
REGULATING TRADITIONAL JUSTICE IN SOUTH AFRICA: A COMPARATIVE ANALYSIS OF SELECTED ASPECTS OF THE TRADITIONAL COURTS BILL

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SUMMARY

Traditional justice systems have been in place for a very long time in South Africa and in Africa in general. They are characterised by informal systems that are not beset by the normal technicalities prevalent in formal justice systems. In recent times South Africa has sought to do away with the *Black Administration Act*, which was the regulating legislation on traditional justice systems, by introducing the *Traditional Courts Bill*. Initially introduced in Parliament in 2008 and withdrawn for another tabling in 2012, the Bill has been met with much criticism. Instead of venturing on a clause by clause analysis of the provisions of the Bill this note considers selected aspects of it which are perceived to be significant and which have courted controversy. These are ascertainment, legal representation, jurisdiction, gender, and the hierarchy of courts. The essential arguments are that the Bill has not been properly aligned with the *Traditional Leadership and Governance Framework Act* 41 of 2003 (as amended in 2009) or the *Constitution of the Republic of South Africa*, 1996 and that the above issues have not been addressed adequately or are at times only vaguely addressed.

The note also considers various provisions from other African countries with similar legislation and which also regulate on the same issues, for the purposes of identifying better ways of addressing the selected issues. In the final analysis, the recommendations are not that the South African legislature must transpose the provisions of other countries, but that the framers of the Bill must reconsider these issues along the lines in which they are addressed in the countries with which

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comparisons are drawn here. Without a reconsideration of the issues, the Bill will still be met with criticism even from those it is meant to regulate, and could potentially result in various constitutional challenges and litigations.

KEYWORDS: Traditional Courts Bill; traditional justice systems; customary law; ascertainment; legal representation; hierarchy of courts; gender