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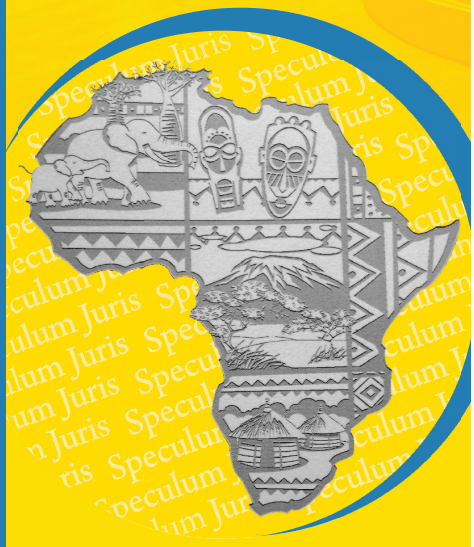

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Reflections on judicial cross-fertilisation in the adjudication of human rights and constitutional disputes in Africa: The case of Namibia

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Abstract

As globalisation is taking its toll on the twenty-first century, economic and political integration has become central in meeting the demands of the global world. The same can be said of the legal profession. As economic and political differences are becoming increasingly blurred, so too are differences in law and legal practice generally. Legal systems, more so judiciaries are therefore increasingly under pressure to harmonise and alfign their laws and systems with trends and developments in other legal traditions. In Africa, especially in common-law jurisdictions, judiciaries are continuously in a process of judicial dialogue, by engaging with each other's jurisprudence and legal material. Through systemic cross-judicial fertilisation and use of foreign judges in domestic legal systems, judiciaries in Africa are dialoguing. Namibia is an illustrious example of this process of cross-systemic judicial fertilisation, particularly in human rights and constitutional disputes. However, recent developments, beginning with the passage of Rule 130 of the Rules of the High Court of Namibia, are slowly stalling this process. This article is a reflection on the use, importance, and relevance of systemic cross-judicial fertilisation in Africa, with particular reference to Namibia. To this end, the article argues that judiciaries in Africa, more so in Namibia, need to encourage and strengthen the use of foreign law, though with caution, in domestic legal systems as a means to the emerging trend of harmonisation and universalism in laws,

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legal practice and legal systems globally.

Keywords: Africa, comparative law, human rights, judicial cross-fertilisation, Namibia

1 INTRODUCTION

Historically, globalisation was considered in terms of international trade and integrated markets and economies, and not necessarily in terms of global justice.[1] This trend is however gradually changing as judges, and as a consequence courts around the world, are beginning to form an integrated judicial system based on informal (and at times formal) judicial dialogues and engagements.[2] These dialogues, which are for convenience often loosely referred to as, "judicial cross-fertilisation", or, "intra (African) judicial dialogues", refers to a continuous informal process of judicial engagement and inter reliance amongst (African) courts of each other's jurisprudence.[3] Its output is usually premised on the systematic application of comparisons of law. Therefore, although not fully defined, conceptually, judicial cross-fertilisation and dialogues are somewhat intricate in comparative law, involving the use of foreign jurisprudence in domestic legal systems.

The growing support for and practice of judicial cross-fertilisation is no surprise, given the realities of globalisation and the swift paradigm shift towards harmonisation of laws and legal practice globally. Indeed, as Hahlo and Kahn once put it "no legal system of significance has been able to claim freedom from foreign inspiration".[4] Sub-Saharan Africa has not been spared from the occurrence of judicial dialogue. Often conventional wisdom has led African judges to borrow jurisprudence from their former colonial masters and from each other's legal systems.[5] At the dawn of colonialism, some imperial masters required courts and judges in their colonies to apply the law obtained in their countries with slight modifications. A glaring example worth noting is Uganda in East Africa. Uganda inherited colonial laws, including judicial precedent from Britain, its colonial master by virtue of Article 12 of the 1902 Orders-in-Council read together with the Foreign Jurisdiction Act of 1890, which defined the extent of the applicability of the Orders, including laws from the British administration in Uganda. This colonial legacy was maintained after Uganda obtained flag independence in 1962.[6] The French colonies had the more infamous *Code de l'indigénat* which for the most part became applicable or persuasive in former French colonies.

The colonial transplant of laws in African legal systems is also evident in Namibia. In the case of Namibia, provision was made that the "laws which were in force immediately before the date of independence shall remain in force until repealed or amended by an Act of Parliament or until they are declared unconstitutional by a competent Court",[7] somewhat passively obliging the courts to be wary of the laws of the colonial master. So it has been a historical practice, though not settled, that the colonial influence of law was carried on in the legal systems, curriculum and practice of most African states, whether Francophone or Anglophone.[8] However, African judiciaries, and as a consequence African courts, have now come to see themselves as autonomous members of a global legal community where knowledge and ideas are exchanged across geographies. In other words, reception and imposition of colonial laws, practices, and traditions, has turned to a widely accepted judicial practice amongst African judiciaries to make use not only of the instruments from the colonial masters but of each

1 Slaughter *A New World Order* (2004) 66–67.

2 See generally, Collste "Globalisation and Global Justice – A Thematic Introduction" 2016 *De Ethica. A Journal of Philosophical, Theological and Applied Ethics* 5–17; Collste "Globalisation and Global Justice" 2005 *Studia Theologica – Nordic Journal of Theology* 55–72; and Martinez "Towards an International Judicial System" 2003 *Stanford Law Review* 429–529.

3 See generally, Rautenbach and Du Plessis "In the name of comparative constitutional jurisprudence: The consideration of German precedents by South Africa Constitutional Court Judges" 2013 *German Law Journal* 1540. In the literature scholars have used different terminology though they in principle are referring to the use of foreign law in domestic legal systems. Typical examples include, "transjudicialism", "judicial comparativism", "constitutional cross fertilization", "globalization of national courts" etc. Each of these terminologies has its shortcomings, including "judicial cross-fertilisation", which is the preferred term for this chapter. See in particular some of the criticism labelled against the term "judicial cross-fertilisation" in Rautenbach and Du Plessis 2013 *German Law Journal* 1540. See also Rosenkrantz "Against borrowings and other nonauthoritative uses of foreign law" 2003 *International Journal of Constitutional Law* 270, particularly his conceptions of the term "borrowing" in a judicial context.

8 Fombad "Africanisation of Legal Education Programmes: The need for Comparative African Legal Studies" 2014 *Journal of Asian and African Studies* 384.

other's laws and jurisprudence.

While it is true that African judiciaries are gradually harmonising in both jurisprudence and legal practice, not all fronts have been similarly receptive of the idea of judicial exchanges, as is evident from the scepticism and criticisms levelled against the idea of cross-systemic judicial fertilisation.[9] To take one of many arguments, Robert Delahunty and John Yoo, in their study on the use of foreign legal material, have opined that the imposition of foreign law undermines the separation of powers as well as the textual and structural basis of judicial review in domestic legal systems.[10] Be that as it may, judicial cross-fertilisation has played and continues to play, a meaningful role in the adjudication of intractable human rights and constitutional disputes and situations, especially in those instances where there has been no clear judicial precedent available to municipal courts in their quest to settle legal disputes.[11] It has also been meaningful in the development of legal jurisprudence in many post-colonial African legal systems, which were, and in some instances still are, largely embryonic.[12] Moreover, cross-judicial dialogues have been instrumental in the "consolidation of an arising global constitutionalism",[13] because it seeks universal solutions to domestic legal problems.

This article reflects on the use and influence of foreign law through cross-systemic judicial fertilisation generally in Africa, with a stern focus on Namibia. The article argues that while the Namibian Constitution expressly provides for the application of international law in the Namibian legal system, in practice the courts have sought additional reference to comparative law and that this systemic use of comparative sources has enriched the human rights and constitutional jurisprudence of Namibia. It is therefore argued that while limiting the use of foreign law through formalised rules, such as Rule 130 of the High Court Rules may be a sound objective, resorting to and using such law could in certain circumstances assist the development of Namibian law in line with similar developments in sister common-law legal systems. More so, such reliance and use of foreign law may steer and align Namibian law and legal practice toward trends in the harmonisation of laws, legal practice, and legal systems globally. The article commences with an introduction, followed by a general discussion, in part two, on the relevance, potential, and challenges of judicial cross-fertilisation. By reference to two judicial decisions, the application of comparative law in Namibia is illustrated in part three, while part four focuses on how African courts, including the ones in Namibia can strengthen the practice of cross-judicial fertilisation. Part five concludes the chapter.

2 THE CASE FOR JUDICIAL CROSS-FERTILISATION IN AFRICA: RELEVANCE, POTENTIAL AND CHALLENGES

To fully appreciate and contextualise the phenomena of judicial cross-fertilisation in Namibia, it may be necessary to first analyse its relevance by reference to its advantages and disadvantages. Comparative engagements by judiciaries hold many advantages. Perhaps the most obvious advantage of judicial cross-fertilisation is its *aiding role*; that is, it can guide courts in addressing issues they were not previously confronted with. Courts the world over are increasingly confronted with legal disputes that are of first impression to them. To contextualise: A few decades ago, no one would have considered the possibility of sexual minority rights having to be adjudicated by courts. But today certainly, sexual minority rights are increasingly being questioned in courts of law, both domestically and internationally. Courts have therefore begun to seek aid by drawing from the settled practices, laws, and cases of sister legal systems. As the comparative law jurist, Rudolf Schlesinger, once argued, "whoever seeks rational solutions of perplexing social problems must recognise that there is much to be gained, not only by learning from the successes and failures of other systems, but also by a broader perspective

12 Okeke "Methodological Approaches to Comparative Legal Studies in Africa" in Mancuso and Fombad (eds) *Comparative Law in Africa: Methodologies and Concepts* (2015) 37; Chodosh "Comparisons: In Search of Methodology" 1999 *Iowa Law Review* 1068.

13 Pinto and Lois "Beyond the borders of the national Constitution: Cross fertilisation and Global Constitutionalism" (undated) 1 http://paperroom.ipsa.org/papers/paper_2833.pdf (accessed 04-11-2020). Others too have supported the use of comparative methodology in adjudication of human rights and generally legal disputes. These include *inter alia*, Kommers "Comparative Constitutional law: Its increasing relevance" in Jackson and Tushnet (eds) *Defining the field of Comparative Constitutional Law* (2002) 61–70; Ackerman "The rise of world constitutionalism" 1997 *Virginia Law Review* 771.

which a comparative approach provides."[14] Similarly Walter Kamba argues that[15]

> [w]hen one is confined to the study of one's own law within one's own country and, thus within one's own cultural environment, there is a strong tendency to accept without question the various aspects (norms, concepts, and institutions) of one's own legal system. One is inclined to think that the solutions of one's own legal order are the only possible ones. This leads to an idealization of one's own legal institutions and to treating them as inherent in the general nature of law."

In common-law countries, lacunae occur in instances where there is no legislation or binding judicial precedent to solve matters before such courts that have not been previously dealt with. Similarly, in civil-law jurisdictions courts may be confronted with questions of law that are not covered under any established code.[16] In such instances, the courts are duty-bound to fill the gaps left by these omissions, and in doing so judicial cross-fertilisation may be ostensible. Furthermore, the idea of judicial cross-fertilisation may also be useful in the elucidation in national legal systems of concepts, norms and principles which has a foreign origin. This transpires specifically in conflict of law cases,[17] where courts must make a choice of law between two or more legal systems. More in line with this reasoning, Carlos Rosenkrantz advances four basic compelling reasons in support of importing foreign law for domestic legal hiccups. First is what he terms the "genealogical argument"; that is, that there is a compelling case for judicial cross-fertilisation if and when domestic law and foreign law are "tied together by a relationship of descent and history".[18] Suppose, the drafting of a certain piece of legislation in country X is modelled and influenced by the textual and structural basis of a similar legislation in country Y, then the subsequent jurisprudential developments from that piece of legislation in country X can mirror and be idealised on the jurisprudence of the legislation in country Y because of its "genealogical" correlation and origins. Secondly, he suggests importing foreign law for domestic legal issues where the context requires borrowing from a foreign jurisdiction;[19] and thirdly on account of procedural considerations if a domestic court is confronted with a matter settled by another court if the decision by such a court was based on procedures that were designed to increase the reliability of these decisions.[20] Fourthly, where explicit reference is made, whether by law or political relic, it may at times be necessary to seek recourse from comparable foreign law and material.[21]

Judicial cross-fertilisation and intra-state judicial dialogues can contribute significantly to the unification and internationalisation of human rights and constitutional law generally. States are increasingly resorting to international treaties and decisions of supranational judicial bodies because of the fact that human rights in themselves are universal.[22] African states have repeatedly referred to international law, either expressly or impliedly, in their domestic constitutions, thus giving rise to the possibility that there is some sort of consensus on cross-cutting norms and values.[23] Accordingly, it should then not be too problematic to borrow from foreign jurisdictions of the same legal heritage, from time to time. The exchange of laws, to a considerable extent increases and will most likely continue to internationalise and strengthen the universal, interrelated, and interdependent nature of human rights and constitutional principles, while simultaneously creating a unification of human rights law across judicial borders. Thus, in the long run, there would most likely be a "blurring of lines between national and international law".[24]

But there are also challenges to (over) reliance of each other's jurisprudence. For example, scholars from predominantly civil-law jurisdictions, such as Pierre Legrand argue against

14 Schlenger "The Role of the "Basic Course" in the Teaching of Foreign and Comparative Law" 1971 *American Journal of Comparative Law* 618.
15 Kamba "Comparative Law: A Theoretical Framework" 1974 *The International and Comparative Law Quarterly* 491.
16 Pinto and Lois "Comparative Constitutional law" in *Defining the field of Comparative Constitutional Law* 37.
17 See for *Sperling v Sperling* 1975 3 SA 707 (A); and *Herbst v Suriti* 1991 2 SA 75 (Zm).
18 Rosenkrantz 2003 *International Journal of Constitutional Law* 278.
19 Rosenkrantz 2003 *International Journal of Constitutional Law* 279.
20 Rosenkrantz 2003 *International Journal of Constitutional Law* 280.
21 Ibid.
22 See generally, Killander (ed) *International Law and Domestic Human Rights Litigation in Africa: An Introduction* (2010) 1–220; Shelton (ed) *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (2011) 1–714.
23 Fombad 2014 *Journal of Asian and African Studies* 464.
24 Slaughter *A New World Order* 15.

the domestic use of foreign law in civil-law municipal systems. The argument is that the common-law *mentalité* is irreducibly different from the civil-law *mentalité*.[25] These two legal traditions are viewed as reflecting two modes of experiencing the world. *Mentalité* refers to the collective mental programme or epistemological substratum within a given legal culture.[26] One cannot transplant a legal rule from one legal culture to another unencumbered by its historical, epistemological, or cultural baggage.[27] This is particularly true if the argument that a rule is an expression of a given culture is correct. Legal rules and norms, it is argued, do not have any independent existence of the legal and social culture in which it exists. Pierre Legrand, therefore, opines that given the culture-specific meaning that a particular legal ethos attributes to rules, the full *meaning* of the rule cannot and does not survive the journey from one legal system to another. Therefore, to transport a single word without distortion, one must carry the entire language around it.[28]

In some legal systems, cross-judicial fertilisation is seen as less relevant in the sense that there is no consistent pattern, use or reliance on comparative judicial precedent.[29] This is particularly true of both common and civil-law traditions. In both these legal systems, there has been a considerable degree of discussions and criticism levelled, perhaps with persuasive reasoning, at the use of foreign material and jurisprudence, particularly in human rights and constitutional law-related matters. Fears have been rife amongst these critics that the unsystematic and uncritical use of foreign material, ideals, ideologies, and cases, may lead to absurdities in municipal systems if no proper adjustments and adaptations are made to local circumstances. This argument has prompted much caution and alarm in certain jurisdictions, to the extent that legal measures have been taken to safeguard the sanctity of domestic legal jurisprudence at the expense of comparative law. Namibia is a splendid example of one such jurisdiction, which has manifested its allegiance to "judicial nationalism", yet its fledging jurisprudence has gained momentously from comparative tenets from its sister legal systems in Southern Africa and beyond.[30] While not always explicit on their position as to the shortcomings of comparative law in the Namibian legal system, scholars have increasingly called for more reliance on domestic legal material. Samuel Kwesi Amoo's dicta in a preface to his monograph on property law in Namibia thoroughly delineate this argument, where he states:

> [F]ollowing the attainment of independence and sovereignty, Namibia has an independent judiciary with a Supreme Court as the highest Court of Appeal and therefore South African authorities only have persuasive effect on the courts of Namibia. The judicial independence endowed on the Namibian judiciary has led to the development of home-grown jurisprudence by the superior courts of Namibia since independence. The foregoing notwithstanding, the Parliament of Namibia in the exercise of its sovereign legislative function has promulgated pieces of legislation to address the needs of the Namibian people and in the process some pieces of legislation promulgated by the erstwhile colonial regime have either been amended or repealed. The cumulative impact is that Namibian law has acquired a national character and identity which must be captured and given due recognition …[31]

The argument that Amoo explicates is an age old traditionalist one founded on state sovereignty; that is the notion that the sovereignty of a state is based on the peculiar values, norms, and practices of the *incola*. Accordingly, it should be, so the argument goes, that "[s]

25 Legrand "European Legal Systems Are Not Converging" 1996 *The International and Comparative Law Quarterly* 52 63.

26 Legrand 1996 *The International and Comparative Law Quarterly* 60.

27 Legrand "The Impossibility of 'Legal Transplants'" 1997 *Maastricht Journal of European and Comparative Law* 111 114.

28 See generally Legrand 1996 *The International and Comparative Law Quarterly* 117, arguing "as the words [and legal norms] cross boundaries there intervenes a different rationality and morality to underwrite and effectuate the borrowed words: the host culture continues to articulate *its* moral inquiry according to traditional standards of justification. Thus, the imported form of words is inevitably ascribed a different, local meaning which makes it *ipso facto a different rule*. There always remains an irreducible element of autochthony constraining the epistemological receptivity to the incorporation of a rule from another jurisdiction, therefore limiting the possibility of effective legal transplantation itself".

29 Nigeria is a notable example of one such jurisdiction. See general the corroborative findings made about the inconsistent, irregular and weak use of foreign law in the Nigerian courts in the monumental study: Okeke "African law in Comparative law: Does comparativism have worth?" 2011 *Roger Williams University Law Review* 26–31.

30 Kariseb "*Westcoast Fishing Properties v Gendev Fish Processors Ltd & Another* – A tenet of 'judicial nationalism'" 2015 *University of Namibia Law Review* 89.

31 Amoo *Property Law in Namibia* (2014) viii.

tate sovereignty in the context of the Namibian judicial system and especially the jurisdiction of superior courts dictates that the precedents of the superior courts of Namibia take precedence of foreign precedents".[32] This conception has been given judicial notice in Namibia and has its own kilometric history that can be traced back to the Practice Directives issued by the then Judge President of the High Court of Namibia which was made applicable to the civil practice of the superior courts in Namibia in the late 2000s. In terms of clause 37 of these directives, legal practitioners are directed to refer to, and rely on, Namibian decisions and authorities in respect of a particular legal subject matter before the courts. Where such authority is lacking, counsel is expected to attest to the court that they are unable, after diligent search, to find Namibian authority on the proposition of law under consideration. However, with the review of the Court Rules in early 2014, Practice Directive 37 was reformed into Rule 130 of the Rules of the High Court of Namibia. On its part, Rule 130 states:

> [s]ubject to Article 140(1) of the Namibian Constitution, where a legal practitioner in his or her heads of argument or any other written submissions or oral submissions relies on foreign authority in support of a proposition of law –
>
> (a) he or she must certify that he or she is unable after (sic) diligent search to find Namibian authority on the proposition of law under consideration; and
>
> (b) whether or not Namibian authority is available on the point, he or she must certify that he or she has satisfied himself or herself that there is no Namibian law, including the Namibian Constitution, that precludes the acceptance by the court of the proposition of law that the foreign authority is said to establish."

Clearly from the above provision, one can deduce that there is a growing trend by the Namibian judiciary of what may be termed "judicial nationalism"; in other words, an inclination to domesticity. There is still considerable uncertainty as to the rationale behind Rule 130. The skeletal judgment of Geier J, in *Westcoast Fishing Properties v Gendev Fish Processors Ltd*,[33] dealt with the magnitude of Directive 37 (the sister provision to Rule 130) and therefore may provide some insight on the rational basis for the court's scepticism of comparative legal sources. By way of background, in this case, counsel for both parties filed their heads of argument with the court relying exclusively on South African authorities. Although both counsels were foreign to the Namibian legal system, they engaged the services of Namibian legal practitioners, albeit on a correspondent basis. The court thus raised the issue of noncompliance with Consolidated Practice Directive 37 of the High Court of Namibia with counsel at the hearing of the matter and eventually struck the matter from the roll.

Describing the matter as "not ripe" the court reasoned that the rationale for Practice Directive 37 was to serve "as a safeguard, [and] to ensure the achievement of the proper adjudication of all cases, [in this jurisdiction], in accordance with the applicable Namibian authorities."[34] The fear of the court it seems is that the continued reference and reliance on foreign authorities, particularly South African sources, would lead to absurdities because the legal systems relied upon are fundamentally different from the legal practice and system in Namibia. The court reasoned *inter alia* that:

> [A]lthough South Africa and Namibia, at the date of Independence, shared, what can generally be described as a common legal system, with a largely similar body of statutory and common law – (as recognised in the Constitution and in respect of which transitional provisions where required) – and where, since Namibia's Independence, the legal systems of Namibia and South Africa have started to diverge – as – in each country – the respective Parliaments continued to legislate – and where the courts continued to hand down judgments, in a legal environment that thus continued to change accordingly – it became important to take into account the developing differences, so that the general body of jurisprudence of this court would be developed in accordance and with reference to the particular – and often different

32 Amoo "The relevance of comparative jurisprudence in the Namibian legal system" in Horn and Hinz (eds) *Beyond a quarter-century of Constitutional Democracy: Process and progress in Namibia* (2017) 204.

33 2013 4 NR 1036 (HC). See also A 228/2012 [2013] NAHCMD 185 (28 June 2013) https://namiblii.org/na/judgment/high-court-main-division/2013-184.

34 *Westcoast Fishing Properties v Gendev* para 10.

> legal developments which had – and were occurring in each respective country.[35]

The court's concerns, as depicted in the above dictum, finds further support in the earlier decision of *Ex parte: Attorney-General; In Re: Corporal Punishment by Organs of the State*, decided before the formal promulgation of Rule 130. In that case, the Namibian Supreme Court had to address itself on the constitutional validity of corporal punishment by organs of the state. While concurring with the finding of the court, that corporal punishment by organs of state violates the right to human dignity, Berker CJ (as he then was) in a separate opinion made his reservations on the use of foreign law by holding:[36]

> [W]hilst it is extremely instructive and useful to refer to, and analyze, decisions by other Courts such as the International Court of Human Rights, or the Supreme Court of Zimbabwe or the United States of America on the question whether corporal punishment is impairing the dignity of a person subjected to such punishment, or whether such punishment amounts to cruel, inhuman or degrading treatment, the one major and basic consideration in arriving at- a decision involves an enquiry into the generally held norms, approaches, moral standards, aspirations and a host of other established beliefs, of the people of Namibia.
> In other words, the decision which this Court will have to make in the present case is based on a value judgment, which cannot be primarily be determined by legal rules and precedents, as helpful as they may be, but must take full cognisance of the social conditions, experiences and perceptions of the people of this country. This is all the more so as with the advent and emergence of an independent sovereign Namibia, freed from the social values, ideologies, perceptions and political and general beliefs held by the former colonial power, which imposed them on the Namibian people, the Namibian people are now in the position to determine their own values free from such imposed foreign values by its former colonial rulers. Added to this is the fact that in the case of Namibia the former colonial rulers, namely the Government of the Republic of South Africa, during their administration of our country embraced certain ideologies, values, and social conventions which were totally unacceptable to the Namibian people, and indeed to the rest of the world. It is therefore inevitable that on independence these ideologies, values and conventions would be discarded by the people and the Government of a free and independent Namibia, in the light of their experiences under the colonial rule.

Given the above, one can cautiously construe that the rationale behind Rule 130 (and perhaps its precursor Directive 37) seeks to ensure *particularity*; the fact that the Namibian society should be guided by its "*own*" legal rules and principles. Though justified an argument, Rule 130 may have drastic consequences for a relatively young legal judiciary. Namibia is a product of the international community, midwifed by the United Nations.[37] More importantly, it forms part of the common-law legal tradition premised on Roman-Dutch legal ideology. It is by far the youngest in terms of age and jurisprudence amongst the Roman-Dutch legal community. Given this reality, it has much to learn in the cementing and development of its legal system. It is therefore worrisome that its imposed limitation on the use of comparative law may hamper its jurisprudential maturity along with its common-law sister legal systems. As Walter Kamba rightly states, comparative use of law makes one "aware of the fact that the institutions, the laws and methods of one's own legal system are not the only possible ones in the world; that there are diverse ways in which different legal systems respond to similar types of social, [legal] and economic problems."[38] Comparative use of judicial precedent, therefore, remains relevant and important, particularly for nascent judiciaries such as the Namibian one.

It is worth noting that like in Namibia, the obstacle or rather the reluctance to rely on foreign law conflates amongst African jurisdictions. In fact, one can cautiously state that these scepticisms and reluctance is rife and common throughout the developing world. Hence in the Zambian context, though true and reflective of most of the developing world, professor William Church argued in the early 1970s that the imposition of foreign jurisprudence tends to make such law seem somewhat formal and artificial thus undermining the laws of the natives.[39] The desire for a legal system "geared explicitly and exclusively to local needs that is a concomitant of political independence", he further argues, necessitates a drive towards

35 *Westcoast Fishing Properties v Gendev* para 2.
36 SA 14/90 [1991] NASC 2 (05 April 1991).
37 See generally, Bösl, Horn and Du Pisani (eds) *Constitutional Democracy in Namibia: A Critical Analyses after Two Decades* (2010) 1–148.
38 Kamba 1974 *The International and Comparative Law Quarterly* 492.
39 Church "The common law and Zambia" in Ndulo (ed) *Law in Zambia* (1972) 31.

(judicial) nationalism, one that is based on a "distrust of anything connected with a past colonial power".[40]

Surely, the concerns of professor Church (and those of like-minded thinking) are credible and deserves to be accorded the necessary persuasive effect and academic courtesy. However, as fruitful and persuasive as some of these arguments are one should not and cannot shy away from the flaws and oversight of some of the advances made. Not only are professor Church's arguments – as good and accurate as they appear – quite frankly obsolete but they are equally counterproductive. If, as he put it, the basis of rejecting foreign law is "it is tainted because of its past association with colonialism, as at best an encrusted relic merely temporarily inherited at independence" is anything to come by, then surely that argument breeds a rebuttal.[41]

Received law cannot be rejected solely based on its past colonial association. It is a complete misdirection firstly to suggest that nothing good came out of colonial legal orientations. This is not to say that colonialism was indeed legitimate and acceptable. Quite the opposite. It is instead a rejection of the argument made by William Church and some others that the mere origins of foreign law lend it to be either colonial or inherently oppressive. There is a grave danger attached to such reasoning because even some domestic laws and practices of post-colonial African states are tainted and brutally oppressive in nature. One may only refer here to African customary laws in most African states that have the effect of exploiting women and the girl child. Or, consider the many presidential laws that have saturated political power in political elite and has left many African states politically and economically dysfunctional.[42] These are all indigenous laws, breed and authored by Africans themselves. Foreign law should therefore not solely on account of its origins be regarded as oppressive and thus not legitimate to cross-fertilise in African legal systems. In any event, local municipal legal systems can never in their entirety be severed from their colonial legal models.[43] This historical reality in simple terms means that African courts would repeatedly have to borrow jurisprudence from other legal traditions.

As stated above, it has also been explicated that foreign law may not always be mindful of domestic circumstances. This has particularly been the argument put forward in the case of Namibia. Again, this thesis requires rebuttal. It should be iterated right from the outset that the use of foreign law should not be seen as erasing the role of local jurisprudence. In this sense judicial cross-fertilisation merely seeks to complete domestic legal jurisprudence. In all material circumstances, judicial cross-fertilisation should only be invoked to the extent that it reflects and addresses domestic peculiarities. Surely, an uncalculated blanket application of foreign law in domestic legal systems should be estopped at all costs. Judges should therefore first be guided by domestic jurisprudence and developments, and where need be, seek recourse to foreign material in the absence of such local content. Owing that most, though not all, foreign law that is fertilised in local legal systems have colonial origins, there has often been a charge made that the use of such laws leads to "a historic privileging of "Global North" knowledge and worldviews with a concomitant under-valuation and marginalisation of thought from Africa".[44]

The two-pronged question that remains to be answered is whether courts should altogether do away with judicial cross-fertilisation, or, as has been the central argument in this article, keep engaging in such processes. It is quite evident from the advances and analysis made in this chapter, that there are persuasive arguments on both side of the board. This makes the choice of either reinforcing or rejecting judicial cross-fertilisation extremely difficult. Nevertheless, there are at least two possibilities to address this challenge. The one position is based on a radical and confrontational approach that suggests that nothing good can come from foreign law given its formative colonial roots. Such an exclusionary approach presupposes that foreign law is colonial in nature and is distinct from domestic (African) systems. Accordingly, its

40 Ibid.
41 Ibid.
42 See for instance the broad discussion made by Charles Manga Fombad narrating how African leaders leave national constitutions dysfunctional by tempering with its content: Fombad "Constitutional Reforms and Constitutionalism in Africa: Reflections on some current challenges and future prospects" 2011 *Buffalo Law Review* 1007–1108.
43 See generally, Okeke "Methodological Approaches to Comparative Legal Studies in Africa" in *Comparative Law in Africa* 41–42, where he discusses in finer detail the impact of colonialism on comparative legal studies in Africa.
44 Bilchitz, Metz and Oyowe (eds) *Jurisprudence in an African Context* (2017) 4.

application would reinvent the wheels of colonialism, distort traditional African conceptions of law, and depreciate peculiar domestic circumstances and context. As such African courts, more specifically Namibian courts, should exclusively rely on domestic legal case law and material in developing its jurisprudence as this will remedy the historical imbalances brought about by the colonial past.

In contrast, the more flexible and "inclusive" approach, suggests that "key currents of thought that have influence in [the] global discussions",[45] and local African thoughts are merged and equally represented. Such an approach recognises that domestic legal systems are part and parcel of a global community, let alone a global legal system and that ideologies from the developed world and developing world need not always be divorced. In this regard the postulation by David Bilchitz, Thaddeus Metz and Oritsegbubemi Oyowe is not only correct but persuasive; namely that the "impulse towards understanding ideas from beyond one's own immediate setting is not something human beings should seek to overcome, but instead should embrace".[46] In the premise, it should in principle not be hard for an African court to apply, for example in the case of expropriation law, say the established "Hull principles" despite the "Northern" origins of these principles, or, as the Zimbabwean Constitutional Court recently did in *S v Chokuramba*,[47] by relying on the Namibian jurisprudence in *Ex parte in Re: Corporal Punishment by Organs of the State*, in confronting the question, whether judicial corporal punishment is constitutional and permissible in law. Given the above, a more nuanced flexible approach is ideally what should be sought, one that does not reject foreign law merely based on its alien character but that appreciates the use of such law to meet domestic needs and circumstances in appropriate instances, and where applicable.

3 JUDICIAL CROSS-FERTILISATION WITH REFERENCE TO NAMIBIAN CASE LAW

This section seeks to illustrate the use and application of comparative foreign law in guiding the Namibian judiciary in addressing intricate constitutional and human rights cases. It is worth noting to begin with that in contrast to the explicit acknowledgement of international law in Article 144 of the Namibian Constitution, the Namibian Constitution does not provide for any explicit legal basis for courts in Namibia to make use of foreign law through comparative techniques. Nevertheless, Namibian courts have through practice given preference to comparative usage of law, particularly foreign case law.[48] This practice has been more prevalent in instances where the propositions of law relate to human rights or constitutional law. In what follows below, I specifically draw attention to two cases because of their explicit use of comparative law. In the instance of the decision in *Ex parte Attorney-General; In re the Constitutional Relationship between the Attorney-General and the Prosecutor-General,*[49] the value and use of comparative law in cases of first impression is illustrated. This case involved an interpretation of a constitutional provision. In contrast, with the decision in *Shaanika v Windhoek City Police*, the importance and use of foreign judicial officers is demonstrated. This case involved human rights issues.

3 1 *Ex parte Attorney-General; In re the Constitutional Relationship between the Attorney-General and the Prosecutor-General (1995)*

Perhaps the most explicit example of empirical use of comparative constitutional law can be attributed to the 1995 Namibian Supreme Court decision in *Ex parte Attorney-General; In re the Constitutional Relationship between the Attorney-General and the Prosecutor-General*. In this case, the Attorney-General of the Republic of Namibia brought a petition in terms of section 15(2) of the Supreme Court Act 15 of 1990, read together with Article 87(*c*) of the Namibian Constitution which provided amongst others that "the Attorney-General shall exercise [the] final responsibility for the office of the Prosecutor-General". The question for determination before the court was whether the Attorney-General, in pursuance of Article 87 of the Namibian Constitution and in the exercise of the *final responsibility* for the office of the Prosecutor-

45 Bilchitz et al *Jurisprudence in an African Context* 5.
46 Ibid.
47 (CCZ 29/15) [2019] ZWCC 10 (3 April 2019).
48 See generally, Zongwe "Equality Has No Mother but Sisters: The Preference for Comparative Law Over International Law in the Equality Jurisprudence in Namibia" in *International Law and Domestic Human Rights Litigation in Africa* 123–148.
49 1991 3 SA 76 (NSC).

General, has the authority to: (i) instruct the Prosecutor-General to institute a prosecution, to decline to prosecute or to terminate a pending prosecution in any matter; (ii) instruct the Prosecutor-General to take or not to take any steps which the Attorney-General may deem desirable in connection with the preparation, institution or conduct or any prosecution; and (iii) require that the Prosecutor-General keeps the Attorney-General informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority.

In deconstructing the relationship between the office of the Attorney-General and the Prosecutor-General, the court drew on empirical models,[50] most of which derived from express provisions in the various commonwealth constitutions, and came to the conclusion that the Prosecutor-General in Namibia is a public servant subject to the administrative scrutiny of the office of the Attorney-General. The court undertook a thorough comparative analysis of the practices in commonwealth jurisdictions. For the most, the court referred to the practice in England, where the Director of Public Prosecutions acts under the 'superintendence of the Attorney-General' and may in special instances be directed by the Attorney-General. The court's position was that even though in England the Attorney-General exercises superintendence over the Director of Public Prosecutions, "in practice he/she seldom, if ever, exercises control over prosecutions". Instead, there exists a constitutional relationship of trust based on frequent and regular consultations. However, the court rejected reliance on the English model in its entirety primarily because of the danger of political appointees allowing political considerations to influence their decisions. Rather the court proposed through its close analysis of the roles of the Prosecutor-General and Attorney-General, that the English practice of "ongoing consultations and discussions which would be in the best interests of the cause of justice …".[51] To this end the court held that the "Prosecutor-General having been appointed by an independent body, should be regarded as truly independent subject only to the duty of the Prosecutor-General to keep the Attorney-General properly informed so that the latter may be able to exercise ultimate responsibility over the Office of the Prosecutor-General".[52] Such ultimate responsibility is to include both financial responsibility and the duty to account to the President, the executive and the legislature.

Until such time that this decision was made in late 1995, there remained uncertainty as

50 The Court analysed the following prosecutorial models: Model 1 (Where the Attorney-General is a public servant, combines with his office the public functions of a Director of Public Prosecutions and is not subject to the directions or control of any other person or authority. Countries exemplifying this model include Kenya, Sierra Leone, Singapore, Pakistan, Sri Lanka, Malta, Cyprus, Western Samoa, Bahamas, Trinidad and Tobago, Botswana and Seychelles (South Africa can now be added to this list.); Model 2 (The Attorney-General is a political appointment. He is a member of the Government but, although holding Ministerial office, he does not sit regularly as a member of the Cabinet. Alone of all the Commonwealth countries, strangely enough, the Attorney-General of England and Wales typifies this particular category); Model 3 (The Attorney-General is a member of the Government and, as such, is normally included in the ranks of Cabinet Ministers. In some jurisdictions, though this is by no means a universal practice, the office of the Attorney-General is combined with the portfolio of Minister of Justice (or similar title). Most of the Canadian provinces and the Federal Government have adopted this model. Other countries that fall within this category include Australia (both the States and the Commonwealth Government), Nigeria and Ghana. Where, in these jurisdictions there exists a Director of Public Prosecutions (or its equivalent), the Director is, in the ultimate analysis, subject to the direction and control of the Attorney-General); Model 4 (The Director of Public Prosecutions is a public servant, who is not subject to the direction or control of any other person or authority. This model will be recognised as the classic Commonwealth officer pattern which the United Kingdom Government consistently sought to incorporate in the independence constitutions of many of the countries represented at the present meeting. Following independence in many countries, this particular provision was changed to bring the Director of Public Prosecutions under the direct control of the Attorney-General. Jamaica and Guyana, however, have retained the total independence of the office of Director of Public Prosecutions); Model 5 (The Director of Public Prosecutions is a public servant. In the exercise of his powers he is subject to the directions of the President but to no other person. This is the situation that exists in Tanzania and which prevailed in Ghana during the latter stage of the first Republic from 1962 to 1966); and Model 6 (The Director of Public Prosecutions is a public servant. Generally the Director is not subject to control by any other person but if, in his judgment, a case involves general considerations of public policy, the Director must bring the case to the attention of the Attorney-General, who is empowered to give directions to the Director. This model is applicable in Zambia alone at present. In Malawi, it is of interest to note, the Director is subject to the directions of the Attorney-General. If, however, the Attorney-General is a public servant, the Minister responsible for the administration of justice may require any case, or class of case, to be submitted to him for directions as to the institution or discontinuance of criminal proceedings).

51 1991 3 SA 76 (NmSC) 39.

52 1991 3 SA 76 (NmSC) 38–39.

to both the roles and relationship between the Attorney-General and Prosecutor-General, though both were constitutionally established and mandated offices. In its search for a settled response to this uncertainty, the court's reliance on comparative methodology on the practices in commonwealth jurisdictions brought legal certainty in an instance of legal uncertainty. Hence, to date, Namibia's position resembles and resonates the practice adopted in the English legal system.

The *Ex parte Attorney-General* decision serves as an illustrious example of the effectivity of comparative law in assisting courts in finding solutions to legal problems that may not on face value be settled or easily ascertainable based on domestic sources.

3 2 *Shaanika v Windhoek City Police*

The 2013 Supreme Court decision in *Shaanika v Windhoek City Police*,[53] is another notable decision that not only illustrates the receptive nature of the superior Courts of Namibia to the application of foreign material but also the value and influence of foreign judges in enriching the jurisprudence of a local court. By way of background, the *Shaanika* matter concerned an appeal petition before the Namibian Supreme Court in which the Applicant, Mr Petrus Shaanika and ten others, sought an order interdicting the Municipality of Windhoek and its agency, the Windhoek City Police, from demolishing their structures which they had erected on the Respondents land without prior consent. The Appellants also sought a declaration that subsections 4(1) and (3) of the Squatters Proclamation 21 of 1985 (the Squatters Proclamation) be declared unconstitutional and therefore invalid and of no force and effect. It was common cause amongst the parties that the land the Appellants had occupied belonged to the Respondent and that they had occupied such land without prior consent or authorisation from the Respondent.

In the High Court, it was found that the Applicants were lawfully evicted from the Respondents land since the occupation of the land was unlawful. The High Court based its discharge of the rule on the "doctrine of unclean hands". The court found per Damaseb JP (as he then was) that the Appellants (the Applicants before it) had not come to court with clean hands, in that they admitted that they were living unlawfully on the Respondents' land. Aggrieved by the High Court's decision, the Appellants petitioned the Supreme Court for relief.

The question that arose before the Supreme Court was first, whether the High Court erred in refusing to consider the Appellants application based on the doctrine of unclean hands; and secondly whether section 4(1) and/or 4(3) of the Squatters Proclamation was inconsistent with the Namibian Constitution. Upholding the Appellants application, the Supreme Court, per O' Regan AJA (as she then was) ordered the Windhoek City Municipality not to demolish and/or remove any structure or building belonging to the Appellants without first obtaining an order of court. The court's position was that an Applicant who had acted only unlawfully is not barred from seeking relief from a court; he or she must have also acted dishonestly or fraudulently.

In the instant case, the court was convinced that although the Appellants' occupation of the Respondents' land was illegal, it was necessarily not out of malice but rather out of desperate circumstances. To the court it was the effect of section 4(1) and 4(3) of the Squatter Proclamation that detracted from the principle of the rule of law. The said impugned provision had the effect, as the court held, that a landowner may, without a prior order of court, and without notice to any occupants, demolish, and remove any structures that have been erected on the land without the consent of the landowner. Section 4(1) also authorises local authorities, again without a prior order of court and without prior notice, to demolish and remove any structures erected on land without the prior approval of the local authority. The court found this to conflict with Article 12 of the Namibian Constitution. The court stated that the right of access to courts is an aspect of the rule of law, and the rule of law is one of the foundational values of a constitutional democracy. In interpreting Article 12 of the Namibian Constitution, the court referred to the European Court of Human Rights' (ECtHR) interpretation of Article 6(1) of the European Convention of Human Rights (ECHR), and argued that any limitation of the right of access to courts would, in any case, have to be consistent with the principle of proportionality as the ECtHR had reasoned in respect of Article 6(1) of the ECHR. The court further argued that, given the personal importance of homes, it was hard to imagine a more

53 SA 35/2010 [2013] NASC 3 (15 July 2013).

invasive action than the destruction of homes or removal of their contents, and that, in a city with a shortage of affordable housing and land, the risk of social conflict is particularly high. Given these implications, the court held that it is essential to ensure that an independent and impartial tribunal finds an eviction to be lawful before any harmful action is taken.

The decision in the *Shaanika* judgment is another point in case that demonstrates the value of the application and use of foreign law. But its value can be drawn more on the fact that foreign judges with their vast judicial wisdom can enrich domestic legal systems. Although O' Regan J, the lead judge in this particular case, did extensively reference South African case law that dealt with the matter before the court, her input and insights from those jurisprudential developments in her own native country, to a considerable extent influenced her judicial acumen and reasoning in this case.

It is a general truism that there are similar and perhaps even more explicit cases, legislation, and other legal material in African states that demonstrate the relevance and importance of comparative use of legal material. Even in Namibia there are a plethora of cases beyond the above mentioned two cases that speaks to the advantage of using foreign legal material. Such examples make a compelling argument that legal systems are in constant need of each other and that the relevant stakeholders of such legal systems should continue to encourage comparative usage of each other's material.

4 TOWARDS THE FURTHER STRENGTHENING OF JUDICIAL CROSS-FERTILISATION AND DIALOGUES IN NAMIBIA (AND BEYOND)

Although the importance of comparative techniques in legal systems may be self-explanatory, if not evident, some African states remain sceptical of foreign legal material. Such scepticism may at times be explicitly stated, while at other instances be evident from practice. For example, some African states such as South Africa prohibit alien legal practitioners, no matter their eminence and experience in law, from practising law in their courts. Limitations in the use and incorporation of comparative law as a course in (African) law schools also further cement this assertion. For the most part, therefore, comparative law and technique are slowly phasing out in the legal systems and legal practice in African states, including Namibia. In Namibia, as stated elsewhere in this article, the promulgation of Rule 130 of the Rules of the High Court of Namibia Rules is but one single, but potential detrimental development to this effect. There is, therefore, need to encourage and strengthen the comparative use of laws in African states. It is the argument of this article that such a process should ideally begin at the grassroots level, particularly at the teaching phase of law. Law schools, in particular, have a duty to expose their students to laws and judicial teachings beyond their domestic jurisdictions.

Many legal education programmes have maintained the character and content that was imposed during colonialism. This is also true of Namibia whose legal system still to a considerable extent resembles its colonial masters. This necessitates a dialogue between the laws and legal systems of the colonial master and colony. Often, scant attention is paid to the comparative study of African legal systems. Comparative law is barely offered as a course in most African law schools. In those schools that do offer it, it is either offered as an elective or reduced to a semester course.[54] This situation is no different in Namibia. Another shortcoming is that where comparative law is offered in African law schools, it is often with reference to western legal traditions (to the detriment of African legal sources), which further perpetuates the dangerous myth that African legal studies are irrelevant or even of lesser importance. This problem begets another challenge: The failure of judges to understand when and how to use foreign jurisprudence in their own jurisdictions. Judges who lack any basic familiarity with foreign decisions (and a sound understanding of foreign language) are reluctant to refer or consider them in their adjudication lest they misinterpret or misuse them.[55] In addition to some of the substantive issues raised above, engagement of foreign jurisprudence also raises methodological issues that is, in terms of which countries and which cases, for instance, should be the subject of comparative engagement or what approaches are to inform judicial processes of comparison. Methodological clarity is important because the absence of such an approach or approaches may lead to absurdities. Although as Konrad Zweigert and

54 Fombad "Comparative Research in Contemporary African legal studies" 2018 *Journal of Legal Education* 984–985.

55 Rosenfeld and Sajo "Introduction" in Rosenfeld and Sajo (eds) *Oxford Handbook of Comparative Constitutional Law* (2012) 12.

Hein Kots correctly once argued "it is doubtful whether one could draw upon a logical and self-contained methodology of comparative law",[56] at a subminimum, judges have several options in addressing methodological shortcomings. On the one hand there is the option of undertaking an explanatory approach. This is more suitable in those instances where courts seek to explain a law or legal principle by drawing on its historical background and evolution in a comparative context in order to develop a local law. On the other hand, in some instances, a descriptive approach would be more appropriate especially in simpler cases requiring mere identification and or description of an applicable norm or law by reference to two or more areas or jurisdictions as a prelude to subsequent analysis. Whichever the approach is taken, careful reflection should be made of the selection of the material selected or jurisdictions identified for comparism, in which case like must be compared with like predominantly.

African law schools, including Namibia, should, therefore, develop curricula with a focus on comparative African legal studies. This is especially important as the continent seeks to harmonise some of its laws through initiatives such as the Organisation for the Harmonisation of Business Law in Africa (OHADA) and the Pan-African Parliament (PAP). Increasingly the Conference of Constitutional Courts in Africa has also begun to foster space for intra-African dialogues. Clearly, the integration of comparative African legal studies within legal curricula in Namibia will also require the teaching of relevant and related case law in local curricula even if those cases and material are not necessarily of the same legal system. The universal nature of fundamental human rights and freedoms globally is reason for African judiciaries to gradually integrate and engage comparative reasoning and dialogue on legal disputes before their domestic benches. There is, therefore, more to be done in terms of intra-Africa judicial dialogue.

Another means in which African judiciaries can strengthen judicial engagement is through the liberalisation of the appointment of judicial officers. Notwithstanding its fair share of drawbacks,[57] domestic judicial systems should consider appointing foreign judges to local benches, especially those with vast judicial experience, because of the diversity in which they can enrich a particular system. This practice has been ongoing, at least in Southern Africa, where retired South African and Zimbabwean superior court judges have been serving, oftentimes in acting capacities in Namibia, eSwathini, and Lesotho.[58] This practice has to a considerable extent enhanced the judicial faculty of these judiciaries, given the reality that they are to date still relatively embryonic and developing when compared to their South African counterpart. It is also important that judges be afforded opportunities to make regular informal contact with each other, through conferences and seminars for instance. After all it is in these informal gatherings and settings that judicial ideas are examined leaving judges judicially stimulated and fertilised in preparation for the bench. Furthermore, it is at these informal gatherings that judges encounter the practice of law with the theory of law. Even more importantly, these gatherings offer practical opportunities for judges and members of the judiciary to engage one another on challenges facing their judiciaries.

5 CONCLUSION

The central argument of this article has been that comparative law, especially through cross-systemic judicial fertilisation remains an important aspect for the harmonisation of laws and legal practice in Africa and beyond. As globalisation is taking its toll in the twenty-first century, economic and political integration has become central in meeting the demands of this century. The same can be said of the legal profession. As economic and political differences are becoming more blurred, so too are differences in law and legal practice generally. Legal systems, more so judiciaries are therefore increasingly under pressure to harmonise and align

56 Zweigert and Köts *An Introduction to Comparative Law* 33.

57 Appointment of foreign judges often raises issues of independence as well as lack of particularity or "reflexivity" in some instances. See for in this regard some criticisms raised against the use of expatriate judges; Dziedzic "Foreign judges on Pacific Courts: Implications for a Reflective Judiciary" 2018 *Federalismi* 1–28; Tjombe "Appointing acting judges to the Namibian bench: A useful system or a threat to the independence of the judiciary?" in Horn and Bösl (eds) *Independence of the Judiciary in Namibia* (2008) 229–242.

58 For example, in terms of s 9(*d*) of the Supreme Court Act, 1990 of Namibia, a foreign judge/national may be appointed to serve under the Namibian judiciary, if such a person has held office as a judge in any other country which in the opinion of the Chief Justice of Namibia is a country whose legal system and legal institutions are sufficiently comparable with the legal system and legal institutions of Namibia as to make judges of such a country suitable.

their laws and systems with trends and developments in other legal traditions. Without any doubt comparative use of foreign law would be an important ingredient to this global process of harmonisation and universalism of laws and legal systems.

Clearly, over the years, especially during the first formative years of the judiciary, the superior courts of Namibia have demonstrated a preference for comparative use of foreign law. Part of this preference can be inferred from the fact that the Namibian legal system, like most former colonies, was closely linked to its colonial master and for purposes of legal certainty reliance was a sine qua non. Consequently, Namibian law and consequently its legal system is greatly influenced by the South African legal system. But with time, the two countries have moved in different directions and this has given rise to a new shift in the Namibian courts, now seeking to strengthen its own legal system with reference to its own circumstances. The introduction of Rule 130 of the Rules of the High Court of Namibia seeks to safeguard this position. While particularity is important this article makes the noble argument that African courts, more so Namibian courts, should not be too sceptic in drawing from the jurisprudential developments in sister legal systems, especially those similarly placed with its own legal system. This is not to suggest that every legal development produced by the superior courts in Namibia should be premised on cross-judicial dialogues from sister legal systems. Rather the argument is that through cautioned comparative engagements with other judiciaries, the Namibian legal system can enrich its jurisprudence; and ensure a harmonised legal system. It would be judicially unethical of the Namibian judiciary, as Charles Fombad once articulated, '… to isolate itself from the rapid changes in legal thinking and analysis and from the fresh approaches and new insights generated by international jurisprudence to deal with common problems'.[59]

59 Fombad "Internationalisation of Constitutional Law and Constitutionalism in Africa" 2012 *American Journal of Comparative Law* 458.