportions responsibility and power between the two court systems so as not to advantage substantially one system over another.\textsuperscript{36} This is especially the case domestically with respect to the behemoth that is the federal court system—in terms of both size and relative power—vis-à-vis any of the state court systems: procedural devices that emphasize the power disparity the federal court system enjoys over the state courts tend to generate friction between the court systems and accordingly to be less successful.

Proceeding by analogy to the international level, one would expect that courts that engage courts from other systems in dialogue can more likely expect to be engaged in dialogue by courts from other systems. Former US Supreme Court Justice Sandra Day O’Connor seemed to have this exchange in mind when she observed that citing foreign sources “may not only enrich our own country’s decisions; it will create that all-important good impression. When U.S. courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced.”\textsuperscript{37} The willingness of a tribunal from one country to engage tribunals from other countries not only may broaden the common pool of reason available for the tribunal that is consulting the decision of a foreign court, but also will likely incline foreign tribunals to consult the decisions of that tribunal on matters of a similar nature which may not be unambiguously addressed by a national rule of decision.

Just as a court system’s willingness to engage in dialogue likely will be met reciprocally, and will encourage courts in other systems to address the rulings of the first court system, so too would we expect a court system’s unwillingness to engage in dialogue to lead to a decrease in that court system’s international influence. And, indeed, there is recent evidence to support this contention. The perception that the judiciaries of the US do not engage in dialogue with courts from other systems appears to have made courts in other systems less willing to

\textsuperscript{36} Certification procedure, under which federal courts certify state law questions to state high courts for resolution, does a better job in this regard than does Supreme Court certiorari review of state court decisions on matters of federal law. See Nash, 94 Va L Rev at 1908 (cited in note 22).

\textsuperscript{37} Justice Sandra Day O’Connor, Address at the Southern Center for International Studies (Oct 28, 2003), available online at <www.southerncenter.org/OConnor_transcript.pdf> (visited Dec 5, 2008).
engage the courts of the US.\textsuperscript{38} Thus, even the American judiciary—the behemoth court system on the international stage—faces reputational consequences from an unwillingness to engage in dialogue.

There is another point that needs to be made here. Inter-tribunal dialogue results not only in the exchange of information about concerns of a similar nature and hence may lead to the correct or the most appropriate response to the specific question before the court. It also leads to the creation of an international public space in which international legal norms emerge. Refusal to participate in that process means not having a role in the shaping of that space. Absentees have no influence.\textsuperscript{39} This argument will of course not be persuasive to those who think isolation is a virtue and that a nation or a community is self-sufficient on matters of norms and rules that are needed to resolve questions and issues that might arise. However, that sentiment hardly accords with the highly interdependent world in which we live.

\section*{D. No Need for Identitarian Anxiety}

As noted above, a major source of anxiety about consulting foreign or international law as a source of understanding domestic law is what this Article has referred to as identitarian anxiety. The notion of identitarian anxiety can be expressed thus: laws, especially basic laws such as constitutions, are not simply instrumental (that is, a means of doing) but constitutive of the very identities of communities (that is, a means of being).\textsuperscript{40} Indeed, many European scholars following Jürgen Habermas have attempted to capture the constitutive aspect of basic laws by invoking the notion of “constitutional patriotism.”\textsuperscript{41} Constitutional patriotism becomes an essential source of solidarity and community in the diverse societies that are typical of many nation-states. A constitutional patriot is one who views the constitution of a particular territorial community as more or less a biography of the community as a whole, and thus allegiance to the constitution is an affirmation of the deepest and most enduring aspect of the identity of the community.


\textsuperscript{39} See also Nash, 58 Emory L J at ___ (cited in note 28) (noting that the absence of judges on a court will affect not only the outcome of the particular case, but also the deliberation undertaken by the court).

\textsuperscript{40} Joseph Raz put it this way: “In large measure what we study when we study the nature of law is the nature of our own self-understanding.” Joseph Raz, \textit{Can There be a Theory of Law}, in Martin Golding and William Edmundson, eds, \textit{Blackwell Guide to the Philosophy of Legal Theory} 324, 331 (Blackwell 2004).

To view a country’s legal regime—especially its basic law—as the biography of the specific people in which it emerges, and whose institutions and lives it is meant to regulate, is to be skeptical of the relevance to one country of the laws and constitutions of another. Indeed, concern over the assumption that the laws and constitution of one country would apply in another goes further: relying on the biographies and narrative of other peoples is either to misunderstand the people and communities one wishes to understand or, even worse, to turn them into what they are not and perhaps should not be.

Identitarian anxiety is thus premised on two distinct but related concerns, each of which has to do with the loss of identity. First, one might be concerned that the nation’s core identities would be undermined by the appropriation of norms that describe and regulate distinctly different institutional and cultural arrangements. Or, second, and just as bad if not worse, one might be concerned that the appropriation of foreign and international norms is a first step into the construction of a cosmopolitan world in which nations and national identities are transcended.

This view seems to misunderstand both the nature of identities and how they emerge. First, it is clearly the case that national identities cannot be understood in a vacuum, but only in the context of how they interact in an international system of states. Indeed, we have come to accept this in relation to the executive (and often legislative) branches of government. There is no reason why that interaction should not include judicial dialogues. Second, and more importantly, nations—just like individuals—are always evolving, always becoming. They are never fully achieved. They are ongoing projects (“organisms,” to cite Justice Holmes) that seek to develop moral and political communities in ever more defensible and perfect ways. And that growth and change often occurs when one engages others who might assist in serious reflection on matters that may have simply been assumed or poorly understood. Inter-tribunal dialogues may assist in that reflection. Third, in an increasingly interdependent world, it may not be unreasonable to assume, as did Justice Michael Kirby of the Australian High Court, that the laws of a country should

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42 Judge Richard Posner seems to have captured the first aspect of the concern when he wrote that “the judicial systems of the rest of the world are immensely varied” and form judicial decisions that emerge “from a complex socio-historico-politico-institutional background of which our judges...are almost entirely ignorant.” Richard Posner, No Thanks, We Already Have Our Own Laws, Legal Aff 40, 41-42 (July/Aug 2004).

43 Judge Posner observes: “To cite foreign law as authority is to flirt with the discredited...idea of a universal natural law.” Id at 42.

44 Missouri v Holland, 252 US 416, 433 (1920) (“It was enough for [the Framers of the US Constitution] to realize or to hope that they had created an organism.”).
not be viewed as operating in a vacuum. Speaking of the Australian Constitution, Justice Kirby held:

Where there is ambiguity, there is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their government, is not intended to violate fundamental human rights and human dignity. . . . The Australian Constitution . . . does not operate in a vacuum. It speaks to the people of Australia . . . [as] it also speaks to the international community . . . [of which] the Australian nation . . . is a member.45

In an interdependent world, each nation’s biography can be fully understood or written only in the context of that nation’s position within the wider world. Again, Justice Kirby, in the Al-Kateb decision, makes the point. “The fact is,” he said, “that it is often helpful for national judges to check their own constitutional thinking against principles expressing the rules of a ‘wider civilisation.’”46 Sometimes, a country’s basic or foundational document makes clear that the particular community’s identity is to be understood in the light of the fact that it is linked to the “family of nations.”47 And courts are specifically instructed or permitted to use international or foreign legal sources to interpret aspects of the foundational document.48

The point here therefore is not to deny the central role that law, especially the basic law, plays in the formation of national identity. Law is not simply a means of doing, it is also a means of being. Rather, the point is to contest the proposition that the sources of national law should be exclusive if the authenticity of national identity is to be guaranteed or maintained. In the globalized world in which each nation exists, linked in various ways to the family of nations, what seems inauthentic is the suggestion that each nation is self-sufficient—that it has all the norms it requires to resolve all issues that might arise within it. To understand oneself fully is partly to engage those to whom one is institutionally linked.

47 See S Afr Const, preamble (“We the People of South Africa . . . lay the foundations for a democratic and open society . . . [that] is able to take its rightful place as a sovereign state in the family of nations.”). Indeed, the South African Constitution requires courts to “prefer any reasonable interpretation of [ ] legislation that is consistent with international law over any alternative that is inconsistent with international law.” S Afr Const, § 233. There is a similar US doctrine—the Charming Betsy canon—which Chief Justice Marshall expressed as requiring that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” Murray v The Schooner Charming Betsy, 6 US (2 Cranch) 64, 118 (1804).
48 The South African Constitution requires courts to “consider international law” and gives them the authority to “consider foreign law” when interpreting the South African Bill of Rights. S Afr Const, § 39.
IV. CONCLUSION

The world is full of boundaries. There are boundaries that are marked by geography, ethnicity, and legal and political culture. Whatever their natures, boundaries provide the condition for communal or individual identities and agencies and they make collective action possible. That very capacity to define and contain, however, allows boundaries "to close off possibilities of being that might otherwise flourish."49 This is the paradox of boundaries that led one scholar to remark that "[b]oundaries both foster and inhibit freedom."50 What this Article has suggested is that inter-tribunal deliberations open up possibilities of being that might otherwise be closed off. They become a valuable source of understanding and shaping the identity of a nation rather than undermining it. To equate identities with self-sufficient agencies is to misunderstand the way identities emerge and change.

50 Id.