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Mixed Systems in Southern Africa: Divergences and Convergences

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I. INTRODUCTION

Most studies on the mixed systems of Southern Africa have usually started and ended with South Africa. It is almost as if it is assumed that all the conclusions reached will apply to the other countries in the region which share the same legal heritage with South Africa. The aim of this Article is threefold. Firstly to show that from the very beginning, the nature of the reception of the mixed system was different between South Africa and the other countries with which it shares the common legal heritage. Secondly, that there have been developments in the nature of the mix which cannot be ignored by comparatists. And finally, to suggest these developments need more extensive studies because of their

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potential to enhance a harmonization of legal rules and principles within the region.

Many of the fundamental legal changes that have taken place in the course of the inevitable process of legal modernization in the different countries in the region have certainly affected the balance in the mix of the two main components in the legal systems in the region.[1] The most interesting question to the comparatist is whether the process has seen a movement towards a more mixed or less mixed system, or whether the pull has been in one or the other direction, and what effect this is likely to have on the legal system. This raises issues that are not only of academic but also of practical interests. We need to know the reasons for these processes and assess whether they are necessarily good. From a practical point of view, at such a time of globalization and regionalism, cooperation will be considerably enhanced if the national legal systems were similar, the same or converging.

This Article will start by examining the origins of the mixed system in terms of the manner in which the mixed common law/civil law system was received in the different states who share this heritage in the region. It will be shown that the reception in the case of South Africa was direct, which might justify the conclusion that South Africa is in a sense the historic source for the reception in a rather indirect manner, of the mixed English law/Roman-Dutch law in the other countries in the region. It will then consider the factors that might have influenced the changes in the nature of the mix in the two components within the system. The fact that two giants of Western legal civilization, the common law and the civil law systems have been successfully integrated in this region opens new vistas for legal developments. It is therefore suggested that there is need for more studies of these Southern African systems by comparatists to see whether South Africa could take the lead in the development of a new subsystem common to all the states in the region.

II. CONTRASTING RECEPTION OF THE COMMON LAW AND ROMAN-DUTCH LAWS

The way in which the English common law and the Roman-Dutch law were received in Southern Africa had been told and retold and there might be no need to belabour this.[2] Nevertheless, there are important

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1. This discussion is limited to the mix between the English common law and the Roman-Dutch law only. The separate issues that arise from the impact of customary law on this mix are excluded.

2. *See, e.g.*, J.H. Pain, *The Reception of English and Roman-Dutch law in Africa with Reference to Botswana, Lesotho and Swaziland*, 9 CILSA 137-67 (1978); A.J.G.M. Sanders, *The*

points about this reception that need to be highlighted mainly because they impact on the way the mixed system has evolved over time in the different countries giving rise to what one may say is potentially a unique sub category of a mixed system. However, before delving into this issue, there is some need to briefly situate the mixed legal system in Southern Africa in the broader context of mixed systems in the world.

A. The Concept of Mixed Systems

For a start, it is necessary to point out that there is nothing axiomatic about the very meaning and scope of the concept of a "mixed systems." No attempt will be made however to revisit the elaborate doctrinal debates over the problems of definition.[3] It is nevertheless, not something that can be entirely avoided. Whilst it is a truism that all legal systems are mixed or potentially mixed, most comparatists are agreed that for taxonomic purposes, the word "mixed system" should be used only for certain legal systems. Even there, there is no consensus on which systems qualify to be so categorized. A Web site of the Faculty of Law of the University of Ottawa contains what it defines as "mixed legal systems," which it groups into 9 categories.[4] The use of the term "mixed" is explained thus:

Characteristic Features of Southern African Law, 14 CILSA 328-35 (1981) [hereinafter Sanders, *The Characteristic Features*]; A.J.G.M. Sanders, *Legal Dualism in Lesotho, Botswana, Swaziland: A General Survey*, 1 LESOTHO L.J. 51-53 (1985) [hereinafter Sanders, *Legal Dualism*]; Eduard Fagan, *Roman-Dutch Law in Its South African Historical Context*, *in* SOUTHERN CROSS. CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 33-64 (Reinhard Zimmermann & Daniel Visser eds., Clarendon Press, Oxford 1996); and Gardiol van Niekerk, "The Convergence of Legal Systems in Southern Africa," 35 CILSA 308-18 (2002).

3. In fact Esin Örücü, *Mixed and Mixing Systems: A Conceptual Search*, *in* ESIN ÖRÜCÜ, ELSPETH ATTWOOLL & SEAN COYLE, STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING 335 (Kluwer Law Int'l, The Hague 1996), points out that attempting a comprehensive study of "mixed systems" and analyzing that concept in general terms is a very dangerous and delicate task. In describing the numerous hurdles she states:

> The third hurdle is one of finding a satisfactory definition of a mixed system: one which can cover all the instances of mixing, whether historical or contemporary, overt or covert, structured or unstructured, complex or simple, blended or unblended, and can distinguish mixed jurisdictions from legal pluralism, where laws of different origin exist side by side in a given society with different legal mechanisms applying to identical situations.

4. These are: mixed systems of civil law and common law; mixed systems of civil law and customary law; mixed systems of civil law and Muslim law; mixed system of civil law, Muslim law and customary law; mixed systems of civil law, common law and customary law; mixed systems of common law and Muslim law; mixed systems of common law and customary law; mixed systems of common law, Muslim law and customary law; and mixed systems of Talmudic law, civil law and common law. *See* http://www.droitcivil.uottawa.ca/world-legal-systems/eng-mixte.php.

> The term "mixed," which we have arbitrarily chosen over other terms such as "hybrid", "composite," should not be construed restrictively, as certain authors have done. Thus, this category includes political entities where there is a juxtaposition of systems as a result of more or less clearly defined fields of application.

It is a classification that is clearly too broad[5] and makes it quite difficult to justify why one country but not another is in one category or another. Most researchers in comparative legal theory have tended to limit the category of mixed legal systems to private law systems based upon a core of common law and civil law elements,[6] but this has now been extended to public law.[7] Although some of these scholars would want to make a distinction between "mixed legal systems" and "mixed jurisdictions,"[8] both expressions will be used interchangeably here to refer to systems in which elements from more than one classical legal system intermingle.

B. The Origins and Nature of the Mixed Systems of Southern Africa

Whilst the reception of the common law and the civil law in South Africa can be described as direct it was only indirect in the other countries in the region, namely the former three High Commission Territories of Botswana, Lesotho and Swaziland, as well as Namibia and Zimbabwe, all of which were once referred to by Justice Schreiner as the "Southern African Law Association."[9] The nature of this reception is significant not only because it has influenced and continues to influence the quantum of each element of the mix that was received but also affects the way the different legal systems have evolved.

The reception of the mixed system in South Africa was direct in the sense that the Dutch East India Company brought the Roman-Dutch component of the law[10] in the mid seventeenth century, when they

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5. See Vernon Valentine Palmer, *Two Rival Theories of Mixed Legal Systems*, 12.1 ELECTRONIC J. COMP. L. (May 2008), http://www.ejcl.org/121/art121-16.pdf, who points out that those who have adopted the broad conception of mixed systems consider that the sole requirement for this is the presence or interaction of two or more kinds of laws or legal traditions within a system. The interaction of laws of different types or sources—indigenous with exogenous, religious with customary—is sufficient to constitute a mixed system.

6. *See* further Palmer, *id.*; Esin Örücü, *What Is a Mixed Legal System: Exclusion or Expansion?*, 12.1 ELECTRONIC J. COMP. L. (May 2008), http://www.ejcl.org/121/art121-15.pdf; William Tetley, *Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified)*, 4 UNIFORM L. REV. 591-619, 877-907 (1999).

7. *See* Esin Örücü, *Public Law in Mixed Legal Systems and Public Law as a 'Mixed System,'* 5(2) ELEC. J. COMP. L. (2001), http://www.ejcl.org/52/art52-2.html.

8. *See* Tetley, *supra* note 6.

9. In *Annab Lokudzinga Mathenjwa* 1970-1976 SLR 25, 29.

10. This term is said to have been coined by one of the great jurists of this era, Simon van Leeuwen, in 1652. *See* Reinhard Zimmermann, *Roman Law in a Mixed Legal System*, *in* ROBIN

established a refreshment station for their traders en route to the East at the Cape of Good Hope. This Dutch version of the civil law was a blend of Roman law, canon law, the law merchant and Germanic law. Roman-Dutch law remained uncodified and applied unchallenged in the Cape until 1795 when as a result of the Napoleonic wars, control of the Cape was taken over by the British. Dutch rule was restored in 1803, but only briefly, for in 1806, the Cape passed again to the British. As Reinhard Zimmermann points out, the continued existence of Roman-Dutch law at the Cape could ironically be ascribed to this British takeover, an event which initially appeared to signal its downfall. The mother country, the Netherlands, was forced to adopt the French *Code Napoléon* when the Cape was occupied by the British who in accordance with their constitutional practice,[11] retained the Roman-Dutch law as the common law of the country.[12] This position was later confirmed by the First and Second Charters of Justice in 1827 and 1832. Nevertheless, the British soon set in motion the process that ultimately transformed South African law into a mixed system by actively introducing the second component of the mixed system, English law. This was done by legislation with a view to bringing the general law in line with English public and commercial law. Other factors which facilitated the reception and penetration of English law include: the adoption of English life promoted by the arrival of British administrators and traders; the establishment of trade links with Britain and other parts of the British empire, the introduction of English legal training; the adherence by the courts to the doctrine of judicial precedent; the adoption of English legislative drafting and conveyancing techniques as well as techniques of statutory interpretation; the introduction of English as the language of the courts; the jurisdiction of the Privy Council in London as an appeal court against judgments of the Cape Supreme Court; and the introduction of new admission requirements and qualifications for appointment as judges.[13]

In spite of its colonial roots, it is now generally agreed that South African law has now acquired its own identity which is neither purely Roman-Dutch nor purely English law. In fact, Eduard Fagan goes even further, when he says that there has been much support, both judicial and academic, for the view that South African law is a legal system in its own

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EVANS-JONES, THE CIVIL LAW TRADITION IN SCOTLAND 45-46 (The Stair Society, Edinburgh 1995).

11. In *Campbell v. Hall* (1774) 1 Cooper 204; 98 E.R. 1045 at 1047, Lord Mansfield has stated the rule thus, "the laws of a conquered country continue in force, until they are altered by the conqueror."

12. Zimmermann, *supra* note 10, at 46.

13. *See* Sanders, *Legal Dualism*, *supra* note 2.

right.[14] This is perhaps not due merely to the fact that tap root was cut off as far back as the 1800s when the Netherlands adopted the French Napoleonic Code, but also the fact that it represents a major example of a jurisdiction where the civilian tradition survives in its original, uncodified form.[15]

The reception of the mixed system in the former High Commission Territories of Botswana, Lesotho and Swaziland was indirect in the sense that it came in through South Africa.[16] The British assumed control over these three territories, not out of any obvious enthusiasm to expand their colonial possession but rather as a means of preventing them from being taken over by the Transvaal Republic or Orange Free State, and using these to threaten the peace of the Cape Colony. The long term objective was to integrate these territories in a future Union of South Africa. Hence, unlike the practice in its other Africa colonies, the British introduced a timeless reception, not of English law but of Roman-Dutch law. The British maintained their base in the Cape and simply administered these territories by remote control from there and extended the local law to these territories.

The British reluctantly assumed jurisdiction over Bechuanaland, as Botswana was then called, in 1885. The various High Commissioners that were appointed administered the territory from their seat in Cape Town and later Pretoria, and often legislated for the territory simply by extending Proclamations designed for what is now South Africa to Botswana. The reception of the mixed system came through the High Commissioner's Proclamation of 10 June 1891, section 19 of which stated:

> Subject to the foregoing provisions of this Proclamation, in all suits, actions, or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope: Provided that no Acts passed after this date by the Parliament of the Colony of the Cape of Good Hope shall be deemed to apply to the said territory.

The exact meaning of this provision was not clear and this reception clause differed significantly from the reception clauses that were used by

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14. *"Roman-Dutch Law in Its South African Historical Context*, *in* SOUTHERN CROSS. CIVIL LAW AND COMMON LAW IN SOUTH AFRICA, *supra* note 2, at 62.

15. *See* Zimmermann, *supra* note 10, at 42. Other jurisdictions outside Europe where it has survived, such as Louisiana and Quebec is largely due to the fact that civil codes were promulgated to shield them from the common law influences.

16. For further discussion of this, see Pain, *supra* note 2, at 137-67; Sanders, *The Characteristic Features*, *supra* note 2; and Sanders, *Legal Dualism*, *supra* note 2.

the British Government to introduce English common law to most of its other African colonial territories.[17] It was uncertain whether the phrase, "the law for the time being in force" in the Cape Colony sought to import the Cape colonial law of 10 June 1891 or the living system of law as changed from time to time and administered in the Cape Colony? The provision has generally been interpreted to mean that it provided for a timeless reception of Cape Colonial law, that is, the living system of Cape Colonial law as it changed from time to time.[18] Nevertheless, to clear any doubts, a new reception clause was introduced by the General Law Proclamation of 1909, section 2 of which provided that "the laws in force in the Colony of the Cape of Good Hope on 10th day of June, 1891 shall *mutatis mutandis* and so far as not inapplicable be the laws in force and to be observed in the said Protectorate,"[19] which is considered to have provided for the timeless reception of Cape Colonial law.[20] There is no explicit mention of Roman-Dutch law in the reception clauses of both the 1891 and 1909 Proclamations. Nevertheless, since Roman-Dutch law was then the Cape Colonial law, this is what is now generally considered by both jurists and judges to have been received in Botswana.

Basutoland, the modern Lesotho, was annexed by the British in 1868 and later incorporated into the Cape Colony by an 1871(C) Act. Following its dis-annexation from the Cape and resumption of direct administrative control by the British in 1884, the High Commissioner issued General Law Proclamation 2 B of 1884, section 2 of which in

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17. The normal British practice at the turn of the century had been to export English common law together with the doctrines of equity and English statutes of general application to its colonies. However, there are precedents for this departure. For example, Roman-Dutch law had been continued in Ceylon and in Demerara and Essequebo in 1803. *See generally* A.N. ALLOTT, NEW ESSAYS IN AFRICAN LAW 9-27 (Butterworths, London 1970); A.E.W. PARK, THE SOURCES OF NIGERIAN LAW (Sweet & Maxwell, London 1972).

18. *See* I.G. Brewer, *Sources of the Criminal Law of Botswana*, 18 J. OF AFRICAN L. 24-26 (1974); Pain, *supra* note 2, at 163-64; Sebastian Poulter, *The Common Law in Lesotho*, 13 J. OF AFRICAN L. 129-31 (1969); Sanders, *Legal Dualism*, *supra* note 2, at 49-50.

19. The express purpose of removing any doubts was stated in the preamble to the Proclamation thus: "Whereas doubts have arisen as to the effect of section nineteen of the High Commissioners' Proclamation of the 10th day of June, 1891, as in force in the Bechuanaland Protectorate."

20. *Cf.* James E. Beardsley, *The Common Law in Lesotho*, 14 J. OF AFRICAN L. 199 (1969), who in interpreting a similarly worded provision in the reception statute for Lesotho, whilst agreeing that the Cape Colonial law received was timeless, nevertheless argues that "the law of the Cape Colony, simply and literally, can only be the law in force in that Colony during the period of its existence and, accordingly, that if the General Law Proclamation did not provide a cut-off date in [1891, in Botswana's case], external events in effect imposed a cut-off in 1909." In his view, the fact that the Cape Colony ceased to exist as a separate, internally autonomous legal system upon its incorporation into the Union of South Africa in 1909 in effect imposed a cut-off in 1909.

language a bit different from that of the Botswana Proclamation, clearly provided for the timeless reception of "Roman-Dutch law."[21]

As regards Swaziland, the territory was a dependency of the Transvaal until 1903 when its administration was taken over by the British by an Order in Council of 1905. Section 3 of the General Law and Administration Proclamation 4 of 1907 expressly provided for the application of Roman-Dutch law in the kingdom.

Neither the attainment of independence by all these countries nor legal developments since then showed any serious doubts with respect to the continuous applicability of Roman-Dutch law. The applicability of Roman-Dutch law and in consequence the extension of a mixed system also came to Namibia and Zimbabwe indirectly because of their close ties throughout the colonial period with South Africa. In the case of Namibia, when South Africa was entrusted at the end of the First World War, with power to administer South West Africa, as Namibia was then called, it introduced an instrument which provided for the application of Roman-Dutch law and its continuous application has been sanctioned by article 140(1) of the 1990 independence constitution.[22]

Southern Rhodesia, as modern Zimbabwe was known during the colonial period, was settled by the British South Africa Company and was declared a protectorate in 1891. The Roman-Dutch common law as applied in the Cape colony was first introduced there by the High Commissioner's Proclamation of 10 June 1891.

It can thus be seen that whilst South Africa actually received its mixed system from their original source, the Dutch and the British, the rest of the countries in the region received it sort of "second hand" through South Africa. Inevitably, the advent of independence and developments since then are bound to affect the nature and content of what was thus received and it is to this that we shall now turn.

III. THE CHANGING DYNAMICS WITHIN THE MIX

Although the writings by comparatists show that the system received by the Southern African countries is mixed, the loose references to it as Roman-Dutch without qualification as the common law of the

21. *See* Pain, *supra* note 2, at 165-67.

22. *See* section 1(1) of Proclamation 21 of 1919(SWA) which reads: "The Roman-Dutch law as existing and applied in the Province of the Cape of Good Hope at the date of the coming into effect of this Proclamation [1st January, 1920] shall from and after the said date be the common law of the Protectorate. . . ."

different countries in the region,[23] has had a tendency to be confusing. For example, Tebbutt J.A. reaffirmed the position taken in several Botswana cases in the Court of Appeal case of *Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd*[24] when he declared thus:

> [I]t is to be noted that the common law of Botswana is the Roman-Dutch law. Although this was laid down as long as 1909 (by Proclamation No. 36 of 1909) when Botswana was still the Bechuanaland Protectorate, the Roman-Dutch law had continued to this day to be applied and is still so applied in Botswana.[25]

In spite of this, there are many who consider the term "Roman-Dutch law," to describe what was actually received, as quite misleading and telling only half the story.[26] However, the use of the expression "Roman-Dutch" law to refer to what was received is too well-established to be questioned. It is generally accepted that "Roman-Dutch" in this context means the mix of English and Roman-Dutch law that was received during the colonial period. As Daniel Visser rightly argues, both Roman-Dutch and English law fulfil the role of "common law" in South Africa.[27] The question however is whether these two elements still have the impact they had before independence not only in South Africa but also in the other mixed jurisdictions in the region. Mixed systems are bound with time to face new challenges that may result in shifts or even new mixes. This has certainly not escaped the systems in Southern Africa.

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23. See 1 GEORGE KASOZE, INTRODUCTION TO THE LAW OF LESOTHO. A BASIC TEXT ON LAW AND ASPECTS OF JUDICIAL CONDUCT AND PRACTICE 8 n.16 (Morija Printing Works, Lesotho 1999), where the author states that Roman-Dutch law has been the common law of Lesotho since 1884. See also JOHN REDGMENT, INTRODUCTION TO THE LEGAL SYSTEM OF ZIMBABWE 5, 14-15 (Belmont Printers, Byo 1981), with respect to the situation in Zimbabwe and A.J. MANASE & L. MADHUKA, A HANDBOOK ON COMMERCIAL LAW IN ZIMBABWE 2 (Univ. of Zimbabwe Publ'ns, Harare 1996).

24. [1996] B.L.R. 190.

25. *Id.* at 194-95.

26. *See further* V.V. PALMER & S.M. POULTER, THE LEGAL SYSTEM OF LESOTHO 57 (The Michie Co., Charlottesville 1972). Thus in the South West Africa case of *R v. Goseb* [1956] 2 SA 696 (SWA) 698, Claassen J.P. remarked:

> I consider that the term 'Roman-Dutch' law is a confusing term, for in fact, the common law of the Union or for that matter the Cape of Good Hope is not Roman-Dutch law. It is South African common law. It is true that Roman-Dutch law forms the basis of our law and as such has supplied the more fundamental and elementary principles of our law. The law has been continuously developed and improved by the courts as well as by legislation. Other systems of law have had a marked influence, particularly English law . . . . In view of all these influences it seems to me that it is more correct to speak of South African common law rather than of Roman-Dutch law.

27. *Quoted in* Zimmermann, *supra* note 10, at 52.

A. The Situation in South Africa

The present legal system in South Africa has been described as one in which both English and Roman-Dutch law carry about equal weight.[28] In fact, recent studies have confirmed that there is indeed such balance between the two components it seems to be resulting into a South African law with its own identity and unique features. [29] This has however, not always been so. A lot has been written of the fierce *bellum juridicum* which raged from about 1906 to the 1970s between pollutionists who strove to civilianize the law and remove the English influence from the South African *usus modernus pandectarum* and the purists who wanted to anglicize the law and remove the Roman-Dutch influence.[30] The position today is summarized by Reinhard Zimmermann who says:

> [T]he dust of battle has settled. Extreme positions are no longer seriously advocated. It is widely accepted today that South African law has acquired its own identity which is neither purely Roman-Dutch nor purely English. Nobody would resort to English law at all costs . . . , nor does anybody argue for its eradication simply on the ground that it is an alien intruder. A pragmatic approach prevails.[31]

Whilst there have been extensive studies tracing the evolution of the South African legal system over the centuries, there has hardly been any on the other mixed jurisdictions in the region.[32] It is thus not clear to what extent there has been mixes within the two components of the mixed systems and whether there are signs of convergence or divergence.

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28. *See id.* at 52; Reinhard Zimmermann & Daniel Visser, *South African Law as a Mixed System*, *in* SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA, *supra* note 2, at 10.

29. Zimmermann & Visser, *supra* note 28.

30. Some of the literature on the subject, besides the two preceding notes are: B. Beinart, *The English Legal Contribution in South Africa: The Interaction of Civil and Common Law*, ACTA JURIDICA 12 (1981); Proculus, Bellum Juridicum—*Two Approaches to South African Law*, 68 S.A.L.J. 360ff. (1951); G.A. Mulligan, Bellum Juridicum *(3): Purists, Pollutionists and Pragmatists*, 69 S.A.L.J. 25 *et seq.* (1952); P.Q.R. Boberg, *Oak Tree or Acorn?—Conflicting Approaches to our Law of Delict*, 83 S.A.L.J. 150 *et seq.* (1966); A.S. Matthews & J.R.L. Milton, *An English Backlash*, 83 S.A.L.J. 31 *et seq.* (1965); Proculus Redivivus, *South African Law at the Crossroads or What Is Our Common Law*, 82 S.A.L.J. 17 *et seq.* (1965); and A. van Blerk, *The Genesis of the 'Modernist'—'Purist' Debate: A Historical Bird's Eye View*, 47 T.H.R.H.R. 255 *et seq.* (1984).

31. Zimmermann, *supra* note 10, at 51.

32. Two worth mentioning were carried out by Professor Gardiol van Niekerk: *The Convergence of Legal Systems in Southern Africa*, 35 CILSA 308-18 (2002), and *The Application of South African Law in the Courts in Botswana*, 37 CILSA 312-26 (2004).

B. The Situation in Botswana and Other Mixed Jurisdictions

Although only a detailed comparative study can give a reasonably accurate trend of the evolution of the mixed systems in the other mixed jurisdictions in Southern Africa, what follows is based mainly on Botswana but with glimpses from the other jurisdictions. It attempts to highlight some of the factors that have influenced the nature of the mixing of the two main components of the legal systems in these countries since independence in the 1960s.

A number of indicators can be used to enable us gauge the dynamics within the different components of the mixed legal system as it operates in Botswana. One of this is the background of the judges that have manned the superior courts of the country since independence. As will shortly be shown, this has sometimes influenced their choice of law. The most comprehensive study of this is contained in Bojosi Othlogile's, *A History of the Higher Courts of Botswana 1912-1990*.[33] In this study, it is shown that knowledge of Roman-Dutch law has never been a prerequisite for appointment to the bench in Botswana. In spite of the strong links with the South African legal system, there appears to have been a deliberate attempt to avoid appointing South Africans to the Botswana bench. Only those who were considered to have "acceptable political opinions" were appointed.[34] Nevertheless, the study shows that of the 18 judges appointed to the High Court from 1913-1965, 8 were British, 9 South Africans and one from another common law jurisdiction. From 1965 to 1994, the 30 judges appointed to sit in the High Court consisted of 10 British, 10 South African, 3 Batswana and the rest from other common law jurisdictions in Africa.[35] As regards the Court of Appeal, for the period 1956-1961, there were 9 Judges, 4 of whom were British citizens and 5 South Africans. From 1967-1994, 21 judges were appointed at various stages, 14 were South African, 4 were British citizens and the rest were from other common law jurisdictions.[36] From the above one can see that almost half of the judges that have sat in the superior courts of Botswana until the mid 1990s have been trained in the Roman-Dutch law and the other half, English law. One would probably

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33. (Mmegi Publ'g House, Gaborone 1995).

34. See *id.* at 86, where the author speculates that besides the concern caused by the institutionalization of apartheid, the fact that South Africa left the Commonwealth in 1961, may have contributed to this policy.

35. As regards those from other common law jurisdictions, one was from the UK/SA, one was from Nigeria, three from Ghana, one from Ireland and one from Sierra Leone.

36. For those from other common law jurisdictions, one was from UK/SA, one from Ghana and one from Nigeria.

have expected more of the former than the latter and even more South Africans than were appointed.

Another useful indication of the trend could be gleaned by having a cursory examination of the sources of judicial precedents relied upon by judges in the course of interpreting and applying the law, bearing in mind however that since independence, most of the statutes have been based on or substantially influenced by English law.[37] For this purpose, the cases reported in the Botswana Law Reports, the only report containing the most important cases decided by the High Court and Court of Appeal in the country, were examined. For the purpose of this analysis, the reports for the year 1990, 1995 and 2000 have been arbitrarily selected.

In the 1990 Report, 99 cases are reported. An examination of these reported cases shows that of the 558 cases cited, 244 (44%) of these are English cases, 188 (34%) are South African cases, 90 (16%) are Botswana cases and 36 (6%) are from other common law jurisdictions. A further analysis shows that in the 75 criminal cases reported, 436 cases are cited. Of the criminal cases cited, 217(50%) are English cases 101(23%) are South African cases, 83 (19%) are Botswana cases and 35(8%) are from other common law jurisdictions. As regards the 24 civil cases reported, 169 cases were cited; 27(22%) are English, 87 (71%) are South African 7(6%) are from Botswana and only 1(1%) was from another common law jurisdiction.

A total of 101 cases are reported in the 1995 report. An analysis of the 476 cases cited show that 107 (22%) are English cases, 251 (53%) are South African cases, 93 (20%) are Botswana cases and 25(5%) are cases from other common law jurisdictions. An examination of the 26 criminal cases reported shows that 163 cases were cited. Of these, 63 (39%) are English cases, 40 (24%) are South African cases, 46 (28%) are Botswana cases and 14 (9%) are cases from other common law jurisdictions. For the 75 civil cases reported 313 cases were cited. Of these, 44(14%) are English cases, 211 (67%) are South African cases, 47 (15%) are Botswana cases and 11 (4%) are cases from other common law jurisdictions.

The 2000 Report contains 70 cases. A total of 263 cases are cited; 44 (17%) are English cases, 129 (49%) are South African cases, 83 (31%) are Botswana cases and 7 (3%) are cases from other common law jurisdictions. An examination of the 25 criminal cases reported shows that 13 (15%) of the cases cited are English cases, 40 (46%) are South

37. *See generally* C.M. FOMBAD & E.K. QUANSAH, THE BOTSWANA LEGAL SYSTEM (LexisNexis Butterworths, Durban 2006).

African cases, 32 (36%) are Botswana cases and 3 (3%) are cases from other common law jurisdictions. As regards the 45 civil cases reported, 31 (18%) of the cases cited are English, 89 (51%) are South African, 51 (29%) are Botswana cases and 4 (2%) are from other common law jurisdictions.

The frequent recourse to South African cases in civil matters is probably not surprising, since the law in this area is largely uncodified and depends almost entirely on Roman-Dutch law as overlaid with some English law principles. What is perhaps surprising is the regular use of South African judicial precedents in interpreting the criminal law statutes that are based entirely on English law. Do the courts and the legislator appear to be moving in opposite directions?

In *State v Mokwena*,[38] Gyeke-Dako J, in considering what factors constitute extenuating circumstances concluded that the Penal Code was silent on this. After considering 25 English and 15 South African cases, he decided to rely on the earlier Court of Appeal decision in *Baoteleng v The State*,[39] where the court had approved a passage from the judgment of Holmes J.A. in the South African case of *S v Letsolo*,[40] which dealt with the meaning of extenuating circumstances. In *Maruti v The State*,[41] the same judge when considering whether the appellant had been "found in possession" of stolen property for the purposes of sections 5 and 322 of the Penal Code, relied exclusively on seven South African cases. In doing so, he said:

> It is to be noted that apart from section 322 of the Penal Code restricting the finding to a peace officer, the provisions of both section 1 of Act 26 of 1923 and section 36 of Act 62 of 1955 (of the South African Acts) are in *pari materia* with section 322 of the Penal Code.[42]

The above case is symptomatic of a general tendency for Botswana judges to resort to South African cases, although both the Penal Code and the Criminal Procedure and Evidence Act are all based on English law.

Whilst there is clear evidence of a predisposition by judges with a Roman-Dutch background to resort to South African and other Roman-Dutch authorities and for those with an English law background to rely on English authorities,[43] this does not always appear to be the case. For

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38. [1990] B.L.R. I.
39. [1971-1973] B.L.R. 82.
40. 1970 (3) S.A. 476.
41. [1990] B.L.R. 89.
42. *Id.* at 94; *see also State v Mosala* [1990] B.L.R. 588; *Kelaletswe & Others v The State* [1995] B.L.R. 100.
43. *See Archibald v. Attorney-General* [1991] B.L.R. 169 (discussed below).

example, Gyeke-Dako, an English law trained judge has often relied on South African cases. An examination of some of the judgments suggests that the consideration of the Roman–Dutch authorities in them were at best superficial. Nevertheless, the legal background of the judges has reflected itself not only in the authorities relied upon but also sometimes in the methodology and technique used in deciding cases and ultimately in the resulting legal principles established. In *Archibald v Attorney-General*,[44] the Court of Appeal was required to determine the method for assessing the quantum of damages in a dependent's claim for loss of future support resulting from unlawful and wrongful killing of the appellants' breadwinner. In the High Court, Livesey-Luke C.J., an English law-trained judge, after a careful examination of the evidence and penetrating analysis of the relevant English and Roman-Dutch law authorities, observed that the actuarial method of assessment that the appellants' counsel had invited him to adopt was commonly used by the South African courts.[45] After a review of the English law approach to this, and in terms evoking shades of English law insularity on the subject, the judge rejected the actuarial method. In doing so, he recited many of the familiar reasons that English judges have used over the years to justify their misgivings of the actuarial technique. In the learned Chief Justice's view, there was "nothing intrinsically Roman-Dutch common law about the use of the year-by-year method or of the actuarial calculations closely associated with it."[46] In the Court of Appeal, two of the three judges who constituted the majority, Amissah J.P. and Aguda J.A., both English law-trained, whilst disagreeing with the Chief Justice's outright rejection of the actuarial method, as well as the amount awarded as damages, adopted the English multiplier method that the latter had used. In doing so, they relied entirely on English law. Puckrin J.A., from a Roman-Dutch law background in his dissenting opinion, saw no reason why the court should "reject" the use of the actuarial method and "employ in its stead methods adopted *holus bolus* from other jurisdictions which may not be applicable in Southern Africa."[47] Although all three judges agreed that the amount awarded as damages for loss of support was too low, the majority in using the English multiplier method awarded P 582, 211.00 as damages whilst Puckrin J.A. in using the South

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44. [1991] B.L.R. 169 and in general, see Charles M. Fombad, Archibald v Attorney-General *in Perspective: The Role of Actuarial Evidence in the Assessment of the Dependents' Damages for Loss of Support in Botswana*, 11 AFRICAN J. OF INT'L & COMP. L. 245-61 (1999).

45. [1989] B.L.R. 421.

46. *Id.* at 430.

47. [1991] B.L.R. 169, 183.

African year-by-year approach was ready to award P 1, 076,342, almost double the amount. Unlike the other two Judges, Puckrin J.A. felt unconstrained in admitting legal writings as persuasive authorities.

In some of the judgments examined in this study, the decisions appeared to have depended to a large extent not only on the background of the judge but also his predilection. Justifications for decisions were simply sought in either English law or Roman-Dutch (basically, South African law), on the assumption that the law on that point was either similar in both systems or governed by one of them. This may well be true in many instances, but this was not often substantiated or where this was done, it was either in the form of an *ex post facto* justification or a simple superficial comparison of certain basic principles. For example, Gyeke-Dako J. in *State v Mokwena*,[48] simply relied on the precedent laid down by the Court of Appeal in *Baoteleng v The State*,[49] when the latter in defining what constituted extenuating circumstances, adopted the judgment of Holmes J.A. in the South African case of *S v Letsolo*.[50] Such an approach is particularly problematic especially in areas such as substantive and procedural criminal law, where the Roman-Dutch common law principles have been explicitly replaced with English law principles. Even if there are doubts or obscurities that need to be resolved, it can be argued that reference should be made to other jurisdictions using English law before recourse is made to South African cases, unless where the law is the same.

Whilst there is some attempt by the judges to rely on both English and Roman law sources, there has however been a considerable shift in favour of English law by the Legislature. In fact, most recent legislation is almost always based on English law and this often results in conflicts and contradictions because in many cases these laws are not adequately adjusted to the realities of a mixed system or the fact that Roman-Dutch law remains the substratum of the legal system.[51] On the whole, the legislative and judicial processes, whilst complementary, appear to be at variance. This is often more apparent than real. As Gardiol van Niekerk in several places in her study points out, references to South African cases with respect to a statute such as the Penal Code that is based

48. [1990] B.L.R. 1.
49. [1971-1973] B.L.R. 82.
50. 1970 (3) S.A. 476.
51. See, for example, the criticisms levelled against the Matrimonial Causes Act 1973, based on the English Divorce Reform Act 1969 and numerous anomalies and contradictions that have emerged because it did not take account of the Roman-Dutch legal substratum by C.M.G. Himsworth, *Effects of the Matrimonial Causes Act Legislation in Botswana*, 18 J. OF AFRICAN L. 175-77 (1974).

entirely on English law is often merely by way of comparison or to indicate a general development in criminal law although in a number of cases, the courts have rather boldly followed South African case law without explanation.[52]

C. Possible Reasons for Changes Within the Mix

What appears to be happening in Botswana, which is, that a period of divergence from South African law, arguably the historical source of the mixed legal system, is followed by a period of convergence, even in areas covered by national legislation based on or influenced by English law, seems to be replicated in other jurisdictions in the region.[53] It was predictable that after independence, many of the countries in the region will develop their legal systems along lines which may be different from what was taking place in South Africa. A number of factors may explain why there appears to have been a period when there seems to have been divergence between legal developments in South Africa and that in the other mixed jurisdictions. Such movements are not unusual, for as we saw above, South Africa went through a period of tension between the purists and pollutionists and now appears to have adopted a pragmatic solution. The other countries in the region have been silently going through their own period of conflict that has seen a shift towards English law although more extensive studies are needed to show the exact extent of the shifts. As the Botswana analysis shows, there is now an increasing reliance on South African precedents. A number of reasons can be given for shifts that have taken place in the mixed jurisdictions.

Firstly, differences in social and economic conditions meant that the laws in each of the Southern African jurisdictions had to be adjusted and adapted to deal with the local realities. The differences in political developments were particularly significant as some countries such as Botswana maintained their inherited multiparty constitutional democracy, whilst others such as Swaziland quickly suspended their constitution. These conditions influenced the extent to which the inherited legal system was retained and developed to deal with the local problems of the day.

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52. Van Niekerk, *supra* note 32, at 315-19.

53. *See, e.g.*, A.J. MANASE & L. MADHUKA, A HANDBOOK ON COMMERCIAL LAW IN ZIMBABWE 1-5 (Univ. of Zimbabwe Publ'ns, Harare 1996); 1 GEORGE KASOZE, INTRODUCTION TO THE LAW OF LESOTHO. A BASIC TEXT ON LAW AND ASPECTS OF JUDICIAL CONDUCT AND PRACTICE (Morija Printing Works, Lesotho 1999); JOHN REDGMENT, INTRODUCTION TO THE LEGAL SYSTEM OF ZIMBABWE 2-5 (Belmont Printers, Byo 1981).

Secondly, the system of apartheid appears to have done more than anything else to discourage many countries in the region who had only received the mixed legal system indirectly through South Africa from freely relying on or referring to its laws. This was not only because the whole inhuman apartheid edifice was constructed on a series of controversial segregation laws but also the manner in which the judiciary sometimes participated in the process. Because some of the judges were so trapped in the apartheid mind-set within a system which gave very little scope for norms concerned with fairness, freedom, justice and individual liberty, it became difficult to separate the system of apartheid from the legal system that in many instances was perceived to support and sustain it.[54] For example, a former Chief Justice of Botswana, Robert Hayfron-Benjamin in *The Taxpayer*'s Case, when referred to a South African Roman-Dutch authority opined that it is hard to rely on such authority which "bears a heavy imprint of the harsh social order within which it was developed," and from which no guidance in matters of human rights can be derived.[55]

A third serious problem is that of the accessibility to many of the Roman-Dutch legal sources. As Judge Aguda points out, learning in Dutch which would have facilitated access is no longer regarded as a worthwhile academic pursuit, nor is knowledge of Latin, which was once also regarded as a mark of culture and an imperative for law students necessary.[56] Although the language problem has been significantly mitigated by the fact that many of the important ancient Roman-Dutch authorities have now been translated into English, apart from South Africa and to some extend Namibia and Zimbabwe, very few of these are readily available in the other Southern African jurisdictions.

Fourthly, the academic support structure for promoting a sound education in the legal system as it exists is weak in many jurisdictions.

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54. For some of the writings on this, see DAVID DYZENHAUS, HARD CASES IN WICKED LEGAL SYSTEMS (Oxford Univ. Press, Oxford 1991); HUGH CORDER, JUDGES AT WORK: THE ROLE AND ATTITUDES OF THE SOUTH AFRICAN APPELLATE JUDICIARY 1910-1950 (Juta & Co, Cape Town 1984); CHRISTOPHER FORSYTH, IN DANGER FOR THEIR TALENTS: STUDY OF THE APPELLATE DIVISION OF THE SUPREME COURT OF SOUTH AFRICA 1950-1980 (Juta & Co, Cape Town 1985); and ADRIENNE VAN BLERK, JUDGE AND JUDGED (Juta & Co. Cape Town 1985).

55. Criminal Appeal 73 of 1978 (unreported). It is however necessary to point out that in a subsequent case, *Attorney-General v. Moagi* 1982 2 BLR 124 the Judge President the Court of Appeal, Maisels, disagreed with him and pointed out that the learned Chief Justice may not fully have appreciated the distinction between the common law of South Africa and certain statutory encroachments on the common law. *See* further A.J.G.M. Sanders, *Constitutionalism in Botswana: A Valiant Attempt at Judicial Activism*, 16 CILSA 364-66 (1983).

56. *Legal Development in Botswana from 1885 to 1966*, 5 BOTSWANA NOTES & RECORDS 57 (1973).

Whilst Latin is no longer a requirement to study law as it used to be in some Universities, Roman law which is a key subject in understanding the civilian system has also almost disappeared from the programme of most law schools in the region or where it is retained, is taught merely as an elective.[57] To this must be added the fact that increasingly, many of those who now teach law in many of the law schools have come from common law jurisdictions and are not very conversant with the subtleties of Roman-Dutch law. Comparative law and legal history is also not considered sufficiently important and are often done merely as appendages to first year introduction to law courses.[58]

Fifthly, as the examples from Botswana above show, there are challenges that are posed not merely by the fact that many of the judges that have been appointed in many of these jurisdictions have been trained only in English law and therefore have to learn or acquaint themselves with the fundamentals of Roman-Dutch law on the bench but in many cases there is some inherent bias in favour of what they are familiar and comfortable with. Whilst there are occasional references to Roman-Dutch authorities, this is sometimes superficial and ritualistic because of the limited ability to research into these old authorities beyond relying on modern interpretations of their works. Hardly are there any references to cases or authorities outside the common law jurisdiction. For example, the 1995 volume of the Botswana Law Report contains references to 651 cases that were either "applied," "referred to," "considered," "cited," "not followed," or "distinguished." In all these, 460 (70.6%) were South African cases, 82 (12.5%) were Botswana cases, 99 (15.2%) were English cases and of the other 10 cases, only one was from Germany, a non-common law jurisdiction. If this is compared with the 1396 cases "referred" to in the four volumes of the 1995 South African Law Report, 1119 (80%) that is an overwhelming majority, were South African cases, 141 (10.1%) were British, 35 (2.5%) were from Canada, and the rest 101 (7.2%) were all from other common law jurisdictions. In spite of the fact that the courts operate in a mixed jurisdiction, there is hardly any

57. Zimmermann, *supra* note 10 at 53, points out that even in South African universities, although Roman law is still an obligatory course, it is usually taught at an elementary level, too elementary to equip the students with a facility for independent historical research and the course tends to be unpopular on both sides of the lecture desk.

58. From the programmes available on the Web site, of the three potentially useful courses, namely Roman law, comparative law and legal history, the law department in the University of Botswana has a course that combines comparative law and legal history, the Faculty of Law in the University of Namibia only offers comparative law, the Faculty of Law of the National University of Lesotho also only offers comparative law whilst the law department of the University of Swaziland only offers Roman law.

reference to cases from civilian jurisdictions. Significant though this may be, too much doesn't need to be read into this given the fact that case law is not as important a source of law in civil law as it is in common law and that this might be more than made up for by reliance on juristic writing. There is however something significant that must not be missed; this is the extensive references to South African case law not only in South Africa itself but also in Botswana and other countries in the region.

What is clearly emerging is that in spite of divergences, unavoidable in the light of post-independence legislation which was based and influenced mainly by English law and the need to take account of the specific legal, social, cultural, economic, and political particularities of each of the countries, there is an increasing tendency to cite South African case law. There is still much in the sentiments expressed by Villiers AJ in *Maisel v. Van Naeren*, when he said: "If guidance as to the application of law to modern circumstances is to be sought from other legal systems, regard should much rather be had to those systems . . . which . . . have their roots in the same historical soil as our law."[59] The courts in the region now pick and choose what they see as desirable from either Roman-Dutch law precedents or English law.[60] Recourse to either English law or Roman-Dutch law must not be an act of blind faith. A rule or principle cannot be good or bad merely because it has or has not got an English or Roman-Dutch law pedigree. Nor is there any intrinsic merit in the survival or preservation of archaic externalities of either the common law or civil law ancestry for the sake of it. The fact that this two potentially diametrically opposed systems appear to have found many common grounds in many areas and do not merely coexist but are actually integrated in a reasonably coherent and harmonious system in Southern Africa suggests that the prospects for legal harmonization of the common law and civil law is not a daunting and impossible task after all. Each brings in something that complements the other. As PQR Boberg has suggested, since the Roman-Dutch law is rich in principles and poor in details, and the English common law is rich in details but poor in principles, the intermarriage of the two would make a perfect combination.[61] Perhaps the most interesting aspect of this development is that in almost all the countries in the region, references to Roman-Dutch

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59. 1960 (4) 836, 847.

60. *See* A.J. MANASE & L. MADHUKA, A HANDBOOK ON COMMERCIAL LAW IN ZIMBABWE 2 (Univ. of Zimbabwe Publ'ns, Harare 1996).

61. *Oak Tree or Acorn? Conflicting Approaches to Our Law of Delict*, 83 SALJ 175 (1966).

law now means nothing more than citing South African case law, which itself is a blend of Roman-Dutch law and English law!

IV. CONCLUDING REMARKS

Legal systems are constantly mixing, blending, melting and then solidifying into new shapes as they cool down.[62] There is therefore no surprise in the conclusion that there are shifts in the nature of the mixes within the different countries that share the common law/civil law mix in Southern Africa. What is clearly missing is a comprehensive scientific study of the nature of these mixes and the implications this could have on future legal developments within the region. There are already some attempts to see how laws in Africa can be harmonized.[63] A study of what is clearly one of the most important sub systems on the continent would make the ultimate goal of harmonizing laws on the continent much easier to achieve. Until such a study is carried out, my observations here are therefore fairly tentative and merely designed to show that there is a big gap in the information that we have that needs to be filled.

A few reasons were suggested why at some stage there appeared to have been a reluctance to refer to and rely on South African law in spite of it being the direct source of the laws that the countries in the region received. This might have been so during the heydays of apartheid but since 1994 the transformation of the South African society has had such a profound effect on the legal system that its potential impact on the mixed systems in Southern Africa can no longer be ignored. In Botswana at least, there is evidence that since 1994, the courts tend to rely on and refer to more South African cases than they do with English cases in spite of the fact that most recent legislation has been influenced by English rather than Roman-Dutch legal principles.

It is indisputable that South African law, especially after its Roman-Dutch component, which had already been cut off from its Dutch moorings by time, history and circumstances, has acquired a unique identity, which is neither purely Roman-Dutch nor purely English law.

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62. Esin Örücü, *What Is a Mixed Legal System: Exclusion or Expansion?*, 12(1) ELEC. J. OF COMP. L. 13 (2008), http://www.ejcl.org/121-15.pdf.

63. In 2004, the All-African Collaborative Project Relating to the Harmonisation of Commercial Law and Related Laws of Member States of the African Union (Harmonisation of AU Law Project) was launched under the leadership of Professor Ph. J. Thomas of the University of Pretoria. Its objectives are work towards the harmonization of laws amongst AU member states with a view to creating a secure legal and commercial environment sufficient to ensure continued regional investment and future development. *See* further Caroline Nicholson, *Some Preliminary Thoughts on a Comparative Law Model for Harmonisation of Laws in Africa*, 14(2) FUNDAMINA 50-65 (2008).

Whilst the civilian substratum is too firmly entrenched to be overridden by the transplantation of English law principles, the synthesis between the two systems does show that civil law and common law can successfully blend to produce a system that is internally consistent and harmonious. Other recent developments suggest that we do not need to go abroad to look for and copy Western constitutional models. For example, the South African constitution of 1996 has not only incorporated the best elements of Western constitutional systems but has so adapted this to its historical, social and cultural environment that it is now a model which even some Western countries can emulate. Judge Guido Calabresi of the U.S. Supreme Court, in pointing out that the fact that several post-1995 constitutions were modelled on the U.S. Constitution did not prevent the U.S. learning from their experiences, observed, "Wise parents learn from their children."[64]

The hope is therefore that more research into how the mixed systems in Southern Africa would be undertaken. This is particularly imperative in a period of globalization and regional growth with a strong current towards the internationalization of legal standards. The search for common legal standards must be guided by a comparative analysis of the present state of the mix in each country.

But there is just one final thought. Do we still need to talk of English law or more often, Roman-Dutch law as being the common law of the countries in Southern Africa when what is actually being applied is a careful blend of the two? The English call their law, English law and rightly so too. The Americans call theirs American law and consider English law as its main historical source only. The French call theirs French law even though it is based on Roman law. There is no reason why the successful blend of English law and Roman-Dutch law that applies in Southern Africa cannot be referred to as Southern African law. It must now be recognized and accepted as a unique subsystem of mixed systems that through creative imagination, pragmatism, and opportunism but with an acute sense of legal history, is sufficiently flexible and adaptable to meet the peculiar needs of the countries in the region.

64. *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995).