The Africanisation of South African Civil Procedure: The Way Forward

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Abstract

Civil procedure enforces the rules and provisions of civil law. The law of civil procedure involves the issuing, service and filing of documents to initiate court proceedings in the superior courts and the lower courts. Indeed, notice of legal proceedings is given to every person to ensure compliance with the *audi alteram partem* maxim ("hear the other side"). There are various rules and legislation that regulate these court proceedings: inter alia, the Superior Courts Act, 2013, Uniform Rules of Court, Constitution Seventeenth Amendment Act, 2012 and the Magistrates' Courts Act of 1944. The rules of court are binding on a court by virtue of their nature. The purpose of these rules is to facilitate inexpensive and efficient legislation. However, civil procedure does not only depend on statutory provisions and the rules of court. Common law also plays a role. Superior Courts are said to exercise inherent jurisdiction in that their jurisdiction is derived from common law. It is noteworthy that while our rules of court and statutes are largely based on the English law, Roman-Dutch law also has an impact on our procedural law. The question therefore arises: How can our law of civil procedure be transformed to accommodate elements of Africanisation as we are part and parcel of the African continent/diaspora? In this regard, the article examines the origins of Western-based civil procedure, our formal court systems, the impact of the Constitution on traditional civil procedure, the use of dispute-resolution mechanisms in Western legal systems and African culture, an overview of the Traditional Courts Bill of 2012 and the advent of the Traditional Courts Bill of 2017. The article also examines how the contentious Traditional Courts Bills of 2012 and 2017 will transform or complement the law of civil procedure and apply in practice once it is passed into law.

Keywords: civil procedure; courts; rules of court; legislation; common law; specialist

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civil courts; dispute resolution mechanisms; Africanisation; African customary law; Traditional Courts Bill; access to justice; transform; complement

Introduction

Civil procedure enforces the rules and provisions of civil law (Cassim, Hurter and Faris 2014–2016, 3; Peté et al 2013, xxxv). It is part of an adjectival law subject because it addresses the proof and enforcement of rights, duties and remedies.[1] A court of law will entertain legal proceedings only if it is satisfied that it is competent to do so, or that it has jurisdiction to hear a particular matter or claim (Herbstein and Van Winsen 2009, 3; Peté et al 2013, 35). The proceedings must also be properly conducted and properly instituted. Therefore, litigation lawyers are confronted daily with the following matters:

- the correct court to proceed in;[2]
- the form of proceedings;[3]
- what documents should be prepared and filed with the court;
- service of such documents on other parties;[4]
- the conduct of proceedings in courts;
- the execution of the court judgment and the question of whether the proper remedy is an appeal or review?

In South Africa, the law of civil procedure basically involves the issuing, service and filing of documents to initiate court proceedings in the courts such as the superior courts and lower courts. Indeed, notice of legal proceedings is given to every person to ensure compliance with the *audi alteram partem* maxim.[5] Common law and statutory law play an important role in the law of civil procedure. Superior courts are said to exercise inherent jurisdiction in that their jurisdiction is derived from common law. It is noteworthy that while our rules of court and statutes are largely based on the English law, Roman-Dutch law also has an impact on our procedural law. This article examines the origins of the law of civil procedure in South Africa, our court systems and the impact of the Constitution, the use of dispute-resolution mechanisms in Western legal systems and African culture, the distinction between South African civil procedure and

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1 This is *vis-à-vis* substantive law, which deals with legal rights, duties and remedies such as criminal law.

2 The question arises as to which court to proceed in, namely, the High Court, the magistrate's court or the Small Claims Court.

3 This relates to the decision whether to use an application or an action proceeding, because different procedures and remedies apply.

4 One has to determine whether service will involve personal service, substituted service or edictal citation.

5 This phrase basically means "hear the other side". This ensures that all parties are given a fair hearing before the court.

African customary-law processes and the impact of the Traditional Courts Bill of 2012 and 2017 respectively.[6]

The article further examines our current law in civil procedure to ascertain whether our law reflects elements of Africanisation, currently elite customary law and practices and to determine whether our civil laws adequately address the needs of the people of South Africa. The article also considers whether there is a need to transform our present law of civil procedure and if so, how? Therefore, the question arises whether our law of civil procedure can be transformed to reflect the cultures and practices of the South African population and thereby improve access to justice for a majority of the South African people. The article concludes that traditional Western-based civil procedure will not change with the advent of both the Traditional Courts Bill of 2012 and that of 2017. These two Bills will be compared to determine the need to amend the latest provision of the Traditional Courts Bill of 2017 to be akin with civil procedure. It is advocated that traditional Western-based civil procedure should rather be brought into a complementary relationship with local African customary law and culture going forward to best serve litigants.

Sources of Law of South African Civil Procedure

The Impact of Common Law

Most of the common-law principles have a Roman origin and were taken over and modified by Roman-Dutch law. The South African history of civil procedure goes back as far as the Justinian, Corpus Juris Civilis period. South African Roman-Dutch law, including law of civil procedure, was received in the Cape Colony in 1652. (Tetley 2000, 64). Roman-Dutch writers, such as inter alia, Groot, de Voet and Van der Linden have influenced the law of procedure (Herbstein and Van Winsen 2009, 49–52, 66, 96; Cassim, Hurter and Faris 2014–2016, 19).

There are certain general common-law principles on which territorial jurisdiction is exercised, and these principles are applicable in the superior courts, such as the doctrine of effectiveness;[7] the doctrine of submission;[8] and the *actor sequitur forum rei* principle,[9] to name but a few. The enforcement of the application of this principle was illustrated in *Fourie v Land-En Landbou*[10] in the Eastern Cape, where the court

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[6] It should be noted that earlier versions of the Bill were introduced in 2008 and 2012. The Traditional Courts Bill of 2017 seeks to provide a uniform legislative framework for the structure and functioning of traditional courts in line with the Constitution.

[7] It refers to the power of the court to give an effective judgment.

[8] It applies when a party does not object to court's jurisdiction thus conferring jurisdiction on the court to hear the particular matter.

[9] The action is brought where the defendant resides.

[10] Case no CA694/2003 Eastern Cape Division.

confirmed that jurisdiction is present where enforcement of a judgment is possible.[11] Latin terms demonstrate the influence of Roman-Dutch law on the law of civil procedure.

However, it should be borne in mind that our rules of court and statutes are based on English law, which was also received in the Cape Colony through statutes (Tetley 2000, 64). Our system of pleadings is based on the English system. Therefore, English procedural law is also influential.

Rules and Legislation

There are various rules and legislation that regulate these court proceedings.[12] The rules of court are binding on a court by virtue of their nature (Cassim, Hurter and Faris 2014–2016, 18; Harms 2016; C-10-100).[13] The purpose of these rules is to facilitate inexpensive and efficient litigation in practice by ensuring that parties conform to the proceedings set out in the rules before the actual trial ensues or proceeds.[14] However, civil procedure does not only depend on statutory provisions and the rules of court as seen from the common-law principles discussion above. One must also bear in mind that the Constitution serves as the supreme law of the land and that any laws that are inconsistent with it may be declared invalid and have no effect.[15] According to section 8 of the Constitution, the Bill of Rights in Chapter 2 applies to "all laws". This means that Chapter 2 also applies to the law of civil procedure.

Our Court Systems and Impact of the Constitution

The courts comprise the Constitutional Court (Du Plessis 2013, 18),[16] Supreme Court of Appeal,[17] magistrates' courts[18] and other courts such as the Small Claims Courts[19] and specialist civil courts such as the Equality Court[20] and the Land Claims Court.[21] The magistrate's court is a creature of statute and it has no jurisdiction beyond the enabling statute, namely the Magistrates' Courts Act 32 of 1944. It is noteworthy that

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11 *Fourie v Land-En Landbou* Case no 694/2003 Eastern Cape Division.

12 Such as the Uniform Rules of Court, Superior Courts Act, 2013, Constitution Seventeenth Amendment Act, 2012, the Magistrates' Courts Act 32 of 1944 and the Small Claims Courts Act 61 of 1984.

13. Case no CA694/2003 Eastern Cape Division.

14 See Uniform Rules of Court.

15 See s 2 of the Constitution.

16 It is now the apex court; the highest court in all matters constitutional and non-constitutional.

17 It functions mainly as a court of appeal and it may never be approached directly.

18 They comprise the district and regional courts, limited by jurisdiction.

19 It is a consumer-oriented court.

20 It is created in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

21 It is created in terms of the Restitution of Land Act 22 of 1994.

section 29(1B) of the Magistrates' Courts Act has vested the regional magistrates' courts with jurisdiction to hear and determine matters relating to nullity of marriage or a civil union relating to a divorce between persons and to decide upon a matter arising from the Recognition of Customary Marriages Act 120 of 1998.[22] Section 29(1B) of the Magistrates' Courts Act vests the regional magistrates' courts with the same jurisdiction as any High Court. It is noteworthy that the status of specialist civil courts is similar to that of a High Court. A party who practises in the specialist civil court requires knowledge to practise in that particular court, including knowledge of jurisdictional principles applicable to that particular court (Peté et al 2013, 37).

The superior courts have inherent jurisdiction to make orders, which are unlimited as to the amounts in respect of matters that come before the courts.[23] However, this is subject to some limitations imposed by the common law and statute. It has been said that "whereas inferior courts may do nothing that the law does not permit, superior courts may do anything that the law does not forbid" (Herbstein and Van Winsen 2009, 49).

The inherent jurisdiction of the superior courts is now enshrined in section 173 of the Constitution, which states that "the Constitutional Court, Superior Court of Appeal and High Court have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice".[24]

It is submitted that the above provision should be read with section 39(2) of the Constitution, which requires courts, when interpreting any legislation and when developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.[25] According to Bertelsman J, section 173 has extended the powers of the courts and the Constitution has increased the scope of judicial activism where interests of justice arise.[26] In *Coetzee v Government of the Republic of South Africa, Matiso & Other v Commanding Officer, Port Elizabeth Prison & Others*,[27] the Constitutional Court found sections 65F and 65G of the Magistrates' Courts Act 32 of 1944 to be invalid and unconstitutional. It should be noted that these sections had ordered the committal of debtors to prison for failure to satisfy a judgment debt. Section

22 Therefore the regional magistrate's court may hear a matter relating to a customary marriage.
23 Superior Courts Act 10 of 2013.
24 Section 173 of the Constitution.
25 *S v Lubisi* 2004 (3) SA 520 (T) at 531–532.
26 *Lubisi* (n 25) 531–532.
27 1995 (4) SA 631 (CC). Regarding additional case law demonstrating the impact of the Constitution on the law of civil procedure, see inter alia, *Bid Industrial Holdings (Pty)Ltd v Strang & Another* 2008 (3) SA 355 (SCA) and *Malachi v Cape Dance Academy International (Pty)(Ltd)* 2010 (6) SA 1 (CC).

34 of the Constitution also facilitates access to courts and ensures a fair hearing and justice for parties.[28] Therefore, the Constitution has an impact on civil procedure.

Earlier versions of the Traditional Courts Bill of 2017 (discussed in more detail below) were found to be contentious because they had elevated the authority of traditional leaders and undermined the rights of women.[29] The Traditional Courts Bill of 2017 was tabled in parliament in February 2017. This new revised Bill is designed to transform the traditional courts to ensure that these courts function and comply with the Constitution and Bill of Rights.[30] Therefore, the new Bill seeks to address the concerns raised in the two previous Bills regarding the role of women and other vulnerable groups. The new Bill also provides litigants with a choice to "opt out" of the traditional court system, prohibits legal representation in line with the Commissioner's role in the Small Claims Court and provides litigants with the right to appeal to the High Courts where procedural deficiencies exist. Jones and Buckle acknowledge the fact that judges ought to recuse themselves when presiding in matters where they have some form of a relationship with one of the parties. It is interesting to observe that there is no recusal provision in the Traditional Courts Bill of 2012 and 2017. It is important to finalise the Traditional Courts Bill of 2017 because of the critical role it plays in the legal system, and parliament is urged to consider the averments made in this article because they are significant to the Africanisation of civil procedure. It is submitted that the traditional courts will fall under the umbrella of a specialist civil court once the Act is implemented.

The Use of Dispute-Resolution Mechanisms in Western Legal Systems and African Customary Law and Culture

As stated previously, section 39(2) of the Constitution requires courts, when interpreting any legislation and when developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.

In civil procedure, when we discuss resolution mechanisms in Western legal systems, we look at alternative dispute-resolution (ADR) mechanisms *vis-à-vis* litigation. The

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28 Section 34 of the Constitution provides that "everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

29 To illustrate this, the 2012 Bill was rejected after receiving criticism from opposition parties and women's rights groups, who found that the Bill trampled on women's rights, especially in the rural areas and appeased traditional leaders instead: "Critics slam Traditional Courts Bill despite Changes". Available at https://www.legalbrief.co.za (accessed 8 September 2016).

30 See cl 3 of the Traditional Courts Bill of 2017.

three primary processes of ADR mechanisms or systems are negotiation,[31] mediation[32] and arbitration.[33] These processes are regarded as informal, voluntary and flexible and they facilitate the inexpensive resolution of legal disputes and help facilitate access to justice (Cassim, Hurter and Faris 2014–2016, 37–45; Peté et al 2013, 445–449). ADR mechanisms are employed in various spheres of law such as divorce and family disputes, labour disputes and environmental disputes. Court-annexed mediation was also introduced in 2014 into the magistrate's court system.[34] It was introduced in Gauteng and the North West as a pilot project.

The goals were to promote access to justice, promote restorative justice, facilitate the expeditious and cost-effective resolution of disputes between litigants; it also offers lawyers a career alternative (Van der Berg 2015, 1–11).

Dispute-resolution mechanisms are not used only in Western systems. Dispute-resolution mechanisms are also embedded in the traditions and customs of African customary law (Aiyedun and Ordor 2016, 173). The common processes employed in African customary law to resolve disputes are negotiation and mediation (Boniface 2012, 381–386; Cassim, Hurter and Faris 2009, 52–53). Such disputes were traditionally resolved within family groups or non-related family groups. Mediation was facilitated by elders in the community and the process involved an "attitude of togetherness" and it occurred in the "spirit of ubuntu" (Radebe and Phooko 2017, 1–13).[35]

The emphasis on a restorative outcome benefiting the whole community rather than the individual distinguishes the practice of dispute-resolution mechanisms in African customary law and culture from Western legal systems (Boniface 2012, 391). This also demonstrates that African cultures are group-oriented and concerned with the welfare of their community rather than on individual achievements and interests (Maluleke 2012, 4). According to Boniface, the impact of colonisation and apartheid on African models of dispute resolution has led to the breakdown of the family and the community (Boniface 2012, 390). Therefore, people are no longer strictly arranged along family lines as they were in the past. The practice nowadays, with urbanisation, is to seek the advice of neighbours rather than extended family groups, with disputes also being reported to the police, church groups, street committees and local civil associations.

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31 "Negotiation" refers to the process in which two or more disputants resolve their differences by agreement.

32 "Mediation" refers to the process in which two or more parties resolve their disputes through the intervention of a third party, namely, a mediator, who is impartial.

33 "Arbitration" involves the use of a third party, the arbitrator, who hears both sides of a dispute and makes an award that is accepted as binding by the parties.

34 See *Government Gazette* 37448, effective 1 August 2014.

35 The phrase "ubuntu" basically means "I am, therefore I exist", and it denotes humanity and morality.

The Distinction between Civil Procedure and African Customary Processes

The first point of departure is to make a distinction between the different processes that are followed in African customary law and civil procedure. This is done by looking into different processes in both African customary law and civil procedure. In civil procedure, for example, a dispute must first exist in order for court proceedings to be initiated. The nature of the claim will determine the process to be followed (Hurter, Cassim and Faris 2014–2016, 30–31, 130–131; Peté et al 2013, 141–144). If the nature relates to a claim for a debt or a liquidated demand, then the plaintiff will issue a simple summons.[36]

The defendant, on the other hand, files a notice of intention to defend to indicate that they want to defend the matter.[37] Subsequently, the plaintiff will file a declaration which contains the basis of their claim, and the defendant will in return file a plea which contains their defence.[38] If there are new averments in the plea, then the plaintiff will file a replication and the defendant will reply by means of a rejoinder.[39] Once the issues are crystallised, the pleadings will be closed and the parties may prepare for trial.[40] The trial process is different in civil procedure because a presiding officer presides over the matter – a judge in the superior courts and a magistrate in the lower courts – and the parties are represented by legal representatives.[41] It should be noted that where irregularities appear, the parties may apply for an amendment, exception or application to strike out the section of the pleading.[42] The judge delivers a judgment and if the parties are not happy with the judgment, they may apply for an appeal or a review (Herbstein and Van Winsen 2009, 1116–1310; Peté et al 2013, 297–328). There are pre-trial judgments in civil procedure, namely, the parties may apply for summary judgment and default judgment (Herbstein and Van Winsen 2009, 515, 700; Peté et al 2013, 206–223).

However, the proceedings in African customary law are commenced by lodging a complaint either to the chief, king or queen, the headman or the head of the kraal, depending on the nature of the dispute (Olivier et al 1995, 79; Rautenbach 2010, 17–43). Upon receiving the complaint, the presiding officer requests a meeting and oral

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36 The nature of the claim also determines the type of summons to be used. A combined summons is used for unliquidated claims, such as divorce or damages, and a provisional sentence summons is used in the case of a liquid document.

37 Uniform Rules of Court and Magistrates' Courts Rules.

38 See Uniform Rules 20 and 22 respectively.

39 See Uniform Rule 25.

40 See Uniform Rules 29 and 35 respectively.

41 The accusatorial system is followed in South African law. It should be noted that a commissioner presides inquisitorially in the Small Claims Courts.

42 See Uniform Rules 23, 28 and 30.

evidence is led by means of witnesses (Olivier et al 1995, 78–139). The presiding officer makes a decision after hearing the evidence and their decision is binding in that regard (Olivier et al 1995, 78–139). In customary law, disputes are presided by traditional leaders and the headmen and the notion of recusal is not known in customary law (Rautenbach 2010, 149–170). It appears that there may be a need to consider incorporating provisions in the new Traditional Courts Bill of 2017 to ensure that justice prevails where the traditional leaders and headmen are related to either party to a dispute.

However, if either of the party is not happy with the decision, then the particular party may refer the matter to a magistrate's court (Bekker et al 1982, 19–69). The new Bill seeks to change this in that parties now refer their disputes to the High Court if either party is not happy with the outcome.[43]

The meeting between the parties is not recorded, and it is more often than not an informal meeting or a discussion. There are no legal representatives representing the parties: the parties in these proceedings are represented by the head of the family or a senior family member (Bekker et al 1982, 70). Currently there are no specific international instruments that particularly address international customary-law customs or disputes, save for conventions of the European Union, United Nations processes and the African Charter on Human and Peoples Rights.[44] Parliament in South Africa has attempted to Africanise civil procedure to bring it in line with the customs and customary-law practices, by drafting the Traditional Courts Bill, thereby introducing a specialist civil court. The following discussion addresses the contents of the Traditional Courts Bill in detail and compares it to current civil-procedure processes.

Overview of Traditional Courts Bill

The first point of departure is to make a distinction between the Traditional Courts Bill of 2012 and the Traditional Courts Bill of 2017, which was recently tabled in Parliament in February 2018. This is based on the fact that there are few amendments to the Traditional Courts Bill of 2012 that are pertinent and which are not incorporated into the new Traditional Courts Bill of 2017. Both Bills aim at integrating the current civil-procedure processes with customary-law customs and practices. In terms of both Bills, traditional courts are created which are managed by the kings, queens, headmen and members of royal families.[45] This is in contrast to civil procedure because the courts are managed by court officers and presided by judges and magistrates. Jones and Buckle do

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43 Section 11 of the Traditional Courts Bill of 2017.

44 The International Covenant on Civil and Political Rights of 1966, the United Nations Convention on the Rights of the Child and Article 29 of the African Charter on Human and Peoples Rights. It should be noted that Article 29 alludes to the preservation of positive cultural values in the spirit of tolerance, dialogue and consultation.

45 Section 4(5)(*a*) of the Traditional Courts Bill of 2012.

acknowledge the role played by the traditional leaders and the protection of the traditional leaders from civil suits regarding issues discussed during the proceedings (Jones and Buckle 2016, Rules 5–47).

The provisions of the old Traditional Courts Bill of 2012 are discussed first and the comparisons will be made later after highlighting the importance in Africanising civil proceedings. The relevant provisions of the Traditional Courts Bill of 2012, some of the contents of which are not incorporated in the new Traditional Courts Bill of 2017 are: clauses 7, 9, 10, 18 and 19; these are each discussed below. It must be noted that there are few amendments to the Traditional Courts Bill of 2012 that are important and which ought to be incorporated in the new Traditional Courts Bill of 2017.

Jurisdiction of the Traditional Courts

Section 9 of the Traditional Courts Bill of 2012 granted the traditional courts jurisdiction to determine disputes relating to the settlement of certain civil disputes of a customary-law nature.[46] There are, however, certain matters that the traditional courts do not have jurisdiction to hear: for example, matters relating to nullity, divorce or separation arising from a marriage and any other dispute that relates to the status of a person.[47] This provision is now enforced in clause 4 of the Traditional Courts Bill of 2017.

Purpose of drafting the Bills

Section 7 of the Traditional Courts Bill of 2012 sets out the specific aims of the traditional courts, namely, they strive to prevent conflicts, maintain harmony and resolve disputes in a manner that promotes restorative justice and reconciliation.[48] This is similar to the mandate of our civil courts to apply the law fairly and deliver judgments in accordance with sections 8 and 34 of the Constitution, and in doing so facilitating access to justice and respecting equality before the law.[49] The aims are also incorporated in the new Traditional Courts Bill of 2017 and they both aim to resolve disputes in a peaceful manner of resolving disputes in communities.

How should the Proceedings in the Traditional Courts be conducted?

Section 9 of the old Traditional Courts Bill of 2012 contained the same contents that are also entrenched in clause 7 of the new Traditional Courts Bill of 2017.[50] They both seek to enforce the notion that the proceedings must conform to customary law and customs,

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46 Section 5(1) of the Traditional Courts Bill of 2012.

47 Section 5(2) of the Traditional Courts Bill of 2012. These matters may not be adjudicated by the traditional courts.

48 Section 7(*c*) of the Traditional Courts Bill of 2012.

49 It should be noted that s 8 encompasses applying the Bill of Rights to the law of civil procedure; s 34 ensures a fair public hearing before a court or an impartial or independent tribunal or forum.

50 Section 9 of the Traditional Courts Bill of 2012.

unless otherwise indicated by the minister.[51] For example, presiding officers are required to ensure that the Bill of Rights is protected and respected.[52] The Traditional Courts Bill does not, however, indicate how the Bill of Rights should be protected: first, there is no legal representation for parties in traditional courts. Secondly, the manner of presenting evidence limits the rights of the party or parties concerned. As a result, only oral evidence is presented in court and no preparation or discovery phase or stages are available to the parties.

Suffice it to say that neither Bill is clear regarding the way in which the preparation or discovery stages occur. It is submitted that these stages help to prepare the parties for trial and prevent the element of surprise. The discovery process is important in civil procedure because it enables the parties to prepare adequately for a matter before the court and the manner of doing so is provided for in the respective rules of both the superior and the lower courts.

Protection of Women and Disabled Persons' Rights

Both Bills acknowledge the significance of protecting the rights of women in order to be in line the provisions of section 9 of the Constitution. The Bills enforce the principle that the presiding officer's role is to ensure that women are afforded full and equal status and that they are permitted to participate in the proceedings in the same manner as their male counterparts.[53]

The right of disabled persons ought also to be protected in that the traditional courts must ensure that their feelings are sensitised or their vulnerabilities addressed during the proceedings. But here again the Bills do not guide the traditional courts as to how the rights of vulnerable persons may be addressed.[54]

Protection of Children's Rights

It is important to note that the Traditional Courts Bill of 2012 places emphasis on the fact that the presiding officers must also protect the rights of children. The new Traditional Courts Bill of 2017, however, is silent in this regard. It is argued that there is a need to incorporate provisions explicitly in the new Bill to ensure that the "best interests of the child" notion is enforced. This will be achieved by ensuring that measures that are put in place to protect the best interests of the child, which is entrenched in section 28 of the Constitution (Songca et al 2016, 33–52). It is important to enforce the protection of the best interests of the child principle in cases that involve children because our courts regard this protection as the "most significant one", as seen

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51 Section 9 of the Traditional Courts Bill of 2012.

52 Section 9(1)(*b*) of the Traditional Courts Bill of 20l2.

53 Section 9(2)(*a*)(i) of the Traditional Courts Bill of 2012.

54 Section 9(2)(*a*)(ii) of the Traditional Courts Bill of 2012.

in *McCall v McCall*.[55] Therefore, further guidelines regarding the procedures and mechanisms are required and it is observed that the later Traditional Courts Bill does not deal directly with this notion; it only highlights the protection in a very broad context.[56]

Audi alteram partem Rule

Section 9 of the Traditional Courts Bill of 2012 requires the presiding officers to apply and enforce the *audi alteram partem* rule during the proceedings.[57] Furthermore, the rule of *nemo index in propria causa* must be enforced.[58] Clause 7 of the new Traditional Courts Bill of 2017 enforces this notion of hearing the other side because both parties to the traditional court proceedings are required to be present when the dispute is resolved.[59] The significance of allowing the other party to be heard in civil proceedings was highlighted by the Supreme Court of Appeal in *Standard Bank of Namibia v Atlantic Meat Market Pty Ltd*,[60] where the High Court had refused to afford the appellant an opportunity to lodge and file affidavits in an urgent interlocutory interdict.[61]

Legal Representation

It is borne in mind that section 9 of the Traditional Courts Bill of 2012 prohibited legal representation in the traditional courts, yet section 35 of the Constitution emphasises the protection of the right to legal representation.[62] Clause 7 of the new Traditional Courts Bill of 2017 also precludes legal representation, yet our courts affirm its significance.[63] This is now incorporated in clause 7 of the new Traditional Courts Bill of 2017. This new Bill also puts in place a blanket prohibition and it would appear that this should not be the case, particularly in serious matters such as rape and incest. It is argued that there should not be a blanket preclusion of legal representation because the circumstances of each case differ and the traditional court should also consider permitting legal representation in exceptional circumstances.

There may be cases where there may be a need to have legal representation in traditional courts (such as rape cases) and to our mind it is not proper simply to prevent it at all.

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55 1994 (3) SA 201 (C) at 202–203.

56 Section 7(3)(*a*)(ii) of the Traditional Courts Bill of 2017.

57 As stated previously, this principle requires all parties to receive a fair hearing before a court. See s 9(*b*)(i) of the Traditional Courts Bill of 2017.

58 This phrase basically means that any decision-making must be impartial. See s 9(*b*)(ii) of the Traditional Courts Bill of 2017.

59 Clause 7 of the Traditional Courts Bill of 2017.

60 2014 NASC 14.

61 Standard Bank of Namibia v Atlantic Meat Market Pty Ltd 2014 NASC 14.

62 See s 9(3)(*a*) of theTraditional Courts Bill of 2012 and s 35 of the Constitution.

63 Section 7(4)(*b*) of the Traditional Courts Bill of 2017.

The circumstances of each case must be considered in order to justify the need to have legal representation in certain matters. These could include cases involving lucrative breach of contract and defamation of character.

Our courts have also emphasised the significance of legal representation. This importance is illustrated in *Botha v Pangaker*,[64] where the High Court (the court *a quo*) had granted an order of divorce in the absence of the appellant and the court referred the matter back to the trial court.[65] The right to have legal representation was also affirmed by the Supreme Court of Appeal in *Legal Aid Board v Pretorius*.[66]

The old Traditional Courts Bill of 2012 permitted the parties to be represented by their partners, family members or neighbours or a member of the community and this was in terms of customary law and customs. But clause 7 of the new Traditional Courts Bill of 2017 "… allows parties to be represented by any person of his or her choice and prohibits legal representation".[67] It is suggested that where the traditional leaders permit legal representation, there ought to be legally qualified assessors who will help the traditional courts to apply their mind properly and to arrive at a fair decision.

Orders granted by the Traditional Courts

Section 10 of the Traditional Courts Bill of 2012 provides for different orders that the traditional courts may grant after adjudicating disputes:[68] they may issue fines; orders for the payment of settlements and orders of compensation for damages.[69] In terms of this section, the settlement may be expressed by including livestock:[70] for example, a beast as payment for damages relating to the impregnation of a virgin; this is referred to as "*ngquthu* beast" (Olivier et al 1995, 79–80). The traditional courts may also order parties to desist from particular conduct complained of.[71] The effect of an order is equivalent to orders or judgments granted by the magistrates' courts;[72] however, these decisions may be appealed to and reviewed by a magistrate's court.[73]

Clause 8 of the new Traditional Courts Bill of 2017 enforces the previous provisions of the old Bill: it aims at restoring relations and peace in broad terms, but it is not as specific

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64 Case no 6499/2012 HC WC.

65 *Botha v Pangaker* case no 6499/2012 HC WC.

66 332/05 SCA.

67 See s 9(4)(*a*) of the Traditional Courts Bill of 2012 and cl 7 of the Traditional Courts Bill of 2017.

68 Section 10 of the Traditional Courts Bill of 2012.

69 Section 10(2)(*a*)–(*b*) of the Traditional Courts Bill of 2012.

70 Section 10(2)(*b*) of the Traditional Courts Bill of 2012.

71 Section 10(2)(*c*) of the Traditional Courts Bill of 2012.

72 Section 11(*d*) of the Traditional Courts Bill of 2012.

73 Section 12 of theTraditional Courts Bill of 2012.

as the old Bill.[74] It would appear that both the old and the new Bills attempt to Africanise civil procedure to a certain extent.

Recording of the Proceedings in Traditional Courts

Clause 18 of the Traditional Courts Bill of 2012 required the presiding officer to record the proceedings;[75] this appears to be akin to the trial proceedings in civil procedure. Jones and Buckle further affirm the significance of recording the proceedings during civil litigation and they also acknowledge the use of digital recordings in civil trials or litigation (Jones and Buckle 2017, Act 17). It would appear that parliament also acknowledges the significance of such recordings, because they are also incorporated in clauses 13 and 14 respectively of the new Traditional Courts Bill of 2017. This reinforces the importance of recording the proceedings in the traditional courts.[76]

Transfer of the Proceedings

Clause 19 of Traditional Courts Bill of 2012 permitted the parties to transfer cases when the need arose.[77] Cases will be transferred if complex or difficult issues are brought before the court or when issues or disputes brought before the court relate to disputes for which the traditional courts do not have jurisdiction.[78] It is noteworthy that complex matters are also transferred from a magistrate's court to the High Court in terms of section 50 of the Magistrates' Courts Act of 1944. Clause 14 of the Traditional Courts Bill of 2017 incorporated the provisions of clause 19 of the 2012 Bill. This affirms that where there is a dispute regarding the jurisdiction of the court, the matter may be transferred to a competent court.

Offences committed in Traditional Court's Proceedings

Section 20 of the Traditional Courts Bill of 2012 provides that if the parties do not respect presiding officers during the proceedings or do not behave in a manner that is desirable, such parties will be guilty of an offence.[79] This appears to be similar to contempt-of-court proceedings in civil procedure.

The new Bill, however, does not necessarily set out offences per se. It provides instead for a party who is aggrieved about non-compliance with the provisions of the Bill to take the proceedings on review to the High Court.

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74 Clause 8 of the Traditional Courts Bill of 2017.
75 Section 18(*a*)–(*c*) of the Traditional Courts Bill of 2017.
76 Clause 13 and 14 of the Traditional Courts Bill of 2017.
77 Section 17 of the Traditional Courts Bill of 2012.
78 Section 19(1) of theTraditional Courts Bill of 2012.
79 Section 20(*a*)–(*c*) of the Traditional Courts Bill of 2012.

It is interesting to observe that in terms of the new Traditional Courts Bill of 2017 review is conducted by a High Court as opposed to a magistrate's court, which was the case in the old Traditional Courts Bill of 2012. It appears that there is a need to review section 11 of the later Bill, because it may create confusion about the jurisdiction of the traditional courts and that of the magistrates' courts. It is submitted that if parties wish to review a decision or the manner in which the traditional court came to its conclusion, they can refer the matter to the High Court in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and allow the reviews and the appeals be dealt with by the magistrate's court.

Powers of the Minister

Section 21 of the Traditional Courts Bill of 2012 permits the minister to draft regulations to ensure that the processes in traditional courts are in line with customary-law practices and customs.[80]

The above discussion on the Traditional Courts Bill of 2012 indicates that the Bill does incorporate civil-procedure processes and the same is now enshrined in section 17 of the Traditional Courts Bill of 2017.

How can Civil Procedure be Africanised to bring it in line with Customary-law Practices?

The question then arises whether there is a need to Africanise the law of South African civil procedure. "Africanness" is said to refer to African philosophy, ontology and epistemology, whereas "africanisation" may be understood to incorporate African traditions and concepts (Mollema and Naidoo 2011, 50–53). Mollema and Naidoo argue that recognition should be given to the Africanisation of the law to reconcile different legal traditions and promote diversity of the law (Mollema and Naidoo 2011, 63). It is noteworthy that the preamble to the African Charter on Human and Peoples Rights states that the charter should consider the values and historical traditions of African civilisation: it demonstrates the significance of African values and traditions. Erasmus also acknowledges the need to reform or develop civil procedure and avers that the chiefs must accept changes and that this ought to be extended to other jurisdictions (Erasmus 1999, 12–19).

The discussion on South African civil procedure has shown that the law of civil procedure is based on Roman-Dutch law, English law and legislation. It is also influenced by the Constitution, which is the supreme law of the land. In terms of sections

80 Section 21 of the Traditional Courts Bill.

39 and 211 of the Constitution, one needs to give effect to African customary law.[81] The contentious Traditional Courts Bill has recently been tabled in parliament. As previously stated, the aim of the Bill is to regulate traditional courts and customary law in order to bring it in line with the Constitution. The advent of traditional courts will provide litigants with a speedier, cheaper and more flexible forum for hearing disputes than the costly formal court system. The new Bill also reflects elements of traditional Western-based civil procedure: it prohibits legal representation (similarly to the Small Claims Courts); it focuses on restorative justice measures (similarly to court-annexed mediation in the magistrates' courts) and where procedural deficiencies exist, it affords litigants the right to appeal to a High Court.

It is submitted that, once implemented, the passing of the Traditional Courts Bill will result in a specialist civil court. As observed previously, the provisions of the Bill do to a certain extent incorporate some current civil-procedure processes that are observed by our courts. The rules in the traditional courts should also regulate the discovery stages and other processes that are currently observed in civil procedure because, more often than not, the parties appear in traditional courts without disclosing evidence beforehand. This lack of discovery may be prejudicial to the opposing parties when, when confronted with such evidence, they are taken by surprise. The rules of both the superior courts and the magistrates' courts regulate the discovery of evidence in the respective courts. For example, Rule 23 of the Uniform Rules of Court enables the parties to litigation to discover evidence that is important for litigation in a matter (Jones and Buckle 2017, Service 12 2016). In the superior courts, Rule 35 regulates the manner in which evidence ought to be discovered in civil proceedings.

According to Boniface, Western knowledge systems need to be brought into a complementary relationship with relevant indigenous knowledge (Boniface 2012, 391). It is submitted that the establishment of a complementary relationship between South African civil procedure and customary-law practices and values should be the way forward.

Conclusion

It is acknowledged that the current South African civil-procedure processes differ from customary-law practices in the country: while the former are highly regulated, the latter are not. The law of civil procedure is primarily based on statute, legislation or rules; an attempt can be made to strive towards Africanising civil procedure in order for it to be akin to customary-law practices or custom. A litigant is able to choose a traditional court to hear their claim rather than the formal court system. This will also save costs for the

81 Also see s 211 of the Constitution, which recognises that courts must apply customary law when it is applicable and subject to the Constitution; and see any legislation that specifically addresses customary law.

litigant because the costs of litigation can be high in the formal court system. This is why we suggest that the proceedings in the traditional courts should, for example, allow parties to discover and, where necessary, allow legal representation; and why we suggest that there should be legally qualified assessors to help the traditional leaders to make informed decisions.

It is evident that both Traditional Courts Bills seek to incorporate current civil-procedure processes into traditional courts, and this, in our view, will Africanise civil procedure when the new Bill and its regulations are amended and finally passed. It is important to consider our submissions when finalising the new Traditional Courts Bill of 2017 because of the critical role it will play in our legal system. It is also submitted that the inclusion in the new Bill of clauses affording litigants the right to seek redress in an alternative forum rather than in the traditional courts and the provision addressing the review of procedural shortcomings in the High Courts are welcome changes.[82] It is submitted that the new Bill identifies with the court-annexed mediation project in the magistrates' courts in so far as it focuses on restorative justice measures such as compensation and reconciliation. It is evident that the later Traditional Courts Bill seeks to incorporate current civil-procedure processes into traditional courts. This, in our view, will complement rather than Africanise civil procedure when the Bill and its regulations are finally passed.

It is important to finalise the Traditional Courts Bill because of the critical role it will play in South Africa's legal system. There also appears to be a need to conduct additional research into South Africa's customary-law practices to ensure that these practices are kept abreast with constitutional practices. This will give effect to the historical traditions and values of African civilisations in the "spirit of tolerance, dialogue and consultation", and therefore promoting the moral well-being of society.

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82 See cls 4 and 11 respectively of the Traditional Courts Bill of 2017.

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