The convergence of legal systems in Southern Africa

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Abstract
In this article, the integration of laws in Africa through unification, harmonisation or convergence is considered. With regard to the integration of the laws of different countries in southern Africa, reference is made to the countries belonging to the South African Law Association and the states of the Southern African Development Community (SADC). Initially the legal systems of the former group of countries corresponded not only in ideology, method and approach, but also in content. As expected these laws started diverging when they were implemented and interpreted by their different national judicial institutions. Published material on SADC seems to be directed only at economic and international economic law or the enforcement of foreign judgments and the harmonisation of private law has so far not entertained much attention. In South Africa the natural convergence of the Indigenous African law and the imposed western law seems unlikely and harmonisation difficult because the multicultural legal community does not share common perceptions of the concept of law, a theory of valid legal sources, a legal methodology, a theory of argumentation and of legitimation of the law, or a common basic legal ideology.

Introduction
Legal writing on the unification, harmonisation or convergence of private law in Europe abounds. The focus is no longer on the desirability of the coming together of laws for the building of a Europe united on an economic, political, social or even a military level. It is rather on the method of achieving such a unified system of private law.1 Yet, since the latter half of the 1990s, both the concept and the feasibility of achieving unification has been criticised. The idea of a unified European law — which implies a total integration of legal concepts, rules and cultures — has now been renounced in favour of harmonisation or convergence, both of which imply that whilst changes take place, differences will remain and the separate legal systems will retain their individual identities. In Europe it was the globalisation of economics and the

development of a European Union which prompted the movement to a converged private law.²

In Africa too, much has been written since the early 1960s, about the integration of laws through unification, harmonisation or convergence. However, Africa presents a far more complex problem than Europe, in that legal pluralism prevails throughout the continent. The question of integration may accordingly be approached from various angles. On the one hand it may relate to the coming together of the legal systems of different countries in Africa. On the other hand, it may relate to the convergence of the imposed colonial law and the indigenous laws of an individual country. In some countries, such as Cameroon, Mauritania and Somalia, the difficulties surrounding unification or integration are exacerbated by the fact that two separate imposed legal systems (as opposed to a hybrid legal system) belonging to different legal families apply — the one a common-law system (English law); the other a civil-law system (French law in the former two countries and Italian law in the latter).³ A third possibility is, of course, the convergence of different indigenous systems applicable within a single country. With regard to private law, the focus has so far been on the unification of the imposed Western law and the indigenous laws within individual African countries.

The integration of the laws of different countries in Southern Africa focuses on two groups of countries. The first comprises the countries belonging to the South African Law Association; the second the states of the Southern African Development Community (or SADC). Two questions will be considered in this article, namely the convergence of the legal systems of Southern Africa, and the convergence of indigenous African law and imposed Western law.

Convergence of legal systems in Southern Africa

The South African Law Association

As early as 1971, Mr Justice Schreiner raised the idea of a South African Law Association, referring to those countries in Southern Africa in which both indigenous African and Roman-Dutch law (as influenced by English law) apply.⁴ These are South Africa (including its erstwhile protectorate

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³ These three countries differ from the Southern African countries in which English law influenced the existing imposed Roman-Dutch law. In Cameroon, eg, anglophone and francophone Cameroon were united in 1961 to form the Federal Republic of Cameroon, thus creating a legal system in which two distinctly imposed systems of law apply in addition to the indigenous legal systems. See generally Fombad ‘Cameroonian bi-juralism: current challenges and future prospects’ 1999 (1) Fundaminta 1; Ogungbe ‘The inroad of European law into the West African legal system — effects and defects’ in Van den Bergh (ed) Law in Africa: new perspectives on origins, foundations and transition (1999) 95.

⁴ Annab Lokudzinga Matenjwa 1971 Swaziland Law Reports 29H.
SWA/Namibia), Zimbabwe, Botswana, Lesotho and Swaziland. The latter four countries came under British control during the late nineteenth century. The intention was, initially, to incorporate Botswana, Lesotho and Swaziland into the Union of South Africa. Even though this never happened, Britain administered these so-called 'High Commission Territories' as part of South Africa. Consequently it was determined that the 'law for the time being in force in the Colony of the Cape of Good Hope' should apply in Lesotho and Botswana,\(^5\) and that Roman-Dutch law should apply in Swaziland.\(^6\) It was further determined that their respective indigenous laws should be preserved. Roman-Dutch law was first introduced in Zimbabwe when it was declared a protectorate in 1891 and the law of the Colony of the Cape of Good Hope was made applicable. In this case, too, provision was made for the preservation of the indigenous law. It is obvious that initially the legal systems of all these countries corresponded not only in ideology, method and approach, but also in content. The Roman-Dutch common law as influenced by English law was the same in all five countries.\(^7\)

The indigenous systems of the Swazi, Sotho and Tswana conformed with the corresponding indigenous systems in South Africa. Even today, research on the law of the Tswana would be incomplete without reference to Schapera's works on the Tswana of Botswana.\(^8\) Likewise, for example, the work of Ashton on the laws of the Basuto and those of Kuper and Marwick on the Swazi, are indispensable sources for traditional Sotho or Swazi law.\(^9\) Although the indigenous systems of the High Commission Territories and Zimbabwe were not identical as amongst each other, there was substantial uniformity from an ideological and lego-technical point of view. Because of the constant interaction between these countries, it is not inconceivable that these indigenous systems, or at least some of them, may well have moved closer together over the last century.

With regard to the imposed common law, there could initially hardly have been a question of convergence. Instead it is to be expected that when unified laws, or laws derived from a common source, are implemented and interpreted by different national judicial institutions, they would eventually diverge and become merely harmonised.

A superficial perusal of the column 'Current Legal Developments' in *The Comparative and International Law Journal of Southern Africa* during the past fourteen years indicates that South African case law, including private law,

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\(^5\) Section 6 of the General Law Proclamation 2b of 1884 (Lesotho); section 2 General Law Proclamation (Botswana).

\(^6\) Roman-Dutch law (as influenced by English law) applied in the Zuid-Afrikaansche Republiek (Transvaal) which bordered on Swaziland.

\(^7\) In Zimbabwe appeals lay to the Cape Supreme Court and from there to the Privy Council.

\(^8\) See e.g. *A handbook of Tswana law and custom* (1938); *Native land tenure in the Bechuanaland protectorate* (1943) and *The Tswana* (1953).

\(^9\) Ashton *The Basuto* (1952); Kuper *The Swazi, a South African kingdom* (1966); Marwick *The Swazi* (1940).
is still regularly referred to by the courts of the other four countries. Considering the reception formulas of Zimbabwe, Botswana, Lesotho and Swaziland, it is not surprising that South African law, as the historic source of their law, should be an important directive in legal development. Zimbabwean cases are still reported in the South African Law Reports and, at least with regard to substantive criminal law, South African case law carries considerable authority in Botswana. This is confirmed by the words of Quansah that 'Botswana law reports are replete with South African case law as the latter has a pervasive influence on Botswana law because of the strong historical links between the two legal systems'. The assumption is that the legal systems of the members of the South African Law Association still correspond to a large extent. However, it is only through a thorough investigation of recent legislation and judicial decisions that one would be able to establish the true extent of the divergence which must surely have taken place over the last century, specifically as regards private law. Such an investigation falls outside the scope of this article.

It is not only South African law which impacts on the legal systems of the other Southern African countries. The process is reciprocal. The work of the South African Law Commission on the harmonisation of the common and indigenous law contains ample references to legal development in the countries belonging to the South African Law Association as well as Zambia, Kenya, Tanzania, and Ghana. It seems that consideration was given to Anglophone Africa, rather than those Southern African countries in which the Roman-Dutch law was imposed. The legal systems of the erstwhile British colonies are recurrently both converging and diverging. For instance, in the Law Commission's report on the internal conflict of laws it is recommended that the repugnancy clause be abolished, following the example of Botswana and Kenya. Therefore, while a divergence took place with the abolition of the repugnancy clause in the latter two countries, the legal systems will converge once more when the Law Commission's recommendation is followed and the repugnancy clause is abolished in South Africa. Another example of convergence occurred when, in 1978, the Transkei followed large parts of the Tanzanian Law of Marriage Act. This Act is founded upon the influential work done by the Kenyan Commission of 1968. Tanzanian legislation also influenced the South

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10See eg Commander of Defence Force and another v Matela CA (cri) No 3/99 (Lesotho); Ntokozo Armstrong Dlamini v Edmund Dlamini civ case 34/87 (HC) and Joyce Zama (born Camp) v Ralf Zama civ 651/88 (Swaziland).


13Act 5 of 1971.

The Southern African Development Community

During the early 1980s a new dimension was added to the notion of the convergence of legal systems in Southern Africa. The broadening of scope of academic research in this regard was prompted by the formation of the Southern African Development Co-ordination Conference (SADCC), the forerunner of the Southern African Development Community (SADC). Both these organisations are aimed at economic development and integration as well as social upliftment. The objectives of the SADCC were to reduce economic dependence, to create regional integration, to mobilise member states’ resources in the quest for collective self-reliance and to secure international understanding and support. The ultimate objective of SADC, which was established in 1992, is to

build a Region in which there will be a high degree of harmonisation and rationalisation to enable the pooling of resources to achieve collective self-reliance in order to improve the living standards of the people of the region.18

The focus is thus not only on economic integration and the facilitation of free trade in the region. Sectorial programmes include a wide range of issues relating to the environment and wildlife, energy, illicit drug trafficking, transport, education and training, health care, law enforcement and legal affairs, and matters pertaining to ‘gender and development’. Therefore, integration, harmonisation or convergence of laws in the region could potentially include private law. However, published material on SADC seems to be directed only at economic and international economic law or the enforcement of foreign judgments. The harmonisation of private law in SADC has so far not received much attention.19


16Act 120 of 1998. See also Cotran’s discussion of the Kenyan Commission’s report referred to above in n 14.

17Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zimbabwe, Zambia, South Africa, Democratic Republic of Congo, Namibia, Mauritius and Seychelles are member states of the SADC. See generally SADC <www.sadc>.

18SADC <www.sadc>.

Economic development and integration has long been a concern in Africa, and various other bodies working towards transnational economic advancement, have come into being over the years. These include the Southern African Customs Union which was created in 1970 as re-enactment of an earlier (1910) agreement between South Africa and the High Commission Territories; the Preferential Trade Area for Eastern and Southern African States (1982); and, most recently, the African Development Forum (ADF) which was established in 1999. The latter is an initiative led by the Economic Commission for Africa (ECA) to create an African Economic Community. The emphasis is on political and economic unity and regional integration. In regulation 35 of their Consensus Statement it is indicated that Africa should move towards a common citizenship, through the initial steps of harmonizing citizenship, naturalization, immigration and employment laws, and through progressively removing restrictions on travel. The economic overtone of the ADF becomes apparent when one looks at the members of its steering committee which includes the Economic Commission for Africa (ECA), the Organisation of African Unity (OAU) and most recently the African Union (AU), the African Development Bank (ADB); and regional economic communities such as the Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS), the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), the Southern African Customs Union (SACU) and the Economic Community of Central African States (ECCAS).

It is clear that while there is considerable potential for the harmonization or convergence of private law in Southern Africa, there is still little coordinated initiative in this regard.

Convergence of the imposed general law and the indigenous law

Many reasons may be put forward for the unification, integration or convergence of the imposed Western law and the indigenous legal systems within individual countries. These include the achievement of equality, simplifying the legal system, nation building, modernisation and economic development. Yet most attempts at unification have failed because these endeavours have been dominated by Western values and characterised by dominance of Western law. Nowhere in Africa could the imposed law take the place of existing indigenous law. Today, not only deep legal pluralism, but also state-law pluralism prevails in most African countries. It is increasingly appreciated that legal pluralism poses no threat to equality, legal certainty,

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11 See generally Woodman's discussion of policies entailing the unification of laws in Africa in 'Unification or continuing pluralism in family law in Anglophone Africa: past experience, present realities, and future possibilities' 1988 Lesoibo Law J 60ff; Prinsloo 'Pluralism or unification in family law in South Africa' 1990 CILSA 324.
12 State-law pluralism prevails where at least two, officially recognised, autonomous and parallel legal systems co-exist and interact in limited, prescribed circumstances. In contrast, deep legal pluralism exists where various legal systems are observed irrespective of state recognition of them. Deep legal pluralism is not founded upon relations of unequal power, as is the case with state-law pluralism.
nation building and development. Unification is not the only answer to realising these goals. As in Europe, the focus is now more on the harmonisation or convergence and the refining of choice-of-law rules. Choice-of-laws rules which respect individuals' freedom to choose a system of law best suited to their needs, or which provide exact guidelines that would not prejudice certain categories of persons (eg women), could ensure equality and legal certainty and simplify the task of lawyers and judicial officers.

Harmonisation and convergence
Harmonisation and convergence are consequences of the adaption of law to socio-economic conditions and occur when societies approach one another. In the case of harmonisation, the overt discord between different systems of law is removed but they are allowed to co-exist as separate systems. This does not take place spontaneously. It implies an active process through the intervention of the courts or the legislature. In contrast, convergence refers to a natural, spontaneous process. It is based on contact, not on chance and some measure of intercommunication is thus a prerequisite. In its widest sense, convergence is a dynamic phenomenon, a process by which legal systems, institutions, ideologies and methods approach one another and become reasonably similar, or where a gradual disappearance of distinctions occurs. Another difference between harmonisation and convergence is that the former is usually directed at a specific narrow field and is more intensive, albeit that it is still not the same as unification. Harmonisation of certain fields of law may lead to the eventual convergence of the legal systems generally.

With regard to convergence, a further distinction may be drawn between doctrinal and functional convergence. Doctrinal convergence is the coming together of concepts and principles, while functional convergence is the interdependent use of concepts, the on-going process of obtaining knowledge of 'the other system', and the process of becoming better equipped to work with the other system. Functional convergence thus takes place through practising the law and as such is associated with practitioners, while doctrinal convergence is pursued by scholars, law-reform commissions and eventually legislatures either as an active process of harmonisation, or as a an academic theoretical exercise to determine the extent of the spontaneous process.

For a number of years, the South African Law Commission has been actively engaged in a project on the harmonisation of indigenous law and South

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23A conscious, forced or deliberate convergence may then be either harmonisation or, depending on its goal, unification.

24See Waters n 2 above at 21 and 31ff who shows that an ongoing functional convergence has led to an observable doctrinal convergence in European law. Also Markesinis 'Studying judicial decisions in the common law and civil law: a good way of discovering some of the most interesting similarities and differences that exist between these legal families' in Van Hoecke & Ost The harmonisation of European private law (2000) 125ff shares the view that civil law and common law systems are converging. This is opposed to Legrand's view in his article 'European legal systems are not converging' 1996 International and Comparative Law Quarterly 52.
African common law⁵. As indicated elsewhere,⁶ these attempts are, with some exceptions, unfortunately directed by Western values and seem to lean towards the unification of laws, in the main through the elimination of indigenous norms. In fact, in one of its discussion papers the Law Commission makes it clear that its efforts are aimed at the removal of the differences that currently distinguish indigenous law and Western law and at assimilation of the two systems.⁷

**Differences in legal cultures**

Fundamental differences in cultures, and more specifically legal cultures, are commonly advanced as an obstacle in the path of convergence or harmonisation. Van Hoecke, clearly proceeding from a European perspective, is of the opinion that harmonisation is possible only in what he refers to as a ‘sufficiently homogeneous legal culture’⁸ within a legal community.⁹ That implies a legal community which shares common perceptions of the concept of law, a theory of valid legal sources, a legal methodology, a theory of argumentation and of legitimation of the law, as well as a common basic legal ideology. While this may hold true in the civilian and common-law traditions with their shared culture and fundamentally Western values, it could certainly not apply in Africa where indigenous law and Western law have such divergent conceptions of law, rules and rights.

These fundamental differences do, to some measure, create obstacles in the path of harmonisation and work against convergence. If one looks at the Western law purely from the perspective of its civilian heritage, harmonisation with indigenous law does not seem feasible and convergence seems impossible. But our common law is a hybrid of the civilian and common-law traditions, and if one focuses more on the common-law characteristics of the Western or general law in South Africa, one finds surprising concordance with the indigenous systems despite their divergent values.

Modes of thinking about law and the understanding of facts, rules and laws differ in the general (Western) law and in indigenous law. It is difficult to translate indigenous law or normative systems for social ordering into a language or concepts comprehensible to a ‘Western’ reader. Yet it is necessary to do so in order to determine whether harmonisation or convergence is possible. One way of explaining indigenous law is by analogy with familiar

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⁵These include projects on alternative dispute resolution, customary marriages, succession, the administration of estates, arbitration and community dispute resolution, traditional courts and the judicial functions of traditional leaders and the conflict of laws.
⁶See Van Niekerk ‘State initiatives to incorporate non-state laws into the official legal order: a denial of legal pluralism’ 2001 CILSA 349.
⁷South African Law Commission ‘Customary law: succession’ Discussion Paper 93 (Project 90) August 2000 13. That is in spite of the fact that the Law Commission acknowledges the existence of legal pluralism as well as the fact that the Constitution demands respect for cultural diversity.
⁸Legrand n 23 above at 56 describes legal culture as a normative framework for legal communities.
⁹Van Hoecke n 1 above at 3.
Western concepts. If one looks at the fundamental features of the 'legal mentalité' or the 'collective mental programme' of the common-law tradition as described by Legrand, there is some intersection with indigenous law as far as legal reasoning, the character of rules, the role of facts, the significance of systematisation, the meaning of rights and the presence of the past are concerned. A comparison of the cognitive structure of indigenous law (which resembles that of the common-law tradition) and that of the general law in South Africa, to establish to what extent a natural doctrinal convergence of these two legal systems is possible, is very broadly speaking, then also an exercise in the comparison of the common-law and civilian traditions.

In line with its dominant civilian heritage, the general law in South Africa is perceived as a set of rules rather than a series of decisions. In contrast, knowledge of indigenous law is deduced from the interpretation of patterns which have emerged from previous judicial interventions. Many researchers focus on the mechanical processes of social ordering and dispute resolution to establish the regularities in terms of which indigenous societies or relationships are ordered. Unlike the civilian conception of law as a coherent, consistent and rational set of rules, deductively used to determine the outcome of a case, indigenous law is perceived as a reserve of knowledge. Legal reasoning and legal doctrine may consequently more appropriately be described with reference to the common-law inductive method of proceeding from instances to principles, a pragmatic and responsive process.

Yet that would be an over-simplification of the indigenous process. Legal reasoning in indigenous law is determined by the all-encompassing goal of restoring harmony of the collectivity. The importance of maintaining the equilibrium in the community is evidenced by the fact that there are various extra-judicial processes which may be resorted to before a dispute is settled in a court of law. In indigenous courts, judicial officers will also first try and restore peace before adjudicating upon the case and will attempt to reconcile the parties involved. This feature, which contrasts with the formalism of the civilian tradition where the focus is rather on normative coherence and consistency, reminds too of the pragmatism in the common-law tradition. The latter is concerned with the result rather than the method. It focuses on the resolution of a dispute that will at the same time serve the needs of society.

The centrality of the facts of legal cases 'reflects the common law's assumption that legal knowledge emerges from facts (ex facto jus ortitur) rather than from rules (ex regula jus ortitur). As indicated, from a theoretical point of view, this may be applied to indigenous law. However, more significantly, in indigenous law the importance of facts, rather than rules, illustrates the lack

\(^{30}\)Legrand 60ff.

\(^{31}\)Intellectualism in the civilian tradition refers to conceptualisation and contradiction-free consistency of empirical legal materials as well as abstraction in legal reasoning. Intellectualism was derived from Greek philosophy, and it induced Roman and later European jurists, starting in the twelfth century with the revival of Roman law in Bologna, to conceptualise and systematise legal phenomena.

\(^{32}\)Legrand 68.
of abstraction. Thus, legal reasoning is founded in the visible and tangible or sensory observation and then related to an inner or intellectual basis. This contrasts with the civilian tradition which emphasises differentiation, classification and conceptualism.

Nevertheless, one should, bear in mind that in practice the reasoning pattern one may expect to be followed is not always followed. In an analysis of judicial decisions in common law and civil law, Markesinis\(^3\) shows that different ways of thinking in common-law and civilian traditions should not necessarily stand in the way of harmonisation or convergence. He illustrates this by reference to German cases where neither a clear deductive nor an inductive logic was followed, but where the decisions were rather the result of the courts' feeling of fairness. Similarly, in South Africa, the courts, as guardians of the Bill of Rights and in the process of developing the Western law to the changing needs of society, often divert from the expected inductive logic. In making such decisions public policy becomes a mechanism in judicial law-making.\(^4\) There is therefore no reason why the strict civilian tradition in legal reasoning of the courts, or the difference in legal reasoning in indigenous and Western law, should stand in the way of harmonising these two legal systems. The proviso is, of course, that in harmonising the systems changes are brought about in both and that indigenous law is not simply adapted to mirror Western law. The danger of merely reforming or adapting indigenous law to become more like Western common law is increased by the fact that the courts are in essence all characteristically 'Western'.

Harmonising becomes more problematical when one deals with two systems of law which, on a macro-comparative level, differ not only in the process of legal reasoning, but also in the basic axioms or fundamental assumptions which underpin such legal reasoning, such axioms being based on societal values. One may say that the legal technique in dispute resolution, legal process and general approach to law and legal reasoning of the general law in South Africa is characteristically civilian, and thus fundamentally specialised. This gives rise to legalism, conceptualism and rationalism.\(^5\) In contrast, indigenous law is characteristically non-specialised. There is accordingly a lack of separation, differentiation and classification with regard to all aspect of social ordering. Had South African common law at this level revealed more of the characteristic features of the common-law tradition, a convergence with indigenous law may have occurred more easily.

Furthermore, legal ideology differs in indigenous law and in the general law. Legal ideology is determined by politics, religion, social structure and

3Markesinis n 22 above 25ff; see also Van Hoecke n 1 above 12ff on inductive and deductive reasoning; Waters n 2 above at 31; Legrand 64-65.
4Corbett 'Aspects of the role of public policy in the evolution of our common law' 1987 SALJ 52 54 65 68 Van Aswegen 'Policy Considerations in the law of delict' 1993 THHR 174.
5See also Van Hoecke 'Legal cultures, legal paradigms and legal doctrine: towards a new model for comparative law' 1998 International and Comparative Law Quarterly 495 503.
philosophy. From an ideological point of view indigenous law is communal and focuses on social solidarity, whilst the common law is individualistic. The principles of natural law, justice and equity, which constitute fundamental principles in Western law are all directed at the pre-eminence of the individual and the concept of equality. This is underscored by the fact that section 173 of the Constitution directs the courts 'to develop the common law, taking account of the interests of justice'.

Conclusion
The differences mentioned above make the natural convergence of the general law of the land and indigenous law unlikely and harmonisation difficult, if not impossible. The task of the law makers, both the legislature and the courts, is hampered by the fact that legal training focuses overwhelmingly on the general law of the land and that the temptation is there to use the Western legal ethos as the yardstick for harmonisation. That indigenous law suffers in this process, has become clear from recent initiatives by the courts and the legislature, as well as from pronouncements of the South African Law Commission. These efforts have only increased the divergence between the living indigenous law and official indigenous law. Yet, harmonisation of indigenous law and the common law is necessary. The proviso is that the process of harmonisation is not a one-sided endeavour to convert indigenous law into, or to render it acceptable to, Western law. Reform of indigenous law must stay true to the living indigenous law otherwise it will merely be a theoretical exercise with no effect at grass roots level.

Waters said that 'one has to wonder whether it would not lead to a more productive future if, instead of attempting to bring common law and civil law doctrine closer together, scholars had turned from attempting to cross the mountains of the other's perceived axiomatic principles — an approach which has engaged scholars ... in endless debates ... '. Perhaps in South Africa one should focus on a functional approach in harmonising indigenous law and Western law. That would mean that the courts no longer view law from a purely Western perspective, but adapt both legal systems where this is required. It is only the overt areas of discord between the systems which should be removed to minimise conflict. Given their Western orientation, the courts should aspire to obtain knowledge of indigenous law so that they are able to function within and work with that legal system. Then even a doctrinal convergence may eventually occur. Finally, the ultimate aim should not be a unified system of law. The fact of legal pluralism should be accepted.

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36See generally Zweigert & Kötz Introduction to comparative law Translated by Weir (1992) 64. Markesinis n 22 above at 122–124 discusses how different 'backdrops', rather than different values or concepts in the different legal systems, may result in different conclusions.

37Act 108 of 1996.

38For a detailed discussion see Van Niekerk n 23 above.

39Waters n 2 above at 33.