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AN EXPLORATION OF THE ROLES OF TRADITIONAL COURTS IN COMBATING CRIME:

A STUDY OF THE MAPHUMULO TRADITIONAL TRIBE, STANGER

By

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DECLARATION

I Snethemba H.F Jili student number 214512364, hereby confirm that this Thesis is my own work which I have never previously submitted to any other university for Any purpose. The references used And cited have been acknowledged.

Signature of Candidate: 

On the ……. 4th …….. day of …December ……2020

DEDICATION

This work is dedicated to the residents of the Maphumulo traditional tribe ward 11 *(isgodi kwaNgcolosi)* as well as their traditional leaders who in joint hands work together to ensure that crime in their community is dealt with and ensuring that everyone is able to fight injustices; seek remedies; and exercises their right to access justice.

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ABSTRACT

The restorative justice system has existed among nations across the world for centuries. It is argued that this form of justice draws on the wisdom of indigenous cultures for restorative and not punitive justice. To recognise and promote restorative forms of justice, many countries have developed protocols, standards, and ethical procedures for practitioners of restorative justice. One such tool is indigenous or tribal courts. South Africa is amongst those countries that acknowledge restorative justice as its indigenous people have been using traditional systems as a tool to manage crime for a very long time. African restorative justice is embedded in African norms, values and beliefs that provide society with normative but often unwritten outlines for maintaining social peace, resolve conflict, and combat crime. However, the arrival of colonialism and apartheid in South Africa disrupted most Africans' political, economic, cultural, and social lives. Fortunately, the traditional justice system has survived as it still exists and thrives in resolving disputes and managing crime in some parts of South Africa, especially in rural areas.

However, because South Africa is a democratic country that has been steered by a human rights-based Constitution for more than two decades, this study was conducted to address the question whether rural communities have unrestricted access to the formal justice system, or whether they are effectively served by a tribal justice system. This was done against background evidence that the formal justice system has been unable to reach and serve all the inhabitants of this country, and that rural people in particular would then seek legal support and restitution by approaching the traditional justice system. The overarching aim of the study was thus to investigate the role of alternative justice measures in combating crime in a rural area. The study objectives were to: (i) explore the laws and procedures applied by a traditional court to address crime; (ii) to determine whether these laws and procedures were in line with the South African Constitution; and (iii) to ascertain the effectiveness of the traditional court to combat crime in the area under study. The study adopted an exploratory and descriptive research design, and the qualitative research approach was used to obtain the required information. The study findings revealed that, more than two decades into democracy, many residents in this rural area experienced frustrating challenges when they wished to access the formal justice system. It was mainly for this reason that the participants admitted that they relied almost exclusively on the traditional justice system as their only effective and available channel to seek restitution for legal matters and injustices. This study concluded that the role played by the traditional justice system in the rural area under study bridged the gap between

rural residents and the formal justice system. Therefore, although this informal justice system was undeniably plagued by shortcomings such a gender-based approach that seemed to favour the voice of men and marginalise that of women, it was concluded that this traditional court was effective in combating acts of crime that might otherwise have escalated into serious threats against justice and the peaceful coexistence of the affected community.

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CHAPTER ONE:

INTRODUCTION

1.1. The Role of Traditional Courts in Combating Crime

Umbreit, M.S., Coates R.B., & Roberts A.W. (2000) argued that the prevalence of traditional forms of justice is not a new phenomenon as these systems have existed for centuries not only in Africa, but also across the globe. Amongst the studies they cite is that of Naude (2006), who states that a restorative justice system that is driven by indigenous measures is not a new concept in the world as it has been existing for centuries. Traditionally, this was the dominating form of criminal justice that was practised during the Roman; Greek, and Arabian civilisations**.** During the ancient eras, communities had the responsibility to care for one another. However, this is still the case in modern times as some communities, especially in rural areas, use a form of justice that emphasises that the victim needs to be compensated for the crime he or she experienced (Naude, 2006). This form of justice system has persisted globally as Western countries like Australia, New Zealand, Canada, and the United States of America have embraced restorative justice programmes by allowing indigenous justice practices and local mediation committees to function. In the period since the 1990s, most of those countries have provided legislations for restorative forms of justice by, for instance, referring certain cases such as assault to the restorative justice conferences (Naude, 2006).

Similar to the authors cited above, Harper (2011) argues that a restorative justice system is not a new phenomenon in Africa and that it still exists in countries like Nigeria, Ghana, and South Africa. In these countries, a restorative justice system still exists in the form of traditional and indigenous legal forums such as those that communities have trusted and relied on as a source of justice for centuries. Harper (2011) further elaborated that the current formal justice system is unable to reach every citizen in most African countries, and thus providing justice for all citizens is unlikely to be accomplished without the traditional justice system being part of the solution. Such argument can be argued to be supported also by Ndlela (2010) when he stipulated that, in most African countries, both the formal and the traditional justice systems are required if governments wish to address citizens' right to access justice. This dual system is necessary not only because of the availability of traditional courts and the non-availability of formal courts in rural areas, but also because of the high respect and influence the traditional justice system has been accorded among residents of urban and traditional communities alike (Ndlela, 2010).

Previous conducted studies as of Ndlela (2010), Ayuk et al (2013); and Hlubi (2013) argued that many citizens in most African countries have limited access to a formal justice system. However, the South African Constitution guarantees equality and protection for all this country's citizens and it is thus regarded as an African country that has one of the most innovative and advanced democracies in the world (Hlubi, 2013). The Constitution of the Republic of South Africa Act No. 108 of 1996 (South Africa, 1996) is the supreme law of the land. Chapter two of the Constitution contains the Bill of Rights which, amongst others, guarantees that every citizen has the right to equality before the law, to be protected by the law, and to have equal access to justice (Hlubi, 2013). However, despite having a constitution that has guaranteed, for more than twenty-five years, that all citizens have equal rights, it can be argued that there are citizens who still have limited access to legal justice. For instance, Ndlela (2010) argues that one cannot ignore the fact that South African crime rates have increased rapidly since 1994 (the year of the abolishment of apartheid) and that crime has spiralled out of control. The high crime rate in South Africa concerns every citizen, especially as the current criminal justice system (CJS) seems to be unable to control criminals. It was therefore not surprising that a survey showed that most South Africans felt three times less safe in 2015 compared to how they felt in the 1990s (Ndlela, 2010). This escalation in feels of uncertainty and fear might be because most communities used alternative measures to control and combat crime in the era before 1994. For example, traditional societies had the means of social control in the form of traditional courts that acted as reformation institutions and moral cleansers as they dealt with every misconduct and criminal offence at community level, and they were thus used as a tool to correct criminal behaviour and serve justice (Igbo & Ugwuoke, 2013). It has been suggested that such a tool can again be implemented in the formal justice system so that it can be used to bridge the wide gap between citizens and the state, strengthen the social solidarity of individuals and their communities, and increase compliance with and respect for the law among citizens (Hargovan, 2009).

Boertie (2005) states that both the restorative justice system and the formal justice system may be subjected to criticism for being incompetent and even flawed in numerous ways. However, some of those flaws can be managed through the implementation of certain measures. For example, facilitators in the restorative justice system should be properly trained to adhere to international and national protocols and standards, while similar and appropriate standards and guidelines should also be devised for and implemented by the traditional justice system.

1.2. Background to the study

Umbreit et al. (2000) argue that the restorative forms of justice that exist across the world draw on the wisdom of many indigenous cultures that have been existing in many countries for centuries. Examples of such cultures are found among the Australian Aborigines, the New Zealand Maoris, and the indigenous American and African people. Moreover, despite the fact that these traditional forms of a justice have been subjected to modern world influences, the implementation of the wisdom and moral value systems of people has varied among countries and regions − but the influence of their cultural values and norms is undeniable (Umbreit et al., 2000). Therefore, the various countries that have recognised and promoted restorative justice have developed protocols, standards, and ethical procedures for practitioners of such systems. Although it is a contentious point, such practitioners are generally trained and educated about handling the restorative justice process, ensuring the safety of the victim and offender, avoiding techniques that intimidate or manipulate affected individuals, and handling informal restorative negotiations (Boersig, 2005). Canada is one of the countries that support a restorative justice system, and it introduced a programme that recognises the roles played by restorative justice for all manner of crimes (Boersig, 2005).

To understand the differences between the formal and restorative justice systems, Umbreit et al. (2002) state that the formal justice system is attributive and retributive in nature and thus focuses on punishing the offender. The restorative justice system, on the other hand, focuses on the process of restoring offenders and decreasing their potential for reoffending again. For example, studies conducted in Australia showed a re-offending rate of 20% for cases that were dealt with by the restorative justice system compared to 40% reoffending for cases dealt with by the formal courts (Braithwaite, 1998). Similar findings were also reported by a South African study conducted by Schönteich (2002), who found an 80% re-offending rate for prisoners whose cases had been dealt with by the formal courts compared to a 20% re-offending rate for cases heard by restorative courts. Such high reoffending rates in the formal justice system may suggest that it is unable to minimise crime through the rehabilitation of offenders and that citizens may therefore lack trust in the formal justice system. They may thus revert to alternative measures to restore offenders and to minimise crime. Boersig (2005) also states that half of the cases reported and dealt with by the formal courts are dismissed or withdrawn, and this leads to a minimal number of convictions. Thus, the high rate of cases reported to the police is disproportionate to the cases that are brought to justice. This situation is prevalent in South Africa as was evidenced by a study that was conducted by Schönteich (2002). The latter study

found that, of a total of 2.58 million criminal cases recorded annually by the South African Police Service (SAPS), only 24% made it to court. It may be argued that such a high dismissal rate of cases has resulted in victims feeling dissatisfied and betrayed by the formal justice system because of their exclusion from judicial proceedings and the denial of the emotions of anxiety, anger and fear that they experienced due to crime (Boersig, 2005). Conversely, a study that was conducted by Umbreit (2002) in Australia revealed that community members who participated in the restorative form of justice were highly satisfied with this system because it not only served justice, but also restored the offender, the victim, and those (such as community members) affected by the crime (Umbreit, 2002).

Roach (2000) corroborates Umbreit's views, and elaborates that restorative justice conferences not only serve justice, but also assist the victims of crime to overcome their traumatic experience by helping them move beyond their feelings of anger and powerlessness and allowing them to meet and confront the offenders. On the other hand, the formal justice system, being retributive in nature, possibly exacerbates the anger of victims and reinforces their sense of victimhood and helplessness as it marginalises the restoration process between victim and perpetrator. However, the form of justice that is facilitated by restorative justice conferences involves not only the victims and their offenders, but also community members − especially those directly affected by the offence. Further to the differences between these two forms of justice, Boersig (2005) explored the statistics of 227 formal court cases and 119 restorative justice cases and found that, in South Australia, the process of the formal courts took twice longer to finalise than that of the restorative court format. For example, a similar case that was finalised within 6 months by the restorative justice court took a whole year to be finalised by a formal court. The latter means delays in getting justice for victims who must relive their experiences of the crime for a longer period in the formal justice system compared to what happens when cases are heard by restorative justice conferences.

Beall and Ngonyana (2009) reiterate that traditional or indigenous forms of justice are not a new phenomenon in South Africa as the traditional justice system has been in practice for centuries and even existed before the Europeans arrived on this continent. Before the arrival of the colonists in the southern parts of Africa, traditional communities implemented structures, procedures, and systems to maintain order and relations (Beall & Ngonyana, 2009). In these traditional systems, the leaders were individuals with high governing responsibilities and their main role was to administer peace and justice based on indigenous laws. Traditional leaders

performed their role in collaboration with an Induna, elder councillors, and respected community members in what was referred to as *inkundla/isgcawu* (tribal courts) (Ntlama & Ndima, 2009). These 'courts' were both judicial courts and parliaments as all issues, whether civil or criminal, were dealt with by these tribal institutions in which everyone who was affected was allowed to participate. However, various studies as of Nxumalo (2012) have argued that these traditional institutions of justice have been altered or destroyed by colonialism and the apartheid era in South Africa (Moseneke, 2007).

The traditional justice system is arguably one of the most affected traditional institution as colonialists and the apartheid government redefined, 'fixed', and codified indigenous laws into customary laws. This was done to bring indigenous law in line with colonial rule and this caused the collapse of African rural solidarity and its economy (Maloka, 1996). Thus, all traditional institutions have gradually but systematically been weakened, and this has damaged the union between traditional leaders and their people. Maloka (1996) further elaborates that, even after the apartheid era ended in South Africa, the trust and faith people had in traditional institutions were damaged as many traditional leaders had associated themselves with the apartheid government. However, Sithole (2015) argues that the restorative justice system has somehow managed to survive the apartheid era and still exists in the current democratic dispensation. Therefore, the challenge that faces the government of the day is the need to incorporate traditional institutions into the new democratic rule of law. In this regard, Williams (2001) argues that the Constitution does not seem to recognize the traditional justice system as the rightful justice channel for many residents in this country and therefore, because the formal justice system in South Africa is unable to reach all residents, the South African government should devise appropriate justice channels for all, but especially for people in disadvantaged urban and rural areas.

1.3. Problem statement

Despite Chapter 2, Section 9 of the 1996 South African Constitution guaranteeing a right to equality; equal protection and benefit of the law for all its citizens, previous researchers as of Oyeike (2012); Hlubi (2013) had found that there are some citizens who still have limited enjoyment of that right. Such citizens include residents from rural areas whose livelihoods resulted in difficult experiences in accessing certain basic services of the government such as the right to access justice (Oyeike, 2012). With most rural areas being underdeveloped and lack most basic services, a general argument that can be made is that a very low percentage of

lawyers and legal professionals produced in South Africa practice their profession in rural areas. This therefore means rural residents are more likely to experience difficulties in accessing most forms of legal services as legal assistance seem to be limited or absent (Hlubi, 2013). This can be argued to creates a challenge in ensuring that every citizen enjoys their right to access basic services, equality and protection by the law as stipulated in the current South African Constitution (Hlubi, 2013). Furthermore, Kariuki (2009) elaborated that due to large number of citizens having limited access to formal justice, it had resulted into residents in areas such as rural areas and urban areas' informal settlements have reverted into relying on non-state or informal justice systems to fill up the void and exercise their right in seeking remedies for injustices. These include the traditional justice system and other community-based forms of justice such as the Community Policing Forums (CPFs) (Kariuki, 2009). It can be further argued that alternative forms of justice such as traditional courts play a significant role in filling up gaps caused by limited access to basic services. This includes fulfilling duties such as preventing crime, administer justice, and maintain social peace (Beall and Ngonyama, 2009).

In support of the above arguments, one may further argue that many residents in rural areas do experience limited access to certain services. This is evidential also with the residents of the *KwaNgcolosi* area under the Maphumulo Local Municipality. The residents of this municipality rely on just one magistrate's court and one South African Police Service station, namely the Maphumulo SAPS police station. Just like most basic services, both the magistrate's court and the Maphumulo Police Station are located in the centre of the small town of Maphumulo. To reach the centre of town, community members in the area must travel distances of between 34 to 62 kilometres, and the majority must make use of taxis at a rate of as high as R45 per trip. These factors limit certain residents from accessing legal services (Maphumulo Municipality Annual Report, 2015/2016). The annual report also indicates that the Maphumulo magistrate's courts, and the Maphumulo SAPS station serve the Maphumulo Local Municipality area which comprises eleven wards with an approximate population of 22 143.

Table 1.3.1 below summarise the cases reported to the Maphumulo SAPS over a period of four years (Final Mono All Stations Data, 2017).

Crime category	**April 2013 to March 2014**	**April 2014 to March 2015**	**April 2015 to March 2016**	**April 2016 to March 2017**	***Total over a period of 4 years***
1.Murder	22	25	14	20	*81*
2. Sexual Offences including rape.	46	58	41	34	*179*
3. Assault with the intent to inflict grievous bodily harm (Assault GBH).	124	163	159	145	*591*
4. Stock theft e.g. livestock.	53	61	96	72	*282*
5. Robbery at residential premises.	24	18	13	17	*72*
6. Burglary in residential premises.	170	156	108	149	*583*
7. Drugs-related offences.	71	55	80	110	*316*

Table 1.3.1: *Summary of crimes reported to the Maphumulo police station (2013 – 2017)*

The data reflected in the table above suggest that serious crime prevention challenges are experienced by the Maphumulo SAPS as it appears that crime statistics generally increased over a four-year period, with just a limited drop in some categories. Overall, it appears that crime in the Maphumulo municipality areas including the *KwaNgcolosi* area had become unmanageable over the reviewed period with drug-related offences and robberies/burglaries in particular spiralling out of control as, respectively, 316 and 655 (72 + 583) cases had been reported in just four years. Assault occurred at a persistent rate of more than 100 cases per year while a high rate of sexual offences also occurred, although as slight decline may be observed (Final Mono All Stations Data, 2017). When the 2013 period crime rates are compared with those in the 2017 period, there was an overall increase in various offences, which suggests that the Maphumulo SAPS battled to combat crime in these areas. This finding comes as no surprise as the SAPS in the Maphumulo area is responsible for eleven wards with an estimated population of 22 143 residents (Maphumulo Municipality Annual Report, 2016). This may be due to the demographics of the area as close observation may reveal that households in the area are scattered across various smaller communities that are located at some distance form one another. Moreover, there are poor network connections which are exacerbated by a poor infrastructure, and the Maphumulo SAPS may therefore find it difficult to reach and service all the residents in need of protection and recourse in the areas of this municipality. The high rates

of crime reported in this area may be much higher as some residents, such as those living in *KwaNgcolosi*, reportedly resort to dealing with minor cases in a traditional court setting not only to impose justice for victims, but also to allow the police to deal with more serious cases.

It may also be argued that escalating crime rates not only indicate the inability of the formal CJS to combat crime in this region, but that they also reflect challenges that are related to the geographical location of the Maphumulo police station and magistrate's court. Both these structures, that should provide basic and essential services to the community, are located far from most residents, as was indicated earlier. Thus, distance becomes a barrier even when residents are willing to report a crime and seek a remedy for the injustice they experienced. It is therefore unsurprising that some residents including from the *KwaNgcolosi* area, have no other choice, but to rely on the most available justice system as an alternative to the formal CJS. In this context, a traditional tribal court system apparently plays an important role in the lives of the Maphumulo community.

According to the Maphumulo Municipality Annual Report (2016), residents of Ward 11 in the Maphumulo Local Municipality are predominantly of the *KwaNgcolosi* tribe. This area was purposively selected as the study area because according to the Maphumulo Annual Report (2016), it is the ward that is least developed and most geographically isolated within that municipality. Moreover, the Annual report also reveals that residents of this Ward seem to experience more difficulties in accessing basic services compared to those of any other Ward in this municipality. It can be argued that the ward 11 KwaNgcolosi residents are thus the most likely to rely on alternative measures to achieve justice for any crimes they might experience. At the point of conceptualising this study, anecdotal evidence was rife that the residents of Ward 11 relied mostly on traditional courts to exercise their rights and to achieve justice and that, due to backlogs in the formal CJS, they had stopped relying on the Maphumulo SAPS and the Maphumulo magistrate's court.

1.4. Rationale for the study

Due to escalating crime rates in the Maphumulo SAPS area, it is evident that the SAPS experiences extensive problems in bringing criminal cases to trial to achieve justice for the residents. Thus, backlogs in the CJS and difficulties in controlling crime in the Maphumulo Local Municipality (including the *KwaNgcolosi* area) seem to compel some communities to revert to traditional crime prevention and control systems. Moreover, the crime prevention problems experienced by most areas such as *KwaNgcolosi* seem to be exacerbated by factors

such having access to only one SAPS station, the extensive community (more than 22 143 residents) that has to be serviced by one police station and one magistrate's court, poor network connections, challenging geographical locations, and a poorly managed and underdeveloped municipality. It can be argued that the Maphumulo SAPS members experience difficulties in reaching and serving most residents in their area of responsibility. This applies mostly to the *KwaNgcolosi* area which was argued by the Maphumulo Annually report (2016) to be the least developed and most geographically isolated area. It will therefore be no surprise to note that the *KwaNgcolosi* area and some relatively inaccessible communities revert to alternative forms of combating crime, which in this case persist in the use of tribal court procedures. Hlubi (2013) argues that traditional courts act as an alternative mechanism of justice for rural communities as they provide access to justice to those individuals who have limited access to the formal justice system, and the practices of the *KwaNgcolosi* tribe seem to corroborate this notion.

The *KwaNgcolosi* tribe comprises a significant part of Ward 11 in the Maphumulo Local Municipality area. The Maphumulo Annual Report (2016) states that this ward is not only the least developed ward within the municipality but also the most geographically isolated one from basic services. The long distances that the residents need to travel to reach the Maphumulo police station and magistrate's court and the high costs of transport prevent most residents especially of KwaNgcolosi from willingly reporting crimes and seeking recourse through the formal CJS. It was therefore deemed important to investigate the alternative criminal justice system employed by the *KwaNgcolosi* tribe in order to determine if justice is served for the victims of crime in this area. Moreover, as the residents seem to rely heavily on their tribal court to combat crime, the researcher needed to explore the role played by the *KwaNgcolosi* tribal court in combating crime as the justice that is meted out by traditional courts has been subjected to much criticism in related literature. The human rights of the citizens of South Africa are entrenched in the Constitution and the Bill of Rights as the supreme law of the country. It was thus necessary to determine if the hearings held by this tribal court deviated in any respect from the human rights provisions in the laws of the Republic of South Africa.

1.5. Aim and objectives of the study

1.5.1. Aim

The study aimed to explore the roles of the traditional court of the *KwaNgcolosi* tribe in combating crime and achieving justice for its citizens. It has been argued that a traditional

justice system dominates in most rural areas because access to institutions of the formal justice system is usually limited for rural residents. The study thus aimed to explore such roles played by the traditional justice system in managing and preventing crime within a democratic society. Some researchers have argued that traditional legal systems should serve as alternative mechanisms for delivering justice and seeking remedies for victims in rural communities (Hlubi, 2013). Therefore, because there is a dearth of information in the literature about the roles and effectiveness of the traditional justice system in the Maphumulo area, this study intends to explore such roles and bridge that gap, particularly as the role of the *KwaNgcolos*i traditional court would be investigated against the democratic legal framework that guides the CJS in South Africa. Furthermore, it can be argued that this study will contribute to the knowledge about such traditional courts through addressing questions and criticisms about the relevancy of these traditional institutions within the democratic dispensation in South Africa.

1.5.2. Objectives

The objectives of the study were to:

- Investigate customary laws applied by a traditional court to prosecute the perpetrators of crime;
- Identify the types of crimes dealt with by a traditional court;
- Explore the procedures followed by a traditional court to control crime;
- Determine whether the procedures followed by a traditional court are in line with the South African Constitution; and to
- Ascertain the effectiveness of the roles of a traditional court in combating crime among the members of the *KwaNgcolosi* tribe in the Maphumulo area.

1.6. Key research questions.

The study was guided by the following Key research questions:

- What customary laws are applied by a traditional court to prosecute the perpetrators of crime?
- What are the types of crimes dealt with by a traditional court?
- What procedures are followed by a traditional court to control crime?
- Are the procedures followed by a traditional court in line with the South African Constitution; and

- What is the effectiveness of the roles of a Traditional court in combating crime in among the members of the *KwaNgcolosi* tribe in the Maphumulo area?

1.7. Defining key research terms

Since the study will be using various African terminologies which might not be understood by everyone, and certain terms being used interchangeably in the study such as traditional courts and customary courts. It is of high importance that the study starts by defining these terms.

1.7.1. Tradition: Refers to the practices, values, ideas and beliefs belonging to a particular community or group that are unwritten but are handed down from one generation to the next. (Finnegan, 1992). Furthermore, Tradition is used to identify or mark out that group of people and is argued to be active and constantly changes to adapt to a certain change or situation (Anyawu, 2005).

1.7.2. Traditional leadership Institution: Refer to one of the oldest governance institutions in the world but mostly in Africa which belongs to the African people. It existed way before apartheid and colonialism and symbolizes early forms of societal organization for the African people (William, 2007). It can be argued that the term Chieftaincy, the traditional authority and traditional leadership can be interchangeably used to refer to the institution of African traditional leaderships. These form of institutions does not only include the monarchy, the king and the chief but they also include the African people, their way of life, what they are doing, what they did and what they intend to do (Anyawu, 2005).

1.7.3. Traditional leaders: Regarded as structures of leadership which occupy a position of communal leadership in cultural mores and values and enjoy certain communities' legality in directing their affairs (Department of Provincial and Local Government, 2002). Their main role as traditional leaders is the regulation and controlling of social behaviour within their traditional community. Their leadership rights and roles are argued to be supported and recognised by their people in terms of customary laws and some cases also by statues (Anyawu, 2005). Despite having such power, it can be stated that no traditional leader performs any duties alone, but rather they operate with other traditional structures such as tribal councils, royal councils, general advisors, elders' council, families, or community members (Oomen, 2000).

1.7.4. Chief *(inkosi):* In many areas, chiefs are referred by people in their indigenous language and at the Maphumulo *KwaNgcolo*si area, the chief is referred to as *Inkosi* (singular) and

Amakhosi (plural). A chief refers to either a male or female senior traditional leader, who is usually chosen through a combination of kinship principles including primogeniture, marriage or position of the mother, and any other considerations decided on by the appointing family council (Hlubi, 2013). As senior traditional leaders, chiefs head the regulation and controlling of social behaviour within their traditional communities. They are argued to head over certain cases such as resolving civil disputes, allocating land, and combating certain criminal issues such as assault and when fulfilling every role, chiefs are argued to work closely together with their headsmen to retain and restore communal peace (Anyawu, 2005). It can be further elaborated that South Africa have approximately 16,9 million people (accumulate 45% of the country's population) living under the ruling of over 800 chiefs who rule and head traditional affairs in their traditional communities (William, 2001).

1.7.5. Headmen *(Induna/Izinduna):* A headman can be defined as a chiefs' (or king's) representative in a traditional community and that is because these leaders occupy the roles of being chiefs' assistances in a traditional community (Anyawu, 2005). An Induna or headmen is usually a male individual who is also regarded as a connection between the chief and the people and that is because he usually reports to the chief about any activities taking place in the area. In some areas, it is the chief who chooses his or her induna, while in other areas the headmen's position is passed through family clans (Anyawu, 2005).

1.7.6. Customary law: Tshehla (2005) states that the Recognition of Customary Law Marriage Act No.102 of 1998 define African customary law as being the usages of customs and tradition by the South African indigenous people which belongs to their culture and these customs and traditions are unwritten but instead passed from one generation to the next. Rautenbach (2008) elaborated that with the implementation of democracy in 1994, what was known as indigenous law was codified and placed into par value with other forms of law and legislations that are subjected to the constitution and was then referred to as customary law (Rautenbach, 2008). The Customary law can be differentiated into two parts, mainly the living customary law and the official customary law. The official customary law is defined as legal practices deriving from culture or tradition of the indigenous people and had been accepted as law (Tshehla, 2005). Further, it is made part of written law which furtherly reflect in case laws and statutes. Meanwhile, living customary law is defined as a form of law that is not rigid but rather changes to adapt to certain conditions. It is furtherly not written law but is followed by most African communities daily (Tshehla, 2005).

1.7.7. Tribe: Argued to be a human form of social organisation consisting of a small group of people with temporary or permanent political integration and bounded by common origin, culture, tradition, ideology, and language (Anyawu, 2005). Furthermore, tribe can be argued to emphasize on the origins of kinship as well as ethnicity forming part of the lives of those people who belong to it (Anyawu, 2005).

1.7.8. Traditional community: It is also referred to as a customary society and is argued to refer to a group of people who lives through allegiance to a traditional council which is usually under the leadership of a chief (Anyawu, 2005). According to the Traditional Leadership and Governance Framework Act 2003, a traditional community is one that is recognised by section 2 of this Act which stipulate that for a community to be regarded as a traditional community it needs to be subjected to a system of traditional leadership in accordance to that community's customs and follow a customary law system (Tshehla, 2005). Traditional communities are argued also to be bounded by strong social bonds and shared factors such as moral, values, laws customs and their way of living (Department of Provincial & Local Government, 2002).

1.7.9. Traditional Justice System: Refers to a traditional institution that acts as a judicial or a body of law in a traditional community. Its role is to impose law and implement justice in traditional court conferences and that is done by applying indigenous law and legal practices deriving from cultural mores and values (Tshehla, 2005). A traditional Justice System is furtherly argued to take a restorative and reconciliation form of justice, which is based on promoting family values as well as promoting and preserving African values of justice (Ntlama & Ndima, 2009). It can be furtherly argued that some scholars stipulate that the existence of colonialism in South Africa resul5ted in the colonialists manipulating the traditional governance institutions. However, despite such manipulation by colonialism, the traditional justice system is argued by Beall & Ngonyama (2009) and Ndlela (2012) to be the only organ of traditional institution that had survived such impacts and is still in existence even nowadays.

1.7.10. Traditional courts: The term traditional courts, tribal courts and customary courts are used interchangeably in the study. These courts are defined by the Traditional Courts Bill [B1-2012] as courts of law under customary law, which are established and function in terms of customary law and customs with the aim to resolve disputes in accordance to the constitution and the traditional court bill (The Traditional Courts Bill [B1-2012]). Traditional courts are argued to be the oldest form of courts which existed prior to colonisation in South Africa and

are currently established and prescribed by traditional authorities in rural areas under the Black Administration Act [Act No. 38 of 1927] (Hlubi, 2013). Further, the proceedings of these courts are argued to involve the affected parties plus the community assembling under a tree, hall or any other community building to come with a resolution to a certain issue presented with traditional leaders such as the chief heading these proceedings (South African Law Commission, 1999).

1.7.11. Rural Crime: Refer to any type of crimes, it can either be violent, property, etc which occurs "in the country", and the country is defined as being agricultural land or area located in small towns, villages, or any other areas outside big and small cities (Fraser, 2011). It may be argued that South African studies conducted on rural crime elaborate that offences that are viewed as mostly taking place in rural areas are usually dealt with by their traditional courts (Mbatha, 2017). Those issues include livestock theft, crimes over land, domestic violence, assaults, and crimes relating to cultural or traditional practices as well as civil matters such are land disputes, social disagreements or quarrels, and disputes over land (Mbatha, 2017).

1.8. Structure of the dissertation.

Chapter one: Introduction

This chapter serves as a foundation of the whole study, firstly it provides an introduction and the background of the study. It then presents other foundational elements of the study such as the problem statement; motivation; the aim of the study; objectives of the study; and the key research questions. Lastly, this chapter defines key important terms used throughout the study.

Chapter two: Literature Review

In this chapter, the research firstly introduced the chapter, as well as defining key research terms. The chapter thereafter moves to review existing literature, which is previously done researches on the topic of traditional leaders and traditional courts. The information was retrieved in secondary sources of literature such as articles; dissertations; journals; newspapers articles or any other informative source containing existing literature on the topic. The study also drew from or referred to sources such as the case laws; the Republic of South African Constitutions, Acts; Legislative and Policy Frameworks.

Chapter three: Theoretical Framework

This chapter consists of the theoretical framework; this is where the theories that guided the study are presented and discussed. The researcher chose theories that support the unity in society and explain other alternative measures to resolve societal issues: namely the Social Sodality theory; The Alternative Disputes Theory; as well as the Broken Window Theory.

Chapter four: Research Methodology

This is the chapter of Research Methodology and it presents the scientific methodology that is used in this study to achieve its aim and objectives.

Chapter five: Data Presentation, Analysis and Discussion

Chapter 5 of this study consists of data presentation and findings. This chapter consists of two parts, firstly it presents data and findings that were found by similar previously conducted studies. Secondly, it analyses and explores the similarities and differences of the findings of the study itself and these are the opinions; views and information collected from the study participants. Those findings are analysed and used to formulate a discussion about the study topic to achieve the study aim and meet the objectives of the study.

Chapter six: Conclusion and Recommendations

In this chapter, the study concludes regarding the whole study and research findings. It also makes future recommendations regarding the functioning of traditional courts, especially how they should be assisted or improved by the government to address the critics raised against this whole institution. This chapter also makes some recommendations on how the constitution as being the supreme law of the land should act towards the traditional justice system.

1.9. Chapter Conclusion

This chapter provides an insight into the outline into the study. This was done by presenting the background of the study; the problem statement; the aim and objectives which are the core elements underpinning the study. It lastly provides a summary of the study by stating what each chapter entails. This is done to provide the reader with a clearer idea of how the study is structured. The following chapter which is the literature review comprises of more insight regarding the study and establish the foundation for the progression of the study arguments and discussions.

CHAPTER 2:

AN *EMPIRICAL PRESENTATION ON THE ROLE OF TRADITIONAL COURTS*

2.1. Introduction

The role of the traditional justice system in managing crime is discussed with reference to previous studies, especially those that were conducted in Africa. This chapter commences by elaborating on the roles played by traditional courts in managing crime from a global perspective. The roles of these courts on the African continent are then explored, with specific focus on one of the best known and traditional courts in Africa, namely that of the Igbo society in Nigeria. The traditional justice system in South Africa is then discussed. An overview of the history of traditional courts during the pre-colonial, the colonial, and the apartheid era is presented, with particular focus on the recent democratic dispensation in South Africa. The discourse is underpinned by references to existing Acts, legislations and frameworks that guide the functioning of traditional leadership institutions in South Africa as well as the findings and conclusions of earlier studies. Traditional leadership and its role in combating crime are addressed to support the aim and objectives of this study.

2.2. The Traditional justice system and the Formal Justice system in combating crime.

To elaborate roles played by the restorative justice system especially in the form of traditional courts in combating crime, one may firstly discuss both forms of justice system which are the formal justice system and the traditional justice system. Mbatha (2017) stated that the main difference between the formal justice system and the retributive forms of justice including indigenous justice practices is that the formal justice system is a justice system of the west that is attributive and retributive in nature, involving formal courts and legal gurus. Meanwhile, the restorative forms of justice are based on indigenous legal practices involving the local community and are restorative with their primary goal being the restoration of the offender, the victim, and the community (Mbatha, 2017). This means it aim to reconcile and restore relationships that were affected by the issue in hand, unlike the formal justice system which is argued based on revenging and enforcing punishment on the wrongdoer (Ubink & Van Rooi, 2011). They further argued that justice within the formal justice is served by adjudication and deciding on who win or lose on the matter and that is different to the restorative form of justice which emphasises on mediating and seeking facilitations that are accepted by everyone as a settlement. Furthermore, restorative justice conferences differ as they do not apply formal

procedures or formal laws but instead, they apply indigenous laws and flexible procedures that can be understood by everyone including ordinary citizens (Chopra & Isser, 2013).

Oyieke (2012) elaborated that the formal justice system is criticized also by using only the English language and that is argued to be problematic to those who do not understand this language but only understand the native languages. It can be further elaborated that this reveals flaws within the formal justice system because through transcripts and language translations information may be distorted from its originality and that may jeopardize an opportunity to access and have a fair share of justice for certain individuals (Oyieke, 2012). The usage of the English language in the formal justice system is different from the restorative form of justice that uses native or indigenous languages that are understood by everyone affected including the illiterate and ordinary citizens. It may be stipulated that the restorative form of justice recognises that justice should be equivalently available to everyone, regardless of their social-economic status and level of education (Mbatha, 2017).

2.3. A Global Perspective on the Roles of the Traditional justice system.

Naudé (2006) states that restorative justice in indigenous contexts is not a new concept in the world as it has existed for centuries and was the dominating form of criminal justice during the civilisations of the ancient Arabs, Romans, Asians and the Greeks. He further elaborates that, during these periods, communities shared the responsibility for caring for one another and this is still the case, particularly in rural areas. Many such communities still use this form of justice that places emphasis on compensation for the victim of a crime (Naudé, 2006). A study that was conducted by Boersig (2005) showed that indigenous people in Australia had been oppressed by colonialism and the enforcement of European laws. This form of oppression was an act of domination while European laws and forms of justice were unable to meet the needs of indigenous communities (Boersig, 2005). However, most Westernized countries such as Australia, New Zealand, Canada, and the United States of America have re-discovered restorative justice measures after 1974 when an experimental victim-offender recognition programme was established in Canada (Naudé, 2006). He further elaborated that this led to most Western countries embracing restorative justice programmes by acknowledging indigenous practices and local mediation committees by the 1990s. Most of these countries provided legislations for restorative forms of justice and referred certain cases to restorative justice conferences. According to Newman (2000), a study that was conducted by Baldry in Italy on restorative justice programmes for juveniles found that numerous offences were

referred to restorative justice conferences such as indigenous courts. The crimes that are referred to range from extortion and property theft to violent crimes. Cases that were mostly dealt with by these justice conferences were theft (31%), personal injuries (13%), robbery (10%), and attempted murder (4%) (Newman, 2000).

Umbreit et al. (2002) argued that, what differentiates the restorative justice system from the formal justice system, is that the former focuses on the process of restoring offenders and decreasing their possible chances of reoffending again while the former justice system focuses on punishment. This view is supported by various researches that were conducted in Australia, England and the United States of America. These researches found that offenders whose cases had been referred to the restorative form of justice showed a low re-offending rate compared to offenders whose cases had been dealt with by the formal justice system (Umbreit et al., 2002). For example, an Australian study showed a re-offending rate of 20% for cases dealt with by the restorative justice system compared to a reoffending rate of 40% for cases dealt with by the formal courts (Braithwaite, 1998). A further example is a South African study (Schönteich, 2002) that found an 80% re-offending rate for prisoners released after 5 years in South Africa. About 54% of these offenders had served only one to three years of their sentences, which he argues could be attributed to restorative forms of justice such as the indigenous justice system. Boersig (2005) refers to research conducted in South Australia involving 227 formal court cases and 119 restorative justice cases. He elaborates that half of the cases reported to the formal courts were dismissed or withdrawn which resulted in a small number of convictions (Boersig, 2005). In the South African context, Schönteich (2002) argues that the formal justice system is performing only partially in managing certain offences as, on average, of about 2.58 million criminal cases recorded annually by the SAPS, only 24% make it to court, only about 11% of those cases went to trial, and these resulted in a sentencing rate of only 8%. This means that numerous cases are left unsolved and justice is thus not achieved for many victims. According to Boersig (2005), cases reported to the formal justice system are either dismissed or the victims of such crimes feel rejected and disrespected. Moreover, physical, emotional, or financial harm is often not addressed by formal courts (Boersig, 2005).

According to Gustafson (2005), a Canadian study on formal court cases found that about 60% of traumatised victims expressed their wish to meet with their offenders, while 87% of offenders also stated they wished to meet their victims. An Australian study that was conducted on cases of restorative justice found that 93% of victims felt that the process was helpful while

96% felt that they had been treated fairly. Moreover, 98% of victims expressed their gratitude for the process as it had allowed them to freely express their feelings without fear of intimidation or victimisation. Of these, 94% stated that the offender had been genuine in offering an apology. An overall 94% stated that they would again take part in the restorative justice system if they experienced a similar issue (Umbreit et al, 2002).

In light of the above, it may be argued that the restorative justice system not only restores, reforms and reintegrates the offender into society, but that the victim and the affected members of the community are also acknowledged and considered (Boersig, 2005). In Australia, community members who had participated in restorative forms of justice were highly satisfied with the methods and processes followed by the restorative justice system to combat crime and restore wellbeing (Umbreit et al, 2002). This means that, although the formal justice system is the predominant form of justice used in most countries, it is flawed in many respects, such as not opening opportunities for restoration for both the victim and the offender (Boersig, 2005). It is therefore not surprising that many more traditional people revert to informal courts to seek justice and restoration.

Furthermore, Boertie (2005) argues that both the restorative and the formal justice systems are subject to criticism for being incompetent in various ways. He points out that many of those flaws can be managed. For example, in the restorative justice system most flaws can be managed through the implementation of certain measures such as properly training facilitators to adhere to international and national protocols and standards, to comply with codes of conduct, and to be subjected to continuous assessments on the way they facilitate restorative justice conferences (Boertie, 2005).

2.3.2. The Traditional Justice System in Africa (Igbo Tradition): The current Era

The traditional leadership institution serves many different roles within society even nowadays and amongst those roles, their administering of justice can be argued to be one of the biggest roles they play (Igwe, 2017). One may further state that such administering of justice by traditional courts within the African culture is underlined under three factors, namely: rehabilitation; deterrence or prevention; and restoration. The first factor is rehabilitation, and it is based on rehabilitating or reforming the offender so that they will not engage themselves in an offence again (Ejikeme, 2011). The second factor is deterrence or prevention and is also aimed at preventing the offender from re-offending. This is done by imposing to an offender a

form of punishment that he or she will never want to experience again (Ejikeme, 2011). The last underlining factor is restoration and is argued as a process of getting the offender to repair the damage their crime caused on the victim. Such repairing can be reconciling of the offender with the victim and community or a form of payment that the offender makes to the victim as compensation (Ejikeme, 2011). In some cases, a fourth and fifth factors called retribution and denunciation are included. The retribution factor is argued to aim at revenging or 'getting even' with the offender and that means the suffering of the offender itself is regarded as being a form of justice served. Meanwhile, denunciation or condemnation is aimed at offering a visible form of justice, it is underline on punishment as a tool that gives society a sense of moral decency and give people a form of justice that does not condone disruptive behaviour but rather enforces acts that are in accordance to laws, norms, tradition and culture and also punish those who go against them (Ejikeme, 2011). This means that denunciation creates some sort of fear and teaches other people who are witnessing the punishment to obey the law.

The African traditional justice system is argued to be more different from the formal justice system in many ways than one and that also include the ways of identifying and unidentified offender in a known crime (Igwe; 2017). Within traditional societies, certain mechanisms that are used in demonstrating proof favouring or against an accused person or group who are refusing to admit being guilty to the alleged crime in question. These proof mechanisms derive from myths based on tradition, beliefs, or religion (Palmary, 2004). In this form of justice system there are no conventional procedures involved, but rather the three principal methods of crime detection are adopted, and these include Divination; Oath-Swearing; and Trial by Ordeal. Regarding *Divination,* Igwe (2017) argued that it is a form of crime detection where diviners are used in revealing the identity of an unknown offender who committed a known crime. Diviners are argued to be special practitioners who have a special gift of connecting and receiving messages from the spirit world. The divination crime detection is underlined by an argument that despite a person committing a crime in secret, their identity should always be revealed (Igwe: 2017). That is because divination is believed to be a method of supernatural means that is used to reveal or unearth any existing mystery surrounding a crime. A diviner is used to unearth any criminal, by providing clues to the missing puzzle pieces and help discover the guilty or innocence of any accused group or person and the verdict of the diviner is usually accepted by the people as being true and from the gods (Palmary, 2004).

The second principle of crime detection of the traditional justice system is referred to as *Oath-taking* and is argued to be applicable in a case where a crime was committed and the offender

is unknown but rather there are suspects with no one willing to confess (Ejikeme, 2011). The process of oath-taking involves those suspects stepping forward in front of an assembled community and their traditional leaders to take a prescribed phrasing oath and they must swear on the oath touching the offence or issue in hand (Ejikeme, 2011). This principle in some traditional society is referred to as Invocation of the gods of the Land and that is because it is believed that if a suspect who did the offence but swears in oath not to have committed it, he or she will be severely punished by the gods such as being struck down by some deadly disease or experiencing mysterious death (Ifemesia, 1979 as cited in Igwe, 2017). Meanwhile, the last principle used in traditional courts is *Trial-by-Ordeal* and it is defined as a method of using customary law to obtain the truth about a crime or criminal(s) regarding more serious cases of crime such as rape and murder (Igwe, 2017). The trial-by-Ordeal is argued to be a technique used to discover the truth about the offence conducted and finding the unknown offender who committed that offence. It involves the suspected offender standing trial and because under customary law in most African tradition such as the Igbo tradition, an individual does not stand trial alone and therefore when a suspected offender stands trial before a traditional judgement seat, he stands together with his family, kindred, age grade, as well as his entire community (Igwe, 2017). It can be argued that in some African tradition, a father or a family head will have to answer or explain the wrongful actions of his child or family member and once the case has been presented and discussed the traditional judgement seat announce a verdict. In a case of a guilty verdict, it is made with the aim of purification; atonement; or appeasing to the gods and according to most African traditions it is the family members' responsibility to ensure that the appeasing or atonement by their relative offender is done (Igwe; 2017).

2.4. A brief history of Traditional institutions and their Laws in South Africa:

2.4.1. The pre-colonial and colonial eras.

Prior to European colonization and these countries' enslavement of African people, traditional communities in the Southern African region had systems, measures and structures of African laws that regulated behaviour and maintained order and social control (Ntlama & Ndima, 2009). The traditional leadership institution was the only form of governance and derived its legitimacy to govern from culture and tradition. Traditional leaders who were the heads of traditional institutions ranged from heads of villages to councils of elders, chiefs, and kings (Olidapo, 2006). In the precolonial era, traditional leadership was respected and honoured because of the important roles these leaders played in shaping the people's quality of life under

their reign. Their influence impacted all aspects of African life, from issues relating to culture, to agriculture and the law (Nxumalo, 2012). Traditional leaders had sole governance powers and authority which embraced the administrative, judicial, and political domains (Chigwana, 2016). When exercising their judicial powers and authority, indigenous laws were applied to resolve disputes and conflicts that threatened the peace. These traditional leaders presided over domestic and societal disputes, criminal matters, and all claims in *legotla* or *inkundla* (courts) involving all the affected community members (Oomen, 2005). It has been argued that the traditional justice system was fully democratic as court settings were open to attendance by every member of the tribe and those who wished to participate in the discussions. The role of women, however, was always subjected to the wishes and authority of men (Oomen, 2005).

Sithole (2008) elaborated that the strong relationship between traditional leaders and their people changed when the Dutch arrived and settled on the southern tip of Africa. The African system of traditional leaders was irreparably damaged as the Dutch became the administrators of colonialism and manipulated indigenous laws and rules to fit in with their Western ideals of justice. Part of their mission was 'to civilise' indigenous people which tainted and weakened the relations between traditional leaders and their people (Sithole, 2008). It is undeniable that, before the arrival of the colonialists, traditional societies in Africa had well established means of social control, moral cleansers and reformation that served as instruments to serve justice. However, this system was seriously damaged by the advent of colonialism (Olidapo, 2006).

2.4.2. The apartheid era

Khan and Lootvoet (2001) argue that, during the apartheid era in South Africa (which formally ranged from 1948 to 1994), traditional authorities associated themselves with various political organisations. Traditional institutions were, to a large extent, manipulated by the National Party, which was the ruling party of that time. Many scholars argue that traditional leaders were used as tools for the government to implement and accomplish their policy of 'divide and rule' (Khan & Lootvoet, 2001). The power of traditional leaders was weakened and became unrecognisable as some traditional leaders were used by the apartheid government as instruments to achieve the separation and segregation of citizens along the lines of beliefs, race and gender (Nxumalo, 2012). Women in most traditional communities were the most affected as they were denied opportunities for advancement and occupied the lowest ranks in the community (Umbe, 2010). Some even argue that traditional leaders enjoyed various privileges through collaborating with the apartheid government (Houston & Fikeni, 1996). For instance,

prior to 1948, traditional authorities were given the authority to allocate land held in trust, to protect law and order, to deliver administrative services at local governance level, and to administrate social welfare (Houston & Fikeni, 1996). However, this slightly changed in 1948 when the Nationalist Party (NP) came into power and expanded its jurisdiction over traditional authorities (Khan & Lootvoet, 2001). For instance, the NP introduced the Black Authorities Act No. 68 of 1951 which granted traditional leaders the power to control land within tribal, regional, and territorial areas (Khan & Lootvoet, 2001). These areas were combined in patches with the aim of creating reserves that were later converted into self-ruled, independent areas referred to as 'homelands' (Ntsebenza, 2004).

The establishment of these homelands profoundly affected traditional governance structures because leaders now had to be elected, appointed and approved by homeland governments while some, whose positions were based on hereditary rights, were marginalised (Khan & Lootvoet, 2001). Most traditional authorities then became subordinate to the NP regime as paid puppets of the oppressive apartheid regime who were no longer accountable to their people but to the state. This means that traditional authorities collaborated with the apartheid government that expounded colonial principles of rule and law (Ntsebenza, 2004). Traditional leaders became tax collection representatives for the NP government and they also recruited individuals from Black communities as cheap labour for white-owned enterprises, such as the mines (Khan & Lootvoet, 2001). Certain legislations, such as the Black Authorities Act of 1951, were used to change traditional authorities into an extension of the government. This was achieved through the implementation of various racist policies that led to the erosion of traditional governance and leadership structures (Khan & Lootvoet, 2001).

2.5. Traditional Institutions in South Africa: The Democratic Era

In the era after 1994, South Africa successfully came to terms with the impact of its painful past. However, to this day the issue of traditional leadership has not yet been adequately addressed and has been plagued by endless debates on how the government should incorporate this institution into the new democratic dispensation (Van Wart, 2003). This challenge is embedded in the lack of a common understanding of what roles traditional leaders should play at local government level (Bank & Southall, 1996). It has thus been difficult for the government of the day to determine how this institution can be accommodated within the democratic dispensation of this country. The current ruling political party, namely the African National Congress (ANC), acknowledges traditional leadership in the Constitution of the Republic of

South Africa of 1996 (Williams, 2010). It can be argued that this means the government sees traditional leaders as role players in the lives of the people they represent.

Ndlela (2010) highlighted that various traditional leaders took part in the Convention for a Democratic South Africa (CODESA) that negotiated a new democratic dispensation for this country. The CODESA negotiations resulted in the adoption of the 1993 Interim Constitution of the Republic of South Africa, which acted as the foundation for the final Constitution of the Republic of South Africa Act No. 108 of 1996 (hereafter referred to as the Constitution) (Ndlela, 2010). Both the 1993 and 1996 Constitutions recognise traditional leadership and customary law in South Africa. The 1996 Constitution obliges the courts of the country to apply customary law whenever applicable, subject to the Constitution and relevant legislations (Manwana, 2014). Section 212 of the Constitution recognises traditional leadership institutions and provides for their roles and status subject to constitutional law (South Africa, 1996). Section 212 states that the customary law system should be observed by a traditional authority and that he or she should act in accordance with legislation, even if amended. The section also obliges all courts to apply customary law where applicable, subject to the Constitution or any legislation specifically dealing with customary law (South Africa, 1996).

Hugh (2004) argues that Section 212 (2) provides for the establishment of Provincial Houses of Traditional Leaders in all provinces. Currently, six of the nine provinces of South Africa have such houses, and all are represented in the National House of Traditional Leaders which is a single body that represents traditional leaders. The House of Traditional Leaders has been granted significant authority in terms of African culture and traditional custodianship. At both national and provincial levels, this House has played an important role in matters affecting traditional leaders, traditional communities, and customary law (Tshehla, 2005). The South African Constitution not only acknowledges and recognises customary law and places it on a par with general laws, but it also includes every individual's right to willingly choose the cultural life he/she desires. It further guarantees equality and non-discrimination (Nhlapo, 2005). Section 182 of the Constitution also places traditional authorities on a par with any other elected leaders of similar authority. This is evident in the statement that a community's traditional leader, who regulates an indigenous law system and resides within the jurisdiction of an elected local government, is an ex-officio member and has the right to stand for any position in a local government (Khan & Lootvoet, 2001). Traditional authorities are also mandated to advance service delivery by local governments. This means that, within the democratic dispensation of South Africa, traditional authorities are role players in local

municipalities and should assist them in achieving their objectives as protected by the Constitution (Rugege, 2003). This role is also affirmed by the Traditional Leadership and Governance Framework Act No. 41 of 2003, Section 5(1) that obliges both the national and the provincial spheres of government to encourage cooperation between municipalities and traditional councils (South Africa, 2003).

Section 20 (1) of this Act gives traditional leaders the power to promote socioeconomic development, amongst others. This implies that the traditional authority structure can be viewed as a fourth sphere that functions at local level (Khan & Lootvoet, 2001). This is supported by the Municipal Structures Act of 1998, which requires that traditional authorities attend and participate in meetings of local councils. The Traditional Leadership and Governance Framework Act of 2003 (South Africa, 2003) further demands that they participate in the implementation of the Integrated Development Plan (IDP) policy. Therefore, although the roles played by traditional leaders are often unclear, the Constitution and related Acts recognise and protect their role in communities (Khan & Lootvoet, 2001). This was confirmed by the Constitutional Court in a case where it stated that Section 166 (e) that refers to "any other court established or recognised by an Act of Parliament" consents to the recognition of traditional courts via the Black Administration Act No. 38 of 1927. The court further stipulated that Section 16 (1) of Schedule 6 of the Constitution recognises traditional courts where it states: "Every court, including traditional leaders…continues to function... (South African Law Commission, 1999). It is therefore undeniable that, in the South Africa democratic dispensation, legislation and policies recognise the role of traditional leaders (Rugege, 2003).

In summary, the Black Administration Act No. 38 of 1927, the White Paper on Traditional Leadership and the Traditional Leadership Governance Framework Act No. 41 of 2003, as well as the Traditional Court Bill [B1-2001] aim specifically at providing clarity regarding traditional leaders and their roles within South Africa.

2.6. The Roles of traditional leaders and Customary Courts within the new South African Democratic Dispensation.

2.6.1. The Black Administration Act No. 38 of 1927

Hugh (2004) argued that it may be noted that the Black Administration Act No. 38 of 1927 was clearly not passed during the democratic dispensation but during the colonisation time which can be believed was under Herzog as the Prime Minister. It can therefore be argued that even

during the colonisation time, the leaders of that era also recognised and acknowledged the existence and roles of traditional institutions. Furthermore, Bekker (1993) elaborated that historically, traditional leaders had various roles ranging from acting as judicial officers in customary law matters to maintaining control and distributing land which were roles all protected under the Black Administration act of 1927. These roles were mandated by the Zulu Chiefs and Headman Act No. 8 of 1974 (Bekker, 1993).

The Black Administration Act No. 38 of 1927 being the main Act was introduced to establish a national system that recognised customary law and created a justice system that catered for traditional communities. However, this Act was subjected to many criticisms, such as that it was a reminder of South Africa's colonial past and that it did not conform to certain constitutional values and human rights (Rautenbach, 2014). On a positive note, the introduction of this Act permitted the Minister to mandate traditional leaders to institute a court of chiefs or headmen (or *Indunas*) and empowered these courts with jurisdictional powers (Hugh, 2004). But, due to continued criticism and disapproval, the Act was repealed, with the exception of Section 12 dealing with the provision of civil jurisdiction and Section 20 consisting of the provision of criminal jurisdiction for traditional courts (Rautenbach, 2014). Section 20 of the Black Administration Act specifies that traditional leaders' courts should hear both civil claims and criminal cases if they were associated with Black customs and laws. These matters should also be brought to the court by a Black person against another. This stipulation of the Act is also supported by Section 16 (1) of Schedule 6 of the Constitution which provides for the continued functioning of traditional courts (Hugh, 2004).

2.6.2. Traditional Leadership and Governance Framework Act No. 41 of 2003

Tshehla (2005) argues that the White Paper on Traditional Leadership and Governance Framework and its ensuing Act No. 41 of 2003 constitute government policy which calls on traditional leadership institutions to embrace democracy and certain principles such as equality, transparency, efficient governance, and accountability. Hlubi (2013) states that the preamble of this policy also clearly stipulates that the state aims to transform traditional leadership institutions so that they function under the imperatives of the Constitution and the Bill of Rights. The objectives of the White Paper thus propose the creation of traditional leadership institutions that can promote governance and values in a democratic society, underscore freedom and human dignity, achieve non-sexism and equality, and adapt and respond to change (Hlubi, 2013). The Traditional Leadership and Governance Framework Act states that

traditional leadership institutions should promote nation-building and harmony and peace amongst the people. Moreover, they should strive to promote culture and tradition and interact with all governmental structures and organs of the state for the promotion of co-operative governance principles. They should also promote dispute resolution measures that are effective, efficient, and fair as well as an administration that is fair and just (Hlubi, 2013).

Sithole (2008) points out that Section 20 (1) (a-n) of the Act specifies the roles of traditional leaders. These roles include assurance of safety and security, the administration of justice, officiating traditional marriages, and the registration of births and deaths. Tshehla (2005) states that the Traditional Leadership and Governance Framework Act of 2003 also provides a framework within which local municipalities and traditional leaders can function. It further recognises the roles of both institutions and obliges the state to respect, protect and promote the system of traditional leadership according to the commands of a democratic South Africa. However, Reddy & Biyela (2003) argued that although the system of traditional leadership was recognised by both Constitutions, there were uncertainties at the time about the role of traditional leadership as a political institution − and these needed to be clarified. Sithole (2008) further argues that, while the Traditional Leadership and Governance Framework Act clarified and detailed the roles of traditional leaders, it was unclear which issues had to be dealt with by traditional leaders in a democratic dispensation. In this context, the Traditional Courts Bill (B1-2017), that had been pending for a long time, was finally passed.

2.6.3. The Traditional Courts Bill [B1-2017]

The ongoing debate on how traditional forms of government could and should operate within a constitutional democracy took a new route when the controversial Traditional Courts Bill [B1-2017] (hereafter referred to as the Bill) was tabled and passed by parliament (Cowling, 2012). The passing of the Bill raised more questions and debates than before because, when the Bill was drafted in 2008, the most affected communities were rural but had not been consulted. Instead, the drafting of the Bill had relied on the advice and opinions of the House of Traditional Leaders (Cowling, 2012). The aim of the Bill was to replace outdated elements of the Black Administration Act of 1927, with specific focus on the role of traditional courts. Clause 2 of the Bill sets out its two objectives and stipulates that the Bill intends to regulate the existing traditional court system and to alter it to be consistent with the Constitution. By passing this Bill, parliament was trying to normalize traditional courts so that standards and norms would emerge to ensure access to a fair justice system for all Black, and especially rural,

citizens of the country (Skhosane, in Van Dalsen, 2019). The Bill also aims to bring the traditional justice system in line with the values of the Constitution, such as achieving equality, the right to human dignity, freedom, non-sexism, and non-racialism. The Bill also emphasises the promotion of access to justice, justice restoration, improving the quality of lives for residents of traditional communities through mediation, and the preservation of the values of the African people that are based on a restorative and reconciliatory form of justice (Rautenbach, 2014).

According to Skhosane (in Van Dalsen, 2019), parliament acknowledges that South Africa is a democratic country that needs to embrace its different cultures, customs, and traditions. For this reason, this piece of legislation was designed to guarantee that the Bill of Rights, which entrenches universal rights, is respected by everyone. Clauses 2 (c) and (d) of the Bill highlight the necessity to formulate a uniform framework for governing the courts of traditional leaders and improving the traditional justice system in terms of its competence, effectiveness, and integrity (Rautenbach, 2014). In terms of regulating the Bill as a modern piece of legislation and an international tool, Clause 3 of the Bill spells out various principles and guidelines that should be employed in the application of the Bill (South Africa, 1996). The main aim of these principles is to promote African values that entrench reconciliation and restorative justice. The Bill thus aims to promote these principles within the framework, freedoms and guarantees of the Constitution (Rautenbach, 2014). The Bill also stipulates the nature of the matters that fall under traditional courts' jurisdiction, such as theft and malicious damage of property to the maximum value of R5 000 (Van Dalsen, 2019). Furthermore, the Bill permits traditional courts to maintain order in their communities and states that they should operate in a manner that benefits the whole community and not specific individuals (Van Dalsen, 2019).

Van Dalsen (2019) concludes that the Traditional Court Bill acknowledges that, in the South African customary justice system, one size does not fit all. Different people live in different communities and therefore the Bill allows people to freely conduct and access customary justice that is embedded in their traditions and customs. Bennett (2004) argues that Section 30 of the Constitution, which validates the maintenance of about 1 500 traditional courts, stipulates everyone's right to take part in a cultural life of their choice. He further elaborates that section 31 stipulates that no person belonging to a certain culture may be denied the right to enjoy that culture with other members of a community (Bennett, 2004).

2.7. The Traditional Justice System

Ntlama and Ndima (2009) state that the traditional justice system can be defined as a restorative and reconciliatory form of justice that promotes family values and preserves the African justice system. It values the participation and inclusion of every individual and community member in resolving disputes or issues. They further elaborate that the primary goal of the traditional justice system is to restore a healthy relationship between disputing parties which consist of victims, offenders, and community members. Melton (1995) also elaborated that it uses indigenous means of resolving conflict such as peace-making, talking circles, family or community gatherings, traditional dispute resolution, and traditional mediation sessions that are conducted in the language of the affected tribal community. The traditional justice system also endorses the principles of Ubuntu, which seek the restoration of peace and harmony among members of a community. Different forums are argued to fall under this form of justice and also those forums vary among tribes (Tshehla, 2005). However, the most common forums of the traditional justice system are family forums, community forums, traditional courts, quasi-modern courts, and modern tribal courts (Melton, 1995). Family forums may be defined as family 'talking circles' or gatherings that are headed by an elder of the family or community leader/s. Furthermore, in these forums, indigenous law, practices and sanctions are used to deal with matters arising from family disputes such as marital conflict, property disputes, the misconduct of parents or juveniles, and violence or abusive behaviour (Melton, 1995). In family forums, chosen elders initiate certain traditional protocols and summon affected individuals to a gathering. The victim can speak on their own behalf with family members assisting whenever they can to enlighten the issue the victim has brought to court (Zuni, 1992). In a case where the victim is too young or vulnerable, family members serve as his or her representative and speak on their behalf (Melton, 1995). In the traditional justice system, community forums are generally more formal than family forums. They rely on the willingness of family members to discuss issues, events, or accusations within their community (Zuni, 1992).

Melton (1992) further argued that during the procedures of these forums, tribal officials act as mediators and, together with the community and the use of customary law, sanctions are issued to resolve the conflict and restore peace. When summoning affected individuals to these courts, tribal representatives notify involved individuals and their families. In some instances, they may even be escorted by a tribal official to the gathering (Mamdan, 2013). Tribal representatives act as facilitators in community forums and participate in resolving the matter

between the alleged offender, the victim/s and their families. The compliance of the offender is generally deemed compulsory as he or she has been 'judged' by tribal officials and the families involved (Melton, 1992).

Traditional courts function in tribal communities where indigenous governing structures still prevail. The initiation of matters in traditional courts occurs through recorded civil or criminal complaints or a signed petition (Ubink & Van Rooi, 2011). The offender is summoned by his/her family or relatives to the dispute hearing and, usually, everyone in the community with reasonable interest in the matter and who is willing to attend and participate in the hearing is allowed to take part from the arraignment to the sentencing phase (Melton, 1992). These court proceedings are headed by tribal authorities who not only observe the compliance of the offender, but who also use indigenous law to resolve the dispute and impose sanctions. In some cases, they may use written criminal and prescribed codes (Hlubi, 2013).

2.8. The Law of Traditional Courts: Indigenous Laws and Customary Law

Beall and Ngonyama (2009) argue that customary law, which was formerly known as indigenous law, is a form of law that is used by traditional courts to prevent crime, administer justice, and maintain social peace. They further elaborated that it is a system of law that existed and was practised in Africa before the arrival of the Europeans. However, it was uncodified. Moreover, Laleyele (2014) also stipulated that not every law, code of conduct or approved behaviour was written down − instead, juristic thoughts were determined using customs, traditions, religion, proverbs, taboos, and all the rules of behaviour that formed part of the moralistic values that had been passed on from generation to generation.

Different terms are used interchangeably to refer to the laws of indigenous societies such as customary law, indigenous law, native law, and tribal law. These laws usually derived from the customs of a certain group of people (Melton, 1995). The Policy Framework on the Traditional Justice System defines customary law as "the unwritten and uncodified body of laws whose true validity originated from the tradition and culture of the South African people, which also differs amongst all traditional communities" (Hlubi, 2013: 192). Customary law is argued not to be rigid but is flexible and changes to adapt to the lives of the people who live by these rules. It changes and is repealed in accordance with cultural, societal, political, and economic settings (Anyawu, 2005).

Mwana (2014) points out that the South African Constitution recognises that customary law falls into two categories: 'official (codified) law' and 'the living (uncodified) law'. He argues that what is referred to as official (or codified) law, was the result of colonisers formalising the laws of indigenous people by imposing rules that were inflexible, Western orientated, and *their* conceptions of law and order. Conversely, living (or uncodified) customary law is the law as it evolved naturally through constantly changing African socio-cultural processes of dispute resolution and their way of living. This form of law is usually referred to as indigenous law (Mwana, 2014). Thus true/living/indigenous law became distorted through codification by the state and legal experts, whereas previously it had been the law as exercised by the people who lived under it. It can therefore be argued that the differences between uncodified or indigenous law and codified or customary law need to be examined (Mamdan, 2013).

2.8.1. Indigenous Laws versus Customary Laws

Rautenbach (2008) argues that indigenous law has always been subordinate to the formal legal system in colonised South Africa. He further stipulated that in fact, it has never enjoyed the same recognition although it has served the original inhabitants of the Southern African region for centuries. What was originally known as indigenous law was codified and converted to customary law, which is often viewed as the corruption of indigenous law as it was derived from squabbles between Black power brokers and dominant White colonial structures (Robinson, 1995 as cited in Hlubi, 2013). A further argument is that there are extensive differences between customary law and indigenous law. For instance, customary law is viewed by many as a modernised hybrid of Roman-Dutch law and thus foreign to indigenous law (Robison, 1995). This means that, despite the fact that codified customary law has elements of indigenous law to ensure its viability, it has been distorted and uses a formal language that is different to the one used by its original designers (Beall and Ngonyama (2009). It is thus no longer seen as a true version of indigenous law as it has collapsed due to being further classified into multi-versions of customary law. These multi-versions describe customary law as codified, textbook, judicial, and living (Ubink & Van Rooi, 2011). Furthermore, they argue Codified customary law to refers to the codification by legislators of the customary law of a certain jurisdiction, which results in legal certainty and availability while alternating it into a foreign language that is different from the one used by the original community. Meanwhile, Ubink and Van Rooi (2011) define customary law as a texted form of customary law that has been written by authorities such as the state, anthropologists, and administrators. They further argue that textbook customary law is generally used by the courts to determine certain customary norms

and it serves as a source of non-legal and formalistic customary law (Ubink & Van Rooi, 2011). Judicial customary law can be described as "norms derived from the application of customary law by judges in courts and legislated in national reports of law. Lastly, living customary law refers to the norms that regulate the daily lives of a local community" (Ubink & Van Rooi, 2011:54). The distortion of indigenous law and its merger with Roman-Dutch law into customary law make it difficult to distinguish which specific laws are truly of the African people. What is clear, however, is that this hybridization of African law is confusing for many people who still choose to honour their culture and customs (Anyawu, 2014).

2.9. Defining crime in the traditional context

Garofalo (2005) argues that crime is a form of behaviour that is regarded by society as immoral and harmful and it is usually punishable by authorities. He further elaborated that crime is also viewed as causing major injury to a community's moral sense when it is adopted by certain groupings in society. The word 'crime' is argued by Garofalo (2005) to originates from the Greek word 'krimos' which is a synonym for 'krama' that means social disorder. One should note that actions that are considered as acts of crime differ according to definitions of crime by states, societies, or groups (Garofalo, 2005). This study focused on crime as defined by such acts in traditional contexts.

Igbo and Ugwuobe (2013) argue that, in a traditional society, a person is considered to have committed a crime if he/she has seriously violated a society's traditions, customs, and acceptable ways of living. They also stipulated that although crime in traditional communities is uncodified, it is universally viewed by traditional communities as any conduct or act that is a violation of the norms and values cherished by a community and that has a harmful consequence and thus requires punishment. Igbo (2007) argues that criminal acts or offences can be minor or serious depending on the situation. However, in some African societies certain offences are regarded as an 'abomination', such as theft, murder, adultery, rape, suicide, and incest. An 'abomination' or taboo results in extensive consequences for the offender, his or her direct family, and even the extended family (Igbo & Ugwuoke, 2013). It is believed that such acts may result in a dreadful and even incurable illness or disease, and even in death. Fear of such adverse consequences can thus be argued to cause people to conform to society's traditional laws, norms, and customs to avoid punishment or sanction by their community and/or the gods (Igbo & Ugwuoke, 2013).

Igbo (2007) points out that, in traditional societies, crime is usually classified into three categories, namely: offences against the community, offences against individuals, and offences against the gods or the spirit world. An offence against an individual can be defined as an offence against another person such as murder, assault, stealing the property of another, and serious breaching of trust (Igbo & Ugwuobe, 2013). If these offences are ignored, the victim or his or her family might seek revenge which might lead to an endless cycle of offences such as vengeful killings, counter-killings, or blood feuds between families and within communities (Igbo & Ugwuobe, 2013). Offences against the community are acts that disrupt peace and wellbeing such as witchcraft, murder, incest, and even adultery, and it is generally believed that such acts ought to result in terrible consequences and grief for the offender and even for his or her family (Ayuk, et al, 2013). Traditionally, such dire acts were severely punished by the community but, within the new democratic dispensation and the supremacy of the Constitution, most of these acts or offences are now dealt with by the state. However, some rural communities still deal with these acts in traditional courts instead of handing them over to the state (Igbo & Ugwuobe, 2013).

One category of crime in traditional societies is offences against the gods or spirit world. These can be argued to be actions or behaviour that are regarded as an insult to the gods or the ancestors. Such acts include the killing of sacred animals and the desecration of sacred places or shrines or any object associated with the earth goddess (Igbo, 2007). He further argued that in earlier times, individuals who conducted such acts were either banished, socially marginalised, or even executed. Anyawu (2014) argued that this was done to please the gods and ancestors as it was believed that, if the offender was left unpunished, vengeance would be imposed on the entire community by the gods. This belief was strengthened by the idea that, despite being long dead, the gods and ancestors continued to take an active interest in the lives of the living (Anyawu, 2014). It was further believed that, if the gods were not appeased, there would be endless misfortunes in store for the offender, his/her family, and the community. To appease the gods and the ancestors, certain purification rituals needed to be done before peace would be restored (Igbo & Uguowe, 2013). It can be argued that many of these beliefs and customs are still adhered to by people in traditional communities.

2.9.1. Offences mostly active or reported in rural areas

Figure 2.9.1. below shows what according to the study findings of Mbatha (2017) are the most common forms of crimes taking place in rural areas. The study will discuss each form of crime in detail by referring also to other previously conducted researches.

Figure 2.9.1: Common crimes taking place in rural areas (Mbatha, 2017).

2.9.1.1. Livestock theft

Most rural areas in South Africa, especially in the KwaZulu-Natal province, is argued by Mbatha (2017) to be faced with the increasingly problematic crime of livestock being stolen. This is a concern for most residents as they also experience a difficult challenge of unable to recover their stolen stocks. That is because most rural areas in the country are large in sizes and scattered around the area, and therefore make it difficult to track stolen stock, and detecting its movements (Mbatha; 2017). Furthermore, research had revealed resource-deprived farmers to be faced by the most significant challenge of livestock theft, which leaves them with the possibility of crippling their live hoods (Greenberg, 2007). Moreover, statics conducted in 2016 showed that in the Free State Province, the main concern form of crime is livestock theft; and it was further discovered that controlling livestock theft is difficult as it requires officials to spend extensive time in the countryside lingering for possible livestock thieves (Mbatha; 2017).

In relation to the Province of KwaZulu-Natal, Mbatha (2017) argued that most rural residents keep and take care of their livestock or domestic animals as their habitual source of living and their form of wealth. However, with houses in rural areas being scattered; and livestock such as cattle's being usually left attended especially on the veld around their homes, it can result in

a high possibility of livestock theft (Mbatha, 2017). Additionally, it can be argued that most rural residents have no secured barn for their livestock, but rather use stables or cowsheds for their livestock. This therefore not only leaves a room for luring criminals to steal such domesticated animals, but it also means most families and farmers will lose their source of income through the theft of their livestock (Greenberg, 2007).

A further argument of this regard can be drawn from the elaboration of the KwaZulu-Natal Department of Community Safety and Liaison (2010) which stipulated that throughout the rural areas of the country, research had shown that thieves who operate in stealing livestock are usually organised acts that involve local offenders; and the shortage of impounding facilities creates challenges and difficulties in confiscating stock that might be discovered from suspected thieves. Seeing that regulating livestock theft in rural areas is difficult, Mbatha (2017) recommended preventative measures that residents may implement to avoid being victims. These include communities putting fences that are in a good state to protect their livestock; ensuring that they mark their stock properly; as well as to immediately report cases of their stolen stock; and inform officials if they have recovered their stock (Mbatha; 2017).

2.9.1.2. Domestic violence

An argument made by Wendt (2009) was that general statistics proposes domestic violence to be mostly present in the city or towns and that might be because such crime in rural areas is hardly reported; and therefore, it is difficult to estimate an overview of crimes against women in rural areas because of the high level of certain crimes being under-reported. There are however certain characteristics and previous studies as of Dekeseredy & Schwartz (2009) that show that domestic violence is highly present also in rural areas and sufferers of such violence face several challenges. This form of violence is argued to mostly happen in the home; and women as victims frequently find it difficult to get assistance; run away or escape from their abusers (Dekeseredy & Schwartz, 2009). In most rural areas, there are certain factors that 'supposedly' make it difficult for a victim of domestic violence to escape the abuse and those factors include: being economically independent on the spouse or live-in partner; marital status; illiteracy; lack of job opportunities; accepting violence as a disciplinary technique; lack assisting services such as support institution or centres such as POWA; and limited transport to reach such places offering assistance including police stations (Mbatha, 2017). A further argument was made by Fraser (2011) when they argued that because of all these mentioned factors, domestic violence victims from rural areas are placed in vulnerable situations of being

continuously victimised; and sanctuaries that offer free assistance services to such victims and their children are usually located in town.

The reason why victims of domestic violence in rural areas are less likely to get assistance to escape as compared to victims of the same violence in the city is that those in rural areas are usually short on transport or money to reach to provisions of psychotherapy support or sanctuary which mostly are established and located in town (Fraser, 2011). It can be argued that this means victims of domestic violence in rural areas are most likely to be trapped in this form of abuse as they are unable to reach such places to get assistance to escape. This was supported by Wendt (2009) [cited in Fraser, 2011] who stated that victims of domestic violence in rural areas are more likely to suffer alone and in silence; and because of the existing strong bond amongst rural residents, victims may be uncomfortable to speak out about their mistreatment due to fearing the possible retaliation from the family; friends; or relatives of their abuser. Furtherly, it can be argued that because of rural residents being short on acquaintances or neighbours whom they can turn to for support, they are furtherly more prone to be strapped in the abuse than victims in urban areas (Dekeseredy & Schwartz, 2009). Domestic violence victims may furtherly be trapped due to other factors such as financial conditions and that is because other victims depend on their abusers economically and therefore are powerless to break away from the chain of the abuse as they have no other means of survival besides their violent partner (KwaZulu-Natal Department of Community Safety & Liaison, 2012).

2.9.1.3. Child abuse

The KwaZulu-Natal Department of Community Safety & Liaison (2012) argued that there are many crimes committed in rural areas against children. However, Mbatha (2017) stipulated that the problem is that not much research had been conducted on these types of crimes and therefore there is very little available information to be alert the respective programs of rural children's protection. Due to very little information available about such cases, not very much assistance or protection can be offered to the children who are victims (Mbatha, 2017). The kind of information that is known however, most of these crimes happen privately within their domestic circles or intersections from their peer groups, and therefore stay hidden and less likely to come out and be known also by outsiders (Bancroft, 2004). The most common form of child abuse that happen in rural areas is argued to includes child neglecting; sexual abuse; and child labour and child neglecting happen in a case where a parent(s) or guardian do not take care of their child in an appropriate manner (Mbatha, 2017). She further elaborated that

these includes not providing a proper and safe living environment for the child; not sending the child to school; depriving a child a proper meal or proper medical and health care, imposing harsh or harmful parental control or punishment on the child, etc.

It may be further argued that Talbot (2011) found child labour to be another form of abuse experienced by rural children. Many cases are argued to have been reported where children work both informal and formal labour for them to be allowed to continue to stay on a farm (Mbatha, 2017). One may argue that in relation to child labour, the Basic Conditions of the Employment Act (Act 75 of 1997) stipulates that employing a child below the age of fifteen years is a criminal offence; unless the child will be performing in arts and employer have the permission from the Department of labour to allow such child to work (South Africa, 1997). In a case of employing child who is between the ages of fifteen to eighteen, such child should only be given work that is appropriate for their age or that will not endanger them or put their lives on risk (Mbatha;2017). The constitution further elaborates that every child below the age of eighteen years has a right to be protected from any form of employment that is: not appropriate for their age; hazardous; exploitative in nature; disturb their schooling or endanger their development mentally; socially; physically; spiritually; or morally (South Africa, 1997). It can be argued that this means if a child's employment contradicts any of the mentioned conditions, the employer and the family can be argued to be guilty of child abuse in a form of child labour.

Meanwhile, another form of abuse found to be experienced by children in rural areas is sexual abuse. This form of abuse is argued by Mbatha (2017) to occurs mostly because of rural children being powerless and characterised by immense poverty due to the socio-economic difficulties existing in rural areas. Mears, et al (2007) further elaborated that previously conducted studies had found that sexual abuse amongst children not only happens in their homes or areas of residence, but also at their schools by teachers or their schoolmates. It is unfortunate to note that Mbatha (2017) stated that due to therapeutic services lacking in rural areas, children who are victims of sexual abuse are more likely to submit to this form of abuse. Furthermore, with the unfortunate of rural police stations and courts being far away and lacking proper infrastructures to protect children, such victims of sexual abuse are more likely to be secondary victimized during the phases of investigations or trials Talbot (2011). This results in the restrictions of reporting such cases and leads also to the perpetuation of child abuse in rural areas (Talbot, 2011). It may be further elaborated that in some cases, many children (victims) are usually not aware that the act committed against them is an actual crime and should be

reported (Mears, et al (2007). That is because, in other cases the perpetrator is of authority or in a higher position (such as their teacher); the abuser is a breadwinner of their family; or there are no resources available to access protection services such as Bobby Bear or other children protection organisations or institutions (Mbatha; 2017). This therefore means the victims end up being restricted to report their cases. This can be argued to be a raise a serious concern, as previous studies as of Mears, et al (2007) and Mbatha (2017) had found that child abuse have many negative effects on the child such as socially withdraw; isolation from peers; depression, and possible long-term effects such as suicide, continue the cycle of abuse later on their lives.

It can be concluded that most children in rural areas still travel long distances to get to school and to channels that respond to cases of child exploitation; neglect; and child abuse (Mbatha, 2017). She further elaborated that therefore, such issue of lacking services still needs to be addressed and properly met by our government for the sake of the wellbeing of every child living not only in rural areas but across South Africa. One may also argue that it is not only the government's responsibility to cater for the wellbeing of children but also the parents and families need to monitor and protect children from any form of abuse and seek assistance on the child's behalf if he or she is abused.

2.9.1.4. Crime over land

According to the findings of the KwaZulu-Natal Department of Safety & Liaison (2010), despite rural areas being less developed as compared to the cities, there are forms of economic activities that dominantly take place in rural areas. Such economic activities include the subsistent agriculture and commercial agriculture. Furthermore, Mbatha (2017) elaborated that it is therefore not surprising that there is rising of certain issues such as conflicts or clashes over communal land. That is because when residents practice subsistent or commercial farming, they rely on such farming as their means of survival, and therefore a larger portion or space of farming means a better live hood (KwaZulu-Natal Department of Safety & Liaison; 2010). The department further stipulated that rural residents not only require land to grow crops to implement their farming but also require land for gazing after their domestic animals or livestock. This sometimes leads to clashes over communal land; invading other people's supposed spaces, abusing the rights of others; abusing livestock of another, etc.; and that may result also into extensive squalls or communal conflicts (KwaZulu-Natal Department of Safety & Liaison; 2010).

Furthermore, Turker (2015) argued that research had found that other factors such as agricultural industrialisation and scientific equipment used in farming activities together with their large collection of costly devices and establishments make rural areas become eye-catching and create a large room for burglary to criminals. It can be argued that this means because of the nature of farming facilities and equipment used in farming areas, it creates attention and makes them appealing to criminal and therefore ends up creating opportunities for criminal activities to take place. Mbatha (2017) argue that another factor luring criminals and creating farming areas being an opportunistic spot of crime is that it is generally known that larger number of farmers own guns, such as riffles; and therefore, assaults or burglary are more likely to frequently take place in intending to steal those weapons. This means that through the valuable tools available in rural areas, criminal's attention is drawn to these areas to access these tools and therefore results in criminal activities taking place through available opportunities (Mbatha, 2017).

2.9.1.5. Violence

Amongst common crimes that happen in rural areas, Mbatha (2017) argue the acts of violence to be regarded as one of the most common forms of crimes taking place in most rural areas. This was supported by Shihadeh et al (1996) who argue that residents in rural areas usually turn to violence as their form of communicating and they consider that violence is a way of resolving dilemmas, settling disputes, and restoring peace. However, he further stipulated that, that is usually not the case as most violence usually ends in criminal acts. Furthermore, Mbatha (2017) elaborated that an issue that is regarded as further perpetuating violence and cause crime in rural areas is the availability of guns or firearms; and previous statistics had shown that possession of guns in rural areas is more than two times the figure of gun possession in urban areas. It can be argued that such high statistics resulted from high numbers of huntsmen and farmers present in rural areas and that is because most of these individuals are known to possess or have ownership of guns such as shotguns; riffles; or pistols (Mbatha, 2017). Statistics had revealed that the ownership of guns such as the pistol firearm is higher in rural areas with 23% of rural residents owning the firearm, as compared to the 15% pistol firearm ownership for city dwellers (Mbatha; 2017).

A further argument can be drawn from the argument of Dugard (2011) who argued that the availability of guns especially handguns in rural areas can be associated with most violence happening in rural areas. He also argued for that to includes the most common form of violence

which is the taxi violence. Dugard (2011) further elaborated that taxi violence in South Africa is rooted in the system of apartheid and results in most violence and crime in rural areas. Previous studies as of Ngubane (2016) had found that taxi owners and drivers fight amongst themselves, and sometimes fight even with the passengers. In some cases, their violence gets out of control and results in assault or killings even of the innocent people Ngubane (2016). She further argued that residents get also affected in a way that they have to stay indoors to protect their lives. Furthermore, in some cases, taxis and other forms of transport stop transporting people, and those residents who rely on transport to get to work or school are usually most affected (Dugard, 2011). This means that although this form of violence is usually conducted by certain individuals, in some cases, it however, gets to a point where the whole community is affected. This, therefore, calls for violence in rural areas to be properly addressed as it is done in the city (Mbatha, 2017).

2.9.1.6. Wildlife Crime

Mbatha (2017) argued wildlife crime to be a difficult challenge concerning the rural part of the country. She further elaborated that wildlife crime more particular in the form of animal poaching is an increasing concern, not only in South Africa but also throughout the globe. That is because wild animals such as fish; rhinos; deer; and hare coursing are argued to be hunted and poached for their body parts. These include animal horns; internal organs; skins; etcetera (Wales; 2003). Previous statistics had revealed that since the year 2008, there had been an extensive increase in wildlife crimes especially the poaching of rhinos. This is evidential as the number of rhinos killed in South Africa rapidly had increased out of control every year and reaching a total of 448 rhino killings in 2011 (Shaw; 2011). This extensive increase of wildlife crimes especially the poaching of rhinos had been argued to become the main issue of concern for the police officials in South Africa (Shihadeh et al., 1996 in Mbatha, 2017). Furthermore, they argued that it is unfortunate to learn that it seems like there are no signs of levels of rhino poaching coming under control as the killing of rhinos continues to increase. Shaw (2011) argued that the government had however made some means to respond to the issue and combat the poaching of rhinos. That includes the placement of the personnel of the South African Army along the Kruger National Park border as well as Mozambique (Shaw, 2011).

Previous research as of Wales (2003) had found the crime of poaching to usually be perpetrated by organised and violent gangs motivated by the large sum of monetary profit that is gained through animal poaching. Furthermore, Mbatha (2017) argued that despite rhino poaching

being argued to usually be perpetrated by organised and violent gangs who are lured by the huge sum of money gained, it had been found that even professionals trusted within the wildlife industry also take part in the traditional way of poaching. This further perpetuates the poaching of rhinos and extensively increase the ranks of rhino poaching (Mbatha; 2017).

2.9.1.7. Tradition or cultural practices

According to Mbatha (2017: 27) "One of the features that make rural areas distinctive from urban areas is the dominating practices of tradition or cultural activities. However, some of those practices are equivalent to criminal conduct or misdemeanours". Van der Watt & Ovens (2012) further elaborated that in most rural areas of South Africa, the form of traditional practice which is a concern in the case of *Ukuthwala* (traditional forced marriage). The *Modus operandi* for ukuthwala can be defined as "a planning male accompanied by his friends or male relatives, ambush and forcefully take a proposed female usually within the environment of her residence (any time of the day from broad daylight; in the afternoon; or at night) with the intention of making her his bride" (Mbatha, 2017: 27). This form of supposed traditioned is argued by some previous researchers as of Van der Watt & Ovens (2012) to be usually done by someone who is driven by their selfish intentions; as in most cases, the victim abducted is usually told that a fee was paid for them to be bought, and therefore they are now a form of property that is possessed by their supposed spouse (Van der Watt & Ovens; 2012). The practice of *Ukuthwala* is furtherly argued to be an issue in most rural areas because even young children as young as 14 years of age are being victims of *Ukuthwala*; (Van der Watt & Ovens; 2012). According to observations of other previously conducted research as of Maluleke (2009), this form of practice should raise a serious concern especially in rural communities, and that is because it is proposed to have countless negative effects on young girls. These include effects such as early pregnancy; pregnancy complications; school drop-out; domestic violence; being infected with HIV; STIs; etcetera (Maluleke; 2009).

Furthermore, it can be argued that despite Ukuthwala being a cultural concern and traditional practice, Schedule 2 Section 4 (2) (a) of the traditional court bill (B1-2017) elaborate that the jurisdiction of traditional courts in dealing with such cases is only to offer advice and guidance in such cases. Mbatha (2017) elaborated that this means traditional courts cannot preside over cases of Ukuthwala as such cases are regarded by the constitution as being a form of forced marriage and therefore considered as a crime against the state. Furthermore, she also argued that crime against the state is dealt only by the state through formal courts. In conclusion, the

custom of ukuthwala is argued by Maluleke (2009) to be a form of child abduction and child abuse. He argued that, that is because according to Chapter 2 of the Bill of rights, 1996, when a child is being forcefully taken away from their safe environments and sold to be a property of a stranger means that their rights as a child are being taken away. These rights include a child's right to a safe home and environment, the right to go to school; the right to be protected from harm (South Africa, 1996). Through the above-mentioned effects, this form of custom can be argued to be a serious crime imposed on defenceless young girls and therefore every child should be protected from being made a victim of such practice (Van der Watt & Ovens, 2012).

2.10. The Election Procedures of Traditional Leaders.

In aiming to address the common asked question of whether leaders are born or made, Van Wart (2003) argued that the assumption of the great man theory states that leaders such as heads of the states or major businesses are born and not made. That is because the theory proposes that leadership cannot be formally taught but rather can be learnt especially through observation; and being born into leadership allows for more observations and early significant training (Van Wart; 2003 as cited in Nxumalo; 2012). This brings the study to the discussion of the general procedures of selecting leaders especially traditional leaders. The procedure of selecting these leaders varies amongst traditions and communities; and through the process selection, the institution's legitimacy in its community is not affected (Teffo, 2002). When selecting a new leader, in some community, it is the regaining king or traditional leader who decides and chooses from his children, who will succeed him (Anyawu, 2005). For example, at the age of 18 years, King Swati the third was chosen by his father King *Sobuzo* to be his throne's successor. He was chosen from the children of the Kings favourite wife, and this decision was supported by the whole kingdom (Teffo, 2002). Meanwhile, in some places, the reigning leader's first male child automatically qualifies to succeed in his father's leadership or authority, this means they inherit the positions. For example, because King *Sikwati Mampuru* was the first son of the late king, he was coroneted into being the new king of Mamone in Limpopo after the passing away of his father the late king (Teffo, 2002). Previously traditional leaders were succeeded only by their first male children. However, nowadays even female children are succeeding from their fathers' throne or authority (Anyawu, 2005).

Despite traditional leadership being inherited in most areas, it can be noted that Anyawu (2005) argued that some communities choose their own leaders. That is done through the community

choosing amongst all the men in their community who will be their leader. They choose an individual based on his or her regarded qualities or characteristics, such as being wise, strong, and capable of leading (Anyawu, 2005). While in the past it was regarded as 'a taboo' to appoint a female to be a traditional leader, nowadays more women than before are being appointed. This can be viewed as the institution of traditional leadership adapting to the modern world (Chigwata, 2016). The selection procedure of traditional leaders is much accepted by all the people in their respective communities because there are viewed as being part of their culture and in some cases are believed to be supported also by the gods (Teffo, 2002). These leaders are therefore highly respected in their traditional communities and treated with extensive esteem especially when the community feels that the appointed traditional leader is from the applicable community and was chosen according to their traditional norms or succession (Teffo, 2002).

2.11. The Removal Procedure of Traditional Leaders

Olidapo (2000) argued that despite the governance of traditional leaders being highly respected and valued by their communities, they can still be removed from their leadership or positions. Regardless of the procedure followed when they were selected, traditional leaders can be removed on several grounds such as oppression; corruption; neglecting affairs stubbornness and arbitrariness in governance (Olidapo, 2000). The removal process of traditional leaders varies amongst communities, but usually, it is achieved through removals headed by other traditional authorities such as herdsmen and other old men of the village and that is done in the presence of members of the communities who also take part in the decision of removing the leader (Anyawu, 2005). Moreover, According to Teffo (2002:4), "In every community, every member knows that nobody is above the law and therefore there is a command of checks and balances. This ensures that the king or any other leader does not become an authoritarian in his rule while oppressing the community". It can be argued that means even within the traditional justice system, no one is above the law but rather everyone is bounded by it. Teffo (2002) further elaborated that once the present leader is removed by the community, they after decide on the new leader or the vice leader becomes the leader. He further argued that in a case of inherited authority, the second elderly child of the family is elected into being the new leader in place of the removed leader.

2.12. Traditional court procedures in the process of combating crime

Under the Black Administration Act No. 38 of 1927 and relevant statutes that guided the legal system in the former homelands, the South African Law Commission (1999) argued that customary procedures were followed to resolve disputes. The Commission further elaborated that Scholars have argued that customary court procedures were informal, flexible, simple, and put both parties at ease. They were thus willing participants in the quest to find a resolution for the problem at hand (South African Law Commission, 1999). One can argue that similar procedures are still followed in many rural and traditional communities. For instance, the community comes together in the village under a tree, in a hall or any other community building to deliberate political, economic, and social issues. This is their form of 'parliament' (Oladipo, 2000). The procedures take an inquisitorial form as traditional leaders and their councillors assemble in *lekgotla* (a communal forum for deliberation), hear the complainant's and the defendant's evidence, and then, in accordance with their cultural customs and practices, they resolve the dispute, and these court proceedings are conducted in the presence of both parties (Oomen, 2005). Furthermore, such courts are bound by the Black Administration Act to proceed without discrimination on grounds of gender or race. The Act further demands the full involvement of all interested parties unless a certain individual or group has been ordered by the court not to be involved in the proceedings (Nhlapo, 2012). Unlike the formal court system, traditional courts do not follow any written or prescribed set of rules, but rather the Black Administration Act requires that a customary court should apply customary law and the proceedings of these courts should be entrenched in the relevant community's traditions and culture. In this manner, justice is distributed quickly and fairly (Hlubi, 2013).

Black Administration Act [No. 38 of 1927] further obliges customary court proceedings to be conducted in the most widely spoken language in its area of jurisdiction. This renders traditional courts user friendly and accommodating to everyone, including the illiterate (Nhlapo, 2012). These courts are argued by Hlubi (2013) to thus accommodate everyone, regardless of their status or background and because the procedures followed in customary courts are simple and informal, legal representatives such as lawyers are not allowed. They thus offer a cheap and affordable form of justice as no one pays any legal fees other than a minimal levy, and therefore justice is affordable for everyone (Hlubi, 2013). Moreover, such courts are available in almost every traditional leader's jurisdiction. This means that these courts will meet in or near every village and the residents have easy access and need not pay any transport fee (South African Law Commission, 1999). Because lawyers and other formal

legal experts are absent from traditional courts, examination and cross-examination are done by the traditional authorities present and everyone else who is permitted to take part in the procedures (Du Plessis & Scheepers, 2000). This means individuals may take part in the proceedings by posing questions to both parties. Because the setting is simple, anyone may take a turn to speak and this inquisitorial procedure is not harmful to anyone, even the accused. Questions are aimed at arriving at the truth and intimidating and laborious cross-examination by legal experts is avoided (Makgoro, 1993).

2.13. The Jurisdiction of customary courts

Lambert (1995) argued that the power and authority that traditional courts possessed before colonisation and apartheid changed in 1850 when magistrates were appointed as administrators of Native law in Natal. He further stated that this was intended to shift trial criminal cases to magistrates while traditional leaders were allowed to preside over civil and minor criminal cases. Later, the Native Administrators Act (1875) was passed which governed the jurisdiction of these courts (Lambert, 1995). Traditional courts had the right to preside over cases involving inheritance, property, marriage, and other civil cases (Palmary, 2004). She further elaborated that appeals deriving from these courts were referred to magistrates as the administrators of Native law. A Native High Court was also established later, and it presided over appeals referred by magistrate's courts (Palmary, 2004). However, many leaders of the traditional justice system ignored the Native Act and continued hearing matters, including criminal cases, as they had done before. Because there were very few magistrate's courts, magistrates simply ignored traditional justice courts as the latter assisted in lightening the caseload and this made their burden easier. However, this blurred responsibility contributed to the ambiguity of what traditional courts may or may not address, even today (Palmary, 2004).

A further argument made by Hlubi (2013) was that the Black Administration Act also serves to prescribe to chiefs or headmen in rural areas what areas they should preside over. She further elaborated that the aim of this Act is to clarify understanding of the functions and role of traditional leaders. It clearly stipulates that chiefs and headmen (or *Indunas*) should oversee and regulate traditional courts (Hlubi, 2013). The Black Administration Act further stipulates that the court of traditional leaders should continue to be recognised in areas where they were first established such as in rural areas falling under the jurisdiction of chiefs and *Indunas* (South African Commission, 1999). According to the Black Administration Act, in the former Transkei, Bophuthatswana, Venda, and Ciskei states (TBVC states) which were self-governing

territories, customary or traditional courts had both criminal and civil jurisdiction (Hlubi, 2013). Even today, under this Act and other enactments, customary courts are obliged to apply the customary laws of a relevant tribe, whether codified or uncodified and irrespective of dealing with civil disputes or criminal matters (Nhlapo, 2012).

2.13.1. The Jurisdiction of Traditional courts over civil matters

It can be argued that Section 2 of the Black Administration Act No. 38 of 1927 determines which civil issues traditional courts may hear. In Section 12 (1) (a), the Act elaborates that the Minister of Justice and Constitutional Development may permit the hearing and determination of civil claims by traditional courts (Rautenbach, 2014). The Act provides that civil claims should arise out of African law and that the disputing parties should be Black individuals residing within the area of jurisdiction of that court (South Africa, 1927).

According to Rautenbach (2014), for a civil claim to be achieved successfully, four conditions should be met by these courts: (i) The traditional leader must be authorised by the Minister to act as the presiding officer. (ii) It is essential that the civil claim should arise as a contravention of customary law. (iii) Both parties should be Black Africans. (iv) Both parties should reside within the area of jurisdiction of that traditional leader. However, in some cases, traditional courts do hear a civil dispute where one party resides within the area of jurisdiction of the presiding traditional leader while the other is a non-resident (Rautenbach, 2014).

Tshehla (2005) states that, under the Black Administration Act, traditional leaders are mandated with the responsibility of overall governance of their areas. He further elaborated that one of their responsibilities is to preside over civil cases involving inheritance, property, allocation of land, overseeing traditional marriages, resolving disputes, maintaining social order, and overseeing any other civil cases. All these roles should be supported with the assistance of their community (Tshehla, 2005). Furthermore, Procedures that should be followed to resolve civil disputes are stipulated in the Chiefs' and Headmen's Civil Courts Rules that was promulgated in terms of Section 12 (9) of the Black Administration Act (Rautenbach, 2014). Moreover, he also argued that this set of rules obliges traditional courts to follow procedure and execute judgement according to the recognised customs and laws of their respective communities. It further forbids legal representation in traditional courts as the litigants are usually poor (Rautenbach, 2014). If large fees have to be paid, it might lead to complications and hardships for a complainant who brings a case against a very rich person. The other reason is that these courts use customary law, and the involved parties are generally

knowledgeable about this form of law, therefore legal representatives will have no role to play (Rautenbach, 2014).

It can be argued that there are some civil cases in which traditional leaders' powers are limited, such as cases of nudity, child custody, child maintenance, adoption, and dissolving a marriage. Such cases are referred to and dealt with by the formal justice system such as the children's court (Traditional court bill, 2017). However, traditional courts do have jurisdiction in cases of returning *lobola* and any damages arising from adultery (Rautenbach, 2014). This means that traditional courts' powers are somewhat limited by the Act, as there are civil cases that these courts may not oversee due to certain factors such as the seriousness or complex nature of a case involving children (Rautenbach, 2014).

In light of the above, it may be argued that unresolved civil matters can lead to criminal acts such as revenge attacks or even killings and endless feuds. It therefore seems fortunate that, in traditional communities, disputes or matters that threaten the peace are dealt with by the entire community and that decisions or rules that accommodate all parties in disputes are given due attention (Tshehla, 2005).

2.13.2. The Jurisdiction of Traditional Courts over Criminal Matters.

In terms of criminal jurisdiction, Tshehla, (2005) argued that authority is vested in traditional leaders to effectively control behaviour within their communities and this means these leaders are mandated to deal with any misdemeanours and lawlessness that occur within their communities. Section 20 of the Black Administration Act makes provision for the criminal jurisdiction of traditional courts under the heading 'Powers of Chiefs, Headmen and Chiefs' disputes to try certain offences' (Rautenbach, 2014). Section 20 (1) (a) specifies that the Minister of Justice and Constitutional Development may defer criminal jurisdiction upon traditional leaders and their courts with the power to punish any African individual who has conducted a misdemeanour within the area of jurisdiction of a traditional leader (South Africa, 1927). This Section further states that, for a traditional leader to preside over such cases or impose punishment, the following crimes must have been committed: (i) Any crimes of common law besides the ones mentioned in the Act's Third Schedule; (ii) any customary law crimes besides the ones specified in the Third Schedule of the Act; and (iii) any statutory crime besides the ones mentioned in the Third Schedule of the Act (Rautenbach, 2014). The Third Schedule lists 35 offences that are regarded as the most serious common law crimes such as

rape, robbery, murder, and culpable homicide (Rautenbach & Matthew, 2010). Section 20 (1) (a) of the Act states that traditional courts have criminal jurisdiction over statutory offences, offences under common law or customary law, excluding offences such as rape, murder, culpable homicide, arson, and robbery. All these offences are excluded under the Third Schedule of this Act (Nhlapo, 2012).

It can be argued that the Black Administration Act No. 38 of 1927 has been in effect for a long time in South Africa to regulate the functioning of traditional authorities. However, many of its provisions were changed with the passing of the Traditional Court Bill (B1-2017) (Hargovan, 2009). The preamble of the recently passed Bill states that it intends to amend some unacceptable provisions of the Black Administration Act 38 of 1927 as well as some former homeland legislation provisions that were in stark conflict with constitutional values (Traditional Court Bill, 2017). The following section will focus on a discussion of the Bill.

2.13.3. The Jurisdiction of Traditional courts: The Traditional Court Bill [B1-2017]

The Traditional Court Bill (B1-2017) can be argued to be the most recent Act that governs the functioning of traditional institutions and especially traditional courts. According to this Bill, Traditional courts have the competency to deal with the following matter in terms of Schedule 2 (Section 4 (2) [a]):

a) Theft to the value of goods not exceeding R5 000;
b) Malicious damage to property of less than R5 000;
c) Assault with no grievous bodily harm inflicted;
d) Any premise breaking or entering with the intention to commit an offence that is either of common law or contravention of any statute to an amount of not more than R5 000;
e) Receiving any stolen property with the knowledge of the property being stolen where the amount involved is not more than R5 000;
f) Cases involving *crimen injuria* (infringing of one's dignity or rights);
g) Providing advice that relates to practices of customary law in respect of:
    i. *UkuThwala;* (traditional forced marriages)
    ii. Initiation
    iii. Customary law marriages
    iv. Custody and guardianship of minor or dependent children
    v. Succession and inheritance
    vi. Benefits of customary law

h) Any matter that rises out of customary law and custom where the claim or value in dispute is less than the amount determined by the Minister from time to time by notice in the Government Gazette. Different amounts may be determined in respect of different categories of dispute;
i) Quarrels between members of the community.

One may argue that, should a traditional court acts on matters beyond those that have been listed above, they would be committing an offence against Schedule 2 (Section 4 (2) [a]) of the Traditional Court Bill. Previous studies such as of Shoeman (2012) and Tshehla (2005) uncovered that some traditional courts still preside unlawfully over various cases. Some of these studies further elaborate that some traditional courts seemed to be aware of the prohibitions imposed by the Bill, while others were unaware of these limitations. Furthermore, the Bill stipulate that Traditional courts may preside over cases involving community disputes and deal with various issues arising from customary law where the value of the property in question or the claim is less than an amount determined by the Minister as published in the Government Gazette (Van Dalsen, 2019). Therefore, when a traditional court contravenes Schedule 2 (Section 4 [2] [a]) of the Traditional Court Bill, it can be argued that it is acting unlawfully. When such cases are brought to these courts, they are obliged by this section of the Bill to pass them to formal courts with higher powers, such as magistrate's courts (Van Dalsen, 2019).

2.14. Sanctions that may be imposed by traditional courts

In African traditional communities, punishment is imposed on the offender with the aim of preventing repeat crimes and maintaining crime control in society. This was argued by Onadeko (2008) when he further elaborated that Punishments or sanctions are imposed in traditional courts by the courts' leaders and members of the affected community. Furthermore, imposing a punishment occurs after the accused has been found guilty of an offence or of the violation of a certain law. Such offences may be of a moral, social, religious, legal, or traditional nature (Chigwata, 2016). The South African Law Commission (1999) refers to Section 20 (2) of the Black Administration Act where it states that traditional courts are obliged to impose punishment that is in accordance to customary law, but that they are forbidden to impose certain forms of punishment that are unconstitutional, such as the death penalty. They are for instance permitted to impose punishments in the form of fines less than R50, two large heads of stock, or ten small heads of stock. As far back as 1999, the South African Law

Commission (1999) further argued that the maximum amount of R50 was already out of date as it was no longer equivalent to two large heads of stock. Currently, other legislations such as the *KwaZulu Amakhosi* and *Iziphakanyiswa* Act of 1990 proposes the amount of R1 000 or one large head of stock as a maximum fine that can be imposed by traditional courts (South African Law Commission, 1999).

Traditionally, punishments imposed by tribal courts did not only involve fines or stock, but also other sanctions such as corporal punishment, banishment, and even the death penalty (Van Dalsen, 2019). He further elaborated that however, the supreme law of the county renders such sanctions unconstitutional and unlawful, and traditional courts are thus compelled by various Acts to no longer impose such punishments. Hlubi (2013) argued that The Black Administration Act (No. 38 of 1927), for instance, criminalizes such punishments. She further elaborates that Section 20 (2) of the Act stipulates that traditional courts are prohibited from imposing any punishment involving mutilation, imprisonment, death, grievous bodily harm, or excessive fines (Hlubi, 2013). These restrictions of the Act are in line with Section 12 (1) (e) of the Constitution which states that no person shall be treated or punished in an inhuman, cruel, and degrading manner (South Africa, 1996). Corporal punishment, which was one of the most common forms of punishment imposed by traditional courts, was abolished in South Africa. The case of *S v Williams* was a watershed in this matter as corporal punishment was deemed unconstitutional by the Constitutional Court (South Africa, 1995). Furthermore, the judges stipulated that the act of corporal punishment contravened Section 12 (1) (e) of the Constitution which states that nobody shall be treated or punished in an inhuman manner. Soon after this ruling, the Abolition of Corporal Punishment Act No. 33 of 1997 was passed and corporal punishment was abolished in South Africa (South African Law Commission, 1997).

Hlubi (2013) argues that Section 1 of the Abolition of Corporal Punishment Act (No. 33 of 1997) requires that any law that still permits corporal punishment by a court of law, particularly traditional courts, should be repealed. This means that traditional courts are prohibited from imposing any punishment that involves mutilation or grievous bodily harm, imprisonment, or death (South African Law Commission, 1999). Even the Traditional Courts Bill (B1-2017) stipulates that traditional courts may no longer impose punishment with objects such as a *sjambok*, imprisonment, or the denial of right to land. There are alternative compensations and court orders that are linked to restorative justice and these should be implemented instead (Van Dalsen, 2019). Therefore, traditional courts are not only mandated to ensure that appropriate

and legal punishments are imposed, but they also need to distribute justice fairly in accordance with the traditional justice system to ensure that the fostering of social justice and forgiveness are accomplished, and that social peace is maintained (Layele, 2014).

It can thus be argued that traditional courts should focus on combining punishment and forgiveness to produce a society in which everyone lives peacefully and fearlessly (Onadeko, 2008). In this context, justice administration in traditional societies is directly aimed at social rather than legal justice because it involves voluntary forgiveness and reverses negative feelings which would otherwise have resulted in vengeance or resentment directed at a group or person who wronged another (Layele, 2014). He further elaborated that if such a justice system functions effectively in society, it leads to a peaceful co-existence among communities.

2.15. Appeals against the verdicts of traditional courts.

Rautenbach (2014) points out that Section 20 of the Black Administration Act (Act No. 38 of 1927) stipulates that any person convicted by a customary court can appeal against that conviction or sentence in a magistrate's court that has jurisdiction in the district where the traditional trial or hearing took place. He further elaborated that the procedures to follow are set out in the Regulations for Criminal Appeals. For instance, a person convicted by the traditional court who wishes to appeal should provide a notice of appeal to the traditional authority who convicted him/her. The notice is also sent to his or her accuser as well as to the clerk of the concerned magistrate's court within 30 days of the conviction (Rautenbach, 2014). According to Section 10 of the Traditional Court Bill (B1-2017), when a party takes a matter for review from a traditional court to a division of a high court, the proceedings should be based on certain grounds such as that the traditional court was deemed incompetent to deal with that matter, it was not properly instituted as stipulated in Section 5 of the Bill, the court was non-compliant with the provisions of Section 7 (3) (a) which stipulate that women or any vulnerable person should be allowed to participate fully and equally in traditional court proceedings without being discriminated against), the proceedings in the traditional court were not conducted in the presence of both parties, one or both parties were not permitted to be presented as stipulated in Section 4 (3) (a) and 7 (4), and so forth (Traditional Court Bill [B1-2017]). Once a matter concerning one or more of the grounds mentioned in Section 10 of the Bill has been submitted for appeal, it is then referred to and reviewed by the higher court (Rautenbach, 2014).

The clerk of the magistrate's court who receives the matter chooses a court date for the appeal and informs all parties concerned. However, it is up to the magistrate to either approve, postpone, or dismiss the appeal hearing should an appellant fail to appear in court. In the case of an appeal against a traditional court verdict, the magistrate's court is obliged to follow Section 309 A of the Criminal Procedure Act No. 105 of 1977 (South Africa, 1977), which urges the magistrate to hear and record all available evidence that may be relevant to the issue at hand. The magistrate may also confirm or vary the verdict (the conviction or sentence) of the traditional court. He or she may also order that the sentence of the tribal court be satisfied instantly. The magistrate may also dismiss an imposed sentence and impose another sentence that is rightful and lawful. A sentence of a traditional court may also be dismissed and, instead, the magistrate may impose imprisonment of a period less than 3 months and with no opinion of a fine (Rautenbach, 2014).

2.16. The perceptions of rural residents on the functioning of traditional courts

Beall et al. (2004) argue that the extensive debates and questions regarding the role of traditional leadership in a democratic dispensation resulted from concerns that traditional institutions had been broadly de-traditionalized through colonialism and apartheid and that they had therefore lost their true originality and identity and thus no longer fitted within the context of South African communities. Paradoxically, democracy also resulted in the restoration of traditional institutions through a process of "re-traditionalization" (Beall et al., 2004). Williams (2001) found that approximately 16.9 million people (or 45%) of the South African population lived under the ruling of more than 800 chiefs and that over 70% of the country's poor resided in rural areas under extreme poverty. Most such citizens still live-in deprived circumstances as they lack or have limited access to resources and services such as the formal justice system (Oyieke, 2012). It can be argued that the traditional justice system is thus used by most people in rural areas as their only access to justice.

Ntsebenza (2004) argues that, at local level, traditional institutions are strong political bodies. According to Van Dalsen (2019), at a media briefing held in 2019 about the passing of the Traditional Court Bill, Deputy Minister Jeffery of the Department of Justice and Constitutional Development argued that the Bill served to emphasise the importance of traditional courts. Moreover, these courts will not allow formal legal representation to ensure that the system of traditional justice allows for a cheap, speedy, and assessable form of justice that is familiar and

open to everyone (Van Dalsen, 2019). Hlubi (2013) argues that the functioning of these courts positively impacts residents who witness and experience the justice imposed by these courts.

A previous study of Oomen (2005) was consulted to explore peoples' attitudes towards the traditional form of justice. As cited in Hubi (2013), Oomen (2005) conducted a survey in a district of the Limpopo province called *Sekhukhume*. This survey was about the functioning of traditional courts versus that of formal justice courts in this area. The majority of her respondents were in favour of the traditional court over formal justice courts and they preferred to report cases or disputes to their traditional court. Table 2.16 below shows the number of cases reported to the magistrate's court and the traditional court in the *Sekhukhune* area, Limpopo in a period of 1 year (Oomen, 2005 as cited in Hlubi 2013).

Matter/ issue	**Magistrate's court**	**Traditional court (Kgosi)**
Maintenance issues	77	19
Marital issues	57	53
Family issues	22	71
Land disputes	35	62
Cases of witchcraft	35	68
Petty theft	19	67
Assault or inflicting bodily harm	38	49
Theft (other than petty theft)	90	9

***Table 2.16**: Number of cases reported to the magistrate's court and the traditional court of Skhukhune area over a one-year period (Oomen, 2005; cited in Hlubi, 2013).*

The above table, which presents data on Oomen's (2005) study in the *Sekhukhune* area, shows that the majority of the community members in that area preferred taking the traditional justice route and using the traditional court in the area rather than the magistrate's court when reporting cases or disputes. It can be argued that some of the reasons for this preference were that they were happy with the way cases were handled by this court that it was a speedy process, and that cases were finalised in a fair manner (Hlubi, 2013). The use of their indigenous language was also a commendation as the respondents argued that they were understood and could understand the proceedings which made the justice process less confusing as there were no translations or bombastic words involved (Oomen, 2005). Moreover, this community is argued

to also prefer the traditional court because the history of their traditional leadership dated back to the 1950s. Oomen (2005) also argued that the residents in the *Sekhukhune* area also trusted and supported traditional leadership because the elected government representatives seemed to be failing in fulfilling most of their obligations in the area. Furthermore, the trust these residents had for elected members was eroded as the latter seemed to distance themselves from the community. This was evidenced by the comments of a magistrate who stated that the *Sekhukhune* area was the most boring place to work in because residents solved their issues themselves or through their traditional court (Oomen, 2005). The magistrate as per the study findings furtherly stated that the cases, he had to deal with were mostly assault and theft. The court sat for one session per week to deal with these cases and he and his colleagues referred to them as customary law issues. It is therefore arguable to state that the community undoubtedly preferred the traditional court over the magistrates' court because the former was viewed as free or cheap, accessible, speedy, and unintimidating. Lastly, a very few cases of appeal were referred from the traditional court to the magistrate's court (Oomen, 2005).

In light of the above, as supported also by Oyieke (2012), one may argue that traditional courts not only deliver justice and minimize the workload of cases referred to the SAPS and magistrate's courts, but they also perform mediating functions and promote reconciliation among members of rural communities. Bank and Southall (1996) also found that the community they studied worked together with their leader to oppose the introduction of alternative justice institutions. This built trust between the leader and the people who worked together to maintain peace in the area and to create a respectful and law-abiding community (Bank & Southall, 1996). In summary, the findings of previous studies as of Oyieke (2012) support the notion that traditional courts play a significant role not only in the administration of justice, but also in restoring and maintaining peace in their areas of jurisdiction.

2.17. Concerns regarding the functioning of traditional courts

Even though traditional institutions are constitutionally recognised by both the 1993 and the 1996 Constitutions, they are still subjected to various criticisms, even after the passing of the Traditional Court Bill (B1-2017). For instance, Rautenbach (2014) argues that the nature of these courts is too different from that of formal courts. That is because, unlike formal courts, traditional courts forbid the use of legal representatives and their proceedings are also not guided by certain standard or legalistic rules. Moreover, every case is treated differently depending on its nature or the incident (Hlubi, 2013). This lack of standard procedures and

rules may suggest that justice may not be similarly distributed to all citizens as these courts are not bound by any rules or regulations besides their indigenous or customary laws (Rautenbach, 2014).

Another criticism was made by Sosisbo (2012) when he stipulated that traditional courts do not record any judgement or ruling as all the proceedings are purely verbal. Thus, traditional courts may contravene the law of precedent, which states that all courts are bound to follow previous decisions or rulings made by legal authorities in similar cases. This is also referred to as judicial precedent (Sosisbo, 2012). One may thus critically state that, by not recording judgements in all cases, similar cases are likely to receive different judgements or rulings. Thus, citizens' right to equal and fair justice may be violated if a case is not treated in the same manner as that of an earlier, similar case (Sosibo, 2012).

Another concern is that traditional courts are patriarchal or gender-biased because women are not allowed equal participation during the proceedings while men have all the decisional and judicial power (Rautenbach, 2014). It may thus be argued that traditional courts violate women's constitutional right to equal and fair treatment. Section 9 (3) and (4) of the Constitution elaborates on equality and obliges the state and anyone else not to discriminate against any individual due directly or indirectly to sexual orientation, gender, religion, culture, belief, language, and birth. It further provides that national legislation should combat any unfair discrimination (South Africa, 1996). The same obligation of non-discrimination against anyone, especially women, is also stipulated in Section 7 (3) (a) of the Traditional Court Bill (B1-2017) which elaborates that, during traditional court proceedings, everyone is entitled to equal and fair participation, and that includes those at risk of being marginalised or discriminated against, such as women and children. This section of the Traditional Court Bill further argues that these courts should observe and respect the rights of every individual concerned as stipulated in Chapter 2 of the Constitution (i.e., the Bill of Rights), with particular reference to sub-section (3) (a) (i) of Chapter 2. This section stipulates that women are entitled to participate fully and equally in the proceedings of traditional courts (Traditional Court Bill, B1-2017). It can be argued that this means that traditional courts that discriminate against women are guilty of an offense as they contravene Section 9 (3) and (4) of the South African Constitution as well as Section 7 (3) of the Traditional Courts Bill. Traditional courts that conduct their proceedings in a biased and patriarchal manner are thus unlawful. However, it may be argued that it is likely that cases involving women may be dealt with differently because

traditional courts are not bound by judicial precedents but deal with cases differently depending on the nature of the case and the parties involved (Sithole, 2008).

Sosibo (2012), who conducted a study on traditional courts in the Vhembe district in the Limpopo province, detected strong evidence of nepotism. For instance, some traditional leaders protected people that were related to them. When cases were brought to the attention of the traditional court against individuals related to any traditional leader of that court, these leaders dragged their feet in bringing the matter to court. If they were finally brought to court, the relatives were usually given a lesser punishment compared to judgements in similar cases that involved non-related citizens (Sosibo, 2012). It can be argued that this means that people's constitutional right of being equal before the law is sometimes not upheld by traditional courts when certain individuals are given preferential treatment regardless of the offence they committed. This was supported by Hlubi (2013) when she argued that this had also occurred in cases involving individuals of higher economic status in rural areas. For instance, in her previous study, Hlubi (2013) uncovered incidences of high preferential treatment of wealthy individuals with a higher status than others in rural areas. These included pastors and taxi and shop owners whose services were viewed as pivotal by the residents in the area. Rautenbach (2014) argued that this suggests that some traditional courts do not treat every case in an equal and fair manner. He further elaborated that in fact, the outcome of cases seemed to depend, in some instances, on the parties involved and not the nature of the offence. Sosibo (2012) further argued that such unlawful acts of nepotism are in violation of various Acts and policies regarding the functioning of traditional courts such as the above-mentioned section of the Traditional Court Bill and Chapter 2 of the Constitution that stipulates that nobody is above the law.

In essence, on may conclude by arguing that questions have often been raised about the constitutionality of traditional courts and their ability to treat all cases equally as stipulated in the Constitution, the Traditional Court Bill, and the Black Administration Act. The most popular critic is can be argued to be that if these courts' procedures or rulings contradict any Acts, framework, legislation, policy, or the Bill of Rights, they undeniably violate the rights of those who rely on or use this form of the justice system. It is for this reason that many critics of traditional courts and traditional institutions have called for these courts to be monitored by the state on a quarterly or yearly basis. It can be argued that this will ensure that all proceedings of traditional courts are conducted in line with the Constitution and other legal frameworks that

protect the rights of citizens as well as those who preside over the functioning of traditional institutions.

2.18. Schools of Thought: Democratic Pragmatism versus Organic Democracy

The discussion on the roles of traditional leaders and the traditional court system can be concluded by referring to Cele (2011), who distinguishes two paradigms related to the functioning of traditional leadership institutions within a democratic dispensation. These paradigms are referred to as Democratic Pragmatism and Organic Democracy. Jackson et al. (2009) argue that a literature review of the system of traditional leadership in South Africa revealed that these are the two schools of thought that aim to explain the relevancy of traditional leadership in the post-1994 era. The contrast between these two paradigms lies within the compatibility or incompatibility of traditional leadership with democracy, and most scholars adopt either one or the other of these paradigms (Hlubi, 2013). The Democratic Pragmatic school of thought views traditional leadership governance as an outdated institution that is inappropriate in a democratic society, while the Organic Democratic school of thought views traditional leadership as people's representative that is legitimate, accessible, and respectable (Sithole, 2008). The Democratic Pragmatic school of thought thus does not believe in the relevancy of traditional institutions in a democratic era, while the Organic Democratic school of thought emphasises that these institutions still have certain roles to play in society despite the advent of a democratic dispensation (Sithole, 2008).

2.18.1. The Democratic Pragmatism school of thought

Hlubi (2013) argued that Proponents of the Democratic Pragmatism school of thought question whether traditional leadership and the structures it embodies are compatible with human rights and democracy. She further elaborated that they maintain that this system is incompatible with democracy and human rights and, therefore, it is not consistent with the principles of democratic governance. Furthermore, the basic assumption of the Democratic Pragmatism school of thought is that the institution of traditional leadership utilises the manipulative measures of apartheid that aimed at legitimizing separate development (Hlubi, 2013). It can be argued that this means Democratic Pragmatism thus argues that traditional authorities are outdated, and no longer relevant as traditional communities have progressed over the years and become modernised. Traditional institutions thus no longer have a role to play in developing these communities (Nxumalo, 2012). According to Jackson et al. (2009), academics adhering to the Democratic Pragmatism school of thought conducted an assessment of the two national

legislations that are known to deal directly with traditional leadership, namely the Traditional Governance Framework Act No. 41 of 2008 and the Communal Land Rights Act No. 11 of 2004. Their assessment of these two pieces of legislation revealed, according to them, the incompatibility of traditional institutions with democracy. According to these scholars, traditional institutions (such as traditional courts) are contrary to democratic values and modern economic models (Nxumalo, 2012). This means that, according to proponents of Democratic Pragmatism, traditional institutions do not adhere to democratic principles and clash with the economic plans of democracy that are distributed by global discourses and that intend to remove any form of supremacy that is not democratic, such as the supremacy of traditional leadership (Jackson et al, 2009).

Mandani, (1996 in Sithole, 2008) states that Democratic Pragmatism regards citizens who live in rural areas under the authority of traditional leaders as 'non-citizens' as they are the subjects of an authority that is undemocratic and has no accountability. They further propose that, because traditional authorities are not elected, they do not give other worthy people a chance of being elected. One of the concerns of Democratic Pragmatism is therefore that the governance of traditional leaders is inherited or awarded to certain individuals instead of being bestowed upon democratically elected leaders by means of majority voting (Sithole, 2008). It can be argued that this means traditional leadership is thus imposed on traditional communities that have no voice regarding who gets elected to govern them in local affairs.

Hlubi (2013) also argues that traditional leadership has no safeguards against any unfair exploitation of power. Moreover, it is patriarchal as it usually favours men over women. She further elaborates that women in traditional areas are likely to be marginalised by this patriarchal system and that their rights to equality, as entrenched in the Constitution, are thus violated (Hlubi, 2013). A further argument was made by Sosibo (2012) when he elaborated that because traditional governance is male dominated, women are oppressed and their constitutional rights to equality are violated. He further elaborated that it is an unfortunate to note that very few or no measures are put in place to protect those at risk of being marginalized or oppressed by this form of justice system. It is therefore not surprising that Jackson (2009) made an arguing conclusion that traditional leadership not only consists of a system that permits the inheritance of leadership, but that it also contradicts core democratic values and should thus not be sustained as part of any democratic dispensation.

2.18.2. The Organic Democracy school of thought

Tshehla (2005) highlights the significance of traditional leaders as well as the necessity to preserve the cultural practices of South Africans and their diversity. A further elaboration was made by Sithole (2008) when he argued that Organic Democratic supporters view traditional leadership governance as a system that addresses the different needs of individuals who understand more than one type of democracy. He further stipulated that proponents of the Organic Democracy school of thought view traditional leadership as the bedrock of African democracy. This argument was supported also by Chigwata (2016) when he stipulates that this school of thought argues that the conventional democracy of the West does not fully extend to everyone as different communities have various needs that should be fulfilled in different manners. He further elaborated that traditional leadership is thus viewed as an institution that fills a gap in democratic governance that conventional democracy fails to reach. Moreover, the current democratic governance is argued by Hlubi (2013) to be too westernized and does not cater for every community in a country as diverse as South Africa. She further stated that therefore, traditional leadership governance satisfies the needs of communities that would otherwise be neglected by democratic governance. Furthermore, the proponents of this paradigm maintain that traditional leadership provides a unique leadership model that satisfies certain social and governance needs of communities and thus views traditional leadership as a substitute for democracy (Hlubi, 2013). One can argue that this means traditional leadership is an alternative form of democracy that focuses less on the existing government and more on rationalizing justice based on the principles of culture and morality (Sithole, 2008).

Nxumalo (2012) argues for the Organic Democracy school of thought by proposing that, regardless of the fact that the powers of traditional leaders were abused, and they were manipulated by colonialism and apartheid, it is an institution that has never disappeared despite colonialism and it can therefore not be regarded as a governance system that was 'invented' by apartheid. One may argue that the view of the Democratic Pragmatism school of thought is that traditional leadership governance is a system that was created by the apartheid regime to achieve their aims of separate development, whereas the Organic Democracy school of thought proposes that the traditional justice system was in governance long before the impact of colonialism (Nxumalo, 2012). The Organic Democracy school of thought is thus of the view that traditional leadership and justice are solid foundations of African democracy that values traditions. Therefore, there is an absolute need to preserve and protect African cultural practices

(Tshehla, 2005). Moreover, proponents of the Organic Democratic school of thought do not oppose the modification of traditional leadership institutions to bring it in line with democratic principles. Rather, they contest the notion that traditional leadership institutions are fundamentally undemocratic (Sithole, 2008). A concluding statement can be of Hlubi (2013) who proposed that the Organic Democracy views traditional institutions as a valuable part of the culture and traditions of the African people and it therefore urges that they need to be protected. She further elaborated that this school of thought therefore proposes that traditional leadership is not in contravention of the Constitution, but it is against the view that the institutions it upholds, such as the tribal court system, are inconsistent with democracy and thus no longer relevant.

2.19. Conclusion

The discourse in this chapter reviewed relevant literature to provide an overview of the topic under investigation. Various themes and sub-themes highlighted the nature and role of traditional courts in combating crime among rural communities. The functioning of traditional courts was also juxtaposed with democratic principles of justice, with particular focus on earlier studies and the views of rural communities. It is undeniable that the traditional justice system is not a new phenomenon globally or in South Africa where traditional leaders presided over courts and dispensed justice long before colonialism. Regardless of the democratic principles that the South African Constitution entrenches, traditional leadership is recognised and protected by current statutes that govern the functioning of all traditional institutions, and particularly the traditional justice system. This form of justice seems to serve as an alternative form of justice for most citizens who are marginalised or deprived of access to the formal justice system. Communities in rural areas trust and heavily rely on traditional leaders and traditional courts that deal with both criminal and civil matters. Previous studies as of Nxumalo (2012) have found that, because both certain criminal and civil offences were reported to and dealt with by this form of the justice system, the traditional justice system has been highly effective in combating crime. However, despite many positive findings, various scholars have offered criticisms of this form of justice, particularly as they argue that it contravenes current democratic principles and violates some human rights as entrenched in the Constitution and, more specifically, the Bill of Rights.

CHAPTER 3: *THEORATICAL FRAMEWORK*

3.1. Introduction

This chapter focuses on the theoretical framework that underpinned the study. Grant and Osanloo (2014) argued that a discussion of the theoretical framework of a scholarly investigation is important in the sense that it acts as an anchor of the literature review while providing a foundation for the processes of the methodology and the analysis of the data. For this research to achieve its aim, three theories were employed that constituted the theoretical framework, namely: the alternative dispute resolution theory, the social solidarity theory, and the broken window theory. These theories were utilised to explore the roles and functioning of a traditional court in a rural community where it serves to combat crime and seek justice for the victims of offences.

3.2.1. The alternative dispute resolution theory (ADRT)

Stone (2004) argued that the alternative dispute resolution theory (ADRT) is based on a wide variety of dispute resolution techniques that have the similar essential characteristic of two parties and a third party. It can be argued that the third-party act as a facilitator and seek means of resolving the differences of the two parties by turning to alternative measures rather than accessing formal legal proceedings. The ADRT thus refers to a set of procedures or principles that are followed informally to resolve legal disputes outside the formal courts (Mnookin, 1998). Furthermore, the ADRT proposes various mechanisms that may be used to solve societal disputes or issues. Most of those ADRT mechanisms takes the form of arbitration; mediation; and negotiation; and these are referred to as being the foundation and first steps of the Alternative Dispute Resolution Theory (Stone, 2004).

- ***Arbitration:***

This is a form of an ADRT mechanism where the conflicting parties decide to take their matter to a third party referred to as an arbitrator (Stone, 2004). He further elaborated that the arbitrator will then act as a peacemaker in resolving their dispute. This form of resolution system can have an arbitrator ranging from a single individual up to a panel of three to five arbitrators (Stone, 2004). Moreover, the arbitrator is chosen by the parties based on their expertise or knowledge concerning the subject or matter of the dispute. In some cases, the parties may choose an arbitrator based on their legal knowledge or training (Mnooklin; 1998). The procedure of the arbitration system is argued to involve a third-party who heads the hearing of

evidence for cases of the conflicting parties and since it involves informal procedures, parties have the right to present any evidence they willing to present (Stone, 2004). In some cases, there is an application of rules of evidence; allowing motion practice; as well as exercising of other judicial procedures. Mnooklin (1998) elaborated that based on the manner of the case and evidence presented, the arbitrator(s) issues a final decision which is binding to the parties. However, in some cases, the verdict or decision is only binding if the disputing parties agree. This means that the arbitration mechanism can be argued to be a process where conflicting parties in deciding to resolve their dispute, they seek assistance from an outside party who acts as a facilitator; heads the resolution process and provide a solution that the disputing parties are usually obliged to follow to solve their dispute (Mnookin, 1998).

- ***Mediation*:**

Ayres & Nalebuff (1997) argued that like the Arbitration process, Mediation is also a voluntary process where conflicting parties choose a third party called a mediator to assist them in resolving their dispute. Additionally, they argue that the goal of a mediator is to govern and facilitate the negotiations to assist conflicting parties themselves to reach an acceptable settlement that is mutual to the parties (Ayres & Nalebuff, 1997). This means that the goal of the mediation process is to create peace among the conflicting parties. That is because in most cases, the mediator meets with the disputing parties and collectively try to come up with a solution to the problem in hand or get the parties to agree to a voluntary settlement that will retain peace (Mnookin, 1998). Furthermore, the process is argued not to be open to the public as the proceedings are private and confidential and do not involve any standard rules or fixed rules. The proceedings are argued also to be unstructured, informal, and once the decision had been reached, it is then reduced and recorded in writing which after becomes an enforceable contract (Mnookin, 1998). This means the Mediation process does not follow any rules or procedures and unlike the arbitration ADRT mechanism, it is not the third party who provides a binding solution. Rather, it is the third party together with the affected parties who decide on the solution and such decision is then recorded and become a contract binding to the parties.

- ***Negotiation:***

Negotiation is a form of the ADRT mechanism that is argued by Mnookin (1998) to be voluntary in nature. He further elaborated that that is because negotiation is not enforced to the parties in disputes but rather it is the parties themselves who decide if they want to negotiate in solving the dispute or not. With negotiation, a neutral third party with their decision-making

authority is not required but rather it is the disputing parties' responsibility to decide on any resolution. The negotiation process includes informal and undefined procedures or presentation governing rules in terms of presenting an argument or evidence (Arrow et al; 1995). If there is an arbitrator or judge, he or she has no authority to enforce a resolution to the disputing parties but rather his or her goal as a mediator is to act as a facilitator, assist the parties into resolving the dispute as well as achieving a mutual settlement term for their dispute (Ayes & Nalebuff, 1997). This means that in the negotiation mechanism, it is up to the conflicting parties to decide to get a third party to intervene in their conflict. However, despite the third party being chosen to mediate, he or she may not impose a solution to the conflict but rather can assist the conflicting parties to come up with a solution for their conflict themselves (Mnookin, 1998).

3.2.2. The Alternative Dispute Resolution Mechanism: The Traditional Justice system.

Rautenbach (2014) argues that governmental and non-governmental organisations worldwide have been striving to provide an alternative dispute resolution mechanism that will ensure an affordable and effective form of justice for everyone. He further elaborates that there are organisations that focus on alternative dispute resolution mechanisms and that act as a legal system based on traditional values and norms. Among such organisations are the Arbitration Foundation of Southern Africa, the Muslin Judicial Council, and the South African Pluralistic Legal System, to name a few (Rautenbach, 2014). One example of the South African Pluralistic Legal System is traditional courts that play an important and effective role in resolving disputes in many traditional communities, especially in rural areas. These traditional courts are regarded as more easily accessible, cheaper, and much faster than the formal courts in South Africa (Bennett, 1985). These courts are also revered as being effective and accommodative to every individual as they are alternative justice organisations that bridge the gaps left by the formal justice system and because they offer justice resolutions to individuals who are marginalised by the formal justice system (Oomen, 2005). Furthermore, it has also been argued that these courts are more effective than formal courts as they are user friendly, easy to access, and their functioning is underpinned by traditional values and norms that are understood and upheld by African people (Oomen, 2005).

Bennet (1985) elaborates that the alternative dispute resolution theory is closely associated with traditional courts because the ADRT underscores the direct involvement of those most affected by a conflict in the process of meditating, participating in decision-making, and resolving issues in a manner that is free from any legal jargon. He further argues that the traditional justice

system is part of the hybrid practices of alternative dispute resolution because the proceedings of these courts are flexible, steer away from confidentiality, and are open to the public (Mnoklin, 1998). This means that, unlike the Western justice system, the traditional justice system can be argued to be a system that is usually simple and makes it easy for every participant to be accommodated. Such elaboration of Mnokin (1998) will assist the study in finding out the effectiveness of both the traditional justice and the formal justice in rural areas.

Just like in processes of arbitration, mediation and negotiation, the traditional justice system involves a neutral party (i.e., tribal authorities) whose responsibility it is to run the dispute resolving proceedings and to make appropriate decisions to resolve the dispute (Mnoklin, 1998). It can be argued that this justice system does not resolve a dispute through judgements or adjudication, but that it rather facilitates a resolution that is consensual and accepted by all parties (Ubink & Van Rooi, 2011). This means that the aim of the traditional justice system as an ADRT mechanism is to involve a third party whose role is to mediate and help the conflicting parties resolve their dispute by coming up with a consensual solution that will settle their differences. As a traditional justice system is dominant in South Africa's traditional communities, it is no surprise that most rural residents agree to be subjected to the jurisdiction of these courts and allow their method of resolving disputes through alternative resolution mechanisms between conflicting parties and to restore the peace in this manner (Rautenbach, 2017). Processes followed using alternative dispute resolution mechanisms are generally slightly different from one another, depending on how far the parties move from the formal system of judicial and legal crime resolution towards a private system of achieving justice (Stone, 2004). Moreover, mechanisms that are entrenched in the ADRT can be differentiated in terms of the level of formality that is applied in the procedures. For example, some alternative dispute resolution mechanisms do not follow the procedures of formal litigation but are conducted as public trials that exclude the role of judges in what is viewed as ordinary hearings (Stone, 2004). It can be argued that this means that various forms or mechanisms of crime resolution are proposed by the ADRT and that they all differ in accordance with the techniques that are followed by the conflicting parties to resolve their dispute.

3.3. The social solidarity (or social control) theory

Ray and Reddy (2003) argue that social solidarity means social bonds that are derived from societal moralities. Societal morality is defined as the content of shared common knowledge about politics, morals and ethics, together with any other agreement between people about what

is good or bad. This agreement results in the formulation of common bonds that are recognised by society and that mould it together. If these bonds become too weak or relaxed, individuals in a particular society will drift apart (Ray & Reddy, 2003). This can be argued to means that a society is united and bound by common values, morals, shared knowledge, and agreements regarding most aspects − thus such bonds need to be strongly attached or else society will fall apart, and societal wellbeing will collapse. Kariuki (2015) elaborates that aspects such as social networking, trust, and common duties are elements that join people together and enable their coexistence. Moreover, through strong maintenance of these social ties, the existence and effective functioning of the society is guaranteed. Emile Durkheim, a French Sociologist, argues that members of a society are social factors that are controlled by certain social elements to stay in that society, and these social elements result in fear of being excluded from society and therefore ensure that potential wrongdoers avoid committing misconducts so that they will stay in that society (Kariauki, 2015). This means that there are social factors that compel individuals to become attached to the rest of society and that give them a sense of belonging. Individuals therefore refrain from engaging in wrongdoings and conform to all societal expectations so that they will not lose their place in society (Kariauki, 2015).

Igwe (2017) states that, historically, African communities maintained strong and collective forms of social control which did not only ensure that social peace was maintained, but which also resulted in communities forging strong bonds, harmony, and a sense of oneness. He further elaborates that this made it easy for members of these societies to overcome any adversity and challenges that threatened their existence as they worked together to overcome them. However, Igwe (2017) states that these strong bonds and the sense of oneness were weakened by the advent of colonialism which actively enforced the separation of African individuals from their cultures. This occurred because Europeans promoted their own cultures, beliefs and livelihoods as being superior to those of Africans and this resulted in the perception that African cultures and individuals were inferior (Muruthi, 2006). African cultures were consequently dismantled and African values and norms, which were the foundation on which African societies had been built, collapsed to a large extent. Social solidarity also collapsed in most regions where it had existed before colonialism and this further led to the disintegration of cultural and societal bonds (Muruthi, 2006). He further elaborated that thus factors that bound individual's together and promoted unity existed long before colonialism, but these bonds were dismantled and eroded as colonists enforced their own cultures and values on African people, which resulted in the collapse of social solidarity and unity amongst people in African societies.

Achieving social sodality is further defined by Muruthi (2006) as a stage where society members better recognise and treat each other as humans and share concerns relating to the wellbeing and welfare of one another. He further elaborated that as people's sense of meaning originates also from their culture; and values and attitude of culture being the foundation of social norms people live by; one therefore need to acknowledge that cultural roles allow residents also to resolve their disputes as well as facilitating the strengthening of social ties that binds those people together (Muruthi, 2015). To explain the resolution of disputes by elders or traditional leaders within the African societies as well as its restorative nature, it can be argued that traditional resolution disputes measures are not only practices of traditional justice which bring the whole community together with a common goal of administering justice but it also aims to restore social ties that had been weakened or broken because of the wrong done, whether omitted or committed and if these social ties are left weak or absent, the existence and functioning of the society could not be effective (Karuki, 2015). Since conflict or disputes in society are viewed as disturbing factors amongst the relationship of community members, the resolution of disputes by the traditional justice system is argued to be a social element beneficial to the society as it provides societal members with a form of the justice system that not only restores and maintain peace but also strengthens their societal bonds as they work together in solving those disputes and therefore ensuring an effective functioning society (Faure, 2000). It can be argued that this means the practice of traditional justice brings the whole community together with a common goal of administering justice.

Komter (2005) defines the African indigenous dispute resolution system as a foundation for re-establishing social sodality as it acts as peace-making tool that teaches society a lot about healing and reconciliation. He refers to the Rwandan *Gacaca* system, which is a community-based justice system that is rooted in Rwandan tradition. Komter (2005) states that *Gacaca* means 'justice amongst the grass'. It is a traditional justice and reconciliation system that is based on the involvement of the affected local community for the resolution of a dispute. In this justice system, the affected community and the victim decide what form of punishment or sanction will be imposed on the offender(s) to ensure that justice is served. Moreover, the perpetrator is integrated back into society as part of the community (Komter, 2005). It can be argued that the *Gacaca* system demonstrates that African dispute resolution approaches are also able to serve justice and consolidate peace as they achieve the restoration of social sodality through public participation. Public participation is seen as an important element in a peace-

making process because, when society members take part in the restoration or building of peace, social sodality is strengthened (Muruthi, 2006).

3.4. The broken window theory

The broken window theory was introduced in 1982 by two social scientists namely James Wilson and George Kellings. This theory argues that when a broken window is left unfixed, it leads to disorder, decay and fear which all result in an increase in misconduct and criminal behaviours (Kellings & Wilson, 1982). Thus, the broken window theory proposes that, if a single broken window is left broken and is not replaced, it will result in more windows being broken. Idiomatically translated, this means 'take care of little problems and the big problems will take care of themselves' (Lortz, 2017). In the policing context it may be argued that the underlining notion of the broken window theory is that, if minor crimes are left uncontrolled or unmanaged, the situation will spiral out of control and this will result in the escalating commission of major crimes. Kamalu and Onyeozili (2008) propose that when disorder within a community reaches critical mass, it results in more serious crime problems and urban decay. Thus, broken windows refer metaphorically to disorders in society that create fear and escalate into disorder that goes against the values of a community (Kelling & Wilson, 1982).

According to Kellings and Coles (1996), in the policing context the broken window theory rests on four pillars:

- Putting the police in close contact with those who are predisposed to criminal behaviour and misdemeanours;
- Ensuring police visibility and presence to discourage the likelihood of criminal behaviour and the perpetration of crime;
- Improving citizens' ability to prevent crime by taking control of their neighbourhoods; and;
- Promoting cooperation between the police and the community to fight crime through a unified approach.

The broken window theory argues that disorder does not need to be directly linked to major crimes, but that disorder results in an increase in fear of crime and the withdrawal of residents. Thus, informal social control decreases and therefore levels of serious crime increase (Lortz, 2017). Authors who hypothesize this theory propose that it views the community as a collective

victim and that a community with ‘broken windows’ can be identified by signs of decay such as instability, a high rate of crime, and a lack of social control and order (Kamalu & Onyeozili, 2008). This means that the presence of crime signals and the absence of social order shape the risk perceptions of people and encourage increasingly high levels of anxiety and fear. This can be argued to result in a decrease in levels of social unity and collective productivity as communal confidence and trust are dissolved (Kelling & Wilson; 1982).

In the policing context, Kelling & Wilson (1982) further state that the broken window theory proposes that police officials can work collectively with communities to manage social disorder, reduce fear, and create an environment that is less crime orientated. However, while the broken window theory calls for the root causes of a culture of crime to be dealt with before this culture results in ever more serious offences, the police argue that there is little they can do as some of the minor disorders are not even regarded as offences (Kelling & Wilson, 1982). It may thus be argued that police officials are often unable to ‘fix broken windows’. Aiyer et al. (2014) address this issue by proposing that, to limit the prevalence of ‘broken windows’, a community should establish ‘busy streets’. Such a community protects itself by establishing thriving local businesses, organised spaces and activities, and visible formal and informal social interactions. This means that communities should adopt a policy of establishing ‘busy streets’ because numerous activities keep residents busy and distract them from engaging in criminal behaviour. Alyer et al. (2014) thus argue that constant social interaction and active community members strengthen both individuals’ and the community’s effectiveness in taking control of their environment. This is because, through active participation, individuals and organisations can forge solidarity, give recognition to one another, enjoy activities that happen in their area, and simultaneously maximise control of themselves and their environment (Alyer et al., 2014). It can also be argued that this form of social solidarity can promote social order and reduce social isolation and fear among residents through minimising social disorganisation. In this manner, ‘broken windows’ are fixed, and social wellbeing is restored (Alyer et al. 2014).

Supported by the social solidarity theory and the social disorganisation theory, the broken window theory further argues that, if community members become distant or isolated from one another because of weak or fragile social bonds, it can result in an inability to recognise and deal with issues that disrupt peace in the community (Kubrin & Weitzer, 2003). This means that a weak-bonded community will disregard any ‘broken windows’ due to a lack of unity, and therefore these unattended broken windows means collapsed social control which is an

invitation for ‘more windows to be broken’ (William & Kelling, 1982). To fix the ‘broken windows’ (or the ills) in their communities, rural communities often embrace community policing or, if this formal structure is absent or impacted by corruption, they turn to the traditional justice system as a means of restoring the threats that endanger their community (Hlubi, 2013). One of the pillars of the broken window theory is community members’ ability to regain control of their neighbourhood (Lotz, 2017). The traditional justice system becomes part of this pillar when the community collectively and collaboratively participate in rooting out crime. Therefore, just like fixing a broken window, the traditional justice system that punishes and prevents minor offences will stem the tide of serious offences (Alyer, 2014).

Taylor (1999) argues that, when a community fixes its broken windows, it reduces any offender’s motivation to engage in crime or misconduct and it also increases social control, decreases fear among residents, and establishes communication channels. This means that when the community utilises techniques to regain social control, it discourages potential offenders and increases effective social order that prevents minor disorders from escalating into more serious offences (Taylor, 1999). Such elaboration of the Broken window theory can be argued that it will assist the study in exploring whether a traditional court is effective and whether crime would have increased in the area if this form of justice system was not present.

In light of the above arguments, it may be argued that community policing techniques such as traditional courts utilise social solidarity and problem-solving mechanisms to actively address any condition or situation that threatens public safety through social disorder, crime, and fear of crime (Lotz, 2017). Fear of crime as an issue of public safety that may become a serious community disorder which, when left uncontrolled, will spiral out of control and result in fearful community members who will avoid going outdoors. This ‘head in the sand’ attitude will, in turn, minimise opportunities for informal social interactions and will consequently lead to more social isolation (Alyer et al., 2014). Social isolation is regarded as a contributing factor to social disorganisation and escalating criminal activities as it leads to a reduction of residential mobility and disrupts social solidarity. Both the latter are required for effective social control of crime and prevention (Brooks-Gum & Earl, 2008).

Kubrin and Weitzer (2003) raise the argument that absent or ineffective social control and weak social bonds result in social disorganisation. They further elaborated that the latter term refers to a state where a community is unable to come together to achieve common goals and overcome common social problems. One may argue that when this occurs, ‘broken windows’

are ignored which creates further social disorder. For instance, visible social disorder such as vandalism and rowdy street behaviour leaves people (especially potential offenders) with the perception that social control and ties are weak or absent, and the ensuing behaviour will further weaken any positive social ties as delinquents will engage in increasingly negative social behaviour (Wilson & Killing, 1982).

It can be concluded that, like the social disorganisation theory, the broken window theory proposes that unattended wrongdoings or disorders result in social disorganisation. This leads to diminished trust, promotes fear, raises social isolation, and increases opportunities for crime and misdemeanours (Bazemore & Umbreit, 2004). These two theories thus propose that communities should not only strengthen social solidarity, but that they should also act collectively to control social disobedience and disorder through techniques such as community policing or any other appropriate crime control mechanism. This will ensure that the community maintains positive social wellbeing as every misconducted will be dealt with before it can spiral out of control and become a major issue (Aiyen et al., 2014).

3.5. Conclusion

The significance of the theories implemented in this study was to brighten the traditional justice system in a rural setting and assisted the study in forming a foundation for analysing and explaining the data findings. These theories include the Social sodality theory which emphasises on the importance of communities coming together to fight against any matters that threaten the peace within their area. This theory further elaborates that if a community consist of weak social bonds, crime is more likely to increase. Meanwhile, this is also supported by the second theory of the study which is the Broken window theory which emphasises that if minor issues are left uncontrolled, there are more likely to results into serious issues or more crime. It, therefore, proposes that communities should leave no issues untreated, but they should rather work jointly to combat any of those matters before they escalated into serious crime and disturb communal peace. One may elaborate that this is somehow supported by the third theory of the study which is the Alternative Dispute Resolution Theory (ADRT) and this theory aims to recognise and focus more on alternative measures used in combating crime or communal issues in certain communities that have limited access to the formal justice system. It can be concluded that the elaboration of all the theories which are the Social sodality; the Broken Window; and the ADR theory will be applied in Chapter 5 to demonstrate how these theories sustain the study findings.

CHAPTER 4: *RESEARCH METHODOLOGY*

4.1. Introduction

This chapter presents an in-depth discussion of the research design and methodology that were employed. Therefor the research design and approach, the method of sampling, how the data (primary and secondary) were collected, and what methods were used analyse the data ae discussed. The location of the study area where the *KwaNgcolosi* tribal community resides in the Maphumulo Local Municipality (Ward 11) will be described. The chapter is concluded with an elucidation of the ethical considerations, the limitations that impacted the study, as well as the procedures that were followed to ensure the reliability and validity of the data.

4.2. Nature of the Study: Research Design

The study adopted both an exploratory and descriptive research design. The reason for this combined approach was that the researcher first wanted to determine whether, in general, traditional courts have a role to play in combating crime. Secondly, it was necessary to fully understand and describe the functioning of traditional courts and to determine their impact on minimising injustices in rural communities.

With the study aim being to explore the roles of the traditional court of the KwaNgcolosi tribe in combating crime and achieving justice for its citizens, a qualitative research approach was adopted to obtain the necessary information. This approach was appropriate as the study did not compare any variables but investigated a phenomenon by obtain a clear understanding of it through an exploration of selected participants' first-hand experiences (Creswell, 2009). Information was thus obtained first-hand from people who had directly been affected by traditional court experiences (Mphatheni, 2016). The sample that was recruited represented the population of the *KwaNgcolosi* tribe and they willingly shared their experiences of and knowledge about the functioning of the *KwaNgcolosi* tribal court.

The qualitative research design focuses on people's way of understanding, interpreting, experiencing, and participating in their cultural and social worlds (Lankshear & Knobel, 2004). This means that the qualitative research approach is a valuable tool to define the way people interpret their experiences and to gather data of real-life situations (Mthembu, 2016). Researches have shown that the qualitative research approach is also useful because it allows for an interviewing environment that is favourable to the respondents and this enables them to

freely express and share their full understanding of and knowledge about the topic (Boyce & Neale, 2006). The qualitative research design was thus the most suitable choice because it provided rich and detailed descriptions of the roles of a traditional court as the *KwaNgcolosi* people experienced it (Mthembu, 2012). This research approach supported the exploratory and descriptive nature of the study and the participants were able to provide answers that related to the study objectives in a relaxed and non-coerced manner. The reason for not using a quantitative approach was that it would have restricted the participants' responses. This include the participants not being able to provide the researcher with detailed information such as customary laws applied by the *KwaNgcolosi* traditional court to prosecute the perpetrators of crime; the types of crimes this traditional court deals with; the procedures followed by it to control crime. These are some of the objectives of the study, which would have played a major role in the study achieving its aim. Therefore, using the qualitative approach ensured a level of freedom of expression and thus enabled an unrestricted exploration of the topic under investigation (Boyce & Neale, 2006).

In exploring the perceptions of the public about the roles played by traditional courts in combating crime, the researcher drew upon three related theories which are the Alternative Dispute Resolution theory; the Broken Window; and the Social Solidarity theories as discussed in chapter three above. The study being empirical in nature, it drew its information also from both primary and secondary sources of data and regarding the primary sources of data, it included in-depth interviews with sample participants representing the *kwaNgcolosi* population. As mentioned above, these participants were expressing their views and perceptions about the explored phenomena within the study. Meanwhile, secondary data were gathered via the searching engines such as Google Scholars, Ebscohot, Jstor to get access to books, articles, journals, and other important documents relevant to the study.

4.3. Profile of Ward 11 of the Maphumulo Local Municipality: Residential Area of the *KwaNgcolosi* Tribe

Hlubi (2013) argues that rural areas dominate scholarly investigations in South Africa, but to this researcher's knowledge very few, if any, studies have focused on the deep rural area known as Maphumulo in the KwaZulu-Natal province. The latter author argues that this province continuously faces various challenges of which poverty and a high level of unemployment, especially among women and the youth, are rife. Other challenges are that the population migrates in large numbers to urban areas or other provinces to seek employment or better means

of survival. One cause of these phenomena is that the province experiences limited development in rural areas (KwaZulu-Natal Provincial Growth and Development Strategy, 2011). Previous researchers have suggested that most residents in rural or peri-urban areas in KwaZulu-Natal, such as the Maphumulo Local Municipality, still live in poorly developed conditions. For example, many still live in traditional Zulu dwellings under the rule of traditional leaders such as the *amakhosi* (chiefs) and *izinduna* (indunas) (Hlubi, 2013).

This study was conducted among members of the traditional *KwaNgcolosi* tribe who live near Stanger on the North Coast of Durban, KwaZulu-Natal. This tribal area is administered by the Maphumulo Local Municipality which is one of four municipalities in the iLembe District in the province of KwaZulu-Natal. This tribal area is located 42 kilometres from the town of Stanger and is 123 km from the city of Durban. The municipality comprises eleven wards and the study was conducted in Ward 11 among the *isigodi: KwaNgcolosi* people who are served by one traditional court (Maphumulo IDP, 2016). This study area was selected because tribal court hearings still occur here, and traditional leadership dominates most activities. The Maphumulo Local Municipality administers rural tribal land that is managed on behalf of the local municipality by the Ingonyama Trust. The most prevalent economic activity is sugar cane cultivation, and some land is used to raise small herds of cattle. Subsistence agricultural activities in the form of small cropping areas belonging to traditional family units are also practised on available land (Maphumulo IDP, 2016).

The Maphumulo Local Municipality has an estimated population of 120 643 people, with 6 802 belonging to ward 11 of the municipality. The area has roughly 22 149 households. In terms of ethnicity, 99.7% of the population is Black African with 99.2% being IsiZulu speakers (Maphumulo IDP, 2016). The residents in this area generally have a low socio-economic status and the unemployment rate is 49.0% with a youth (15-34 years) unemployment rate of 58.4%. In terms to housing development, formal dwellings exist on 43.8% of the land, while 59% of the dwellings are traditional. Of these dwellings, 62.4% have electricity while 33.7% of the households rely on alternative energy sources such as paraffin and firewood. Clean running (potable) tap water is available to 78.9% of the households while 21.1% relies on alternative water sources such as water pumps and river water (Maphumulo IDP, 2016). In terms of education, the no schooling category comprises 31.3% of the population, a Matric (Grade 12) qualification comprises 21.9% of the population, while a small group (3.9%) holds a tertiary education qualification (Maphumulo IDP, 2016).

The road network and transport system in the study area is not well developed and thus residents have limited access to basic services and resources such as shops, a post office, banks, and chemists. Moreover, job opportunities are also limited which is exacerbated by the low education levels of the residents as they have limited opportunities to improve their standard of living (Maphumulo local Municipality Annual Report, 2015/2016).

The researcher was motivated to conduct the study among people of the identified community because she was aiming to explore the roles played by the traditional court of the *KwaNgcolosi* tribe in managing crime and provide access to justice for its residents. This is especially because no prior research had been done here to explore the functioning and influence of the traditional court phenomenon as it is practised in this municipal area in the current democratic era. Various researchers as of Anyawu (2005) and Sithole (2008), argued that traditional institutions such as tribal courts seem to be no longer relevant or useful in a democratic dispensation and for this reason there is a dearth of information and scholarly knowledge about this phenomenon. However, anecdotal evidence and the researcher's personal knowledge showed that traditional court hearings occurred as the predominant judicial practice in this area. Ward 11 of the Maphumulo Local Municipality that is generally populated by the *KwaNgcolosi* tribe was therefore purposely selected as the study area. Moreover, this area lacked development and was characterised by a poor infrastructure at the time of the study, and these factors made in suitable as a study area for the topic under investigation. It was well known that residents of this area had limited access to basic services, livelihood resources and the formal justice system as the Maphumulo SAPS and the Maphumulo magistrate's court are in town, some distance away from the residents' rural dwellings. The residents thus established community forums or tribal courts to protect their rights and to resolve injustices.

4.4. Sampling size and Method

Conducting a qualitative research project among an entire population is time consuming and expensive, and therefore researchers select a representative sample of the population to elicit data for research (Spring, 2007). Sampling is defined as "a process of selecting a group representative of a certain population to obtain information..." (Mphatheni, 2016). This information is then evaluated to address the research questions and objectives. Selecting a sample saves the researcher a lot of time, money and effort while producing study results that are authentic and reflective of the views and experiences of the population (Spring, 2007).

However, in most such instances the findings may not be generalised to the entire population or beyond the study area.

A nonprobability sampling method was used, and this included purposive and snowball sampling to recruit the required number of study participants. By using these sampling methods, the researcher ensured that the sample that was selected was knowledgeable of the topic and would therefore be useful to the study (Spring, 2007). The sample ultimately included 16 male and female participants. Of these participants, 15 were ordinary residents of the area while the 16th male respondent was a member of the traditional authority structure of the *KwaNgcolosi* tribe.

The participants were selected using the purposive (judgemental) sampling technique. The researcher thus used her judgement to select a sample from the population to ensure that thick and relevant data would be elicited to assist in providing the information that would address the study objectives and achieve its aim (Nueman, 2000; Kumar, 2010). The purposive sampling method also ensured that those who did not have access to tribal court proceedings were excluded, such as children under 21 years of age, visitors, and newcomers to the tribe. These latter categories of people are not allowed to attend traditional court proceedings because it is argued that such individuals "do not understand the 'ways' of the *KwaNgcolosi* tribe, its traditions and culture, and tribal court proceedings".

The study also utilised snowball sampling. In using this sampling method, the researcher first selected initial study participants purposely and these participants were then asked to refer the researcher to other individuals who would also meet the criteria for inclusion in the study (Creswell, 2009). The snowball sampling method was useful as the researcher initially did not know everyone in the tribe who had attended tribal court proceedings or who would have adequate knowledge about the topic. However, through snowball sampling, the researcher was introduced to additional individuals who were knowledgeable about traditional court proceedings and who agreed to participate in the study.

The 16 participants were all African South Africans whose mother tongue was IsiZulu. The purposive sampling method allowed the researcher to select participants from both genders (male and female) who were above 21 years of age. All the participants were residents of Ward 11 in the Maphumulo area and they had been residing in the area for more than five years. The study purposively excluded individuals who were not allowed to attend tribal court

proceedings, who were under 21 years of age, and who were visitors and newcomers to the area. Moreover, the 16 participants were purposively chosen because they were members of the *KwaNgcolosi* tribe and had attended tribal court proceedings. All of them had been born and bred in this area and had spent almost their entire lives as members of the *KwaNgcolosi* tribe in a tribal village. Only residents who had experienced such court proceedings for more than five years were selected because, as mentioned above, they possessed thick knowledge and had a good understanding of the functioning of a tribal court. Participant 14, who was a member of the *KwaNgcolosi* traditional authority, was selected because he was highly knowledgeable about the functioning of the tribal court and had experience of guiding court proceedings, passing laws, and imposing sanctions. Only this one member of the traditional authority agreed to participate in the study as, according to tribal custom, strangers are allowed to approach only one member of the authority structure who will then speak on behalf of all the traditional leaders, especially when it concerns the private matters of the tribe such as their laws and traditional court procedures.

Below is Table 4.4.1 which shows a summary of the description of the participants (sample) of the study.

Participant No.	Gender	Age	Occupation
1	Female	43	Self-employed
2	Female	33	Vendor
3	Male	53	Shopkeeper/owner
4	Male	31	Partially employed
5	Male	46	Vendor
6	Male	60	Unemployed
7	Female	63	Pensioner
8	Male	26	Unemployed
9	Female	57	Farmworker
10	Female	48	Farmworker
11	Male	62	Pensioner
12	Male	61	Pensioner
13	Female	41	Self-employed

Participant No.	Gender	Age	Occupation
14	Male	59	Taxi industry/Member of the Traditional Authority.
15	Female	66	Pensioner
16	Male	57	Housebuilder

Table 4.4.1: Description of the participants (sample) of the study.

It can be concluded that the researcher acknowledges that using such a small sample (16 respondents of an estimated population of 800 to 1 200 people) precluded the findings from being generalised to every rural area that uses tribal courts in South Africa. However, the study elicited adequate information that was also common among all the participants and therefore the findings of the study could be generalised to the whole population of the Maphumulo *KwaNgcolosi* tribe and possibly also to other tribal courts in other villages in the Maphumulo Local Municipality.

4.5. Data Collection Techniques

The data collecting instrument that was used was an interview schedule that was administered to the 16 participants during semi-structured, one-on-one in-depth interviews. This interview format allowed the participants to express themselves fully and frankly and to provide detailed information regarding their perceptions and views about the impact of tribal court proceedings (Pratt, 1995; Ngubane, 2016). Unstructured or open-ended questions were used to allow the participants to provide free-form answers, and this allowed the researcher to collect data that would achieve the aim of the study and meet its objectives. Each participant was thus free to provide a complete picture of their insights into tribal court proceedings and the role played by traditional courts in combating crime. The participants were able to do this without any fear of contradiction as the interviews were one-on-one between the participant and the researcher. Using the IsiZulu language in the interviews also made it easier for the participants to express themselves richly and idiomatically when they shared their opinions, experiences and thoughts about the functioning of a traditional court. As some participants were illiterate, the researcher used an interview schedule and a letter of informed consent that were both written in IsiZulu. IsiZulu was the only language that was used to explain everything about the study and to conduct the interviews.

Each interview lasted between 20 to 40 minutes and was conducted in a safe, secluded space where no interruptions occurred. Of the 16 interviews, 12 were conducted at the participants' own homes while 4 were conducted away from the participants' homes. Mphatheni (2012) argues that interviewing participants privately in their own familiar spaces allows them to express themselves openly and enables them to feel comfortable and free from any threat or harm. Each participant was asked for their consent to be interviewed and the purpose of the study and the interviewing procedures were explained to each in IsiZulu. A letter of informed consent was then given to each participant which was also explained repeatedly in isiZulu to ensure that the participants fully understood the process before signing the letter. The interviews were conducted using open-ended interview questions that had been prepared and included in the interview schedule. The researcher used a pen and notepad for taking down notes and an audio recorder was used during one interview with the permission of the participant. As information was collected and recorded in IsiZulu, two assistants who are proficient in IsiZulu and English were used to translate the information. These translators endeavoured not to distort the information during the translation process and the quotations that are presented in this dissertation thus reflect, as far as possible, the verbatim comments of the participants.

Data were also collected from secondary sources such as articles, dissertations, journals, newspapers, and other informative sources that contained information about the topic. Sources such as the South African Constitution, legislations and policy frameworks were also consulted to support the arguments and ensure the progression of the discourse.

4.6. Data analysis

All the information collected for the study either from primary or secondary sources were analysed using the thematic analysis method. Braun and Clarke (2006) argue that, in a qualitative study, thematic analysis is an important and useful method. Using this analysis method, emerging data are categorised and then analysed under themes (King, 2003, cited in Mkhize, 2012). This analysis technique enables a researcher to analyse the data, identify themes, and report on the findings that may range widely on a single topic (Braun & Clark, 2006, cited in Mbatha, 2017). In this study, for example, the question was asked why the residents chose to report a crime to the traditional court rather than to the police. Through the recording of responses given by the participants, the researcher familiarised herself with the

data collected and realise that this question elicited relatively similar answers. The theme 'reporting crimes to the traditional court rather than to the police' then emerged based on the similarity of the answers. This means corresponding patterns were revealed. The researcher thus evaluated all the responses and those that fitted together and presented a pattern, were classified under a specific theme. Furthermore, the patterns that corresponded were listed under sub-themes, while the themes that emerged from the responses were collated to form a uniform picture of the role and impact of a traditional court in a rural area, according to the views of members of the KwaNgcolosi tribe. The final step that was taken by the researcher was that she linked similar or opposing themes to the study findings and this was done repeatedly for all data collected to produce a quality of work (Ngubane, 2017).

4.7. Ethical considerations

Consideration of ethical issues is essential before any study involving humans or animals is conducted, and a study conducted without following ethical processes or adhering to ethical principles may not be accepted, submitted, or published (Mphatheni, 2016). Ethical behaviour (or ethics) refers to a way of acting in accordance to rightfully given principles or a set of codes, especially those belonging to a certain group or profession (Kumar, 2011, cited in Ngubane, 2016). This means that the guidelines that determine what is the right or wrong way of doing something need to be followed rigorously. Furthermore, Mkhize (2012) elaborates that ethics involves respecting oneself and others, conforming to social justice, and complying with norms and human rights. The researcher must always act carefully and responsibly to avoid hurting or exploiting others (Mlamla, 2016). Ethics can be consolidated as a code of conduct that regulates the positive manner in which a certain individual or group should act or conduct themselves.

Bless et al. (2006) stipulate that ethics in the field of research places importance on treating research participants in a manner that is sensitive and humane, especially if they are being exposed to various degrees of risk by the nature of the study. As interviews with participants are regarded as an invasion of privacy, researchers need to maintain high standards of ethical conduct throughout the study (Cohen et al., 2007, cited in Ngubane, 2016). Conforming to ethical principles in research is essential because it assists the researcher to be aware of his or her responsibilities and to avoid any abuse or violation of rights (Bless et al., 2006, cited in Mphatheni, 2016). This means that ethical considerations are aimed at protecting participants from any abuse or harm that might result from their participation in a study and, therefore, the

researcher must rigorously consider every ethical issue during the research process to protect the wellbeing of participants.

To gain ethical clearance to interview the participants and conduct this study, there were some ethical principles the researcher had to follow. As the location of this study was Ward 11 in the Maphumulo Local Municipality and involved the *KwaNgcolos*i tribal community, the researcher sent a letter to the municipal authority requesting a gatekeeper's approval (Appendix D). The letter of approval from the Maphumulo Local Municipality was received in July 2018 (Appendix G). Moreover, Since the research involves the traditional authorities within KwaZulu-Natal Province, the researcher sent a letter and requested an approval also from the KZN Department of Cooperative Governance and Traditional Affairs (Appendix C). However, the department responded and stated that they do not have such authority and advised the researcher to ask for the permission to conduct research directly from the Maphumulo *KwaNgcolosi* tribal authorities (Appendix F). The researcher then sent a letter of request to the *KwaNgcolosi* Induna (the Induna of a tribe generally ranks second to the Chief) and in February 2019 a gatekeeper's letter was also obtained from the *KwaNgcolosi* Tribal Authority to conduct the research in this area and to involve members of the *KwaNgcolosi* tribe as participants (Appendix H). The researcher also applied for ethical clearance from the University of KwaZulu-Natal and permission was granted in September 2019 (reference number: HSS/1604/018M − Appendix I). Consent was also requested (Appendix A) and received in writing from each participant. Participation was purely voluntarily, and any participant could withdraw at any time should he or she wish to do so.

4.7.1. Procedure followed to access the research field and participants

When any educational research project is planned, gaining access to the study area is an important first step (Mkhize et al., 2012; Simons & Usher, 2000). One correct procedure is to seek permission to conduct the research from respective gatekeepers. Gatekeepers can be defined as formal or informal authorities who oversee access to a research site (Neuman, 2000).

Initially, the researcher encountered some difficulties in obtaining permission from the Maphumulo *KwaNgcolosi* tribal authority as she was unknown to the *Induna*. In his words, it was "...difficult for me to trust a stranger coming from the city to question the ways of my tribe". However, as the researcher had relatives living in the area, an elderly male relative accompanied her to the home of the Induna to fully explain the purpose and nature of the

research. The Induna then reviewed the letter of application for gatekeeper's permission and approved the application after a period of time.

To recruit the participants, the researcher was again accompanied by an elder (a male relative) living in the area who proposed the names of a few participants. As most of these potential participants were of the older generation, the presence of a male relative was important as, in most rural areas, it is considered disrespectful for a youngster (especially a female) to approach elders on her own. As the researcher explained that she was willing to also approach and include a person with tribal authority as a participant, most of the people she approached were not unwilling to participate. To avoid bias, the researcher's relative was excluded from the study. This was also important because he had been in contact with potential participants and could have influenced them unwittingly.

4.7.2. Informed consent

The National Commission for the Protection of Human Subjects (1979, as cited in Kumar, 2011) states that informed consent is governed by three criteria. First, it is potential participants' prerogative to give their consent and they should thus meet the inclusion criteria and not be coerced in any way. Secondly, before people consent to participate, they should be given adequate information about the study to make a reasoned and informed decision. Lastly, the consent given must be voluntary and not forced.

In this research project, all the above requirements were adhered to. A letter containing details of the study was handed to each participant and they were explained to them repeatedly in IsiZulu. The researcher ensured that each participant understood what the research was about, what the purpose was, what would be expected of the participants, and what they should expect during the interview process. It was explained that participation was voluntary, and they had the right to decline to participate and to withdraw at any time. The researcher informed the participants that she would use a note pad and a voice recording device. The latter was allowed in one instance.

The participants were also assured of the confidentiality and anonymity of their participation. The researcher further assured them that all information would be regarded as highly confidential and that only the participant, the supervisor, the co-supervisor, and the researcher would know who provided what information. To protect their identity, pseudonyms are used in this study report and will be used in all other publications that may flow from this study. The

participants are referred to as Participant 1, Participant 4, etc. The participants were assured that any information they provided would only be used for research purposes. All the recorded and transcribed information was stored in a secure place where only the researcher and the research supervisor had access. These raw data will be destroyed after five years.

4.8. Limitations and challenges of the study faced by the researcher

The study had some limitations and challenges; however, they were all constantly monitored to maintain the validity and reliability of the study and to ensure that both are not compromised.

The researcher experienced lots of difficulties in obtaining ethical clearance. That is because she had to get a gatekeeper's letter from the Maphumulo Local Municipality to conduct the research in Ward eleven of their municipality, as well as another approval from the KwaZulu-Natal Department of Cooperative Governance and Traditional Affairs (Dept. of COGTA) as the researcher also wished to approach traditional leaders of the tribe as participants. The researcher sent emails to both the Maphumulo Local Municipality and the Dept. of COGTA, she quickly got a responsorial letter approving her request from the municipality. However, with the KZN Department of COGTA, the researcher sent numerous emails to the Departments Head office in Pietermaritzburg (PMB) which were not responded to, she further tried calling the department, posted a formal letter requesting permission and still did not get a response. She then decided to travel to their Head Office in PMB to request for an approval letter personally. A few weeks later, the department emailed the researcher a letter of regret. Permission was not granted based on the traditional courts being an independent organisation from the department and therefore the researcher was advised to contact the Maphumulo-*kwaNgcolosi* tribal Authority to request for such approval to conduct the research. This wasted lots of time and money for the researcher and caused a huge delay to the study as she had to start all over again to request and wait for such a permission from the Maphumulo Tribal Authorities. However, getting such authority from the Maphumulo *KwaNgcolosi* tribal court did not have many delays.

The researcher further experienced difficulties in obtaining ethical clearance from the university, and that is because the University ethics department was taking a lot of time, even up to weeks before responding to the researcher's application emails. She had to travel to their Head Office at the UKZN Westville Campus to hand deliver all required documents and corrections requested by the Ethical department before the application for ethical clearance was finally processed. The researcher was then granted with a full ethical clearance approval from

the UKZN ethical committee with protocol reference number HSS/1604/018M to visit the field, collect data and continue conducting the research.

In terms of data collection under primary sources, the researcher was willing to do a research observation, and that was to attend an actual tribal court proceeding of the Maphumulo tribal court. That is because the researcher was willing to observe, record; and take down notes as the tribal court case is in proceedings to get more information and have a true experience of these courts in action. However, The Maphumulo tribe authorities proposed that "strangers" or people outside their tribe are not allowed to sit and observe or be part of the court proceedings of their tribe, rather they suggested that during interviews the researcher will get any inside information from members of the tribe who are participants and who attend these courts. This means the researcher had to rely only on the information provided by that leader and the resident participants about the functioning of the Maphumulo tribal court. This was worrying to the researcher as participants can be biased or hide some useful information from the researcher, and that may alter the accuracy of the study findings. Furtherly, the researcher was willing to include 2 or more traditional authorities of the Maphumulo *KwaNgcolosi* tribe, however, she managed to get only one member who stipulated that only one leader is allowed to speak to 'strangers' on the behalf of all the traditional authorities of the tribe. That was furtherly worrying to the researcher as it meant she had to rely on the information of one person which can be biased or modified. Another difficult limitation was finding statistical information on number of cases previously reported or dealt with by the Maphumulo tribal court and their outcomes and that is due to court proceedings within that court being not recorded.

A further limitation was faced by the researcher when all participants refused to be voice recorded, they all provided a reason for not knowing what will happen to their voice recorded information. Fearing that their voices will be recognised and the information they provided might be used against them. Most of them even went as far as saying they will pull out of the study interview if they find they are secretly recorded. Therefore, due to ethical issues, the researcher had to respect the requests of the participants and record the information they were providing only through writing on a notepad. That created difficulties as the researcher had to try to write on a faster pace to have all the information recorded and that resulted also in the interviews taking a longer period as the respondents had to repeat some of the information for the researcher to be able to record them. A further limitation faced by the researcher was funding, the researcher had no source of funding for the research and therefore had to personally manage all the cost of the research such as travelling for two days to the area of

Maphumulo *kwaNgcolosi* tribe, which is approximately more than is one hundred and twenty-three point six kilometres from Durban to meet with her participants. The researcher also had to get research instruments such as writing pads, sound recording devices as well as paying two isiZulu-English translators, language and grammar editor which were all covered out of the researcher's costs. Lastly, the study being conducted in a rural area, having residential homes scatted throughout the area; and having no transport. The researcher had to travel on foot from the transport rank and throughout all homes of participants, this took a lot of time and was exhausting for both the researcher and the research assistant. With the area having a very low population, the researcher struggled to get participants as planned in the researcher proposal. She had to get more individuals from the older generation and less from the younger generation, due to the youngsters being not available or present at their homes during the time of data collection.

4.9. Conclusion

This chapter offered a comprehensive description of how the study acquired its information from 16 participants. It covered information such as who the participants represented, how they were recruited, and the exact description of the methods that were used to acquire the data that were used in the study. This chapter also elucidated the nature of the study and the research methodology and offered justification for employing the qualitative methodological approach. A description of the study area and a profile of the Maphumulo *KwaNgcolosi* tribe were provided. The chapter also referred to the need for adherence to ethical considerations such as acquiring gatekeepers' letters that allowed the researcher to conduct the study among members of the *KwaNgcolosi* tribe in the Maphumulo area in KwaZulu-Natal. The ethical considerations that were adhered to for acquiring the informed consent of the participants were also discussed. By adhering to ethical guidelines for qualitative research, aspects such as the reliability and validity of the findings were partly addressed.

CHAPTER FIVE: DATA PRESENTATION AND ANALYSIS

5.1. Introduction

The purpose of this chapter is to present, discuss and analyse the findings. The study was conducted to explore and understand the role played by a traditional court in combating crime. In a rural area. The study sample was purposely drawn from the *KwaNgcolosi* tribe residing in a deep rural part of an area known as the Maphumulo Local Municipality. The data that were collected from 16 participants through unstructured interviews are presented, discussed and analysed. The real names of the participants are obscured by using pseudonyms in a numerical code format. The data were analysed using thematic analysis. This entailed the translation of the data into English and multiple, thorough readings of the transcripts to identify similar code words. These were then organised according to themes and sub-themes as they related to the collective insights and experiences of the participants. These themes and sub-themes are discussed under appropriate headings in this chapter.

5.2. Customary Laws Imposed by Traditional Courts to Prosecute Perpetrators of crime.

Reitenbach (2008) elucidates that the current legal system in South African is a mixture of English common law, Roman-Dutch law, and indigenous laws that are formally referred to as customary law. He further elaborates that indigenous African laws have always been regarded as inferior in South Africa despite being the oldest and most original laws that existed in the Southern African region before colonisation. However, with the advent of democracy various changes have been made to South African laws post-1994 as indigenous laws have been systematically codified and placed on a par with other laws and legislations. These changes have been compelled by the Constitution of the Republic of South Africa Act No. 108 of 1996 (South Africa, 1996) that entrenches human rights for all and thus necessitates the acknowledgement of customary law. Ntlama and Ndima (2009) argued that traditional leaders are the administrators of justice in most rural communities and that their authority is based on indigenous or customary laws. These traditional institutions are a form of governance that rural residents rely on for serving justice, allocating land rights, and formalising traditional and customary practices. The latter argument was confirmed by the participants of the current study:

Participant 6: *We don't know much about the laws of the constitution, but we know that some of those laws are the reason why this country is upside down. Too much freedom and rights are given to hooligans…*

Participant 13: *Most government laws are against what God tells us to do and some lack humanity... We rather use our African laws that were used even by our very own forefathers…*

The above and similar comments by other members of the *KwaNgcolosi* tribe mean that the tribal court applies indigenous rather than customary laws when acts of crime in their area are investigated and dealt with. Robison (1995) argues that there are extensive differences and gaps between customary laws and indigenous laws. In distinguishing indigenous laws from customary laws, Ntlama and Ndima (2009) state that the foundation of original indigenous laws is the principle of Ubuntu (humanity) which is underpinned by the concept that laws are entrenched in lived experiences. Tshehla (2005) also defines law as lived experience, and elaborates that customary law is used in traditional communities, especially during traditional justice conferences. The laws that are upheld by traditional courts fall into two categories, namely 'living customary law' and 'official customary law'. The latter author defines official customary law as legal practices that are derived from the culture and traditions of indigenous people and that have been accepted as law. Such laws have been made part of written law and are reflected in current case laws and statutes. He defines living customary law as indigenous laws that guide legal practices relating to the lived experiences of people. These laws are also derived from culture and traditions but are not rigid; in fact, they are changed constantly to adapt to the daily lives and conditions of a community. These laws are not 'cast in concrete' as written laws but are adhered to according to circumstances by most African communities (Tshehla, 2005). The current study detected adherence to such laws among the *KwaNgcolosi* tribe as the participants stated that, while cultural and traditional laws applied to their community, each case was treated differently based on merit. Moreover, sometimes an indigenous law was altered to deal with a situation according to merit, and therefore their laws were not rigid.

Reitenbach (2008) also distinguishes indigenous law from customary law and stipulates that indigenous law is effective, simple, oral, and fluent in nature. It is argued that the manipulation of such laws into a rigid, written legal framework violates their originality, freezes African living culture, and hinders social and legal developments. The study findings thus corroborated Ubink's (2011) argument that what is known as customary law is also a corruption of

indigenous law by the colonisers who wished to dominate over Black power and manipulate the originality of their laws. This occurred as the colonisers hoped to achieve a better understanding of African people and therefore to devise appropriate laws that would better control them. The following comment corroborates the above arguments:

Participant 3: stated …*I don't know much about the constitution, but our law is not there. The whites changed our original laws to suit them and then called it our African law, well it is not…*

In some sense the statement suggests that the tribal court of the *KwaNgcolosi* tribe does not recognise codified customary law but adheres to what is regarded as their original indigenous laws. Ndlela, Green and Reddy (2010) also state that traditional communities apply protocols and norms that are derived from their culture and traditions that specify every member's place and role within their society. Thus, the roles of men, women, children, and youths are clearly defined by traditional laws. These roles are underscored by the social solidarity theory as it proposes that the strong social bonds among members of a community strengthen social solidarity. Such bonds are forged by a common tradition as well as strong cultural norms and values.

In light of the above, the study met the first objective that aimed to explore the laws used by traditional courts to prosecute the perpetrators of crime. The findings revealed that the Maphumulo tribal court applied laws that were derived from the traditional norms and values entrenched in a common culture, traditions, and religion. According to the social solidarity theory, such laws forge strong social bonds and enable a community to work together and manage issues that threaten their safety and wellbeing as a community.

Moreover, the tendency of the *KwaNgcolosi* tribe to adhere to indigenous customs and African legal practices when combating crime is supported by the alternative dispute resolution theory (ADRT) which stipulates that, instead of using formal courts to achieve justice and seek remedies, some communities follow an alternative traditional justice system to resolve legal issues (Ubink & Van Rooi, 2011). The latter authors further argue that the traditional justice system is an ADRT mechanism that is used to manage crime through involving a third party whose role is to mediate and help the conflicting parties solve their dispute by coming up with a consensual solution that will settle their dispute through the application of certain laws and by following certain procedures (Ubink & Van Rooi, 2011).

Tshehla (2005) also argues that the formal justice system favours residents of urban areas because the system adheres to technical procedures that are very complex and consume lots of time, money, and resources. This cumbersome system deprives poor, illiterate, and needy individuals from access to justice as they cannot afford or even understand it. According to Ntlama and Ndima (2009:17), "people who live in traditional communities subscribe to the principles of customary law and embrace a traditional court system that applies a form of law that they understand." They conclude that these courts are highly effective as they derive their true legitimacy from South African culture and traditions and serve those who may otherwise be deprived of justice.

5.3. Procedures Followed by Traditional Courts to Control Crime

The South African Law Commission (1999) stipulates that, according to the Black Administration Act (Act No. 38 of 1927), the Traditional Court Bill (B1-2017) as well as other relevant statutes of traditional institutions stipulate that, to resolve any dispute, traditional courts are obliged to follow customary law procedures. These statues require that customary law procedures should be flexible, informal, and inquisitorial and that they should use indigenous languages that are spoken and understood in the area where the case is heard (Oladipo, 2000). In terms of the relevancy of traditional courts and their customary procedures, Sithole (2008) argues that different people have different legal needs that need to be addressed appropriately, but Western legal procedures do not fulfil these needs. He therefore views the institution of traditional leaders and traditional courts as bridging the gap between the state and the vast majority of marginalised people who require access to legal services but whose needs are not met by Western legal provisions. Such argument of Sithole (2008) can be supported by some of the responses provided by the participants.

Participant 12 said:

...lemkhuba yokumangalelana ezinkantolo akukona okwethu. Kepha imkhuba yabezizwe esafunzwa yona ngenkani sitshelwa nokuthi masilahle okwethu kwasendulo ngoba kungubuqaba futhi akuhambelani neskhathi kanye nomthetho wezwe, kwamthetho loyo esawufunzwa uhulumeni wabamhlophe… Thina asibona abamhlophe, singabansundu, ngakho ke imithetho nomgududu yabo ayikulungisi okwethu okunaloko iyabhidliza, yingakho sizikhethela ukuhlala nokwethu esikwaziyo nokusebenzayo kwase Ndulo

(*..The practice of filing a complaint in the courts is not our way and is a foreign ways that is forced upon us. We were told to abandon our indigenous ways because they are viewed as barbaric and outdated and contradicts the laws of the country. Those are the same laws that were enforced on us by the white government. We are not whites but Africans, therefore their laws and procedures do not fix what's ours, but they destroy and that is why we have chosen to stick to what is ours, what we know and what works for us, which are indigenous measures from our past).*

5.3.1. Procedures followed by the *KwaNgcolosi* tribal court

To address objective 3 which is to explore procedures followed by a traditional court to control crime, the participants were asked what procedures were followed by the *KwaNgcolosi* traditional court that they were familiar with.

Through the analysation of the findings, it revealed that some offences or legal issues that occurred in the Maphumulo rural areas were usually reported to and dealt with by the tribal court of each tribe or village within this municipality. According to the participants, offences or issues that were reported to the tribal court ranged from civil matters to criminal acts and all matters are dealt with by following customary law procedures. They further elaborated that all cases reported to the *KwaNgcolosi* traditional court, whether civil or criminal, were dealt with jointly by a range of individuals who attended to these cases. These individuals were various members of the tribe, the families of the conflicting parties, the conflicting parties themselves, and the victim/s and the accused. The participants revealed that these cases were headed by authoritative traditional leaders of the *KwaNgcolosi* tribe, namely the Chief, the *Induna* or the *isgungu senduna* (the Induna's committee that consists of about 5-8 members), and elderly men of the tribe who have seniority. It is noteworthy that women, apart from being a victim or accused and their families, have little authority in these courts. This marginalisation of women in hearing cases is derived from traditional African culture.

Question 5 of the interview schedule asked the participants about the procedures that needed to follow to bring a case to the *KwaNgcolosi* traditional court. All the participants agreed that protocol needed to be followed before their case reached and would be heard by the traditional court. Based on the findings, this protocol is briefly summarised as follows:

- When someone is willing to report a case to the tribal court, the person first approaches one of the members of the *isgungu senduna* (the Induna's committee) which is a committee consisting of 5 to 8 male members chosen by the Induna and the Chief.
- This member will consider the case and notify two other members of the Induna's committee, including the Induna. (An Induna is the most senior member of this committee who is generally revered for his insight and wisdom.)
- Together these men will consider the case and decide if it is justified to present it to the tribal court.
- If the court decides to preside over the case, the Induna will instruct his members to summon those affected by the case to come on a certain date to the *inkundla yamacala* (tribal court) at the home of the Induna or in the community hall for the case to be discussed.
- Individuals who are obliged to be present are the victim (or plaintiff) and the accused (or defendant) as well as their families and witnesses (if any). Other members of the tribe as well as friends of the two parties and their neighbours may attend, but they are not obliged to do so.
- The proceedings are of an inquisitorial nature and thus the affected parties bring their matter before all the participants who preside over the court. They relate the facts of the matter and bring supporting evidence and witnesses, if any.
- The IsiZulu language is the indigenous language of the area and is spoken and understood by all residents of the tribe and therefore it is the only language used throughout the tribal court proceedings.

How each case is conducted depends on the matter at hand − thus every case is treated on merit. This practice is supported by the alternative dispute resolution theory that stipulates that the arbitration system proposed by the ADRT involves a third party that heads the court and hears evidence presented by the conflicting parties. It involves following informal procedures during which each party has the right to present any evidence they deem relevant (Stone, 2004).

The fact that the *KwaNgcolosi* tribe members come together to combat issues in their community is also supported by the social sodality theory as it argues that, through the formulation of strong bonds and social ties locally, society's ability to maintain social control increases because residents are able to identify strangers who may cause trouble and they are highly likely to play a role in preventing acts or behaviour that may encourage crime and

victimisation in their area (Sampson & Groves, 1989). It may thus be argued that, in communities such as the *KwaNgcolosi* tribe, the strong social bonds they forge make it easier to maintain social control. This is because residents apply crime managing procedures that they all share and understand as these procedures are underpinned by principles that are derived from their culture and traditions.

5.4. Issues that are reported to and dealt with by Traditional Courts

One of the objectives of the study was to discover the nature of the cases or issues that were reported to and dealt with by the traditional court of the *KwaNgcolosi* tribe. The 16 participants agreed that some issues were more prevalent than others. Those that were predominantly addressed included both civil and criminal cases such as livestock and crop theft, assault, quarrels and disputes over land, and domestic violence. Thirteen participants added that matters such as infidelity, family neglect, and not paying child damages or child maintenance were issues that were occasionally reported to the traditional court.

5.4.1 The traditional court and civil matters

5.4.1.1. Land disputes

Rautenbach (2014) argues that, in traditional communities, traditional courts play a significant role in resolving any form of dispute amongst its residents because the system of traditional leadership is popular and respected, especially rural areas. He further elaborates that these courts are viewed by residents as reliable, speedy, easily accessible, and affordable as they cost less than the Western legal system. According to the Maphumulo Integrated Development Review (IDP) (2009), the *KwaNgcolosi* tribe resides in Ward 11 of the Maphumulo Local Municipality which is predominantly comprised of parcels of rural land that belong to various tribes. These tribal areas are managed on behalf of the Maphumulo Local Municipality by the Ingonyama Trust Act of 1996. When the participants were questioned about the types of cases heard by the tribal court in their area, the issue of land ownership was one.

Participant 11: *In this area, most of the land belongs to the Chief ... whoever is willing to get a piece of land needs to contact Mr … (the Chief's herdsman) or other members of the traditional authority…*

Participant 7: *We once had a matter between two brothers fighting over their late father's piece of land. The extended family intervened by reporting the matter to our court (tribal court) and*

that land dispute was dealt with. It is better this way as, in the past, people were even killed just to acquire that piece of land.

According to the findings, conflict over land in the *KwaNgcolosi* tribe usually erupted among family members or neighbours. It was revealed that despite the fact that most pieces of land were owned by traditional authorities, some pieces of land were owned by individuals as they had inherited or bought land from the Chief. Most participants revealed that family members or relatives fought over land belonging to late relatives. As most tribal people in rural areas do not draw up a handwritten will but usually notify their families verbally about the distribution of their belongings after their death, it was not surprising to find that, in some cases, surviving family members challenged the legacy and claimed whatever piece of land they desired. The participants agreed that disputes over land occurred mostly amongst siblings, half siblings, children, and stepparents who would dispute ownership of land that had belonged to a late biological parent. Surviving spouses of a late husband as well as son/s and uncle/s would often get into conflict over land belonging to a late biological father, brother, or uncle. Moreover, neighbours would also dispute land ownership if the land of a deceased person was close to theirs. It was thus common for the tribal court of the *KwaNgcolosi* people to hear such cases and resolve the disputes.

In summary of the 16 participants' narratives, the following procedures and practices seem to be the most common:

- Once a case has been brought before the traditional court, the conflicting parties, their relatives, neighbours, or any witnesses are summoned to the tribal court to tell their story to all the participants of the court.
- Members of the tribal authority and relevant members of the tribe usually hear all the evidence from both sides and, after discussion, agree on a rightful decision.
- The final decision usually does not include compensation for any of the two parties if it was only quarrel, but one party will be compensated if the quarrel resulted in harmful actions such as assault, vandalism of property, or in cases of *crimineria injuria* (injuring the dignity of another).
- The complainant is compensated based on the nature of the injury or abuse they experienced, ranging from a fine of R100 to one chicken or one cow, depending on the merit of the case.

- However, if the quarrel is about land ownership, the tribal decides which party should acquire the whole piece of land or, in some instances, the parties are allowed to share the land. In rare instances the land reverts back to the chief.

Earlier studies such as of Oomen (2005) and Mbatha (2017) have also indicated that land disputes are the most common civil cases heard by traditional courts in rural areas. However, as most rural residents have no money to take such cases to the civil courts (Mbatha, 2017), it is logical to conclude that the majority of land dispute cases in rural areas, as was the case in the current study, are heard and resolved by traditional courts rather than by statutory courts.

Mbatha (2017) argues that land dispute resolution is necessary to restore peace in rural communities and to end endless feuds among family members and neighbours. One can argue that land disputes in rural tribal areas rarely occur between individuals who are strangers, but that it is relations and neighbours who quarrel over land. The findings under this sub-theme are supported by the broken window theory as some participants narrated how, in the past, unreported cases of conflict over land had led to bloodshed or injuries for the sake of procuring land. However, the participants stated that such incidents no longer happened as their traditional court dealt decisively with land disputes and thus 'left no window unbroken'. Therefore, as the tribal court in the study area seemed to take care of small problems at an early stage, it resolved big problems even before they could erupt.

5.4.1.2. Paying child damages and child maintenance.

Rautenbach and Mathee (2010) state that paying child damages occurs in the African culture when a male impregnates a female, and she becomes pregnant before marriage. The biological father is then required by traditional law to pay damages to the woman's family as it is taboo for an unmarried female to fall pregnant. This payment known as 'child damages' differs among African tribes and communities but, generally, payment is made by a male or his family to a woman's family for several reasons, such as a sign of acknowledging the act of impregnating the woman or agreeing that he fathered the unborn child (Rautenbach & Mathee, 2010). This payment has different outcomes, such as allowing the man to claim parental rights and, in some cases, to compel the mother to give the unborn child his surname.

In addressing the third objective of the study, which was to explore cases or issues dealt with by traditional courts, the researcher found that the issue of paying child damages and child maintenance were some of the civil cases dealt with by the traditional court of the *KwaNgcolosi*

tribe. According to the participants, in some cases a male who impregnated a woman before marriage refused to pay damages, and then family members of the woman, especially her parents, referred the case to the tribal court in the hope that the court would pass a ruling that would force him to make the payment. In the case of the *KwaNgcolosi* tribe, damage payment ranged from one goat to two cows and a goat.

Participant 2: *My boyfriend denied [his role] and refused to pay damages after I fell pregnant with my son. He stated that I was no longer a virgin and the man who took my virginity was the father. He continued to deny my baby [as his] even after his family stated that my son resembled most of their male family members, especial his late grandfather. His family and I then went to report him to our court. With his family on my side, I won the case and my baby's father was forced to pay damages − two goats plus child-maintenance − every month.*

Participant 8*: I used to drink away all the money I got from doing small jobs and could not support my child. Umawakhe [the baby's mother] reported me to the inkundla which told me to pay maintenance every month, or every wage I earned would be given to the mother and I would get a share from her.*

The findings thus revealed that the *KwaNgcolosi* tribal court dealt with cases of child neglect by the father and the issue of paying maintenance. However, jurisdiction to handle such cases is not stipulated in the traditional court Bill. Instead, Schedule 2 Section 4 (2) (iv) of the Bill states that traditional courts should not preside over such cases but should rather offer advice regarding certain cases, including cases of custody and guardianship of minor or dependent children. This means that the *KwaNgcolosi* tribal court does not have jurisdiction to preside over such cases, but its members may help by offering advice regarding cases concerning the positive upbringing and wellbeing of children in the area. Moreover, legally the wellbeing, upbringing, and protection of children in South Africa are protected by the Children's Act No. 38 of 2005 (South Africa, 2005). It can be argued that any form of abuse or neglect of a child is a violation of this Act, and such cases need to be referred to and dealt with only by the Children's court. This is a court in South Africa that deals with cases involving children and it is mandated to always operate in the best interests of the child. When the researcher notified the participants of the existence of a children's court, the Children's Act No. 38 of 2005 and the non-jurisdiction of traditional courts over children's cases, most of the participants argued that the *KwaNgcolosi* tribal court operated just like the children's court as it protected *everyone's* right to care and safety, including that of children. Some participants elaborated

that the services of their court were a lot cheaper and that the situation of the child, the parents and the family were monitored even after the court case.

The findings regarding payment of child damages and child maintenance are supported by the ADRT, which stipulates that if there is a dispute about a child or fatherhood, the conflicting parties need to come together and negotiate a solution with the assistance of a third party, which in this case is the traditional court. The negotiation mechanism theory further stipulates that the third-party acts as a mediator but has no authority to enforce a resolution on the disputing parties; rather, its purpose is to act as a facilitator and to assist the parties to resolve the dispute and to reach mutually agreed settlement terms for the dispute (Ayes & Nalebuff, 1997). A conclusion that can be drawn from this subtheme is that, if a traditional court should adopt the role of presiding over cases involving children, its needs to be monitored regularly by the government to ensure that it operates in the best interests of the child and that no child's rights are violated.

5.4.1.3. Social disputes, conflict, and quarrels.

Rautenbach (2014) investigated traditional courts as an alternative dispute mechanism in South Africa and, based on the findings, argues for the right of traditional communities to resolve disputes amongst their residents using a justice system that is preferred by members of that community. He further elaborates that such a right can be exercised by every citizen, especially those who reside in peri-urban and rural areas where there are numerous unofficial courts that serve the community and achieve justice for all residents. In the current study, all 16 participants agreed that disputes, especially among family members and residents in their area, were usually not investigated by the SAPS. The police would simply advise the conflicting parties to resolve their differences on their own by involving a third person such as a community member, an induna, or a chief to prevent the quarrel from getting out of hand. A very famous story about such an incident was narrated by most of the participants and involved a lost cell phone and the individual who found it. This story was told to explain why quarrels were referred to the tribal court and not the police:

Participant 5: *A few years ago, a drunk male individual lost his cell phone in a tavern in the area. Another male who arrived later to have a drink found the cell phone and kept it. A few days later these two males met, and the previous owner of the cell phone noticed that his cell phone was used by the new 'owner'. He ordered the new owner to give the cell phone back to*

him as he had unfortunately lost it when he was drunk. The new owner refused, claiming that it was his luck and therefore he would not return the phone. They started to quarrel over the phone until a third party noticed that the quarrel might become violent. He suggested that they all three should take a very long drive to the Maphumulo SAPS to report the matter and have it resolved by the police. However, the police stated that since the cell phone was not stolen, there was no criminal case, but proposed that they should take the matter to the small claims court or try to resolve the ownership and reach a fair agreement. On their way home, after being dropped off by the third party, the previous and the new cell phone owner continued to quarrel and started to fight, which ended when the first owner stabbed the new owner. Thus, one party was badly wounded due to an assaulted, while the other party was badly bruised. Luckily, nobody died.

According to the respondents, since that day most quarrels had been referred to and resolved by the traditional court, and very few had been referred to the police or formal officials. They argued that, when such cases were reported to the police, it was the police officials themselves who suggested that the conflicting parties should take the matter to their traditional authorities to have it resolved before it got out of hand. A few participants proposed that even if the police advised the conflicting parties to take their quarrel to a formal court (the small claims court for instance), very few residents of the area, if any, followed that route. They stated that most residents had lost trust in the police due to their disappointment resulting from the lost/stolen cell phone quarrel. One may argue that another reason why the rural residents preferred the traditional court was the distance they had to travel before they could even report a case. Moreover, the participants admitted that they had limited knowledge of formal court procedures and that paying expensive legal fees was beyond their means.

The narrative of the 'stolen' cell phone and the subsequent assault took an interesting turn because, what had started as a simple quarrel, ended up in a crime of assault with the intent to do grievous bodily harm or attempted murder. This occurred because the issue was not properly handled or resolved at an early stage. What happened during this incident is supported by the broken window theory which proposes that, if small problems are left untreated, they will escalate and become bigger problems. Thus, the ability of tribal courts to solve minor problems such as quarrels will prevent them from escalating into criminal acts that may cause injury or even death. Moreover, the alternative dispute resolution theory stipulates that many mechanisms can be used to resolve social disputes outside the formal courts. Boege (2004) states that, in areas where formal institutions that control violence, regulate disputes and

address conflict among the people are absent, such communities turn to other customary means of addressing their issues such the traditional justice system, which is widely available to communities in rural areas.

5.4.2. Traditional courts and criminal matters.

5.4.2.1. Theft of Livestock and property.

Previous researches have shown that theft of livestock is one of the most challenging crimes faced by communities and farmers in rural areas (Greenberg, 2007). The latter author argues that this is because most rural farmers keep livestock as a source of income, but few have barns or secure cowsheds for their livestock. This means that there is plenty of opportunities for lurking criminals to steal domesticated animals (Greenberg, 2007).

Participant 15: *It also happened to me and it left me with nothing. The six cattle that I inherited from my late husband were stolen from their cowshed at night. They started by stealing three...a few months later they came back for two and a week later they came back to steal the last one.*

Four participants argued that their livestock was more than just domestic animals, or a symbol of wealth as perceived by the African culture. In fact, they saw livestock as a source of income. One participant stated that, due to traditional rituals and ceremonies in rural areas, one of the most lucrative businesses was farming and, more specifically, keeping livestock. African rituals and ceremonies generally require that a domestic animal such as a goat or cow is slaughtered during a celebration. Therefore, because of social solidarity and traditional customs in rural areas, residents support one another by buying local produce and livestock. When asked why livestock theft was prevalent, most of the participants mentioned that residents in the area were extremely poor and therefore some stole to feed their families. Stolen livestock were reportedly sold in distant areas because the community would stand together and search for any stolen livestock, which was usually in vain.

Participant 3: *When your livestock is stolen, it is better to report to the inkundla [traditional court]. Mr ... [the Induna] will instruct his committee and the community forum to search the area. He also spreads the word to the Induna of other nearby villages to let them know and ask if certain unknown stock has been spotted. The police usually say that the livestock is probably wandering in nearby areas and that the owner should come back to report again after few days if they still have not found them. Meanwhile, your livestock is being taken further away.*

The participants stated that if stolen livestock were recovered, the thieves would be brought before the tribal court in the area where the theft occurred. According to the participants, the punishment for theft depended on how many heads of stock had been stolen, but usually the offenders would compensate the victim with a goat or a cow. They would also be given a hiding by the elders, especially if the offenders were youngsters. When asked if they were aware of the abolishment of corporal punishment by law, all the participants were aware of this but seemed to be against it.

One participant stated: *Since corporal punishment was banished, most youths and kids nowadays have turned into hooligans knowing that they will no longer be punished"*.

Most of the participants argued that the fear of corporal punishment more than the fear of going to jail prevented youngsters from getting into deviant behaviour. Therefore, even though corporal punishment is unconstitutional and regarded as a violation of the right not to be treated in an inhumane and dehumanising manner, the participants, and by extension many other members of this community, believed that deviance should still be reported and dealt with by the traditional court. Arguably, when a suitable punishment such as a hiding is imposed, it serves as a deterrent to *everyone*, especially those who are engaging or planning to engage in criminal behaviour.

The KZN Department of Community Safety and Liaison (2010) argues that the majority of rural areas in South Africa experiences livestock theft and that reports have shown that the rates of livestock stolen from kraals and the veld are not much different. Previous studies such as of Mbatha (2012) also found that criminals who stole livestock in rural areas usually conducted an operation that was well organised and involved other residents. One may thus argue that, due to certain circumstances that prevail in rural areas such as well organised crime syndicates, a low population, houses that are far apart, and poor impounding facilities, it is challenging for law enforcers to keep track and detect the movement of stolen stock when conducting an investigation (Mbatha, 2017). This means that, due to the conditions and infrastructure that prevail rural areas, it is often easy for opportunistic criminals to steal livestock. Efforts to keep livestock 'safely' in spaces such as kraals seem to serve no purpose as these spaces are poorly constructed. Moreover, as rural areas have a low population density and homes that are scattered across the countryside, livestock theft offers no challenges for criminals.

Livestock theft seemed to be a serious issue in the *KwaNgcolosi* tribal area as all the participants had either been the victims of livestock theft more than twice or they knew several residents who had been victims. One may argue that this is because almost every household in the Maphumulo area keeps some form of livestock or domestic animals that range from chickens to goats and cattle. Thus, the community felt exposed to livestock theft and it was not surprising that they had decided to work together to combat this crime. The social solidarity theory supports such a collaborative effort as it stipulates that communities with strong social bonds can minimise crime if they identify mutual threats and jointly fight against issues that threaten the peace and wellbeing of the community. As was mentioned above, the *KwaNgcolosi* residents reported livestock theft to the tribal authorities and the Induna and members of his committee were then responsible to launch a search for the missing livestock in nearby areas. It is the responsibility of all residents to spread the word about the theft and this usually helps to recruit witnesses to come forward or ensure that the stolen livestock is recovered.

Mbatha (2017) states that law enforcers lack the resources to combat the crime of livestock theft and that this crime escalates when left unattended − just like more windows are broken in an abandoned building when nobody seems to care. It was thus not surprising to find that members of the *KwaNgcolosi* tribe lacked faith in law enforcers and turned to their tribal court as a means of combating this crime.

5.4.2.2. Assaults

Mbatha's (2017) study entitled *An understanding on [sic] the nature of rural crimes*, which was conducted in the eStezi rural community of Mshwathi Municipality in Maphumulo, found that assault was one of the most common crimes in this area. Substance abuse was the main cause of arguments, quarrels, and even assault. Based on the findings of her study, Mbatha (2017) argues that substance abuse is the most common vice among the youth who spend most of their time in places like shebeens or taverns and are known to become violent when intoxicated. Fights then break out in these drinking places and even at home.

The current study, which utilised respondents from the rural *KwaNgcolosi* tribe in the Stanger area, recorded similar data. The respondents argued that, due to a lack of public entertainment facilities and employment opportunities for the youth, most of them spent their time with other youngsters in places like taverns, tuckshops, or shebeens. The participants argued that most children dropped out of school at an early age and they lamented that this increased the number of unemployed, bored youths wandering around in the community with nothing positive or

productive to keep themselves busy. They argued that most youths therefore spent most of their time with their friends and peer pressure often led to misbehaviour and misdemeanours.

Participant 4: *Most assaults occur amongst us [the youth] and it is usually due to too much drinking that got out of hand. We therefore report such cases to be dealt with by the community and our elders.*

The participants were unanimous that most assaults occurred due to fights among the youth, with the consumption of alcohol being the main cause of such incidents. According to the participants, cases of assault were usually reported to the traditional court and dealt with by the traditional authorities and some residents, especially those directly involved in or affected by the incident. The following points summarise the general reporting and trial system in case of an assault:

- Assault cases need to be reported by the person who was assaulted or by relatives on his/her behalf.
- Reports are made to members of the Induna's committee who inform other members of the committee, including the Induna.
- The Induna then notifies the Chief and, together with other members of the traditional authority, he decides on a date when the affected parties have to present themselves to the court.
- In a case where the perpetrator is unknown or is in hiding, the case will be reported to the traditional authorities and investigated by the community forum, the Induna's committee, and relevant members of the *KwaNgcolosi* tribe.
- In some cases, nearby community/tribal authorities, who may either have witnessed or be informers, will also be invited to participate.
- When a perpetrator was caught and is presented to the tribal court of the *KwaNgcolosi* tribe, his or her sanction ranges from one goat − which is equal to R1 500 − or one cow − which is equal to R3 500 or more. He or she may also have to compensate by paying the victim one goat and one cow, depending on the severity of the assault.
- If a male assaulted a female, he also receives corporal punishment from one or two male elders of the tribe. This is done to teach him that, in future, he should pick on someone his own size and gender.

By the vivacity of the comments, it was clear that all the participants were more than happy to report any cases of assault to their traditional leaders rather than to the police, and they expressed complete satisfied with the way such cases were dealt with by this court.

Participant 14: *Whenever you are assaulted, you need to report it to one of us [members of the Induna's committee] so it can be presented and be dealt with by* kwinkundla *[the tribal court]. It does not matter how badly you were assaulted; we deal with any assault case presented to us.*

Schedule 2 of the Traditional Court Bill (B1-2017) refers to matters of jurisdiction by traditional courts. According to Section 4 (2) (c), traditional courts have jurisdiction to preside over matters of assault; however, this jurisdiction excludes cases where grievous bodily harm was inflicted. This means that a tribal court has jurisdiction only over general assault cases and not cases of assault with the intention to do grievous bodily harm (GBH). However, the participants, as members of the *KwaNgcolosi* tribal court, admitted that they dealt with all forms of assault including GBH which, as the statute requires, need to be reported and dealt with by statutory (or formal) courts. What this means is that if a traditional court deals with cases of severe assault, it is operating outside its jurisdiction and therefore contravenes the Traditional Court Bill (B1-2017) as well as other policies and frameworks (such as the Black Administration Act No. 38 of 1927) that govern the functioning of traditional institutions and forbid its courts to preside over certain cases.

A final argument is that acts of assault can lead to major criminal acts such as assault with the intention to do GBH, attempted murder, revenge killings, torture, and even murder. The finding that the traditional tribal court tended to operate outside its jurisdiction suggests a contradiction that may be explained with reference to the broken window theory. Thus, if an incident such as a serious assault is left unattended by formal law enforcement agencies such as the police, this oversight will motivate the traditional court to attend to serious assault cases more often and more readily, as their members may have done so in the past with impunity. They thus operate outside the law to enforce the law within a community. Therefore, when the *KwaNgcolosi* tribal court addresses cases of aggravated assault and the perpetrator/s is/are punished severely and quickly, they set an example and are not only resolving that specific matter, but they also prevent the assault from leading to other serious criminal acts. In this manner peace is restored and crime is reduced, which is the main purpose of law enforcement and the judiciary.

5.4.2.3. Armed house robbery

Mbatha (2017) argues that, because the population in rural areas is low and houses are scattered widely apart, armed house robbery is an easy crime to commit for opportunistic criminals. Members of the *KwaNgcolosi* tribe proposed that armed house robbery and house break-ins were two of the most prevalent criminal activities and that they were escalating in their area. Most of the participants argued that offenders were generally from nearby villages. They knew this as most offenders who had been caught and brought before their traditional court had been strangers belonging outside their tribe. The participants further elaborated that, if suspects were found, their homes were thoroughly searched for the missing goods by elders of the tribe. They would be instructed to do so by traditional leaders such as the Induna or even the Chief. Most of the participants stated that stolen goods were usually found in shops in nearby villages, meaning they had been sold there by the offenders to avoid being traced. In general, it was determined that the procedures to bring such offenders to book are as follows:

- When apprehended, the offender/s is/are summoned before the *KwaNgcolosi* tribal court to be dealt with, even if they are not from the area.
- First, they are asked to return all the stolen goods to their rightful owners.
- Punishment is meted out by the tribal court depending on the severity of the case. In most cases, corporal punishment is imposed and executed by the elders of the tribe. As most offenders are youths, this punishment is quite severe.
- If offenders are older, the traditional court usually imposes compensation for the victim of a goat or R1 000 cash, depending on the value of the stolen items and the damage caused by the offender.
- If an item was stolen but not recovered, the offender is compelled to buy a similar item and to replace the lost or damaged goods.

Participant 10: *My husband and eldest son work and live in the city. I am left alone here with my young children. My home was broken into three times while we were not at home and once while we were here. They come into our homes carrying knives or guns and threaten to kill us if we do not do as they say. They know we cannot cry for help, as most of us don't have neighbours close by.*

Participant 1: *I think because most of us [females] live alone with our young children, criminals find us easy targets. My neighbour was recently a victim of an armed house robbery. They took*

her radio, television, and other electrical appliances. She is a widow who stays with her grandchildren as her children are working in Pietermaritzburg.

A question was posed to determine whether the traditional court had jurisdiction to preside over cases of armed house robbery and stolen goods. Schedule 2 Section 4 (2) (a) of the Traditional Court Bill (B1-2017) stipulates that traditional courts may preside over cases where the offender broke into or entered premises intending to commit an offence. The Bill also states that the offence for which compensation is sought should not exceed R5 000. This means that offences involving goods exceeding the value of R5 000 fall outside the jurisdiction of traditional courts and such cases thus need to be referred to a higher court such as a magistrate's court.

It may be argued that the tribal court under study did not operate within the mandate of the Traditional Court Bill regarding burglary and armed robbery because this court reportedly dealt with all house break-ins and armed house robberies, regardless of the claim involved. In adherence to its mandate, a tribal court should direct cases exceeding the amount of R5 000 to the formal justice system, as presiding over such cases contravenes Schedule 2 of the Traditional Court Bill.

The offence of house burglary, whether arms were involved or not, is explained by a criminological theory referred to as the routine activities theory. This latter theory is a sub-theory of the rational choice theory and was developed by Cohen and Felson in 1979. It stipulates that an offender tends to commit a crime when an opportunity to do so presents itself (Felson, 1997). This theory thus proposes that crime is likely to happen if the following are present: an individual who is able and willing to commit a crime, another individual who is considered a suitable target and deemed defenceless by the motivated offender, and when nothing can stop the offence from happening (Kennedy & Forde, 1990). The armed house robberies that reportedly occurred in the Maphumulo area among the KwaNgcolosi tribe seemed to meet the criteria of the rational routine theory because most males work and live in cities or towns away from their homes. Most households thus consist only of females, children and grandparents who are all vulnerable and suitable targets for criminals. The absence of males who are usually the protectors of their families is then regarded as the absence of guardianship. When these guardians are absent, house robberies are thus likely to prevail.

The broken window theory also stipulates that crime opportunities can be minimised if crime prevention measures are in palace. Such measures need to be effective and instil fear in

criminally motivated individuals so that they will not engage in crime, knowing that they will be punished. Thus, just like any other crime that can be prevented before it escalates, armed house robberies can also be prevented if crime control measures such as traditional courts operate effectively in rural areas.

5.4.2.4. Domestic Violence:

Mbatha (2017) argues that, because of the prevalence of patriarchy in rural areas, it is not surprising that cases of domestic violence are reported. However, it is believed that this form of abuse occurs more regularly in urban than in rural areas. The current study found that cases of domestic violence also occurred in the area under study as some female participants revealed that they had experienced this form of violence in at least two different relationships in their lives. When asked why women in this area stayed in abusive relationships, the participants argued that most females depended on their male partners who were the breadwinners of their families. Thus, females stayed in such relationships in order not to lose financial support for themselves and their children. Some participants viewed domestic violence as a form of domestic discipline that should be inflicted when a wife did not respect her husband. This is an African custom that stipulates that females should, out of respect, be submissive and subordinate to their male partners.

Participant 15: *My late husband used to beat me every time we disagreed. I kept quiet for years, even when he started beating me in front of our children. He was the only one working, so reporting him meant our family would starve and my children would no longer be able to go to school.*

Participant 13: *I was ashamed I would be called a failure as a wife and a woman who did not respect her husband, and my family told me to be strong and hold on to my marriage.*

The study found that, in recent years, women in the Maphumulo rural area who had been experiencing domestic violence were willing to get out of those abusive relationships. However, they felt trapped as reporting such cases to the police meant that their abusive partners would be arrested, and this had financial implications for their households. These women therefore chose to stay and endure the pain in silence rather than losing their daily bread. However, the participants stated that women who refused to go to the police were advised to seek assistance by reporting their cases to a tribal leader. This person would refer

the case to the tribal court which meant that no one would be arrested, and the abusive partner would simply by told to apologise and compensate the victim and her family by paying them a certain amount of money or by giving them a goat. Generally, such a man would have to do penance by slaughtering a white chicken at his matrimonial home to appease his ancestors who would be angry at him for causing violence in his forefather's house. He would also receive counselling from the male elders of his family or from the community on how to solve problems and treat his wife better.

It may be argued that the process of law followed by the formal justice system marginalises rural abused women who are often unable or too scared to report the matter to the police. They thus suffer in silence while the abuse continues. However, when cases of domestic violence are heard by a tribal court, women more readily break their silence and they thus manage to escape the abuse before it is too late.

The study of Rakovec-Felser (2014) have shown that choosing to stay silent in an abusive relationship has many negative outcomes, particularly for the children of the abused woman. Moreover, she further elaborated that children who grew up in an abusive household are more likely to learn this behaviour and impose it on others as they grow up (Rakovec-Felser, 2014). Due to the abuse they experienced, such children usually end up being psychologically and emotionally traumatised and they adopt a mentality of violence, believing that it is the only solution to most problems and the only means of getting what they want (Mbatha, 2017). It was no wonder that most of the study participants who had been victims of domestic violence raised the concern that the abuse also affected their children. Participant 13 mentioned that her eldest son had a very short temper and had been involved in violent arguments. Participant 4 mentioned that all her children started dropping out of school during the time when she was severely abused. It was fortunate that these women had the presence of mind to report the abuse to their tribal leaders and the tribal court then dealt with the issue swiftly and decisively.

5.4.2.5. Crop theft

The Maphumulo IDP Review (2009) states that subsistence farming in the form of smallholder farms where crops are cultivated by traditional family units is the dominating agricultural and economic activity in the Maphumulo area. These families utilise small plots of land to grow crops and they sell the produce or use it to feed their families. However, these small farms or plots of land are vulnerable to thieves who often raid the crops with impunity.

Participant 5: *You sleep one night with a garden full of vegetables but wake up the next morning to find that someone has done the harvesting for you, leaving you with nothing to feed your family.*

Participant 10: *Because of poverty people steal almost everything here, even crops. My neighbour and I were both victims. One time they stole my mealies from my garden just before I harvested it. While from my neighbour's garden, a few nights later, they stole her mealies and avocados. Luckily, those thieves were caught and appeared in our tribal court.*

According to participants, crop theft just before harvesting was common in the Maphumulo area because of poverty and unemployment. They stated that almost every household would have a garden or crops to feed the family, but that some residents stole crops from others' gardens. When asked what the reason for this theft was, they listed: the desire to eat different kinds of food, being too lazy to plant their own gardens, and own crops not ready for harvesting.

Frazer (2011) also found that poverty caused the theft of crops as a means of survival. Livestock, poultry (especially chickens) and crops would be stolen to feed a family or an individual and thus to avoid going to bed on an empty stomach (Fraser, 2011). Thus, abject poverty was the major cause of crop theft. Moreover, poor security and fencing structures made it easy for offenders to vandalise or break into other residents' gardens at night to steal their crops. These produces would be used to feed a family or to sell at a market in town for ready cash.

The findings that were discussed in this section addressed the third objective of the study. Moreover, they are supported by the social solidarity theory that posits that, through strong social bonds, members of a community will assist one another in minimising crime in their community. By giving recognition to one another and forging strong social bonds, the *KwaNgcolosi* community was able to assist their tribal leaders and the Induna's committee in investigating cases of theft and bringing the thieves to book. The community, by their own admission, served as witnesses and informants and readily provided information needed by the tribal court to resolve a matter and serve justice. As the broken window theory proposes, should such matters have been left untreated, there was a strong likelihood that crime would have escalated, and this would have threatened peace and stability in the area. As the Maphumulo police station is far from the *KwaNgcolosi* tribal area, cases were not reported to the police. The tribal court that serves as an alternative dispute resolution measure thus, according to the

alternative dispute resolution theory, seems to be a suitable and effective alternative justice system, particularly as people in this area have limited access to the formal justice system.

Ray and Reddy (2003) argue that the governance role of traditional institutions in rural areas ranges from preserving the law, maintaining order, allocating tribal land, and minimising the gap between the people and the government by providing some governmental services to the people who are deprived of such services.

5.5. Matters not dealt with by the formal justice system but managed by traditional courts.

Responses provided by participants for question 7 of the interview questions guidelines, which aimed to get their views regarding the reason(s) they think the Maphumulo residents choose to report some of their matters to their tribal courts, instead of reporting every case to the police or formal courts. Through the analysis of the participants' responses, a subtheme of issues not dealt with by the formal justice system but managed by traditional courts was developed.

Participant 4: *… Inkundla (traditional court) solve every issue that disturbs peace amongst its people, it does not say this case or that is not harmful, or the problem will go away…*

The response provided by 16 over 16 of participants was that it is slightly impossible for rural residents not to report some matters or issues to the traditional court, and that is because they argue that there are issues that are experienced by traditional communities but are not dealt by the formal justice system due to certain reasons such as being deemed by the system as being legal or acceptable by the state and/or society. These factors include issues such as infidelity, family neglecting, etc. Most participants regarded these issues as being 'non-African' and are against indigenous customs, norms, or laws. Some further elaborated that these factors also threaten peace of an individual or the society; and therefore, had to be dealt with. This, therefore, explains why these residents tend to traditional courts to deal with such issues, it is because the formal justice system does not deal with such matters.

5.5.1. Infidelity:

Based on a previous constitutional court case's ruling, it can be argued that adultery no longer formulates part of the law in South Africa and the spouse who was wronged is now unable to sue the other spouse for damages. This undisputed decision was formulated and made by the Constitutional court's judges in the case of R v V (2700/08) [2014] ZAECPEHC 97; 2015 (3)

SA 376 (ECP). The ruling and final decision was that marriage is based on a willing agreement between two parties and in a case of the failing of the marriage, the intervention of the law in the party's personal affair is not ideal (Legalbreif; 2019). This means that according to the judges of the constitutional courts, as two parties voluntarily agreed to get married, if their marriage breakdowns, the involvement of the law will be mingling with their personal affairs and therefore they need to seek other means to solve their issue besides formal law (Legalbreif; 2019).

Participant 6: *We once had a case of a farmworker whose wife was working in town and came home every weekend. The husband (farmer) had an affair with some lady in the area. They were caught, brought to the tribal court, and were asked to compensate the wife with a goat and one white chicken for cleansing...*

Participant 12…*It is better nowadays that inkundla (tribal court) deals with infidelity before the man (unfaithful spouse) would get some serious beating from his male in-laws…*

One may argue that a family is an important institution forming part of a community. As stipulated by the Social Sodality theory, the study Participants elaborated that traditional authorities work together with the community members to ensure that every family live happily and peacefully for the sake of peace for the whole community. That means if there is an issue threatening the happiness or peace of a certain family, family councils of that family intervene and try to resolve the issue, however, if they do not succeed, the traditional courts intervene on the behalf of the whole community and try to prevent that family problem before it escalates and affects other family members or the whole community. It can be argued that acts such as infidelity or adultery usually results in negative outcomes such as families breaking down, divorce, separation, rage and killing of the unfaithful spouse or secret lover, stress and depression suffered by the faithful spouse. Other effects can include extended family members getting affected, such as children getting psychologically or socially affected through their families breaking down. According to participants, authorities not only ensure compensation for the abused spouse but also the couples are offered assistance in rebuilding their marriage or relationship if they are still willing to stay together, and such assistance is offered by the family members (usually elders) of both the couples, with the assistance of traditional authorities. It can be argued that traditional courts play an important role by dealing with cases of infidelity, and that is because, with the ongoing killing or abuse of women in South Africa, women are trapped in loveless and abusive relationships. There are abused in many forms,

from psychologically, emotionally, and physically, resulting in negative effects such as individuals killing or being killed by their partners, and increasing cycle of violence.

One may argue that the intervention of the third part in failing relationships make it easy for any negative outcome to be prevented or avoided before exhilarating into bigger issues and the study findings reveal that by dealing with cases of infidelity, the Maphumulo traditional courts fulfil such role. These findings are supported also by the Broken Window Theory which stipulates that prevention is better than cure and this means this theory stipulates that if little problems are taken care of the big problem will take care of themselves. It can, therefore, be elaborated that the traditional court should manage the acts of infidelity before they result to negative outcomes such as depression and breaking down of families, and since formal courts no longer deal with infidelity, residents of the Maphumulo traditional community report such cases to their tribal courts to prevent such acts from exhilarating to major issues. One may that state with high levels of social solidarity in rural communities, it means no women or man should suffer abuse in silence as residents intervene in helping one another.

It can be concluded that traditional courts seem not to have limitations in terms of what cases can be prosecuted or not, if a matter seems to threaten the peace and wellbeing of residents, the traditional courts intervene to address such matter. Ndlela, et al (2012) elaborated that the main aim of traditional leaders and their institution had always been about ensuring people's enjoyment of prosperity, peace, and security every time.

5. 6. Are Procedures of Traditional Courts Inline with The Current South African Constitution?

One may argue that with the South African constitution and the Bill obliging traditional courts to follow customary procedures, it can be argued based on the study findings that most procedures followed by the Maphumulo *KwaNgcolosi* traditional courts can be deemed inline with the South African constitution. However, the researcher found that this court can be argued to occasionally acts unconstitutionally when imposing some of its punishments to the offenders, especially to juvenile offenders. For examples, when dealing with cases of livestock theft, armed house robberies, etc committed by the youth, despite imposing punishment such as compensating with money, goat, or cow, corporal punishment is also imposed. During the study interviews, when the researcher asked participants about the banishment of corporal punishment by the constitution, all participants were aware of such banishment but seemed to be against it. Participant 7 stated: "*Since the banishing of corporal punishment, most of the*

youth and kids nowadays had turned into 'hooligans' knowing that they will no longer be punished". Most of the participants argued that the fear of corporal punishment prevents most youngsters from getting into deviance behaviour more than going to jail.

Concerning the South African laws and regulations regarding imposing corporal punishment, one may refer to Section 12 (1) of the Constitution of RSA (1996) which stipulates that everyone have a right to be free from all forms of injuries, not to be tortured or be treated in a manner that is inhumane, cruel, or dehumanising. Furtherly, in the case of *S v Williams* the South African constitutional court deemed corporal punishment as being unconstitutional after the judges had stipulated that it contravenes Section 12(1) (e) of the Constitution of RSA (1996) as this form of punishment can be regarded as treating or punishing people in an inhumane; cruel, and degrading manner. Such judgement led to corporal punishment being abolished everywhere and in everything in South Africa. This, therefore, means that one can argue that the Maphumulo tribal court is guilty of contravening Section 12 (1) of the RSA Constitution (1996) and the precedence ruling of the constitutional court in the case of S v Williams and that is because this tribal court still imposes corporal punishment in its court rulings.

5.6.1. Traditional courts and the issue of injustices

Nxumalo (2012) argues that African traditions, culture, and customs are notorious for advancing inequality, bias and prejudice and that women are usually the most affected or vulnerable as they are subjected to patriarchy (male domination) and occupy the lowest positions in their communities.

5.6.1.1. Patriarchy, biases, or favouritism

The fourth objective of the study was to determine whether the proceedings of a traditional court were in line or in conflict with the Constitution of the Republic of South Africa. Questions 9 and 10 of the interview schedules gathered this required information from the participants. Question 9 determined whether the traditional court dealt fairly with each case, irrespective who the complainant or the defendant was. Thus question 9 and question 10 explored whether fairness prevailed in the tribal court by determining if patriarchy, bias, and favouritism existed

Participant 1: *No individual of the right age is excluded from taking part in any court proceedings. If someone is excluded, it is because of a different reason that is known by the*

authorities of the traditional court and residents who are attending. The excluded person is usually notified of the reason(s).

Participant 6*: It has often happened that, during a court proceeding, a woman has raised a better solution to the case than the one raised by a man. You will then find that all members present at the court will decide to follow the solution provided by her to solve the case. So how can they [females] say they are not heard like us [males]?*

Most of the participants stated that they never felt mistreated or subordinated by the traditional court or any of its procedures. When a traditional court case was heard, a word of invitation would be issued to every affected household in the area. This would be done to ensure that, on the day of the court proceeding, each affected household would send a family member to represent them and participate on their behalves. Participants 3, 11 and 14 stated that, even on the day that the case was heard, numerous efforts were made to ensure that every household was presented − even those without male representatives. All the respondents (16/16) stated that anyone above the age of 21 could represent their household, regardless of being a male or female. Most of them also stated that, during the court proceedings, everyone above the age of 21 was free to raise a hand and participate in the trial. Most of the female respondents agreed that they did not feel inferior during these court proceedings.

Based on the above responses, it may be argued that the tribal court of the *KwaNgcolosi* is fair, unbiased, and not patriarchal. However, two female participants made statements that suggest that patriarchy still exists in this tribal court.

Participant 10: *As a female, if you are presenting a case and you are serious about getting compensated, you need to bring your husband or male relatives. That is because the court is headed by only males and usually most of the participants are males and are less likely to side with a female unless there is a male's voice backing her.*

Participant 9: *A while ago, the goats of a male member of the community destroyed the crops in a widow's garden. She reported the case to our tribal court, and, on the day of the hearing, she was accompanied by her two eldest daughters while the man [the defendant] brought his uncles. The court heard the case but merely asked the man to apologise to her. Not happy with the outcome, the widow went to get her brothers who accompanied her a few days later and spoke to the traditional authorities on her behalf. Only then was the crook [defendant] asked to compensate her with a goat. Most people won't admit it, but a man's voice speaks louder there [traditional court] [than that of a woman].*

Section 7 of the Traditional Court Bill (B1-2017) outlines the procedures that should be followed by traditional courts. According to Section 7 (3) (a) of the Bill, traditional courts are obliged to observe and respect the rights that are contained in the Bill of Rights (Chapter 2 of the Constitution) (South Africa, 1996). Most importantly, subsection (3) (a) (i) of Chapter 2 of the Traditional Court Bill states that women are entitled to participate fully and equally to men in the proceedings of these courts (Traditional Court Bill, 2017). The above findings thus suggest that the traditional court of the *KwaNgcolosi* tribe does not provide full and equitable justice in cases where females are concerned. It was evident that, when a female presented her case, her voice alone was not strong enough to result in a fair judgement. One may argue that even though women are not openly suppressed or exploited by these courts, they are unable to participate as equally and fairly as men as a male relative is required to speak for them or else the ruling is likely to be unfair, as was demonstrated by the latter case.

Participant 2 mentioned that everyone, including women, accepted the traditional custom of being represented by male relatives rather than herself or female relatives during a traditional court hearing. Moreover, she stated that it was considered disrespectful for a female to approach a male, especially one in authority such as the Chief or the Induna, on her own. She stated that a woman always had to be accompanied by a male who would negotiate on her behalf, and only then would she 'be heard'. When this finding is evaluated against the provisions in the Bill of Rights that is entrenched in the Constitution, it is clear that, in a democratic dispensation where everyone is equal before the law, this traditional court adheres to customs and traditions that promote inequality and patriarchy and that this violates the rights of female members of the community. It was surprising that most of the participants justified these customs and accepted them as rightful and just in the name of culture or tradition.

Moreover, Chapter 2 of the Constitution (South Africa, 1996) emphasises everyone's right to be treated equally and not to be discriminated against because of gender, age, or sexual orientation, to name a few. However, the study found that all the executive members of the traditional court of the *KwaNgcolosi* tribe were males and that no female was allowed to preside over any of the proceedings. When the researcher asked the participants for their views on the possibility of a female becoming a community leader or being appointed as member of the traditional court, 10 of the 16 participants stated that this should never happen. They based this assertion on traditional African culture as well as the Bible, claiming that both deny any woman the right to oppose or rule over a man. Surprisingly, even some of the older female participants supported this view and accepted that only males should be rightful tribal leaders.

Participant 15: *I might be a female myself but in the book of Ephesians 5 verse 25, if I remember correctly, the Lord says, "Wives, submit to your husbands, as to the Lord. For the husband is the head of the wife, as also Christ is the head of the church".*

Participant 12: *I am not a strong believer, mzukulu [grandchild], but I know that it is not only our culture but also the Bible that says that women should not rule over us [males] but should be subservient to us. So, who are we to turn against the word of God?*

When this finding is evaluated against the Bill of Rights and Section 5 of the Traditional Court Bill (B1, 2017) which provides for the composition of tribal court officials and their participation in a traditional court, it is noted that subsections (1), (2) and (3) stipulate that traditional courts should be presided over by both female and male members who should all be participating on an equal footing to achieve justice. This provision promotes equality in traditional courts as stipulated by Chapter 9 of the Constitution (South Africa, 1996). Subsection 2 of the Traditional Court Bill promotes the equality of women and protects their rights, whether they are the victims or the accused. Subsection 3 paragraph (a) states that, during the administration of justice, members of a traditional court are obliged to ensure the protection and fair representation of women either as members or one of the parties who brings a case to court. These provisions promote and enable the meaningful and willing participation of women in tribal court proceedings.

Even though the ADRT argues that traditional courts act as an alternative means of combating crime and the broken window theory states that they serve as a tool for managing minor crimes before they escalate out of control, it was found that male domination still prevailed in the rural community under study. What was disconcerting was that patriarchy was still promoted in a legal structure where fairness and equality should be practised. It was also noteworthy that most females were not aware of the unfairness of the prevailing male domination in their community and it may be argued that this was because it was promoted in the name of tradition, culture, and religion. The sad reality is that these women were not aware that their constitutional rights were violated by persistent male domination and demands for adherence to traditional customs. For instance, women have the right not to be discriminated against based on their gender and they have a right to occupy high positions of authority and be treated fairly and equally in criminal or civil trials. It is undeniable that the women in this rural area were intimidated and marginalised by the community's adherence to traditional values and norms, of which male dominance was the most notable. For instance, it was established that some

women were aware of their rights, but they chose not to make any demands as such behaviour would mean that they denied their African culture and their religion.

5.6.1.2. The traditional court and the LGBTs (Lesbian; gay; bisexual; and transgender) community

According to the literature, the LGBT community is one of the most vulnerable groups in South Africa due to discrimination, social exclusion, and general abuse because of their sexual orientation. Question 8 determined if the *KwaNgcolosi* traditional court treated every case fairly or if anything that this court did hindered full justice. Of the 16 participants, 13 felt that the court dealt fairly and diligently with all cases and that there was no preference or favour. However, when the issue of LGBT people in the community was raised, the majority of the participants were evasive or stated that cases representing members of this group had never been dealt with by their tribal court. Some participants (9/16) elaborated that the community regarded gay or lesbians as 'possessed' or 'bewitched' and that they were punished by their ancestors because a member of their family or their parents had angered them. They stated that such individuals would very likely first be referred to traditional diviners for 'healing' or 'cleansing' before their cases would be heard by the court.

It was also revealed that prejudice against and ignorance regarding the LGBT community existed among the members of the *KwaNgcolosi* tribe. For instance, one person of authority (Participant 14) stated:

Such individuals have never presented a case in our court and we also have never received a case related to such a matter. However, if we do, we will have to refer it to the police because most residents, especially the older generation, do not fully understand the whole gay/lesbian matter. We would not want to be accused of imposing an unfair judgement because of the individual being gay. So, we will rather let the police deal with it.

Section 7 (3) (a) (ii) of the Traditional Court Bill (B1-2017) stipulates that vulnerable people such as children, the elderly, people with disabilities, and people who are at risk of being discriminated against based on their sexual orientation or gender identity should be treated in a manner that considers their vulnerability. Section 7 (3) (b) (i) and (ii) further obliges a tribal court to give such people a fair hearing before a decision is taken. It is further stipulated that any decision taken should be impartial (Traditional Court Bill, 2017). This Bill thus obliges traditional courts to deal fairly with individuals who are considered vulnerable, especially

before passing judgement. Moreover, in such cases, as in all others, judgement should be objective and fair. This was clearly not the case in the *KwaNgcolosi* tribal court and the proposal that the authorities would refer a case involving a person from the LGBT community to the police thus seems the rightful thing to do. During the interviews it was noticed that most participants were critical of the LGBT community and did not fully understand them or approve of their way of life. It thus seems inevitable that a person from the LGBT community might be judged unfairly or be subjected to discrimination in this tribal court.

In light of the above findings and arguments within this subtheme, the researcher would like to draw her argument in supporting the argument of the Organic Democratic school of thought which states that it does not oppose the modification of traditional leadership institutions to fit into the South African democracy. Rather, this school of thought is contesting the main idea of traditional leadership institutions being viewed as fundamentally undemocratic (Hlubi, 2013). It can be arguable to state this means that there may be some flaws or loopholes within the functioning of the traditional justice system, nevertheless, Boertie (2005) states that both the restorative justice system and the formal justice system may be subjected to criticism for being incompetent and even flawed in numerous ways. He further elaborated that however some of those flaws can be managed through the implementation of certain measures. For example, facilitators in the restorative justice system should be properly trained to adhere to international and national protocols and standards, while similar and appropriate standards and guidelines should also be devised for and implemented by the traditional justice system (Boertie, 2005).

5.7. The Effectiveness of the roles of Traditional Court in Combating Crime

Sithole (2008) elaborates that democracy has not succeeded in some parts of South Africa. This argument is based on the fact that different societies have different needs, and that Western democracy has not fulfilled all those needs. Therefore, many marginalised communities have turned to alternative structures such as traditional leadership systems to address, amongst others, their social and legal needs.

5.7.1. Measures to combat crime in a rural context: The formal South African justice system versus the traditional justice system

The data revealed that members of the *KwaNgcolosi* tribe preferred a traditional justice system over a formal, more democratic judiciary system. They argued that the traditional justice system was more effective than the formal justice system in more ways than one. For instance,

it was mentioned that when an offence was reported to the police, the offender not only got locked away without reconciling with the victim, the victim's family, or the affected community, but he or she also got a criminal record that would 'haunt them' for the rest of their lives, even after having served their sentence. Such a person would then also have difficulties finding a new job and starting a new life after prison.

Participant 6: *The system of this government of arresting does not believe in forgiveness and giving a person a second chance in life. The criminal simply gets locked away without making things right with those he or she hurt. That leaves those hurt with unhealed wounds or permanent scars. Another problem is that once the person has served their time, it takes years for their criminal record to be removed, meaning they might not get another job easily. This may influence them to fall back into crime to put food on the table to feed themselves and their families.*

Some participants argued that the formal justice system was a 'selfish' form of achieving justice because legal officials and the state would 'cash in' and make a fortune out of the misery of others while the victims, as well as those affected by the crime, were left empty handed. Of the 16 participants, 12 proposed that the formal court system should improve its functioning by compensating victims appropriately, especially in a case where the offender had to pay bail. They suggested that, if victims were compensated by the formal courts as they would be by traditional courts, rural residents would be more inclined to trust the formal justice system and they might then see it as a route to seek a fair resolution.

Participant 10: *Nothing hurts more than seeing a 'crook' walking free in our community claiming he served his punishment by paying bail. Meanwhile the victim is suffering because of his actions, with no token of apology or compensation paid by the criminal.*

Participant 10 proposed that rural communities' own form of justice (i.e., the traditional courts) ensured that every form of compensation that is enforced by a traditional court on behalf of the victim/s is met by the offender and received by the victim/s and those affected. Most of the participants also proposed that, before the offender compensated the victim, he or she should apologise in the court setting not only to the victim, but also to every other person affected by the crime, such as the victim's family and friends and members of the community. The respondents argued that the acts of apologising and paying compensation symbolised true admission of guilt by the offender and were beneficial to both the victim and the offender as

they allowed the victim to heal, to accept the injury or loss, and to move on. Moreover, these acts reflected the principle of Ubuntu (humanity and dignity) and they also helped the offender to rehabilitate and be accepted back into the community.

5.8. Factors that enhance the separation between rural residents and the formal justice system.

Question 7 asked the respondents to comment on the reasons why most rural residents would report incidences of misdemeanour or crime to their traditional leaders for reference to the tribal court rather than to the police (SAPS). On analysing the responses, a pattern of similarities was detected, which means that three sub-themes emerged that explained the 'separateness' of rural residents from the formal justice system. These factors were rural poverty, a lack of facilities, and geographic isolation.

5.8.1. Unemployment poverty in the rural area under study:

Mbatha (2017) states that one of the most challenging factors that affect rural areas is abject poverty. Various studies as of De Navas Walt et al. (2010) corroborate the statement that poverty is a disabling factor in rural communities compared to towns. For instance, he further stipulated that 16.5% of communities in rural areas is burdened by poverty, whereas 14.9% of urban residents experience severe poverty (De Navas Walt et al., 2010). Moreover, residents in rural areas can be argued to experience severe difficulties in accessing municipal and governmental facilities and services compared to their urban counterparts (KZN Department of Community Safety & Liaison, 2010). Moreover, the department argued that rural areas notoriously lack clean water, public safety, functional water-borne sewerage systems, and transport facilities.

Rural areas are thus underdeveloped and are characterised by a lack of basic services and a proper infrastructure. In this context, Mbatha (2017) refers to numerous issues such as the lack of employment opportunities, with the most affected groups being females and the youth. A common demographic pattern in South Africa is that it is predominantly males who migrate from rural to urban areas in search of employment so that they can support themselves and their families. Most rural women thus depend on their male partners or family members for financial sustainability and survival (KZN Department of Community Safety & Liaison, 2010). Young people who cannot find jobs in rural areas are also dependent on other family members for their livelihood. A term used in previous studies as of Mbatha (2012) is 'young pensioners' and she

argued for this term to refers to youths in rural areas who depend solely on people who receive old-age pensions and disability and child support grants from the government. Due to a lack of employment opportunities in rural areas, poverty levels thus escalate, and this makes it difficult for rural residents to maintain even an average standard of living (Mbatha, 2017).

In corroboration of the above, the current study found that poverty was one of the factors that compelled rural residents to turn to the traditional justice system as a means of combating crime and seeking restitution. The participants argued that, due to limited financial means and a lack of ready access to a police station and a magistrate's court (which are located in distant towns), it was very difficult for them to seek help form formal structures when a crime had been committed. They also elaborated that heavy fees were involved when formal justice services were accessed and paying for such services was a challenge on its own. They therefore turned to an affordable and available justice system which would begin by reporting a case to a relevant member with authority and ended in restitution offered by the traditional court. These services were offered free of charge and were readily accessible in their residential area.

Participant 6: *My eldest son was once mugged and assaulted at night on his way from work. We reported this to the police, and they came days later. The issue went to court. However, it kept on being postponed as they said there were no witnesses or suspects. The case took months and we had to walk up and down to attend the case in town till we ran out of money. We decided to forget about them [the criminal court] and went to report the case to our tribal court. The case was investigated by the community policing forum of the Induna. The culprits were found and immediately dealt with. The boys [the accused] were asked to return the cell phone, compensate for stealing it and apologise to my son. Then all the boys [the victim and the two accused] went to the police station and asked them to drop the case.*

Participant 4: *Many people around here will tell you that reporting a case to the police is a waste of time and money. Cases take years to be solved while you spend your last cent walking up and down to courts. Lawyers also need to be paid. We are not working so where will all that money come from?*

These responses resonate with findings by Mbatha (2017), who argues that poverty and a lack of governmental services compel rural residents to devise their own means of legal representation as they cannot expect assistance from the government. Mbatha (2017) also argues that some residents live closer to towns than others, but that most of these towns are few and far between and generally poorly developed. This makes it difficult and costly for residents

in rural areas to obtain the legal services they need. The low population rate in these areas that results from migration to the cities also makes it difficult for the government to develop rural towns and improve the public facilities found here. According to previous studies as of Muhammed (2011), they have demonstrated that most public facilities in rural towns lack resources such as efficient and sufficient law enforcement agencies to effectively combat crime, and this makes it difficult for rural inhabitants to access legal support services.

In conclusion, it has been demonstrated that poverty creates limitations for rural communities, particularly as basic services such as shelter, education, health, medical care and law enforcement are limited or, in some instances, completely absent. Due to migration to the cities, rural populations are declining, and it has become difficult for the government to deliver basic services to these areas. It is therefore not surprising that there are growth predictions for the social exclusion of rural communities, including access to legal aid (Mbatha, 2017). It therefore seems inevitable that rural communities will adhere to traditional structures for legal aid and support. This phenomenon is supported by the alternative dispute resolution theory which acknowledges that there are many ways of combating challenges or issues that threaten a community's wellbeing. This is evident in rural areas where a lack of facilities and legal support compels residents turn to other means if they wish to find recourse for injustices. Thus, traditional courts are approached to address an offence or misdemeanour while the formal justice course, which is not available to everyone, is avoided. The ADRT further proposes that many issues can be effectively dealt with by alternative justice measures that are less costly and more accessible (Sampson et al., 1997).

5.8.2. Geographic Isolation

Geographic isolation is regarded as a factor that enhances the gap between rural people and the services provided by the formal justice system. Shihadah et al. (1996) state that geographic isolation detaches rural communities from formal justice system structures because natural features create difficulties for justice to be implemented in these areas. Features such as mountain ranges, rivers, and long distances restrict reactional time and minimise the pace of offering support services. Moreover, as rural towns are often dispersed in isolated areas, it makes it difficult and costly for rural residents to reach the legal services they require (Mbatha, 2017).

In the current study, most of the participants argued that homesteads in the area were geographically isolated and far from cities or towns, and that services provided by the formal justice system, such as the SAPS, were too far for residents to access. They were thus motivated to seek other legal service providers.

Participant 4: *Even if we do want to report our issues to the police, my sister, the problem we have is that it costs us R45 return to go to town, reach the police station and report a case. If we call them [the police], the poor network gets in the way or they might come days later if your case is serious, but in most cases, they will tell you stories. They will say they do not have a police car or officers available to come at that time, or they will complain about the bad roads.*

Participant 10: *Well, in this area we are not used to seeing the police, so it is hard for us to reach them. I think they do not like the area we live in and so do not mind us. So, we just take a walk and take our issues to Mr ... [the Induna] who we know will pass it on to the Chief and other traditional authorities. It is he who sometimes calls the police for us if a case is serious.*

Participant 6: *It seems like the police respect Mr ... [the Induna] because they try to come if he is the one who called them. But if I call or any of the other residents of the area call, the police will tell you this and that…. they will say they do not have a vehicle to come, remind you of the bad roads, or come sometime later and say they got lost as their machines [GPS] could not find the house. So, we no longer bother calling them [the police].*

It was apparent that the isolated geographical location of the area under study made it difficult for police officials to investigate and solve crimes. Mbatha (2017) argues that most criminal activities in rural areas are difficult to solve compared to the cases of similar offences in urban areas because rural areas are geographically isolated and not easy to access. The police in rural areas are also understaffed and patrols and investigations often have to be conducted by a single officer who battles to locate clear suspects or eyewitnesses.

The wide-open spaces between homesteads and villages also make it difficult for law enforcers to respond to calls. Going out to these areas costs a lot of money and is time consuming (Ralph et al., 1994). Moreover, rural areas are underdeveloped and lack infrastructure, which makes it difficult for law enforcers to respond to calls and investigate cases. Rural residents thus seem to be neglected by formal justice processes and thus tend to turn to alternative justice measures, which is a point that is underscored by the ADRT. Geographical isolation and the concurrent

lack of access to formal justice mechanisms are therefore reasons why rural residents turn to a traditional court rather than the police to seek restitution for a crime.

5.8.3. Lack of facilities:

Mbatha (2017) stated that due to being undeveloped and underpopulated, rural areas and its residents still faces many challenges in their neighbourhoods ranging from accessing a variety of extensive services, jobs availability, non-availability of resources or facilities, and leisure time amenities. She further elaborated that this results in many different issues such as levels of crime exhilarating out of control, and many individuals especially the young getting involve in chaotic or misdemeanour acts (Mbatha, 2017).

About the study, as mentioned in the chapters above, the Maphumulo Local Municipality consists of one SAPS police station and one magistrate's court which are both located in the town of Maphumulo which is an estimated 40, 48 kilometres from the residents of ward 11 Maphumulo *kwaNgcolosi* tribe, and it cost residents of *kwaNgcolosi* tribe an estimated transport fare of R40 return to get to the police station in the town of Maphumulo. Other facilities such as victim support centres, crime, or justice organisation and/or institution are absent in the area. This means that residents' rights to access justice, seek remedies and access measures to combat crime or deal with its effects are limited in rural areas of Maphumulo. Kariuki (2009) elaborated that due to the issue of large numbers of residents having limited access to justice; residents of poor rural areas and urban areas' informal settlements have reverted into relying on non-state or informal justice systems such as traditional courts to fill up the void and exercise their right in seeking remedies for injustices. What this means is that due to not having any facilities offering the services of the formal justice system available, rural residents turn to other alternatives measures to fill that gap and combat crime.

Participant 13: *We do not have much available around here, we just use what we have... Even if we report a case to the government's court, you will run out of transport money walking up and down attending endless court arguments that you do not even understand.*

To the researcher's surprise, about 10 of the 16 participants argued that even if the government do implement or develop facilities of accessing formal justice services (such as magistrates or civil courts) in rural areas, majority of residents will still report most of their cases to traditional courts. They argued for the reason being having limited understandings of the formal justice system, the usage of English language in the formal courts and the procedures followed by

these courts. This was argued also by Tshehla (2005), when he argued that the system of formal justice consists of technical procedures that are very complex, complicated and consume lots of time, money and resources; and therefore, resulting to the poor and needy individuals such as rural residents being deprived access to justice as they cannot afford or even understand it.

5.8.3.1. Lack of education and further training facilities

Fraser (2011) argues that education level and sound financial prospects are lower in rural than in urban areas in all nations. Few facilities for education and training are offered or available in rural areas while they are readily available in urban areas, which usually means that rural residents need to migrate to urban areas to access such services. Limited education and skills development facilities are the main reasons why rural areas experience challenges such as limited jobs opportunities, poverty, and increased crime rates (Mbatha, 2017). This is problematic because employment and self-employment opportunities are limited in rural areas which increases the levels of poverty and crime. In most countries, formal education levels in rural areas remain low and are mostly limited to primary school qualifications. The group that is most affected by these limitations is women who obtain minimal levels of formal education and are exposed to fewer opportunities for employment or professional training compared to their male counterparts (Headbeater et al., 2008).

Based on the above, it may be concluded that lack of job opportunities and poverty make it difficult for rural residents to gain access to various facilities or services that are more readily available in cities. One such facility is the formal justice system (police stations and formal courts) as poor rural residents can hardly afford to travel the distances that separate rural homesteads and towns. It therefore seems inevitable that rural residents will approach traditional courts that are more readily available to them.

5.8.2. The language of the formal justice system and its procedures as a barrier to accessing justice.

It may be argued that the prevalence of high illiteracy rates and low levels of education in rural areas compel rural residents to turn to the traditional justice system for legal aid. Rural areas have few schools and those that are found there are often many kilometres from the homes of most residents. Many learners also drop out of school at an early age for various reasons such as limited learning resources, poverty, domestic problems, and long distances (Mbatha, 2017).

Participant 3 responded:

"Mntanani asifundanga thina, manje yonke lemgudugudu eyenziwa amaphoyisa nohulumeni mawubike icala iyasidida thina, sigcine sesivaleleka ngaphandle ngenxa yokungaqondi abakwenzayo, angisayiphathi ke eyokungalizwa kahle ilimi lwesilungu, sidideka siphele".

(My child, we are not educated, so all these procedures followed by the police and the state when you report a crime confuse us and we end up being left out because we do not understand what they are doing, not to mention our limited understanding of the English language. We just get more confused)

Participant 4: *Most of the older people in this area, especially the women, are illiterate. The youth do go to school but most of us did not finish school mostly because of family issues. So, my sister, I think you also see that going to courts that will confuse us with fancy English words is a waste of time and an embarrassment to us.*

According to Oyieke (2012: 60), "The predominant use of English in the formal justice system creates a barrier as many illiterate rural people cannot speak or understand this language". Furthermore, translators are used but are not readily available and when an indigenous language is used in a formal court, English translations and transcriptions are often flawed (Oyieke, 2012). This can be argued to be problematic as justice should be fair, uniform, and accessible to every citizen. No person should be misunderstood or excluded from our courts because the legal system is unaffordable (Sithole, 2008). One may argue that all these factors are evidence of flaws within the current justice system and that they need to be addressed. If not, most residents in rural areas will continue to turn to traditional courts because these courts follow procedures and use a language that are simple and familiar to every participant, even those who are illiterate (South African Law Commission, 1999). This means that traditional courts are accommodative and less likely to exclude certain individuals based on their status or level of education.

Various studies (Oomen, 2005; Tshehla, (2005); and Hlubi, 2013) agree that most rural residents prefer the traditional justice system and avoid the formal justice system for reasons as discussed above. They also argue that the traditional court system recognises everyone's right to tradition, language, culture and beliefs. Hlubi (2013) argues that, unlike the formal justice system, the traditional justice system is associated with minimal intimidation as individuals are regarded as equals in terms of status. Such courts also allow members of the public to take part and have a voice during court proceedings and this enhances the administration of justice. Therefore, even though the traditional justice system is flawed in

certain respects, it is user friendly because it accommodates everyone concerned, regardless of their status, level of education, or class.

According to the broken window theory, the absence of the police and other formal crime control mechanisms in rural areas should encourage the escalation of crime and, when crime is allowed to run rife, residents in those areas will live in fear of being victimised and they will be too scared to live their lives outside their residential homes (Sampson et al., 1997). However, the presence of community leaders and traditional courts in these areas prevents this from happening.

5.9. The Impact of a lack of formal justice system structures on Rural Residents.

Aiyer et al. (2014) argue that, in communities where social control is weak, an environment is created that generates criminal behaviour which escalates into more serious forms of social disorder. This view is elucidated by the social sodality and the broken window theories that argue that criminals will run amok if social bonds are weak and when small misdemeanours are not rooted out.

Participant 9: *Have you ever heard of hell on earth, my child? That is what we [rural residents] will get if traditional courts are no longer working in our areas. We will live in fear as criminals will be working freely day and night, knowing that the police are far and difficult for us to reach.*

Participant 13: *...if our court stops dealing with bad behaviour in our community, this area will be like Sodom and Gomora ...it will be a war zone.*

According to the respondents, traditional institutions not only guided the community, but also played multiple roles such standing in for the police and maintaining social control and order. This view is supported by the ADRT. Through the functioning of a traditional court, traditional leaders impose punishments, deliver justice, solve issues, reconcile people, and ensure peace in rural areas. Previous research has established that criminal activities, when unchecked, create violent environments where residents' humanity is compromised. Harmony then becomes disorder that breaks down social bonds (Igwe, 2017). The social sodality theory argues that, in such a society, combating crime is difficult. The most disturbing effect of unchecked criminal activities, according to the broken window theory, is that crime will escalate because opportunistic criminals will emerge. This is referred to as a mob mentality which occurs when

humans adapt to a certain pattern of behaviour or follow a trend due to a particular form of influence. These negative effects will occur among traditional communities if there is neither a formal nor a traditional justice system to curb crime (Lotz, 2017). This therefore means, because formal justice system services are minimal in rural areas, the gap can only be bridged by a traditional court that helps to minimise the effects of crime.

Bazemore and Umbreit (2004) agree with the above view as they argue that uncurbed neighbourhood crime increases social disorganisation and diminishes trust, produces fear, and gives rise to the social isolation of fearful residents. This also creates opportunities for escalating criminal acts and misdemeanours. This view is supported by the broken window theory that stipulates that the perpetuation of misdemeanours in areas with a minimal form of control or preventative measures to combat crime will cause crime to escalate. When this happens, fear and victimisation lead to a lack of trust in the government as residents perceive that the government and its formal laws fail to protect them from harm (Aiyer et al., 2014).

5.10. General Challenges faced by the traditional justice system.

Question 13 asked the respondents to give their thoughts on whether there is anything that the government can do to better improve the functioning of traditional courts. On analysing the responses, the subtheme emerged of issues faced by traditional institutions in rural areas emerged. Anyawu (2005) argued that since the beginning of academic writings about traditional institutions in the 1980s during the era of apartheid in South Africa, most academic writers had been intending to dismiss traditional institutions especially chieftaincies. The dismissal is based on traditional institution's structures being viewed as incompetent, corrupt and undemocratic. Mzala (1998) argued that the South African current constitution further perpetuates the issue as in Section 212 subsection (2) paragraph (a), it states that establishing Houses of traditional leaders may be provided for by the provincial legislations. She further argued that the usage of the term 'may' reveals doubts about the provision of Houses of Chiefs, whose role is to advise legislatures on issues relating to culture, tradition, and customary law. Ntshebenza (2004) further stated that the constitution had imposed more powers to the democratically elected individuals than to traditional leaders and deprived them any authority of initiation at both the levels of National and Provincial spheres. This means that many people, especially those residing in outcast areas, are marginalised, and excluded from development, resulting in an atmosphere of not participating and enjoying the democracy (Anyawu, 2005).

5.10.1. Democratic elected leaders and traditional institutions.

According to previous studies conducted on traditional institutions as of Cele (2011) had revealed that traditional leaders throughout South Africa, especially in KwaZulu-Natal, have made an expression that their powers seem to have been abolished through the implementation of the municipal structures which were implemented by the 1995 elections of the local government (Hlubi, 2013). This means that powers traditional authorities used to possess before the democratic era in South Africa had diminished or weakening and that can be argued to be due to the application of local democratic leaders which are local government councillors.

Most respondents (12/16) proposed that in most nearby areas, clashes had taken place between the local municipality councillors and traditional authorities especially *inkosi* (the chief). That is because most local councillors and some residents believe that traditional institutions are no longer relevant, in charge, or playing any role in rural areas. The respondents also highlighted their blessing for Mr… their *induna* (chiefs' herdsman) being also their democratic elected ward councillor. However, they raised their concern about the past and the future where Mr … was or will no longer be their local councillor.

Participant 11: *God and our forefathers are still with us, or else Mr … our induna would not have been elected to be our local municipality councillor. But no one knows what will happen in the future regarding the peace of KwaNgcolosi.*

The researcher found that the respondents' concern derived from the conflicts they witnessed taking place in the past and within near-by areas between the democratically elected local councillors and traditional leaders. Apparently as stated by the respondents, the conflict is about the competition of power, and such competitions between traditional leaders and local councillors are based on questions such as who should lead the community?; Whose voice should be heard?; Who should subordinate to the other; who should be in charge and rule in most decision making? The participants furtherly elaborated that such competition results in communities breaking down as some residents support the ruling of traditional authorities while others support the ruling of democratically elected leaders such as local councillors. One may argue that most rural residents in most rural communities including ones of the *KwaNgcolosi* tribe (especially from the older generation) support the ruling of traditional leaders as they regard them as their natural elected leaders and their voice. While the remaining minority (especially the youth) supports the newly democratically elected leaders, as they

regard traditional institutions as being outdated. To restore and maintain peace and unity in traditional communities, most participants recommended that the government should protect and cater for roles that local government institutions should play in rural communities as well as specify the roles that should be played by traditional institutions. That will minimise the conflict between these leading institutions and maintain peace and sodality in rural communities. The participants furtherly suggested that the government can furtherly provide roles that both these institutions can play jointly for the uplifting of their rural communities. It can be argued that based on the views and opinion of the study participants, the alternative mechanism of traditional courts seems to be the form of justice that rural mostly rely on.

5.11. Conclusion

In this chapter, the empirical data were presented, discussed, and analysed using the thematic analysis approach. The main topics that emerged from the data were coded and presented as themes that elucidated a comprehensive picture of the participants' perceptions about the functioning of the traditional court that combated crime in the area where they lived. Various forms of crime such as livestock theft, assault, burglary, and domestic violence occurred in the area under study and were mostly reported to and dealt with by the traditional court. Factors that drove these rural residents to report acts of crime to the traditional court rather than to the police included poverty, lack of facilities and infrastructure, and the remoteness and inaccessibility of the geographical location of the area. Additionally, for most residents in the area, the traditional justice system was the only form of justice they understood and could relate to from socio-cultural, economic, and legal perspectives. For them, the traditional court was available, trustworthy, and reliable. Not only did they perceive that this court served justice, but they also felt that it was a 'community policing forum' that prevented crime because of its existence and functioning. When asked what the government could do to improve the functioning of such courts, most respondents suggested that traditional courts should not only be granted more extensive judicial powers but that leaders who preside over these courts should be paid for providing justice to those who are impoverished and marginalised from accessing formal justice structures such as the police and magistrate courts.

CHAPTER SIX: *CONCLUSION AND RECOMMENDATIONS*

6.1. Introduction

This study was conducted to explore the roles played by the traditional court system in combating crime in a selected rural area. Its main aim was to discover the effectiveness of this traditional court in managing rural crime. The data were obtained from members of the *KwaNgcolosi* tribe residing in the Maphumulo area near Stanger.

To achieve this its aim, the study was obliged to meet the following main objectives:

- Investigate the customary laws applied by a traditional court to prosecute the perpetrators of crime;
- Identify the types of crimes dealt with by a traditional court;
- Explore the procedures followed by a traditional court to control crime;
- Determine whether the procedures followed by a traditional court are in line with the South African Constitution; and to
- Ascertain the effectiveness of the roles of a traditional court in combating crime among the members of the *KwaNgcolosi* tribe in the Maphumulo area.

6.2. The Traditional Court as the Only Available Justice System in the Rural Area

According to previous studies such as of Rautenbach (2014), many criticisms and concerns have been raised about traditional authorities and, more specifically, traditional courts. Criticisms have ranged from the outdatedness of these institutions to their unconstitutionality and irrelevance in a democratic dispensation. Data that were collected by means of question 16 of the interview guideline aimed to elicit participants' opinions regarding criticisms levelled at the traditional court system. In general, the participants argued against the formal justice system as they perceived it to be distant, inaccessible, and costly. Instead, they argued that the traditional court is accessible and affordable. They also stated that, if the traditional court had not been available, many problems would have escalated out of hand. Participant 1 stated that, if traditional courts were abolished, rural residents would have nowhere to report criminal acts or resolve conflict. They were concerned that the SAPS and formal courts were "mountains away" from them and that their inaccessibility left them with no recourse when legal matters had to be resolved. She also stated it would be "hell on earth" for rural residents if traditional leadership were abolished in South Africa. According to her, criminals would have a free hand as they would have no fear of the police who were effectively dysfunctional in the area. She

concluded that the traditional court was the rural version of a police service and court as the members resolved issues, reconciled people, and ensured peace in the area.

It was clearly established that these rural residents did not only lack trust in the formal justice system of South Africa, but they also doubted its efficacy for rural communities. During the interviews, all the participants referred to the traditional court as *inkundla yethu* (our court), whereas they used the term *inkundla yahulumeni* (the government's court) when referring to statutory courts. They argued that statutory courts did not address all cases arising in their rural area such as infidelity, refusal to pay child maintenance, domestic violence, and land disputes. The agreed that all matters related to disturbing the peace in their community were dealt with by their tribal court and not by the SAPS.

Participant 13 stated that, without traditional leaders and their indigenous courts, their area would be like "Sodom and Gomora" and would resemble a "war zone". She thus viewed the traditional court not only as the peacemaker of the area, but also as their parliament that established order and dealt with anything and everything that threatened to disrupt the proper functioning of their society. These and other comments suggested that the traditional court not only bonded people together, but that it was also a control measure that was readily available to rural residents. These findings resonate with those of Tshehla (2005).

According to the broken window theory, the absence of control measures to combat crime will lead to an escalation in criminal activities. This will create fear of victimisation among community members and many will be too scared to venture outside their homesteads. It will also diminish trust not only in one another, but also in the government and the formal justice system. Previous research has established that criminal activities create room for violence and this, in turn, diminishes humanity and harmony (Alyer et al., 2014). A very disturbing effect caused by the absence of an efficient guardian system, as posited by the broken window theory, is that minor offences will escalate into more serious criminal tendencies because opportunistic criminals will emerge and become increasingly emboldened. This is referred to as 'a mob mentality' as criminals will operate with impunity in an environment where their activities go unchecked and unpunished.

6.3. Language and Procedural Barriers in the Formal Justice System

The predominant use of the English language in formal courts creates a barrier for rural individuals who are illiterate or who do not understand this language (South African Law

Commission, 1999). Although interpreters are employed by the courts, some legal jargon and complex legal proceedings are difficult to translate appropriately from English into indigenous languages. This often causes confusion and excludes those who do not understand English or who are unfamiliar with the formal legal system. Moreover, translations often distort meaning or deviate from original meanings without intentionally meaning to do so. Thus, after translation, the information may deviate from the initial intention and this impedes individuals' right to a fair and equal trial as stipulated by the Constitution (Hlubi, 2013). It therefore was not surprising that some individuals of the *KwaNgcolosi* tribe preferred to use the traditional justice system as the only means of accessing justice. For the participants, this system was accessible as they were not required to use any legal jargon or complex terms. Instead, they were addressed in and could use their indigenous language in terms that were understood by everyone, including ordinary residents and the illiterate.

The participants argued that the procedures followed by the formal justice system were too complex and challenging and confused ordinary citizens, particularly those who were illiterate. According to the South African Law Commission (1999), lawyers use fancy legal terms and jargon during court proceedings to impress the judge or magistrate and this intimidates rural victims and witnesses. Most of the participants admitted that they feared legal representatives and one participant in particular noted that lawyers tended to make a mockery of witnesses and even of a victim when trying to make a point or cause confusion. This may be regarded as secondary victimisation. In this context, the gap between witnesses with a low level of education and economic status and the legal representative of an accused seems too wide, and most rural residents feel intimidated by formal courts and those who preside over the proceedings. It is therefore not surprising that the poor and marginalised turn to alternatives to seek justice. Traditional courts are deemed less intimidating because they are presided over by individuals from the same community who can relate to the traditions and customs that are upheld by such a court.

Most participants admitted that they were not against reporting a case to the SAPS (the formal justice system) or submitting to any procedures of this system, but some aspects created challenges that they as rural residents found difficult to deal with. One problem was dealing with a legal representative when a case was heard in a formal court. The participants argued that cases in the formal justice system were dragged out too long and were costly, particularly for the victim. Some participants were aware that the state provided free legal representatives

whenever needed, but most were not convinced that reporting cases to the formal justice system was beneficial. They were particularly concerned about the distances that rural people had to travel to courts or police stations as they argued that free transportation or funds for transport were simply not available.

In light of the above, it was clear that poverty and unemployment widened the gap between the formal justice system and rural residents as the latter were evidently unable to meet the financial demands of the former. It is a known fact that the state offers free legal assistance only in criminal cases, and this creates severe challenges for those who wish to file a costly civil case such as child maintenance or a land dispute. Individuals who are poor are therefore deprived of the right to seek access to the courts to claim their civil rights, and it is therefore not surprising that rural residents turn to traditional courts when they seek restitution. Three participants proposed that the state should provide free legal assistance even in civil cases to make formal civil courts accessible to everyone, including low- and middle-class people who are barred from legal support due to high costs.

Based on the above arguments, it is evident that the formal justice system, in particular the police and formal courts, create barriers for rural people as they use English and thus marginalise indigenous languages during their procedures regardless of the use of translators. It was therefore not surprising that the rural participants viewed the formal justice system as alien to them. Illiteracy and low education levels seem to enhance this alienation as they create barriers for rural individuals who wish to access justice. Moreover, the participants argued that rural individuals were not only excluded from the formal justice system because of language and complex procedures, but that their right to an equal and fair trial was violated. For this reason, the participants admitted that they rather turned to their tribal court for restitution as here they could use their indigenous language and understand the procedures in the company of people who were familiar to them. They thus perceived the traditional court as user friendly and inclusive in terms of gender, economic status, and level of education.

6.4. Limited Access for Rural People to the Formal Justice System

The data revealed that the traditional community under study relied heavily on their tribal court to deal with misdemeanours and crime. In this context, it may be argued that this community replaced organisations that are supportive of the formal justice system such as the police, victim counsellors, POWA (People Opposing Women Abuse), social workers, and psychologists with

a tribal system that functioned effectively and addressed their needs. Traumatised community members were thus assisted by people in the community to overcome any adversity. However, it is also true that residents and particularly victims of crime who rely exclusively on the traditional court deny themselves access to professional services such as trauma counselling. It may also be argued that rural victims of incidences such as domestic violence, child abuse or assault do not receive psychological assistance to help them recover from the trauma or stress due to the crime they experienced, and they might thus not be able to escape abusive environments which may lead to post-traumatic stress disorder (PTSD), social withdrawal, depression, and even suicide or murder.

Another argument is that the Traditional Court Bill (B1-2017) and related legislations forbid traditional courts from presiding over certain cases such dissolving marriages or imposing child maintenance. The laws of the country clearly stipulate that such cases can only be dealt with by formal civil courts. The problem is that rural residents do not only have limited access to these courts, but they also face challenges such as the inability to afford legal fees or understanding the language and procedures of these courts. This means that a victim of domestic violence may be trapped in an abusive relationship with no form of escape which may lead to long-term effects such as suicide or depression. In some instances, abused spouses may by killed by their abusive partners, or vice versa, and this may create a cycle of violence if the abuse is witnessed by the children.

When the participants were questioned about the effects of trauma on individuals and the community, most argued that residents had strong social bonds and traditional institutions that promoted the welfare of individuals encourage residents to look out for one another. Participant 14, for instance, argued that victims readily spoke out and sought help or talked to someone about their traumatic experiences instead of suffering alone and in silence. He further elaborated that witnesses were usually keen to speak on behalf of the victim. It was therefore clear that the people in this community cared for one another and that they were less concerned about what they did not have. Instead, they worked collaboratively to find the means to fulfil gaps and address deficiencies, regardless whether these means were professional or not.

6.5. The Constitution, Democracy, and Traditional Institutions

The Constitution of the Republic of South Africa (1996) recognises the value of culture, customs, and traditional leaders. However, it does not address the functions and roles of

traditional institutions per se. Earlier researchers as of Oomen (2005), Ndlela (2012), and Hlubi (2013) have argued that traditional institutions and indigenous structures play a significant role in society for millions of rural residents across the country, particularly in terms of their role in the legal sphere of the lives of rural communities. Therefore, regardless of numerous critics raised against this form of institution, traditional institutions continue to function in the best interests of the communities they serve. Such institutions include traditional courts that continue to enforce traditional laws and distribute justice in rural communities. Efforts have been made to formalise the role of traditional leaders and laws through for example the Black Administration Act, the Traditional Leadership and Governance Framework Act, and the Traditional Court Bill that all acknowledge the value of traditional governance. According to these legal frameworks, traditional courts have legislative powers in both criminal and civil matters, depending on the case. However, regardless of the importance of these Acts and policies that provide legitimate powers to different traditional structures, endless questions, and critiques about the legitimacy of traditional institutions persist in light of the democratic values that the Constitution as the supreme law of the land entrenches. That creates a plethora of challenges, especially to those who rely on the services of traditional institutions. It can therefore be argued that relevant Laws and Acts should be amended and redefined to address any questions or critics raised regarding traditional institutions. This means the RSA constitution itself does not need to be amended in this regard because it does recognise the system of traditional leadership. It is then up to the relevant Laws and Acts to address this recognition in finer detail.

Furthermore, it may be argued that that plethora of challenges that needs to be addressed by relevant Laws include clashes between traditional institutions and certain spheres of government, especially at the local municipal level. That is because the powers of traditional and formal structures are not clearly separated by the Constitution or the legal frameworks flowing from it. Therefore, the power struggle between traditional leaders and democratically elected leaders is an ongoing dilemma in rural communities. These clashes often erupt in violence and cause the violation of the constitutional rights and freedom of communities. One sphere that is often negatively affected is justice for residents who rely on the services of traditional institutions.

In light of the above, it is noteworthy that Tshehla (2005) and Ndlela (2012) argue that, irrespective of the criticisms levelled at and the questions raised about traditional leaders and

the forums they represent, it is unlikely that the South African government will successfully implement democracy and the benefits of constitutional rights without the assistance of traditional leaders. They acknowledge the invaluable role these leaders play in rural communities and argue that one can never turn a blind eye to the value of traditional institutions, particularly as they bridge the gap between citizens and the government in rural areas. One important role that they play is to ensure that citizens in rural areas are granted their rights, whether by constitutional or traditional means. One right that rural citizens are deprived of due to circumstances is the right to an equal and fair justice system. As they are often unable to access the formal justice system for reasons discussed earlier, it seems only just that traditional courts offer this service. These courts not only allow rural residents to seek legal remedies, but also to exercise their rights in a manner that is easily available, accessible, cheaper, comprehensive, and quicker than the formal justice system. Moreover, it is available to all residents irrespective of their age, gender, education, background, and social status. Therefore, if the government proposes to diminish the powers or deny the existence of traditional institutions due to criticisms about them, it needs to consider how it will bridge the gap between itself and rural residents and how it will deliver certain deprived communities of the right to access justice.

6.6. Recommendations

In the attempt to meet the aim of the study and answer all the key research questions, the interviews were unstructured, and the participants could express themselves as freely as they wished. Requesting recommendations from participants, the researcher included question 13 in the interview schedule which asked if there was anything the participants thought the government should do to improve the functioning of traditional institutions. The information elicited from this question was analysed together with the data that were collected from responses to question 16, which asked the participants whether there was anything that they wished to add that they thought would be resourceful to the study. The information that was elicited based on these questions assisted the researcher to formulate recommendations that are discussed in the following sections.

6.6.1. Separation of powers between traditional institutions and local municipality councillors

A surprising finding was that, despite the low level of education of most residents in the area under study, the respondents were knowledgeable of the provisions in the Constitution

pertaining to traditional institutions and leadership. More specifically, they raised the issue of the constitution lacking what is regarded as *non-separation of powers* between traditional institutions and the democratically elected leaders. Most of the respondents (13/16) suggested that the democratic election of local councillors denied traditional leaders and their structures their rightful place in society. They also felt that these leaders were no longer given the recognition and respect they deserved and that the work they did in their rural communities was marginalised. The respondents highlighted their respect for their Induna, who was also their democratically elected local councillor. However, they raised concern about the prospect of future clashes that might arise between traditional authorities and a local municipal councillor who might replace the Induna after a next election. The participants therefore suggested that the government should clarify the roles that local government should play in their community and specify those that traditional institutions should fulfil. A positive suggestion was that the government should acknowledge and formalise the collaborative role of municipal and traditional structures for the upliftment of rural communities. This recommendation arguably calls for the amendment of relevant Acts to be revised and refined. That is because as mentioned above, by the constitution giving recognition to the existence of traditional authorities, it leaves the door wide open for relevant Acts to define the position, functioning and roles. The Constitution, therefore, does not need amendment, but rather relevant ministers and ministerial advisors need to act on this regard and amend relevant Acts and most importantly address the critics raised against those acts.

6.6.2. Free legal services for criminal and civil matters

It may be argued that all citizens' right to justice is unlikely to be achieved if certain cases are unaffordable for some victims of crime. Most of the participants stated that they preferred a tribal court because of its affordability. Legal representation in formal courts is notoriously expensive and unaffordable for many as lawyers have to be paid by the parties themselves. Free legal representation (from the Legal Aid scheme) is only available in criminal cases and not in civil cases. The respondents argued that legal fees were expensive and rural residents were unable to afford lawyers or even contact one to seek restitution in civil matters. One participant stated that if a person was poor, he or she had to suffer in silence and was denied the opportunity to file a case in court. Conversely, it was stated that tribal courts did not require any legal representation or fees, whether it was a civil or criminal case. This means that the plaintiff and defendant represent themselves in either of the cases, and the outcome of each

case depends on the evidence presented. Therefore, according to the participants, the government needs to provide free assistance to those who cannot afford legal services for formal civil courts as is the case when accessing their traditional court.

6.6.3. Workshops and training for citizens who preside over tribal courts

The main critique that has been raised against the traditional justice system is that most of its proceedings, laws and sanctions are not in line with the Constitution (Sithole, 2008). This means that the traditional justice system as a whole is often deemed unconstitutional and should therefore not be granted any judicial powers. However, the data of this study confirmed that many rural residents rely on these courts as their only source of justice, and therefore the government should offer workshops and train people who preside over traditional courts. Appropriately prepared workshops that offer a relevant curriculum will assist in educating traditional authorities on the role they should play in their areas of jurisdiction. This means that their judicial powers should be clarified, and they should be familiarised with the provisions of and barriers presented by the Traditional Court Bill (B1-2017). They can also be trained to deal with the cases referred to them that are sanctioned by this Bill in a legally acceptable manner. This will ensure that these courts operate in line with the Constitution and that they do not contravene any law of the country. The researcher strongly argues that calls to abolish these courts because of certain flaws should not be heeded as this will cause more harm than good because marginalised communities that rely on these courts will no longer have ready access to justice. The government should therefore either improve the functioning of these courts or offer a better alternative if these courts are no longer allowed to function.

6.6.4. Regular monitoring by local government officials

To ensure the effective functioning of tribal courts, their proceedings should be monitored by officials of local governments. Rautenbach (2014) argues that the Black Administration Act No. 38 of 1927 should be heeded. One of the conditions of this Act is that traditional leaders should be recognised by the state. This means that such people must be officially authorised by the Minister to serve as presiding officers over civil matters. The researcher therefore proposes that the state should avoid passing laws that regulate traditional courts without monitoring how these provisions are exercised or how the presiding leaders deal with the cases they are authorised to hear. To ensure the effective functioning of these courts, local government officials or appointed government department officials (e.g., officials of the Department of Cognitive Governance and Traditional Affairs) should conduct regular visits to

monitor the proceedings of traditional courts in terms of both civil and criminal cases. This will ensure that traditional authorities do not abuse their powers and that these courts will function in line with the Constitution. All rural residents will then be assured of receiving a fair trial that is overseen by recognised and authorised tribal leaders. No leader will then preside over a case without having received recognition by a relevant minister.

The researcher also recommends that local government or other officials conduct independent studies about traditional courts on an annual basis to elicit the views and opinions and hear about the personal experiences of residents regarding the traditional justice system in rural areas. This will ensure that residents will be able to voice their opinions, concerns and requests about the justice system they require.

6.6.5. Resolve the detachment between rural residents and structures of the formal justice system

Tshehla (2005) interviewed SAPS members of the Seshogo police station who were responsible for this rural area. These SAPS members suggested that fighting crime in rural areas was more effective than in cities because rural areas had traditional leaders who worked together with the SAPS to manage crime. Moreover, traditional courts assisted by dealing with minor crimes and referring serious cases to the SAPS. The current researcher supports this view and recommends that the SAPS and traditional courts collaborate in rural areas because, when traditional courts resolve minor crimes such minor assault or family conflict, their interventions prevent the escalation of crime. Serious crimes such as assault with the intent of doing grievous bodily harm, murder, gender-based violence and endless feuds between groups will then be curbed. As suggested by the broken window theory, if you leave one broken window unfixed, more windows will be broken. Therefore, if the SAPS and traditional leaders collaborate and take care of the little problems, bigger problems will be prevented.

The SAPS should also be more visible in rural areas by conducting regular patrols and searches, especially in potentially high crime zones where shebeens or taverns are located. One may argue that the visibility of police officials will not only reduce criminal activities and make residents feel more comfortable and trusting in the SAPS, but it will also provide residents with opportunities to report ongoing criminal activities in their area such as domestic violence or illegal traditional practices. The researcher proposes that, if rural residents cannot access the services of the formal justice system due to their geographical isolated or impoverishment, then

such help should come to them. Every person is entitled to the right to access justice and no one should be denied this right, regardless of their economic status or geographical location.

Another measure that the government may use to bridge the gap between rural residents and the formal justice system is to facilitate workshops on the formal justice system. The researcher found that most rural residents were not knowledgeable enough about structures in the formal justice system and they therefore avoided resorting to them. Some participants raised concerns regarding the unaffordability of the services of formal courts and many (11/16) were unaware that lawyers were accessible free of charge through the Legal Aid system in criminal cases. Thus, the unwillingness of rural residents to turn to formal courts was because they lacked knowledge of this system and their rights to access it. Workshops should therefore be conducted in rural areas to educate residents about their rights which will narrow the gap between rural residents and the formal justice system.

6.7. The Future of Traditional Institutions in South Africa

Teffo (2002) argues that, for South Africa to regain and maintain a functional society with better forms of social control, its future depends on the promotion and recognition of the cultural diversity of its citizens. He further elaborates that the current formal justice system is not a one-size-fit-all kind of justice as many aspects such as the complex procedures that are followed, the language used, the distances that have to be travelled, and the costs involved result in the exclusion or marginalisation of certain individuals from services offered by the formal justice system (Teffo, 2002). This means that many rural residents are automatically deprived of their right to access the services of statutory courts. The South African government is therefore obliged to acknowledge and formalise existing alternative measures that are used by marginalised communities to access the services of statutory courts and to exercise their right to seek justice (Teffo, 2002). This means that the norms, values, traditions, and cultural diversity of the people of South Africa play a significant role in forging a sense of solidarity within communities that enables them to maintain peace and control criminal behaviour before it escalates into serious crime. This diversity needs to be recognised and harnessed by the traditional justice system for the benefit of marginalised communities.

Hlubi (2013) elaborates that democracy is the right of every South African citizen as it is entrenched in the Constitution. Thus, the right to a fair and equitable justice system needs to be enjoyed by every citizen, including rural residents. However, the government needs to be

extra vigilant in how it delivers democracy to rural residents. It is inarguable that traditional institutions cannot offer rural residents everything they desire, but they can serve as means to bridge the gap between themselves and the government (Anyawu, 2005). If there is close collaboration and trust between rural communities and government officials, plans can be devised for effective development and service delivery (Anyawu, 2005). Furthermore, previously conducted studies as of Tshehla (2005), Ndlela (2012) and Hlubi (2013) argued that traditional institutions and their courts may have flaws, but that their impact on society, particularly on rural communities, is more positives than negative. He thus states that these institutions should be brought effortlessly in line with the Constitution and relevant laws to eliminate all criticism against them and to enable rural residents to have a fair share of justice.

It is undeniable that, since the advent of democracy in South Africa, the functioning of traditional institutions has been subjected to many questions and concerns (Tshehla, 2005). Criticisms levelled at these institutions are mostly based on arguments that leadership in rural communities is inherited and not elected, that females and youths are deprived of fair representation and equal participation in traditional courts, and that some practices and sanctions imposed by traditional courts are unconstitutional. However, it can be argued that if the state is willing to incorporate the traditional justice system as a legitimate part of the South African legal framework in order to bridge the gap for those who are denied access to statutory courts, it needs to devise measures that will address the flaws in the functioning of traditional courts and traditional governance institutions (Teffo, 2002). Such measures should include regular monitoring of the tribal court proceedings by the government, and regular free training workshops for traditional authorities who head the proceedings of these courts. This will ensure that all flaws are detected and addressed and that this form of the justice system is brought in line with the Constitution. This will be fair to everyone.

6.8. Conclusions

- Regardless of the fact that South Africa has been a democratic country for more than two decades, there are still many citizens in the country whose right to justice is minimal or violated. This is because rural residents in particular have limited access to the services of the formal justice system for reasons such their isolated locations and the long distances they have to travel to towns and cities. It is therefore argued that these residents are denied the right to seek justice as stipulated in the Constitution.

- Due to the deprivation referred to above, many South Africans in rural areas have been compelled to turn to the traditional leadership system to exercise their right to justice.
- However, the tribal court system has been subjected to many criticisms regardless of efforts to formalise it, such as the Traditional Court Bill and the recognition and protection of this institution by the Constitution. A particular criticism is that tribal courts do not adhere to democratic principles and requirements, particularly in terms of the equal rights of women.
- Moreover, the recently passed Traditional Court Bill (B1-2017) has been criticised by scholars for many reasons. Some reasons are that it is not compliant with the Constitution, that it proposes two sets of separate legal systems − one for rural dwellers and the other for the rest of South African citizens − and that the drafting of the Bill was done without proper consultation with the public who are the most affected members of society.

In conclusion, if the government is eager to bring the traditional justice system on a par with the laws of the formal justice system, it should amend related laws and Acts. In this case, the amendment of the constitution to include exact roles and functions of traditional authority is unnecessary. That is because, it can be argued that it is not the role of the Constitution to define the details of the law, the fact that it recognises traditional systems seems to be sufficient. Therefore, relevant Legislations and Acts should then address this recognition in finer detail. This includes addressing critics such as the traditional justice system being argued to create a separate kind of justice or a different form of law which contradicts the Constitution. This means regulations and procedures that guide the roles of traditional institutions need to be clearly defined in line with the democratic principles that the country adheres to. This proposal assumes that the simple passing of governing legislations, Acts, and the Traditional Court Bill by the government to guide traditional legal courts has not been adequate. Therefore, an amendment of those laws and Acts regarding this form of justice will ensure that it is placed on a par with the constitution which is the supreme law of the land.

In closing, the researcher would like to stipulate that as mentioned during the study, she supports the argument of the Organic Democratic school of thought that does not oppose the modification of traditional leadership institutions to fit into the South African democracy. Rather, they are contesting the main idea of traditional leadership institutions being viewed as fundamentally undemocratic.

REFERENCES

Aiyer. S.M., Marc A., Zimmerman. M.A., Samuels. S.M, & Reischal, T.M., (2014). From Broken Windows to Busy Streets: A Community Empowerment Perspective. *Sage Journals,* 42(2). pg. 99.

Anyanwu, C.S. (2005). Is the African traditional institution (chieftaincy) compatible with contemporary democracy? A case study of Bochum in Limpopo Province of South Africa. *African Journal on Conflict Resolution*. 4(1).

Arrow, K., Mnookin. R., Ross. L., Tversky. A., & Wilson. R (1994). *Barriers to Conflict Resolution.* New York. W. W. Norton & Company Publishers. p. 200-351.

Ayres, I. Nalebuff, & Barry J. (1997). "Common Knowledge as a Barrier to Negotiation." *UCLA Law Review, 1997. California.* p. 145.

Ayuk, A.A., Owan, E.J., Abul. U.F. (2013). Traditional Methods of Crime Control and Community Security in Odukpani Local Government Area of Cross River State – Nigeria. *IOSR Journal Of Humanities And Social Science (IOSR-JHSS)* Volume 14, Issue 5. p. 61-66.

Bancroft, J. & Vukadinovic, Z. (2004). Sexual addiction, sexual compulsivity, sexual impulsivity, or what? Toward a theoretical model. *Journal of sex research*, 41(3), p.225- 234.

Beall, J. & Ngonyama, M. (2009). Indigenous institutions, traditional leaders, and elite coalitions for development: the case of Greater Durban, South Africa. *Interdisciplinary Journal for the Study of the Arts and Humanities in southern Africa.* 1, 15.

Bekker, J.C. (1993). *The Role of Chiefs in a Future South African Constitutional Dispensation, Africa Insight*, 23(4), p. 107.

Bennett, T.W. (1985). Application of Customary Law in Southern Africa: *The Conflict of Personal Laws*. Cape Town. Juta. p.39.

Bennett, T.W., (1999). *Human rights and African customary law under the South African Constitution.* Cape Town. Juta.

Bless, C., Higson-Smith, C. & Kagee, A. (2006). *Fundamentals of socials research methods: An African perspective*. Cape Town: Juta.

Boersig, J. (2005). 'Indigenous youth and the criminal justice system in Australia' in Elliott E and Gordon RM (eds), *New directives in restorative justice*. London: Willan Pub, 115-133.

Boyce, C. & Neale, P. (2006). *Conducting in-depth interviews: a guide for designing and conducting in-depth interviews for evaluation input*, 3-7. Watertown, MA: Pathfinder International.

Braun, V. & Clark, V. (2006). *Using thematic analysis in Psychology. Qualitative Research in Psychology*, 3(2), 77-101. ISSN 1478-08887. Available online http://eprints.uwe.k/11735. [Accessed 2019-07-24].

Bursik, R. J. (1986) 'Delinquency rates as sources of eco-logical change'. in J. M. Byrne and R. J. Sampson (Eds.). *The Social Ecology of Crime*. New York: Soibger Verig. p.63-76.

Cele, S. (2011). "The Role of Traditional Leaders in a Democratic South Africa" in *a Closer Look at the Relations between the Traditional Leaders and Local Government Councillors*: http://www.kwanaloga.gov.za/LinkClick.aspx/fileticket. [Accessed on 13 June 2018]

Chigwata, T. (2016). The role of traditional leaders in Zimbabwe: are they still relevant? *Law democracy & development.* Volume 20 (2016). Available from: http://dx.doi.org/10.4314/ldd.v20i1.4. [Accessed on 13 September 2018].

Chopra, T. & Isser, D. (2012). Access to Justice and Legal Pluralism in fragile states: The case for women's' rights: *Hague Journal on the Rule of Law* [1876-4045] (4). 55.

Cohen, L., Maunton, L., & Morrison, K. (2011). *Research methods in education* (7th ed.). London: Routledge Falmer.

Cowling, M. (2012). 'Another Kind of Justice. SA Media'. *The Witness.* 23 April 2012. Downloaded from https://pmbejd.org.za/index.php/pmb_ejd-in-the-media/. [Accessed on 30 July 2019].

Creswell, J. W. (2009). *Research Design: Qualitative, Quantitative and Mixed Methods Approaches*. London: Sage Publications. p.37

Crime statistics (2016). *Statistics 2015/2016*. Cape Town, South Africa: Peter-John Pearson. www.cplo.org.za. [Accessed 2019-07-24].

Daly, K. (2005). *A tale of two studies: restorative justice from a victim's perspective.* Elliott E and Gordon RM (eds), New directions in restorative justice. London: Willan Pub, 153-174.

DeKeseredy, W.S., Donnermeyer, J.F., & Schwartz, M.D. (2009). *Toward a gendered second*. Washington, DC: Pew Research Centre. p. 98.

Du Plessis, W. & Scheepers, T. E. (2000). Traditional Institutions. *Potchefstroom Electronic Law Journal*. 1, available from: http://www.puk.ac.za/lawper [Accessed 04 September 2018].

Elechi, O. O. (2004). *Human Rights and the African Indigenous Justice System*. Paper presented at the 18th International Conference of the International Society for the Reform of Criminal Law, Montreal, Canada, Quebec. p.8-12.

Final Mono All Stations Data (2017). Department of Police Media Statement SAPS- Crime Statistics. https://pmg.org.za/page/SAPSCrimeStats.2016/2017. Accessed on 14/06/2018.

Fraser, J. (2011). Rural Crime Prevention: A Literature Review. Crime Prevention. Ottawa. International Journal of Rural Criminology, Volume 2, Issue 2 (June), 2014. p. 2-8.

Goddard, W. & Melville, S. (2004). *Research methodology: An introduction*. Juta & Company Ltd. URL: http://dx.doi.org/10.5539/jel.v5n3p288. [Accessed on 2019/07/24].

Greenberg, M.T. (2007). The importance of the community context in the epidemiology of early adolescent substance use and delinquency in a rural sample. *American journal of community psychology*, 44(3-4), p.287-301.

Harper, E. (2011). *Engaging with customary justice systems. Customary justice: perspectives on legal empowerment.* International Law organization. *p. 29-42*.

Hlubi, P.F. (2013). *The role of the Centre for Community Justice and Development in indigenous governance of social justice in Impendle. KwaZulu-Natal* (Doctoral dissertation, University of KwaZulu-Natal, Durban).

Holomisa, P. (2004). Traditional justice instils respect for the rule of law. SA Media. *Business Day* - The University of the Free State. 06 Oct 2004. Downloaded from https://pmbejd.org.za/index.php/pmb_ejd-in-the-media/. [Accessed on 30 July 2019]

Houston, G.F., & Mbele, T. (2011). *KwaZulu-Natal History of Traditional Leadership Project: Human Sciences Research Council, Democracy and Governance. Final Report*. Cator Manor. Downloaded from: http://hdl.handle.net/20.500.11910/2855/. (Accessed on 3 October 2017).

Hugh, B.A. (2004). *Traditional leadership in South Africa: a critical evaluation of the constitutional recognition of customary law and traditional leadership*. Doctoral dissertation, University of the Western Cape.

Igwe, O.W., (2017). *A legal appraisal Of the Status of Vicarious Liability in Customary Criminal Law in Nigeria.* Port Harcourt, Nigeria. p8-36.

Kakalik, J. S. et. al (1996). *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act*. Santa Monica CA, Institute of Civil Justice. p. 85-87.

Kariuki, F. (2015). Conflict resolution by elders in Africa: Successes, challenges and opportunities. Alternative Dispute Resolution Journal, 3(2). Chartered Institute of Arbitrators. Kenya. pp.30-53.

Kelling, G.L., & Wilson, J.Q., (1982). *Broken Windows: The Atlantic. John Jay College of Criminal Justice.* Retrieved: http://www.petermoskos.com. [Accessed on 02 September 2019].

Keulder, C. (1998). Traditional leaders and local government in Africa: lessons for South Africa (Pretoria: Human Sciences Research Council 1998) at 201.

King, L.A. (2003). 'Measures and meanings: The use of qualitative data in social and personality psychology' in Sansone, C., Morf, C., & Panter A., *Handbook of Methods in Social Psychology*. New York. Sage Publication. p. 173-194,

Komter, A.E. (2005). *Social Solidarity and the Gift*. UK. Cambridge University Press. p.108.

Kumar, R. (2011). *Research methodology: A step-by-step guide for beginners* (3rd Ed.). London: Sage Publications.

KwaZulu-Natal Department of Community Safety and Liaison. (2010). *Rural Safety in KwaZulu-Natal*. Published by the KZN Department of Community Safety and Liaison, Pietermaritzburg.

KwaZulu-Natal Department of Community Safety and Liaison. (2012). *Rural Safety in KwaZulu-Natal*. Published by KwaZulu-Natal Department of Community Safety and Liaison, Pietermaritzburg.

Laleye, S, A. (2014). Punishment and Forgiveness in the Administration of Justice in Traditional African Thought: The Yoruba Example. *International Journal of Philosophy and in Theology December 2014*, Vol. 2, No. 4.

Lankshear, C. & Knobel, M. (2004). *A handbook for teacher research from design to implementation*. New York: Open University Press.

Maluleke, J. (2009). Ukuthwala: Let's protect our children. *Justice Today, Volume 5*. Department of Justice and Constitutional Development. p. 57.

Mbatha, N.P., (2017). *An Understanding on The Nature of Rural Crimes: A Case Study of Kwa-Maphumulo Estezi* (Doctoral dissertation, University of KwaZulu-Natal, Durban).

Melton, A. P. (1995). Indigenous justice systems and tribal society. *Judicature 126, Volume 79*. pp 126- 133.

Mkhize, S. M. (2010). *Effects of community violence on learners in a rural context*. Master's Thesis, Faculty of Humanities, Development and Social Science, University of KwaZulu-Natal.

Mnookin, R. (1998). *Alternative Dispute Resolution*. Harvard Law School John M. Olin Centre for Law, Economics and Business. Discussion Paper Series. Paper 232. Available from http://lsr.nellco.org/harvard_olin/232. Accessed on 10 /07/2019.

Mokgoro, Y. (1998). "The role and place of lay participation, customary and community courts in a restructured future judiciary", in *Reshaping the structures of justice for a democratic South Africa*. Pretoria. Association of Democratic Lawyers. p.

Mphatheni, M.R. (2016). *Community Perceptions of Child Sexual Assault: Case Study of Ngangelizwe Community in Mthatha*. Master's Thesis, Faculty of Humanities, Development and Social Science, University of KwaZulu-Natal, Durban.

Mthembu, P. (2012). *Masculinity and sexuality: investigating risky sexual behaviour amongst high school boys in Umlazi*. Master's Thesis, Faculty of Education, University of KwaZulu-Natal. Pietermaritzburg.

Muhammad, B.L. (2011). *Rural Crime and Rural Policing Practices (Multicultural Law Enforcement)*. An applied research project, Department of Interdisciplinary Technology, School of Police Staff and Command Programme. Detroit Police Department, Detroit.

Murithi, T., (2006). African approaches to building peace and social solidarity. *African Journal on Conflict Resolution,* 6(2), p.9-33.

Naude, B. (2006). An international perspective of restorative justice practices and research outcomes. *Journal for Juridical Science* 31(1): 101-120.

Ndlela, R. N., Green, J.M. & Reddy, P.S. (2010) Traditional Leadership and Governance in Africa. *Africa Insight* (40) 3. 2-21.

Neuman, W. (2000). *Social research methods: Qualitative and Quantitative Approaches* (4th Edition.). Boston: Allyn and Bacon.

Newman, G. (2000). Advances in comparative criminology: the UN Global Report on Crime and Justice. In Del Frate AA, Hatalak O and Zvekic U (eds), Surveying crime: a global perspective. Rome: ISTAT/UNICRI.

Ngubane, L.P. (2016). *"From Political Wars to Taxi Wars": Investigating the Transition of Taxi Violence in a Low-Income Urban Community in the Mpumalanga Township, South Africa*. Master's Thesis, Faculty of Humanities, Development and Social Science, University of KwaZulu-Natal. Durban.

Nhlapo, T.,(2005). The Judicial Function of Traditional Leaders: A Contribution to Restorative Justice? A paper presented at the conference of *The association of law reform agencies of Eastern and Southern Africa (ALRAESA),* Vineyard Hotel. Cape Town. 14-17 March 2005.

Ntlama, N & Ndima, D. (2009). The Significance of South Africa's Traditional Courts Bill 1 to the Challenge of Promoting African Traditional Justice Systems, *International Journal of African Renaissance Studies*. (4)1. 45-63

Nxumalo, F.T., (2012). *Traditional leadership in local economic development: A case study of the uMgungundlovu District*. Master's Thesis, Faculty of Humanities, Development and Social Science. University of KwaZulu-Natal, Durban.

Oladipo, O. (2000). *Tradition and the Quest for Democracy in Africa*. Available from: www.polylog.org/theme/l.2/fcs4-en.htm. [Accessed on 14 July 2017].

Onadeko, T. (2008). Yoruba Traditional Adjudicatory Systems. *African Study Monographs* 29(1) 15-28.

Oomen, B. (2005). *Chiefs in South Africa: Law, Culture, and Power in the Post-Apartheid Era.* University of KwaZulu-Natal Press, James Currey Publishers, Pietermaritzburg.

Oyieke, Y, O. (2012). *Investigating the Gap between Law's Promises and Rural Women's Lived Reality: A Case for Narrativ*e. LLM Degree Dissertation, Faculty of Law, University of Pretoria. Pretoria.

Palmory, I, (2004). *Traditional Leaders in the eThekwini Metropolitan Region: Their role in crime prevention and safety promotion.* Johannesburg. Centre for the Study of Violence and Reconciliation and Midlands Women's Group. p. 6-48.

Posner, R. A. (1986). *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations.* University of Chicago Law Review. 53: 366-393.

Rakovec-Felser, Z. (2014). Domestic violence and abuse in intimate relationship from public health perspective. *Health Psychology Research* Vol 2:1821. University of Maribor, Slovenia.

Ramsden, P. (2009). *The Law of Arbitration: South African and International Arbitration.* Juta, Cape Town. p. 99.

Rautenbach, C. (2008). South African Common and Customary Law of Interstate Succession: A Question of Harmonization, Integration or Abolition. *Electronic Journal of Comparative Law* (12)1-5.

Rautenbach, C. & Mathee, J., (2010). Common-Law Crimes and Indigenous Customs: Dealing with the issues in South African Law. *Journal of Legal Pluralism and Unofficial Law*. 1. p. 109-144.

Rautenbach, C. (2014). *Traditional Courts as Alternative Dispute Resolution (ADR) Mechanisms in South Africa*. Available from http://ssrn.com//abstract=2447614. [Accessed on 10 July 2019]. p. 288-329.

Ray, D.I. & Reddy, P.S. eds., (2003). Grassroots governance? *Chiefs in Africa and the Afro-Caribbean (No. 1).* University of Calgary Press. Hardback.

Reddy, P.S. & Biyela, B.B., (2003). *Rural local government and development: A case study of Kwazulu-Natal:* Quo Vadis? Grassroots governance, pp.263-274.

Rugege, S. (2003). *Traditional leadership and its future role in local governance.* Law Faculty. University of the Western Cape. Available from https://www.ajol.info/index.php/ldd/article/view/138285/127849. Accessed on 2020/08/18. Pp 171-194.

Schoeman, M. A. (2012). *Philosophical view of social transformation restorative justice teachings: A case study of Traditional Leaders in Ixopo*. SA, Phronimon 13(2).

Schönteich M. (2002). Making courts work. Institution for Security Studies. Pretoria. ISS Monograph Series, no 75.

Shihadeh, E.S. & Flynn, N. (1996). Segregation and Crime: The Effect of Black Social Isolation on the Rates of Black Urban Violence. Social Forces, Volume 74, Issue 4. Available from https://doi.org/10.1093/sf/74.4.1325. Accessed on 16/10/2019. Pages 1325–1352.

Shongwe, V. (2009). Keeping the tradition. *SA Media: Sunday Tribute*. The University of the Free State. 01 November 2009. p. 26

Simons, H. & Usher, R. [Eds.] (2000). *Situated ethics in education research.* London: Routledge and Falmer. p. 109.

Sithole, M.P. (2005). The Secular Basis of Traditional Leadership in KwaZulu-Natal, Alternation: *Interdisciplinary Journal for the Study of the Arts and Humanities in Southern Africa*. Special Edition 2. p. 54

Sithole, M.P. (2008). *Fifteen-Year Review on Traditional Leadership.* Available from http://www.hsrc.ac.za/en/researchdata/koeedoc/10991 [Accessed on 19/08/ 2017].

Sosibo, K. (2012). Boost for traditional courts. Mail and Guardian.*SA Media*- The University of the Free State. Page 18. 31 May 2012.

Stone, K.V.W. (2004). *Alternative Dispute Resolution: Encyclopaedia of Legal History*. University of California, Los Angeles. School of Law Public Law & Legal Theory Research Paper Series. Research Paper No. 04-30. p. 21-39.

Strang, H. (2004). Is restorative justice imposing its agenda on victims? In Zehr H and Toews B (eds), *Critical issues in restorative justice.* New York: Criminal Justice Press. p. 96

Taylor, Ralph B. (1997). Social order and disorder of street blocks and neighbourhoods: Ecology, microecology and the systemic model of social disorganisation. *Journal of Research in Crime and Delinquency* 34(1). p. 62- 91

Teffo, J. (2002). Monarchy and Democracy: Towards a Cultural Renaissance. *Journal of African Philosophy 2*. p. 78-104.

Tshehla, B. (2005). Traditional Justice in Practice: A Limpopo Case Study. Institute of Security Studies. ISS Monograph Series. No.115. p. 4-53.

Ubink, J, & Van Rooij, B. (2011). 'Towards Customary Legal Empowerment: An Introduction. Traditional Justice: Practitioners' Perspective. Working Paper. International Development Law Organisation in Conjunction with the Vollenhoven Institute, Leiden University. http://www.idlo.int/english/WhatWeDo/Research/LegalEmpowerment/Customary2. aspx Legal working papers online series-Traditional Justice. Accessed on 30 November 2018.

Umbreit, M.S., Coates R.B., & Roberts A.W. (2000). The impact of victim-offender mediation: a cross-national perspective. *Mediation Quarterly* 17(3): p.215-227.

Van Dalsen, A. (2019). *The Traditional Courts Bill - A Problematic Piece of Legislation*. Johannesburg, Helen Suzman foundation.

Van der Watt, M & Ovens, M. (2012). Contextualizing the practice of *Ukuthwala* within South Africa. Child Abuse Research. *A South African Journal 2012*, 13(1) 11-26.

Venter, L., & Strydom, H. (2012). *Research at grassroots for the science and service professionals: Sampling and methods (2nd Ed.).* In A. D. Vos, C. Strydom, C. Fouché, & C. Delport (Eds.), 6-15. Pretoria, South Africa: Van Schaik.

Wendt, W.S., (2009). New directions in feminist understandings of rural crime. *Journal of rural studies*. 39, p.180-187.

Williams, J.M. (2001). Blurring the Boundaries of 'Tradition': T*he Transformation and Legitimacy of the Chieftaincy in South Africa*. Ph.D. Thesis: University of Wisconsin.

Legislations, Policy Frameworks

Department of Justice Memorandum 8/8/1/7 (DDM) of 8/11/96.

Department of Provincial and Local Government (2002) Draft White Paper on Traditional Leadership in and Institutions in South Africa (October 2002).

Ex Parte Chairperson of the Constitutional Assembly: In re-certification of the Constitution of the Republic of South Africa, 1996(4) SA 744 (cc)

KwaZulu-Natal. (2011). KwaZulu-Natal Provincial Planning Commission: KwaZulu-Natal Provincial Growth and Development Strategy (KZN PGDS) 2011. Pretoria: Government Printers. Leadership in and Institutions in South Africa (October 2002).

Maphumulo Local Municipality. Integrated Development Programme, (IDP) 2016/17 http://www.ilembechamber.co.za/wp-content/uploads/2017/12/Maphumulo-Municipality-IDP.pdf. (Accessed on 02/03/2018)

The National Commission for the Protection of Human Subjects of Biomedical & Behavioural Research: The National Research Act (Pub. L. 93-348). The Belmont Report, 1979.

The Republic of South Africa (2008) Policy Framework on the Traditional Justice System under the Constitution (2008) Pretoria: Government Printers

The Republic of South Africa. 1996. Constitution of the Republic of South Africa Act (Act No. 108 of 1996) Pretoria: Government Printers

The Republic of South Africa. 2003. Traditional Leadership and Governance Framework Act (Act 41 of 2003) Pretoria: Government Printer.

The Republic of South Africa. 2011. Traditional Courts Bill [B 1- 2017]. Summary of the Bill Published in Government Gazzette No. 40487 of 9 December 2016.

The South African Law Commission Project 124, Report (1999). Department of Justice.

Traditional Courts and the Judicial Function of Traditional Leaders Bill attached to report 209 of 2003. South African Law Commission.

South Africa:

Abolition of Corporal Punishment Act (Act No. 33 of 1997)

Chapter 12 (ss 211-212) - Constitutional Court of South Africa.

Children's Act (Act No. 38 of 2005)

KwaZulu Amakhosi and Iziphakanyiswa Act (Act of 1990)

Recognition of Customary Marriage Act (Act No. 102 of 1998)

Regulations for Criminal Appeals: Criminal Procedure Act (Act No. of 105 of 1977) [Section 309A]

Section 12: Freedom and Security of the Person

The Basic Conditions of the Employment Act (Act No. 75 of 1997)

The Bill of Rights (Chapter 2)

The Black Administration Act (Act No. 38 of 1927)

The Native Administrators Act (1875)

The Republic of South Africa. 1996. Constitution of the Republic of South Africa Act (Act No. 108 of 1996) Pretoria: Government Printers

The Zulu Chiefs and Headman's Act (Act No. 8 of 1974)

Cases

Ex Parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa, 1996(4) SA 744 (cc)

R v V (2700/08) [2014] ZAECPEHC 97; 2015 (3) SA 376 (ECP)

S v Williams and Others 1995 (3) SA 632 (CC)

APPENDICES – ENGLISH AND ZULU VERSIONS

APPENDIX A: *Declaration of Informed Consent in English*

Dear Participant

INFORMED LETTER OF CONSENT

Title: "An Exploration of the Roles of traditional courts in combating crime: A study of the Maphumulo traditional tribe, Stanger".

Researcher Information and Contact Details

Name: Miss Snethemba H.F Jili

Cell no: 078 303 8817

Email: 214512364@stu.ukzn.ac.za

Research Purpose: I am a Master's student at the University of KwaZulu-Natal and I am conducting a research project to fulfil the requirement for the degree of Master of Social Science in Criminology and Forensic studies. The main contact person is Professor Shanta Singh, who is my supervisor and will be supervising me throughout the formulation of this project. I would like to know if you are willing to be a participant in the research project on roles played by traditionals court regarding crime management in rural areas. The researcher's interest in involving participants is to get the tribal community's perspective on what roles are played by traditional courts in managing crime in tribal communities, as well as how these courts can be improved for them to be more effective.

Procedures Involve:

As a participant, you will be interviewed in a one-on-one interview section with the researcher, and the duration of that interview will be between 20 to 40 minutes. During the interview, you will be asked questions relating to the functioning of the traditional court in your tribe as a tool for crime management. The interview is unstructured, therefore despite the research using certain questions as guidelines, you as the participant can still add any information or formulate any discussion that will add more information and content to the research. Participation in the study is voluntary, therefore you may refuse to participate. You are also allowed to withdraw

from the study at any time during the interview, whenever you feel uncomfortable or no longer willing to participate. As the research project is for the academic purpose only, the participants will not gain financially or in any similar form. Concerning confidentiality, all information provided during the conduction of the study will highly confidential between the participant, the supervisor and researcher. Participants' names will not be mentioned either during the interview nor research but rather one will be coded and referred to for example participant 1or respondent 1, one is also allowed to provide a disguised name. Any information provided will not be used against any participant and will only be used in this research. It will also be kept confidential between the researcher and the research supervisor.

Data collection methods:

If you are willing to be interviewed, please indicate whether you allowed or not allowed the following device to be used during the conduction of your interview?

Usage of the recording device	Allow	Not Allow
• Sound recording device		

Thank you for your willingness to contribute to the study.

As a participant in this study, you will be allowed to ask the researcher any question about the study on the above-mentioned information or you can contact and ask the research supervisor Professor Shanta Singh at Singhsb@ukzn.ac.za.

DECLARATION FOR CONSENT

I participant: ……. ……. (Participant number or disguised name)

Hereby agree to anonymously take part in the study, as all the content of the study had been explained and clearly understood before taking part in the project.

Participant's Signature: …….

Date: ……..

APPENDIX A: *Declaration of Consent in Isizulu*

Mubandakanyi othandekayo

INCWADI YOKUCELA IMVUME

Isihloko: *"Ucwaningo ngendima edlalwa izinkundla zamacala zesintu ekulweni nobugebengu: udaba lwesizwe sakwaMaphumulo eStanger".*

Imininingwano yomfuni-lwazi kanye nemininingwane yokuxhumana

Igama: Nkosazane Snethemba Jili

Inombolo yocingo: 0783038817

I-imeyili: 214512364@stu.ukzn.ac.za

Inhloso yocwaningo:

Ngingu Snethemba Jili umfundi waseNyuvesi yaKwaZulu-Natali owenza iMasters kwimfundo yobugebengu nokwaphula umthetho. Njengengxenye yezifundo zami, nginesifiso sokwenza ucwaningo mayelana nendima edlalwa izinkundla zamacala zesintu ekulweni nobugebengu, ngibheke kakhulu kwisizwe sakaMaphumulo esgodini sakwaNgcolosi. Kulolucwaningo ngicathuliswa uPhrofesa Singh ongumfundisi wakuyo leNyuvesi yakwaZulu-Natali. Ngithanda ukwazi ukuthi ungathanda yini ukuzibandakanya nocwaningo engilwenzayo, okungukuzwa uvo kanye nemibono yabahlali besizwe sakwaMaphumulo kaNgcolosi mayelana nendima edlalwa inkundla yesintu yokuthetha amacala kulendawo. Iphinde futhi ithole izindlela lezinkundla ezingathuthukiswa ngayo ngokwezinga,ukuze zisebenze kangcono.

Izinyathelo ezithathwayo:

Njengombandakanyi, uzoba nenkulumo mpendulwane nomfuni lwazi, hlambe lenkulumo izothatha imzuzu ephakathi kwamashumi amabili kuya kumashumi amathathu. Kulenkulumo, uzobuzwa imibuzo ethile mayelana nokusebenza kwezinkundla zamacala esintu kwisizwe sakho njengethuluzi lokulwa nobugebengu. Lenkulumo ayikalelwe, ngakho ke umbandakanyi uvumelekile ukuphendula nokuphawula ngendlela othanda ngayo nabona ifanele, noma ikhona imbuzo,kepha uvumelekile ukufaka noma yini obona izosiza ucwaningo. Ukuzibandakanya kulolucwaningo akusiyo impoqo kepha ukuzithandela, ngalokho uvumelekile ukuyeka ukuzibandakanya uma ungasathandi noma ungasazizwa ukhululekile. Njengaloku lomsebenzi

kungowesikole, umubandakanyi Akukho nzuzo azoyithola efana nemali nokunye. Mayelana nokugcinwa kwezimfihlo, lonke ulwazi umbandakanyi anginika lona lizoba phakathi kwami njengomqoqilwazi, umcathulisi, kanjalo nawe njengombandakanyi kuphela. Amagama angempela ababandakanyi ngeke avezwe, kepha ababandakanyi bazonikezwa amagama abafihlayo, isibonelo bazobizwa ngombandakanyi wokuqala,umbandakanyi wesbili. Ulwazi olutholakele kumbandakanyi ngeke lisetshenziselwe lutho olunye ngaphandle kokusekela lolucwaningo. Angeke lisetshenziselwe okunye okungekuhle okufana nokuthunaza umbandakanyi noma isithunzi sezinkundla zamacala zesintu. Kepha ulwazi lizogcinwa luyimfihlo phakathi komcathulisi nomqoqi-lwazi.

Izindlela zokuqoqa ulwazi

Ngicela uveze ukuba uyavuma yini ukuthi kusetshenziswe lobuchwepheshe obulandelayo ngenkathi yokuzibandakanya kwakho kulolucwaningo?

Ukusetshenziswa kwesqophi-lwazi	Yebo, ngyavuma	Cha, angivumi
• Isiqopha-lizwi (audio recorder)		

Ngyabonga ngokufisa ukuzibandakanya nocwaningo

Njengombandakani, unikeziwe ilungelo lokubuza eminye imbuzo ethe thuthu ngocwaningo kulemininingwane engenhla, noma ungathinta umcathulisi wocwaningo uProfesor Singh kulemininingwane: i-emeyili- Singhsb@ukzn.ac.za. noma kule nombolo ethi: 031 260 7885.

UKUNIKEZA IMVUME

Mina…….....(Igama elifihlayo likambandakanyi) ngichazelekile futhi ngyayiqonda imigomo nokuqukethwe kulolucwaningo, ngakho-ke ngiyavuma ukuzibandakanya nalo.

Isiginesha yombandakanyi:……..…….. Usuku: …….

***APPENDIX B**: Interview Schedule in English*

Title: "An Exploration of the Roles of traditional courts in combating crime: A study of the Maphumulo traditional tribe, Stanger".

Interview guideline-questions

1. Do you think nowadays traditional leaders still have a role to play to preventing crime?

2. Are you aware or familiar with the functioning of traditional courts in this community?

3. Out of a total of ten, how many cases in this area would you say are reported to traditional courts and how many are reported to the police?

4. What indigenous laws are followed in this community to prevent crime?

5. What procedures one needs to follow, to bring a matter to the traditional court of this village?

6. What procedures are followed by the traditional court to impose indigenous laws and facilitate access to justice in this rural community?

7. Why do you think residents of this village prefer to report some of their matters to traditional courts rather than taking the formal justice system route, such as the police and civil courts?

8. Would you say everyone within the community have equal rights to access these courts, as well as enjoying its justice system? If yes, how so and If no, why?

9. In your opinion, do traditional courts fairly deal with people's case? If yes, how so, and If no, why?

10. Some argue that the African tradition and culture is very patriarchal and always favour men, what can you say about that to these courts?

11. During the proceedings of traditional courts, is there anything done by these courts that you think may hinder justice and should be changed or avoided?

12. Some argue that traditional leaders lack knowledge regarding the South African constitution, laws and procedures, and therefore their powers to resides over any case should be taken away, and all cases should be handled by the formal justice system. What is your opinion on that?

13. Can the procedures of traditional courts be formally adopted by the government to work incorporation with traditional leaders to prevent crime, especially in rural areas? And Why?

14. What do you think the government can do to better improve the functioning of these courts?

15. Some argue that traditional leadership and their courts are outdated, old fashion and no longer relevant within the new democratic era. Can you provide your opinion on that?

16. Is there anything you willing to add on what we have discussed that you think will assist me in my research?

APPENDIX B: *Interview Schedule in IsiZulu*

Isihloko: ***"Ucwaningo ngendima edlalwa izinkundla zamacala zesintu ekulweni nobugebengu: udaba lwesizwe sakwaMaphumulo eStanger".***

Inkombandlela-mbuzo

1.Ngabe ngokubona kwakho abaholi bomdabu kusekhona indima abayidlalayo ekulweni nobugebengu?

2. Ngabe unalo ulwazi ngenkundla yamacala yesintu esebenza kulendawo?

3. Emacaleni ayishumi, mangaki amacala ongathi kulendawo abikwa enkundleni yesintu, bese eba mangaki ongathi abikwa emaphoyiseni?

4. Yimiphi imithetho yomdabu elandelwa kulendawo ukulwa nobugebengu?

5. Ngabe yiziphi izinyathelo umuntu ekumele azithathe uma enesifiso sokuletha icala noma udaba enkundleni yamacala yesintu kulendawo?

6. Yiziphi izinyathelo ezithathwa inkundla yamacala yesintu ukufaka umthetho kwizaphula mthetho, iphinde ihlomulise ubulungiswa kumhlukunyezwa kulendawo?

7. Ngokubona kwakho, kungani abahlali bakulendawo bekhetha ukubika amanye amacala kwinkundla yesintu, kunokuba babike wonke amacala kwabomthetho, njengamaphoyisa nezinkantolo?

8. Ngabe bonke abahlali banawo amalungelo alinganayo okufinyelela kulezinkundla zamacala, Baphinde bahlomule ngobulungiswa obunohlonze? Uma uvuma kungani, noma uma uphika kungani?

9. Ngowakho umbono, ngabe izinkundla zamacala zesintu zibhekana nodaba labantu bonke ngendlela enobulungiswa na? Uma uthi yebo, ushongani? Noma uthi cha, ushongani?

10. Abanye abantu bathi imikhuba namasiko kwesintu kuvuna kakhulu abesilisa kube kucindezela abesifazane, ungaphawula uthini kuloko mayelana nezinkundla zamacala esintu?

11. Uma kuthethwa amacala enkundleni, ngabe kukhona okwenzeka kulezinkundla obona kulimaza ubulungiswa, ekumele kushitshwe noma kugwenywe?

12. Abanye bathi abaholi bomdabu abanalo ulwazi mayelana nomthetho sisekelo waseNingizimu Africa, imithetho kanye nenqubo mgomo yawo, ngalokho wonke amandla abaholi bomdabu okuthetha amacala kumele athathwe kubo, bese wonke amacala abikwe kwabomthetho. Ngabe kuthini ukuphawula kwakho ngalombono?

13. Kungabe izinyathelo ezithathwa izinkundla zamacala zesintu zingasetshenziswa yini nawuhulumeni ehlanganyela nabaholi bomdabu,ukulwa nobugebengu,ikakhulukazi ezindaweni ezisemakhaya? ushongani?

14. Yikuphi ocabanga ukuthi uhulumeni angakwenza ukuthuthukisa ukusebenza kwezinkundla zamacala zesintu?

15. Abanye abantu bathi ubuholi bomdabu kanye nezinkundla zamacala esintu sekuphelelwe iskhathi, futhi akusabalulekile kuleskhathi sentando yeningi. Ngabe uthini owakho umbono ngaloku?

16. Ngabe kukhona ofisa ukukwengeza kuloku esesikuxoxile, obona kuzoba usizo kulolucwaningo?

APPENDIX C: *Application for Permission to Conduct Research to The Kwazulu-Natal Department of Co-Operative Governance and Traditional Affairs.*

SCHOOL OF APPLIED HUMAN SCIENCES

DEPARTMENT OF CRIMINOLOGY AND FORENSIC STUDIES

KZN Department of Cooperative Governance and Traditional Affairs (COGTA)

Natalia Building, Langalibalele Street 330

Pietermaritzburg

3201

Dear Sir/Madam

Application for permission to conduct research

My name is Miss Snethemba H.F. Jili, a master's student at The University of KwaZulu-Natal majoring in Criminology. As part of my master's degree, I willing to conduct a research project in ward 11 of the Maphumulo Local Municipality under iLembe district. The research topic for my study is "An exploration of the effectiveness of traditional courts in relation to crime management in rural areas: A study of the Maphumulo traditional Tribe". Throughout this research project I will be supervised by Professor Singh, who is the Academic leader of Criminology and Forensic studies, and also the University criminology Lecturer. As instructed by the University, I am hereby appealing to the KZN Department of COGTA for an ethical clearance letter, which is a permission to approach traditional leaders and 15-18 residents of *kwaMaphumulo* Ward 11 tribe, to be participants and be interviewed about the effectiveness of the traditional court in their tribe.

Background and objectives of the Research study

Despites more than two decades into democracies, and with Chapter two of the Constitution of the Republic of South Africa (RSA) Act [Act No. 108 of 1996] in the Bill of Rights, guaranteeing everyone's right to equality before the law and one's right to the protection and benefit of the law, as well as guarantying access to courts for all (Hlubi, 2013), rural residents still face several obstacles in accessing basic services such as access to formal justice which would improve their quality of life. This therefore calls for an exploration of alternative

strategies and techniques such as indigenous justice systems as primary justice mechanisms for traditional rural communities, making the legal system responsive to the voices of the unfamiliar to ensure access to justice for all (Hlubi, 2013). In view of the challenges confronting the current justice structure, this research aims to contribute to the debates on the use of indigenous governance system to deliver social justice as an alternatives justice system (Chopral & Isser, 2013). An argument made by Hlubi (2013), she stated that traditional justice structures such as traditional courts are local legal forums that individuals in rural areas rely on to access justice.

In order to explore the effectiveness of traditional courts in crime management, the research project is underlined by the following objectives: To determine laws used by traditional leaders to manage crime in rural communities; To explore the procedures used by traditional courts to control crime; To find out whether do rural residents prefer formal justice system or traditional courts procedures to be followed in relation to managing crime; To investigate whether traditional laws and procedures of these courts are inline or in conflict with the South African Constitution; To evaluate the effectiveness of traditional courts in relation to managing crime in rural areas.

After the completion of the whole research project, I oblige myself to provide the Department of COGTA, as well as participants with a copy of the full research project. For further information, please do not hesitate to contact me on 0783038817 or email 214512364@stu.ukzn.ac.za . You can also contact the project supervisor Prof. Singh on 0312607895 or email Singhsb@ukzn.ac.za.

Thank you for your time and hope you will consider and approve my application.

Yours Sincerely

Miss Snethemba H.F. Jili

Criminology and Forensic Studies

University of KwaZulu-Natal (Howard College)

…[redacted]…

……...

APPENDIX D: *Application for Permission to Conduct Research To The Maphumulo Local Municipality*

SCHOOL OF APPLIED HUMAN SCIENCES

DEPARTMENT OF CRIMINOLOGY AND FORENSIC STUDIES

Maphumulo Local Municipality

P.O Box X9205

Maphumulo

4470

Dear Sir/Madam

Application for permission to conduct research

My name is Miss Snethemba H. F. Jili, a Master's student at The University of KwaZulu-Natal majoring in Criminology. As part of my Master's degree, I willing to conduct a research project in wards 11 of the Maphumulo Local Municipality. The research topic for my study is "An Exploration of the Roles of Traditional Courts in Combating Crime: A study of the Maphumulo traditional Tribe. Throughout this research project I will be supervised by Professor Shanta Singh, who is the Academic leader of Criminology and Forensic studies, and the University Criminology Lecturer. As instructed by the University, I am hereby appealing to the Maphumulo Local Municipality for an ethical clearance, which is a letter of permission to approach traditional leaders and 15-18 residents of ward 11 *KwaNgcolosi* tribe, to be participants and be interviewed about the roles played by the traditional court to combat crime in their tribe.

Background and objectives of the Research study

Despites more than two decades into democracies, and with Chapter two of the Constitution of the Republic of South Africa (RSA) Act [Act No. 108 of 1996] in the Bill of Rights, guaranteeing everyone's right to equality before the law and one's right to the protection and benefit of the law, as well as guarantying access to courts for all (Hlubi, 2013), rural residents still face several obstacles in accessing basic services such as access to formal justice which

would improve their quality of life. This therefore calls for an exploration of alternative strategies and techniques such as indigenous justice systems as primary justice mechanisms for traditional rural communities, making the legal system responsive to the voices of the unfamiliar to ensure access to justice for all (Hlubi, 2013). In view of the challenges confronting the current justice structure, this research aims to contribute to the debates on the use of indigenous governance system to deliver social justice as an alternatives justice system (Chopral & Isser, 2013). An argument made by Hlubi (2013), she stated that traditional justice structures such as traditional courts are local legal forums that individuals in rural areas rely on to access justice.

In order to explore the effectiveness of traditional courts in crime management, the research project is underlined by the following objectives: To determine laws used by traditional leaders to manage crime in rural communities; To explore the procedures used by traditional courts to control crime; To find out whether do rural residents prefer formal justice system or traditional courts procedures to be followed in relation to managing crime; To investigate whether traditional laws and procedures of these courts are inline or in conflict with the South African Constitution; To evaluate the effectiveness of traditional courts in relation to managing crime in rural areas.

After the completion of the whole research project, I oblige myself to provide the Municipality, as well as participants with a copy of the full research project. For further information, please do not hesitate to contact me on 0783038817 or email 214512364@stu.ukzn.ac.za . You can also contact the project supervisor Prof. Singh on 0312607895 or email Singhsb@ukzn.ac.za.

Thank you for your time and hope you will consider and approve my application.

Yours Sincerely

Miss Snethemba H.F. Jili

Department of Criminology and Forensic Studies

University of KwaZulu-Natal (Howard College)

…[redacted]…

…..…….

APPENDIX E: *Application for Permission to Conduct Research To The Maphumulo KwaNgcolosi Traditional Authorities in Isizulu.*

SCHOOL OF APPLIED HUMAN SCIENCES

DEPARTMENT OF CRIMINOLOGY AND FORENSIC STUDIES

Maphumulo Traditional Authority

P.O Box 20

Maphumulo

4470

Msawoni/Nomzane

Ukufaka Isicelo Semvume yokwenza ucwaningo.

Igama lami ngingu Snethemba Jili, umfundi waseNyuvesi yaKwaZulu-Natali eThekwini, owenza izifundo zeMasters kumkhakha wezobugebengu nokwaphula umthetho. Kwingxenye yezifundo zami nginesifiso sokwenza ucwaningo kwisizwe sakwaMaphumulo esgodini samaNgcolosi, ngaphansi kwesihloko esithi: "An Exploration of roles played by traditional courts in combating crime: A study of the Maphumulo traditional Tribe, Stanger". Phecelezi okungukuthi ukuhlola indima edlalwa izinkundla zesintu zamacala ekulweni nobugebengu. Kulo lonke lolucwaningo ngicathuliswa uProfessor Shanta Singh, owumphathi wesikole sezobugebengu, ophinde abe umfundisi kuso lesiskhungo semfundo ephakeme yaKwaZulu-Natal.

Njengomyalelo wesikole engikuso, ngibhala lencwadi ukucela kubaholi bomdabu nendabuko bakwaMaphumulo esgodini samaNgcolosi ukuba ngithole imvume yokuzokwenza ucwaningo endaweni yabo,ngiphinde ngibandakanye nabahlali abayigcosana kwisizwe sakhona. Engifisa ukukwenza emva kokuthola imvume ukuvakashela isizwe sakaNgcolosi, ngiqoqe ulwazi kubahlala abambalwa bakhona kanye nakubaholi boMdabu ngokuthi ngibabuze imbuzo ethile mayelana nezinkundla zamacala zesintu kanye nendima eyidlalayo ekulweni nobugebengu.

Ngiyaqikelela ukuthi lolucwaningo alunabungozi, kubona bonke abazibandakanya nalo, futhi Akukho gxabano noma thuthuva olungabangwa yilo. Njengesibophezelo sesikole, ngiboshiwe ukuba ngiqikelele ukuth Lonke ulwazi elizotholakala kulocwaningo, kumele ligcinwe endaweni ephephile,liphinde lisetshenziselwe umsebenzi wesikole kuphela,ukuze kuvikelwe ababeyigxenye yalo.

Uma kuyisifiso sabaholi boMdabu bakwaMaphumulo, emva kokuqeda umusebenzi walolucwanino, ngizimisele ukuthumela yonke imiphumela yalo ukuze bazibonele imphumela noma okutholakele. Ngemininingwane ethe thuthu, kuvumelekile ukungithinta kulenombolo 0783038817 noma kwi email yami yesikole ethi 214512364@stu.ukzn.ac.za . Ungaphinda uxhumane nomcathulisi wami kulolucwaningo uProf. Singh kulenombolo 0312607895 noma nge email ku Singhsb@ukzn.ac.za.

Ngiyabonga ngethuba, ngiyathemba ukuth isicelo sami sizophumelela futhi siphendulwe.

Ozithobayo

uNkosazane Snethemba H.F. Jili

UMnyango wezobugebengu kanye nemfundo yonzululwazi

INyuvesi yaKwaZulu-Natal (Howard College)

…[redacted]…

…….....

APPENDIX F: *Gatekeepers Letter from The Kwazulu-Natal Department of Cooperative Governance and Traditional Affairs.*

cogta

Department:
Cooperative Governence and Traditional Affairs
PROVINCE OF KWAZULU-NATAL

Tel. +27 33 395 2942 **Fax.** +27 33 394 9714
Postal. Private Bag X 9078, Pietermaritzburg, 3200
Office. Natalia Building, 330 Langalibalele Street, Pietermaritzburg, 3201

OFFICE OF THE HEAD OF DEPARTMENT

Enquiries: Imibuzo: Navrae:	**Ms. NH Ally**	My Reference: Inkomba Yami: My Verwysing:	E-mail:	**Buhle.Ally@kzncogta.gov.za**	Date: Usuku: Datum:

Miss Snethemba Jili
Department of Criminology and Forensic Studies
University of Kwa-Zulu Natal
Durban
4000

Per email: 214512364@stu.ukzn.ac.za

Dear Ms Jili,

RE: APPLICATION FOR PERMISSION TO CONDUCT RESEARCH

Your correspondence dated 18th June 2018, bears reference.

I hereby wish to acknowledge receipt of your email and state that the Department cannot grant the authority that has been requested, as Traditional Councils, including amaKhosi and by association Traditional Courts are separate Organs of State that are governed by their own legislation. As a result we cannot grant this authority. You are however, advised to contact the relevant iNkosi and the Traditional Council directly for the permission you require.

Y[redacted]

MR T. TUBANE
HEAD OF DEPARTMENT
DEPARTMENT OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS

DATE: 1/8/18

APPENDIX G: *Gatekeepers Letter from The Maphumulo Local Municipality.*

Private Bag 9205, MAPHUMULO, 4470, Tel: 032 481 4500/42, Fax: 032 481 2068/53

Office Of The Municipal Manager

TO WHOM IT MAY CONCERN

Dear Sir/Madam

PERMISSION TO CONDUCT RESEARCH AT THE MAPHUMULO LOCAL MUNICIPALITY WARD 11

This serves to confirm that permission has been granted to Miss Snethemba Jili to conduct research in ward 11 of the Maphumulo Local Municipality on the study titled: "An Exploration of the Roles of Traditional Courts in Combating Crime: A study of the Maphumulo traditional tribe, Stanger". The Maphumulo municipality is eager to assist during the conduction of the study wherever possible.

The permission to conduct the study is granted on a basis that the results of the findings will be utilized only for research purposes, and a copy of the full research shall be provided to the Municipality upon completion.

Yours Sincerely

[redacted]

P.N. Mhlongo
Municipal Manager

MAPHUMULO MUNICIPALITY
PRIVATE BAG 9205
MAPHUMULO 4470

APPENDIX H: *Gatekeepers Letter from The Maphumulo KwaNgcolosi Tribal Authorities.*

Maphumulo Tribal Authority

Nkosazane Jili othandekayo

Lencwadi ibhalelwe ukuphendula isicelo sakho sokuzokwenza ucwaningo kwisizwe esgodini sakwaMaphumulo, ngaphansi kwesihlokosithi "An Exploration of the roles of traditional courts in combating crime: A study of the Maphumulo Traditional Tribe, Stanger". Siyisizwe sakaMaphumulo, kuyinjabulo enkulu ukukwazisa ukuthi isicelo sakho samukeliwe saphinda savunyelwa. Lemvume unikezwa ngaphansi kwemigomo yokuthi akunabungozi obungaqubulwa ilolucwaningo, kuphinde futhi ulwazi oluqoqiwe lizosetshenziselwa kuphela ukusiza ucwaningo.

[redacted]

Mr Z.W. Ninela

Induna YakwaNgcolosi

Dear Miss Snethemba Jili

This letter was written to respond to your request, in requesting to conduct a research project at the Maphumulo tribe under the topic: "An Exploration of the roles of traditional courts in combating crime. A study of the Maphumulo Traditional tribe, Stanger". It is within great pleasure to inform you that your application was successful and approved. The permission has been granted on a condition that no harm will be caused by the project to anyone or the tribe and the information received will only be used for the school project purposes.

[redacted]

Mr. Z.W. Ninela

Herdsman (Maphumulo: KwaNgcolosi)

AMANGCOLOSI TRADITIONAL AUTHORITY
UMVOTI REGION
P.O. BOX 36
MAPHUMULO
4470

Stamp

APPENDIX I: *University of Kwazulu-Natal Ethical Clearance.*

UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

6 September 2019

Ms Snethemba HF Jili
School of Applied Human Sciences
Howard College Campus

Dear Ms Jili,

Protocol reference number: HSS/1604/018M
Project Title: "An exploration of the Roles of traditional courts in combating crime: A study of the Maphumulo traditional tribe, Stanger".

Full Approval – Full Committee Review Protocol

With regards to your response received on 28 August 2019 to our letter of 08 November 2018, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL.**

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number. PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 1 year from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithf[redacted]

.....

Dr Rosemary Sibanda (Chair)

/dd

cc Supervisor: Professor Shanta Singh
cc. Academic Leader Research: Professor Ruth Teer-Tomaselli
cc. School Administrator: Ms Ayanda Ntuli

Humanities & Social Sciences Research Ethics Committee
Dr Rosemary Sibanda (Chair)
Westville Campus, Govan Mbeki Building
Postal Address: Private Bag X54001, Durban 4000
Telephone: +27 (0) 31 260 3587/8350/4557 **Facsimile:** +27 (0) 31 260 4609 **Email:** ximbap@ukzn.ac.za / snymanm@ukzn.ac.za / mohunp@ukzn.ac.za
Website: www.ukzn.ac.za

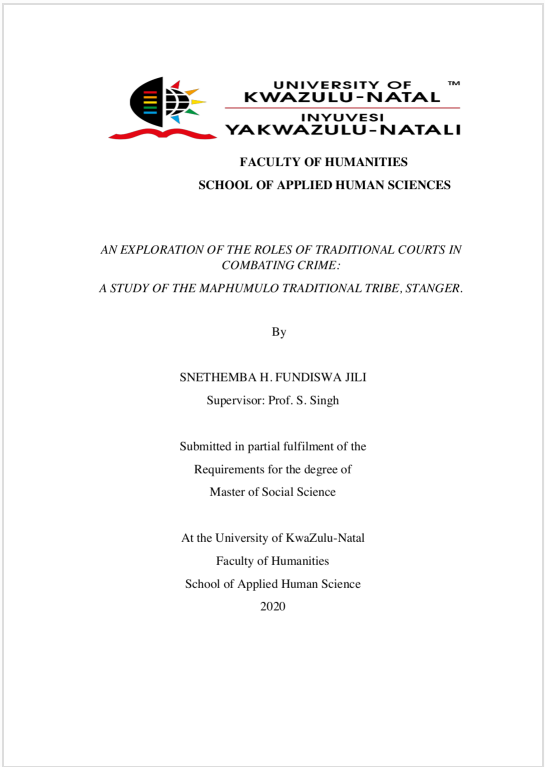
APPENDIX J: *Turnitin Receipt*

Digital Receipt

This receipt acknowledges that Turnitin received your paper. Below you will find the receipt information regarding your submission.

The first page of your submissions is displayed below.

Submission author:	Snethemba Hopefull Fundiswa Jili
Assignment title:	Masters
Submission title:	An Exploration of the Roles of Tradi…
File name:	Third_Draft.docx
File size:	542.4K
Page count:	154
Word count:	61,503
Character count:	330,635
Submission date:	13-Nov-2020 04:48AM (UTC+0200)
Submission ID:	1444470702



UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

FACULTY OF HUMANITIES
SCHOOL OF APPLIED HUMAN SCIENCES

AN EXPLORATION OF THE ROLES OF TRADITIONAL COURTS IN COMBATING CRIME:
A STUDY OF THE MAPHUMULO TRADITIONAL TRIBE, STANGER.

By

SNETHEMBA H. FUNDISWA JILI
Supervisor: Prof. S. Singh

Submitted in partial fulfilment of the
Requirements for the degree of
Master of Social Science

At the University of KwaZulu-Natal
Faculty of Humanities
School of Applied Human Science
2020