11 Institutionalising judicial dialogue – Mechanisms for accelerating the development of jurisprudence in The Gambia

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1 Introduction

A constitution is foundational to any modern state; it establishes the structure of government as well as the normative values by which that government commits itself to comply. The importance of a constitution increases in a country undergoing a transition. Not only does it affirm the new government's commitment to human rights and the rule of law, but it also creates a framework that reduces the risk of reverting to authoritarianism. Consequently, the revision or replacement of the constitution serves as an essential component of the transitional justice processes, at least in part, because of its potential to promote non-recurrence.[1] In The Gambia, the Constitutional Review Commission (CRC) played a central part in this crucial task, preparing a draft constitution to serve as the foundation for a stable democratic government.[2] Although the CRC's efforts proved unfruitful, the foundational role of a constitution remains critical even if it is only through amendments to the existing document. Consequently, consideration of the current constitution and attention to potential future modifications remains a crucial aspect of the transitional process.

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1 See UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, UN Doc A/RES/60/147 (2006) para 23, articulating examples of appropriate mechanisms for promoting non-recurrence that resonate with but do not specifically include the establishment of a new constitution.

2 Constitutional Review Commission Act (The Gambia) 7 of 2017, section 6(1): 'The functions of The Commission are to draft a new Constitution and report in relation to the Constitution'.; Draft Constitution of The Gambia 13 November 2019. See generally Constitutional Review Commission website www.crc220.org (accessed 11 January 2020). Between the drafting and publication of this chapter, the CRC's proposed constitution was put to parliament and failed to achieve sufficient votes for adoption. It is uncertain whether The Gambia will proceed with an effort to again draft a new constitution or proceed by amending its previous 1997 Constitution. In either case, the analysis of this chapter remains relevant, and the recommendations should be incorporated.

This chapter makes the case for the inclusion of explicit language in the constitution that encourages Gambian courts to consider jurisprudence from international and foreign courts. Doing so will embolden the courts to actively participate in judicial dialogue. It will also enhance the development of Gambian jurisprudence, protecting human rights by encouraging courts to build upon the analysis of similar rights within other jurisdictions. Additionally, it will allow Gambian courts to contribute their voice to the development of international law. Both outcomes will promote the non-recurrence of violations by enhancing respect for human rights and integrating Gambian courts with their international and foreign counterparts. It is a strategy for institutionalising a monist approach to the relationship between international and domestic law, which accelerates the latter's development. To be clear, this chapter does not claim that a textual mandate is necessary for judicial dialogue; in fact, Gambian courts have engaged in such dialogue previously without an explicit mandate.[3] Rather, the argument being put forward claims that a textual mandate can expedite the development of jurisprudence by increasing the extent, frequency, and openness with which Gambian courts participate in comparative constitutional and legal analysis.

Unfortunately, The Gambia's current Constitution does not include a textual mandate to incorporate foreign and international jurisprudence.[4] The CRC's proposed constitution also lacked such a provision.[5] Equally troubling, the draft included language that seemed to discourage the consultation of foreign and international jurisprudence.[6] Despite the failure to ratify this new Constitution, its proposal indicates a trend towards solidifying a dualist approach to international and domestic law that would disadvantage future courts in The Gambia. This trend should be reversed in future efforts to adapt the current Constitution or adopt a new one.

In order to make an argument in favour of a textual mandate, this chapter will proceed in four parts. The first section will clarify the meaning

3 The Constitution of the Republic of The Gambia, 1997; see also sections 3.1-3.3 below discussing the means by which Gambian courts have previously engaged in judicial dialogue.

4 Gambian Constitution.

5 See Draft Constitution of The Gambia.

6 See sections 9(2)-(3) of the Draft Constitution of The Gambia: 'Subject to subsection (3), a treaty to which The Gambia is a party shall not form part of the laws of The Gambia unless it is incorporated in an Act of the National Assembly. (3) The courts may have due regard to international treaties on human rights to which The Gambia is a party where it considers it necessary to aid its interpretation or application of a provision of this Constitution with respect to any right or freedom.'

of judicial dialogue and map out the mechanisms by which it achieves the claimed benefits. The second section will demonstrate the role judicial dialogue has played previously within The Gambian legal system. In doing so, it seeks to demonstrate judicial dialogue as an accepted tool of legal analysis that would not require seismic changes to Gambian legal theory. Section three will then examine the mechanisms by which judicial dialogue occurs. It will give particular attention to how an explicit textual mandate can encourage judicial dialogue. Finally, section four will offer a brief conclusion that includes recommendations directed toward the development of Gambia's Constitution. The chapter will also examine two examples of texts that invite judicial dialogue. The first – the African Charter on Human & Peoples Rights[7] – will be introduced in section two and the second – the Constitution of the Republic of South African, 1996 – will be introduced in section three. These two documents serve as excellent examples of an invitation to judicial dialogue, which The Gambia may wish to emulate.

2 Judicial dialogue

Courts do not exist in isolation. As they work to interpret laws or give content to the rights enumerated in constitutions and international agreements, they often refer to the analysis of other courts in similar situations. In some cases, the receiving court may be compelled to comply with the analysis of the originating court. This is most common when a lower court examines an issue that closely tracks a precedent established by a higher court within the same jurisdiction. In common law jurisdictions, the lower court is typically bound to apply the established law to the new case.[8] Occasionally, courts may treat the opinions of supranational bodies with similar deference.[9] Even when courts are not compelled to follow precedent, they may look to the analysis of sister courts within or outside their jurisdiction. These vertical and horizontal relationships between courts result in an understanding that when they issue opinions, they

7 OAU, African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

8 AWB Simpson 'Common law' in P Cane & J Conaghan (eds) *The new Oxford companion to law* (2008).

9 See eg the notion of Conventionality Control as interpreted in several Latin American countries. P González-Domínguez *The doctrine of conventionality control: Between uniformity and legal pluralism in the inter-American human rights system* (2018), examining the growing tendency of member states to open up their constitution and legislation to ensure conformity with corpus juris of Inter-American system while also balancing this trend against issues of subsidiarity – referred to as 'margin of appreciation' in the European system.

are communicating with one another.[10] Such communication is judicial dialogue: 'the phenomenon of borrowing and transplantation [of judicial reasoning] from the international to the national, the national to the international, from national jurisdiction to national jurisdiction'.[11] Judge Eduardo Ferrer Mac-Gregor of the Inter-American Court of Human Rights describes the concept of judicial dialogue as 'emerg[ing] from the practice of the courts and tribunals themselves' and encourages his fellow jurists to engage more openly in the practice as well as initiate a conversation about its utility.[12]

There are multiple reasons why a court might participate in judicial dialogue. Historical legacies may shape the structure of a particular legal system, making it more inclined to engage with other systems. Limited resources in a particular jurisdiction might make the efficiency of judicial dialogue advantageous. A nascent court might incorporate foreign jurisprudence in order to provide its decisions with more heft, thereby buttressing its own legitimacy. In some cases, international commitments may even require reference to international or foreign jurisprudence. In addition to these pragmatic reasons for judicial dialogue, there are at least two substantive reasons to promote judicial dialogue. First, it accelerates the development of jurisprudence by borrowing external precedent.[13] In a nascent democracy, or one undergoing a transition, accelerating this development strengthens the courts.[14] Second, judicial dialogue places a legal system within the larger community of international law.[15] It strengthens the human rights norms shared among the international

10 AM Slaughter *A new world order* (2004) 75-79.

11 C McCrudden 'A common law of human rights? Transnational judicial conversations on constitutional rights' (2000) 20 *Oxford Journal of Legal Studies* 499 at 501.

12 E Ferrer Mac-Gregor 'What do we mean when we talk about judicial dialogue? Reflections of a judge of the Inter-American Court of Human Rights' (2017) 30 *Harvard Human Rights Journal* 89 at 89-92.

13 ED Elliot 'The evolutionary tradition in jurisprudence' (1985) 85 *Columbia Law Review* 38: 'Law is a scavenger. It grows by feeding on ideas from outside, not by inventing new ones of its own.'

14 The strengthening of courts referred to here is related to, yet distinct from, the legitimisation of courts mentioned previously as a practical reason for judicial dialogue. As developed further below, the strengthening of courts involves the development of a robust jurisprudence as well as its recognition as an independent and authoritative institution. For an example of how this legitimisation and strengthening interact through communicative strategies that develop and diffuse norms, see E Gonzalez-Ocantos 'Communicative entrepreneurs: The case of the Inter-American Court of Human Rights' dialogue with national judges' (2018) 62 *International Studies Quarterly* 737.

15 AM Slaughter 'Judicial globalization' (2000) 40 *Virginia Journal of International Law* 1103 at 1112-1115.

system within a domestic context and enables the country to contribute to the development of international law.

2.1 Receptivity and development of jurisprudence

When courts interpret statutes and constitutional provisions and apply them to a particular case, they do so with reference to an underlying theory that explains the purpose, values, and intent of the law at issue.[16] Even when drafters include seemingly clear language about the intent of a constitutional provision or statute, gaps inevitably arise as societies change over time – recognising new rights or interests, encountering new challenges, or incorporating new technologies. Jurisprudence enables courts to address these gaps in a way that is consistent and predictable across cases. By developing an underlying theory of law, courts can apply the principles used in previous cases to similar yet unanticipated circumstances in other cases. It is a form of analysis by analogy in which decisions in an individual case are made 'in light of legal principle[s] exemplified in previous judicial decisions'.[17]

Consequently, while a constitution should explicitly state the normative and legal presumptions forming its foundation, it should also anticipate the need for courts to add nuance and detail in the future. Gambian courts, like all other courts, can then expect to cultivate jurisprudence through three modalities. First, over time the courts will draw from their own precedent to maintain consistent interpretation and application of Gambian law. Second, Gambian courts will receive the jurisprudence of courts under previous constitutions as well as the wealth of common law tradition that predated the nation's independence. Receiving this previous legal tradition is not a given, rather it entails a conscious effort to build upon the legacy of predecessors.[18] Third, the courts can actively look to foreign and international courts examining similar situations

16 K O'Regan 'Text matters: some reflections on the forging of a new constitutional jurisprudence in South Africa' 75 *The Modern Law Review* 32: 'The Constitution requires the Court to adopt a principled and consistent approach to adjudication of constitutional disputes. In performing this task, the Court has sought to demonstrate, both in its judgments and its practice, that the judicial method for dispute resolution is different to the political resolution of disputes. The judicial method is characterized by, amongst other things, institutional indifference to political contestation, modes of reasoning and analysis that are candid and conspicuous, not covert, by procedures which are open and fair, and in fidelity to the constitutional text and purpose.'

17 J Bell 'Precedent' in P Caen & J Conaghan (eds) *The new Oxford companion to law* (2009).

18 It is a remote, though unlikely possibility, that a future constitution would elect to nullify all previous and inherited law in The Gambia. Doing so would be unwise and, to the best of the author's knowledge, is not currently under consideration.

and incorporate elements of the analysis into their reasoning. A vibrant and robust jurisprudence results from all three mechanisms working in tandem.

Judicial dialogue facilitates this reception and development of jurisprudence. When courts share their reasoning, it becomes easier for other courts to build upon their analysis and develop it further. The receiving court can then share its jurisprudence with another jurisdiction, including that from which it originally borrowed. It is possible to parse these conversations more closely, distinguishing how the vertical or horizontal relationships shape the nature in which jurisprudence and precedent are incorporated.[19] In general, this experience of judicial dialogue promotes the development of jurisprudence capable of adapting to new circumstances.[20] It extends the lifespan of a constitution, making it relevant beyond just those circumstances envisioned by its drafters.

2.2 Participation in the global conversation

A related yet distinct benefit of judicial dialogue is the way it incorporates Gambian courts into a global legal community. Active participation in this community promotes the alignment of common norms and values among nations as well as provides The Gambia an opportunity to contribute its unique perspective to the development of international law. Both are beneficial for the long-term stability and prosperity of The Gambia.

When courts engage in judicial dialogue, their theories of jurisprudence align over time.[21] Decisions from different jurisdictions begin to reflect similar underlying values, even if their precise expression varies. This alignment enables countries to participate fully in the international arena.[22] The shared values form a foundation for comity and collaboration and,

19 For a brief example of vertical and horizontal relationships as the result of incorporation of precedent see the discussion below (section 4.3) on the use of 'must' and 'may' in the South African Constitution.

20 DS Law & WC Chang 'The limits of global judicial dialogue' (2011) 86 *Washington Law Review* 523 at 526-27 (citing Slaughter (n 10) 99), summarising the benefits of judicial dialogue posited by others in order to analyse the mechanisms by which it occurs rather than engaging in a normative analysis.

21 Slaughter (n 15).

22 See AK Perrin 'African jurisprudence for Africa's problems: human rights norm diffusion and norm generation through Africa's regional international courts' (2015) 109 *Proceedings of the Annual Meeting (American Society of International Law)* at 32-37: analysing the interaction among various African regional courts and the development of human rights norms suitable to Africa's unique context.

particularly for smaller nations, the legitimacy afforded by this relationship can become a mechanism for the assertion of soft power.[23]

From a theoretical perspective, the relationship between domestic and international law can be characterised as either monist or dualist. When a country takes a monist approach to international law, domestic law is cast as part of a single collective system. In a monist approach, the domestic system is fully integrated with the international. In contrast, a dualist approach views the domestic and international legal systems as parallel. They may be complementary but need not align in all cases and conflicts may arise as a result. In practice, most domestic legal systems fall along the continuum between monism and dualism, differing in the emphasis they offer international law and its resulting integration. The CRC's Draft Constitution leaned heavily toward the dualist approach, permitting consultation of international law only if it had been incorporated domestically by the legislature. Moreover, international treaties could only be consulted if The Gambia was a party and the treaty concerned human rights.[24] This approach risked a chilling of judicial consultation with external sources, thereby thwarting opportunities for engagement with the international legal community. In contrast, consider two other African constitutions. That of South Africa, discussed in greater detail below, actively encourages the Constitutional Court to consider international and foreign law.[25] In doing so, it has positioned South Africa closer to the monist end of the spectrum while still retaining significant elements of dualism. Namibia, in contrast does not explicitly encourage nor prevent its jurists from relying on foreign law. In practice, Namibia's Supreme Court draws heavily from foreign precedent, which enables it to give clarity and content to otherwise ambiguous constitutional provisions.[26] It remains, therefore, closer to the dualist end of the spectrum while still benefiting from judicial dialogue.

It should be emphasised that the alignment of values resulting from a monist inclination and robust judicial dialogue is not unidirectional. Just as domestic jurisprudence develops, so too does international law. As a participant in judicial dialogue, Gambian courts can assist in shaping it. International law is drawn from both formal treaties and customary

23 Slaughter (n 10).

24 Section 9(2-(3) of the Draft Constitution of The Gambia.

25 C Rautenbach 'South Africa: Teaching an "old dog" new tricks? An empirical study of the use of foreign precedents by the South African Constitutional Court' in T Groppi & MC Ponthoreau (eds) *The use of foreign precedents by constitutional judges* (2013).

26 I Spigno 'Namibia: The Supreme Court as foreign law importer' in T Groppi & MC Ponthoreau (eds) *The use of foreign precedents by constitutional judges* (2013).

international law, the latter encompassing that which has not been formally established.[27] Rather, customary international law develops through consistent state practice and *opinio juris*.[28] When states consistently recognise and abide by a norm and when they do so out of a sense of legal obligation, they contribute to the development of international law. Over time the norm is solidified and becomes customary international law. Consequently, domestic courts can influence international law through the consistent application of normative principles.[29]

3 Historical precedent in The Gambia

Judicial dialogue is neither a novel nor a wholly foreign concept in The Gambia. Even if not explicitly labelled as such, Gambian courts have engaged in forms of judicial dialogue since the founding of the Republic. Three particular experiences suggest openness in the Gambian judiciary towards judicial dialogue. First, The Gambia is a common law country, which entails an approach to law that is inherently receptive to the judicial decisions and reasoning of other courts. Second, throughout their history, Gambian courts have included foreign nationals. These jurists brought with them the perspective and insight of their home courts even if its application to Gambian cases was unintentional. Third, The Gambia is a state party to the African Charter on Human and Peoples' Rights, which explicitly invites the incorporation of international legal standards.[30] As explained above, these standards draw on customary international law, which in turn is based in part on the *opinio juris* of international and foreign domestic courts. As a result, state parties incorporate foreign jurisprudence

27 V Lowe 'International law' in P Cane & J Conaghan (eds) *The new Oxford companion to law* (2008): 'Rules of public international law emerge as rules of customary international law, or are laid down in international treaties, or are inferred from those principles of law that are recognized by civilized nations and are apposite for application in the field of international law'.

28 M Mendelson 'Customary international law' in P Cane & J Conaghan (eds) *The new Oxford companion to law* (2008): 'Mostly, customary rules are created by one or a few states claiming a right, and others either following suit or acquiescing in the claim, either expressly or tacitly, until there is a sufficiently widespread and representative practice . . . It is often said that . . . there must also be a 'subjective element' in the form of acceptance or recognition: the so-called *opinio juris sive necessitatis*.'

29 TL Grove 'The international judicial dialogue: When domestic constitutional courts join the conversation' (2001) 114 *Harvard Law Review* 2049 at 2071: 'Joining this increasingly sophisticated dialogue provides a constitutional court with an opportunity to influence the development of international law'.

30 N 7; see also discussion below (sec 3.3).

when they engage with the African Human Rights System because of the extent to which that system draws on foreign sources of law.

3.1 The practice of common law

As a common law country, Gambian courts are accustomed to interpreting precedent and considering the opinions of other courts when evaluating cases.[31] Unlike civil law, in which courts reference statutes to determine the outcome of a case, common law courts are expected to give greater weight to the principle of *stare decisis* when reviewing a case.[32] *Stare decisis* directs courts to defer to the precedent set by other courts in similar circumstances. Common law courts are not strictly obligated to follow precedent but should give it deference, only breaking from it when there are compelling countervailing factors.[33] Consequently, when a common law court examines precedent it engages in a form of judicial dialogue – considering and possibly incorporating the jurisprudence of its predecessors. When the precedent comes from a court within the same jurisdiction, less attention is given to the process. However, the common law also lends itself to the incorporation of precedent from other jurisdictions, in which case the act of judicial dialogue becomes more apparent.[34]

Historically, the common law system has its origin in English law.[35] Spread across much of the world by the British Empire, the legacy of which stretches from North America and the Caribbean to Anglophone Africa and South Asia.[36] As a result, there are striking similarities in the legal systems of countries as distinct as Canada and Bangladesh, New Zealand and Belize, or Ireland and Uganda.[37] In some cases, these legal systems have also incorporated elements of customary, traditional, or religious law while retaining a foundation in common law. The Gambia

31 Gambian Constitution.

32 Bell (n 17): 'At one extreme, *stare decisis* is a rule giving binding legal authority to the previous decisions of higher courts or even previous decisions of the same court. A subsequent court is required to follow the ruling laid down in such a previous decision. At the other extreme, lawyers may simply adopt a good practice of consulting previous decisions and according them weight in their deliberations. In most jurisdictions, judicial decisions are not a formal source that creates the law, but only interpretations of the constitution, treaties, legislation, and custom. But previous decisions have authority because judges are expected, as a matter of professional duty, to respect previous decisions of the courts'.

33 Bell (n 17).

34 Slaughter (n 15) 1103.

35 Simpson (n 8)

36 As above.

37 As above.

is one such country, its legal system representing a blend of traditions but predominantly that of the common law.[38]

As a result of this historical legacy and the principle of *stare decisis*, common law countries inherited a vast amount of precedent and jurisprudence from English courts. This inheritance was not always positive and often perpetuated the hegemony of colonialism far past independence. Even today, several former colonies retain appellate procedures that involve review by the Judicial Committee of the Privy Council in England. The Gambia permitted such review until the 1997 Constitution placed final appeal in the Supreme Court of the Gambia.[39] But regardless of the negative legal residuals of colonialism, the fact remains that common law countries inherited English jurisprudence upon which they have since built.

The judicial dialogue of common law countries extends beyond the referencing of pre-independence case law. Common law courts also look to one another to better understand the shared principles they have inherited and now develop for their specific contexts.[40] Consequently, a court in The Gambia might look to decisions from Nigeria, Ghana, or Sierra Leone when applying a legal principle in a new context. Likewise, in a federal system like the United States, the courts of one state will look to the decisions of another state when analysing its own laws.[41] These courts share a common law foundation, but they also have cultural and historical similarities that make such dialogue particularly advantageous. A similar trend can be seen among countries in Latin America, which share a common legal tradition, albeit not one rooted in common law. These countries have replaced the unidirectional importation of jurisprudence from colonial and hegemonic powers with multidirectional judicial dialogue amongst one another. Some scholars have noted a correlation between this trend toward horizontal dialogue and an increased incorporation of human rights norms in Latin America, although multiple other factors have likely also contributed. [42]

38 Section 7 of the Gambia Constitution of 1997 states: 'In addition to this Constitution, the laws of The Gambia [include] (d) the common law and principles of equity; (e) customary law so far as concerns members of the communities to which it applies; (f) the Sharia as regards matters of marriage, divorce and inheritance among members of the communities to which it applies.'

39 1997 Constitution.

40 Slaughter (n 15) 1103.

41 GA Caldeira 'The transmission of legal precedent: A study of state supreme courts' (1985) 79 *The American Political Science Review* 178.

42 M Freitas Mohallem 'Horizontal judicial dialogue on human rights: The practice of constitutional courts in South America' in A Müller (ed) *Judicial dialogue and human rights* (2018).

Gambian courts have not separated themselves from the judicial dialogue among common law nations. In *Gambian Press Union v The Attorney General,* the Supreme Court referenced case law from Botswana and Canada as well as Privy Council cases originating from Jamaica, Trinidad & Tobago, and Antigua.[43] In *Ousainou Darbo et al v Inspector General of Police et al*, the Supreme Court considered case law from Nigeria and Ghana, specifically referring to them as having 'persuasive value [but] not binding on this court'.[44] In *Jammeh v Attorney General*, the Supreme Court closely examined case law from Nigeria, India, and Canada.[45] In short, the Gambian Supreme Court has regularly looked to foreign courts for inspiration and clarification around fundamental concepts of common law. The Court does not always accept the interpretation presented by the foreign court but rather gives consideration to its rationale and whether it would be appropriately applied in the Gambian context. In doing so, the Court engages in judicial dialogue.

3.2 Foreign judges

The Gambia already has experience with the practice of judicial dialogue because of the composition of its courts. Notably, the 1997 Constitution does not limit judicial appointments to Gambian nationals.[46] Nor did the Draft Constitution proposed by the CRC. Both explicitly permit the appointment of a foreign national so long as he or she has sufficient experience on a court of the same competence in another common law country – 15 years for the Supreme Court and 12 years for the Appeals Court under the 2019 proposed Draft Constitution.[47] As of writing,

43 *Gambian Press Union v The Attorney General* SC Civil Suit 1/2014 (2018), considering the severability of provisions with an Act of Parliament as it pertains to the definition of 'seditious intention'.

44 *Ousainou Darbo et al v Inspector General of Police et al* SC Civil Suit 003/2016 (2017), upholding provisions of the Public Order Act as constitutional because the license requirement was reasonably justifiable in a democratic society and did not completely abolish the right to assembly.

45 *Jammeh v Attorney General* AHRLR 72 (GaSC 2001), explicitly referencing foreign case law for test to establish severability of provisions of the Amendment Act of 2001.

46 1997 Constitution.

47 The Draft Constitution of The Gambia at section 189 states: 'A person is qualified for appointment as Chief Justice if he or she is qualified to be appointed a judge of the Supreme Court. (2) A person is qualified to be appointed a judge of the Supreme Court if he or she – (a) has at least fifteen years' experience as a superior court judge; or (b) has at least fifteen years' experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal or Shari'ah field; or (c) has held the qualifications specified in paragraphs (a) and (b) for a period amounting, in aggregate, to fifteen years or more; and (d) is a person of high moral character and proven integrity. (3) A person is qualified to be appointed a judge of the Court of Appeal if he or she – (a) has at least twelve years' experience as a superior court judge;

there are two non-Gambian Judges sitting on the Supreme Court: Justice Abubakar Datti Yahaya of Nigeria and Justice Nicholas Colin Browne-Marke of Sierra Leone.[48] There are multiple reasons for the inclusion of foreign nationals on the Supreme Court of The Gambia and the practice is not uncommon globally. Although the majority of countries prohibit the practice, a 2018 survey by Anna Dziedzic identified 30 countries with foreign judges currently sitting on their constitutional courts.[49] Consequently, The Gambia's practice is not an outlier. Dziedzic identifies multiple reasons for the inclusion of foreign judges, such as the need to moderate internal political divisions or the lack of a large pool of qualified lawyers alongside limited incentives for them to accept a judgeship.[50] The International Bar Association has suggested that the lack of strong incentives to accept appointment to the bench plays an important role.[51] Along related lines, the relative nascency of The University of The

or (b) has at least twelve years' experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal or Shari'ah field; or (c) has held the qualifications specified in paragraphs (a) and (b) for a period amounting, in aggregate, to twelve years or more; and (d) is a person of high moral character and proven integrity.'; compare The Gambian Constitution at section 139: 'Qualifications for appointment of judges (1) A person shall be qualified for appointment as Chief Justice if he or she is qualified to be appointed a judge of the Supreme Court and has been a judge of a superior court in a common law country for not less than ten years. (2) A person shall be qualified to be appointed a judge of the Supreme Court if he or she holds or has held office as a judge of the Court of Appeal, or as a judge of a court having similar jurisdiction in a common law country, in each case for not less than five years, or if he or she has practised as a legal practitioner before a court having unlimited jurisdiction in civil and criminal matters in a common law country for not less than twelve years. (3) A person shall be qualified to be appointed as a judge of the Court of Appeal if he or she holds or has held office as a judge of the High Court, or as a judge of a court having similar jurisdiction in a common law country, in each case for not less than five years, or if he or she has practised as a legal practitioner before a court having unlimited jurisdiction in civil and criminal matters in a common law country for not less than eight years. (4) A person shall be qualified to be appointed as a judge of the High Court if he or she holds or has held office as a Principal Magistrate or Master in The Gambia, or an office, which in the opinion of the Judicial Service Commission, enjoys a comparable jurisdiction in a common law country, in each case for not less than five years, or if he or she has practised as a legal practitioner before a court having unlimited jurisdiction in civil and criminal matters in a common law country for not less than five years. (5) In this section, "common law country" means – (a) a country within the Commonwealth; (b) a country outside the Commonwealth prescribed by an Act of the National Assembly for the purpose of this section the courts of which exercise a common law jurisdiction.'

48 B Asemota 'Supreme court session ends' *The Point* 13 June 2017.

49 A Dziedzic 'Foreign judges on constitutional courts' *International Association of Constitutional Law Blog* 13 June 2018.

50 Dziedzic (n 49).

51 International Bar Association 'Under pressure: a report on the rule of law in The Gambia' (August 2006).

Gambia's law faculty might indicate a limited pool of qualified lawyers.[52] Regardless of the ultimate reason for the inclusion of foreign judges, the effect of their presence is significant for the practice of judicial dialogue.

Foreign judges are deeply steeped in the tradition of their home jurisdictions, all the more so when they are required to have spent time serving in a superior court of that jurisdiction. Such deep expertise is a great resource for Gambian courts because it enables thoughtful consideration of the precedent they draw from other jurisdictions. Likewise, the home jurisdictions benefit from this experience when the judges return, bringing with them the experience and perspective they have gained while sitting on a Gambian court. Even when these judges do not explicitly cite their experiences in another jurisdiction, it is reasonable to presume that their judicial philosophy has been deeply shaped by the experience and it likely serves as an unconscious influence.

As a corollary to the experience of foreign judges in The Gambia, many Gambian judges also have significant experience with foreign or international courts. Chief Justice Hassan Babucar Jallow served on the Special Court for Sierra Leone and as Prosecutor for the International Criminal Tribunal for Rwanda.[53] Justice Cherno Jallow has worked in the office of the Attorney General of the British Virgin Islands.[54] Justice Mary Sey previously sat on the Supreme Court of Vanuatu as well as that of The Gambia.[55] And Justice Gibril Semega-Janneh was previously a judge in Sierra Leone.[56] It is equally reasonable to presume that their judicial philosophy has been shaped from these experiences as it is for Justices Datti Yahaya and Browne-Marke.

This cross-pollination can occur throughout the legal system. By virtue of their position, judges engage most directly in judicial dialogue. However, lawyers, paralegals, clerks, and other legal professionals also

52 There are, of course, many excellent senior lawyers from The Gambia who received their legal training abroad and then returned home. The claim here is not that qualified lawyers do not exist but rather that they are few compared to the need and the limited incentives for them to enter the judiciary.

53 K Jawo 'Hassan Bubacarr Jallow is new Chief Justice' *The Point* 16 February 2017.

54 KAF Touray 'Justice Cherno Jallow designated Constitutional Review Commission Chairman' *Foroyaa* 23 May 2018. In addition to his many other accomplishments, Justice Cherno Jallow also currently serves as Chairman of the CRC; one would hope that his previous legal exchange experience will inspire him to draft a constitution that is amenable to judicial dialogue.

55 B Asemota 'Six Gambians appointed Superior Court Judge' *The Point* 28 April 2017.

56 B Asemota 'Gambia: President appoints eight Gambian judges' *AllAfrica* 18 October 2017 https://allafrica.com/stories/201710181028.html (accessed 10 May 2019).

interact with counterparts from foreign legal systems. This includes both Gambians and non-Gambians with training or experience abroad who now work in The Gambia. As with judges, these interactions inevitably influence the way they understand and approach jurisprudence. They in turn influence judges and encourage the incorporation of foreign jurisprudence, thereby further promoting judicial dialogue.

3.3 International and regional instruments

Outside of its common law history, Gambian jurisprudence has additionally been shaped by international law. As discussed above, international law is developed not only through treaties but also through customary international law and the development of *opinio juris*. There are myriad ways through which The Gambia's relationship with international law entails judicial dialogue. Perhaps the clearest is its commitment to the African Charter on Human and Peoples' Rights (African Charter).[57] The African Charter can serve as a model for inviting judicial dialogue in a way that enables domestic courts to enhance the development of jurisprudence toward the promotion of human rights.

The Gambia ratified the African Charter in 1983 and serves as host for one of its main judicial bodies – the African Commission on Human and Peoples' Rights.[58] In line with the development of international law, the African Charter includes the following provisions:

> Article 60:
> The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.
>
> Article 61:
> The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international

57 Ratification Table: African Charter on Human and Peoples' Rights http://www.achpr.org/instruments/achpr/ratification/ (accessed 17 June 2019).

58 As above.

> norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.[59]

These two articles invite the African Commission to engage in judicial dialogue with other regional and international judicial bodies committed to the promotion of human rights. It provides priority to judicial dialogue within the continent but encourages a wider conversation as well. As a result, both the African Commission and the African Court for Human and Peoples' Rights have regularly cited international agreements and case law from other jurisdictions.[60] Additionally, the African Commission and the African Court engage in intra-system judicial dialogue analogous to that which might happen within a domestic system, whereby the Commission has the power to refer cases to the Court, the Court considers the Commission's assessment of the case, and each references previous cases from the other. This posture has enabled the African human rights system to develop jurisprudence rapidly, borrowing from its counterparts and adapting those elements most relevant to the African context.[61]

The specific textual mandate eases this process of adoption and adaptation. In contrast to the African Charter, the American Convention on Human Rights does not include an explicit directive to the Inter-American Commission on Human Rights or the Inter-American Court of Human Rights to consult external sources of law.[62] Decisions from the Inter-American system still engage international law but hesitate to cite sources from outside the region directly. As a result, the jurisprudence they develop can be convoluted at times, as they try to find a hook within Inter-American precedent to justify the development of a right. In contrast, the African Commission and Court regularly rely on external jurisprudence when interpreting the African Charter. This distinction is particularly evident in the African and Inter-American systems' jurisprudence on collective land rights for indigenous groups. In the seminal case for the Inter-American system, *Sawhoyamaxa Community v Paraguay*, the Inter-American Court cited only one external source within the paragraphs outlining its reasoning – an International Labour Organisation treaty.[63] The Inter-American Court's reasoning in the case is counterintuitive,

59 African Charter (n 7) arts 60-61.

60 M Talbot 'Collective rights in the Inter-American and African human rights systems' (2017) 49 *Georgetown Journal of International Law* 163 at 172-75.

61 Talbot (n 60) 182-83.

62 Organization of American States (OAS), American Convention on Human Rights, 'Pact of San Jose', Costa Rica, 22 November 1969, , 1144 UNTS 123.

63 IACHR (29 Mar 2006) Ser C/ Doc 146, paras 87-89,93-112, 127-44.

grounding collective land rights in the individual right to property. The logic is cobbled together and may prove difficult to extend to other forms of collective rights not associated with land.[64] In contrast, the African Commission in *Endorois v Kenya*[65] and later the African Court in *African Commission v Kenya* (case of the *Ogiek* people) regularly cited Inter-American and other external precedent, which facilitated a more coherent and logical analysis of the issue.[66]

The practice of judicial dialogue is not only useful for engagement across systems as we have seen in the case of the Inter-American and African human rights systems; it is also an effective mechanism for the development and diffusion of norms within a human rights system. In the Inter-American system, the notion of conventionality control requires domestic courts to consider the American Convention and other international commitments when interpreting domestic law. Perhaps even more significantly, the concept requires courts to recognise the authoritative nature of the Inter-American Court's interpretation of the Treaty and give it due consideration.[67] Although the concept of conventionality control is not as dominant in the African system, one can witness a similar effect in the use of decisions of the African Commission and African Court by domestic courts when interpreting provisions of the African Charter. In a key decision expanding the freedom of expression, *Peta v Minister of Law, Constitutional Affairs and Human Rights*, the Constitutional Court of Lesotho cited a resolution of the African Commission calling for the repeal of defamation laws as well as the African Court's decision in *Konate v Burkina Faso Government* applying the African Charter's right to freedom of expression to criminal defamation laws.[68] The *Peta* decision also directly cited The Supreme Court of Kenya's ruling in *Okuta v Attorney General* concerning criminal defamation.[69] *Okuta* had referenced the same African Commission Resolution and African Court decision as *Peta*.[70] Domestically, the decision in *Okuta* was then considered by Kenyan

64 Talbot (n 60) 172-75.

65 (2011) AHRLR 160 (ACHPR 2011).

66 Application 006/12, African Court on Human and Peoples' Rights, Judgment (26 May 2017).

67 González-Domínguez (n 9).

68 (CC 11/2016) LSHC 3 (18 May 2018) (citing the African Commission on Human and Peoples' Rights *Resolution on Repealing Criminal Defamation Laws in Africa* ACHPR/Res.169(XLVIII)10; *Konate v Burkina Faso*, Appl 004/2013, African Court on Human and Peoples' Rights (2014)). Lesotho's Constitutional Court deepened its analysis in *Peta* even further by also considering the review of freedom of expression made by both the European Court of Human Rights and South African courts in several cases.

69 *Peta* (n 68).

70 (397/2016) eKLR (6 Feb 2017).

courts attempting to apply the case on defamation to other issues related to freedom of expression. In *Andama v Director of Public Prosecutions* the court used the precedent to overturn a law criminalizing the publication of obscene material.[71] On the other hand, in *Kahiu v Mutua* the previous analysis was considered but ultimately the court found that a ban on the distribution of a film featuring a homosexual relationship did not violate the right to freedom of expression.[72] This string of cases demonstrates the process of diffusion as a norm is shared among jurisdictions and develops at each step.

Of course, The Gambia's participation in international law is not limited to the African Human Rights System or engagement with its fellow courts on the continent. Other international bodies to which it belongs also engage in similar judicial dialogue, even if not as explicitly as the African System.[73] The Gambia, in turn, aligns its domestic law with international standards established by these bodies, thereby participating in judicial dialogue that extends beyond the common law world. Consequently, consider the following example of how jurisprudence might flow between jurisdictions: The Inter-American Court for Human Rights might crystallise understanding of a right to development based on the *opinio juris* expressed in domestic (mostly civil law) courts throughout Latin America. The African Commission might then incorporate that approach, citing articles 60 and 61, when giving content to the rights enumerated in the African Charter. The Gambia then complies with its commitment to the African Charter and interprets the right to development in accordance with the African Commission's understanding. Adjustments to the definition that happen through this process might influence other jurisdictions and shape *opinio juris* over time.

4 Facilitation of judicial dialogue

Given the benefits of judicial dialogue, the question remains how best to encourage it. Such norm diffusion can be accomplished in at least two ways. First, it can occur through direct engagement with jurists from multiple jurisdictions. This can be achieved through both formal and informal means that provide space for judges and lawyers to interact. Second, judicial dialogue can occur through the direct reading and referencing of precedent from other jurisdictions. This second mechanism,

71 (214/2018) eKLR (31 July 2019).

72 (313/2018) eKLR (29 April 2020).

73 For example, Economic Community of West African States (ECOWAS), International Criminal Court (ICC), International Labour Organization (ILO), and International Court of Justice (ICJ), etc.

where judicial dialogue occurs within the context of published decisions, can be empowered by a textual mandate in the country's constitution. Even when no such textual mandate exists, judicial dialogue remains possible, but it can be undertaken more readily when explicitly permitted in the constitution. South Africa serves as a useful example of what such a textual mandate might look like in the new Gambian Constitution.

4.1 Membership, participation and interaction

The global community of legal professionals is vast. Yet within the narrower group of judges, and specifically those who sit on superior courts, there exists ample opportunity for professional interaction. Conferences draw legal scholars and practitioners from all over the world. Organisations hold gatherings where jurists share experiences and perspectives on the law. Non-governmental organisations (NGOs) and governments conduct trainings under the guise of capacity building and promoting the rule of law.[74] Anne-Marie Slaughter describes these activities as 'serv[ing] to educate and to cross-fertilize [as well as] broaden the perspectives of participating judges'.[75] Legal education sits at the core of each of these – forming the foundation of one's legal theory through exposure to other legal systems. In many cases, such legal cross-pollination occurs early in a lawyer's professional development and shapes his or her judicial philosophy if later appointed to the bench. Young Gambian lawyers often pursue education abroad, receiving legal training in South Africa, Europe, the United States, or elsewhere.[76] Many such programs include students and faculty from around the world, making the sharing of legal perspectives inevitable. Whether it occurs during the early stages of formal education or as part of continuing education throughout one's professional career, this engagement facilitates a deeper understanding of other jurisdictions, sowing seeds for future jurisprudence. It is an informal mechanism of judicial dialogue.

Gambia's inclusion of foreign nationals on its Supreme Court demonstrates its commitment to engaging the jurisprudence of other

74 For a review of the origin and history of these type of exchanges programs see SF Halabi & NK Laughrey 'Understanding the judicial conference committee on international relations' (2015) 99 *Marquette Law Review* 239.

75 Slaughter (n 10) 99.

76 The University of The Gambia's Faculty of Law was only founded in 2007, meaning that most senior attorneys received legal training abroad. For example, on the Supreme Court, Chief Justice Jallow studied in Tanzania, Nigeria, and the UK; Justice Sock studied in the US and Australia; and Justice Jallow studied in Malaysia and Barbados. It is likely that this tendency will continue as Gambians, even those trained locally, seek additional education abroad.

jurisdictions.[77] Few countries have gone so far as inviting perspectives from other countries into its judiciary. This commitment should be lauded and retained in any future constitution. Alongside it, The Gambia should continue to pursue opportunities for membership, participation, and interaction with transnational organisations that facilitate exchange between the judges of multiple countries.

4.2 Within the context of written decisions

The clearest form of judicial dialogue occurs within the context of written decisions. In many jurisdictions, courts provide a written explanation of the reasoning underlying the decision reached in a specific case. Such explanations are particularly useful in common law countries that rely on precedent for the analysis of future cases. The written decision provides insight into the reasoning of the court and which legal issues were dispositive. When written decisions are not available, future courts are uncertain how the decision was reached. Even in civil law countries without the emphasis on precedent, written decisions can be helpful because they explain how and why the law was applied. If a court is not bound by the principle of *stare decisis* such clarity remains beneficial because it leads to consistent and predictable application of the law.[78]

Not only are future courts able to understand the reasoning of a particular decision when it is written down, so too are foreign courts. Written decisions can inform the way those foreign courts approach similar cases and shape their own jurisprudence. Such horizontal dialogue occurs regularly across multiple countries.[79] It varies, however, in the extent to which the receiving court is explicit about the influence of the other jurisdiction.[80] The extent to which the court can be candid about its inspiration reflects its original mandate. As seen above, a judicial body such as the African Commission or Court that has been textually empowered to consult foreign sources of law can directly cite and analyse foreign decisions in its opinions. On the other hand, those like the Inter-American Court must be more discreet in citing foreign law.[81]

Even when courts lack explicit textual empowerment to consider the jurisprudence of other courts, they often still do so.[82] However, it becomes

77 See discussion above (sec 3.2).

78 Bell (n 17).

79 Slaughter (n 15) 1103-1105.

80 Slaughter (n 15).

81 See discussion above (sec 3.3).

82 See eg, the practice of Namibia. Spigno (n 26).

more difficult to do so openly or to the same extent. As a result, there are fewer citations to foreign courts in their written decisions.[83] Perhaps more importantly, the inability to openly engage with the foreign jurisprudence means that the court is not able to explain how or why it has adopted or altered the foreign precedent. Even if other jurists identify the unnamed source of inspiration, they might not understand why the adoption and any adaptations occurred if the receiving court does not explain. This leaves those in the receiving jurisdiction at a distinct disadvantage as they try to develop the jurisprudence further. Alternatively, the receiving court that is prevented from openly citing a foreign decision might seek to find a domestic hook for the inspiration it draws from abroad. Such justifications tend to be cobbled together and make for poor precedent.[84]

In contrast, when courts have a clear textual mandate that enables them to consider foreign or international law, they can openly engage with the ideas they draw from others. They can distinguish the application of a principle within the context of their country or criticise the shortcomings of the other court's analysis. Moreover, doing so creates a clear record and informs decisions made by lawyers and judges in future cases. This leads to the more rapid development of jurisprudence.[85]

4.3 The South African example

South Africa can serve as a useful example. The 1996 South African Constitution was adopted following the fall of apartheid and has become paradigmatic of the wave of late-20th-century constitutions.[86] Like the South African Constitution, many more recent constitutions include an emphasis on human rights and an enumeration of specific rights by name.[87] As a result, these constitutions tend to be long and detailed. As comprehensive as they may be, they are not able to anticipate every potential threat to or manifestation of human rights. Amendments enable modification but

83 See discussion above (sec 3.3).

84 See S*awhoyamaxa Community v Paraguay* (n 63); Talbot (n 60).

85 See *Endorois v Kenya* (n 65); Talbot (n 60).

86 The Constitution of the Republic of South Africa, 1996.

87 For example, The Constitution of Democratic Republic of the Congo, 2005 (including a total of 229 articles and 58 articles under the heading of 'Of human rights, of fundamental freedoms and of the duties of the citizen and of the state'); The Constitution of Ecuador, 2008 (including a total of 444 articles and 74 articles under the heading of 'Derechos' (rights)); The Constitution of Egypt, 2014 (including a total of 247 articles and 43 articles under the heading of 'Public rights, freedoms and duties' as well as other rights enumerated under 'Basic components of society'); The Constitution of Kenya, 2010 (including a total of 262 articles including a 'Bill of rights' encompassing 40 articles).

adaptability remains essential. Even in instances where explicit reference is made to external sources of law or international commitments, courts must be sufficiently nimble to adapt their jurisprudence as new issues arise or new applications of those international commitments emerge.[88] Active engagement with the reasoning of other courts is fundamental to judicial dialogue and enables the required agility, which does not necessarily result from the simple incorporation of international treaties into domestic law.

The South African Constitution anticipates this need by inviting judicial dialogue. Specifically, '[w]hen interpreting the Bill of Rights, a court, tribunal or forum. . . *must* consider international law and *may* consider foreign law'.[89] At the same time, courts are invited to develop the common law when applying the Bill of Rights: [90]

> When applying a provision of the Bill of Rights . . . a court—(a) in order to give effect to a right in the Bill, *must* apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

88 The example of Benin illustrates this point as well as the importance of political will to engage in judicial dialogue. The country's 1990 Constitution explicitly incorporates the African Charter on Human and Peoples' Rights (Constitution of the People's Republic of Benin, 1990, section 7: 'The rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986 shall be an integral part of the present Constitution and of Béninese law.'). It does not, however, include language guiding or explicitly permitting the Constitutional Court, Supreme Court, or lower courts to consider foreign or international jurisprudence in their deliberations. Following many years of Benin's Constitutional Court incorporating the protections of the African Charter into its domestic law, a recent conflict with the African Court demonstrates the difference between such incorporation and the active practice of judicial dialogue. In 2019 the Constitutional Court upheld a change to the election candidacy requirements. A citizen that was disqualified from seeking office as a result brought a claim before the African Court of Human and People's Rights, which found that the change violated The African Charter's protection of judicial independence, national consensus, and other fundamental rights. (*XYZ v Benin*, Application 010/2020, African Court of Human and Peoples' Rights, Judgment (27 November 2020). This presented the Constitutional Court the opportunity to engage the African Court in judicial dialogue and consider how the latter's interpretation of the rights enshrined in the African Charter might influence the manner in which those same rights were manifested in domestic law. Instead of pursuing such dialogue or addressing the African Court's concerns, the government of Benin instead withdrew the right of its citizens to access the African Court directly. (Government of Benin 'Retrait du Bénin de la CADHP – Déclaration du ministre de la Justice et de la Législation' Press Release (28 April 2020) https://www.gouv.bj/actualite/635/retrait-benin-cadhp---declaration-ministre-justice-legislation/ (accessed 14 July 2021).

89 Section 39(1) of the South African Constitution (emphasis added).

90 Section 8(3) of the Suth African Constitution (emphasis added).

> (b) *may* develop rules of the common law to limit the right, provided that the limitation is in accordance with [provisions of the Constitution].

The common law jurisprudence that results aligns with international law and draws inspiration from foreign jurisdictions. The Constitution's use of 'must' and 'may' guides the court. Depending on the source of law being consulted and the type of question at hand, the Constitution directs the court to either comply with or consider foreign law. Such parsing helps to distinguish judicial dialogue from the simple reception of foreign law because the court must discern which elements are most appropriate for adoption, modification, or rejection.

However, the question remains as to whether such language in the South African Constitution has been beneficial for the development of the country's human rights jurisprudence. Between 1995, at which point the interim constitution contained similar language, and 2010, the South African Constitutional Court cited foreign precedent in over half of the cases for which it issued decisions.[91] Yet some scholars believe that a textual mandate is unnecessary and that courts will undertake judicial dialogue regardless. The practice in Namibia seems to support this perspective.[92] Tara Leigh Grove claims

> courts with an internationalist [monist] view of their domestic charters do not need an explicit textual license to find that outside precedents, though not always dispositive, are nevertheless pertinent to constitutional interpretation.[93]

At the same time, she recognises a correlation between the understanding of the constitution and the likelihood courts will engage in judicial dialogue; those that see the constitution as isolated will minimise dialogue while those that 'perceive their constitutions as documents that "speak to," and listen to, the entire international community' are more likely to engage.[94] In short, the positioning of the constitution matters but a specific mandate for judicial dialogue is less important.

Similarly, David Law and Wen-Chen Chang, in addition to taking issue with the use of the term 'dialogue,' argue that even when courts do not directly cite sources of foreign law they seem to be inspired by foreign

91 Rautenbach (n 25) 194 (Of the total 403 decisions issues during that period, 209 cited foreign precedent).

92 Spigno (n 65).

93 Grove (n 29) 2052.

94 Grove (n 29) 2073.

jurisprudence.[95] Taking advantage of a natural experiment, they examined judicial decisions in Taiwan to challenge the claim that increased citation and interaction among judges results in increased reception of foreign jurisprudence.[96] Based on interviews with judges and clerks of the Taiwanese Constitutional Court, they concluded that comparative analysis is common despite the lack of judicial interaction or explicit citation.[97]

However, others believe that the text matters because it can signal the appropriate positioning of the constitution that Grove describes. Kate O'Regan, a scholar and former justice of the South African Constitutional Court, argues that a constitution directs courts in part by providing normative markers for the sake of analysing individual rights in context.[98] The reference to international law and invitation to consider foreign law provides one such marker.[99]

> In expressly permitting the consideration of foreign law, the door is firmly closed on the vigorous debate that is waged in the United States of America concerning the permissibility of considering the jurisprudence of foreign courts.[100]

A seminal South African case, *S v Makwanyane*, illustrates O'Regan's argument.[101] In *Makwanyane*, the Constitutional Court considered the death penalty under the Interim Constitution, which contained language about interpretation in light of international and foreign law.[102] As a

95 Law & Chang (n 20).

96 As above.

97 Law & Chang (n 20) 575: 'We do not dispute that globalization has had a profound impact on the capacity of judges to interact across national borders and, indeed, upon the development of constitutional law more generally. Nor do we question the value of comparative analysis for constitutional courts around the world that increasingly find themselves faced with similar questions and equipped with similar analytical tools. It is both conceptually inaccurate and empirically unwarranted, however, to characterize the way in which constitutional courts currently use foreign law as a form of "dialogue." And it is also doubtful whether actual dialogue of the literal, judge-to-judge variety has much impact on either the frequency or sophistication with which constitutional courts actually consider foreign law.'

98 O'Regan (n 16) 32 states: 'I do not assert that the text determines the outcome of every dispute. It does not. But I would assert that constitution text is the most important starting point for judicial decision-making.'

99 O'Regan (n 16) 21-26.

100 O'Regan (n 16) 24. For consideration of debate referenced in the US and an argument for increased judicial dialogue there, see M Flaherty *Restoring the global judiciary: Why the Supreme Court should rule in US foreign affairs* (2019) 240-251.

101 1995 (3) SA 391 (CC).

102 The Interim Constitution of the Republic of South Africa, 1993 art 35(1) states: 'In

result, the justices consulted international and foreign law alongside South African law and the text of the Constitution in striking down the death penalty. Justice Chaskalson engaged in an extensive comparative analysis, using international law and case law from foreign jurisdictions including the United States, Canada, India, Tanzania, and elsewhere.[103] Likewise, Justice Ackermann considered case law from the United States and India as well as the German Basic Law.[104] Justice Didcott cited multiple United States cases as well as one from Zimbabwe.[105] The other justices similarly consulted foreign law, resulting in a decision that thoroughly examined the issue before striking down the death penalty.[106] As O'Regan suggests, they took the language in the Interim Constitution as an indication of the sort of nation South Africa wanted to be: open and democratic, standing among the community of nations to advance human rights. As a result, it established a robust jurisprudential foundation as the nation transitioned out of apartheid. The *Makwanyane* decision stands as an example of the positive influence judicial dialogue can have.

Interestingly, and importantly, the act of comparative constitutional analysis and judicial dialogue does not require the reception of jurisprudence without critical evaluation. *Makwanyane* demonstrates this point. Despite a deep and rigorous examination of the death penalty in the United States where the practice remains widely permissible, the South African Constitutional Court ultimately determined that capital punishment was inconsistent with the Constitution's recognition of human rights.[107] Such consideration, evaluation, and ultimately rejection of foreign precedent suggest a method of constitutional interpretation and comparative analysis that enables South African courts to advance human rights principles.[108] Whether, and to what extent, it is facilitated by the Constitution's language may be unclear, but there is no indication that the text of South Africa's Constitution has hindered judicial dialogue or the development of jurisprudence.

interpreting the provisions of this Chapter a court of law shaw promote values which underlie an open and democratic society based on freedom and equality and *shall*, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and *may* have regard to comparable foreign case law' (Emphasis added).

103 *Makwanyane* (n 101).

104 As above.

105 As above.

106 As above.

107 *Makwanyane* (n 101).

108 Of course, this is not to suggest that the South African Constitutional Court is without its own issues or shortcomings, as all courts have.

5 Conclusion and recommendation

Given the potential benefits of judicial dialogue, The Gambia would be prudent to incentivise its facilitation through a new constitution or appropriate revisions to the existing constitution. Doing so will enable The Gambia to intensify the rate at which it develops its jurisprudence as well as allow it to contribute to the global development of international and common law. These factors are particularly potent for a nation, like The Gambia, emerging from decades of totalitarian rule. Judicial dialogue will promote the rule of law and advance human rights norms.

The Gambian Constitution can contribute towards that advancement by providing the judiciary with a clear textual mandate. Although there is disagreement about the extent to which such a textual mandate is necessary, there seems to be no significant disadvantage to its inclusion. Consequently, the inclusion of language like that in the South African Constitution is warranted even if its advantages are less than certain. Such a mandate would include the requirement that courts consult international law; and permission for courts to consult foreign law.

Requiring consultation with international law does not establish any new expectations. It simply reaffirms monist elements of The Gambia's existing approach to international law. The international instruments Gambian courts would consult are precisely those global and regional treaties the country is already obliged to follow. Non-treaty-based, customary international law is also binding when it reaches the level of a *jus cogens* norm.[109] In this respect, judicial dialogue does not create new requirements. Rather it enables the courts to more readily interpret and apply the law that is already applicable by making the monist approach explicit.

Similarly, permitting consultation with foreign domestic courts would not drift from established practice for Gambian courts. Instead, it would enable the judicial dialogue that has taken place among common law jurisdictions to continue openly and invite its extension to non-common law jurisdictions whose jurisprudence could be advantageous to The Gambia. Courts would exercise discretion in determining when and with whom such dialogue is appropriate. But like a requirement to consult

109 A Orakhelashvili 'jus cogens' in P Cane & J Conaghan (eds) *The new Oxford companion to law* (2008): 'The principal characteristic of peremptory law is its primacy over other international norms; and this results in the nullity of the conflicting norms, titles, and transactions.'

international law, a textual mandate permitting consultation with foreign domestic law simply allows dialogue to occur in a more transparent and candid manner.

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