



**The Role of the Centre for Community Justice and Development  
in Indigenous Governance of Social Justice in  
Impendle, KwaZulu-Natal**

**by  
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degree of  
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at the  
School of Management, Information Technology and Governance  
College of Law and Management Studies

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I Phindile Favourite Hlubi declare that

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## Dedication

This work is dedicated to my parents, the late Mduduzi Edward Hlubi and my mother, Thembekile Doris Hlubi, for dedicating three decades of your life to NGO work, the tenacity and passion you have for NGO work is beyond comprehension, and for being an advocate for the powerless and marginalised in society.

*“All that I am and all that I ever hope to be I owe it to my mother”* Abraham Lincoln

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## Glossary of Acronyms

AIDS	Acquired Immune Deficiency Syndrome
AU	African Union
CCJD	Centre for Community Justice and Development
CEO	Chief Executive Officer
CoGTA	Cooperative Governance and Traditional Affairs
CPF	Community Policy Forum
EU	European Union
FGP	Focus Group Participants
FGQ	Focus Group Questions
HIV	Human Immunodeficiency Virus
IDP	Integrated Develop Plan
KZN PGDS	KwaZulu-Natal Growth and Development Strategy
KZNPPC	KwaZulu-Natal Provincial Planning Commission
KZN	KwaZulu-Natal
NGO	Non Government Organisation
PGDS	Provincial Growth and Development Strategy
PM	Public Managers
RSA	Republic of South Africa
SAPS	South African Police Services
SSA	Statistics South Africa
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund

## Abstract

### The Role of the Centre for Community Justice and Development in Indigenous Governance of Social Justice in Impendle, KwaZulu-Natal

Although a post-apartheid South Africa emerged in 1994 and an internationally recognised Constitution became effective in 1996, rural KwaZulu-Natal is home to poverty stricken citizens without access to socio-economic justice. Very few lawyers practice in rural areas especially in areas governed by traditional authorities. As a consequence many citizens are arguably ignorant of their legal rights; yet legal awareness is the foundation of constitutional protections and socio-economic justice. This research undertaking falls within the broader framework of the field of access to justice, exploring alternative justice approaches that a traditional community, like Impendle can utilise to be able to access justice. The study focuses on assisting traditional rural communities find alternatives to the formal, often exclusivist and problematic nature of the justice system that often act as a gate keeper, hindering access justice. This study seeks to achieve a set of objectives set against the study background and research problem. The objectives of the study are as follows, (1) to investigate the use of indigenous governance techniques by the CCJD, (2) to determine the relevance of customary law in accessing justice in the rural area of Impendle, (3) to explore the value of governance systems for access to justice in Impendle and (4) to develop policy recommendations for the governance of social justice systems as one mechanisms citizens in rural areas can use to access justice. This study examines indigenous governance of social justice as delivered by the Centre for Community Justice and Development (CCJD), a nongovernmental organisation based in KwaZulu-Natal. This research study is theoretically driven by John Rawls' theory of social justice which includes (1) addressing structural disadvantage as structures of oppression, (2) addressing discourses of disadvantage relative to access to justice in a democratic society, and (3) empowerment of disadvantaged groups toward understanding, addressing and removing barriers to exercise power. Exercising power of citizens in rural Impendle is about the power of access to justice in this study. Using a qualitative research design and case study strategy with an underlying advocacy/participatory worldview, findings from interviews and focus groups indicate that, while CCJD does use indigenous knowledge systems to facilitate access to justice, staffing and budgetary constraints curtail overcoming the challenge of ensuring that South Africans in the study area do not experience barriers in accessing equal access and protection under the law. The study concludes with recommendations for CCJD justice mechanisms, for public policy-makers seeking to address structural disadvantage of so many South African citizens and for policy-makers in South Africa and other countries seeking to facilitate indigenous knowledge systems of governance

## **TABLE OF CONTENTS**

Title Page	
Declaration	ii
Supervisor's permission to submit	iii
Acknowledgements and Dedication	iv
Glossary of Acronyms	v
Abstract	vi
List of Data Matrices	vii
List of Figures	viii
List of Tables	viiix

## **CHAPTER ONE**

### **INTRODUCTION TO AND BACKGROUND OF THE STUDY**

1.1 Chapter Introduction	1
1.2 Background of the study	2
1.3 Research Problem	11
1.4 Research Objectives	12
1.5 Research Questions	13
1.6 Philosophical Worldview, Research Design and Methods	16
1.7 Chapter outline	16
1.8 Chapter Conclusion	17

## CHAPTER TWO

### LITERATURE REVIEW

2.1 Chapter Introduction	18
2.2 Customary Law within the South African legal system	19
2.2.1 Distinguishing Customary Law from Indigenous Law	21
2.2.2 Distinguishing Customary Law from Formal Law	21
2.2.3 Role of Customary Law in Traditional Communities	22
2.3 The Institution of Traditional Leadership in a Democracy	23
2.4 Two Paradigms of Traditional Leadership	26
2.4.1 Democratic Pragmatic Tradition	27
2.4.2 Organic Paradigm	27
2.5 Traditional Justice Structure and Procedure for Dispute Resolution	29
2.6 The Role of Indigenous Justice within the new Judicial System in South Africa	31
2.7 Theories Underpinning the study	33
2.7.1 John Rawls' Social Justice and Human Rights Theory	33
2.7. 2 Paulo Freire's Critical Consciousness	35
2.7.3 Steve Biko's Black Consciousness	36
2.7.4 Philosophy of <i>Ubuntu</i> within the practice of Law	37
2.8 Theoretical Framework	38
2.8.1 Operationalisation of Theoretical Framework	38
2.8.1.1 Addressing Structural Disadvantage as Discourse of Oppression	39
2.8.1.2 Addressing Discourse of Disadvantage	40



2.8.1.3 Empowerment	41
2.9 Chapter Conclusion	43

## **CHAPTER THREE**

### **RESEARCH DESIGN AND METHODS**

3.1 Chapter Introduction	44
3.2 Research Design	44
3.3 Philosophical Worldview	45
3.4 Research Strategy	47
3.5 Case, Site and Informant Selection	49
3.5.1 Case Selection	49
3.5.2 Site Selection	49
3.5.3 Informant Selection	49
3.6 Sampling and Units of Analysis	50
3.7 Data Collection Tools	52
3.7.1 Focus Group Discussions	52
3.7.2 Semi- structured Interviews	53
3.8 Ethical Considerations	54
3.9 Data Analysis	56
3.9.1 Content Analysis	57
3.9.2 Thematic Analysis	57

3.9.3 Data Matrix	58
3.10 Trustworthiness in Qualitative Study	58
3.10.1 Truth Value	59
3.10.2 Transferability	60
3.10.3 Consistence and Dependability	60
3.10.4 Neutrality and Confirmability	60
3.10.5 Triangulation as an aspect of Confirmability	61
3.11 Researcher Reflexivity	62
3.12 Limitations of the Study	62
3.13 Chapter Conclusion	63

## **CHAPTER FOUR**

### **DATA ANALYSIS AND FINDINGS**

4.1 Chapter Introduction	64
4.2 Case of Impendle in Context	64
4.3 The Province of KwaZulu-Natal in Context	66
4.4 Data Analysis and Findings	67
4.4.1 The Theoretical Framework, Philosophical Worldview and Emerging Themes	67
4.4.1.1 The theoretical framework and advocacy/participatory Philosophical worldview	68
4.4.1.2 Emerging themes	73
4.4.2 Achievement of Research Objectives	79
4.4.2.1 Focus group data responsive to research objectives	83
4.4.2.2 Interview data responsive to research objectives	87

4.4.3 Answering of Research Questions and Sub-questions	92
4.4.3.1 Focus group data responsive to research questions and sub-questions	92
4.4.3.2 Interview data responsive to research questions and sub-questions	99
4.4.4 Cross-case Analysis of Data from Focus Groups and Interviews as Sub-cases	101
4.4.4.1 Cross-case analysis of focus groups as sub-cases	101
4.4.4.2 Cross-case analysis of interviewees as sub-cases	106
4.5 Triangulation of the Study	111
4.6 Chapter Conclusion	112

## **CHAPTER FIVE**

### **FINDINGS, RECOMMENDATIONS AND POLICY IMPLICATIONS**

5. 1 Chapter Introduction	114
5.2 Findings and Conclusions Drawn from the Study	114
5.3 General Overarching Conclusions	118
5.3 Recommendations	119
5.4 Chapter Summary	120

## **REFERENCES**

1. Books	122
2. Journal Articles and other Publications	124
3. Legislative and Policy Framework	129

## APPENDICES

Appendix A	Ethical Clearance Letter	130
Appendix B	Turn-it-in Report	131
Appendix C	Data Collection Tool	132
Appendix C- 1	Composite Table of Focus Group Questions	132
Appendix C- 2	Composite Table of Interview Questions	133
Appendix D	Interviews Guide	134
Appendix D	Table A4-1 Alignment of Research Objectives, Research Questions and Data –gathering Tools: Focus Group Questions and Interview Questions	134
Appendix E	Matrix with Composite Matrix of Additional Focus Group Responses	137
Appendix F	Matrix of Additional Interview Responses	141
Appendix G	Republic of South Africa 2003: Policy Framework on Traditional Justice System under the Constitution. Department of Justice and Constitutional Development	147
Appendix H	Republic of South Africa 2011. Traditional Courts Bill, Republic of South Africa, summary of Bill Published in Governance Gazette No. 34850. [B-1 2012]	148

## List of Data Matrices

Matrix 4.1	Alignment of Theoretical Framework, Reform Agenda and Advocacy/Participatory Philosophical Worldview	69
Matrix 4.2	Alignment of Theoretical Framework, Oppression and Inequality with Advocacy/Participatory Worldview	70
Matrix 4.3	Alignment Theoretical Framework, Marginalisation and Alienation Component and Advocacy/Participatory Worldview	72
Matrix 4.4	Alignment Theoretical Framework with Consciousness Raising and Empowerment Component of Advocacy/Participatory Worldview	73
Matrix 4.5	Themes Emerging Through Excerpts from Focus Group Responses	76
Matrix 4.6	Themes Emerging Through Excerpts from Focus Group Responses	77

Matrix 4.7 Research Objective 1: Use of Indigenous Governance Techniques by CCJD: Focus Group Responses	84
Matrix 4.8 Research Objective 2: Relevance of Customary Law: Focus Group Data	85
Matrix 4.9 Research Objective 3: Value of Indigenous Governance Systems for Access to Justice in rural Impendle: Focus Group Data	86
Matrix 4.10 Research Objective 4: Policy Recommendations for Governance of Social Justice Systems as one of the Mechanisms to Access Justice in Rural Communities	87
Matrix 4.11 Research Objective 1: Use of indigenous governance techniques by CCJD: Interview Data	88
Matrix 4.12 Research Objective 2: Relevance of Customary Law in Accessing Justice: Interview Data	90
Matrix 4.13 Research Objective 3: Value of Indigenous Governance System for Access to Justice in rural Impendle: Interview Data	91
Matrix 4.14 CCJD Use of Indigenous Justice Techniques: Focus Group Data	93
Matrix4.15 The Role of CCJD in Providing Advice: Focus Group Responses	95
Matrix 4.16 Alternative Justice Mechanisms and Indigenous Governance Techniques of CCJD: Focus Group Responses	96
Matrix 4.17 Customary Law and Relevance to Access to Justice: Focus Group Responses	97
Matrix 4.18 Value of Indigenous Governance Systems and Customary Law in Access to Justice in Rural Areas: Focus Group Responses	98
Matrix 4.19 Themes Generated by Multiple Research Questions or Sub-questions: Responses from Interview Data	100
Matrix4.20 Cross-Case Analysis of Focus Group Data: Focus Group Question 1- 3	102

Matrix 4.21 Cross-case analysis of focus group data – Focus Group Questions 4 – 6	103
Matrix 4.22 Cross-Case Analysis of Focus Group Data: Focus Group Question 7 & 9	105
Matrix 4.23 Cross-Case Analysis from Interview Data: Interview Questions 1-3	107
Matrix 4.24 Cross-Case Analysis from Interview Data: Interview Questions 4- 6	108
Matrix 4.25 Cross-case analysis from Interview Data: Interview Questions 7-9	110
Matrix 4.26 Cross-case Analysis from Interview Data: Interview Question 10	111

### **List of Figures**

Figure 1.1 Background and Overview of the Study	15
Figure 2.1 Representation of Literature Review	19
Figure 2.2 Traditional Leadership Paradigms	28
Figure 2.3 Procedure Followed in the Traditional Justice Court	30
Figure 2.4 Social Justice and Human Rights Theory	38
Figure 3.1 Advocacy/Participatory Worldview Underpinning the Study	47

### **List of Tables**

Tables 2.1 Legislative Interventions Impacting on Traditional Authority	25
Table 3.1 Sampling Procedure	51
Table 4.1 Selected Statistical Demographics of Impendle	65
Table 4.2 Linkages between Theoretical Framework and Themes from the Study	75
Table 4.3 Themes emerging from certain data relative to research objectives	80

Table 4.4 Alignment First Research Questions with Data Gathering Tools	81
Table 4.5 Alignment of Second Research Questions with Data Gathering Tools	82
Table 4.6 Alignment Third Research Objective with Data Collecting Tools	82
Table 4.7 Alignment Fourth Research Objective with Data Collecting Tools	83

## **CHAPTER 1**

### **INTRODUCTION TO AND BACKGROUND OF THE STUDY**

#### **1.1 Chapter Introduction**

Public administration and governance have long been concerned with constitutional democracy. In that regard, the focus of this study is access to justice as one of the constitutional guarantees for all citizens in the new democratic dispensation in South Africa. Wojkowska (2006:30) asserts that access to justice is best conceived as a process by which a range of different inter-related factors combine to enable citizens to obtain a satisfactory remedy for a grievance. South Africa is one of the most advanced democracies in Southern Africa; its citizens enjoy extensive rights and protection under various laws and policies advanced by the post-apartheid government. The South African Constitution (RSA, 1996) is hailed as one of the most progressive in the world. Chapter 2 of the Constitution, the Bill of Rights, guarantees that everyone is equal before the law and has the right to the equal protection and benefit of the law. The Bill of Rights further guarantees the right of access to courts for all citizens. However, for rural communities, it remains unclear whether the right to access to justice and equality before the law is worth the paper it is written on and if this is a privilege enjoyed only by a select few.

Nearly two decades into democracy, South African society remains extremely unequal with an increasingly widening gap between the rich and the poor, the haves and the have-nots. The majority of the poor in South Africa live in rural areas; their living conditions are characterised by immense poverty, limited access to resources, services and opportunities and gross underdevelopment. As a consequence of past developmental policies and their geographic location, rural people still face several obstacles in accessing basic services that would improve their quality of life. These communities continue to be marginalised as the laws are at times seemingly insensitive to their plight. Oyeike (2012:87) argues that South Africa has a different set of challenges impacting on accessibility of justice for the ordinary members of society. The post-apartheid legal system continues to be plagued by a highly exclusive legal culture that is complex, English-centric and in some ways leaves people in rural communities unable to access justice.

As long as the material conditions of rural people do not change, constitutional guarantees such as access to justice and equality before the law remain an unfulfilled promise. This 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 other to ensure access to justice for all. Indigenous justice structures are local legal forums that individuals in rural areas rely on to access justice. Indigenous justice structures are a vehicle through which individuals and communities find opportunities for self expression using an indigenous framework that makes sense to them as both individuals and a collective. The indigenous justice structure has the potential to empower participants because it enables people to engage with a system that values and take cognisance of their customs, culture, societal norms, and standards using their own language. Indigenous justice institutions use indigenous systems of governance that are rooted in local conditions, and are recognised and accepted by traditional rural communities. Chopra and Isser (2013:356) note that, this amounts to the vernacularisation of the justice system; an approach to justice that allows indigenous people to define their own conception of justice that may provide more protection than the enforcement of formal norms and allow for change at their pace. It allows people to bring their own version of justice to the fore and shape the justice process in a bottom-up manner. The traditional, non-state normative system of justice demystifies the justice system; it enables rural people to communicate directly with the system, bridging the distance between officials and local people. In view of the challenges confronting the current justice structure, this study aims to contribute to the debate on the use of indigenous governance techniques to deliver social justice through alternative systems such as those used by the Centre for Community Justice and Development (CCJD), a non-governmental organisation (NGO) based in Pietermaritzburg, KwaZulu-Natal which is the subject of this study.

## **1.2 Background of the Study**

This study was conducted in KwaZulu-Natal (KZN) at Impendle, a small deep rural area about 76 km to the outer west of Pietermaritzburg, the capital city and provincial bedrock of the UMgungundlovu District Municipality. KwaZulu-Natal is predominantly rural and is mainly a dormitory province, as most people of active economic age migrate to other provinces to work and live and only return to the province on retirement or due to ill-health. The province continues to be plagued by the twin challenges of poverty and high rates of unemployment among women and youth, particularly in rural areas. Furthermore, the province suffers an endemic problem of rural underdevelopment. There is a high incidence of HIV/AIDS and massive service delivery backlogs; KZN's dispersed settlement pattern adds to the cost of infrastructure development (KwaZulu-Natal Growth and Development Strategy, (KZNPGDS) 2006:16-17). These challenges impact the living conditions and real life circumstances of people

in rural areas like Impendle, many of whom have yet to benefit from democratic governance in post-1994 South Africa.

Impendle consists of mainly traditional dwellings and informal settlements, and is characterised by stark poverty, underdevelopment and a massive infrastructure and social facilities backlog. According to the Impendle Municipality's Integrated Development Plan (IDP) (2011/12), the municipality has a population of 33 105, the lowest population within the UMgungundlovu district. The decline in population is due to a host of issues already cited, including the perceived lack of economic confidence and opportunities in the area. People migrate to larger cities with better employment prospects; consequently, a high percentage of households depend on government social grants such as the old age pension and child support grant. As an almost entirely rural and traditional community, Impendle residents live in mainly traditional Zulu dwellings and settlements under the rule of traditional leaders (*Amakhosi* and *Izinduna*). Traditional leadership structures and traditional courts enjoy constitutional recognition, and act as custodians of justice within a community. However, justice has to be exercised within the parameters of the supreme law of the land, the Constitution of the Republic of South Africa (RSA, 1996). This means that traditional leaders do not have sovereign judicial powers over the people within their jurisdiction. In common with the rest of the country, the judicial system in traditional rural areas of South Africa is legally plural as it recognises both formal and informal justice systems as legitimate mechanisms to administer justice. As McQuoid-Mason (2008: 6) has noted, in the rural environment, a fusion of village, community and traditional courts usually operates and involves community members as well as formal court processes. Consequently, indigenous governance solutions continue to reflect cultural norms, values and traditions, while remaining practically effective.

It is clear that a large portion of the KZN province is rural and that this is where the majority of the poor are located and are deprived of access to services and opportunities. As with other professionals in South Africa, lawyers are reluctant to practice in rural areas, as such a small percentage of the total number of lawyers the country produces practice in rural areas. This is an unfortunate circumstance as these are the areas in which their services are needed the most. This further perpetuates a situation in which rural residents have minimal access to any form of legal services. As a consequence, most people residing in rural areas are ignorant of their legal rights; yet legal awareness is the foundation for fighting injustice. This implies that the poor and marginalised are unable to claim their rights and seek remedies for injustices. The challenge remains to ensure that no group of people experiences barriers to accessing basic services and

that all enjoy equal access and the protection of the Constitution. This is the rationale for this study on the indigenous governance of social justice as delivered by the CCJD.

The CCJD is a NGO based in KZN whose mandate is to ensure access to justice for communities within the rural areas of the province. McQuoid-Mason (1999:8) argues that one of the rare benefits of the apartheid system was the development of a vibrant NGO community in South Africa. This included several organisations engaged in public interest law. In addition to NGOs, many of the country's 23 universities operate campus law clinics which provide pro bono services to the indigent communities. Funding often comes from external donors. The CCJD was conceived at the former Faculty of Law at the then University of Natal as the Centre for Criminal Justice. However, the organisation grew and diversified over the years, eventually becoming a free-standing NGO. CCJD programmes assist disadvantaged communities to secure access to justice and other basic services. The 15 support centres throughout KZN (now independent entities supported by CCJD) are governed and managed by individuals from the respective communities who are trained paralegals who – as public managers – offer indigenously-driven techniques in an effort to provide justice systems that meet community needs.

Several challenges confront NGOs working within the justice sector in rural communities. The first is the ability to establish and maintain credibility and legitimacy with the local indigenous traditional authority, formal justice structures, and other justice structures already operating in the areas as well as the community at large without detracting from the mission, vision and objectives of the organisation which is provision of access to justice to the poor and marginalised. The second challenge is gaining cooperation and support without posing a threat to the power of these constituencies, while, the third is the fact that interaction between the alternative and formal justice systems often involves compromises on both sides. The challenge remains for the NGO to maintain a balance between gaining acceptability and legitimacy, and offering locally acceptable solutions and options while upholding and maintaining human rights. The strengths of the CCJD lie in the fact that the outreach centres are governed and managed by individuals from the local community that are well-versed in local culture and traditions, enjoy the support of community leaders and the community at large and have been trained as paralegals.

Harper (2011:11) maintains that, the paralegal approach is particularly relevant in a rural community context; since paralegals are locally-based they are well versed with local political and power structures. Furthermore, they are readily available to assist community members and

have the benefit of an insider understanding of matters in dispute. Combined with flexibility, such insight makes them better able to come up with context specific and appropriate mechanisms in resolving disputes. In addition to this, they are well positioned to devise context relevant and socially binding and agreeable solutions. Furthermore paralegals are in touch with realities of both the indigenous and formal justice systems and this enables them to function effectively and efficiently with both systems, depending on each case. They have the leverage to workout dynamic and imaginative mechanisms to solve problems at hand. The option of mechanism can be either indigenous or formal in nature. Paralegals also offer quasi-legal services such as mediation, community legal education and advocacy as data collected during fieldwork reveal in Chapter 4. CCJD paralegals operate as custodians of information in communities; they offer assistance on all issues to do with government administration, assist community leaders with legal matters, enhance the local community's understanding of and access to state justice, advise traditional authorities on statutory law; provide training where necessary and act as a check and balance.

In keeping with Harper's (2010) perspective, Wojkowska (2006:17) maintains that NGO-based village or community mediation schemes are able to work with communities to help them devise new ways of solving disputes based on mediation. These methods create conditions that are free from social pressure and the interests of powerful groups in the community. Ubink and Van Rooij (2011:7) propose an institutional approach that creates linkages between the state and customary norms. This entails codification of customary norms into legislation, selecting those norms that enhance human rights and the protection of marginalised groups. Of relevance to the South African context would be the inclusion of customary law in the Constitution (RSA, 1996) as this is the law in terms of which the majority of people in the country conduct and regulate their lives and personal relationships. Also of relevance is the recognition of customary marriages, through the promulgation of the Recognition of Customary Marriages Act, 15 of 2000. Codification has the advantage of rendering norms certain and accessible. However codification of customary norms is not without problems; firstly, it can affect the fluidity, informality and accessibility of customary law as it is lived by experience. Secondly, without proper consultation it can serve to strengthen the norms governing elite interests. Moreover, it can suffer serious credibility and acceptability challenges and be ignored if it does not reflect the communities' norms and interests. Ultimately there is a possibility that codification may result in further stratification of customary law system which complicates the system further as this would not have resolved challenges inherent within the living customary law.

The second level of linkage proposed by Ubink and Van Rooij (2011:9) is between state and customary dispute resolution mechanisms; this can be achieved by incorporating the customary courts, with traditional authorities as the oversee and the primary level of the legal system. This would empower and authorise traditional authorities to dispense justice within the parameters set out in systems and procedures while maintaining human rights standards. State courts act as overseers of the activities and functions of the customary courts and develop a system and procedures that will align customary court functioning to be of the required standard. In instances where customary court has a prerogative to apply customary imperatives, a connection is formed between the customary and state justice systems. State controlled customary judgements have a potential to boost the image and integrity of customary ruling. However the state court institutions are less accessible to marginalised citizens that are the intended beneficiaries of such a system; therefore judgements may have no bearing or effect on living customary norms. In view of the formal character of state courts, judges are most are likely to base their decisions on written text as opposed to engaging in an alien and unfamiliar legal territory and culture, which is application of apply living customary law; this undermines the integrity of living customary law and defies the objective of establishing linkages between the two traditions of law.

The relevance of this approach for this study is to determine whether and, if so, how CCJD paralegals fill some of the gaps identified between the state court and customary court. In other words, do services rendered by paralegals act as a system of checks and balances for traditional leadership in matters pertaining to the application of customary law within their jurisdiction. Paralegals appear to work closely with traditional leadership to safeguard human rights and ensure fair and procedural standards in the application of customary law. It can be argued that the South African legal arena has made significant strides in upgrading the status and character of customary law. Reitenbach (2008:1) maintains that the Constitution (RSA, 1996) brought customary law on par with common law by affording it constitutional recognition, subject to the Constitution and other legislation. Although not to the same extent as that proposed by Ubink and Van Rooij (2011), this creates a linkage between the two legal traditions in the South African legal environment.

In this regard Ubink and Van Rooij (2011:9) acknowledge the work of the South African Constitutional Court in encouraging judges to apply living law by providing that living customary law can overrule codified versions. However, this does not come without challenges; firstly, judges have to rely on the expertise of local culture specialists to provide advice on a

case-by-case basis. Norms may be contested and there might also be different customary norms at play. The Constitution does not compel judges to call on customary experts; this is left to the discretion of the judge presiding over the case. Oyieke (2012; 48) claims with reference to the Jacob Zuma rape case that, “despite Zuma’s remarks about culture and sex throughout the trial, an African elder was never consulted to verify his statement. By raising the culture defence within the law, Zuma took advantage of the cultural pluralism that exists in South Africa”. Secondly, the inherent characters of customary law - flexibility, informality, negotiability and the unpredictability of dispute settlement - are not in tune with state court protocol and proceedings. The precision and certainty with which state proceedings are conducted may not be easily reconcilable with customary court systems. However, the CCJD offers a pragmatic solution to this challenge; as noted by Harper (2011) paralegals are positioned between indigenous and formal justice systems. Exploiting the best that both systems have to offer, that is relevant and imaginative approaches to problem solving. Paralegals are better able to understand the background of the dispute and can come up with socially legitimate and enforceable solutions; they also offer quasi- legal services where necessary.

The final form of linkage proposed by Ubink and Van Rooij (2011) is that of linking state and customary administration. The assumption behind formation of this connection is that the administration is an important element in the implementation phase, in particular customary administration. The success of this linkage lies in proper integration and buy in of customary administrators as they wield power and support of majority in their areas. As such, they may have been implicated in power abuse and human right violations; it is therefore necessary to bring them into the confidence of the people as well bring the new system of merger into their confidence. Linking customary and state administration can upgrade the status and responsibility attached to customary administrators. However, in doing so, care should be taken not to undermine and compromise the legitimacy of customary administrators. The assumption made by this linkage is that customary administrators are inherently corrupt and incapable of upholding human rights; they always rely on the parent body, the state administrator, for supervision and monitoring. As Ndulo (2011:91) maintains, Western understanding of African customary law is influenced by a negative attitude towards all things African.

On the contrary, the evidence points to weaknesses within the formal judiciary as well. In recent cases, the independence and integrity of the South African judiciary has been the subject of criticism due to the alleged failure of some Supreme Court judges to exercise impartiality. Ubink and Rooi (2011) identify four main approaches that can be used in connecting state and

customary administration. Firstly, the state can formally acknowledge and upgrade status of customary administration without necessarily having to regulating how it functions, as long as there are no violations of legislation; however, this does little to reform customary administration. Secondly, customary administrators can be merged into the state administration system, their customary functions clearly laid out and stipulated, and mandating formal state administrators to map out functions, roles and responsibilities of traditional authorities. Thirdly, the state can set up a community based entity, equivalent to the local customary structure, this will assist create and achieve equity in power. Finally, hybrid local structures, which is a combination of both customary and state administration can be set up, representative of both administration systems can be established in which both state and customary administrators are represented. This is akin to the multi-stakeholder forums operating with the justice sector that exists in Impendle; the CCJD participates in these forums.

The drawback of the hybrid linkage lies in the underlying assumption that customary administrators are subordinate to state administrators. Oyieke (2012: 48) asserts that South African legal environment is premised upon the Western legal paradigm, it favours the dominant Western science over customary norms. This linkage also perceives customary administrators as less able and answerable to state administrators. By virtue of the fact that state administrators define the role and function of customary administrators, customary administrators are reduced to another layer and entity of the state. In this regard Ntlama and Ndima (2009:26) maintain that the Traditional Courts Bill (RSA, 2012), pending promulgation in South Africa, the Constitution and other legislation prioritise the role of traditional leaders in the governance structure but fail to fully clarify what this role should be; the challenge is to define and execute this function.

CCJD outreach programmes seek to remove barriers and form a bridge between the client and their rights, educate communities about their rights and enable them to claim these rights and resolve conflict through mediation. The community footprint of CCJD is driven by paralegal coordinators who assist community members to access justice. Clients are educated on a variety of issues affecting them, such as the legal system, court procedures and public administration procedures. Where necessary, the parties in dispute are brought together for mediation and reconciliation occurs without necessarily approaching the courts. The stance adopted by the CCJD resonates with the constitutional dispensation that promotes the recognition of customary law and the use of alternative dispute resolution processes while at the same time upholding the Constitution as the supreme law of the land. Bennett (2004) cited in Ntlama and Ndima (2009:12) notes that, it was only during the new political order that customary law was

incorporated as a basic component of South Africa's legal system. Section 211 (3) of the Constitution (RSA, 1996) reads, "the court must apply customary law when that law is applicable, subject to the Constitution and any other legislation that specifically deals with customary law". Furthermore, section 39 enjoins the courts and other law forums to develop customary law amongst others; in as far as it is compliant with the Bill of Rights. Similarly, Raitenbach (2008:1) asserts that, modern South African law is based on a hybrid of Roman-Dutch law, English common law, and indigenous law referred to as customary law.

Raitenbach (2008:4) adds that, customary law was denigrated to an inferior system of law in the South African judicial system and this unequal relationship has disadvantages for many people who live in accordance with indigenous law of certain or all purposes. However, since customary law has now gained its rightful place in the South African legal system, there is no reason for customary law principles to be replaced by common law principles. The new Constitution brought customary law on par with the common law by affording it constitutional recognition, subject to the law. Customary law is now seen through the lens of the Constitution rather than common law, as it was previously the case. On the other hand, in recognising customary law, the Constitution affirms the role of traditional leaders as legitimate structures for the dispensation of justice within traditional communities that fall under their jurisdiction.

Beall and Ngonyama (2009:2) maintain that South Africa was not atypical in accommodating traditional institutions in its new democratic government, during transition from the apartheid to democratic regime. This is a worldwide phenomenon that is predominant in post colonial states, and it has been established that customary institutions have a permanence of existence. In many parts of the world, especially post-colonial states, customary institutions remain important. Justifications for the inclusion of indigenous institutions in constitutional democracy vary. Popular opinion ranges from the view that traditional institutions are at the heart of African culture, in a democracy they present a different perspective of governance, this assist enhance the credibility and acceptability of new government, also important is that chieftaincy should be accommodated because it is part of the institutional fabric of the country. On the other hand, it should be noted that the inclusion of indigenous governance institutions in democratic governance was not a unanimous decision; this was a hotly debated issue. Some felt that the inclusion of these institutions in the democratic dispensation would undermine hard won democracy and would put a brake on democratic consolidation.

In similar vein, scholars have divergent views on whether South Africa's legal system has been sufficiently democratised or if it remains exclusive. Oyieke (2012:6) notes that in spite of hard



won democracy, the transformation of some institutions of governance has either not occurred or is taking place at a frustratingly slow rate. Oyieke (2012:6) argues that, for the indigent and poverty stricken people at the periphery of society, the justice system remains inaccessible. “The South African legal culture despite being steeped into constitutional democracy is still exclusive, elitist and formal, favouring one way of being over others. It is still dominated by the grand narratives and western originated paradigm that restricts legal access to those who fit in the acceptable mould”. It favours formal justice mechanisms over other forms of justice and by so doing restricts access to a limited few. This effectively prohibits access to justice for the majority of people, in particular marginalised rural people. Wojkowska (2006:5) has noted that the informal justice system is the foundation and primary source of dispute resolution for masses of people living in deprived and underdeveloped rural areas in many countries. Many people who live in traditional communities subscribe to the principles of customary law and embrace the traditional court institutions that apply this form of law.

It is for this reason that Clark and Stephens (2011:1) propose the use and strengthening of a hybrid justice system approach, arguing that “to improve the quality of dispute resolution, justice must be maintained in individuals’ daily activities, and dispute resolution mechanisms situated within a community and economic context. Reforms should focus on everyday justice, not simply legal institutions which people may not understand or be able to afford”. Clark and Stephen (2011) distinguish three approaches that can be used to apply this approach to justice. Firstly, the hybrid justice system applies to countries that embrace both civil and customary traditions simultaneously, a situation where two legal traditions mix in the same social milieu, sometimes described as “mixed jurisdiction”. This is generally used to denote countries or jurisdictions where civil and common law traditions are both applied. Secondly, this applies where two or more hybrid legal system exists; what some scholars refers to as legal pluralism. The difference between the first and second approach is that the first is limited to a mix between common and civil legal tradition. Civil tradition governs some sectors and common legal tradition governs other sectors. On the other hand the second approach encapsulates a broader range of legal tradition, such as the application of customary, civil and religious legal tradition. The pluralist approach makes allowances for the application of diverse rules to distinct units of the society who lives by these rules and principles. The third approach recognises the hybrid approach as an element of an individual legal institution rather than the bigger spectrum of entire justice sector as a whole. In this approach both formal and customary legal institutions can borrow from the other legal institution where necessary, applying rules in the legal sense and at times negotiating outcomes. The hybrid approach is relevant to this study as it relates to legal

pluralism focusing on the customary and formal justice hybrid; hence this depicts the South African legal environment.

### **1.3 Research Problem**

The broad field of study within which this research undertaking falls is access to justice, with a particular focus on people residing in rural areas. The study acknowledges that there is more than one avenue available to people to access justice. As a direct consequence of South Africa's past spanning decades of colonialism and apartheid, the formal justice system remains a dominant tradition in access to justice. This system favours people living in urban areas while systematically denying access to those in rural areas. As a result, the large majority of people residing in South Africa's rural areas, lack access to justice, which is problematic.

Ubink and Van Rooi (2011:2) assert that customary justice systems play a much more important role in the lives of many of the world's poor than state justice systems. Indigenous justice systems represent the lived reality of most people in developing countries, especially in rural areas. This study explores the value of an alternative justice system as a means of rural people accessing justice. South Africa has a plural legal environment, with a hybrid of legal traditions. Even though customary law has always been part of dispute resolution, tradition and customs embraced by people in rural areas, it has occupied a subservient position within the judicial system. It was not until democratic governance that customary law was upgraded to be on par with common law as a part of redressing the injustices of the past. Section 211 (3) of the Constitution, (RSA, 1996) states that "the court must apply customary law when that law is applicable, subject to the Constitution and any other legislation that specifically deals with customary law" In this regard, Ntlama and Ndima (2012:26) contend that "the constitutional protection of the customary law system conveys nothing more than the institutionalised dominant status of common law principles over those of customary law. It reduces the significance of customary law ruling to a system in which it is a step child of common law that has to be merely tolerated". This too is problematic.

Grant (2006:3) notes that not only is South Africa a culturally diverse society, it is a society in which the culture of the majority, including legal culture has been disparaged and subjected to a minority, Western culture, first under colonialism and subsequently under apartheid. Ntlama and Ndima (2009:17) further maintain that the transformative nature of the South African Constitution (RSA, 1996) affirms the value of customary law, rooted in the principles of restorative justice. It also gave "recognition to the valuable role placed by traditional leaders in

communities as an important step towards advancing access to justice”. A number of challenges were identified which prompted the need for this study, including that, while the Constitution recognises customary law, it also places limits on its applicability in as far as it has to be applied subject to the Constitution. It could be argued that the former colonisers corrupted and abused the institution of traditional leadership as agents to serve its purpose; traditional leaders have not been able to rid themselves of this bitter past. While the Constitution is clear on the prioritisation of the institution of traditional leaders, it lacks clarity on the role traditional leaders should play. This is yet another problem complicating access to justice.

In view of the background of the study and the research problem, the advocacy/participatory worldview underlies this study as subsequently described.

#### **1.4 Study Objectives**

In view of the research problem cited above, objectives of this study are to:

- Investigate the use of indigenous governance techniques by the CCJD;
- Determine the relevance of customary law in accessing justice in the rural area of Impendle;
- Explore the value of indigenous governance systems for access to justice in Impendle;
- Develop policy recommendations for the governance of social justice systems as one of the mechanism citizens in rural areas can use to access justice.

Ubink and Van Rooi (2011:2) conducted a study on the customary legal empowerment in African states like Rwanda, Ghana as well as in Asia. They found that, besides being the main point of access to justice for the poor, the customary justice system remains very resilient despite being poorly funded and supported by state and donor-led agencies. It is regarded as sub-standard justice for the poor and it is felt that diverting limited resources to it will compromise the entire justice system. On the other hand, the CCJD’s justice programmes are mainly intended to provide access to justice for the poor and marginalised. The focus is on strengthening the disadvantaged, as can be seen in the objectives of the organisation which are, among others, to educate disadvantaged communities about their rights and to enable such communities to claim their rights to justice and services. These objectives are compatible with the advocacy/participatory worldview that focus on empowering marginalised groups and

consciousness-raising so that they are able to engage with public institutions such as the legal system.

## 1.5 Research Questions

The research questions which this study aims to answer are as follows:

### Main Research Question:

- How does the CCJD develop and use indigenous governance techniques to facilitate access to justice for rural communities?

### Sub-Questions:

- What are indigenous governance and justice systems and how are they connected to contemporary access to justice?
- Why does the CCJD utilise alternative justice systems as a means for rural communities to access social justice?
- Which alternative justice mechanisms are used by the CCJD in dispute resolution and how do the indigenous beliefs of the community influence these mechanisms?
- What is customary law and is it still a relevant justice structure in Impendle?
- How does customary law in Impendle facilitate access to justice for rural civil society?

Figure 1.1 below represents the background to the study and research problem, the main field of this study being access to justice. The figure proceeds to illustrate three broad areas as the main avenues through which justice can be accessed. These are formal justice structures such as courts and police, traditional justice structures such as the traditional courts of *Izinduna* and *Amakhosi* and finally, NGOs such as the CCJD and intergovernmental structures, the Community Policing Forum (CPF), United Nations Children Funds, (UNICEF), and United Nations Development Programme, (UNDP). Further to this the figure proceeds to identify and illustrate the sources of law of the three justice structures; for formal law, it is the Constitution, statutes and other sources of law. For traditional justice it is the Constitution as the supreme law of the country, indigenous justice practices, the Traditional Courts Bill (RSA, 2012) and other sources of law relevant to the context. Finally, for the NGOs, the intergovernmental structure is the Constitution, European Union (EU) and African Union (AU) agreements. The third and final tier of the figure identifies the problem area for the study; as all three tiers operate within one space,

problems do arise from time to time. The Constitution as the supreme law of the country to which all other laws must give effect cuts across all justice structures.

The first area of problem is the tension between the Constitution and customary law; even though customary law has been given full recognition and is on par with other law in the South African legal system, it is still subject to the Constitution as the supreme law of the country. In other words, it does not enjoy complete autonomy as a fully fledged system of law. Another tension between the Constitution and customary law is that the former emphasises restorative justice whereas the latter emphasises rights-based justice. Furthermore, some customary practices are considered unconstitutional and therefore prohibited, which causes problems for those who subscribe to them. Secondly, there is a view that customary law in its current form is not the same as indigenous law as it was practiced by indigenous people prior to colonisation. Proponents of this viewpoint maintain that as a result of colonialism, indigenous law was adulterated to serve the interests of the colonisers. Hence customary law in its current form falls short of capturing the rich dynamics and intricacies of indigenous law as a living system of law.

Thirdly, this viewpoint notes that traditional leaders were used by the colonisers to maintain control of the local population; this led to a compromised position and view of traditional leadership. According to proponents of this point of view traditional leadership is incompatible with democracy. Traditional leadership does not enjoy outright support and recognition and this impacts on their role as justice arbiters. Fourthly, there is some discontent within traditional leaders' circles with the democratic government with regards to their scope, role and functions; they have been largely excluded from participating in political decision-making which has always been within their scope of jurisdiction. Finally, while the Constitution cuts across all three structures of justice, it is not always compatible with and responsive to local conditions and dynamics. These viewpoints are further discussed in Chapter 2 during a review of the literature.

## Study Background and Research Problem

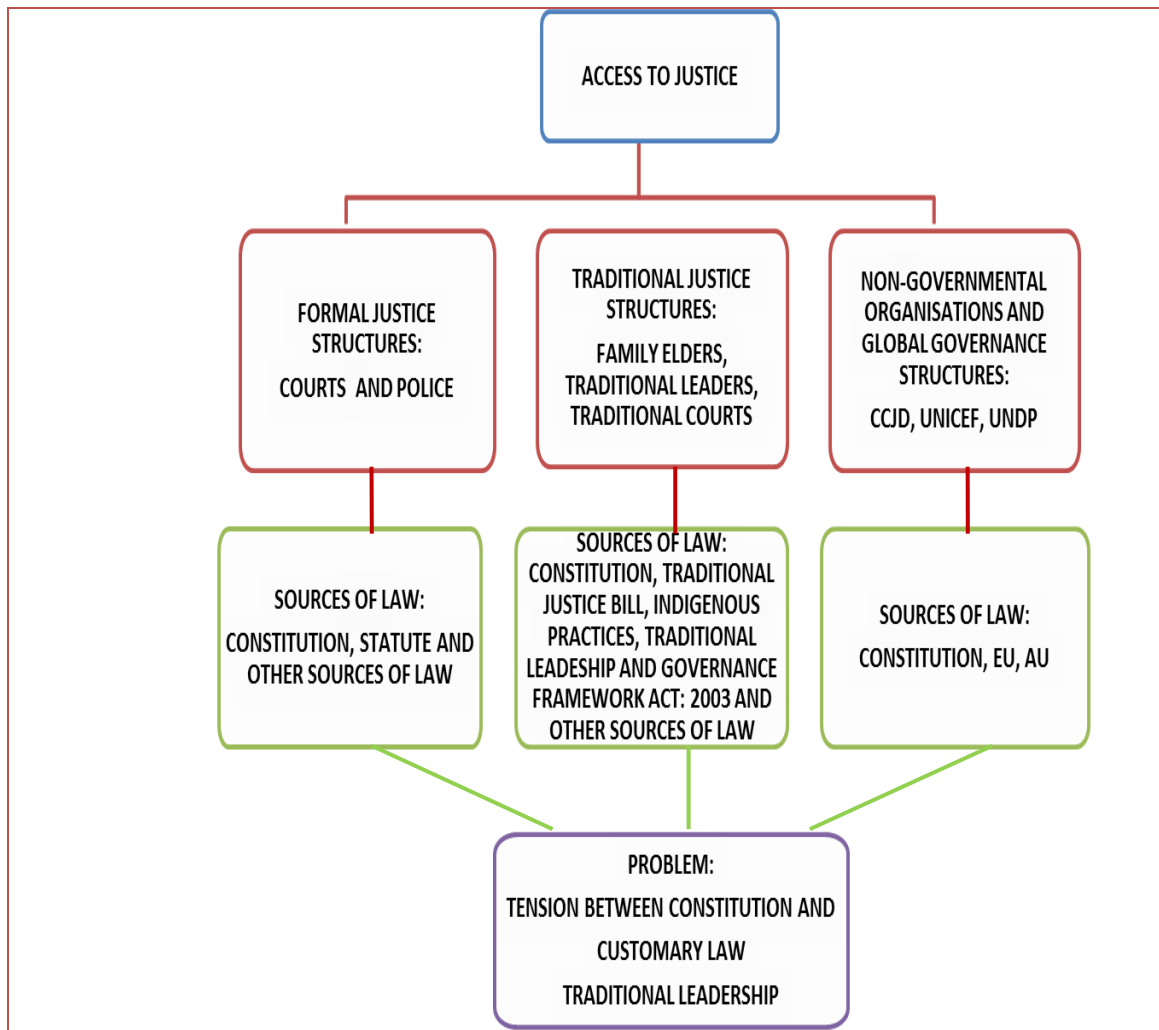


Figure 1.1 Study Background and Research Problem

Source: Adapted by the researcher from The Republic of South Africa, Constitution of the Republic of South Africa Act 108 of 1996 (RSA, 1996); Republic of South Africa, Recognition of Customary Marriages Act 120 of 1998, (RSA, 1998); Republic of South Africa, Traditional Leadership and Governance Framework Act 41 of 2003 (RSA, 2003); Republic of South Africa, Policy Framework on the Traditional Justice System under the Constitution, 2008, (RSA, 2008); Republic of South Africa, Traditional Courts Bill, (RSA, 2012); Republic of South Africa, Summary of Traditional Courts Bill Published in Government Gazette No. 34850, December 2011.

## **1.6 Philosophical Worldview, Research Design and Methods**

Punch (2008:245) maintains that different ontological and epistemological positions influence how a researcher goes about studying phenomena, the assumptions made, where one's focus will be, what questions one will ask and what data gathering methods one will use. The underlying worldview for this study is advocacy/participatory which states that research should focus on the needs of groups and individuals that are marginalised in society. This worldview is pertinent to this study about access to justice for citizens in rural areas which is concerned with issues of empowerment, inequality, oppression, domination and alienation that need to be addressed in society (Creswell, 2009:9).

With the underlying advocacy/participatory worldview, this study employed a qualitative research design. It is an appropriate design for conducting a study that involves in-depth understanding of a social phenomenon within its natural habitat – such as questions about access to justice in rural areas. The qualitative research design afforded the researcher insight into rural people's experiences of the justice system from the point of view of participants. A case study strategy was employed. Data collection techniques included interviews of CCJD public managers who operate the community advice offices and citizens of Impendle who access those services. Data analysis was a combination of thematic, content and matrix analysis as further discussed in Chapter 3. The upcoming outline of the chapters in the next section is followed by conclusion of this chapter before proceeding to Chapter 2 which is entitled Accessing Justice through Alternative Justice Approaches.

## **1.7 Outline of Chapters**

This dissertation is structured as follows:

Chapter one: Introduction and Background to the Study. This chapter reviews the background for the study as well as the research problem while identifying research objectives and research questions. It also provides an outline of the five chapters of this dissertation.

Chapter two: Literature Review. This chapter explores customary law in the South African context, the institution of traditional leadership and the role of indigenous justice in the post-apartheid era of the judicial system. That chapter also presents the theories underpinning the study and explains the theoretical framework that drove the study.

Chapter three: Research Design and Methodology. In this chapter the selection of research design, philosophical worldview and research strategy are explained. Also discussed are the case, site and informant selection, sampling and units of analysis, ethical considerations, data collection tools, data analysis and limitations of the study.

Chapter four: Data Analysis and Findings. This chapter provides a contextual background of Impendle and the province of KwaZulu-Natal. It presents procedures undertaken by the researcher to analyse the data through a combination of content, thematic and data matrix analysis. After displaying the data responsive to the research objectives and research questions and interrogating the literature in relation to interpretation of data, the chapter concludes with triangulation of the study.

Chapter five: Summary of Findings and Conclusions, Policy Implications and Recommendations. In the final chapter, findings and conclusions are summarised and policy implications drawn and recommendations for government and NGOs are made, based upon findings from the study.

## **1.8 Chapter Conclusion**

This chapter presented an introduction to this study, locating it within the broader scope of access to justice and relating it to the topic under investigation which is the value of the indigenous governance of social justice for rural communities, in particular Impendle. The chapter also provided the background to the study, profiling the KZN province as a mainly rural province and the challenges facing these rural areas, with the CCJD community advice office in Impendle identified as the location of the study. The chapter stated the research problem and highlighted the objectives that the study sets out to achieve and the research questions the study is designed to answer. Finally, the structure of the dissertation was outlined.



## **CHAPTER 2**

### **ACCESSING JUSTICE THROUGH ALTERNATIVE JUSTICE APPROACHES**

#### **2. 1 Introduction**

This chapter explores and critically examines the body of available literature in the field of access to justice and indigenous governance as both relate to the research topic. It also provides a synthesis of what has already been written on the topic. Using the CCJD as a model, the study sets out to review the literature to answer the research questions and achieve the research objectives. It begins by investigating the use of indigenous governance techniques as a vehicle to facilitate access to justice for rural communities. Secondly, it seeks to determine how indigenous governance and justice systems are connected to contemporary access to justice. Thirdly, it questions the relevance of customary law in the traditional, rural community of Impendle. The study examines the relevant literature on the institution of traditional leadership given the fact that it is at the apex of the entire network of indigenous governance systems (Ntlama and Ndimba, 2009:26). Hence the administration of justice is mainly carried out by traditional leadership, usually on the basis of customary law. However, as will be seen in Chapter 4, traditional leaders were not targeted as respondents. Rather, the study centres on CCJD and how rural community members perceive the services rendered by CCJD.

Figure 2.1 below is a diagrammatic representation of the literature review for the study. It shows that the views of different scholars, theorists and activists and the legislation and policies constitute the local and international experience that forms part of the body of literature that guides this study.

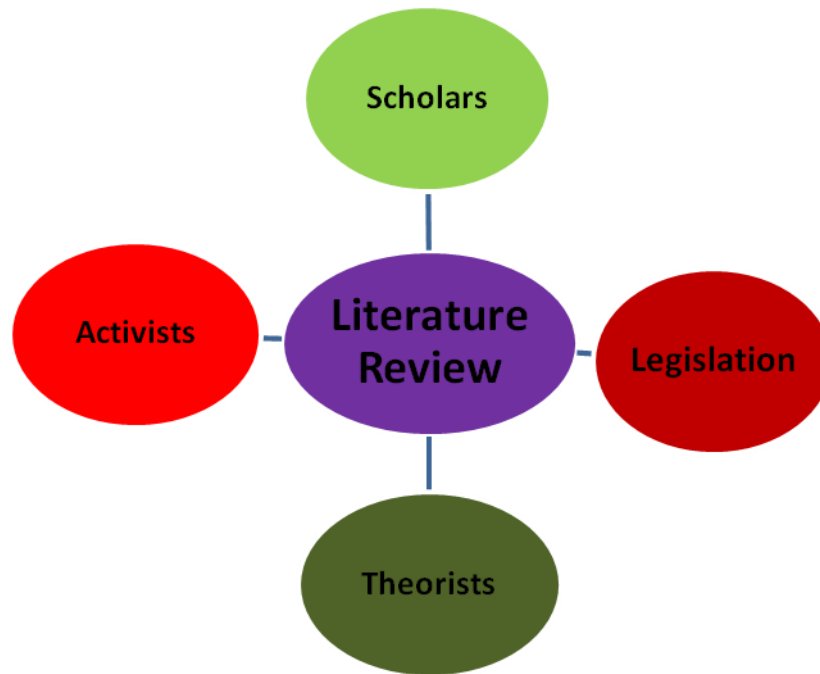


Figure 2.1 Diagrammatic Representation of Literature Review

Source: Adapted by researcher and listed in descending chronological years from a review of Oyieke, (2012); Traditional Courts Bill (RSA, 2012); Summary of Traditional Courts Bill Published in Government Gazette No. 34850, (December 2011); Ndlela, Green & Reddy, (2010); Tesoriero, (2010); Beall, & Ngonyama, (2009); Policy Framework on the Traditional Justice System under the Constitution (RSA, 2008; Rautenbach, (2008); Sithole, (2008); Ndlela, Green & Reddy, (2006); Ray, & Reddy, (2003); Sithole, (2005); Nussbaum, (2003); Traditional Leadership and Governance Framework Act 41 of 2003 (RSA, 2003); Recognition of Customary Marriages Act 120 of 1998 (RSA, 1998); Constitution of the Republic of South Africa 108 of 1996 (RSA, 1996); Rawls, (1985).

## 2.2. Customary Law within the South African Legal System

Customary law has been the subject of extensive debate among academics in South Africa. Much of this attention emanates from the post-apartheid government's decision to upgrade its status to be on par with common law. Scholars note that, the advent of democracy in 1994 gave customary law a new lease on life in view of the fact that it was accorded constitutional recognition as a legitimate system of law alongside common law, subject to the Constitution and other legislation. Reitenbach (2008:4) observes that customary law had always been treated as a subordinate system of law that never enjoyed parity with transplanted laws despite the fact that it is the law of the original inhabitants of this country. Modern South African law is a hybrid of

Roman-Dutch law, English common law, and indigenous law referred to as customary law. There are many definitions of customary law; some scholars even go as far as to differentiate between living customary law and official customary law. Tshehla (2005:20) maintains that “official customary law refers to traditional or cultural legal practices that have been captured and made part of the written law, often reflected in statutes and case law. While living customary law refers to the non static, unwritten law that is practiced by traditional communities on a day to day basis”. For the purpose of this study, the definition provided in the Recognition of Customary Marriages Act, 102 of 1998 (RSA, 1998) will be used. This Act defines African customary law as the customs and usages traditionally observed among the indigenous people of South Africa which form part of their culture.

Chirayath (2005:3) maintains that customary law is not universal; it differs according to locality and tradition, as well as the political history of a particular country or region. Reitenbach (2008:8) observes that colonialism had a major impact on the existence and development of South Africa’s judicial system. While scholars agree that colonialism influenced customary law, some argue that customary law is a pre-colonial system of governance. Mandani (1996) cited in Beall and Ngonyama (2009:2) states that customary law is a system of law that had long been in practise prior to the arrival of the Europeans in Africa but was not codified. The colonialists manipulated this system to tailor local people’s practices to fit in with Western ideals as part of their ‘civilising’ mission. Ntlama and Ndima (2009:7) maintain that African customary law was used to order lives and relations among African societies and existed long before European enslavement and colonisation. In this regard, African customary law refers to a system of justice in Africa before the arrival of the Europeans. Traditional communities had system, procedures and structures in place prior to the arrival of the colonisers, which they used to regulate and order relations. In this regard, Ndlela, Green and Reddy, (2010) assert that traditional communities “functioned through an elaborate system of protocols negotiated through generations, which defined the place of every segment of society, such as men, women, children and youth”. Ntlama and Ndima (2009:7) distinguish two distinct phases in the evolution of customary law in Africa; firstly, the pre-colonial period in which customary law was unadulterated by Western influences and secondly, the period under colonialism and apartheid characterised by the distorted influence imposed on customary law. How pre-colonial customary law can be fully understood as an African indigenous system, is beyond the scope of this dissertation.

### 2.2.1 Distinguishing Customary Law from Indigenous Law

Some scholars are of the view that there is a distinct difference between customary law and indigenous law, despite the manner in which this subject is treated and presented in the Constitution (RSA, 1996). Robinson (1995), cited in Govender (1999:2) maintains that there is a significant difference between customary law and indigenous law. It is argued that customary law is a corruption of indigenous law arising from a compromise between black power brokers and the dominant colonial power structure; it talks to the superiority of the coloniser over customary law (Reitenbach, 2008). The character of indigenous law is different to customary law in that it is essentially oral, fluid and dynamic in nature; hence the merging of indigenous law into rigid and foreign written culture adulterated and violated its very core. Ubink (2011:4) states that many colonial administrators were preoccupied with the codification of indigenous customs in the hope that it would permit a better understanding of local society and a better means of control. According to this school of thought, customary law falls short of capturing the dynamics and intricacies of indigenous law as a living system of law. Finally, the purpose of indigenous law is to reflect the living culture of African people; codified customary law cannot fulfil this objective as it freezes African life and hinders future developments.

Ubink and Van Rooi (2011:6) maintain that there are multi-versions of customary law; they distinguish between codified, judicial, textbook and living customary law. Codified customary law refers to legislation codifying the customary law of a certain jurisdiction. This, it is argued, ensures legal certainty and accessibility while at the same time unifying and simplifying it in a formal language different from that used by the original community. Judicial customary law refers to the norms developed by judges when applying customary norms in court as legislated in national law reports. Textbook customary law refers to authoritative texts written by the state, administrators and anthropologists, often used by state courts when trying to ascertain appropriate customary norms. It offers non-legal and less formalistic sources of the appropriate customary law. Finally, living customary law refers to the norms that govern daily life in a local community.

### 2.2.2 Distinguishing Customary Law from Formal Law

In distinguishing the uniqueness of African law from its Western counterparts, Ramose (2002), cited in Ntlama and Ndima (2009:9) affirms that *ubuntu* is the basis of African law and that the African view is that law is a lived experience. Elechi (2001:2) argues that pre-colonial African justice systems were rooted in human rights; all societies, including African people have

grappled with human rights issues. Elechi (2004) maintains that another distinguishing feature of the African indigenous justice system is that it is community-based; human-centred and employs restorative and transformative principles of conflict resolution. Restorative justice is negotiative and democratic; it empowers communities to participate in dispute settlement. Adding to this debate, Ubink and Van Rooi (2011:7) maintain that in contrast to the state justice system, customary justice systems do not resolve disputes through adjudication and deciding who wins or loses, but through mediation seeking to facilitate a settlement that is acceptable to all. Unlike formal law, customary law is not codified which makes it flexible; it thus offers a high level of discretion to dispute settlers. Harper (2011:4) states that another difference which is a source of discomfort for some governments and donors is that since customary law operates outside of state regulation it is open to human rights violations, nepotism and discrimination.

### 2.2.3 Customary Law in Traditional Communities

Many people who live in traditional communities subscribe to the principles of customary law and embrace the traditional court system that applies this form of law. An estimated 14 million people form part of traditional communities in all provinces in South Africa except the Western Cape, according to the Policy Framework on the Traditional Justice System under the Constitution, (RSA, 2008). In the context of this framework, customary law is defined as an unwritten body of law that differs from area to area and among different traditional communities. Furthermore, it is a body of practices, rules, institutions and values applied by a traditional community. Ntlama and Ndima (2009:17) note that while it is significant that the functioning of customary courts should be established by law, these courts derive their true legitimacy from South African culture and tradition. In recognising customary law, the Constitution also affirms the role of traditional leaders as legitimate structures for the dispensation of justice within the traditional communities that fall under their jurisdiction. In addition, there are other NGOs, as well as partially state-funded agencies whose mandate it is to facilitate access to justice for marginalised groups and communities. These include the Legal Aid Board, traditional court structures and agencies like the CCJD and similar agencies facilitated by quasi-legal personnel.

Olechi (2004:1) emphasises the relevance and importance of the role of customary law in rural communities, noting that African indigenous institutions of social control remain relevant in people's affairs, particularly in the rural areas of Africa where the majority of people reside. Ubink (2011:1) maintains that for the majority of the poor people living in developing countries, customary law provides the most accessible justice system. Disputes are dealt with in a plethora

of local dispute settlement institutions, from family elders to the more formalised chief's courts. Ever since colonisation, governments have been forced to consider and recognise the pervasive nature of customary justice systems and their importance to people. Chopra and Isser (2012:337) also maintain that informal justice systems are a primary locus of dispute resolution for the vast majority of the population, and therefore cannot be ignored. In South Africa, this implies that traditional court structures are not only the primary justice structure, but the justice mechanism of choice for the majority of people residing in rural areas. Harper (2011:4) has noted that delivering access to justice for all is unlikely to be achieved without customary systems forming part of the solution. In most developing countries, the state cannot provide access to justice to the entire population, nor is it the most efficient provider of such services. Hence, this study, among other things, explores the value of the indigenous governance system used by the CCJD to facilitate access to justice in rural Impendle.

### **2.3 The Institution of Traditional Leaders in a Democracy**

Ndlela, Green and Reddy, (2010:3) note that the institution of traditional leadership has remained resilient as an institution of governance withstanding colonialism and democratic government. This has mainly been due to the strong support base that traditional leadership has received from rural communities. Through the ages, rural people continued to be attached to the institution of traditional leadership. Ntsebenza, (2003: 177) defines traditional authorities in South Africa as an all encompassing term through which rural people could access a whole range of benefits, notably: land, renewal of certificate for migrant workers, and pensions. Other than traditional authorities, there were no alternative channels for rural people to access any service, benefit or rights. Sithole (2008:41) observes that traditional leadership is a form of governance that has pre-colonial roots but was seriously tampered with by colonialism. As a consequence, the role and status of traditional leaders has been seriously compromised as they continue to be seen as colonial machinery to control the indigenous population. Ndlela, et al (2010:2) maintains that the mandate for traditional leaders has always been to ensure that people enjoy peace, prosperity and security at all times. However, Duminy and Guest (1989), cited in Sithole (2003:107) assert that chiefs were used as the hand of government in the exploitation of people by colonial government officials who imposed themselves as superior over traditional leaders. This is a view confirmed in Cele (2011: 5) which states that the apartheid system turned chiefs into civil servants, who could be hired, fired, paid and if necessary, created by government. Under colonial and apartheid structures, traditional leaders increasingly turned to the government for support rather than their subjects. State recognition became more vital for

chieftaincy than popular support, and this made them puppets of the system. Cele (2011: 6) explains that there were however some chiefs who resisted colonialism and apartheid such as Sekhukhuni, Hinstsa and Bambatha.

It is against this backdrop that the debate on traditional leadership in a democracy has focused upon whether it is democratic or not and whether or not it should be accommodated as part of the current system of governance in South Africa. Ray & Reddy, (2003) maintain that, traditional leadership broadly exercises governance functions ranging from the provision of services to the preservation of law and order, allocation of tribal land subject to the relationship with national government. Yet Sithole (2003:103) argues that “traditional leadership as a form of government is undergoing a precarious stage in KwaZulu-Natal, a stage that is neither a fault of the traditional leaders nor that of the state, but in which both systems are seeking to prevail”. The position in which South Africa finds itself with regard to the institution of traditional leadership in a democracy is not unique. As Beall and Ngonyama (2008:3) state, the effective accommodation of the aboriginal population and indigenous institutions in a formal democratic government structure is an issue that has also vexed successive administrations in countries such as Australia and India. Ray (2013:95) making reference to the Ghanaian experience asserts that “a central problem with regards to traditional leadership has been how to handle issues of determining what authority to recognise for them in local governance”. This too has been a problem in post-apartheid South Africa. As Reddy & Biyela (2003:274) put it, traditional leadership in South Africa has been constitutionalised, however the role and general functioning of this institution of governance has yet to be clarified.

It is within this background that traditional leaders challenge the democratic government about what they perceive as continued ambiguity and the alienation of traditional leaders in South African politics. A similar sentiment is expressed by traditional leaders in Sithole, (2008:1) “while it is true that traditional leadership enjoys constitutional recognition, there seems to be continued ambivalence and uncertainty about their role as a political institution” *Amakhosi* complained about what they perceive as government’s patronising attitude, enticing them with legislation and policy, while alienating them and making them politically redundant. *Inkosi* Phathekile Holomisa (2000), cited in Sithole (2005:103) argues that one of the ironies of the post-apartheid government is the comfort that its new rulers found in the government system of their former oppressors; they also do not seem to know what to do with the indigenous systems that somehow managed to survive the colonial onslaught.

Advancing the argument further, Reddy & Biyela, (2003: 269) maintain that traditional leadership and structures should be an integral part of formal local governance given their grass root support and legitimacy in rural areas. Similarly, Cele (2011: 9) states that the government is committed to strengthening traditional leadership system, arguing that this is reflected in chapter 12 of the Constitution, (RSA, 1996), that specifically acknowledges the institution of traditional leadership and its place and role within the system of democratic governance. This is also evident in the Council of Traditional Leaders Act (RSA, 1997) and the Traditional Leadership and Governance Framework Act (RSA, 2003) that aimed to provide clarity and substance to the role of traditional leaders. The Traditional Courts Bill (RSA, 2012), pending promulgation, also addressed this issue. Tshehla, (2005:14-15) provides an elaborate historical exposition of both South African legal precedents and legislative interventions impacting on traditional authority. Table 2.1 below stipulates this legislation and the purpose for which it was intended under the colonial and apartheid governments and the current democratic dispensation.

Table 2.1 Legislative Interventions Impacting on Traditional Authority

Year	Legislation	Purpose/Result
1878	Natal Code of Zulu Law	To eliminate uncertainties regarding customary law
1881	Ordinance of 11 of 1881	Recognised African civil law
1885	Ordinance in Law 4 of 1885	Recognised African civil law subject to the repugnancy clause
	Natal Native High Court & Transkei Native Appeal Court	Handed down written judgements that served as precedents on customary law
1927	Black Administration Act	Created separate court system for black South Africans
1951	Black Authorities Act	Created homelands
1967	Rule (6) of chiefs and Headmen's Civil Court Rules	Required the traditional court to record the names of the parties, particulars of claims, particulars of defence, judgement and date of judgement



1988	Law of Evidence Amendment Act	Provided for admissibility of evidence of the existence of customary law subject to the Constitution
1993	Interim Constitution of the Republic of South Africa Act	Provided for recognition of customary law subject to the Constitution
1996	Constitution Of the Republic of South Africa Act	Chapter 12 dedicated to the traditional leadership and section 166(e) provided for the recognition of courts outside of the system
1996	Schedule 6 of the Constitution	Provided for inclusion of all pieces of legislation from different homelands and independent states into the South African law
1997	The Abolition of Corporal Punishment Act	Abolished traditional leaders' right to apply corporal punishment
2003	Traditional Leadership and Governance Framework Act	Regulates traditional leadership and seeks to put it in line with the country's Constitution

Adapted from Traditional Justice In Practice. A Limpopo case study. (Tshehla, 2005)

## 2.4 Two paradigms of Traditional Leadership

Taking this debate further, Cele (2011:7-9) distinguishes two paradigms within traditional leadership governance in a democracy. The dichotomy lies in the compatibility or incompatibility of traditional leadership with democracy. Most scholars adopt one of two extreme positions. On the one hand, the extreme modernist tradition sees traditional leadership as an obsolete institution in a democracy, while on the other hand the extreme tradition sees traditional leaders as truly representative of their people, accessible, respectable and legitimate. In keeping with this view, Sithole (2008:41) states that the tension between those who are in favour of the traditional leadership system and those who believe that it is incompatible with democratic government can be categorised into two paradigms; the democratic pragmatic and the organic democratic paradigm. Each paradigm is briefly discussed.

#### 2.4.1 Democratic Pragmatic Tradition

Proponents of the democratic pragmatic paradigm maintain that traditional leadership is not compatible with democracy and human rights, and is therefore not consistent with democratic governance principles. The basic assumption of this school of thought, Sithole, (2008:4) is that traditional leadership is about apartheid's manipulative measures to legitimise separate development. As a result, traditional leadership structures should not be sustained in a democracy as they are at odds with the fundamental values of freedom and choice. In terms of this line of thinking Tshehla (2005:16) notes that the only basis for the maintenance of the system of traditional leadership is to reinstate wrongfully deposed leaders. Secondly, traditional leadership does not have a place within the current dispensation because African communities have developed significantly. Mamdani (1996), cited in Sithole (2008:5) maintains that rural citizens under traditional authorities are not true citizens; they are subjects of undemocratic authority with no accountability. Traditional leaders are not elected; neither do they give other people a chance to be elected. There is no system of recourse against unfair exercise of power and women in traditional rural areas are marginalised by a patriarchal system that favours men over women. This implies that women's rights to equality as guaranteed by the Constitution may be violated. Some scholars maintain that traditional leaders have re-inserted themselves into the discourse of politics. Proponents of this point of view suggest, as Sithole (2008) puts it, that traditional leaders have opportunistically plotted their way into politics.

#### 2.4.2 Organic Democracy

At the other end of the spectrum scholars like Tshehla, (2005:11) point to the importance of tradition and the need to preserve the cultural practices of the diverse South African citizenry. Proponents of this school of thought see traditional leadership as the bedrock of African democracy. Sithole (2008:10-11) asserts that proponents of the organic pragmatic school of thought regard traditional leadership as a different and unique system of democracy, and as "a system of governance that fulfils different needs towards people who understand more than one type of democracy". One variant of this school of thought sees traditional leadership as an institution that fulfils a governance gap where conventional democracy has not succeeded. Scholars committed to this school of thought maintain that traditional leadership offers unique leadership attributes that fulfil specific social and governance needs of people as communities. The generic package of the Western form of democracy does not suit all; different communities have different needs that will be fulfilled differently. Furthermore, the presence of traditional leaders within a locality both physically and culturally is an advantage and an entitlement in a

community. Traditional leadership is seen as an alternative form of democracy that places less emphasis on how government comes into being and more on the rationalisation of justice based on cultural-moral principles and expressed human feelings, all of which are subject to vigorous negotiation on a case-by-case social issue basis. Finally, Sithole, (2008:12) points out that those who support the notion of organic democracy are not opposed to the democratisation of traditional leaders; they contest the basic idea that traditional leadership is fundamentally undemocratic in the first instance. In Figure 2.2 is a diagrammatic representation of the traditional leadership paradigm adapted by the researcher from Sithole (2008).

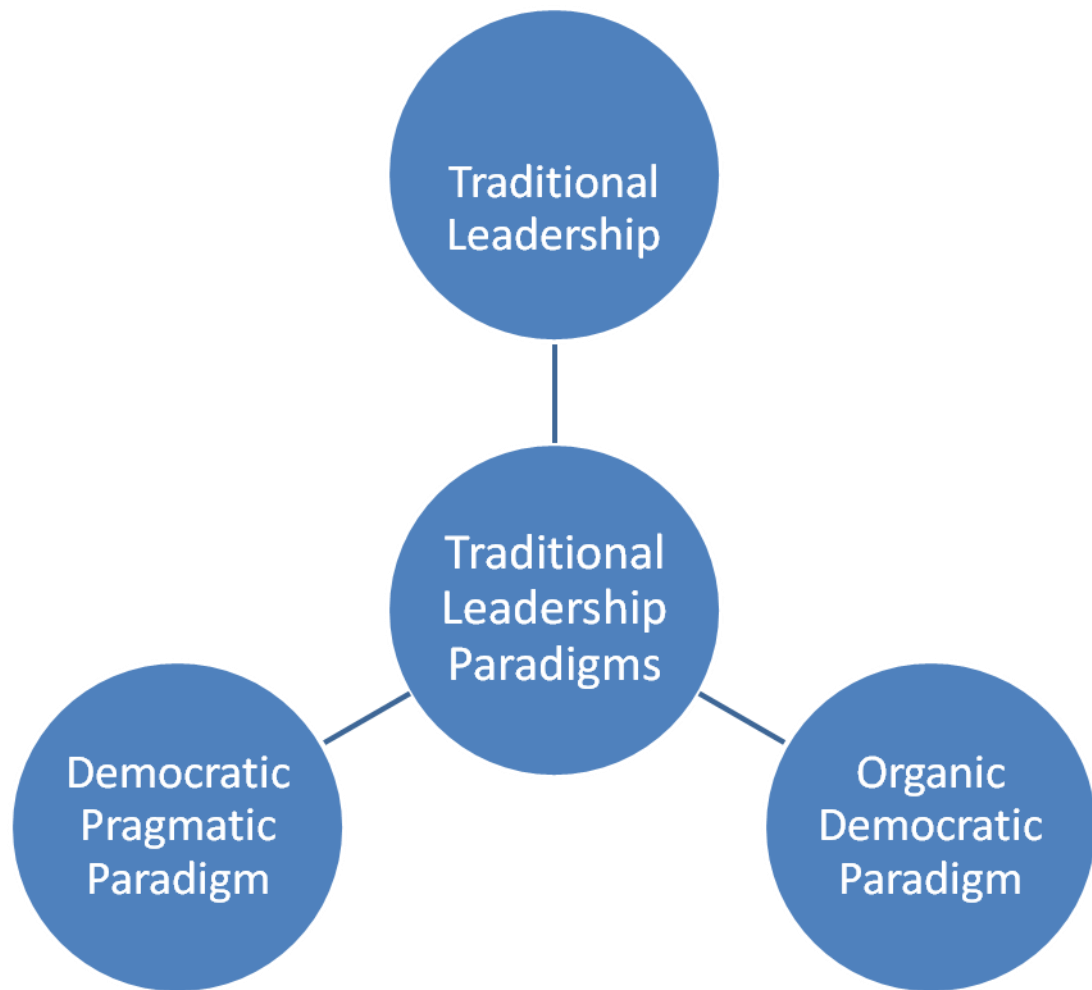


Figure 2.2 Traditional Leadership Paradigms

Source: Adapted from Sithole, (2008) in Fifteen Year Review on Traditional Leadership:

A Research Paper

## 2.5. Traditional Justice Structure and Procedure for Dispute Resolution

At the helm of traditional justice structures is the traditional leader as the primary governance structure closest to the community. Traditional leadership plays a critical and vital role in the administration of justice in traditional communities, is part of the cultural heritage of the African people and enjoys constitutional recognition. The role of traditional leadership in the administration of justice is not limited to dispute resolution. This role is traditionally twofold, namely, a proactive role to promote social cohesion, co-existence, peace and harmony and a reactive role to resolve disputes as stated in the Policy Framework on the Traditional Justice System under the Constitution (RSA, 2008). From time immemorial, traditional leaders have had dispute resolution mechanisms in place which have been successful in resolving disputes in rural communities. Moseneke (2007:31) asserts that traditional leadership has been administering justice in traditional communities for centuries; long before the colonial presence, civil and criminal disputes were resolved by applying indigenous law in the communal context of *inkundla* or *lekgotla*, (court) presided over by a traditional leader. Bennet and Murray (2006) also maintain that the role of traditional institutions in the administration of justice can be traced to the pre-colonial era. Today, traditional court structures offer indigenous governance solutions that continue to reflect cultural norms, values and traditions, while remaining practically effective. Hence, Schoeman (2012) argues that the primary goal of the African indigenous justice system is the restoration of victims, the community, and offenders. This is contrary to the Western justice system which is retributive in nature. Tshehla (2005:20) contends that in a traditional court, the administration of justice and dispute resolution is applied almost simultaneously; the traditional court tries a case and hands down a verdict. The ultimate objective is dispute resolution and to restore a healthy relationship between the parties in dispute. The restorative nature of traditional justice finds expression in the rituals conducted in some communities at the end of a trial. This is also reflective of the conciliatory nature of *ubuntu* justice that seeks to restore peace and harmony between community members.

Traditional justice commences with the family at the lowest or local level with the elders in a family the first to intervene and resolve a dispute. Ntlama and Ndim (2009:6) state that this is the lowest level of governance; the men in the family are the heads of the household. If the issue remains unresolved, the matter is escalated to local headman or headwomen. Taking the matter to the traditional court is seen as a last resort, and is only done after initial attempts to resolve the dispute have failed. The traditional justice system is based on the values of participation and the

inclusion of families and communities in resolving disputes. It promotes family values, responsible parenting and moral regeneration. At the same time, it promotes and preserves the African values of justice, which are based on reconciliation and restorative justice, Policy Framework on the Traditional Justice System under the Constitution, (RSA, 2008). As reflected in data presented in Chapter 4, the CCJD justice mechanism seems to be based on similar principles and value systems. CCJD programmes value and respect local indigenous justice systems; its programmes are focused on family preservation and peace building. It uses mediation mainly in cases of family disputes such as domestic violence and maintenance and to restore peace and repair relationships. Figure 2.3 is a graphic representation of the procedures followed for dispute resolution in the traditional justice system.

Procedures followed in the traditional justice system are:

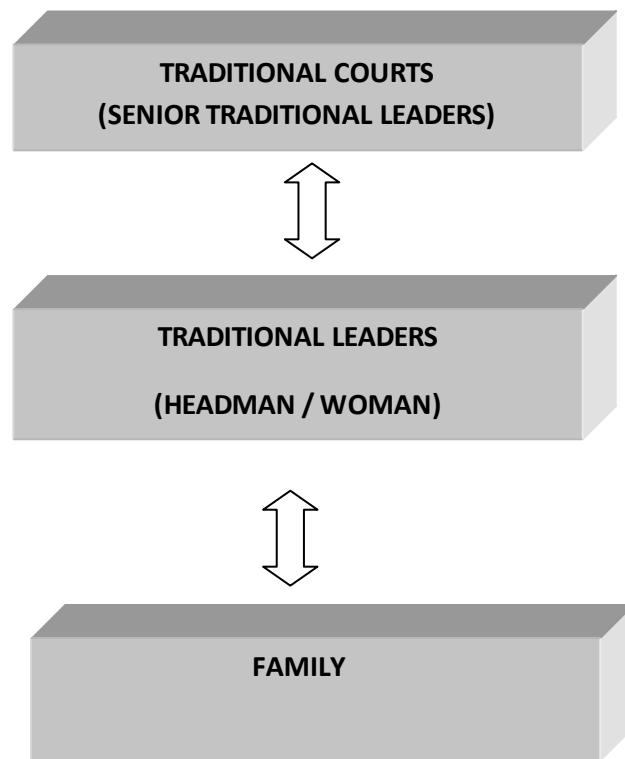


Figure 2.3 Policy Framework on Traditional Justice System: Adapted by the researcher from the Policy Framework on the Traditional Justice System under the Constitution (RSA, 2008)

As a result of their geographic location, traditional communities have limited access to services and opportunities; this perpetuates a cycle of poverty and underdevelopment. Very few lawyers choose to practice in rural areas, especially in those governed by tribal authorities. As a consequence, many people residing in rural area are arguably ignorant of their legal rights as guaranteed in the Bill of Rights; yet legal awareness is the foundation for fighting injustice. This

implies that the poor and marginalised seldom exercise their rights and rarely seek remedies for injustices. In view of this, the challenge remains to ensure that no groups of people in South Africa experience barriers to accessing basic services and that all people enjoy equal access and the protection of the Constitution.

## **2.6 The Role of Indigenous Justice within the new South African Judicial System**

Oyieke (2012:108) states that the old oppressive regime has been voted out of power and replaced by a democratic and people centred government founded on the basic tenets of free thinking and grounded in the democratic principles of equality, dignity and freedom. In order to reverse the harm caused by the systemic discrimination entrenched during apartheid, the imaginative application of the law is required to achieve the lofty ideals set out in Constitution. Nhlapho (2005), cited in Oyieke (2012:66) maintains that customary law in the current judicial arrangement is twice as vulnerable because it has to re-negotiate not only its content but also its political relationship with the rest of the legal system. In view of these sentiments, the question arises as to whether the indigenous justice system in its current form is a suitable mechanism to deal with the injustices and correct the shortcomings still prevailing in the current justice system, inherited from colonial and apartheid ideologies.

Thus it is arguable that the formal judicial system in its current form is characterised, among other things, by overtly unequal power relations, which tend to reinforce privilege and power while further marginalising and disempowering the disadvantaged. Ntlama and Ndima (2009:12) note that, customary law was regarded as a supplementary legal system that could be applied at the court's discretion to a particular case. It was therefore treated as a subordinate system of law, often ignored in the application of common law which was seen as the general law. Oyieke (2012:60) maintains that the current system alienate other people on the basis of language it seems to favour English or Afrikaans over indigenous local languages. Legal proceedings continue to be mediated through the medium of English or Afrikaans to the detriment of indigenous people. Who first has to contend with understanding and adjusting to an alien institution and in addition to this an unfamiliar foreign language. If one speaks in one's native language , there are issues with translation and transcription. The role of language is of paramount importance as it is one of the factors that may hinder access to justice. In so doing, the law does not take into account the plurality of the lived experiences of its users.

While this may be the case, it remains questionable whether alternative justice is the most suitable mechanism for the delivery of justice to marginalised groups of people in society. Some

scholars are of the view that traditional justice systems are in themselves also problematic insofar as they are based on patriarchal social norms. They warn that alternative justice systems, whether informal, indigenous or traditional, should not be treated as a panacea for all injustices within the justice system. Chopra and Isser (2013:339) assert that it is widely assumed that customary systems are based on patriarchal social norms that reaffirm the subordinate role of women; thus they are incompatible with the right to equality enshrined in the Constitution. Consequently, as a mechanism for the delivery of justice, customary law is seen by some to be in contravention of the Constitution which has as its ideal the concept of equality for all South Africans. It can be argued that, if customary law is patriarchal then customary law perpetuates inequalities and the oppression of women and children in particular by maintaining and promoting a patriarchal status quo as a result of the influence of the culture and indigenous practices of rural communities. However, patriarchy in African indigenous systems is different from the type of patriarchy about which Westernised feminists complain. Although that discussion is beyond the scope of this dissertation it is worth noting that Figure 2.3 depicts, as traditional leaders, headmen as well as headwomen.

As to alternative justice systems, there are weaknesses, particularly in matters pertaining to women and children. However, Chopper and Isser (2013:340) argue that the positive feature of the informal justice system lies in its accessibility, familiarity and effectiveness in delivering justice to marginalised groups in society. Van Rooij (2012:286) maintains that the delivery of justice in a pluralistic legal environment should be understood from the perspective of the users of justice. For the purpose of this study, this can be understood as implying that the focus should be on the impact of the alternative justice system on rural people as users of legal system rather than on the system itself. This will provide clarity on users' understanding and experiences of the justice options available to them. Congruent with this argument is the new legal development summarised as the bottom-up legal paradigm. This approach focuses on the end user of the justice system rather than on the institutions that make up the system.

The alternative justice approaches discussed share a common sentiment that justice must be equitable accessible to all members of society irrespective of socio-economic background. . They also recognise the relevance and value of traditional culture, customs, values, traditions and mechanisms to deliver justice. This is congruent with the constitutional provisions that recognise the relevance of African customary law in the South African legal system. The alternative justice system is an exercise in social justice in that it strives for equality, equity and fairness in accessing justice. Consequently, as the next section indicates, this study is grounded

in John Rawls' theory of social justice. Central to this theory is the ideal of creating a society and institutions based on equity, equality and solidarity that understands and values human rights (Tesoriero, 2010:69). Furthermore, justice is seen as a moral basis for democracy and should be treated as the first virtue of social institutions. Hence it is pertinent to investigate how the CCJD uses indigenous governance techniques to deliver social justice through alternative systems.

Rawls introduces the concept of equal rights as an element of social justice, and maintains that as an element of social justice, equal rights imply equal access to the things that make it possible for everyone in society to be successful. All people, from the poorest person on the margins of society to the wealthiest, should have equal rights and opportunities (Tesoriero, 2010:67). As an agent for social change, social justice is concerned with equal justice not just in court but in all aspects of society. The extent to which an action is in line with social justice or not will be subject to whether it facilitates or hinders access to justice, human rights and opportunities for advancement in society (Rawls, 2003 cited in Robinson, 2010:79).

## **2.7 Theories Underpinning the Study**

There are a number of theories and philosophies that underpin this study, namely: social justice and human rights theory as stated by John Rawls, critical consciousness as maintained by Paulo Freire, Black consciousness as expressed by Steve Biko and *ubuntu* within the practice of law. Each is discussed in turn.

### **2.7.1 John Rawls' Social Justice and Human Rights Theory**

The relevance of social justice theory for this study has been established. John Rawls' theory of social justice and human rights underlies this study. Rawls' view of social justice involves egalitarianism, "a belief in the equality of all human beings, where no one should enjoy special privileges over others" (Tesoriero, 2010:69). Equality is the cornerstone of the Constitution (RSA, 1996), and the Bill of Rights, giving further effect to relevance as it guarantees among other things the right of access to courts or any impartial tribunal for all citizens as well as the right to self determination. Ntlama and Ndimu (2009:13) assert that the right to self determination fundamentally ensures the right of people to promote and develop the customs and practices of their system of justice concomitant with the development of Roman-Dutch common law and constitutional law. Grant (2006:3) observes that South Africa is a culturally diverse society; moreover it is a society in which the culture of the majority, including legal culture has been disparaged and subjected to a minority, Westernised culture, first under colonialism and



subsequently under apartheid. Therefore, for this study social justice becomes a relevant and important tool in exploring equality and equity for all in accessing the justice system. It is also relevant as it asserts the importance of human rights within the scope of social justice. Rawls (2003), cited in Robinson (2010:80) acknowledges the importance of human rights within the discourse of social justice. He maintains that human rights are expansive and include many basic rights relevant to criminal justice including but not limited to the right to life, liberty, security, equality before the law, and fair and public hearings by independent and impartial tribunals.

While human rights are central within the discourse of social justice, liberty is one of the most important elements of social justice. Rawls (2003) cited in Robinson (2010:81) puts forward three principles of justice. The first is the equality in basic liberties principle; in which he posits freedom of speech, thought and association as basic liberties to which all human beings are entitled. These are referred to as constitutional essentials. Secondly, he puts forward the principle of equality of opportunities for advancement. Finally, he posits the difference principle, in which he advocates for positive discrimination for the underprivileged to achieve equity in society. In relation to this study, these principles raise the question of whether measures must be put in place to assist marginalised people to access justice in society. It is therefore worth investigating how indigenous governance techniques assist the CCJD to ensure access to justice for rural communities. In addition, Rawls offers three ideals of the social justice and human rights approach. These are firstly, addressing structural disadvantages such as class, gender, race, ethnicity and many factors as structures of oppression. This ideal has to do with confronting and countering structures of oppression in order for communities to realise their full potential. He notes that this can be achieved by among other things, putting in place strategies such as affirmative action, positive discrimination and raising consciousness; these will assist communities to rise above their position as marginalised groups in society. This is a typical example of the deconstruction of the structures of oppression and marginalisation of some people within the country.

Secondly, Rawls advocates for addressing the discourses of the disadvantaged in society. It is argued that this can be done by tackling the discourse of power, such as understanding power relations between people and how they relate to one another. Power relations must be identified and deconstructed if they reinforce privileges and power while marginalising and disempowering others. He argues that deconstruction is necessary for raising consciousness. Powerless groups must be assisted to articulate their position and take corrective measures where necessary. As an example, Oyieke (2012: 112) has argued that customary law like any other law

is not static; it is fluid and dynamic in nature because it is contingent and the result of social interactions. It can be placed in context and amended.

Finally, Rawls advocates for empowerment; the overall aim of social justice and human rights should be to increase the power of the disadvantaged. The barriers in society that prohibit people from participating and affecting the community they live in must be understood, addressed and removed. Empowered communities are capable of taking advantage of resources, opportunities, and the knowledge at their disposal to increase their capacity to determine their own future. In line with this viewpoint, Niegocki (2012:44) maintains that this conceptualisation of social justice is concerned not only with giving voice to marginalised individuals, but also with cultivating their capacity and ability to act on their own volition, strengthening one's control over his/her life.

### 2.7.2 Paulo Freire's Critical Consciousness

This study is also influenced by Paulo Freire's approach to critical consciousness. This approach encourages closer examination of the structure of social and economic relationships within a society. It maintains that when one's consciousness is raised s/he will be able to identify her/his own needs and in turn challenge one's material reality. "The more people know about the conditions of their own action and about the overall workings of their society, the more they are likely to be able to influence the circumstances of their own lives" (Burkey, (1998), cited in Thabethe, 2006; 110). It is against this background that Paulo Freire's critical consciousness approach seeks to provide poor people in communities with access to better opportunities by challenging the root causes of social ills such as poverty. In this way poverty is seen as a structure of oppression and disadvantage is addressed. Strong, well-informed communities are most effective in achieving constructive change.

In keeping with the idea of consciousness-raising, Freire evolved a theory based on the conviction that every human being is capable of critically engaging with the world in a dialogical encounter with others. This helps in the deconstruction of psychological oppression as it assists learners to confront their own lives. Freire (1993), cited in Thabethe, (2006) notes that, the environment in which people find themselves in a community can either empower or domesticate them to accept as normal that which oppresses them. When people are empowered they question the system they live in and the knowledge offered to them with the aim of influencing the future they envisage for themselves and their children. This view is compatible with the consciousness approach to the practice of law as advocated by Oyieke (2012:103), who

states that there must be a change in consciousness in the way the law is approached in order for all actors to ensure that their rights are not violated and that the hindrances that exist to seeking relief where such violations occur are removed. In keeping with this study, this entails rural people using their consciousness to construct new ways of being and living that validate their culture, practices and tradition in line with constitutional principle of equality.

### 2.7.3 Steve Biko's Black Consciousness

Oyeike (2012:107) introduced a new way of thinking about law and an alternative contemplation on how to engage with it. This new approach calls for the consciousness-raising of those affected by the law as well as those in the legal profession. Steve Biko's notion of Black Consciousness appeals to black people to realise their self worth and embrace their potential for greatness despite seeming obstacles. Those in the legal fraternity must acknowledge that the legal culture excludes certain groups and is discriminatory, unconstitutional and undemocratic. Legal professionals must be conscious of their conservative style and be able to challenge it and consider other approaches because conservatism reduces the transparency of the legal process, undermining its contribution to deepening democratic culture. On the other hand, for a rural community the notion of consciousness-raising is useful as it assists in demystifying the law and empowering people to interact and contribute to their development. Motsei, (2007) cited in Oyeike (2012:40) calls for an attitude change among custodians of the law, such as the judiciary's officers, police and other members of society; if this is not achieved, the impact of new legislation will remain limited. In line with this school of thought, Biko's consciousness approach to the field of law calls for legal professionals to be cognisant of the fact that the law is not neutral; instead it is value laden in favour of the dominant ruling tradition of the government in power. Hence in their practice of the law they have to consciously reflect on this notion of law as a discourse of disadvantage for others in society.

Biko's Black Consciousness approach is consistent with the theoretical framework insofar as it advocates for addressing the discourse of the disadvantaged in society. This ideal maintains that such deconstruction is a necessary pre-condition for consciousness; people must be assisted to engage with the law in the manner best suited to them and that best serves them. Applied to this study, legal consciousness parallels what Biko termed the intellectual ignorance of white people who believed that their leadership and values were natural and thus the only legitimate way of being. Addressing the discourse of disadvantage will prevent a small group of people controlling the consciousness of the majority by denigrating beliefs of the majority population and insisting on reliance upon a foreign value system. Furthermore, it entails encouraging rural communities

like Impendle to engage with and join forums like the CCJD and other indigenous justice structures that take into account their value systems and how these affect their daily lives. This will enable them to actively engage with these systems in an attempt to make the law more accessible.

#### 2.7.4 Philosophy of *Ubuntu* within the Practice of Law

Indigenous African culture is deeply rooted in the values of *ubuntu*, one of the many positive virtues of African culture. According to Schoeman (2012:19) *ubuntu* subscribes to the values of true humanness, care, sensitivity to the needs of others, respect, empathy and congruence. Nussbaum (2003: 568) asserts that, loosely translated, *ubuntu* refers to the capacity in African culture to show compassion, reciprocity, dignity, harmony and humanity in the interests of building and maintaining the community with justice through mutual caring. It seeks to honour the dignity of each person and is concerned with the development and maintenance of mutually affirming and enhancing relationships. It embraces and requires justice and thus inspires and creates a firm foundation for our common humanity. The philosophy of *ubuntu* should be central in the struggle for social justice and should be used as a tool for the transformation of a legal culture that is elitist, and favours Western ideology over indigenous ideology. Schoeman (2012) further argues that traditionally, the *ubuntu* philosophy was used to maintain law and order in society. It was, and still is in some societies, a mechanism for conflict resolution and reconciliation. It should be used as a moral compass in the struggle to make the voices of marginalised groups heard.

Mabovula (2011), cited in Scheoman (2012:19) maintains that *ubuntu* principles are entrenched in South African law and the judicial system, but westernisation and globalisation have resulted in acculturation associated with the erosion of traditional values resulting in anomie. The philosophy of *ubuntu* is compatible with the CCJD's approach of indigenous governance of social justice, as it focuses on empowering the marginalised and on engaging with them in a manner that values and respects their cultural practices and traditions. As Chapter 4 shows, during the focus group sessions, participants indicated that they preferred the CCJD approach to the formal justice system because they are treated with respect and dignity by the paralegals. They value the privacy with which dispute settlement procedures are undertaken at the CCJD; the agency makes them feel that they are valued and important members of the community. The approach used by the CCJD is not only consistent with *ubuntu* but with the worldview underpinning this study; it is conciliatory and focuses on family building and restoration. In view

of the theories and philosophies underlying this study, a theoretical framework was selected to drive the study.

## 2. 8. Theoretical Framework

A theoretical framework provides the researcher with a guide for the direction of the research (Kumar, (1999), cited in Majam and Theron, 2006:612). The theoretical framework for this study emanates from John Rawls’ social justice and human rights theory. The theory posits three ideals of social justice and human rights as discussed in section 2.7.1 above. Figure 2.4 is a diagrammatic representation of Rawls’ social justice and human rights theory.

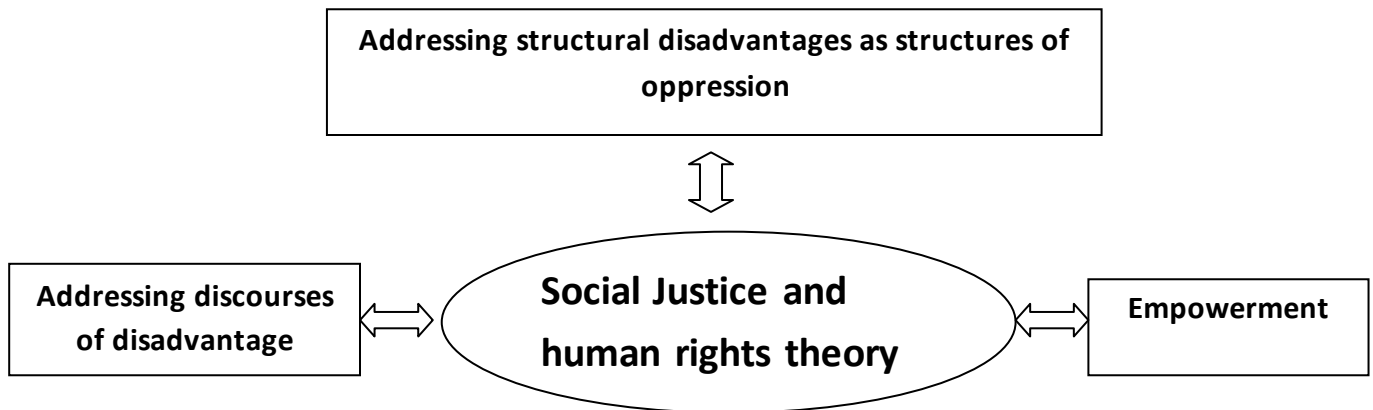


Figure 2.4 Social Justice and Human Rights Theory

Adapted by the researcher from (Tesoriro, 2010)

### 2.8.1 Operationalisation of Rawls’ Social Justice and Human Rights Theory

Using the theoretical framework as a vehicle to guide this study, this section operationalises the three pronged theoretical framework listed above – (1) addressing structural disadvantage as structures of oppression, (2) addressing discourses of disadvantage and (3) advancing empowerment through access to justice by indigenous means. Social justice and human rights theory lie at the centre of the public governance paradigm, allowing for divergence or convergence of constitutionalism and indigenous governance as the case may be. In Chapter 4 tables (showing data analysis procedures and processes) and matrices (containing data – excerpts from interview and focus group transcripts) display how the theoretical framework drove the study. Next discussed are the components of the theoretical framework and how those components are operationalised in this study.

#### 2.8.1.1 Addressing Structural Disadvantages as Structures of Oppression

This study was conducted in a deep rural area of KZN. Rural areas in South Africa are associated with and characterised by poverty and underdevelopment which are the result of apartheid policies. The poverty and underdevelopment confronting rural communities can be understood as a result of how apartheid shaped or denied access to socio-economic opportunities and government services. The structures of oppression need to be addressed; the task of developing rural areas becomes an exercise in justice. The South African legal system is an example of the structures of disadvantage that need to be addressed. The post-1994 transformation of the legal system has not resulted in any significant change, in particular from the point of view of consumers and users of the judicial system. Nineteen years into democracy, rural people are still experiencing challenges in accessing the system. Customary law, as one of the African indigenous justice systems, while enjoying full constitutional recognition, does not enjoy equal status and prestige with common law.

The approach adopted by the CCJD in engaging with the law from the perspective of local indigenous culture and practices affirms the role and status of customary law. In addressing structural disadvantage, legislation and policies that are pro-poor must be enacted; this calls for pro-poor policies that target rural development and an extensive focus on massive infrastructure investment to deal with backlogs dating back centuries. Tied to this is an exercise in consciousness-raising of communities so that they are conscious of their position as marginalised and deprived. This realisation will propel them into action, to demand that their rights are met and that government services be accessible to rural communities as this is their constitutional right. Communities that are capacitated and have reached their full potential are able to confront and counter structures of oppression in society. This ideal corresponds with Biko's vision, expressed in Oyieke (2012:135), which envisages a society that takes into account the values and knowledge of not only the powerful minority, but listens to the voices of and includes the discourse of the ideologically marginalised majority. It would also value indigenous practice and culture as the majority's lived experience and create a space for it in the dominant legal discourse.

As the findings from this study demonstrate, addressing structural disadvantage as structures of oppression has a direct correlation with the objectives of CCJD to enable "disadvantaged communities to claim their rights and services as well as building capacity of people by educating disadvantaged communities about their rights". If people do not know their rights and are unable to identify when these rights have been violated, they will not be able to demand and

seek recourse when necessary. This ideal is congruent with the philosophical worldview underpinning this study. The advocacy/participatory worldview hold that research should be intertwined with society's politics and political agenda. This implies that research activity is not a value free and neutral activity. It must be connected with the lives and realities of communities where it takes place. This worldview further stipulates that the researcher must allow space and the voice of participants in the research process, raising their consciousness in the process and advancing an agenda for change. The research process should embrace the principles of participation, reflection, empowerment and the emancipation of groups seeking to improve their social situation (Auriacombe and Mouton, 2007:447). Structures of oppression are worsened by discourses of disadvantage.

#### 2.8.1.2 Addressing Discourses of Disadvantage

Since the dawn of democracy in South Africa, extensive measures have been put in place to make justice accessible to the previously disadvantaged. Despite these innovative initiatives, for some people, particularly in the rural areas, the formal justice system is firstly inaccessible and secondly perceived and experienced as an alien culture. Factors such as geographic distance, the language and proceedings of the court, the prohibitive cost of using the system, and the excessive number of laws as well as outcomes that are seen to be inappropriate for local preferences influence people's choices and use of the informal rather than the formal justice system. Other factors include the structural organisation of court procedures and systems, i.e., long delays, formalistic and expensive legal procedures and the language of the courts that is sometimes inaccessible to ordinary people. It emerged from the field research done at Impendle that people prefer to deal with people they know and can relate to. The approach adopted by the CCJD of using local people as coordinators in their outreach centres assists in addressing the justice system and the law as discourses of disadvantage. People have confidence in people they know and are familiar with; the coordinators are familiar with local culture and practices. They are able to engage with legal institutions and simplify issues for their clients. Elechi (2001:2) observes that the African indigenous justice system is community-based; human-centred and employs restorative and transformative principles in conflict resolution. This approach resonates with the CCJD programme and approach; they assist communities to write letters; fill in forms, and follow up on cases with employers on behalf of their clients.

It is clear that the formal justice system is often not the first choice for all people, particularly in communities with local justice providers such as traditional leaders. In some instances, this structure is recognised and preferred as the legitimate authority to adjudicate, decide or mediate

a case. The formal justice system is a form of justice inherited from the colonial past (Wojkowska (2006:7). In communities led by traditional authorities, the norms and procedures of the informal justice system are more in accordance with the local culture and people's social relations. However, it is important not to lose sight of the fact that providing accessible justice is a state obligation. Sithole (2008:3) notes that, the state must ensure that all people have access to justice. This does not mean that that justice should be provided through formal justice systems only. The provision of justice through the informal justice system is appropriate and valid as a mechanism to enhance the delivery of accessible justice to communities where formal justice does not have capacity or geographic reach (Wojkowska, 2006:8).

In addressing justice as a discourse of disadvantage, this study inquired into the use of the alternative justice system as means of accessing justice. Data collection tools questioned the legitimacy and constitutionality of the informal justice system as a viable option for the powerless to articulate their position in ways that makes sense to them and enable them to participate in the justice system and corrective action. The Constitution (RSA, 1996) gives customary law and indigenous law equal status with common law. In this sense, the Constitution recognises the validity of both the formal and informal justice systems as legitimate mechanisms for administering justice in society. This weakens the monopoly of the formal justice system as the primary source and custodian of justice in society, while affirming and strengthening attempts to address justice as a discourse of disadvantage. Informal and traditional justice mechanisms are often more accessible to the poor and disadvantaged and may have the potential to provide speedy, affordable and meaningful remedies (United Nations Development Program (UNDP) Access-to-Justice Practice Note, 2004:4). The data collection and analysis focussed upon whether and how CCJD is addressing the discourse of disadvantage and whether in so doing the rural community of Impendle is being empowered..

#### 2.8.1.3 Empowerment

The overall objective of empowerment is to increase the power of disadvantaged groups in society. Empowerment as an ideal of social justice and human rights entails understanding, addressing and removing barriers to exercise power (Tesoriero, 2010). This study was an exercise in empowerment and consciousness-raising as one of its objectives was to help capacitate rural communities so that as members of society they are able to take full advantage of the justice system at their disposal. Empowered communities are aware of the available options and are capable of exercising their right to choose that which make sense to them.



Empowerment as an ideal has relevance for Paulo Freire's critical consciousness as he maintains that meaningful enlightenment is empowerment, as people come to know and understand their conditions in a society and can challenge the root causes of social ills. Empowering the poor and disadvantaged to seek remedies for injustice, strengthening linkages between formal and informal structures, and identifying the counter biases inherent in both systems can provide access to justice for those who would otherwise be excluded. In keeping with this viewpoint, it can be argued that empowerment is linked to the participatory/advocacy worldview as it seeks to embrace and empower disadvantaged groups in society. The significance of this study being theoretically driven by the social justice theory is that this debate places it in an appropriate historical, political and social context as it investigates whether a sense of social justice can be achieved for rural communities that continue to experience disadvantage and marginalisation from social goods, in this instance, being deprived of access to justice. The study also investigates the use of alternative strategies for social change within the context of the legal system. Oyieke (2012:14) maintains that an alternative approach grounded in indigenous values and sensitive to the voices of the unfamiliar other is injected into the law. Rawls' theory of social justice sees justice as a social good that must be equitably available to all members of society in a democracy. Furthermore, Rawls regards justice as a moral basis for a democracy that should be treated as the first virtue of all social institutions (Tesoriero, 2010). Central to the theory of social justice is the ideal of creating a society and institutions based on equity, and equality that understands and values human rights; these ideals are compatible with the values espoused in South Africa's Constitution (RSA, 1996).

Secondly, the study is underpinned by the advocacy/participatory worldview, which focuses on the needs of marginalised groups in society. Different levels and pockets of marginalisation exist; this warrants the study being guided by a participatory/advocacy worldview. The legal system marginalises people living according to customary laws and principles in favour of those whose lives are ordered and fashioned along Western formal law. In so doing, it effectively marginalises indigenous traditional justice systems which are the justice system of choice for the majority of people living in rural areas. Traditional leaders as custodians of customary law and governance structures that are closer to people within their jurisdiction perceive their role and status as politically redundant and alienated from governance under democratic government. The site of this study, Impendle, a rural area in KZN, is a pocket of marginalisation and alienation; South Africa rural communities are extremely marginalised in comparison with their counterparts in urban areas. Proponents of the advocacy/participatory worldview believe that a research agenda should be intertwined with politics and a political agenda for reform that can

change the lives of participants and institutions (Creswell, 2009:9). This study is guided by this worldview that focuses on a reform agenda for the marginalised in society, and is committed to fostering meaningful empowerment opportunities and interaction with research participants. Tables and matrices in Chapter 4 depict not only how the philosophical worldview is connected to the theoretical framework but also how data collection tools were lined up to analyse the way in which data responded to the theoretical framework, research objectives and research question and sub-questions.

## **2.9 Chapter Conclusion**

This chapter presented a review of the body of available literature on the subject under discussion, under the heading, ‘Accessing Justice through Alternative Justice Approaches’ This heading reflect the approach adopted by the study in exploring alternative justice approach that can be utilized to access justice apart from the formal justice approaches. In doing this the study begins by examining the views of different theorists, scholars and activists and the legislation impacting the field of access to justice, proceeding from the premise that access to justice is a social justice imperative. The theories underpinning the study were also discussed and analysed, this assisted in the identification and discussion of the study’s theoretical framework. The following chapter looks into the research design and methods upon which the study is based as well as the research strategy that will drive the study. Further to this chapter 3 will also look into the selection of case, site and informant used. The study will conclude by examining data analysis method and how the researcher intends ensuring trustworthiness of the study.

## **CHAPTER 3**

### **RESEARCH DESIGN AND METHODS**

#### **3.1. Introduction**

Tlhoalele, Nethonzhe and Lutabingwa (2007:562) maintain that research methodology is the heart and soul of research; it is a roadmap of the research that describes the methods and procedures that the researcher will use to conduct the research. Research methodology can be viewed as the pillar of research process. As Schwandt (2007), cited in Schrink (2010:428) states, research methodology incorporates methods, techniques and procedures that are employed to implement the research design. It relates to the theory of how an inquiry should proceed.

#### **3.2. Research Design**

There are three types of research design: qualitative, quantitative and mixed-method design. The research problem, objectives and questions lead to the research design and the design selected determines the other methodical procedures to be followed. Hence it is critical that design decisions relate to other methodological aspects of the research as a whole. Webb and Auriacombe (2006:589) state that, research design consists of a clear statement of a research problem and methods for collecting, processing and interpreting observations to answer the research questions. Webb and Auriacombe (2006:591) maintain that while research method refers to the means required to execute a particular stage of the research process, such as data collection methods, research techniques refer to the variety of tools that can be used when data is collected, such as survey questionnaires, interviews and observation. Both the research methods and techniques are linked to the research paradigm that drives the study.

This study employed a qualitative research design as this is an appropriate design for conducting a study that involves in-depth understanding of a social phenomenon within its natural habitat – such as questions about access to justice in rural areas. The qualitative research design afforded the researcher insight into rural people's experiences of the justice system from the point of view of participants. The researcher immersed herself in the world of the people under study during field visits and then sought to describe and analyse people's experiences from their point of view. Webb and Auriacombe (2006:597) argue that a qualitative researcher seeks to become immersed in the object or subject of study. Furthermore, qualitative research designs are context specific; the objective is not to replicate, but to gain insight into the life world of participants. A qualitative design allows the researcher firsthand experience of the phenomenon under study. Creswell (2009:4) maintains that qualitative research is a means of exploring and understanding

the meaning individuals or groups ascribe to a social or human problem. Using a qualitative design afforded rural people an opportunity to define their experiences of the justice system, as well as their subjective interpretation and perceptions of access to justice. The qualitative research design adopted moved from the particular to the general and had a flexible structure, with the entire research process converging towards an inductive style.

A qualitative research design is relatively open and unstructured (Webb and Auriacombe, (2006:597). It was best suited to study the indigenous justice system, in the sense that it afforded the researcher firsthand experience of how this system operates from the point of view of the rural community of Impendle. A qualitative research design is flexible, based on the assumption that social phenomena are dynamic rather than static, continuously changing and evolving in relation to the changing environment in which the research is conducted. The traditional indigenous justice system is a flexible, less structured system of justice that allows participants leverage to participate in a manner that is meaningful and makes sense to them. As with any qualitative study the researcher approached the research site from the perspective of an inquirer, with no little or pre-conceived ideas and conscious of the fact that reality is not static but a continually evolving phenomenon. To this effect, Webb and Auriacombe (2006:591) argue that qualitative research is an exploration of what is assumed to be a dynamic reality; it does not claim that what is discovered in the process is universal and thus replicable. In similar vein there is no claim that the findings in Chapter 4 are universal or replicable. However the way in which the study was undertaken is replicable. Just as the research problem, objectives and questions led to the research design, so were these factors considered in identifying a philosophical worldview associated with the study.

### **3.3. Philosophical Worldview**

Creswell (2009:6) defines a worldview as a basic set of beliefs that guide action; furthermore, a worldview is seen as a general orientation about the world and the nature of research. Punch (2008:245) maintains that different ontological and epistemological positions influence how a researcher goes about studying phenomena, the assumptions made, where one's focus will be, what questions one will ask and what data gathering methods one will use. Although an important component of research, the philosophical worldview is not always explicit; however, this does not reduce its significance and value in research. A philosophical worldview is a theoretical foundation of a research study whether expressed or implied. Creswell (2009: 6) advances four worldviews and maintains that the selection of a worldview will be determined by the research tradition a researcher applies to a study. These worldviews are: post positivism,

constructivism, advocacy/participatory and pragmatism. This study was underpinned by an advocacy/participatory worldview; this is compatible with both qualitative and quantitative research. However, for this study it was adopted within a qualitative approach.

The advocacy/participatory worldview states, that, research should focus on the needs of groups and individuals that are marginalised in society. It arose out of concerns about the shortcomings of other worldviews that do not address issues of social justice for marginalised members of society. The advocacy/participatory worldview concern itself with issues of empowerment, inequality, oppression, domination and alienation that need to be addressed in society (Creswell, 2009:9). This worldview holds that a research agenda must be intertwined with politics and a political agenda for reform that can change the lives of participants and institutions. One of the key features of the advocacy/participatory worldview, according to Creswell (2009:10) is that it is emancipatory in character in that it helps unshackle people from the constraints of irrational and unjust structures that limit self development and self determination. Emancipation and empowerment are central in post-apartheid South Africa. Through the advocacy/participatory worldview, conducting research and generating findings may lead to discourse and change in society arising from the voice of participants and advocating the needs and desires of citizens when it comes to indigenous governance of social justice in a way that promotes access to justice among other constitutional entitlements. This worldview is best suited for this study because it addresses issues of social justice for marginalised and disempowered rural people. Research is intertwined with the social and political agenda of the study participants; the researcher becomes intimately involved with issues confronting the marginalised, using the research activity to effect social and political change. Figure 3.1 is a diagrammatic representation of the advocacy/participatory worldview underpinning this research study.

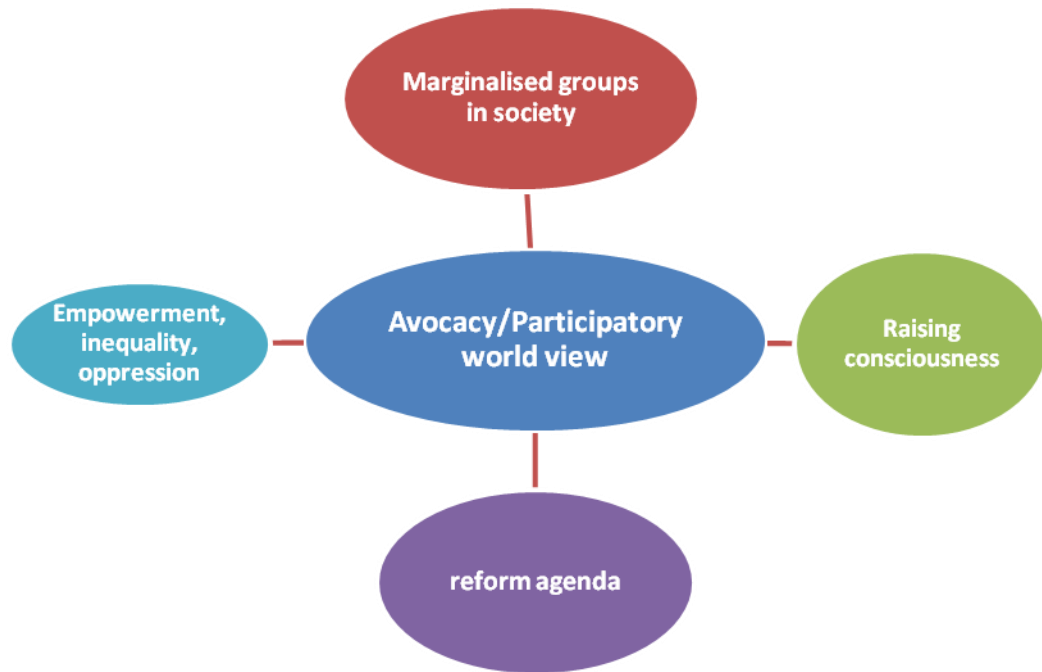


Figure 3.1 Advocacy/Participatory Worldview Underpinning the Study

Source: Adapted by researcher from Creswell (2009)

In Chapter 4, tables and matrices relate this worldview to the theoretical framework through use of the components surrounding the advocacy/participatory worldview in Figure 3.1. Once the research design and philosophical worldview were determined, the researcher designated a compatible research strategy.

### 3.4. Research Strategy: Case Study

The study was undertaken through a qualitative case study strategy. Stephens (2009:45) observes that a case study is one of a large number of research strategies within the qualitative tradition. Yin (2009) defines a case study as an exploration of a bounded system or a case over time through detailed, in-depth data collection involving multiple sources of information and consistent with context. Creswell (2009:13) defines a case study as a strategy in which the researcher explores a programme, event, activity, process, or more individual cases in-depth. Baxter and Jack (2008), cited in Schurink and Auriacombe (2010:437) maintain that a qualitative case study is an approach to research that facilitates the exploration of a phenomenon within its context using a variety of data sources. This ensures that the issue is not explored through one lens, but a variety of lenses which allows for multiple facets of a phenomenon to be revealed. Different scholars have argued that the qualitative case study strategy is best applied to

understanding a social phenomenon in relation to its wider context (Schurink and Auriacombe 2010:438). Schurink and Auriacombe (2010:438) argue that a case study in qualitative research emphasises the detailed contextual analysis of a limited number of events or conditions and their relationships. Case studies are particularly useful in studying real life events and in instances in which the researcher has no control over the phenomenon being studied. Yin (2003), cited in Schurink and Auriacombe (2010:437) asserts that a case study allows the researcher to explore individuals or organisations through interventions, relationships, communities, or programmes and supports the construction and subsequent reconstruction of various phenomena. In addition, a case study enables the researcher to present the complexity and multi-dimensionality of a case. It affords the researcher an opportunity to gain a better understanding and to address the complexity of the case.

Merriam (1998), cited in Schurink and Auriacombe (2010: 438) maintains that as a qualitative strategy, a case study is more interested in the process than the outcomes; in context rather than specific variables; and in discovery rather than information. The strength of a case study in qualitative methodology is embedded in its exploration and description. A case study was relevant for this study as it afforded the researcher the opportunity to understand the political, economic, social, cultural, physical and geographic context of the phenomenon under study, thus gaining a better and broader understanding of the of context surrounding indigenous justice. As an example, some scholars argue that the indigenous justice system is not merely the preferred justice system for rural people, but that is a justice system of choice for a variety of reasons. Approaching the research site with this in mind, the researcher was able to establish on a firsthand basis whether this is a valid argument or not. Hence, the case study allowed the researcher to explore this issue in depth, taking the views of participants into consideration. Swanborn (2010:13) states that, in the final stage of case study research, the researcher invites the persons and stakeholders under study to debate their subjective perspectives, and presents the preliminary research conclusions to them not only to attain a more solid base for the final research report, but also to clear up misunderstandings, ameliorate internal social relations and point everyone in the same direction. Toward this end, a preliminary presentation of data was conducted at the CCJD head office, in the presence of the CCJD CEO, research director and programmes director and the researcher's supervisor and other master's students with the same supervisor. The intention of this presentation was threefold. Firstly, to share and receive input on progress from fellow researchers and the research supervisor in the form of peer review/team review. Secondly, for CCJD staff to gain a sense of the direction the study had taken, to engage

them on issues for clarity and create a dialogue on the study and finally, for the researcher to consolidate the study.

When taking decisions about the research design, philosophical worldview and case study strategy, the researcher also had to decide about case, site and informant selection which is discussed in the next segment.

### **3.5 Case, Site, and Informant Selection**

#### **3.5.1 Case Selection**

Case selection is the process of choosing a case or population to study. In doing so, the researcher also sets an agenda for studying the case. This study set out to investigate the use of the indigenous governance system by the rural community of Impendle to ensure access to justice. The CCJD as an organisation was chosen as the case for this study because one of its primary goals is to ensure access to justice for marginalised people living in rural areas. The CCJD is known to work in partnership with other justice structures such as the police and courts. When the original organisation, the Centre for Criminal Justice (CCJ) was founded by the former law faculty of the former University of Natal, it was envisaged to help end violence in Pietermaritzburg and surrounding communities as apartheid drew to a close. What is unknown is however is whether and if so, how, CCJD works with traditional justice structures such as those administered by *Amakhosi* and *Izinduna*.

#### **3.5.2 Site Selection**

Site selection refers to the process of determining the exact location of the study. The selection of Impendle as the site for this study is appropriate since the focus of the study is the use of indigenous governance in a rural environment. Impendle was deemed appropriate because it is a rural environment with a CCJD outreach centre; the context of this study is specific to rural communities where indigenous traditional governance systems still apply.

#### **3.5.3. Informant Selection**

Informant selection is the process of defining and choosing the study participants - the people from whom data will be gathered. Swarnborn (2010:74) makes a distinction between respondents and informants in research. The term respondent is typically used for participants in survey, whereas for a case study, the term informant is associated with qualitative research studies. Informants are chosen carefully. Depending on the size of the organisation, they can



either be all members of an organisation or stratified according to relevant characteristics. For this study, the researcher was assisted by the CCJD co-ordinator from Impendle outreach centre to select and recruit participants. A meeting was arranged with the coordinator to explain the research study, and to negotiate field entry. On the basis of this meeting the coordinator was able to help recruit suitable informants from the community who use CCJD services. The coordinator also assisted with organising a venue for the focus group sessions. For the selection of informants for interviews with CCJD staff members, the researcher was assisted by the CCJD programme director and research director at head office. The informants for interview sessions were selected from head office and outreach centre personnel. The selection process was based on experience with the programme, and knowledge and familiarity with local people, culture and structures.

The informant selection process was driven by judgmental and purposive sampling which informed the choice of units of analysis. Sampling and units of analysis are described in the next segment.

### **3.6. Sampling and Units of Analysis**

Sampling decisions and units of analysis selected for this study complement one another, as shown in Figure 3.1.

It is practically impossible to include each and every unit of the population in a research study; therefore a representative sample of the population is drawn from which inferences or conclusions can be drawn and, in the case of quantitative studies, the findings can be generalised to the entire population. In qualitative studies, such as this study, the aim is not to generalise the findings. However, theoretical propositions that emerge from the study may be generalised to similarly situated populations and the study design can be replicated in similar contexts (Yin, 2009). Sampling is a meaningful and practical way of conducting a study as it reduces the number of units engaged in a study to a meaningful and manageable size. Babbie and Mouton (2001), cited in Burger and Silima (2006: 657) define sampling as a process of selecting the observations required for a specific subset of a population in order to make inferences about the nature of the population in context.

There are two types of sampling, probability sampling and non-probability sampling. In this study, non-probability sampling was used as it refers to instances where the probability of including each element of the population in a sample is unknown. The researcher's primary objective was to obtain an in-depth description and understanding of the phenomenon under

study. Leedy and Ormrod (2005) argue that in a qualitative study the researcher has no control over the research site; more often than not, qualitative researchers are intentionally random in their selection of data sources. Their sampling is purposeful; they select those individuals that will yield the most information about the topic. This study was conducted at Impendle, one of the CCJD's outreach centres. The population frame of the study is all the clients of the programme and officials employed at the Impendle outreach centre and head office in Pietermaritzburg. In terms of the sampling method used - judgmental sampling - all the clients of the Impendle outreach centre, were eligible for inclusion in the sample. They all reside in rural Impendle, have experienced services from the CCJD, possess similar socio-economic characteristics, and were likely to have experienced or may currently be experiencing structural disadvantage in post-apartheid South Africa, all of which was equally valuable for the study

Table 3.1 displays the sample drawn by the researcher:

1	Interview with CCJD Head Office Programme Director
3	Interviews with paralegals that oversee outreach centre in Impendle
3	Focus groups of 8-12 Impendle residents sought after
3	Focus groups convened of 12 participants each for a total of 36 focus group participants
40	Total participants

Not only does Table 3.1 display the sample. It also shows two stakeholder segments embedded as sub-cases in the overarching case study of CCJD as an organisation as units of analysis. Units of analysis relate to the person or object from which the social researcher collects data. There are several different possible units of analysis; these are individuals, groups of people, organisations, a period of time and social artefacts (Bless and Higson-Smith, 2000:64-65). The units of analysis for this study were the CCJD organisation, and two stakeholder segments – employees of CCJD and clients of CCJD at Impendle. Three focus groups of CCJD clients and four interview sessions with CCJD staff were conducted; this gave the researcher an opportunity to subsequently conduct cross-case comparison of the findings (Yin, 2009).

Data collection tools were used to generate findings from this study, as explained below in relation to the units of analysis from which data were collected.

### **3.7. Data Collection Tools**

Bless and Higson-Smith (2000) note that, a research project stands or falls on the quality of the facts on which it is based. An excellent research design and a very representative sample are not sufficient to ensure good results if the analysis rests on incorrect data. The data collection tools used for this study were focus groups and semi-structured interviews. The focus group questions and interview questions were designed in alignment with the theoretical framework, research objectives and research questions. Data generated by certain focus group questions and interview questions were then used to achieve research objectives and answer research questions as explained in Chapter 4.

#### **3.7.1 Focus Group**

A focus group is a type of an interview where a group of respondents are interviewed together, usually in an unstructured or semi-structured way. The researcher facilitates the focus group, and compiles a list of broad questions or themes to generate discussion and dialogue (Bless and Higson-Smith, 2000:110). For this study the focus groups consisted of three groups with a maximum of 12 participants in each group. During focus groups the researcher was assisted by a peer who was also working on a master's dissertation on another topic, and the person retained to transcribe the focus group transcripts. The transcriber indicated that she could better transcribe the tapes and translate the language from isiZulu to English by attending the focus group session, observing and taking notes. The first session started as soon as 12 informants arrived at the venue. With the first session in progress, informants for the other session started arriving. The assistant researcher attended to them and requested that they wait for the second session. However by the time the first session had ended more than 12 informants, were waiting. In view of this good turn out the researcher opted to conduct the first part of the session with the entire group (the introduction, welcome, explanation of the purpose of study and consent form). This was done to ensure that the informants would not get bored and would wait for the third session. The group was later divided and the research assistant assisted the third group with signing the consent form and the collection thereof. It is for this reason that numbering or coding allocation for the third session runs from 13 to 25.

The researcher used in-depth, open-ended and unstructured questions in the form of a guided conversation to generate discussion and dialogue. The focus group discussions followed a certain order, but were unstructured in order to generate fresh commentary on the subject. Responses were recorded using a tape recorder and in writing, with the aid of the research

assistant; this ensured accuracy and that information was not lost or diluted during the analysis phase (Jarbandhan and De Wet Schutte, 2006:675). The researcher had two research assistants at each of the focus group sessions, helping with audio-recording and hand written notes based on the discussion as mentioned above. The research assistants were a fellow MPA candidate and the person retained to transcribe tapes. The transcriber preferred attending the focus group session and taking notes so as to better transcribe the tapes. They also assisted with handing out, explaining how to fill in and the collection of the consent forms. All sessions started with a discussion and explanation of the consent form. The focus group interviews were conducted in isiZulu which is the informants' home language in order to encourage participation and the active involvement of informants. The audio tapes were translated into English by the transcriber.

### 3.7.2 Semi-structured Interviews

An interview is one way of gathering information directly from participants. It involves direct personal contact with a participant who is asked to answer questions relating to the research problem (Bless and Higson-Smith, 2000:104). The researcher conducted semi-structured interviews with the CCJD outreach centre coordinators. Three interviews were conducted, mediated through an in-depth, open-ended and unstructured question and answer session. The interview technique is often used to retrieve both quantitative and qualitative information, which could in turn vary from fully structured to unstructured interviews (Jarbandhan and De Wet Schutte, 2006:674). In this study, semi-structured, open-ended interviews were used, as this correlates with a qualitative research design and the case study strategy adopted. Jarbandhan and De Wet Schutte (2006:678) assert that semi-structured interview uses questionnaires with only open-ended questions that mould the respondents' frame of reference whilst at the same time giving them freedom to respond in their own way. A semi-structured interview was appropriate in this study since the researcher was certain about what he/she wanted to know, but still wanted to leave a room for explanation as the interview of CCJD public managers proceeded (Jarbandhan and De Wit, 2006:678). The interviews were also recorded and the research assistant assisted with taking hand written notes. The interviews were conducted in both English and isiZulu, with the researcher often switching to provide further clarity when needed.

Before collecting data, ethical protocols were followed as next described.

### **3.8. Ethical Considerations**

Ethical issues are prevalent in any kind of research. Ethics relates to doing well and avoiding harm, through the application of appropriate ethical principles. The protection of participants is imperative in any research study. Orb, Eisenhauer and Wynaden (2001:93) maintain that the nature of ethical problems in qualitative research studies is subtle and different compared with problems in quantitative research. Ethical conflicts often exist in terms of how a researcher gained access to a community group. For this study, a meeting was arranged between the researcher, supervisor and the CCJD programme manager at the CCJD head office in Pietermaritzburg. The purpose of the meeting was to gain access to the research site and develop rapport between the researcher and the organisation managers. This was also an opportunity for the researcher to introduce the study to the organisation, its relevance and value to the organisation and to answer any questions the CCJD managers might have of the researcher.

After this meeting, a follow up meeting was scheduled for the researcher to meet with CCJD's research director and programme manager. At this meeting the researcher presented a preview of the study, how it would be conducted, and identified people that might be relevant and appropriate sources of data. The researcher also had the opportunity to ask questions about the community; this assisted the researcher to profile the community in advance. The researcher asked questions about community norms, values, culture, practices to observe, most appropriate times and days to schedule interviews, and appropriate and acceptable dress code and language. This proved beneficial in the field as the researcher won the confidence and acceptance of the research participant community. This is critical in any research study that involves people; as Orb, Eisenhauer and Wynaden (2001:94) note, concepts of relationship and power between researcher and participants are embedded in qualitative research. The desire to participate in a study depends on a participant's willingness to share his or her experiences.

As an additional measure to ensure the protection of participants and also as additional guidance for the researcher, it was suggested that an electronic copy of the questionnaires be forwarded to the CCJD programme manager for approval prior to field visits. At this stage the researcher had to wait for ethical clearance to be granted by the University's ethics committee before proceeding with the study. At this second meeting it was also agreed that once the research supervisor had approved the interview questions and research guide, a copy of the questions and the guide would be forwarded to CCJD for their approval; thereafter a letter granting access would be issued. Shortly after the second meeting, the researcher was issued with a gatekeeper's

letter from the CCJD head office research director authorising the researcher to access CCJD sites, clients and employees. Subsequent to these meetings the researcher was also granted ethical clearance by the University's ethics committee, paving the way to commence field research. Orb, Eisenhauer and Wynaden (2001:94) state that in qualitative studies, researchers rely heavily on collecting data through methods that involve people such as interviews, observations and other techniques. The researcher should negotiate access to participants to collect data; thus the quality of social interactions between the researcher and participants may facilitate or inhibit access to information. In view of the advocacy/participatory worldview underpinning this study, the researcher was at all times conscious that empowerment opportunities for the marginalised should be created. In preparation for the field research the researcher prepared informed consent forms for the participants; these informed participants about the study, objectives, questions and the benefit of the study to the researcher as well as anticipated benefits for the participants and community at large. An important aspect of this form was that it informed participants of their right to participate, choose not to participate or withdraw from the study at any point.

The consent forms were initially designed in English but had to be translated into isiZulu, the home language of the study participants. In the first session, the researcher welcomed the participants and explained the procedure for the session. Participants were taken through the consent forms and were given the opportunity to seek clarity where necessary after which they were requested to give consent to participate in study by signing the consent form in order for the second phase of study to commence. Participants objected to giving consent to participate in the study before the actual study was conducted, as they were not sure what the second phase entailed. They stated that, as the next general elections drew near, in their experience, different people would come and make promises just to secure their votes and not deliver on those promises. Some would also deceive them into joining their political party. This threatened to stall the process and the researcher tried in vain to explain the ethical considerations behind signing the consent forms. The presence of the CCJD coordinator who is a trusted member of community helped allay their fears as she explained to participants why they needed to sign and assured them of the authenticity of the research study. This worked as all participants signed the consent form and the study progressed to the next stage.

Once ethical protocols were followed and data collected, the data were analysed as explained below and demonstrated in Chapter 4 through tables and matrices.

### **3.9. Data Analysis**

Creswell (2009:199) states that, qualitative data analysis primarily entails classifying things, persons and events and the properties which characterise them, using codes and themes to identify and describe patterns and themes from the perspective of participants. Data analysis involves making sense of text and images. Taking this understanding a step further, Schurink, (2010:431) asserts that data analysis aims to unravel the meanings inherent in the data and present them in relation to the research questions. The responsibility of the researcher at this stage is to explain in detail what procedure/s followed to analyse data in a way that served the purpose of the research. The distinguishing feature of qualitative data analysis is the focus on the interrelated aspects of the setting, group, or persons under investigation. In addition, the fact that qualitative research is fluid and emergent makes the distinction between data gathering and data analysis less absolute than in a quantitative inquiry. Babbie and Mouton (2005) cited in Cloete (2007: 513) contend that qualitative data analysis is an iterative and reflexive process; it begins as data are being collected rather than after data collection has ceased. An analyst has an option to adjust data collection processes when it becomes apparent that additional concepts need to be investigated or new relationships explored. Leedy and Ormrod (2005:136) maintain that ultimately the researcher looks for the convergence of data; many separate pieces are analysed in order to determine whether sources of evidence point to the same conclusion.

For this study, content analysis of data, and matrix analysis as well as thematic analysis were used to analyse data. Mayring (2000) maintains that the goal of qualitative content analysis is to identify important themes or categories within the body of content and to provide a rich description of the social reality created by those themes or categories as they are lived out in a particular setting. Matrix analysis is a way of analysing data through diagrams that present emerging relationships of themes and patterns as signalled by coded data. The researcher carefully prepares codes and interprets data and the results thereof can be used to support the development of new theories and models as well as validate existing theories and provide a description of a particular setting or phenomena. Coding is not a once-off or one code only procedure, as codes can be revised as the researcher moves along the process and multiple codes can be applied to a segment of text. This allows the researcher to understand social reality in a subjective but scientific manner. This study aspired among other objectives to develop policy recommendations for the indigenous governance of social justice systems as one of the mechanisms citizens in rural areas can use to access justice – the social reality in which the participants live. Codes were assigned to participants in this study to protect anonymity and

confidentiality. Content, thematic and matrix analysis are further discussed below as the researcher relied heavily on these types of data analysis.

### 3.9.1 Content Analysis

Content analysis can be used in both quantitative and qualitative research studies, but qualitative content analysis is used for the purpose of this study. Content analysis emphasises an approach to data analysis that moves beyond the mere review and coding of the data collected and their specific meaning. It goes beyond counting words, to extracting themes and patterns that may be latent or manifest in a particular text. It allows the researcher to engage with the text in a manner that will inculcate deep understanding of social reality in a subjective but scientific manner. In the case of this study, for example, the researcher does not have firsthand experience of a rural livelihood; content analysis gave the researcher an in-depth understanding of the real life experiences of rural people and the dynamics thereof from the point of view of the rural people of Impendle as study participants. Successful content analysis requires that the researcher analyse and simplify the gathered data and form categories that reflect the subject of study in a reliable manner (Elo and Kyngas, 2007). There are two approaches to content analysis: deductive and inductive content analysis. Deductive content analysis is used when the researcher has the benefit of existing data on which to base the study or when the researcher has a theory to prove or disprove. For this study, inductive content analysis was used mainly because of the lack of data on the subject under study. The process of transcript review was a joint effort and collaboration between the researcher, assistant researcher and fellow researchers; this served as a cross-check and sounding board for the researcher. This also served as a source of sharing ideas.

### 3.9.2 Thematic Analysis

Thematic data analysis is a qualitative data analysis process in which the researcher identifies underlying themes; these themes are later described using illustrative codes or, as was done in this case, data matrices.. Thematic analysis can be used as a tool for making qualitative data analysis more manageable. Applied in a case study analysis, data from a number of sources are pulled together and analysed with the aim of identifying themes and patterns. The data is later coded and reduced using themes. Management of this process is important as it has implications for data analysis as a whole. Thematic analysis is not the same as paraphrasing data; the themes must tell a convincing and well-organised story about the data and topic and should be the result of thorough engagement with transcripts which means that the researcher must be familiar with the data in order to search and generate themes. For this study, thematic analysis is the result of a



period of engagement with the data from field data collection to documenting data from raw field data to transcripts. The researcher also used a tape recorder to confirm the data in the transcripts. The themes that were developed came from data from focus group and semi-structured interview transcripts.

### 3.9.3 Data Matrix

Using a data matrix, the researcher encodes data from transcripts into symbols or codes in such a way that data are readily accessible; this reduces the large amount of data collected in the field into a manageable size. In qualitative research a data matrix is useful for analysing a pattern of responses; in much the same way as thematic analysis, a data matrix can also be used as a tool to make qualitative data more manageable. Qualitative data is messy and not easily controllable; matrices impose a more linear ordering of the components of data. This allows the researcher to develop and show connections between specific parts of each component. The main strength of matrices is that by creating rows and columns, the researcher or reader can focus on an individual cell in a matrix. Matrices allow the researcher to conduct data reduction which is an important part of qualitative research. Matrices presented in Chapter 4, for example, drew excerpts from focus group and interview transcripts to show how informants responded to research objectives and research questions. As will be shown, the researcher interpreted the matrices while interrogating the literature as part of the data analysis process towards generating findings from the study.

Data reduction that is accomplished by matrix analysis refers to a process of selection, focusing on simplifying and transforming data that appears in written up field notes or transcripts. For this study, matrices assisted the researcher to address two important elements of a qualitative study, which are data reduction as well as triangulation of data analysis; this helps ensure credibility of the overall study.

The combination of content, thematic and data matrix analysis also helped ensure the trustworthiness of the data, its presentation and analysis. Trustworthiness in qualitative research is discussed in the following section.

## 3.10. Trustworthiness in Qualitative Research

Krefting (1991:215) states that, just as there is a need to examine the accuracy and trustworthiness of various kinds of quantitative data in different ways, there is also a need to look at qualitative methods for different ways in which to ensure the quality of data. It is critical

to use alternative models appropriate to qualitative designs that ensure rigour without sacrificing the relevance of qualitative research. Strategies to increase the trustworthiness of qualitative research must be applied throughout the different phases of the research. Krefting (1991) refers to Guba's (1981) model of trustworthiness of qualitative research; this is based on the identification of four aspects of trustworthiness: truth value, applicability, consistency and neutrality. Guba (1981) maintains that these strategies are not exclusive to any one design; they can be used with both quantitative and qualitative design. The difference lies in the application thereof.

### 3.10.1 Truth Value

As noted by Krefting (1991:217), truth value is concerned with whether the researcher has established confidence in the truth of the findings for the informants and the context in which the study was undertaken. It establishes how confident the researcher is with the truth of the findings based on the research design, informants and context. For qualitative research, truth value is usually obtained from the discovery of human experience as lived and perceived by informants. Truth is subject-oriented and is not defined by researchers. Schrink and Auriacombe (2005:414) refer to this aspect of trustworthiness as credibility; the extent to which there is a match between a research participant's views and the researcher's reconstruction and representation thereof. The goal is to demonstrate that the research was conducted in a manner that ensures that the subject of investigation was accurately identified and described and that it is credible to those who constructed the original reality. To ensure credibility, researchers need to focus on testing their findings against various groups from which data were drawn or persons who are familiar with the phenomenon being studied. Credibility is achieved if people who share the experience immediately recognise the description, that is, when informants are able to recognise their experiences in the research findings. Truth value is perhaps the most important criterion for the assessment of qualitative research. For this study, a credibility test was conducted on the day the researcher delivered a preliminary presentation of the study at the CCJD head office, in the presence of the CCJD CEO, research director and programmes director. This presentation represented peer examination, which entails the researcher discussing the research process and findings with an impartial, experienced colleague; in this instance the research supervisor. The intention of this presentation was threefold: firstly to provide an update on progress to fellow researchers and the research supervisor in the form of peer review/ team review and secondly, for CCJD staff to get a sense of the direction of the study, to engage them on issues for clarity and create a dialogue on the study, and finally, for the researcher to consolidate the study.

### 3.10.2 Transferability

Transferability can strengthen a study's usefulness for other settings by designing the study for multiple cases, multiple settings, multiple informants and more than one method of inquiry. The researcher must provide sufficient descriptive data to allow readers to evaluate the application of the data to other contexts. In this study, transferability was achieved by triangulation of the data collection method; hence the use of both interviews and focus groups (multiple informants). The researcher is responsible for providing an adequate data base to allow a transferability judgement to be made by others. This is in line with Tierney and Clement's (undated) assertion that while qualitative research cannot be generalised, it can be transferred. Transferability in this regard entails the ability of the author to evoke in readers an understanding of the research project in a manner that enhances understanding of the research and provokes questions regarding similarities and differences. In this study, both the researcher and research assistants kept a case study journal which was a useful source for transferability purposes. Transferability offers research participants an opportunity to learn something about the problem they are faced with.

### 3.10.3 Consistence and Dependability

Krefting (1991:216) asserts that dependability is similar to consistence. It implies trackable variability; that is, variability that can be ascribed to an identifiable source. Along the same line of thinking, Schrank and Auriacombe (2005:442) note that dependability refers to the stability of data over time and in different conditions; it focuses on whether the research process is logical, well-documented and audited. Dependability in qualitative studies assumes a dynamic universe and social phenomenon, thus resting on a set of assumptions opposite to those of quantitative studies that assume an unchanging and accurately measurable and static view of the phenomenon under study. Dependability can be achieved by conducting code-recoding of data; the researcher codes data for the first time and waits for a couple of weeks, then recodes the data to see if the results are the same. This can be enhanced through the triangulation of data collection methods. Dependability can also be enhanced by repeated observation of the same event and re-questioning informants. In this study dependability was enhanced by triangulation of data collection methods as well as interaction with other researchers about the data.

### 3.10.4 Neutrality and Confirmability

The fourth criterion for measuring trustworthiness, neutrality, refers to the degree to which the findings are the sole function of the informants and conditions of the research and not other motivations and perspectives (Krefting, 1991:216). Qualitative researchers try to increase the

worth of their findings by decreasing the distance between the researcher and the informants. Neutrality is shifted from the researcher to data so that rather than focusing on the neutrality of the researcher, the focus is the neutrality of data. Confirmability of data can be used as a criterion to measure neutrality. In this study confirmability of data was achieved through extended interaction with informants, outside the focus group session; when refreshments were served to informants, discussion and dialogue continued between the researcher, research assistant and the informants. What was different was that the informants initiated and pursued conversations and debates, picking up on issues that arose from the focus group or extending it to other relevant issues that they felt were not covered or thoroughly explored in the focus group. In most cases these conversations and debates, while not structured or recorded, confirmed the focus group discussion.

### 3.10.5 Triangulation as an aspect of Confirmability

Triangulation as an aspect of confirmability enhances the establishment of trustworthiness in qualitative research. Flick (2007) cited in Auriacombe (2010:440) states that triangulation occurs when one or more methodological approaches is brought to bear on a single point with the aim of enhancing the scientific rigour of the study. In a qualitative study triangulation can occur where more than one case, investigator, paradigm, theory and method of data gathering and analysis are used in a single study with the aim of enhancing scientific rigour. For this study, triangulation was achieved through peer examination, data capturing methods, data analysis, researcher reflexivity and research informants. In peer examination, the researcher and fellow researchers engage in extensive dialogue and deliberation on the study and aspects of the study. These interactions can be spontaneous, informal and unplanned but can also be planned. They usually occur post-sessions with informants; the researcher would engage in deep conversation and dialogue with the research assistant. During the write up process they would be sparked by issues emanating from the research journal or the researcher seeking clarity or confirmation of certain events during the focus group or interview sessions. These would also take the form of formal sessions arranged by the research supervisor. Methodological triangulation was another strategy employed to enhance credibility; this entailed the use of more than one method of data capturing. The study relied on focus groups and semi-structured interviews, even though both these methods reside within the same research design tradition. The individual and group sessions elicited interesting points for deliberation and reflection. Triangulation on analysis of data, a combination of content analysis, thematic analysis and matrix analysis was used, as shown in Chapter 4.

### **3.11 Researcher Reflexivity**

Watt (2007:82) states that researcher reflexivity refers to a researcher being aware of the effect he/she has on the outcomes of the research based on the premise that knowledge cannot be separated from the knower. This enables the researcher to be conscious of his/her bias, thus enhancing the trustworthiness of the study. It creates a means for continuously engaging with the phenomenon under study and facilitates understanding of both the phenomenon and the research process. Reflexivity allows the researcher an opportunity to stand outside of self and learn about one's own assumptions, behaviour, thoughts and attitudes to the phenomenon under study. The researcher kept a research journal where events, thoughts, prejudices and excitements were recorded both prior to and after entering the field. An example would be that prior to the field experience the researcher was of the opinion that rural people are generally not in favour of traditional justice structures and traditional leadership. As the session progressed, the informants proved to be engaged in traditional structures and actively participated in the focus group discussions. Keeping a research journal assisted the researcher with a quick source of reference and access to her thoughts, observations and assumptions while in the field.

### **3.12 Limitations of the Study**

Several factors can be identified as limitations of this research study. First, the study was solely funded by the researcher and the costs associated with conducting the study proved to be a challenge. These included travelling costs over a period of a week and other costs such as providing refreshments and reimbursement for participants' transport to the venue. This meant that among other issues, the researcher had to be guided by the cost implications of the period of time spent in the field. The amount of field experience was thus limited. Furthermore, the long distance of daily travelling for a week, to and from the field, meant that some time was lost that could have been used as field experience and the collection of data. Prolonged field experience improves the quality of data collected and also renders a study more credible. Third, the lack of academic documentation and research on the subject under study, particularly from a South African perspective, was one of the limitations of this study. The content of the study touches on aspects such as customary law, culture and many others factors that, while having universal appeal, are context specific. Fourth, the representativeness of this study is a limitation since it was conducted on a minimal sample, compared with the wider population sample. Finally, although careful thought and consideration were given to being open to contrary findings, as with all qualitative studies, the researcher's personal bias might have influenced the results of this study.

However, a concern about personal bias was overcome. As indicated earlier, the researcher was under the assumption that the participants would not be in favour of traditional leadership and justice structures. As the results in Chapter 4 indicate, traditional leadership and justice structures in Impendle are vibrant. Preserving the voice of the informants through data matrix analysis also guarded against personal bias of the researcher. The data speaks while the researcher interprets data and interrogates relevant literature in relation to findings.

### **3.13 Chapter Conclusion**

This chapter on research design and methods is the heart and soul of the research study. It set out how the study was carried out as well as the procedure followed in conducting the study. The chapter set the tone for the study as it identified the philosophical worldview underpinning it, the strategy used to collect data and the sampling procedure, units of analysis as well as case, site and informant selection. The philosophical worldview for this study is the advocacy participatory worldview, with the case study identified as the strategy appropriate for gathering and analysing data required to achieve the objectives and answer the research questions. The study was based at Impendle, a rural area in KZN. Using the CCJD as a case study, the researcher set out to investigate the use of indigenous governance of social justice. The case for the study is the CCJD as an organisation, the site for the study is Impendle and the informants were CCJD clients and employees, with focus groups and interviews were employed as data gathering tools. A variety of measures appropriate for a qualitative study were used to ensure that ethical considerations were taken into account; the researcher also used a number of measures to ensure the trustworthiness of the study. This chapter also discussed the data analysis methods used in the study as well as ethical considerations and limitations of the study.

## **CHAPTER 4**

### **4.1 Introduction**

There are numerous approaches for the analysis of data in qualitative research. The overall objective of data analysis in any research undertaking is the interpretation of data that have been gathered during the data collection phase. This entails the researcher making sense of the multitude of information that has been collected in the field in such a way that meaning is not lost or diluted in the process. Furthermore, qualitative data analysis is the process of bringing order, structure and meaning to a mass of data that has been collected. Qualitative data analysis is not linear; it does not occur in an orderly fashion and hence is not a neat process. It has neither a definite beginning nor an end; hence it is argued that data analysis is an iterative process. For this research study three methods of data analysis were used: content analysis, thematic analysis and matrix development. Combining these three approaches assisted the researcher by strengthening triangulation. Prior to exploring the three data analysis methods used in this study, this chapter examines the background and context in which the study is based; that is, the field in which data was gathered.

### **4.2 The Case of Impendle in Context**

This study was conducted in KwaZulu-Natal, (KZN) at Impendle, a small, deep rural area about 76 km to the outer west of Pietermaritzburg, the capital city of the province and the economic hub of the UMgungundlovu District Municipality. KwaZulu-Natal is predominantly rural and is mainly a dormitory province as most people of active economic age migrate to other provinces to work and live and only return to retire or due to ill health. The province continues to be plagued by the twin challenges of poverty and high rates of unemployment among women and youth, particularly in rural areas. It also suffers an endemic problem of rural underdevelopment. There is high incidence of HIV/AIDS and service delivery backlogs; KZN's dispersed settlement pattern adds to the cost of infrastructure development, KwaZulu-Natal Growth and development Strategy, (PGDS) (2006:16-17). These challenges depict the living conditions and real life circumstances of people in rural areas like Impendle, many whom have yet to experience the fruits of democratic governance in post-1994 South Africa. The need for service delivery is evident in the vision of the municipality which states that "by year 2017 Impendle would have provided the majority of the people and households in Impendle with sustainable access to their social and economic developmental needs and basic services in a fully integrated manner and within a safe and healthy environment" (2011/2012 IDP). This suggests that the community of Impendle is yet to enjoy the full effects and benefits of democracy. Impendle consists of mainly

traditional dwellings and informal settlements, and is characterised by stark poverty, underdevelopment and a massive infrastructure and social facilities backlog. According to the Integrated Development Plan (IDP) of Impendle municipality (2011/12), the municipality has a population of 33 105, the lowest population within the UMgungundlovu district. The population decline is due to a host of issues already cited, including the perceived lack of economic confidence and opportunities in the area. People migrate to larger cities with better employment prospects; consequently a high percentage of households depend on government social grants such as the old age pension and child support grant. As an almost entirely rural and traditional community, Impendle residents live in mainly traditional Zulu dwellings and settlements under the rule of traditional leaders called *Amakhosi* (born into traditional leadership) and *Izinduna* (may have been selected or elected). According to data results, traditional leadership structure and traditional courts enjoy major support and are viewed favourably by the local community as a legitimate form of governance. The table below shows the demographics of Impendle as per the Census 2011, Municipality Report KwaZulu-Natal, Statistics South Africa, Report no. 03.01.53, (Statistics S.A., 2011).

Table 4.1 Selected Statistical Demographics of Impendle

Population	33 105
Households	8 205
Population Growth	-1.34% pa
Unemployment	45.10%
Dependence Ratio of population between 15-64 years	18 482
Area	15 28 km <sup>2</sup>

Source: Adapted by the researcher from Statistics South Africa, Census 2011 Municipal Report KwaZulu-Natal Report no. 03.01.53

Impendle is located in the province of KwaZulu-Natal which is next contextualised.



### 4.3 The Province of KwaZulu-Natal in Context

KZN is a predominantly rural province, with a dependency and poverty ratio level that is highest in the rural areas. As suggested in the KwaZulu-Natal Provincial Growth and Development Strategy, (KZN, PGDS, 2011: 45-48), it is South Africa's most rural and the most populous province; home to 10 645 509 people, more than 21% of South Africa. Black people are the majority in the province – predominantly Zulu and isiZulu is widely spoken. While there is some prosperity in the province, pockets of poverty are concentrated among women and youth, particularly in the rural areas. Fifty-four per cent (54%) of the population reside in rural areas; women and children are the majority in the province's rural areas. The Global Insight Poverty Indicator (2005) cited in the KZN PGDS (2011) revealed that 5.3 million people in the province were living in poverty and 1.2 million people were living on less than US\$1 per day. As has been stated before, the rural areas in South Africa are characterised by infrastructural underdevelopment and an absence of social amenities. The largely rural nature of the KZN province and dispersed settlement pattern adds to the cost of development and infrastructure provision.

The rural areas of KZN are subject to the rule of traditional leaders as the primary governance and justice structure in their respective areas, *izigodi*. As Reddy and Biyela (2003:281) states, "the institutional arrangement in rural areas in KwaZulu-Natal is that there are communities who live in wards or *izigodi*. These wards, *izigodi* constitute a Tribal Authority" Nstebenza, (2003: 177) defines traditional authorities as an all encompassing term to refer to "chief" of various ranks, who have jurisdiction over rural people. This means that the large majority of people rely on an indigenously-driven governance system. Reddy and Biyela, (2003:268) further state that KZN has one king and 277 chieftaincies; this makes it a province with the highest number of traditional leadership structures in the country. At the helm of the traditional leadership institution is the Zulu Monarch, King Goodwill Zwelithini KaBhekizulu Zulu. The monarchy enjoys constitutional recognition as the head of traditional leadership, and the *ubukhosi*, a state-recognised traditional leadership institution. The king has a largely ceremonial relationship within a constitutional democracy and it is incumbent upon him to act on the advice of the provincial premier (KZN PGDS, 2011). However, Ndlela, et al. (2010:2) expresses a different perception with regards to the current role of *Inkosi*, arguing that the perception of *Inkosi* as ceremonial and apolitical, is alien to the African culture since customs allowed them to act politically. The current perception of the role of traditional leaders as articulated in the

Traditional Leadership and Governance Framework Act (RSA, 2008) emphasises the role of traditional leaders as custodians of culture, tradition and custom.

South African's judicial environment is plural and this pluralist culture plays itself out in the rural areas with traditional leaders as custodians and advocates of traditional justice and the formal justice structures of the courts and police. The (KZN PGDS, 2011:64) suggests that the changing role of the traditional leadership is an area that requires greater attention and a new strategy for the province. It is ultimately incumbent on people to choose the justice system most responsive and suited to their needs. However, studies have revealed that rural people are neither always empowered nor knowledgeable enough to choose the means through which they want to access justice. The data analysis for this study reveals that the indigenously-driven justice system is the justice system of choice for the rural community in Impendle. This is in line with the view expressed by Ndlela, et al (2010:1) which states that rural people rely on traditional leaders for governance in matters regarding justice, land rights, customary and traditional practices.

Within the context of the village of Impendle and the province of KZN, data analysis and findings from this study are next discussed.

#### **4.4 Data Analysis and Findings**

This section on data presentation, analysis and findings is arranged in four sub-sections. The subsections are (1) theoretical framework, philosophical worldview and emerging themes, (2) achievement of research objectives, (3) answering of research questions and sub-questions, and (4) cross-case analysis of data from interviews with personnel who manage the CCJD advice office in Impendle and data across the three focus groups of community members who live in Impendle and use the CCJD's services. Stakeholder segments of public managers and of CCJD service end-users are sub-cases embedded in the CCJD as the organisational unit of analysis. After this section is a triangulation of the study which concludes this chapter.

##### **4.4.1 The Theoretical Framework, Philosophical Worldview and Emerging Themes**

As discussed in earlier chapters, the theoretical framework acts as a vehicle to guide the study and to help achieve the research objectives and answer the research questions. Through the use of the theoretical framework, themes were generated from data during analysis.

#### 4.4.1.1 Theoretical Framework and Philosophical Worldview

In this study the theoretical framework is drawn from the work of John Rawls (see Figure 2.4). Studies generally have an underlying philosophical worldview, although it is not always stated. In Chapter 3, the advocacy/participatory framework was identified as underlying this study. This philosophical worldview complements the theoretical framework since this framework revolves around addressing structures and discourses of disadvantage with an aim to empower marginalised and alienated groups while the advocacy/participatory framework also addresses these issues by seeking to give voice to and empower historically marginalised groups – such as citizens who live in the deep rural areas of KZN.

Matrix 4.1 illustrates the link between the theoretical framework underpinning the study and the worldview which drives the study. Elements of the advocacy/participatory worldview are integrated with the theoretical framework; this assisted the researcher to illustrate the alignment between the two features of the study. As Matrices 4.1 to 4.4 indicate, there are four components of the advocacy/participatory philosophical worldview; namely: reform agenda, overcoming oppression and inequality, overcoming marginalisation and alienation, and advancing consciousness-raising and empowerment. Data suggest that, in some ways, the CCJD is engineering the reform of the traditional justice institution. As a result of the history of colonialism and apartheid in South Africa, the traditional justice structure has had an unfavourable relationship with people who viewed traditional leaders as agents of oppression who perpetuated the injustices associated with these unjust systems. According to informants, the CCJD acts as an agent that facilitates transformation of traditional justice structures and building people's confidence in the indigenous governance system. The CCJD facilitates a working relationship with local *Izinduna* and *Amakhosi*. As indicated in one interview session, "the CCJD co-opts members of the tribal court council to be part of their committee to encourage cooperation and strengthen relations between these two structures". This also helps *Amakhosi* and *Izinduna* keep abreast of what is happening in their area and they are updated on amendments to laws by the CCJD. Empowerment is an important element of both the social justice theory from which the theoretical framework emanates and the advocacy/participatory worldview driving this study. For Creswell (2009), the advocacy/participatory worldview, focuses on the needs of groups and individuals that may be marginalised in society. Harper (2011) states that paralegals offer quasi-legal services such as legal education and advocacy, as well as advice to traditional leaders on statutory law; they can act as a system of checks and

balances. Matrices 4.1 to 4.4 display data that spoke to the alignment of the theoretical framework with each of the elements of the advocacy/participatory philosophical worldview.

<b>Matrix 4.1 Alignment of Theoretical Framework, Reform Agenda and Advocacy/Participatory Philosophical Worldview</b>			
<b>Advocacy/ participatory worldview:</b>	<b>Theoretical Framework: Addressing structural disadvantages as discourses of oppression</b>	<b>Theoretical Framework : Addressing discourses of disadvantage</b>	<b>Theoretical framework: Empowerment</b>
<b>Element of Worldview:</b>			
<b>Reform Agenda</b>	<p>“If a person realise that he/she is not satisfied at the traditional court, the person is able to take their matter to CCJD.” <b>FGP3, 5, 7</b></p> <p>“The chairperson of CCJD is <i>Induna</i> or councillor of the tribal court. My aim was so that matters that are handled at tribal court will be matters that I will be informed of.” <b>PM3</b></p>	<p>“I received help from CCJD with funeral policy. Main member had died, they faxed claim forms but it was in English, I didn’t know where to start. I went to CCJD, she helped me directed me what to do and who to talk to, police station. All went well I received my money.” <b>FGP1’ 6,</b></p> <p>“People who have long been on pension or whose family members are deceased, I do follow up on their payment. If it takes too long I arrange transport, negotiate a reasonable fee with taxis in the area to take these people to former employers, I go with them, mostly Johannesburg and Durban” <b>PM 3</b></p>	<p>“Since there is CCJD now they have made us women know that we have rights too; in the beginning we knew that males were the ones that are in control, its him who will say and do everything.” <b>FGP8</b></p> <p>“CCJD’S family mediation process creates a neutral platform for family members, usually man and wife to talk through their differences without involving police and arresting each other. They are empowered to facilitate problem solving.” <b>PM3</b></p>
<p>Key to matrices</p> <p>FGP means focus group participant</p> <p>PM means public manager</p> <p>The numbers following designations represents codes assigned to study participants.</p>			

The views expressed in Matrix 4.1 affirms Creswell’s view (2009) that participatory action is dialectic and focuses on bringing about change in practices, as expressed by PM3, they intervene directly with organisations and companies on behalf of their clients. Social justice theory, as a theory driving the study, advocates for equal access to social goods by members in society, with justice being one of these social goods. In addressing important social justice issues in the community such as oppression and inequality, Oyeike (2012) argues that the formal justice system in its current form and application is oppressive and perpetuates the divide between the

so-called “haves and have nots”. Using foreign language and procedures, for example, restricts access to those who fit the Western mould. As shown in Matrix 4.2, using indigenously driven methods and techniques, the CCJD brings the law closer to people. It also creates a link between state and customary-driven dispute resolution mechanisms (Ubink and Van Rooij, 2011:9). The CCJD conducts capacity building workshops for traditional leadership in the area as well as other justice structure such as the Community Policing Forum (CPF). Harper (2011:11) states that paralegals are positioned between the indigenous and formal justice systems; they offer context relevant, flexible, and workable socially legitimate solutions that are enforceable. In this way the CCJD encourages a synergistic relationship between different structures in society that work within the justice sector; sharing case load results in the speedy resolution of cases. The approach adopted by the CCJD is in keeping with the participatory/advocacy paradigm underlining this study, as it asserts that research must be sensitive to the politics and political agenda of the wider society Creswell, (2009).

<b>Matrix 4.2 Alignment of Theoretical Frameworks, Oppression and Inequality with Advocacy/Participatory Worldview</b>			
<b>Oppression and Inequality</b>	<p>“CCJD also call <i>Izinduna</i> to be present in their workshops.” <b>FGP4 &amp; 6</b></p> <p>“We work with them, sometimes we need to tell them that they made a mistake and they listen.” <b>PM2</b></p>	<p>“CCJD really does a lot of work because there is nothing they cannot resolve. They are social workers.” <b>FGP3 &amp; 13</b></p> <p>“CCJD and traditional leaders are very connected in the community; chairperson of CCJD is <i>Induna</i> in traditional council.” <b>PM3</b></p>	<p>“We are here to bring the law or explain the law in a way that they will understand, simplifying it.” <b>PM2 &amp; 4</b></p>

Components of the advocacy/participatory worldview include guarding against the marginalisation and alienation of people and groups as depicted in Matrix 4.3. This study identified different levels and pockets of marginalisation that need to be tackled, which warrants the study being guided by an advocacy/participatory worldview. Oyieke (2012) maintains that the legal system marginalises people living according to customary laws and principles and favours those whose lives are ordered according to Western formal law. In doing so, the legal system also effectively marginalises indigenous traditional justice systems which are the justice

structures of choice for the majority of rural people. This study was conducted at Impendle. South African rural communities suffer extreme marginalisation and deprivation in comparison with their counterparts in urban areas. While conducting field data collection at Impendle, the researcher was confronted with extreme deprivation of basic infrastructure such as water, sanitation, electrification, and a telecommunication network which is in stark contrast to the urban areas. In view of these levels of deprivation, it is hardly surprising that rural communities in South Africa are still locked in conditions of extreme poverty and underdevelopment. Hence access to basic services can be an important catalyst for change and strengthening local social capital.

Finally, Chopra and Isser (2013) identifying pockets of marginalisation as problematic, assert that customary systems are based on patriarchal social norms that reaffirm the subordinate role of women and children and are thus incompatible with the Constitution. This is also contrary to Rawls' social justice and human rights theory as it involves egalitarianism, a belief in the equality of all human being where no one is entitled to more privileges than another (Tesoro, 2010) Matrix 4.3 reveals an interesting dynamic insofar as the marginalisation of women in rural Impendle is concerned. Women are increasingly being assigned positions of power. They are well represented in the tribal council that makes a special effort to ensure that women preside and adjudicate issues pertaining to women. The presence of the CCJD in the area has also empowered women and men in matters pertaining to their rights and women's rights and entitlements in particular. The matrix also reveals that customary systems and norms are regarded favourably by local people and women in particular.

<b>Matrix 4.3 Alignment of Theoretical Framework and Marginalisation and Alienation Component of Advocacy/Participatory Worldview</b>			
<b>Marginalisation and alienation</b>	<p>“Projects cannot just happen in our area without the knowledge of <i>Izinduna</i> and <i>Inkosi</i>.” <b>FGP4 &amp; 9</b></p> <p>“CCJD has done a lot in ensuring that justice is served by tribal council, they do follow up assisting people with tribal court issues” <b>FGP3, 5, 10</b></p>	<p>“At tribal court there are women that see to the problems and cases brought to court by women.” <b>FGP6 &amp;8</b></p>	<p>“CCJD has taught us men that we should respect our women, we must not touch them when they are tired.” <b>FGP12 &amp; 13</b></p> <p>“We are here to bring the law or explain the law in a way that they will understand, simplifying it.” <b>PL2</b></p>

Oyieke, (2012) introduced a new approach to legal practice, based on Steve Biko’s Black Consciousness which appeals to black people to realise their self worth and potential for greatness despite seeming obstacles. Biko challenged the legal fraternity to recognise that the law is not neutral; it excludes certain groups of people and is undemocratic and unconstitutional. The legal professional must be conscious of their conservative style and must be able to change it. However, for this to happen a critical stage of consciousness-raising must occur for both the legal fraternity and the community affected by an unjust legal system. This is in keeping with Paulo Frere’s critical consciousness approach; this approach encourages a closer examination of the structures of social and economic relations in society as this raises people’s consciousness, which is a precondition for the realisation of one’s condition as deprived. Critical consciousness seeks to provide poor people with access to better opportunities by challenging the root causes of poverty. Consciousness-raising is consistent with addressing discourses of disadvantage in society as a theoretical framework. It also corresponds with empowerment as an ideal of the theoretical framework insofar as the overall objective of the framework is to increase the power of disadvantaged groups in society (Tesoriero, 2010). Consciousness-raising and empowerment are consistent with the advocacy/participatory worldview underpinning the study as they focus on the needs of the marginalised in society as indicated by Matrix 4.4.. Some of the objectives of the CCJD, such as legal empowerment as well as educating disadvantaged communities about their rights and enabling disadvantaged communities to claim their rights to justice and services

are compatible with the advocacy/participatory worldview as they focus on empowering the marginalised so that they are capable of engaging with the legal system.

<b>Matrix 4.4 Alignment of Theoretical Framework with Consciousness-Raising and Empowerment Components of Advocacy/Participatory Worldview</b>			
<b>Raising consciousness and empowerment</b>	“CCJD create a way for your case to carry on if you are not satisfied at tribal court.” <b>FGP3, 5, 10</b>	They teach you what to expect when you go to tribal court for the first time so that you are not intimidated and they teach you about your rights.” <b>FGP 6 &amp; 12</b>	“CCJD conduct workshop and let us know about certain laws.” <b>FGP15, 13, 21</b>

This section discussed four components of the advocacy/participatory philosophical worldview and how it relates to the theoretical framework which guides the study along with excerpts from informants that reveal interaction between the theoretical framework and philosophical worldview. The following section discusses the themes that emerged during the study with guidance by the theoretical framework.

#### 4.4.1.2 Emerging Themes from the Study

Interaction between the theoretical framework and the worldview underlying it helped identify themes. The overarching themes that emerged from focus group and interview data as well as observations of the researcher are:

##### **Theme 1:**

Customary law and traditional justice through *Izinduna* and *Amahkosi* is highly relevant in rural Impendle while formal law and legal procedures seem to be alienating rural people.

##### **Theme 2:**

The CCJD, as an NGO plays a pivotal role in providing access to social justice for Impendle residents independently and in concert with traditional justice structures.

##### **Theme 3:**

Informants prefer restorative justice through CCJD practices rather than the rights-based justice provided by the police and courts.



**Theme 4:**

CCJD programmes – including workshops, community awareness campaigns and addressing women and children-specific issues – have gained considerable credibility in the community.

**Theme 5:**

Through the use of indigenous governance systems and structures, the CCJD helps rural communities empower themselves to engage with the law while balancing individual rights with family values.

In order to arrive at these five themes the researcher first matched questions from the data collection tools (interview questions and the focus group guide) with the research objectives and research questions. (See Appendix D TableA4-1). Through content analysis and thematic analysis, the researcher designed a number of matrices which display actual excerpts from study informants – giving voice to participants in accordance with the advocacy/participatory worldview. The theoretical framework likewise assisted with the emergence of themes. Table 4.2 presents a thematic analysis of the theoretical framework; the researcher developed themes from the data coming out of the focus group responses; further to this, themes are integrated with the ideals of the theoretical framework to establish if there is consistence and alignment between these components of the study. The researcher observed that in much the same way as with other aspects of the analysis, themes relate across all ideals of the theoretical framework, such that each ideal is aligned to more than one theme. This thematic analysis allowed the researcher to demonstrate how the theoretical framework integrates with data from the study; hence themes encompass all aspects of the data gathered.

<b>Table 4.2 Linkages between Theoretical Framework and Themes from the Study</b>		
<b>Addressing Structural Disadvantage as structures of oppression</b>	<b>Addressing discourses of disadvantage</b>	<b>Empowerment</b>
<b>Theme 2:</b>  CCJD, as an NGO plays a pivotal role in providing access to social justice for Impendle residents independently and in concert with traditional justice structures	<b>Theme 1:</b>  Customary law and traditional justice through <i>Izinduna</i> and <i>Amahkosi</i> is highly relevant in rural Impendle while formal law and legal procedures seem to be alienating rural people	<b>Theme 2:</b>  CCJD, as an NGO plays a pivotal role in providing access to social justice for Impendle residents independently and in concert with traditional justice structures
<b>Theme 3:</b>  Informants prefer restorative justice through CCJD practices rather than rights-based justice provided by the police and courts	<b>Theme 3:</b>  Informants prefer restorative justice through CCJD practices rather than rights-based justice provided by the police and courts	<b>Theme 4:</b>  CCJD programmes – including workshops, community awareness campaigns and addressing women and children-specific issues – have gained considerable credibility in the community
<b>Theme 4:</b>  CCJD programmes – including workshops, community awareness campaigns and addressing women and children-specific issues – have gained considerable credibility in the community	<b>Theme 4:</b>  CCJD programmes – including workshops, community awareness campaigns and addressing women and children-specific issues – have gained considerable credibility in the community	<b>Theme 5:</b>  Through the use of indigenous governance systems and structures, CCJD helps rural communities empower themselves to engage with the law while balancing individual rights with family values
<b>Theme 5:</b>  Through the use of indigenous governance systems and structures, CCJD helps rural communities empower themselves to engage with the law while balancing individual rights with family values	<b>Theme 5:</b>  Through the use of indigenous governance systems and structures, CCJD helps rural communities empower themselves to engage with the law while balancing individual rights with family values	

As indicated earlier, the themes linked with the theoretical framework in Table 4.2 arose from focus group discussions and interviews as detailed through the voice of study participants. In Matrix 4.5 which covers themes 1 to 3 and Matrix 4.6 which covers themes 4 and 5, the

researcher aligned a few excerpts from focus group data to demonstrate how themes emerged as data were gathered. The use of consciousness-raising as identified by Biko is evident in the way paralegals interact with the community. Community members are empowered with knowledge and skills on how to work with government departments; they are taught about their rights such that they are able to see if their rights are violated and they can seek recourse.

<b>Matrix 4.5 Themes Emerging Through Excerpts from Focus Group Responses</b>			
<b>Themes 1 – 3</b>	<b>Focus Group 1</b>	<b>Focus Group 2</b>	<b>Focus Group 3</b>
<p><b>Theme 1:</b> Customary law and traditional justice through <i>Izinduna</i> and <i>Amahkosi</i> is highly relevant in rural Impendle while formal law and legal procedures seem to be alienating rural people</p>	<p>“<i>Izinduna</i> help in cases where you are looking for a land to build your house. They also get involved in dispute relating to live stock that people keep.” <b>FGP 9, 0</b></p> <p>“Procedure starts with area representative of tribal court such as <i>Izibonda</i> in different areas or tribal court councillor, then goes to <i>Izinduna</i>, it is escalated accordingly only if the matter could not be resolved in any one of these levels.” <b>FGP3, 8</b></p> <p>“There are women that are always there waiting for cases from women and girls, such as with virginity testing.” <b>FGP9</b></p>	<p>“They tighten the law in this community.” <b>FGP7, &amp;8</b></p> <p>“Procedure starts with area representative of tribal court such as <i>Izibonda</i> in different areas or tribal court councillor, then goes to <i>Izinduna</i>, it is escalated accordingly only if the matter could not be resolved in any one of these levels.” <b>FGP4, 8</b></p> <p>Same procedure is followed but at tribal court there are women who are part of tribal council they deal with women specific issues.” <b>FGP6</b></p>	<p>“They tighten the laws in this community, and play a role in peace keeping and laws and assist resolve dispute.” <b>FGP22</b></p> <p>“Procedure starts with area representative of tribal court such as <i>Izibonda</i> in different areas or tribal court councillor, then goes to <i>Izinduna</i>, it is escalated accordingly only if the matter could not be resolved in any one of these levels. There is no fees only in tribal court” <b>FGP14, 13, 18</b></p> <p>“Same procedure is followed but at tribal court there are women who are part of tribal council; they deal with women specific issues.” <b>FGP16</b></p>
<p><b>Theme 2:</b> CCJD, as an NGO plays a pivotal role in providing access to social justice for Impendle residents independently and in concert with traditional justice structures</p>	<p>“They attend to all social problem and work related problems in the area and they are able to solve them.” <b>FGP3 &amp; 8</b></p> <p>“Knowledge on how to deal with government department, they do follow up for us if it take long to get resolved. They teach us about our rights and how to enforce them” <b>FGP6 &amp; 2</b></p>	<p>“They arrange community workshops and training on many matters affecting people in this area and they also call on <i>Induna</i> to be part of these meetings and workshops.” <b>FGP3 &amp;2</b></p> <p>“ They also teach men about women rights” <b>FGP2, 3, 6</b></p>	<p>“CCJD conduct workshops on a variety of issue affecting people in community. CCJD also teach people on how to deal with police should they have a need to do so. They make sure to invite <i>Izinduna</i> to be part of workshop.” <b>FGP13, 17, 18, 20</b></p>

<p><b>Theme 3:</b> Informants prefer restorative justice through CCJD practices rather than rights-based justice provided by the police and courts</p>	<p>“They are able to assist you directly; if your case needs police they call police and arrange that you be assisted appropriately by police. They explain what is going to happen so by the time police attend to you, you are ready and you know what to do.” <b>FGP2</b></p> <p>“They teach us about our rights but they also teach us to respect and consider families, where our rights begin and where they end.” <b>FGP1</b></p>	<p>“Family mediation is a private process between people involved unlike in magistrate and tribal court where issues are discussed in public.” <b>FGP12</b></p> <p>“They let people voice their opinion, even women are allowed to talk and have an input on the matter, then they explain what the law says and help both parties reach agreement and decision.” <b>FGP7</b></p>	<p>“At CCJD they work differently because they fetch people with a problem and sit them down and discuss problem.” <b>FGP22</b></p> <p>They sit with family and resolve issues and gets resolve it will not go to the police.” <b>FGP17</b></p> <p>“They explain the position of the law and how it apply to the issue and how it should be respected. They also talk about respect in family.” <b>FGP23</b></p>
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Matrix 4.5 and 4.6 also indicate integration of the values of *ubuntu* in the way the CCJD relates to the community and families as they try to mediate and resolve disputes; they also focus on teaching the community about respect and consideration for other people. As one participant

Matrix 4.6 Themes Emerging Through Excerpts from Focus Group Responses				
Themes 4 – 5	Focus Group 1	Focus Group 2	Focus Group 3	
<p><b>Theme 4:</b> CCJD programmes – including workshops, community awareness campaigns and addressing women and children-specific issues – have gained considerable credibility in the community</p>	<p>“CCJD and tribal court are really working together a lot.” <b>FGP3 &amp; 12</b></p> <p>“They always refer you back if you have not reported matter to <i>Induna</i> or <i>Isibonda</i> in your area.” <b>FGP1 &amp; 8</b></p>	<p>“CCJD and <i>Izinduna</i> work together and assist each other resolve dispute in community.” <b>FGP11</b></p> <p>“There is working together between CCJD, <i>Izinduna</i>, CPF and ward committees.” <b>FGP3</b></p> <p>“They encourage us to work with <i>Izinduna</i> and tribal court councillors to report matters to them because they are there to assist community as well.” <b>FGP11</b></p>	<p>“CCJD, <i>Izibonda</i> and CPF they work together and try and resolve issues at that level before it reach the traditional court stage. These structure work together very well to try and finalise matters themselves.” <b>FGP23</b></p> <p>“There are also municipal councillors and ward committees; they also assist resolve dispute in partnership with CCJD and <i>Izinduna</i>.”</p>	

			<b>FGP13 &amp; 15</b>	
<b>Theme 5:</b> Through the use of indigenous governance systems and structures, CCJD helps rural communities empower themselves to engage with the law while balancing individual rights with family values	“CCJD have helped us a lot, they have made us women know that we have rights and those rights must be respected. Before that it was men that were in control of everything.” <b>FGP8</b>	“CCJD has done a lot, now we are able to report if we are not satisfied with tribal court judgement and decision. CCJD assist us and talk with them for us.” <b>FGP3, 6</b>	“CCJD assist a lot, you find some cases resolved by <i>Izinduna</i> and you are not happy, do follow up even on the <i>Induna</i> , they derive a way for your case to be taken to the next level or magistrate court if you like.” <b>FGP16 &amp; 19</b>	

The previous section provided matrices that show how the theoretical framework helped the themes to emerge from the study. It also included Matrices 4.5 and 4.6 which provided excerpts from the focus groups that led to emerging themes. Table A4-1, which appears in the appendix, displays the interaction between the research objectives, research questions and data gathering questions. By aligning the data gathering questions with the research objectives and research questions the researcher was able to pinpoint where to access appropriate data from the transcripts of interviews and focus groups. The data analysis sections are subsequently arranged by data corresponding to certain research objectives, then data corresponding to certain research questions along with an interpretation of what those data suggest. This section is followed by a cross-case analysis of the data so as to achieve the study objectives and answer the questions and sub-questions while giving voice to the participants through the advocacy/participatory philosophical worldview.

Appendix D Table A4-1 is a composite table, depicting study objectives, research questions and focus group and interview questions. This table provides a means through which to navigate the study. The table provided guidance and acted as a point of reference for the remainder of the tables and matrices used for data analysis. Appendix D Table A4-1 makes the process of navigating this section of the study more manageable and understandable.

Through a combination of thematic analysis, content analysis and data matrix analysis, and with the use of Table A4-1, the researcher designed matrices based on excerpts from transcripts of focus group discussions and interviews.

It is worth noting how the tables and matrices interact for the rest of this chapter. In section 4.4.2, tables 4.4 to 4.7 show the focus group questions that elicited answers to help achieve the

research objectives. Matrices 4.7 to 4.10 display excerpts from focus group transcripts that responded to the focus group questions in Tables 4.4 to 4.7. Then Matrices 4.11 to 4.13 hold interview data corresponding to interview questions showed in Tables 4.4 to 4.7 when it came to achieving aims of study.

In section 4.4.3, regarding answering of research questions, Matrices 4.14 to 4.18 converge complementary research objectives and research questions and those matrices are populated with focus group data that respond to the complementary research objectives and research questions. To determine how interview data respond to research questions, Matrix 4.19 consists of interview data both responded to the research questions and gave rise to the themes generated by the study.

In between tables and matrices, interpretive narrative is provided by researcher throughout this chapter.

Only when the matrices relating to the research objectives and research questions were complete were the themes discussed above evident. Other themes emerged but those discussed here are most relevant to the objectives and questions of the study. Again, section 4.4.2 and its subsections cover the use of data to achieve the research objectives. Section 4.4.3 and its subsections cover the use of data to answer research questions while section 4.4.4 subsequently provides a cross-case analysis of the same data with focus groups and interviewees as sub-cases embedded in the CCJD overarching case study (Yin, 2009).

#### 4.4.2 Achievement of Research Objectives

In concluding the previous section and to help achieve the objectives of the study, Matrices 4.5 and 4.6 established a link between excerpts from focus group data themes thereby generated. In this section, making use of content analysis and thematic analysis the researcher established links between the research objectives and the themes emerging from the study. In other words, which themes addressed achievement of which research objectives? This information is provided in Table 4.3. As part of the data analysis procedure, the researcher next aligned the focus group questions and interview questions targeted to address each research objective. These tables of alignment are then shown in Tables 4.4 to 4.7. In this study, tables are used to display data analysis processes and procedures while matrices are used to depict raw data gathered in the field.

Table 4.3 Themes Emerging from Certain Data Relative to Research Objectives			
<b>Objective 1</b> Investigating the use of indigenous governance techniques by CCJD.	<b>Objective 2</b> Discover the relevance of customary law in accessing justice in rural Impendle.	<b>Objective 3</b> Explore the value of indigenous governance system for access to justice in rural Impendle.	<b>Objective 4</b> Develop policy recommendations for governance of social justice as one of the mechanisms citizens in rural community can use to access justice
<b>Theme 4:</b> CCJD programmes – including workshops, community awareness campaigns and addressing women and children-specific issues – have gained considerable credibility in the community	<b>Theme 1:</b> Customary law and traditional justice through <i>Izinduna</i> and <i>Amahkosi</i> is highly relevant in rural Impendle while formal law and legal procedures seem to be alienating rural people	<b>Theme 2:</b> CCJD, as an NGO plays a pivotal role in providing access to social justice for Impendle residents independently and in concert with traditional justice structures	<b>Theme 3:</b> Informants prefer restorative justice through CCJD practices rather than rights-based justice provided by police and courts
<b>Theme 3:</b> Informants prefer restorative justice through CCJD practices rather than rights-based justice provided by police and courts	<b>Theme 2:</b> CCJD, as an NGO plays a pivotal role in providing access to social justice for Impendle residents independently and in concert with traditional justice structures	<b>Theme 3:</b> Informants prefer restorative justice through CCJD practices rather than rights-based justice provided by police and courts	<b>Theme 5:</b> Through the use of indigenous governance systems and structures CCJD helps rural communities empower themselves to engage with the law while balancing individual rights with family values
		<b>Theme 1:</b> Customary law and traditional justice through <i>Izinduna</i> & <i>Amahkosi</i> is highly relevant in rural Impendle while formal law and legal procedures seem to be alienating rural people	

Although Table 4.3 appears first, showing how emerging themes relate to the research objectives, it was accomplished last. Tables 4.4 to 4.7 were the first strategy in beginning to make sense of data. As stated, the purpose of Tables 4.4 to 4.7 is to demonstrate the alignment

between the research objectives and data gathering questions in the research study by indicating how each component is related to the other. That is, the connection between the research objectives and data gathering questions, focus group questions and interview questions. Data gathering questions were the tools used by the researcher that assisted the achievement of the research objectives. This alignment assisted the researcher to establish how focus groups and interviews facilitated the achievement of the objectives of the study. Tables 4.4 to 4.7 enabled the researcher to illustrate the alignment between these components of the study and this likewise increases the probability of the study objectives being achieved. Qualitative research is messy and at times produces more data than necessary for a study; Tables 4.4 to 4.7 assisted the researcher to consolidate, and in the process, tidy up the mess and volume of data produced by the researcher while in the field. Tables 4.4 to 4.7 are followed by matrices of relevant data per research objectives; these are Matrices 4.7 to 4.10.

<b>Table 4.4 Alignment of First Research Objective with Data Collection Tools</b>		
<b>Research Objectives</b>	<b>Focus Group Questions</b>	<b>Interview Questions</b>
<b>Objective 1:</b> Investigate the use of indigenous governance techniques by the CCJD	<b>Question 1:</b> Discuss the relevance of customary law in accessing justice in the rural community of Impendle. <b>Question 8:</b> How does the Advice Office encourage respect for traditional authorities such as the courts of <i>Izinduna</i> and <i>Amakhosi</i> while empowering the community with understanding of their rights as enshrined in the Constitution?	<b>Question 1:</b> What role does Advice Office, (CCJD) play in this community of Impendle and how do you reach out to community about your programmes? <b>Question 3:</b> Why does the Advice Office (CCJD) use avenues other than the formal legal system, (e.g. court, police) like mediation, negotiation, work with traditional authorities to help people find solutions to their problems, in rural communities such as Impendle? <b>Question 9:</b> What has been the impact of the Advice Office in this community, especially relating to domestic violence, child support and maintenance within the family unit? <b>Question 10:</b> What does the Advice Office do to empower and conscientise people in communities of their rights to find fair solutions to their problems, and to seek recourse where necessary?



Table 4.5 Alignment of Second Research Objective with Data Collection Tools		
Research Objectives	Focus Group Questions	Interview Questions
<b>Objective 2:</b> Discover the relevance of customary law in access justice in rural Impendle	<b>Question 3:</b> What role do the traditional courts of <i>Izinduna</i> and <i>Amakhosi</i> play in this community?  <b>Question 5:</b> How does the advice office establish and inspire confidence in traditional authorities and methods as legitimate mechanisms of accessing justice?	<b>Question 2:</b> Do you think traditional authorities help in dealing with people's problems in a fair way? If so, how so. If not, why?  <b>Question 5:</b> Why does the Advice Office, (CCJD) use avenues other than the formal legal system, (e.g. court, police) like mediation, negotiation, work with traditional authorities to help people find solutions to their problems, in rural community such as Impendle?

Table 4.6 Alignment of Third Research Objective with Data Collection Tools		
Research Objectives	Focus Group Questions	Interview Questions
<b>Objective 3:</b> Explore the value of indigenous governance system for access to justice in rural Impendle	<b>Question 3:</b> What role do the traditional courts of <i>Izinduna</i> and <i>Amakhosi</i> play in this community?  <b>Question 6:</b> How does this local justice structure of <i>Amakhosi</i> and <i>Izinduna</i> deal with dispute matters brought to them by women in community?	<b>Question 3:</b> Why does the Advice Office, (CCJD) use avenues other than the formal legal system, (e.g. court, police) like mediation, negotiation, work with traditional authorities to help people find solutions to their problems, in rural community such as Impendle?  <b>Question 7:</b> Are the traditional courts and other traditional structures still relevant for the community of Impendle? Please explain briefly.  <b>Question 9:</b> How does the Advice Office strike a balance between finding solutions that respect local cultural norms and traditional ways of resolving conflict in the home, while at the same time ensure that there is justice, especially for women and children? For example, in cases of domestic violence, maintenance, inheritance, etc

<b>Table 4.7 Alignment of Fourth Research Objective with Data Collection Tools</b>		
<b>Research Objectives</b>	<b>Focus Group Questions</b>	<b>Interview Questions</b>
<b>Objective 4:</b> Develop policy recommendations for governance of social justice systems as one of the mechanisms citizens in rural communities can use to access justice.	<b>Question 10:</b> What would you say is unique in the way the Advice Office assists the community to resolve disputes compared to other places (Probe: traditional structures, police, courts) you have been to?	

Now that it has been demonstrated how data collection questions were aligned with research objectives, upcoming Matrices 4.7 to 4.10 advance the analysis that started with the display of alignment between data collection tools with each objective in Tables 4.4 to 4.7. Matrices 4.7 to 4.10 required the researcher to reflect on how the data responds to each research objective. After the sub-section on focus group data responsive to research objectives is the sub-section on interview data responsive to research objectives. Thereafter is the segment on how data answered the research questions and sub-questions, section 4.4.3.

Next is the analysis of focus group data responsive to research objectives.

#### 4.4.2.1 Focus group data responsive to research objectives

Matrices 4.7 to 4.10 required the researcher to reflect on how the data responded to each research objective. In so doing the matrices forced the researcher to step out of her own terrain and reality, extending the scope of research into the space and life world of the research participants. This breaks the boundaries and divides between the researcher and research participants. Through the data, the researcher is confronted with the real life experiences of the research participants by asking how the data responds to the research questions and the extent to which it assists the achievement of the research objectives. This is in keeping with the advocacy/participatory worldview (Creswell, 2009) as it advocates that the researcher needs to step outside of her/his life world into the research participant's reality. This is the way to obtain evidence of how rural people in Impendle see their lives in relation to the research study, what they have to say and how this responds to the research objectives. This is in keeping with the advocacy/participatory worldview giving voice to the participants. The advocacy/participatory worldview, also allowed both the researcher and participants to shape the research study. Also

important is the fact that the researcher used a case study to execute this research which enabled the researcher to get as close as possible to those being studied and to illustrate responses across sub-cases as shown in section 4.4.4 of this chapter. From data matrix analysis it was determined that customary law is still a relevant source of justice for rural people at Impendle; they recognise and acknowledge *Amakhosi* and *Izinduna* as justice arbiters and custodians of indigenous culture and value systems in the area. As is evident in the matrices, a qualitative study cannot be tidied up and put into boxes; there is a criss-cross of responses across the objectives which resulted in some data gathering questions fitting and crossing over into more than one objective. A brief interpretation of what the matrices reflect along with an interrogation of the literature relative to this study, is provided within this series of matrices, Matrix 4.7 to 4.10

The first column provides the basis of inquiry. The basis of inquiry is a focus group question corresponding to the research objective but reformulated as a statement. The other three columns are organised by focus groups. This same pattern is followed with interview questions that elicited data responsive to research objectives in a separate matrix per objective.

<b>Matrix 4.7 Research Objective 1: Use of Indigenous Governance Techniques by CCJD: Focus Group Data</b>			
Basis of Inquiry	Focus Group 1	Focus Group 2	Focus Group 3
Relevance of customary law in accessing justice in rural community of Impendle	NON RESPONSIVE	“CCJ got to be known by us since they usually get us together to meet and have workshop with us. They would call the <i>Izinduna</i> to be present and they would meet them as well.” FGP4	“ They call the <i>Izinduna</i> to be present and we would meet with them as well” FGP14
Advice office encouragement of and respect for traditional authorities	“The CCJ does encourage regarding the traditional court, because let me say I go there to report a problem. They are able to ask you where you had started there.” FGP8	“The way that they show us and tell us that we should respect these people, if we have problems we must report to them first before we move on. It teaches us that these people exist, let us respect them.” FGP11	“Most of the time even though they are not going to say, but the way that they show us that we should respect these people, even if we have a problem at school we report it to them first.” FGP15

Taken together, Matrices 4.7 and 4.8 offer an analysis of respondents' views on the first two research objectives. In the first basis of inquiry, **FGP4 & 14** respectively noted with positive sentiments, the inclusion of *izinduna* in meetings and workshops organised by CCJD. In traditional rural communities, development programmes and projects must get buy-in and endorsement of local leadership for it to find favour with community.

<b>Matrix 4.8 Research Objective 2: Relevance of Customary Law: Focus Group Data</b>			
<b>Basis of Inquiry</b>	<b>Focus Group 1</b>	<b>Focus Group 2</b>	<b>Focus Group 3</b>
Advice Office, (CCJD) use of avenues other than the formal legal system.	"We work together with the <i>Izinduna</i> firstly when you are looking for a place, dispute matters and other cases such as <i>ukuhlawula</i> , damages for impregnating a girl" <b>FGP 0, 3,5,9</b>	"I can say the role that they play is to tighten the laws in the community, some cases of dispute or any development plan for the area" <b>FGP2, 4, 6</b>	"It happens that we have <i>Izinduna</i> that maybe there is a certain project that will take place here in the area, it doesn't just happen; it start with the Chief and <i>Izinduna</i> first." <b>FGP3</b>
Advice Office establishment and inspiration of confidence in traditional authorities and methods as legitimate mechanisms of accessing justice in communities	"You don't struggle because if there is something that just happens at that time you go to <i>Isibonda</i> and attends to you right away." <b>FGP8, 11, 12</b>	"It is very easy because you go to <i>Isibonda</i> first, even if you go to councillor." <b>FGP1, 8, 11</b>	"It is very easy, because there is <i>Isibonda</i> there, even if you go to councillor." <b>FGP114, 15, 18</b>
Local justice structure of <i>Amakhosi</i> and <i>Izinduna</i> handling dispute matters brought to them by women in the community	"There are women that are always there waiting to solve the issues that women have." <b>FGP9</b>	"At the traditional court there are women." <b>FGP6</b>	"If you get at the tribal court there are women there. They look at problems or cases that have been reported by women." <b>FGP16</b>

Harper, (2011) asserts that the challenge remains for an NGO to maintain a balance between gaining acceptability and legitimacy and offering locally acceptable solutions and options while upholding and maintaining human rights. It would seem that this is one of the elements that facilitated and strengthen credibility and legitimacy of CCJD programme in Impendle community. Ray, (2003: 93) citing a Ghanaian experience post –colonialism, asserts that while post-colonial

governments have overwhelming power, sovereignty, and authority, traditional leaders hold significant amounts and type of sovereignty, legitimacy, and authority. Further to this, in the second basis of inquiry, across the three focus groups, in the first session, **FGP8, 6, 10**- second session, **FGP 11**- third session, **FGP15** participants indicated that CCJD encourages them to work with and to respect traditional leadership, such that CCJD would not deal with a case concerning the community if it has not been reported to *izinduna* or *iziqonga* first. Data gathered in response to these two objectives seems to confirm that, firstly, CCJD relies on indigenously driven governance techniques in their programmes; secondly, customary law still has relevance in Impendle.

Taken as a group Matrices 4.9 and 4.10 below, like Matrices 4.7 and 4.8 before them, suggest that people in rural areas are comfortable with indigenously-driven governance systems. They find comfort in dealing with the traditional justice structures of *Amakhosi* and *Izinduna*. They are familiar with the protocol and procedures followed by the tribal courts. This also reflects confidence in traditional leadership as primary governance structures in rural areas. This implies that the traditional justice system as an advocate for restorative justice has an important role to play in the South African judicial system as a whole.

<b>Matrix 4.9 Research Objective 3: Value of Indigenous Governance Systems for Access to Justice in rural Impendle: Focus Group Data</b>			
<b>Basis of Inquiry</b>	<b>Focus Group 1</b>	<b>Focus Group 2</b>	<b>Focus Group 3</b>
Advice Office (CCJD) uses avenues other than the formal legal system	“We work together with the <i>Izinduna</i> firstly when you are looking for a place and if there is a someone that I don’t get along with, I report the matter there is <i>isibonda</i> , and there is an <i>Induna</i> , for stock theft as well and also if I have a visitor in my home report to <i>induna</i> , it must be known.” <b>FGP 0 3,5, 9</b>	“I can say the role that they play is to tighten the laws in the community, dispute resolution and any development plans for the area. it starts with <i>induna</i> ” <b>FGP 2, 4,7</b>	“It happens that we have <i>Izinduna</i> that maybe there is a certain project that will take place here in the area, it doesn’t just happen, it start with the Chief and <i>Izinduna</i> first.” <b>FGP3</b>
Local justice structure of <i>Amakhosi</i> and <i>Izinduna</i> handling dispute matters brought to them by women in community	“There are women that are always there waiting to solve the issues that women have.” <b>FGP9</b>	“At the traditional court there are women to help.” <b>FGP6</b>	“If you get at the tribal court there are women there. They look at problems or cases that have been by reported women.” <b>FGP16</b>

As Matrix 4.10 shows, while there were responses that helped accomplish objective 4 regarding policy recommendations, the policy recommendations to accomplish this objectives are in Chapter 5 and were drawn by the researcher based upon additional responses from the informants. This is particularly true in terms of responses to interviews as there is no matrix below in the section on how the interview data responded to the fourth objective because these responses were expressed in other contexts.

<b>Matrix 4.10 Research Objective 4: Policy Recommendations for Governance of Social Justice Systems as one of the Mechanisms to Access Justice in Rural Communities</b>			
<b>Basis of Inquiry</b>	<b>Focus group 1</b>	<b>Focus Group 2</b>	<b>Focus Group 3</b>
<b>Question 10 :</b>  Uniqueness of Advice Office in resolving disputes	“They arrange for me to meet with the police, they told them what was going on. They did everything even the statement.” <b>FGP2</b>	“CCJ works differently they fetch both man and wife and talk to both of them.” <b>FGP12</b>	<b>Same response as other focus groups</b>

On the one hand, the section above focused on the accomplishment of the research objectives by use of the focus group data as shown in Matrices 4.7 to 4.10. On the other hand, Matrices 4.11 through 4.13 display informants’ responses as they pertain to the research objectives using the data gathered in the field through semi-structured interviews.

#### 4.4.2.2 Interview data responsive to research objectives

In this section, responses to the interview questions across the four public managers are analysed and aligned with the different research objectives based on identified correspondence. Note that public manager four is a manager at the CCJD headquarters in Pietermaritzburg and will not have as many responses as managers who work at the Community Advice Office or support centre in Impendle and may therefore not be included in some matrices. Although the managers of the Impendle office are paralegals – as are all of those who head up the advice offices – this study refers to them as public managers. The paralegals manage and administer all the day-to-day activities, procedures and processes like any other manager in the public sector; through the

CCJD as an NGO, these managers implement public governance strategies in delivering services that seem to provide access to justice for rural people in Impendle.

The data matrix analysis shown in Matrices 4.11 through 4.13 assisted the researcher to achieve the research objectives. The data analysis process first included alignment of interview questions with particular research objectives as shown by Tables 4.4 to 4.7 above. This process alerted the researcher as to the most logical place to begin sifting through relevant data. Thereafter, responses to interview questions were placed on a matrix in order to determine the extent to which they assist in the achievement of the research objectives. Those interview questions were then shaped into bases of inquiry for purposes of presentation and better comprehension. In the matrices 4.11 to 4.13, the first column is the basis of inquiry (the interview question was turned into a short statement) and the other three or four columns (depending upon whether the fourth public manager had a response) display excerpts from each interviewee. A brief interpretation of the matrices is also provided between matrices as well as a discussion of relevant literature.

The interpretation of Matrix 4.11 shows that public managers provide an important public management function, ranging from legal advice, to community empowerment programmes and facilitation of access to government services that no government department would otherwise provide. Their service is spontaneous and responsiveness specific to an individual's need at the time, which makes the turnaround period short unlike some government department's services that have to follow procedures within the bureaucracy. CCJD public managers have space to get into the life world of clients, to empathise and look into problems from their client's point of view.

This is one of the major differences between formal justice processes and procedures with the informal, indigenous solutions to problems as advocated by the CCJD programme. It is also a strong point of indigenous systems of governance in that CCJD public managers are able to come up with tailor made responses and solutions to unique issues. Wojkowska (2006:17) maintains that "NGO-based village or community mediation schemes are able to work with communities to help them devise new ways of solving disputes based on mediation". This is compatible with empowerment, as an ideal of the social justice and human rights approach, in that communities are empowered to participate in finding contextually and culturally relevant solutions to their problems.

<b>Matrix 4.11 Research Objective 1: Use of indigenous governance techniques by CCJD: Interview Data</b>				
<b>Basis of Inquiry</b>	<b>Interview session with Public Manager 1</b>	<b>Interview session with Public Manager 2</b>	<b>Interview session with Public Manager 3</b>	<b>Interview session with Public Manager 4</b>
Role of CCJD in community and through community outreach	<p>“To give legal advice to our clients.”</p> <p>“Outside of legal advice we get into the shoe of that person. “Make reference ourselves with that institution.”</p>	<p>“. Our role is to bring solutions &amp; answers to problems that are family based. Limiting people arresting each other. The cases we deal with have to do with both parties from the same family.”</p>	<p>“We are able to help them without going through certain processes like going to the court and also at police stations. We give them help at that time.”</p>	<p>“Our provide support to all 15 advice offices; we wanted to make sure that people in rural areas, people who cannot access justice”,</p>
Advice Office (CCJD) uses avenues other than the formal legal system	<p>“It is a good thing to sit down and talk to each person to give his opinion than take case to police and then there will be arrest.”</p>	<p>“They like their matters to be kept private”</p>	<p>“We usually prefer that if people have had disputes at home, it is better to talk to them. Maybe one needs to go to hospital, people to jail.</p>	<p>“CCJD understands that, it is the reason why they do family mediation to resolve problems without anyone getting arrested.”</p>

Communities can participate in the process of finding and defining dispute resolution mechanism. Oyieke, (2012: 65) maintains that South African legal culture is based on a grand narrative of the western ideology, it is highly exclusive, through language and complex processes, and as such, has been known to hinder rural people’s access to justice. For this reason, a call for alternative strategies and techniques such as indigenous justice systems as primary mechanisms for traditional rural people is in order. CCJD’s access to justice programme appears to afford people in Impendle access to justice.

Matrix 4.12 shows that the three centre-based public managers expressed divergent points of view.



<b>Matrix 4.12 Research Objective 2: Relevance of Customary Law in Accessing Justice: Interview Data</b>			
<b>Basis of Inquiry</b>	<b>Interview session with Public Manager 1</b>	<b>Interview session with Public Manager 2</b>	<b>Interview session with Public Manager 3</b>
Fairness of traditional authorities help in dealing with people's problems	"Sometimes it is a yes, sometimes it is a no."	"I think they are fair, but then it also happens that they are not fair."	"I don't think they help them in a fair way, because there is no neutrality."
Relevance of traditional court and other traditional structures	"Yes they have it big time; you can't just in an <i>Nkosi's</i> land be seen meeting there without telling <i>Inkosi</i> ."	"In my opinion I would say it is still relevant seriously.  "In cases where a person want to fence we were both shown where each of our land ends, then when they decide to fence they overlap in my yard then <i>Induna</i> is needed there to come and say where they have go."	

While all the public managers firmly believe that customary law is still relevant in this day and age, they have different opinions on the fairness of the traditional authorities in dealing with people's problems. This is helpful in that it shows that CCJD allows public managers space to express their individuality rather enforcing uniformity and conformity to the detriment of individuality. This is in keeping with the social justice and human rights theory as well as the Constitution, (RSA, 1996) as it advocates for freedom of expression as one of the fundamental human rights.

Matrix 4.13, which is the last matrix in this section, suggests that, in terms of the value of the indigenous governance system for access to justice in rural Impendle, these public managers perceive that mediation as a form of dispute resolution is the most ideal way of settling family-related disputes; in that it focuses on the preservation and restoration of the family unit. Schoeman, (2012) argues that the primary goal of African indigenous justice systems is the restoration of victims, community and offenders. CCJD provides a restorative platform to dispute resolution which offers an open discussion resulting in amicable resolution of problems. Public managers' responses are further explored in Matrices 4.24 to 4.27 below which cross-cases responses from all four public managers interviewed in this study.

<b>Matrix 4.13 Research Objective 3: Value of Indigenous Governance System for Access to Justice in rural Impendle: Interview Data</b>		
<b>Basis of Inquiry</b>	<b>Interview session with Public Manager 2</b>	<b>Interview session with Public Manager 3</b>
Advice Office, (CCJD)'s use of avenues other than the formal legal system	<p>"It is a good thing to sit down and talk, each person to give his opinion than take case to police and then there will be arrest."</p> <p>"Had you start with mediation the problem would be solved and people can live back together."</p> <p>"During mediation you talk well with each other you do not fight."</p>	<p>"People believe in mediation, because if they have problems or before they come to us they have already called a member of family, maybe an older man. They realise it is not successful, they like that way of solving problems."</p> <p>"Because they like their matters to be kept private. Because even there</p>
Relevance of traditional courts and other traditional justice structures	<p>"Yes they have it big time; you can't just in an <i>Nkosi</i>'s land be seen meeting there without telling <i>Inkosi</i>."</p>	<p>"In my opinion I would say it is still relevant seriously.</p> <p>"In cases where a person want to fence we were both shown where each of our land ends then when they decide to fence they overlap in my yard, then <i>Induna</i> is needed there to come and say where they have go."</p>
Advice Office striking a balance between finding solutions that respect local culture, norms and traditional ways of resolving conflict in the home, while at the same time ensuring that there is justice, especially for women and children	<p>"We give them advice, even though there is Constitution; this should not be broken as well.</p> <p>"It doesn't get separated with culture and tradition. Even if you teach them about their rights in the constitution."</p>	<p>"The law was not formed by someone that is far and brings it here. People were also involved so it is not far from the life we live in this house. It does not clash; it is not something that has a big gap in between.</p> <p>"We are able to apply the law such that it is obvious where he was wrong. Rights were not there to give people right to be rude or to be given right to hurt the other if they were wrong.</p>

In Matrix 4.13 responses from PM2 and PM3 and shown. PM1 indicated that "mediation is good as it involves all parties in dispute in resolution of problem". According to PM4, "CCJD centre coordinators are capacitated with skills to assist clients in resolving problems without necessarily going to court because most domestic cases can be resolved" (PM4) with the assistance of these paralegals.

Judging from the responses of public managers, indigenously driven governance system are popular with local people. Using their knowledge and understanding of the law, CCJD public managers are able to apply the law in mediation processes such that an amicable resolution is

reached. “People believe in mediation, because if they have problems before they come to us they have already called a member of family, maybe an older man. When they realise that the approach it is not successful, they come to us because they like that way we resolve problems” (PM1 & 4). Refer to composite matrix of responses from interview questions, appendix C 2 for this discussion.

Objective 4, which covers policy recommendations based upon this study are provided in Chapter 5. The next segment of this chapter is comprised of how data responded to the answering of research questions and research sub-questions.

#### 4.4.3 Answering of Research Questions and Sub-questions

Section 4.4.1 used the combination of content, thematic and data matrix analysis to display and interpret data corresponding to the theoretical framework, the philosophical worldview, and the emergence of themes from the study. Section 4.4.2 showed how focus group and interview data responded to the research objectives. This section discusses how data responded to the research questions and sub-questions, also using a combination of content, thematic and data matrix analysis. Unlike the section on research objectives which displayed matrices that covered the research objectives alone; in this section, the researcher created matrices that show how the data respond to the convergence of each research question and sub-question with the objectives to which these questions may be correlated. Matrices 4.14 to 4.19 not only show how the data respond to a convergence of complementary research questions and objectives but present this data according to focus group responses. After those matrices, Matrix 4.20 brings this section to a close by showing the themes generated by multiple research questions or sub-questions based on responses from the interview data.

##### 4.4.3.1 Focus group data responsive to research questions and sub-questions

As stated, matrices in this section are organised differently than those in the preceding section. In the last section matrices were organised per research objective. In this section, matrices are organised in accordance with a convergence of a research question and a corresponding research objective. Matrix 4.14, for example, illustrates the convergence of data between the research questions, research objectives and responses from focus group participants. The matrix examines the collective responses across three focus groups, comparing and contrasting group responses per question. The matrix commences in the first column by matching the research question and

research objective; this is taken a step further by matching these with corresponding focus group questions which have been turned into statements or topical sub-headings within the matrices above the focus group responses. In other words, this matrix illustrates alignment between three components of the research study; however the focus is group responses as opposed to individual responses in the focus groups. The collective view is presented and underneath is an example of an excerpt from one or more focus group participants. What emerged from the focus group responses is that participants are aware of and clear on the role of the CCJD in their community; they are also aware of the role of indigenous authorities and they acknowledge the cooperation between the CCJD and the *Izinduna* and *Amakhosi*. In contrast with scholars, such as Mamdani (1996) cited in Sithole (2008) and the democratic tradition paradigm which asserts that traditional leadership is an obsolete governance structure that is not compatible with democratic principles, rural people in Impendle still place a high premium on traditional leaders and the tribal court, as this is the primary governance structure closest to the community. It also emerged from the data that the Impendle community also relies on democratic governance structures such as the Community Policing Forum (CPF) and ward committees for crime prevention. These structures function as part of the stakeholders' forum of local justice service providers, such as the CCJD, South African Police Service (SAPS), *Amakhosi* and *Izinduna*, the courts and others.

<b>Matrix 4.14 CCJD Use of Indigenous Justice Techniques: Focus Group Data</b>			
Convergence of Research Question and Objective	Focus Group 1	Focus Group 2	Focus Group 3
<b>Main Research question:</b>  How does the CCJD develop and use techniques of indigenous governance to facilitate access to justice for rural communities?  <b>&amp; Objective 1:</b> Investigate the use of indigenous governance techniques by the CCJD	Relevance of customary law in accessing justice in the rural community of Impendle		
	<b>Collective view:</b> CCJD helps resolve domestic violence and also child abuse issues.  "CCJD looks into violence that takes place in our homes and if you can't handle it they get involved."FGP3, 8,	<b>Collective sentiment</b> The role of CCJD is to empower community, women, children and men on women's rights issues. They run workshops and organise community meetings.  "They play a role in this community, they organise workshops and meetings informing community how to deal with abuse of children and domestic	<b>Collective view:</b> Capacity building on issues pertaining to rights, knowledge and understanding of the law.  "They do workshop and let us know about the laws."FGP15, 18,21,22

		violence”FGP3, 4, 7	
	CCJD advises the community on their rights and where to seek assistance in times of need		
	<b>Collective view:</b>  CCJD works in collaboration with other structures to delivery justice to people in rural Impendle. They assist in cases of family violence and children’s rights.  “Father of my children was prohibiting me from seeing my children. I went to CCJD; they wrote me a letter to take to the police and then fetched my children.” FGP2	<b>Collective view:</b> Non responsive	<b>Collective view:</b> Non responsive
	Impact of CCJD in community, especially relating to domestic violence, child support and maintenance within a family unit		
	<b>Collective view:</b>  Respect for traditional court.  “CCJD does encourage respect for traditional court, if you report a problem, they ask you if you have reported there.” FGP2, 7, 9, 11	<b>Collective view:</b>  “They tell us that we should respect these people (public employees), even if we have problems at school we must report it to them first. They teach us that these people exist, let us respect them especially since we know about our rights.” FGP10, 11, 12	<b>Collective view:</b>  “Problems should be reported to them as well.” FGP15
	CCJD assistance in standing up for one’s rights while making sure family structures and values are not damaged		
	<b>Collective view:</b>  Advocate for respect for human rights and family values.  “Advise on rights and respect for family.” FGP1	<b>Collective view:</b>  Family mediation, quick resolution of problems. It is an immediate dispute resolution procedure.  “You sit down with them and your family, as a woman who has a problem you have your input and the man of the house talk. The issue now end there with us, it won’t go to the police and Induna.” FGP7	<b>Collective view:</b>  CCJD’s family mediation is good; it builds families.  “The issue ends there with us; by the time you go home you are holding hands and it is over.” FGP17

Matrix 4.14 demonstrates the value participants find in traditional governance structures. Matrices 4.15 and 4.16 next shed specific light on the work of the CCJD and suggest that the tribal courts of *Izinduna* and *Amakhosi* as well as family elders are examples of indigenous justice systems. These are connected to contemporary justice issues in the sense that in a democracy, all justice systems are subject to the Constitution as the supreme law of the country. The constitution also gives customary law and indigenous law equal status with status common law.

<b>Matrix 4.15 Focus Group Response to the Role of CCJD in Providing Advice</b>			
Convergence of Research Question and Objective	<b>Focus Group 1</b>	<b>Focus Group 2</b>	<b>Focus Group 3</b>
	CCJD offers the community advice on rights and where to seek assistance in times of need		
<b>Sub Question1:</b> What are indigenous governance justice systems and how are they connected to contemporary access to justice?  <b>&amp; Objective 2:</b> Discuss the relevance of customary law in accessing justice in the rural community of Impendle.	<b>Collective view:</b> Advocate for respect for human right and family values.  “CCJD help a lot when they advise where your rights begin and also respect for your family. Even though you have rights but you must consider your family.” <b>FGP1, 4, 10</b>	<b>Collective view:</b> Family mediation, quick resolution of problems. It is an immediate dispute resolution procedure.  “You sit down with them and your family and you talk; a woman with a problem will also have her input and the man of the house talk. The issue now end there with us, it won’t go to the police and <i>Induna</i> .” <b>FGP7, 9, 2</b>	<b>Collective view:</b> CCJD’s family mediation is good; it builds families.  “The issue ends there with us; by the time you go home you are on good terms.” <b>FGP17, 13, 11</b>

<b>Matrix 4.16 Alternative Justice Mechanisms and Indigenous Governance Techniques of CCJD: Focus Group Responses</b>			
Convergence of Research Question and Objective	Focus Group 1	Focus Group 2	Focus Group 3
<p><b>Sub Question 3:</b> Which alternative justice mechanisms are used by the CCJD in dispute resolution and how do the indigenous beliefs of community influence these mechanisms?</p> <p><b>Objective 1:</b>  Investigate the use of indigenous governance techniques by the CCJD</p> <p><b>&amp; Objective 3</b>  Explore the value of indigenous governance systems for access to justice in rural Impendle.</p>	Impact of CCJD Advice Office in the community, especially relating to domestic violence, child support and maintenance within a family unit		
	<p><b>Collective view:</b> They encourage us to recognise them by reporting cases to them as well.</p> <p>“When you report a case you start there, CCJD can do follow up.” <b>FGP3, 5, 8</b></p>	<p><b>Collective view:</b> They teach us to respect traditional leaders by the way they deal with them.</p> <p>“They teach us that these people (Traditional leaders) exist we must respect them.” <b>FGP1, 7, 11</b></p>	<p><b>Collective view:</b> They teach us to respect traditional leaders by the way they deal with them.</p> <p>” They encourage us to report our problems to them even the one’s from school” <b>FGP 14,16,21</b></p>
	CCJD advises community advice on rights and where to seek assistance in times of need		
	<p><b>Collective view:</b> Advocate for respect for human rights and family values.</p> <p>“CCJD help a lot when they advise where your rights begin and also respect for your family. Even though you have rights but you must consider your family.” <b>FGP1, 3, 9</b></p>	<p><b>Collective view:</b> Family mediation offers quick resolution of problems. It is an immediate dispute resolution procedure.</p> <p>“You sit down with them and your family and you talk; a woman with a problem will also have her input and the man of the house talk. The issue now end there with us; it won’t go to the police and <i>Induna</i>.” <b>FGP7, 10,11</b></p>	<p><b>Collective view:</b> CCJD’s family mediation is good; it builds families.</p> <p>“The issue ends there with us; by the time you go home you are holding hands and it is over.” <b>FGP17, 18, 21</b></p>

Matrices 4.17 and 4.18 indicate that the value of the indigenous governance system for the people of Impendle lies in the fact that it is responsive to their way of life, culture, values, traditions, customs and norms. It regulates their day-to-day lived experiences.

<b>Matrix 4.17 Customary Law and Relevance to Access to Justice: Focus Group Responses</b>			
Convergence of Research Question and Objective	Focus Group 1	Focus Group 2	Focus Group 3
	Role of the traditional courts of <i>Izinduna</i> and <i>Amakhosi</i> in community		
<b>Sub-Question 4:</b> What is customary law and is it still a relevant justice system in Impendle?  <b>&amp; Objective 2:</b> Discuss the relevance of customary law in accessing justice in the rural community of Impendle.	<b>Collective view:</b> Traditional leaders play a big role in this community. There are issues that can only be handled and solved by this structure. “Yes, we work together with them, firstly when you are looking for a place to stay. We also report to <i>Induna</i> or <i>Isibonda</i> if there are issues that need to be resolved between people.” <b>FGP 1, 3, 9</b>	<b>Collective view:</b> Traditional leaders help tighten law in community. “They play the role of tightening the laws in the community and resolve dispute.” <b>FGP2, 3, 5</b>	<b>Collective view:</b> Traditional leaders help tighten law in the community and dispute resolution and they get involved in community development projects. “Yes we agree with them, they help resolve problems, development programmes for the area start with them.” <b>FGP14 &amp; 17</b>

Ubunki and Van Rooi, (2011:12) assert that the “customary justice system plays a much more important role in the lives of many of the world’s poor than state justice systems. Indigenous justice systems represent the lived reality of most people in developing countries, especially rural areas” This assertion has relevance for the community of Impendle, traditional leadership, is held in high regard as custodians of culture and a justice system of choice for local people. “They play the role of tightening the laws in the community and resolve dispute (**FGP2, 3, 5**)”. Olechi (2004:1) emphasises the relevance and importance of the role of customary law in rural communities, noting that African indigenous institutions of social control remain relevant in people’s affairs, particularly in the rural areas of Africa where the majority of people reside.



<b>Matrix 4.18 Value of Indigenous Governance Systems and Customary Law in Access to Justice in Rural Areas: Focus Group Responses</b>			
Convergence of Research Question and Objective	Focus Group 1	Focus Group 2	Focus Group 3
<b>Sub Question 5:</b> How does customary law in Impendle facilitate access to justice for rural civil society?  <b>Objective 2:</b> Discuss the relevance of customary law in accessing justice in the rural community of Impendle.  <b>Objective 3:</b> Explore the value of indigenous governance systems for access to justice in rural Impendle.	Accessibility of customary law and indigenous structures to members of community		
	<b>Collective view:</b> Accessing tribal court is easy.  You don't struggle because if there is something that just happened at that time you can go to <i>Isibonda</i> ." <b>FGP8&amp;12</b>	<b>Collective view:</b> Accessing tribal court is easy.  "It is very easy because you go to <i>Isibonda</i> , even if you go to councillor where you do not need to pay money." <b>FGP2,5,8, 10</b>	<b>Collective view:</b> Accessing tribal court is easy.  "You can go to <i>Isibonda</i> ; that way it is easy." <b>FGP13, 15, 19</b>
	Action of local justice structure of <i>Amakhosi</i> and <i>Izinduna</i> deal in handling dispute matters brought to them by women in community		
	<b>Collective view:</b> Women are well represented at tribal court; their issues are dealt with like all other issues.  "At traditional court there are women who are always there waiting for reports regarding women. They are waiting to solve issues that women have." <b>FGP 0, 8, 9, 10</b>	<b>Collective view:</b> Women are well represented at tribal court; their issues are dealt with like all other issues.  "At traditional court there are women who are there to look at the problems or cases that have been reported by woman." <b>FGP6, 8,12</b>	<b>Collective view:</b> Women are well represented at tribal court; their issues are dealt with like all other issues.  "At traditional court there are women who are there to look at the problems or cases that have been reported by woman." <b>FGP 16, 19, 21</b>

Taken as a whole, by grouping the data in accordance with converging research questions and research objectives, this process has generated a number of findings. For example: the CCJD acts as an avenue for recourse in cases dealt with by the tribal courts. This is an important finding because otherwise the tribal courts would do as they please in view of the fact that the *Inkosi* is the supreme decision-maker in his area. Secondly, CCJD paralegals offer a one-stop service for all local community needs. Thirdly, and contrary to scholarly criticism levelled against customary law and the traditional justice structure as being patriarchal and discriminating against women and children, women participants firmly support traditional leaders and the tribal court - a common sentiment expressed was that all matters brought to attention of the tribal court are attended to in much the same manner irrespective of gender and marital status. These findings are explored further in Chapter 5.

The next segment considers interview data responsive to research questions and sub-questions in a single matrix.

#### 4.4.3.2 Interview data responsive to research questions and sub-questions

The interview data responsive to research questions and sub-questions is organised in a single matrix, different from the matrices in the above section. Recall that in section 4.4.1 on the theoretical framework, philosophical worldview and emerging themes, Matrices 4.5 and 4.6 displayed relationships between the themes generated and the focus group data that helped give rise to the themes. In much the same way, Matrix 4.19 reveals, to a limited extent, some of the excerpts from interview transcripts from which the themes evolved. This interview data is presented in relation to the answering of the main research questions and sub-questions. Using interview responses from paralegals, the researcher set out to establish the alignment between themes generated from the data and the research questions that drove the study. Additional responses from focus group responses beyond the ones included in-text are annexed in a composite table as Appendix C-1 while additional interviewee responses are annexed in a composite table as Appendix C-2.

Matrix 4.19 assisted the researcher to connect the themes and research questions and to determine the extent to which the research question and sub-questions are being answered. The first row consists of the main research question and sub-questions were used as topical headings from each column. The columns then show the themes relative to the relative to the research questions followed by an example for public manager responses that led to the themes. Themes condense data into meaningful data that is user-friendly and easy to handle and manipulate. This matrix was designed to facilitate alignment of research questions and themes, as well as making presentation more manageable and meaningful.

<b>Matrix 4.19 Themes Generated by Multiple Research Questions or Sub-questions: Responses from Interview Data</b>					
<b>Main Research Question: Techniques of indigenous governance</b>	<b>Sub-Question 1: Indigenous governance connection with contemporary access to justice</b>	<b>Sub-Question 2: Alternative justice mechanisms used by CCJD</b>	<b>Sub-Question 3: Influence of community's indigenous beliefs on dispute resolution mechanism</b>	<b>Sub-Question 4: Relevance of customary law as justice structure in Impendle</b>	<b>Sub-Question 5: Customary law facilitating access to justice</b>
<p><b>Theme 4:</b> CCJD programmes – including workshops, community awareness campaigns and addressing women and children's specific issues – have gained considerable credibility in the community</p> <p>“CCJD sought permission from traditional leaders before they start operating in the area.” <b>PM4</b></p>	<p><b>Theme 2:</b> CCJD, as an NGO plays a pivotal role in providing access to social justice for Impendle residents independently and in concert with traditional and other justice structures</p> <p>“Synergistic partnership between CCJD and structures such as CPF and ward committees in the area.” <b>PM3</b></p>	<p><b>Theme 3:</b> Informants prefer restorative justice through CCJD practices rather than rights-based justice provided by police and courts</p> <p>“CCJD extends the reach of access to justice to areas where formal justice lacks capacity and human resources to reach.” <b>PM1</b></p>	<p><b>Theme 2:</b> CCJD, as an NGO plays a pivotal role in providing access to social justice for Impendle residents independently and in concert with traditional and other justice structures</p> <p>“In doing family mediation, as paralegals we need to understand the way of life of the household we are assisting and behave accordingly.” <b>PM3</b></p>	<p><b>Theme 1:</b> Customary law and traditional justice through <i>Izinduna &amp; Amahkosi</i> is highly relevant in rural Impendle while formal law and legal procedures seem to be alienating rural people</p> <p>“Some cases cannot be resolved by us at CCJD, they can only be resolved by <i>Izinduna</i>.” <b>PM1</b></p>	<p><b>Theme 1:</b> Customary law and traditional justice through <i>Izinduna &amp; Amahkosi</i> is highly relevant in rural Impendle while formal law and legal procedures seem to be alienating rural people</p> <p>“The existence of tribal councillors, <i>Izibonda</i> facilitates speedy attention and resolution of cases.” <b>PM1</b></p>
<p><b>Theme 2:</b> CCJD, as an NGO plays a pivotal role in providing access to social justice for Impendle residents independently and in concert with traditional and other justice structures</p>	<p><b>Theme 3:</b> Informants prefer restorative justice through CCJD practices rather than rights-based justice provided by police and courts</p> <p>“Family mediation ensures that</p>	<p><b>Theme 4:</b> CCJD programmes – including workshops, community awareness campaigns and addressing women and children's specific issues – have gained considerable credibility in</p>	<p><b>Theme 4:</b> CCJD programmes – including workshops, community awareness campaigns and addressing women and children's specific issues – have gained considerable credibility in the</p>		

<b>PM1, 2, 3, 4</b>	family structures are restored and maintained.” <b>PM2</b>	the community “Co-opt tribal court <i>Izinduna</i> as chairperson of CCJD area committee, this enhances CCJD’s credibility and informs systems and procedures used.” <b>PM3</b>	community “Paralegals are from the area and so as local people they are well-versed with local culture, norms and values” <b>PM2</b>		
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Thus far, Chapter 4 has analysed the data and presented findings in terms of the theoretical framework, philosophical worldview and themes, achievement of the research objectives and answering of the research questions. The discussion now turns to cross-case analysis of interview and focus group data followed by triangulation of the study before concluding chapter 4 and moving to chapter 5.

#### 4.4.4 Cross-case Analysis of Data from Focus Groups and Interviews as Sub-cases

This is the final section of data analysis, presentation and findings before turning to triangulation of the study. Cross-case analysis of focus groups as sub-cases embedded in CCJD at Impendle is presented in Matrices 4.20 to 4.22 while cross-case analysis of interviewees as sub-cases embedded in CCJD are displayed in Matrices 4.23 to 4.26. In the matrices, the first column provides the focus group question and the additional three columns reflect data from each focus group. This section on cross-case analysis is then followed by a triangulation of the study which brings this chapter to an end.

##### 4.4.4.1 Cross-case analysis of focus groups as sub-cases

In this section, Matrices 4.20 to 4.22 are organised by actual focus group questions posed and discussed during the focus groups. Advancing data analysis further, Matrices 4.20 to 4.22 show how the researcher compared and contrasted responses to the focus group questions across three focus group sessions; it is interesting to note that there is not much divergence in the responses across the three focus group participants. This reflects that participants’ experience CCJD in much the same way and also that local community views and perceptions in relation to access to justice and the indigenous governance of social justice in Impendle seems to be similar. The researcher explored this further as responses to questions are interrogated. From this matrix, the

researcher was able to reflect on important issues relating to the study as a whole. In terms of question 3 on the role of traditional leaders, the matrix established that participants' understanding and value of the role of traditional leaders is similar. Participants further provided details on the specific cases that are dealt with by the tribal court, such as land allocation, *ukuhlawula*, paying damages for impregnating a girl and getting endorsement for development projects earmarked for the community. These are the views expressed by **FGP 0, 7, 8** "*Izinduna* help in cases where you are looking for a land to build your house. They also get involved in disputes relating to live stock that people keep." In this regard, Reddy and Biyela, (2003: 277) assert that, "*Amakhosi* are custodians of the major part of land in rural areas, in the province, (KZN) it is imperative that the *Inkosi* should be involved in every development project for the area from inception to completion"

<b>Matrix 4.20 Cross-case analysis of focus group data: Focus Group Question 1- 3</b>			
<b>Focus Group Question</b>	<b>Focus Group 1</b>	<b>Focus Group 2</b>	<b>Focus Group 3</b>
<b>Question 1:</b> Role of Advice office, CCJD at Impendle and how you came to know about their programmes	"They attend to all social problem in the area even work related problems and they are able to solve them." <b>FGP3, 8</b>	"They arrange community workshops and training and they also call on <i>Induna</i> to be part of these meetings and workshops." <b>FGP2,3, 7, 9</b>	"CCJD teach people on how to deal with should they have a need to do so. They make sure to invite <i>Izinduna</i> to be part of workshop." <b>FGP13, 15, 18</b>
<b>Question 2:</b> What have you learned from the Advice Office, CCJD about your rights and how to find the help you need with the problems you have?	"Knowledge on how to deal with government department, they do follow up for us if it takes long to get resolved. They teach us about our rights and how to enforce them." <b>FGP6 &amp; 2</b>	"We have gained knowledge about our rights and responsibilities, how to access services from which government department." <b>FGP11 &amp; 12</b> "They also teach men about women's rights issues." <b>FGP2, 4, 8</b>	"Knowledge on how to handle different situations, such as reporting cases to police. How to access services from different government department and which department to work with on different matters. They also assist with workers' rights issues, unfair dismissals, claims for deceased's benefits and pension pay outs." <b>FGP18, 21, 22</b>
<b>Question 3:</b> What role do the traditional courts of <i>Izinduna</i> and <i>Amakhosi</i> play in this community?	" <i>Izinduna</i> help in cases where you are looking for a land to build your house. They also get involved in dispute relating to live stock that people keep." <b>FGP0, 7, 9</b>	"They tighten the law in this community." <b>FGP1,7, 9,</b>	"They tighten the laws in this community, and play a role in peace keeping and laws and assist to resolve disputes." <b>FGP 14, 16 ,22</b>

As Matrix 4.21 below shows, the responses to questions 4 and 5 reflect that participants have a firm understanding and knowledge of the procedure followed in the traditional justice system. This confirms the position expressed by Chopper and Isser, (2013:286), which asserts that “the positive feature of informal justice system lies in its accessibility, familiarity and effectiveness in delivering justice to the marginalised”. In addition to this, Wojkowska (2006) and other scholars assert that informal justice systems are the systems of choice for traditional rural people; this is clearly the case for the Impendle community. Traditional justice systems are culturally relevant, easily accessible and understandable. Oyeike (2012) contends that the law must be sufficiently flexible to reflect the voices of the unfamiliar other. Question 6 relates to access to the tribal court for women; contrary to scholars, Mamdani, (1996) cited in Sithole, (2008), Ntsebenza, (2003) and others, who claim that the traditional justice system is patriarchal and therefore disempowers women, women participants’ in this study experience the traditional justice system in much the same way as their male counterparts. They did not express any feelings or suggestions of disempowerment and marginalisation by the local traditional leadership. This is in keeping with Reddy and Biyela’s, (2003) claim that institution of traditional leadership retains popular legitimacy with rural people.

<b>Matrix 4.21 Cross-case analysis of focus group data – Questions 4 – 6</b>			
<b>Focus Group Question</b>	<b>Focus Group 1</b>	<b>Focus Group 2</b>	<b>Focus Group 3</b>
<b>Question 4:</b> What is the procedure that is followed for bringing a matter to the traditional courts of <i>Izinduna</i> and <i>Amakhosi</i> ?	“Procedure starts with <i>Izibonda</i> in different areas or tribal court councillor, then goes to <i>Izinduna</i> , it is escalated accordingly only if the matter could not be resolved in anyone of these levels.” <b>FGP3, 5, 6, 8</b>	“Procedure start with <i>Izibonda</i> in different areas or tribal court councillor, then goes to <i>Izinduna</i> , it is escalated accordingly only if the matter could not be resolved at any of these levels.” <b>FGP4, 5, 10</b>	<b>“SAME AS IN FOCUS GROUP 1 &amp; 2 FGP14, 16,18</b> “Matters are also reported and handled by CPF and ward committees. There are many structures in this community; they work together with traditional leaders <b>FGP13, 15, 17</b>
<b>Question 5:</b> How accessible is this structure to members of the community?	“You don’t struggle at all, if there is something that you want to report you just go to <i>Isibonda</i> in your area and he attends to you straight Wojkowska.” <b>FGP8, 9, 10, 12</b>	“It is very easy because you follow procedure as we have said and your issue gets attended easily.” <b>FGP3, 5, 8</b>	“It is very easy because you follow procedure as we have said and your issue gets attended easily. No money is paid in any of the lower levels, you only pay money when matter reaches tribal court stage.” <b>FGP18, 19, 22</b>
<b>Question 6:</b> How does this <i>Amakhosi</i> and <i>Izinduna</i> deal with dispute matters brought to them	“There are women that are always there waiting for cases from women and girls, such as with virginity testing.”	RESPONSE SAME AS IN FOCUS GROUP <b>FGP6 &amp; 12</b>	RESPONSE SAME AS IN FOCUS GROUP 1 <b>FGP16, 18, 20</b>

by women in the community?	<b>FGP9, 11, 12</b>		
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Matrix 4.22 below reflects that question 7 examined the CCJD's relations with traditional leadership in Impendle; participants view this relationship as characterised by mutual respect and cooperation. Reddy and Biyela, (2003:264) further maintain that a complementary relationship has to exist between traditional leadership and local government thereby maximising development of rural areas. In as much as the statement above speaks to traditional leadership/local government relations, it also has relevance for CCJD/ traditional leader relations in this instance as NGOs must likewise have a complementary relationship with traditional authorities. Question 8 looks at how the CCJD encourages respect for traditional leaders while empowering the community in terms of their rights; the three focus groups shared the sentiment that the CCJD respects local traditional leadership and encourages their clients to involve them in issues affecting them; they don't see themselves as a replacement for traditional leadership in the community. This is important, since this study investigated the role of the CCJD in indigenous governance of social justice in Impendle. Question 9 relates to the CCJD's impact in the community; the common response was that the organisation has had a positive impact on the lives of community members. Participants also gave common responses to questions 10 and 11, although expressed differently. This reflects the individuality of each participant, while at the same time adding to the richness of data gathered an attribute consistent with qualitative research. The value of this matrix for the study is that it reflects the views of the community; this has significance not only for the advocacy/participatory worldview underpinning the study as it reflects the involvement of participants as active agents in matters affecting their lives. But also for the theory of social justice, as Rawls, (2003) cited in Robinson, (2008: 81) maintains, equality as one of the basic liberties principles advanced by the theory posits freedom of speech, thought and association as basic liberties to which all human beings are entitled.

<b>Matrix 4.22 Cross-Case Analysis of Focus Group Data: Question 7, 9 and 11</b>			
<b>Focus Group Question</b>	<b>Focus Group 1</b>	<b>Focus Group 2</b>	<b>Focus Group 3</b>
<b>Question 7:</b> How is the relationship between the Advice Office, CCJD and traditional court of <i>Izinduna</i> and <i>Amakhosi</i> ?	“CCJD and tribal court are really working together a lot.” <b>FGP3 &amp; 12</b>	“CCJD and Izinduna work together and assist each other to resolve dispute in community. They also work with CPF & ward committees” <b>FGP3, 7, 9</b>	“CCJD, <i>Izibonda</i> , CPF and ward committees they work together and try and resolve issues” <b>FGP13, 17, 20, 23</b>
<b>Question 9:</b> What has been the impact of the Advice Office, CCJD in the community, especially relating to domestic violence, child support and maintenance within a family unit?	“CCJD have helped us a lot, they have made us women know that we have rights and those rights must be respected. Before that it was men that were in control of everything.” <b>FGP8, 9, 12</b>	“CCJD has done a lot, now we are able to report if we are not satisfied with tribal court judgement and decision; CCJD assist us and talk with them for us.” <b>FGP6</b> “In cases of maintenance, CCJD is able to make follow up on men that do not pay for their children and ensure they support them. They also assist grannies with girls that leave children at home and do not check on them.” <b>FGP3, 5, 7, 10</b>	“CCJD assist a lot, you find some cases resolved by <i>Izinduna</i> and you are not happy, CCJD is able to do flow up even on the <i>Induna</i> , they derive a way for your case to be escalated to the next level or magistrate court if you like.” <b>FGP16 &amp; 19</b> “In family matters they arrange to talk with families or with two people who have a problem.” <b>FGP16, 17, 19</b>
<b>Question 11:</b> How has the Advice Office assisted you in standing up for your rights while making sure family structures and values are not damaged?	“They teach us about our rights but they also teach us to respect and consider families, where our rights begin and where they end.” <b>FGP1, 3, 5, 9</b>	“They let people voice their opinion, even women are allowed to talk and have an input on the matter. Then they explain what the law says and help both parties reach agreement and decision.” <b>FGP7, 9, 12</b>	“They sit with family and resolve issues and it gets resolved; it will not go to the police.” <b>FGP17</b> “They explain the position of the law and how it applies to the issue and how it should be respected.” <b>FGP22 &amp; 23</b>

As mentioned in a narrative section previously, Matrix 4.20 and Matrix 4.21, explored participant's views of accessibility and procedures of traditional justice system. Among the views expressed, by participants on the procedure followed in accessing traditional justice, **FGP 4, 5, 10** indicated: “Procedures start with *Izibonda* in different areas or tribal court councillor then goes to *Izinduna*, it is escalated to the tribal court only if the matter could not be resolved at any of these levels.” This view of participants is consistent with Reddy & Biyela (2003: 275) who maintain that “traditional leaders broadly exercise governance functions ranging from the provision of services, to the preservation of law and order, allocation of tribal land generally



held in trust, subject to their relationship with national government, they tend to have some form of local governance in place to address the needs of rural community”.

In Matrix 4.22 above participants reveal among other things the relationship with elected, local government structures in the area, that being ward committees and national government structures, CPF in matters pertaining to dispute resolution and prevention crime in the area. “CCJD, *Izibonda*, CPF and ward committees they work together and try and resolve issues” (FGP13, **17, 20, 23**). This synergistic relationship is ideal as it promote cooperation which is the interest of local community. As Reddy and Biyela, (2003:264) point out, “it is imperative that a complementary relationship should exist between traditional leaders and local leadership”.

The study now turns to cross-case analysis of interviewee data which are displayed in Matrices 4.23 to 4.26

#### 4.4.4.2 Cross-case analysis of interviewees as sub-cases embedded in CCJD

As with the section on cross-case analysis of focus group data, matrices that reflect cross-case analysis across interviewees were shaped in accordance with groups of interview questions.

Matrix 4.23 to Matrix 4.26 present a cross-case analysis of interviewee responses against each of the four interviewees as individual units of analysis embedded in the organisational case of the CCJD Advice Office in Impendle. This cross-case comparison of sub-cases assisted the researcher to identify patterns in areas of convergence and of divergence. Through the cross-case analysis the researcher was able to obtain a deeper understanding of the phenomenon under study while at the same time addressing an important feature of a qualitative study; reduction of the volume of data gathered on site into meaningful and manageable data. Using interview data, the researcher set out to determine how data responds to research objectives and research questions. Matrices are useful if the researcher seeks to quantify data and allocate percentages to each interview question response. In some cases, as in responding to question 1, all four public managers responded differently, electing to focus on the role of the CCJD that each considers most important; this does not indicate divergence as all four responses speak to the role played by the CCJD in Impendle. Rather, it reflects different priority areas for different paralegals or public managers. This is in keeping with a qualitative study that calls for an understanding of a research phenomenon from the point of view of those interviewed and also allows participants space to give meaning from his/her own point of view. In the same vein, there are areas of extensive agreement, particularly among the first three public managers who are based on site, to questions 4 and 7. The responses to these questions are of significance for the study since they

address aspects that form the essence of the study. Question 4 speaks to strengthening civil society engagement, while question 7 assesses the relevance of indigenous justice structures to date for the community of Impendle.

<b>Matrix 4.23 Cross-case analysis from interview data: Interview Questions 1-3</b>				
<b>Interview Questions: 1-3</b>	<b>Public Manager 1</b>	<b>Public Manager 2</b>	<b>Public Manager 3</b>	<b>Public Manager 4</b>
What role does the CCJD Advice Office play in this community of Impendle and how do you reach out to the community about your programmes?	<p>“To give legal advice to our clients.”</p> <p>“Outside of legal advice we get into the shoe of that person. Make reference ourselves with that institution.”</p>	<p>“We conduct awareness programmes like we do workshop, presentations, school visits &amp; home visits. Our role is to bring solutions &amp; answers to problems that are family based. Limiting people arresting each other. The cases we deal with have to do with both parties from the same family.”</p>	<p>“CCJD’s role it very important because mostly for people it gets difficult to go to police stations and reports their problems. It gets easier when they come here at CCJD.</p> <p>“We assist in those cases that they are not able to solve. Like those cases where you find that there at the tribal court they make people pay money if they report cases.”</p>	<p>“Our role is to provide support to all 15 advice offices. We wanted to make sure that people in rural areas, people who cannot access justice, people who want their rights to be heard, want recourse could get help.”</p>
Do you think that traditional authorities help in dealing with people’s problems in a fair way?	<p>“Sometimes it is a yes, sometimes it is a no.”</p>	<p>“I think they are fair, but then it also happens that they are not fair”</p>	<p>“I don’t think they help them in a fair way, because there is no neutrality.”</p>	No response
Why does the, (CCJD) use avenues other than the formal legal system, but instead use mediation, negotiation, work with traditional authorities to help people find solutions to their problems, in rural communities?	<p>“It is a good thing to sit down and talk to each person to give his opinion than take case to police and then there will be arrest.”</p> <p>“Mediation there is no fighting.”</p>	<p>“People believe in mediation, because if they have problems or before they come to us they have already called a member of family</p> <p>“ Proceedings are a private affair”</p>	<p>“All cases reported at police station make it to court or get resolved”.</p> <p>“We usually prefer that if people have had disputes at home, it is better to talk to them”</p>	<p>“Normally women approach police stations to report cases of domestic violence and not to open cases.”</p> <p>“Mediation is useful</p>

In Matrix 4.24 below, CCJD public managers, discuss their role in capacitating of local community on legal matters as one of the objectives of CCJD is to act as a bridge between client and their rights. These public managers conduct workshops ranging from legislation, understanding of law, legal empowerment and procedures of the various government

departments, SAPS, SASSA and any other they deem relevant. They also run workshop for their clients on tribal court procedures and functions. In addition to this, public managers conduct workshops for traditional leadership within their areas. As one public manager explains, “Paralegals conduct training & workshops for traditional leaders on Constitution and the five Acts, such as Child Justice, Domestic Violence, Maintenance, Customary Marriages and Sexual Offences Act. This empowers traditional leaders” **PM3**. Harper, (2011:11) maintains that paralegals are positioned between indigenous and formal justice system and use the advantage of both strategically. They offer quasi-legal services, such as mediation community legal education and advocacy, community leaders and advice traditional authorities on statutory law, training where necessary and act as a check and balance system.

<b>Matrix 4.24 Cross-case analysis from interview data: Interview Questions 4-6</b>				
<b>Interview Questions:</b>	<b>Public Manager 1</b>	<b>Public Manager 2</b>	<b>Public Manager 3</b>	<b>Public Manager 4</b>
How does the Advice Office facilitate and strengthen civil society engagement in social justice programmes as a foundation for promoting access to justice?	“We create a relationship with other stakeholders that everywhere we go we need to go together. “There are times where you can see that if a person is not sent to a nurse, ward councillor problem will not be solved.”	“What we do, the thing is, you can’t work alone, on our side we have cases that we are not able to start and conclude on our own. “There are stakeholder meetings, where we meet so that we will be able to get assistance from other members. We talk about referrals, so you can work with other structures.”	“We are meeting, like we usually have stakeholders’ meetings, where people meet and explain how they work. “Sometimes CCJD would have a series of talks on a lot of things that are usually a problem in the community, like Maintenance Act.”	
How does the Advice Office establish and inspire confidence in traditional authorities and methods as legitimate mechanisms of accessing justice in communities?	“We advise that everything we have now, before it was introduced there was <i>Amakhosi</i> and now they still exist, therefore we can’t bypass them.”	“There are cases that can’t be resolved without them just like when a girl has fallen pregnant & there must be payment of a goat & all that. They are the ones that know that much better than us. We cannot finalise it here.”	“If a person comes to us with a matter that has been reported to tribal court we give tribal court a chance to deal with it first. “ <i>Induna</i> is usually chairperson of CCJD council in the area. This helps if matter reaches tribal court because they are close to me.”	“Paralegals conduct training & workshops for traditional leaders on Constitution and the five Acts, such as Child Justice, Domestic Violence, Maintenance, Customary Marriages and Sexual Offences Act. This empowers

				traditional leaders.”
How would you describe the relationship between traditional leadership in the community and the CCJD?	“It is very good, even though we have hiccups here and there. I say it is good that they get some cases and they refer to us and we also get cases that we refer to them. So we are connected in that way.”	“I won’t say it is good or bad because we are faced with work. Sometimes they do something that hurt our client; we have to work with them or explain to them that they done a mistake. It is not good everyday but we are able to work together even though it gets like that. It is not always good.”	“I think it is very much connected, remember I said people who are in CCJD committee are part of the tribal court structure.”	“Paralegals know and understand that they have to work with traditional leaders in their area.”

The section below shows the last two matrices in cross-case analysis of interview questions; Matrix 4.25 and Matrix 4.26 The researcher has tried to identify areas of divergence and convergence from interview data responses. What emerged from this section is that CCJD public managers appreciate the importance and role played by local culture in this community. They are able to maintain a good balance as advocates of human rights while upholding norms and values of community. Harper, (2011:11) maintains that, the paralegal approach is particularly relevant in a rural community context since paralegals are community based, they are familiar with community structures and dynamics, they may be more accessible and approachable. As one public manager, explained, “If we have to go to families for mediation we first observe the kind of household. Is the man of the house a traditional man? If yes, paralegal must respect that, must cover head for an example so that she earns respect and acceptance of the man.” (PM3)

<b>Matrix 4.25 Cross-case analysis from interview data: Interview Questions 7-9</b>			
<b>Interview Questions</b>	<b>Public Manager 1</b>	<b>Public Manager 2</b>	<b>Public Manager 3</b>
Are indigenous justice structures such as traditional courts still relevant to date for the community of Impendle? Explain.	“Yes they have it big time, you can’t just in an <i>Nkosi</i> ’s land, be seen meeting there without telling <i>Inkosi</i> .”	“In my opinion I would say it is still relevant, seriously.”	“Yes, it is still relevant, but even though people are scared that if they speak for themselves it will be like they disrespect <i>Ndabezitha</i> .”
In trying to ensure that there is justice for women at all levels of society, how do the Advice Office and you as paralegal ensure that your work takes culture and tradition into account and fits in with the local Zulu culture?	“We advise them that even though there is Constitution, culture and tradition should not be broken but it should be conducted such that it goes with Constitution.”	“That is not difficult because we live in this community; we are part of the community. When we attend to their matters we know what is sensitive. We know where it differs maybe with believing or tradition. We were not taken from other communities	“In our workshops we always tell women that they have rights but that they do not have rights more than man”
How does the CCJD strike a balance between finding solutions that respect local culture, norms and traditional ways of resolving conflict in the home, while at the same time ensuring that there is justice, especially for women and children?	“It doesn’t get separated with culture and tradition. Even if you teach them about their rights in the Constitution.”	“Rights were not there to give people rights to be rude to others  “We highlight the importance of respect. But abuse is protected by the law.”	“We start by individual sessions, Thereafter family/couple mediation start”

Matrix 4.26 Cross-case analysis from interview data: Interview Question: 10			
Interview Questions	Public Manager 1	Public Manager 2	Public Manager 3
What measures does the Advice Office; CCJD put in place to empower and conscientise the marginalised on their right to access justice?	<p>“We do workshops and conduct awareness programmes; we also tell them that if it happens that they are not satisfied (tribal court) we are here for them. We tell them of their right to use courts of magistrate.”</p>	<p>“I do that because I committed myself, like now what is happening lately, I take people to Johannesburg and urban areas to make arrangements for payments of benefits for deceased family members.</p> <p>One instance there was this white lady in Johannesburg who kept changing stories and was not paying benefits. I told her after phoning for a long time that I will bring my client over to Johannesburg. When we got there she could not believe it. I took out my CCJD card with justice emblem and everything was sorted.”</p>	<p>“We are here to bring law to people but simplify, bring it to them, explain to them in a way that they will understand. We use language that they use so they will understand.</p> <p>“We put the law on the table and it becomes clear where he was wrong &amp; where he was right because he is also guided by the law even if he went to <i>Inkosi</i>, court or police, the law is the same.</p> <p>“Women must respect men and that men as well can play a role as a man but must respect other people.</p> <p>“He ends up seeing that what he did was wrong, though I’m a man and have power I was not suppose to hurt anyone.”</p>

Cross-case comparison of the interviewees with one another and the focus group sessions against each other provides a broader review of informants’ perceptions. This comparative process within each stakeholder segment also lays the foundation for triangulation of the study – which follows – where data from interviews and data from focus groups, along with the secondary data from the literature are compared and contrasted.

#### 4.5 Triangulation of the Study

Triangulation as an aspect of confirmability enhances the establishment of trustworthiness in qualitative research. Flick (2007) cited in Auriacombe (2010:440) states that triangulation occurs when one or more methodological approaches is brought to bear on a single point with the aim of enhancing the scientific rigour of the study. In a qualitative study, triangulation can occur where more than one case, investigator, paradigm, theory and method of data gathering and analysis are used in a single study. Data matrix analysis has allowed for triangulation as the data

analysis progressed from one section of this chapter to another. In most situations, data from interviews and focus groups converged. However, when compared with the secondary data from the literature, the findings in the literature differed from those of this study at times. At other times, the study's findings contributed to the literature. Scholars such as Mamdani, (1996) cited in Sithole (2008) suggest that the traditional leadership system is an oppressive and patriarchal governance system that is not compatible with the values of democracy. Contrary to scholarly criticism levelled against customary law and the traditional justice structure as being patriarchal and discriminating against women and children, the women study participants firmly support traditional leaders and the tribal court; a common sentiment was that all matters brought to attention of the tribal court are attended to in much the same manner, irrespective of gender and marital status. The fact that women have been included and integrated as part of the tribal council that sits and presides over cases ensures that women are fairly treated as these women would attend to women-specific issues. In other words, the indigenous justice system provides all people at Impendle with the ability to seek and obtain access to justice. Mumdani, (1996) cited in Sithole (2008) states that rural citizens under traditional authorities are not true citizens; they are subjects of an undemocratic authority that is not accountable to the people. However, the data from the study suggest that rural people at Impendle value and respect the institution of traditional leaders.

#### **4.6 Chapter Conclusion**

This chapter presented a brief background on Impendle as the site of the study, using demographics to illustrate the socio-economic conditions that shape the real life experiences of traditional rural communities in KZN. The researcher presented an analysis of data gathered using focus groups and interview sessions; these were aligned with the research objectives and research questions to establish the extent to which the data respond to these two elements of the study and also determine which interview questions and focus group questions respond to which objectives and research questions. The researcher also used the data gathered to establish an alignment between the worldview underpinning the study and the theoretical framework of the study. This was illustrated using tables and matrices. In addition, this chapter engaged in data analysis using the method of data analysis identified in chapter three. Using thematic analysis, content analysis and matrices the researcher analysed the data through matrices and tables to establish how the data respond to research objectives and research questions, respectively. The data were also used to establish how data responded to the theoretical framework of the study. Each table or matrix used was preceded by a narrative that explained what the table or matrix set out to do, achieve and establish. The theories in the literature review were integrated into this

discussion. Finally, the chapter addressed data reduction as this is an important element of a qualitative study.



## **CHAPTER 5**

### **SUMMARY OF FINDINGS AND CONCLUSIONS, POLICY IMPLICATIONS AND RECOMMENDATIONS**

#### **5.1 Introduction**

This chapter presents a concise summary of the discussion based on the preceding four chapters. It outlines the arguments and findings of the study and proposes a set of recommendations, as well as proposals for further research, including exploring the study further or exploring from a different angle and perspective. The chapter also highlights policy implications, such as the formulation of new policies to respond to the gaps and divergences identified in the existing body of literature.

#### **5.2 Findings and Conclusions Drawn from the Study**

This section of the study identifies findings and matches these with corresponding study conclusions, further to this both findings and conclusions are matched with objectives of the study this demonstrate how the study achieved its objectives.

##### **Finding:**

This research study established that indigenous justice systems remain vibrant and relevant justice system of choice for people residing in traditional rural areas, such as the Impendle community under study. In terms of the mechanisms available to make justice accessible to people, indigenous, traditional justice systems cannot be ignored as they are one of the main mechanisms through which people in rural areas rely on to access justice. Indigenous justice systems are seen as part of the cultural fabric and a central value point of the community of Impendle. Furthermore, these systems are seen as culturally relevant; people are more comfortable engaging with the indigenous justice system than with the formal justice system that many do not understand and that involve time-consuming processes.

##### **Conclusion:**

Based on this finding it can be concluded that the tribal courts of *Amakhosi* and *Izinduna* are the justice system of choice for the community. It emerged from the focus group discussions that, people regard the *Amakhosi* and *Izinduna* justice structures as easily accessible to all members of community with clear procedures for attending to community issues. Traditional leaders are regarded as the custodians of justice by the community; they are the cornerstone of dispute resolution and provide quick, cheap and culturally relevant remedies.

Findings and conclusion drawn thus far assist the study in achieving research objectives two and three respectively, where research objective two intends to determine the relevance of customary law in accessing justice in the rural area of Impendle while research objective three aims to explore the value of indigenous governance systems for access to justice in Impendle.

### **Finding:**

Contrary to scholarly criticism levelled against customary law and the traditional justice structure as being patriarchal and discriminating against women and children, the finding of this research study was that women study participants firmly support traditional leaders and the tribal court. They did not feel discriminated by traditional leaders and the tribal court. A common sentiment was that all matters brought to attention of tribal court are attended to in much the same manner, irrespective of gender and marital status. The fact that women have been included and integrated as part of the tribal council that sits and presides over cases brought to the tribal court ensures that women are fairly treated, as these women would attend to women-specific issues.

### **Conclusion**

Based on this finding, it is therefore concluded that the indigenous justice system provides the community of Impendle with an avenue to seek and obtain access to justice. It provides an enabling space for all members of community to participate in justice system, it is experienced as an open, inclusive and empowering system as it does not discriminate against women as the marginalised group in society. Thus, findings and conclusion presented contributes towards the achievement of research objective three as it seeks to explore the value of indigenous governance systems for access to justice in rural Impendle.

### **Finding:**

Parallel to the local indigenous justice structure, the community of Impendle also utilise ward committees and the Community Policing Forum (CPF) that are part of democratic government structures and systems to prevent crime and for neighbourhood peace keeping. This is an interesting finding as it reflects that indigenous communities are dynamic and not static; they move with the times and embrace and integrate transformation in social structures. These synergistic partnerships are important as tribal areas form part of the municipal boundaries under a local municipal ward councillor, while CPF structures are part of national government structures entrusted with the responsibility to maintain peace and stability at local level.

**Conclusion:**

Based on this finding this study concludes that synergistic relationship exist between different justice structures in community of Impendle this is reflected in a statement made by one participant in a focus group, “issues do not always reach tribal court in this area as they are usually dealt with and resolved by CCJD, CPF and ward committees.” This has important policy development implications, objective four of this study aims at development of policy recommendations for the governance of social justice systems as one of the mechanism citizens in rural areas can use to access justice. This reflects a need to formalise and regulate these synergistic partnerships in order to enhance and nurture their sustainability.

**Finding:**

The study disclosed Impendle community prefers restorative justice approaches such as those advocated by the CCJD and the indigenous justice structure as opposed to the rights-based approach advocated by the formal justice system. The mediation approach used by CCJD paralegals to resolve disputes is favourably considered by both parties to disputes, especially in family disputes. Paralegals use family mediation to try and resolve disputes among family members; the assumption underlying this approach is that families should not be broken, but restored and rehabilitated. As noted in almost all the interview sessions with paralegals, the intention of the victim in cases of domestic violence, maintenance etc. is not to get the offender, usually a partner, arrested, but is a cry for help to reach out to someone who is able to broker peace by talking to the partner and make him understand the outcome of his actions in the hope that the offender will mend his ways and peace will be restored between the two parties.

**Conclusion:**

It can be concluded that in this way, the CCJD is able to offer assistance and support in a way that the formal justice system is unable and incapable of adopting. This is a gap in government departments and agencies as their training; skills and on-the-job learning do not empower them to respond to this challenge. As one of the paralegals explained, the “police are not keen to attend to domestic violence cases between couples because often times the complainant does not want the partner arrested and would withdraw cases if it has been opened. Police lack capacity to be able to deal with such cases. It is better since there is CCJD in police station because they simply refer most cases of domestic violence to us to deal with.” This responds to research objective one, which set out to investigate the use of indigenous governance techniques by the

CCJD for the community of Impendle and the main research question as it seeks to establish how the CCJD develops and use techniques of indigenous governance to facilitate access to justice for rural communities.

**Finding:**

The study disclosed that paralegals are placed in the delicate position of having to operate within the dictates of the legislation, in particular the Constitution which promotes equality and human rights while at the same time respecting the traditions and culture of the local people which would seem to contravene the spirit and ethos of human rights and equality. It transpired from the interview sessions that the CCJD has a favourable relationship with traditional leadership in the community; this enhances its credibility and acceptance in the area and helps the paralegals to manoeuvre in complicated situations. Paralegals have also established and cultivated good relations with other justice structures in the community, including traditional leaders and their tribal court councils; as trusted community members, they are often consulted. As one paralegal explained, “*Induna* is the chairperson of CCJD outreach office in this area; this encourages relationship building between the two structures.” Because paralegals are local people, they know and understand the cultural dynamics and norms and values of the local people. As another paralegal explained “because we are local people we know how to handle cases in a manner that is consistent with the way of life in this area.” Another paralegal explained that when they do family mediation, they have to understand the way of life of that particular household; if it is a traditional household they would have to dress appropriately, in a manner that would not discredit them even before the session starts, and address the man of the house the way he is addressed by his children and wife. In this way they are able to maintain a balance between the Constitution, Bill of Rights and the traditional way of life that are sometimes at loggerheads with one another.

**Conclusion:**

Based upon the evidence produced by the study it can be concluded that CCJD must balance formal legal structures with the traditional, customary law structures. Another conclusion that can be deduced from the study is that is the restorative justice approach must somehow parallel rights based approach in advancing indigenous justice systems.

**Finding:**

The findings of the study revealed that while it is important that the CCJD enjoys favourable relations with traditional leadership and tribal courts, it is also important that the office acts as an advocate for people who are dissatisfied with tribal court proceedings. Clients often report such

cases to the CCJD for intervention and assistance; paralegals approach the tribal council and try and explain the proper procedures that should have been followed. In this way, the CCJD acts as an avenue for recourse for cases dealt with by the tribal court. This is an important finding because otherwise the tribal court would do as it pleases in view of the fact that *Inkosi* is the supreme decision-maker in his area.

### **Conclusion:**

It can therefore be concluded that CCJD serve as a vehicle to ensure the checks and balance between watch dog for traditional leaders and contemporary concept of social justice. This responds to research objective one, which set out to investigate the use of indigenous governance techniques by the CCJD, as well as the main research question which sought to determine how the CCJD develops and use indigenous governance techniques to facilitate access to justice. It also responds to sub-question three, which set out to establish which alternative justice mechanisms are used by the CCJD in dispute resolution and how the indigenous beliefs of the community influence these mechanisms.

### **General Overarching Conclusions**

Findings and conclusions identified have implications for this study in particular and the field of access to justice in general. While the study has highlighted the important role played by CCJD in the indigenous governance of social justice in Impendle, KZN, it has also highlighted the important role played by the NGO sector within the field of access to justice. Taken as a whole, the study has led to a number of general findings and conclusions from a broader perspective. The study has reiterated the fact that South Africa is a constitutional democracy and the Constitution (RSA, 1996) has as its underlying ideal the concepts of equality for all, it guarantees protection of human rights and access to justice as contained in the Bill of Rights. However, the findings of the study has revealed that nearly two decades into democracy the process of equality, access to justice as espoused in the Bill of Rights is not simple. South Africa has remained persistently unequal; the margin between the rich and the poor refuses to decrease, with the majority of the poor being concentrated in the rural areas.

Findings of the study disclose that the living conditions continue to be characterised by structural disadvantage and immense poverty. In comparison with their urban counterpart, findings of the study indicates that to this date rural communities face several obstacles in accessing resources, basic services and opportunities. They continue to be marginalised by the laws that are seemingly indifferent of their plight. Democracy has been a disappointment for

rural people as it has not translated into any significant change in their material conditions. The study has called for a relook and the laws that continue to exclude rural communities from enjoying full benefit of democratic rights such as equality, access to basic services as well as access to justice. The study calls for an exploration of alternative strategies and techniques such as indigenous justice system to be used as alternative avenues to access justice other than the formal justice approach which restricts access of rural people in many ways. Indigenous justice systems are the local forums like tribal court of and other structures that traditional rural community like Impendle use to access justice. The study has disclosed these indigenous justice structures are justice systems of choice for rural communities. They create opportunities for self expression because people use indigenous framework that makes sense to them as individuals and a collection. Indigenous justice institutions use indigenous systems of governance that are rooted in local conditions, and are recognised and accepted by traditional rural communities.

Further to these findings and conclusions the study has also revealed the role of NGO's as catalysts and advocates for social justice, CCJD has presented a leaving example of the invaluable role that NGO's can play in extending the reach of government services to areas where government has no reach and footprint, these are especially marginalised rural communities like, Impendle. However, in spite of the significant role played by NGO's the study has discovered that they have to contend with the reality of an unstable finding environment, stringent compliance protocols from government and donor funders which sometimes forces them to down scale the bouquet of services they or face closure. The use of advocacy/participatory world view and case study strategy is appropriate as it enables the researcher to focus on the needs of the marginalised community from their own perspective.

### **5.3 Recommendations**

In view of findings and conclusions presented in section 5.2 above, the following presents a set of recommendations based on this section.

- Firstly, to overcome the barriers to access to justice, strategies that take the local context into account must be designed and encouraged; this process should be driven at national level.
- Secondly, the government should formulate policies that formalise and regulate the synergistic partnerships identified by the study between NGOs in the justice sector such as the CCJD, CPF structures and ward committees to ensure the sustainability of these forums.

- Thirdly, community-based forums should be established to liaise directly with the formal justice sector such as the courts and the police.
- Fourthly, the government should acknowledge the role played by NGOs in the justice sector and formalise relations with community-based paralegals. They can be used to reduce court case backlogs and to remove petty crimes from the formal justice system, thereby allowing the court to increase the turnaround time of trying serious and violent crimes.
- Fifth, retired judges should be appointed in an advisory capacity to oversee and assist community-based justice structures and to remove crimes that require mediation from the formal justice system. This will enhance access to justice for the community while strengthening the capacity of community-based justice structures.
- Sixth, government should prioritise building the capacity of traditional leadership as custodians of justice in their respective areas or *izigodi* as this will extend the reach of access to justice for communities and improve the functioning of the tribal courts. The relationship between democratic government and traditional leadership as an institution should be strengthened as this would clarify the role of traditional leadership and the matters they can preside over; these leaders feel that their position has been made redundant by the democratic government.
- Finally, Government should rethink the funding protocols for NGOs as they are either too stringent or unrealistic. NGO funding has been affected by a number of factors; firstly the attainment of democracy meant that some international funders felt that they had achieved their objective of democratising South Africa and their focus shifted to other countries; secondly, the recent recession that affected European countries had a crippling effect on the NGO sector in South Africa which saw some NGOs either close or downsize. These factors have consequences for access to justice for the poor and marginalised people of South Africa. In formulating funding protocols, donor agencies should be sensitive to the local context. The model used by the CCJD can be adopted and replicated by government as a best practice model to be piloted in other areas.

## 5.4 Chapter Summary

In summary, this chapter found that equality is an important attribute of social justice in a democratic society that is measured by the service provided to the poorest and most marginalised members of society. Social justice and human rights are mutually inclusive and intertwined ideals for the empowerment of the poor and marginalised. The study set out to establish the role

of indigenous justice mechanisms in providing access to justice for the rural community of Impendle. This was done against the background of Rawls' idea of social justice and human rights theory, which asserts that, social justice, is about creating a society and institutions based on equity, equality and solidarity that value and understand the human rights and dignity of every human being irrespective of race, gender, ethnicity and geographic location. Using the CCJD as a case study, the study explored the value of indigenous justice systems as one of the avenues for traditional rural communities to access justice. The study acknowledges that indigenous justice systems have shortcomings and does not present them as a panacea. The data from the study revealed that indigenous justice systems are a favourable justice system for traditional rural communities like Impendle. The study acknowledges that democratic governance is undermined where the poor and marginalised are denied access to justice. The marginalised and poor are likely to be ambivalent about the formal justice system and favour their own local, indigenous justice system. Government should find a way of including alternative justice systems in the mainstream justice system by developing systems and strategies that take advantage of the benefits of the indigenous justice system while encouraging reforms, working with instead of against them.

To overcome barriers to access to justice, strategies should be developed and encouraged that take the local context into consideration; this process should be driven at national level. The work done by the CCJD is an outstanding example of what can be achieved if the local context and culturally relevant mechanisms that reflect prevailing community norms and values are integrated with formal systems. The CCJD approach contextualises the justice system and its procedures in order to ensure that the constitutional provision of equality before the law and accessibility by all translate into reality. Drawing on the lessons learned from the CCJD, the theory of social justice, *ubuntu*, the Black Consciousness approach and consciousness-raising, the study calls on justice arbitrators to embrace an alternative approach to law that extends equality and social justice to rural communities.



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## APPENDIX B – TURN IT IN REPORT

## APPENDIX C1 TABLE OF FOCUS GROUP QUESTIONS

Focus Group Questions
<ol style="list-style-type: none"> <li>1. What is the role played by the Advice Office in this community of Impendle and how did you come to know about the programme?</li> <li>2. What have you learned from the Advice Office about your rights and how to find the help you need with the problems you have?</li> <li>3. What role do the traditional court of <i>Izinduna</i> and <i>Amakhosi</i> play in this community?</li> <li>4. What is the procedure for bringing a matter to this local justice structure and</li> <li>5. How accessible is this structure to members of community?</li> <li>6. How does this local justice structure of <i>Amakhosi</i> and <i>Izinduna</i> deal with dispute matters brought to them by women in community?</li> <li>7. How is the relationship between the Advice Office and the traditional court of <i>Amakhosi</i> and <i>Izinduna</i> in this community? Please explain.</li> <li>8. How does the Advice Office encourage respect for traditional authorities such as the court of <i>Izinduna</i> and <i>Amakhosi</i>, while empowering the community with understanding their rights as enshrined in the constitution?</li> <li>9. What has been the impact of the Advice Office in this community, especially relating to domestic violence, child support and maintenance within the family unit?</li> <li>10. What would you say is unique in the way the Advice Office assists the community to resolve disputes compared to other places (for example, traditional structures, police, courts) you have been to?</li> <li>11. How has the Advice Office assisted you in standing up for your rights while making sure family structures and values are respected and not damaged?</li> </ol>

## APPENDIX C2- COMPOSITE TABLE OF INTERVIEW QUESTIONS

Composite table of Interview Questions	
1.	Advice Office Paralegals and CCJD Office staff
2.	What role does CCJD, Advice Office play in this community of Impendle and how do you reach out to community about your programmes?
3.	Do you think the traditional authorities help in dealing with peoples' problems in a fair way? Why do you think this is so?
4.	Why do the Advice offices use avenues other than the formal legal system (eg/ courts, police), but instead use mediation, negotiation, work with traditional authorities etc, to help people find just solutions to their problems, in rural communities such as Impendle? Please give an example of a case.
5.	How does Advice Office in social justice programme as a foundation for promoting access to justice/ Please explain briefly
6.	How does the Advice Office establish and inspire confidence in traditional authorities and methods as legitimate mechanisms of accessing justice in communities?
7.	How would you describe the relationship between traditional leadership in the community and the Advice Office in Impendle?
8.	Are the traditional courts and other traditional structures still relevant for the community of Impendle? Please explain briefly.
9.	In trying to ensure there is justice for women at all levels of society, how do the Advice Offices/you as a paralegal, ensure that the work takes culture and tradition into account and fits with the local Zulu culture?
10.	How does the Advice Office strike a balance between finding solutions that respect local cultural norms and traditional ways of resolving conflict in the home, while at the same time ensure that there is justice, especially for women and children? For example, in cases of domestic violence, maintenance, etc
11.	What does the Advice Office do to empower and conscientize people in communities of their rights to find fair solutions to their problems, and to seek recourse where necessary?

APPENDIX D- Composite Table Alignment Research Objectives, Research Questions and Data Gathering Tools: Focus Group Questions and Interview Questions

<b>Table A 4-1 Alignment of Research Objectives, Research Questions and Data-gathering Tools: Focus Group Questions and Interview Questions</b>			
<b>RESEARCH OBJECTIVES</b>	<b>RESEARCH QUESTIONS</b>	<b>DATA GATHERING QUESTIONS: Focus Group Questions</b>	<b>DATA GATHERING QUESTIONS: Interview Questions</b>
<p><b>OBJECTIVES OF THE STUDY</b></p> <p>Objective 1: Investigate the use of indigenous governance techniques by the CCJD.</p> <p>Objective 2: Discuss the relevance of customary law in accessing justice in the rural community of Impendle.</p> <p>Objective 3: Explain the value of governance of social justice system in offering flexible structures and processes, and outreach to rural communities.</p> <p>Objective 4: Develop policy recommendations for governance of social justice systems as one of the mechanisms citizens in rural communities can use to access justice.</p>	<p><b>Main questions:</b></p> <p>How does the CCJD develop and use techniques of indigenous governance to facilitate access to justice for rural communities?</p> <p><b>Sub-Questions:</b></p> <p>What are indigenous governance and justice systems and how are they connected to contemporary access to justice?</p> <p>Why does the CCJD utilise alternative justice systems as a means for rural communities to access social justice?</p> <p>Which alternative justice mechanisms are used by the CCJD in dispute resolution and how do the indigenous beliefs of the community influence these mechanisms?</p> <p>What is customary law and is it still a</p>	<p>12. What is the role played by the Advice Office in this community of Impendle and how did you come to know about the programme?</p> <p>13. What have you learned from the Advice Office about your rights and how to find the help you need with the problems you have?</p> <p>14. What role do the traditional courts of <i>Izinduna</i> and <i>Amakhosi</i> play in this community?</p> <p>15. What is the procedure for bringing a matter to this local justice structure?</p> <p>16. How accessible is this structure to members of the community?</p> <p>17. How does this local justice structure of <i>Amakhosi</i> and <i>Izinduna</i> deal</p>	<p>12. What role does the CCJD Advice Office play in this community of Impendle and how do you reach out to the community about your programmes?</p> <p>13. Do you think the traditional authorities help in dealing with peoples' problems in a fair way? Why do you think this is so?</p> <p>14. Why do the Advice Offices use avenues other than the formal legal system (e.g. courts, police) like mediation, negotiation, work with traditional authorities etc, to help people find just solutions to their problems, in rural communities such as Impendle? Please give an example of a case.</p> <p>15. How does the Advice Office's social justice programme promote access to justice? Please explain briefly.</p> <p>16. How does the Advice Office establish and inspire confidence in traditional authorities and methods as legitimate mechanisms of accessing justice in communities?</p> <p>17. How would you describe the relationship between traditional leadership in the community and the Advice Office in Impendle?</p>

	<p>relevant justice system structure in Impendle?</p> <p>How does customary law in Impendle facilitate access to justice for rural civil society?</p>	<p>with dispute matters brought to them by women in the community?</p> <p>18. How would you describe the relationship between the Advice Office and the traditional court of <i>Amakhosi</i> and <i>Izinduna</i> in this community? Please explain.</p> <p>19. How does the Advice Office encourage respect for traditional authorities such as the courts of <i>Izinduna</i> and <i>Amakhosi</i>, while empowering the community with understanding their rights as enshrined in the Constitution?</p> <p>20. What has been the impact of the Advice Office in this community, especially relating to domestic violence, child support and maintenance within the family unit?</p> <p>21. What would you say is unique in the way the Advice Office assists</p>	<p>18. Are the traditional courts and other traditional structures still relevant for the community of Impendle? Please explain briefly.</p> <p>19. In trying to ensure there is justice for women at all levels of society, how do the Advice Offices/you as a paralegal, ensure that the work takes culture and tradition into account and fits with the local Zulu culture?</p> <p>20. How does the Advice Office strike a balance between finding solutions that respect local cultural norms and traditional ways of resolving conflict in the home, while at the same time ensure that there is justice, especially for women and children? For example, in cases of domestic violence, maintenance, etc.</p> <p>21. What does the Advice Office do to empower and conscientise people in communities on their rights to find fair solutions to their problems, and to seek recourse where necessary?</p>
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		<p>the community to resolve disputes compared to other places (for example, traditional structures, police, courts) you have been to?</p> <p>22. How has the Advice Office assisted you in standing up for your rights while making sure family structures and values are respected and not damaged?</p>	
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# APPENDIX E- COMPOSITE MATRIX OF RESPONSES TO FOCUS GROUP QUESTIONS

Composite Matrix of responses to focus group questions			
Focus Group Question	Focus Group 1	Focus Group 2	Focus Group 3
<b>Question 1:</b>  Role of Advice office, CCJD at Impendle and how you came to know about their programmes	“They attend to all social problem in the area even work related problems and they are able to solve them.” <b>FGP3, 8</b>	“They arrange community workshops and training on many matters affecting people in this area and they also call on <i>Induna</i> to be part of these meetings and workshops.”  <b>FGP2,3, 7, 9</b>	“CCJD teach people on how to deal with should they have a need to do so. They make sure to invite <i>Izinduna</i> to be part of workshop.” <b>FGP13, 15, 18</b>
<b>Question 2:</b>  What have you learned from the Advice Office, CCJD about your rights and how to find the help you need with the problems you have?	“Knowledge on how to deal with government department, they do follow up for us if it take long to get resolved. They teach us about our rights and how to enforce them.” <b>FGP6 &amp; 2</b>	“We have gained knowledge about our rights and responsibilities, how to access services from which government department.”  <b>FGP11 &amp; 12</b>  “They also teach men about women’s rights issues.” <b>FGP2, 4, 8</b>	“Knowledge on how to handle different situations, such as reporting cases to police. How to access services from different government department and which department to work with on different matters. They also assist with workers’ rights issues, unfair dismissals, claims for deceased’s benefits and pension pay outs.” <b>FGP18, 21, 22</b>
<b>Question 3:</b>  What role do the traditional courts of <i>Izinduna</i> and <i>Amakhosi</i> play in this community?	“ <i>Izinduna</i> help in cases where you are looking for a land to build your house. They also get involved in dispute relating to live stock that people keep.” <b>FGP0, 7, 9</b>	“They tighten the law in this community.” <b>FGP1,7, 9,</b>	“They tighten the laws in this community, and play a role in peace keeping and laws and assist to resolve disputes.”  <b>FGP 14, 16 ,22</b>
<b>Question 4:</b>  What is the procedure that is followed for bringing a matter to the	“Procedure start with area representative of tribal court such as <i>Izibonda</i> in different areas or tribal court	“Procedure start with area representative of tribal court such as <i>Izibonda</i> in different areas or tribal court	“Procedure start with area representative of tribal court such as <i>Izibonda</i> in different areas or tribal court



traditional courts of <i>Izinduna</i> and <i>Amakhosi</i> ?	councillor, then goes to <i>Izinduna</i> , it is escalated accordingly only if the matter could not be resolved in anyone of these levels.” <b>FGP3, 5, 6, 8</b>	councillor, then goes to <i>Izinduna</i> , it is escalated accordingly only if the matter could not be resolved in anyone of these levels.” <b>FGP4, 5, 10</b>	councillor, then goes to <i>Izinduna</i> , it is escalated accordingly only if the matter could not be resolved in anyone of these levels.” <b>FGP14, 16,18</b>  “Matters are also reported and handled by CPF and ward committees. There are many structures in this community; they work together with traditional leaders and <i>Izinduna</i> . CCJD is also one of these structures.” <b>FGP13, 15, 17</b>
<b>Question 5:</b> How accessible is this structure to members of the community?	“You don’t struggle at all, if there is something that you want to report you just go to <i>Isibonda</i> in your area and he attends to you straight away.” <b>FGP8, 9, 10, 12</b>	“It is very easy because you follow procedure as we have said and your issue gets attended easily.” <b>FGP3, 5, 8</b>	“It is very easy because you follow procedure as we have said and your issue gets attended easily. No money is paid in any of the lower levels, you only pay money when matter reaches tribal court stage.” <b>FGP18, 19, 22</b>
<b>Question 6:</b> How does this local justice structure of <i>Amakhosi</i> and <i>Izinduna</i> deal with dispute matters brought to them by women in the community?	“There are women that are always there waiting for cases from women and girls, such as with virginity testing.” <b>FGP9, 11, 12</b>	“Same procedure is followed but at tribal court there are women who are part of tribal council; they deal with women specific issues.” <b>FGP6 &amp; 12</b>	“Same procedure is followed but at tribal court there are women who are part of tribal council; they deal with women specific issues.” <b>FGP16, 18, 20</b>
<b>Question 7:</b> How is the relationship between the Advice Office, CCJD and traditional court of <i>Izinduna</i> and <i>Amakhosi</i> ?	“CCJD and tribal court are really working together a lot.” <b>FGP3 &amp; 12</b>	“CCJD and <i>Izinduna</i> work together and assist each other to resolve dispute in community. They also work with CPF & ward committees” <b>FGP3, 7, 9</b>	“CCJD, <i>Izibonda</i> , CPF and ward committees they work together and try and resolve issues at that level before it reach the traditional court stage. These structures work together very well to try and finalise matters themselves.”

			<b>FGP13, 17, 20, 23</b>
<p><b>Question 8:</b></p> <p>How does the Advice Office encourage respect for traditional authorities such as the tribal courts of <i>Amakhosi</i> and <i>Izinduna</i> while empowering the community with understanding their rights as enshrined in the Constitution?</p>	<p>“They always refer you back if you have not reported matter to <i>Induna</i> or <i>Isibonda</i> in your area.” <b>FGP1 &amp; 8</b></p>	<p>“They encourage us to work with <i>Izinduna</i> and tribal court councillors to report matters to them because they are there to assist community as well.” <b>FGP11 &amp; 12</b></p>	<p>“They direct us to <i>Izinduna</i> and <i>Izibonda</i> to report our cases. They teach us these people are there so they must be respected.” <b>FGP15, 19, 23</b></p>
<p><b>Question 9:</b></p> <p>What has been the impact of the Advice Office, CCJD in the community, especially relating to domestic violence, child support and maintenance within a family unit?</p>	<p>“CCJD have helped us a lot, they have made us women know that we have rights and those rights must be respected. Before that it was men that were in control of everything.” <b>FGP8, 9, 12</b></p>	<p>“CCJD has done a lot, now we are able to report if we are not satisfied with tribal court judgement and decision; CCJD assist us and talk with them for us.” <b>FGP6</b></p> <p>“In cases of maintenance, CCJD is able to make follow up on men that do not pay for their children and ensure they support them. They also assist grannies with girls that leave children at home and do not check on them.” <b>FGP3, 5, 7, 10</b></p>	<p>“CCJD assist a lot, you find some cases resolved by <i>Izinduna</i> and you are not happy, CCJD is able to do flow up even on the <i>Induna</i>, they derive a way for your case to be escalated to the next level or magistrate court if you like.” <b>FGP16 &amp; 19</b></p> <p>“In family matters they arrange to talk with families or with two people who have a problem.” <b>FGP16, 17, 19</b></p>
<p><b>Question 10:</b></p> <p>What would you say is unique in the way the Advice Office assists the community to resolve disputes compared with other places (for example, traditional structures, police, courts) you have been to?</p>	<p>“They are able to assist you directly; if your case needs police they call police and arrange that you be assisted appropriately by police. They explain what is going to happen so by the time police attend to you, you are ready and you know what to do.”</p>	<p>“Family mediation is a private process between people involved, unlike in magistrate and tribal court where issues are discussed in public.” <b>FGP8, 10, 12</b></p>	<p>“At CCJD they work differently because they fetch people with a problem and sit them down and discuss problem.” <b>FGP15 &amp; 20</b></p>

	<b>FGP2, 4, 5, 7</b>		
<p><b>Question 11:</b></p> <p>How has the Advice Office assisted you in standing up for your rights while making sure family structures and values are not damaged?</p>	<p>“They teach us about our rights but they also teach us to respect and consider families, where our rights begin and where they end.”</p> <p><b>FGP1, 3, 5, 9</b></p>	<p>“They let people voice their opinion, even women are allowed to talk and have an input on the matter. Then they explain what the law says and help both parties reach agreement and decision.”</p> <p><b>FGP7, 9, 12</b></p>	<p>“They sit with family and resolve issues and it gets resolved; it will not go to the police.”</p> <p><b>FGP17</b></p> <p>“They explain the position of the law and how it apply to the issue and how it should be respected. They also talk about respect in family.”</p> <p><b>FGP22 &amp; 23</b></p>

# MATRIX F- COMPOSITE MATRIX OF RESPONSES FROM INTERVIEW QUESTIONS

Composite Matrix of responses from interview questions				
Interview Questions	Public Manager 1	Public Manager 2	Public Manager 3	Public Manager 4
What role does CCJD, Advice Office play in this community of Impendle and how do you reach out to community about your programmes?	<p>“ to give legal advice to our clients”</p> <p>“Outside of legal advice we get into the shoe of that person. Make reference ourselves with that institution”</p>	<p>“We conduct awareness programmes like we do workshop, presentations, school visits &amp; home visits. Our role is to bring solutions &amp; answers to problems that are family based. Limiting people arresting each other. The cases we deal with have to do with both parties from the same family”</p>	<p>“CCJD’s role it very important because mostly for people it gets difficult to go to police stations and reports their problems. It gets easier when they come here at CCJD.</p> <p>We assist in those cases that they are not able to solve. Like those cases where you find that there at the tribal court they make people pay money if they report cases”</p>	<p>“ Our role is to provide support to all fifteen advice offices we wanted to make sure that people in rural areas, people who cannot access justice, people who want their rights to be heard, want recourse could get help”</p>
Do you think that traditional authorities help in dealing with people’s problems in a fair way,	<p>“sometimes it is a yes, sometimes it is a no”</p>	<p>“I think they are fair, but then it also happens that they are not fair”</p>	<p>“I don’t think they help them in a fair way, because there is no neutrality”</p>	No response
Why does the Advice Office, (CCJD) use avenues other than the formal legal system, (e.g. court, police) but instead use mediation, negotiation, work with traditional authorities to help people find solutions	<p>“it is a good thing to sit down and talk, each person to give his opinion than take case to police and then there will be arrest”</p> <p>“ had you start with mediation the problem would be solved</p>	<p>“People believe in mediation, because if they have problems or before they come to us they have already called a member of family, maybe an older man. They realise it is not successful, they like that way of</p>	<p>“It is because sometimes people don’t get help. Sometimes at the police station it happens that you report a case and it’s a case that won’t come to court and it is not worth coming to the court.</p>	<p>“Normally women approach police stations to report cases of domestic violence and not to open cases. They just need someone to talk with the husband to stop what he is doing. Police get angry and ask</p>

to their problems, in rural community such as Impendle?	and people can live back together”  “during mediation you talk well with each other you do not fight”	solving problems”  “Because they like their matters to be kept private. Because even there at the formal court the whole community will be there at the time of the case and everyone can see that this person hit this one and who is sentenced. It ends up being hurting them that family matters that supposed to be private but they are talk of anyhow. Just because I am abused now I don't have to show people”	You find that sometimes police will make that person pay something on the side but only to find that that it was not a big case, a case that will go nowhere.  We usually prefer that if people have had disputes at home, it is better to talk to them.  In most cases police don't like to attend to cases of people that are in a relationship or families, because often cases gets cancelled It is better for cases to come on our side here.	why they come to police station if they don't want husband arrested. The woman would say I want someone to talk to him so he would change, as breadwinners they don't want them arrested.  CCJD understands that, it is the reason why they do family mediation to resolve problems without anyone getting arrested.
How does the Advice office facilitate and strengthen civic society engagement in social justice programmes as a foundation for promoting access to justice?	“We create a relationship with other stakeholder that everywhere we go we need to go together.  There are times where you can see that if a person is not sent to a nurse, ward councillor problem will not be solved”	“What we do, the thing is you can't work alone, on our side we have cases that we are no able to start and conclude on our own.  There are stakeholder meetings, where we meet so that we will be able to get assistance from other members. We talk about referrals, so you can work with other structures”	“We are meeting like we usually have stakeholders meetings, where people meet and explain how they work.  Sometimes CCJD would have a series of talk on a lot of things that are usually a problem in the community, like maintenance Act.	

How does the Advice Office establish and inspire confidence in traditional authorities and methods as legitimate mechanisms of accessing justice in communities?	“ we advice that everything we have now, before it was introduced there was <i>Amakhosi</i> and now they still exist, therefore we can’t bypass them”	“There are cases that can’t be resolved without them just like when a girl has fallen pregnant & there must be payment of a goat & all that. They are the ones that know that much better than us. We cannot finalise it here”	If a person comes to us with a matter that has been reported to tribal court we give tribal court a chance to deal with it first.  <i>Induna</i> is usually chairperson of CCJD council in the area. This helps if matter reaches tribal court because they are close to me”	“Paralegals conduct training & workshop for traditional leaders on Constitution and the 5 Acts, such as Child justice, Domestic violence, Maintenance, Customary marriages and Sexual offence Act. This empower traditional leaders”
How would you describe the relationship between traditional leadership in the community and the CCJD?	“It is very good, even thought we have hiccups here and there. I say it is good that they get some cases and they refer to us and we also get cases that we refer to them. So we are connected in that way”	“I won’t say it is good or bad because we are faced with work. Sometimes they do something that hurt our client we have to work with them or explain to them that they done a mistake. It is not good everyday but we are able to work together even though it gets like that. It is not always good”	“I think it is very much connected, remember I said people who are in CCJD committee are part of the tribal court structure”	“Paralegals know and understand that they have to work with traditional leaders in their area”
Are the indigenous justice structures such as traditional courts still relevant to date for the community of Impendle, explain	“Yes they have it big time, you can’t just in a <i>Nkosi</i> land be seen meeting there without telling <i>Inkosi</i> ”	“In my opinion I would say it is still relevant seriously”	“Yes, it is still relevant, but even though people are scared that if they speak for themselves it will be like they disrespect <i>Ndabezitha</i> ”	
In trying to ensure	“We advice them that even though	“That is not difficult because	“In our workshops we always tell	No response

that there is justice for women at all levels of society, how does the Advice office, you as paralegal ensure that the work your work takes culture and tradition into account and fits in with the local Zulu culture?	there is Constitution culture and tradition should not be broken but it should be conducted such that it goes with Constitution”	we live in this community; we are part of the community. When we attend to their matters we know what is sensitive. We know where it differs maybe with believing or tradition. We were not taken from other communities. We are able to deal with them in a way that makes us all understand each other and be on the same level”	women that they have rights but that they do not have rights more than men.  We explain to them that according to Zulu culture men is always the head of the house. If we have men in workshop we explain that a man is a man through his deeds and that respect will come from there.  If we have to go to families for mediation we first observe kind of household, is the man of the house a traditional man. If yes, paralegal must respect that, must cover head for an example so that she earns respect and acceptance of the man.	
How does the CCJD strike a balance between finding solutions that respect local culture, norms and traditional ways of resolving conflict in the home, while at the same time ensure that there is justice,	“It doesn’t get separated with culture and tradition. Even if you teach them about their rights in the constitution”	“We are able to apply the law such that it is obvious where he was wrong. Rights were not there to give people right to be rude to others or to be given right to hurt the other if they were wrong.  In our meetings	“We don’t show that in front of a man, there we use neutrality and also in cases where a man is way too wrong.  We arrange individual session, so you don’t blame one in front of another as this might make them	<b>No response</b>

especially for women and children?		we highlight the importance of respect, everyone must respect the other. But abuse is protected by the law”	loose respect of each other. After that we come again and talk things together.  Thereafter both parties leave satisfied and there will be no one who blame the other because before I sit them down I explain how the office work”	
What measures does the Advice office; CCJD put in place to empower and conscientise the marginalised of their right to access justice?	“We do workshops and conduct awareness programmes; we also tell them that if it happens that they are not satisfied, (tribal court) we are here for them. We tell them of their right to use courts of magistrate	“ I do that because I committed myself, like now what is happening lately, I take people to Johannesburg and urban to make arrangements for payments of benefits for deceaseds family members.  One instance there was this white lady in Johannesburg who kept changing stories and was not paying benefits. I told her after phoning for a long time that i will bring my client over to Johannesburg. When we got there she could not believe it. I took out my CCJD card with justice emblem	“We are here to bring law to people but simplify, bring it to them, explain to them in a way that they will understand. We use language that they use so they will understand.  We put the law on table and it becomes clear where he was wrong & where he was right because he is also guided by the law even if he went to <i>Inkosi</i> , court or police the law is the same.  Women must respect men and man as well can play role as a man but must respect other people.  He ends up seeing that what he did	“Paralegals run workshops for local people; they are best placed to know which issues need to be addressed in their area. They teach women about their rights and assist them on how to go about exercising their rights. Mediation also helps where there are issues to be resolved”



		and everything was sorted.	was wrong must not use power as a man”	
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# **Policy Framework on the Traditional Justice System under the Constitution**



**the doj & cd**

Department:  
Justice and Constitutional Development  
**REPUBLIC OF SOUTH AFRICA**

# Policy Framework on the Traditional Justice System under the Constitution

# CONTENTS

<b>CHAPTER 1: INTRODUCTION</b>	<b>5</b>
1.1 <i>The importance of the institution of the traditional court system in maintaining peace and harmony in traditional communities.</i>	6
1.2 <i>Vision and purpose of the policy framework</i>	7
1.3 <i>Structure of the policy framework</i>	8
<b>CHAPTER 2: AN HISTORICAL ROLE OF THE INSTITUTION OF TRADITIONAL LEADERSHIP IN THE ADMINISTRATION OF JUSTICE</b>	<b>9</b>
2.1 <i>The institution of traditional leadership during the colonial era</i>	10
2.2 <i>The institution of traditional leadership under the apartheid era</i>	10
<b>CHAPTER 3: COMPARATIVE STUDIES</b>	<b>13</b>
3.1 <i>Indigenous justice system in selected countries</i>	14
(a) Botswana	14
(b) Malawi	14
(c) India	15
(d) Ghana	15
(e) Australia	16
(f) Canada	17
3.2 <i>Features that suit the envisaged South African model of traditional courts</i>	17
<b>CHAPTER 4: THE IMPACT OF THE CONSTITUTION ON TRADITIONAL LEADERSHIP</b>	<b>19</b>
4.1 <i>The recognition of traditional courts under the new democratic dispensation</i>	20
4.2 <i>The impact of the Constitution on the institution of traditional leadership</i>	21
<b>CHAPTER 5: CHALLENGES SOUGHT TO BE ADDRESSED BY THE POLICY FRAMEWORK</b>	<b>23</b>
5.1 <i>Introduction</i>	24
5.2 <i>Embracing the new constitutional values</i>	24
5.3 <i>Exercise of judicial functions by traditional leaders</i>	24
5.4 <i>Fragmentation of the traditional justice system</i>	25
5.5 <i>Institutional challenges</i>	25

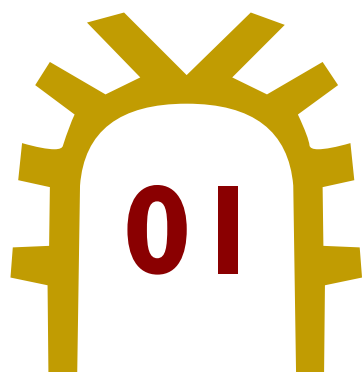


<b>CHAPTER 6: POLICY CONSIDERATIONS</b>	29
<b>6.1 Cultural values enhancing social cohesion, peace and harmony</b>	30
<b>6.2 The traditional justice system suited for the South African constitutional dispensation</b>	30
<b>6.3 The procedures followed in the traditional justice system</b>	31
<b>6.4 Affirming the principles of restorative justice within the traditional justice system</b>	32
<b>6.5 Provision of reasonable resources for the exercise of role and functions of traditional leaders in the administration of justice</b>	32
<b>6.6 The report of the South African Law Reform Commission on traditional courts and judicial functions of traditional leaders</b>	33
<b>6.7 Policy proposals</b>	33
6.7.1 Designation of traditional leaders to preside in traditional courts	33
6.7.2 Accountability of traditional leaders in exercising their role and functions in the administration of justice	33
6.7.3 Attendance of a prescribed training programme by traditional leaders	34
6.7.4 Traditional courts to have jurisdiction in respect of civil disputes arising from customary law and certain criminal offences	34
6.7.5 Traditional courts to impose sanctions of a restorative (justice) nature	35
6.7.6 Service of notices and court process and enforcement of decisions of traditional courts	35
6.7.7 Exclusion of legal representation in proceedings before traditional courts	36
6.7.8 Decisions of traditional courts to be final and appeal to be allowed only against certain orders	36
6.7.9 Review of decisions of traditional courts	36
6.7.10 Mechanisms to be established for referral of cases from traditional courts to magistrates' courts and vice versa	36
6.7.11 The role of traditional courts in the criminal justice system	36
6.7.12 Keeping of certain records	37
6.7.13 Traditional leaders and traditional courts must advance the values and principles of the Bill of Rights	37
6.7.14 The need for national legislation to ensure uniformity	37

# Policy Framework on the Traditional Justice System under the Constitution

6.8	<i>Transitional arrangements</i>	38
CHAPTER 7: CONCLUSION		39
7.1	<i>The development of legislation on traditional courts</i>	40
7.2	<i>The consultation process</i>	40
LIST OF REFERENCES		42

## CONTENTS



# INTRODUCTION



**Policy Framework on the Traditional Justice System  
under the Constitution**



## 1.1 The importance of the institution of the traditional court system in maintaining peace and harmony in traditional communities

- 1.1.1 Traditional leadership plays a critical and vital role in traditional communities in relation to the administration of justice. It is part of the cultural heritage of the African people and is recognised by the Constitution.
- 1.1.2 Customary law has existed since time immemorial and is recognised in the South African legal system. A large number of people who live in traditional communities subscribes to the principles of customary law and embraces the traditional court system that applies this form of law. An estimated 14 million people form part of traditional communities in all provinces in South Africa except the Western Cape.
- 1.1.3 The institution of traditional leadership plays a crucial role in promoting social cohesion, peace and harmony in communities. In this sphere of the administration of justice, traditional leaders resolve disputes through traditional courts (*Makgotla/Inkundla*). The importance of traditional courts derives from the fact that they are closest to the communities and use the language and methods that the community understands better than the procedures applied by formal courts. A traditional leader and his/he councillors sit in commune ("*lekgotla*"), hear the evidence of complainants and "accused" persons, and resolve disputes according to the cultural practices and customs applicable to the community in question. In contrast to the formal court system, traditional courts do not adhere to any prescribed or written set of rules. They are guided by the culture and tradition of the community in which they operate. In this way, justice is dispensed easily and quickly.
- 1.1.4 In the post 1994 democratic dispensation the following categories of leadership positions and institutions are recognised:

### Traditional Leadership positions

The following table illustrates the provincial spread of the three levels of traditional leadership in the country:

	EC	NW	LMP	MPU	KZN	FS	WC	NC	GP	TOTAL
Kings/Queens	6	0	1	2	1	2	0	0	0	12
Senior traditional leaders	220	54	183	63	306	13	0	9	2	850
Headmen/Headwomen	935	100	527	To be recognised	To be recognised	78	0	25	To be recognised	1665

### Houses of Traditional Leaders

The National House of Traditional Leaders was established in terms of the National House of Traditional Leaders Act of 1997 and it operates at national level, the following table indicates the status quo as regards the Provincial and Local Houses in the provinces.

Province	Local Houses	Provincial Houses
Eastern Cape	5 Local Houses to be established	Established
Free State	1 Local House (1 TC to perform functions of Local House)	Established
Gauteng	2 TCs to perform functions of Local Houses	To be established
KwaZulu-Natal	11 Local Houses established	Established
Limpopo	5 Local Houses established	Established
Mpumalanga	3 Local Houses established	Established
North West	3 Local Houses established	Established
Northern Cape	1 Local House	To be established
Total	31	8



# Policy Framework on the Traditional Justice System under the Constitution

## *Traditional Councils*

For each traditional community under the authority of a traditional leader, a traditional council has been constituted and recognised.

## **1.2 Vision and purpose of the policy framework**

- 1.2.1 The vision of this policy framework is to affirm the importance of the institution of traditional leadership in the administration of justice, namely to enhance access to justice and to contribute to the improvement of life for all.
- 1.2.2 The primary purpose of this policy document is to harmonise the traditional justice system with the Constitution.
- 1.2.3 The Black Administration Act<sup>1</sup>, being the remnant of the building blocks of racial segregation, was repealed in November 2005.<sup>2</sup> This gave rise to the need for substitute national legislation to regulate the role and functions of traditional leaders in the administration of justice. Some of the provisions of the Black Administration Act were left operative until 30 June 2008. The policy framework contained in this document is intended to form the basis for the envisaged substitute legislation providing for the role and functions of traditional leaders in the administration of justice.
- 1.2.4 The policy document is the culmination of a literature research, a comparative study of other jurisdictions, as well as consultations with traditional leaders, those government departments responsible for traditional affairs, and other stakeholders in the field of customary law. The Minister and some officials undertook study visits to observe the indigenous systems in India and Botswana. Other information was derived from an international conference on traditional institutions, which was held in Durban in May 2007, and from a subsequent Conference of Magistrates, which was held in Midrand in September 2007. At these conferences, national and international speakers shared their experiences of traditional institutions and the role these institutions play in the administration of justice.

- 1.2.5 The 1994 democratic elections ushered in a new democratic order. This new order formed the basis for the review of the legislation and practices that existed prior to 1994. This policy document focuses on the role and functions of traditional leaders under the new democratic dispensation, in the administration of justice. The following extract from the foreword to the White Paper on Traditional Leadership and Governance is relevant:

“The institution of traditional leadership occupies an important place in African life and, historically, in the body politic of South Africa. It embodies the preservation of culture, traditions, customs and values of the African people, while also representing the early forms of societal organisation and governance. However, when South Africa adopted the Interim Constitution and, subsequently, the 1996 Constitution, our people declared the Republic of South Africa to be a sovereign, democratic State founded on a number of universal values, including the supremacy of the Constitution. This marked the ushering in of a new era.

Following the 1994 elections, the new government embarked on a course to transform the South African state. This included the transformation of institutions of governance in accordance with the new democratic order and constitutional principles such as equality and non-discrimination. One of these was the institution of traditional leadership. Like our forebearers on the African continent, we were thereby presented with the singular challenge of defining the place and role of the institution of traditional leadership in the new system of governance. The new Constitution has laid the basis for this and enjoined the new government to develop legislation that would conclusively address this matter.”

- 1.2.6 The objectives of this policy paper are therefore to-
  - (a) affirm the importance of traditional leadership in the administration of justice and to establish an indigenous justice model that is suitable to the new constitutional order;
  - (b) establish a basis for the enactment of legislation regulating the role and functions of traditional

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1 Act 38 of 1927.

2 Repeal of the Black Administration Act and Amendment of Certain Laws Act (Act 28 of 2005).



leaders in the administration of justice, consistent with the new constitutional dispensation;

- (c) enhance the efficiency of and increase access to traditional courts; and
- (d) determine the criminal and civil jurisdiction of traditional courts and develop procedures governing traditional courts.

1.2.7 The deficiencies in the traditional court system must be adapted to meet the new constitutional requirements.

### **1.3 Structure of the policy framework**

1.3.1 In the next chapter (Chapter 2), the historical role of traditional leadership is given. This chapter seeks to illustrate and provide the background of the role that traditional leadership has played in the administration of justice before the commencement of the Constitution. It reflects briefly on the colonial era, the apartheid era,

including the period under the homeland and self-governing states, and the period immediately prior to the new constitutional dispensation.

Chapter 3 focuses on a comparative study of the indigenous justice systems in selected African and other western countries, as well as the general features thereof that resemble the South African indigenous system. Chapter 4 considers the developments brought about by the new constitutional order, while Chapter 5 provides an overview of the challenges facing traditional leadership under the new constitutional dispensation. The last chapter (Chapter 6) focuses on policy options that are suited for the South African traditional justice system and provides a framework for the legislation that is intended to give effect to the policy framework.

1.3.2 Chapter 7 contains a conclusion which gives a brief outline of the consultation process that was undertaken in developing this policy framework.



02

# AN HISTORICAL

ROLE OF THE INSTITUTION OF TRADITIONAL LEADERSHIP IN  
THE ADMINISTRATION OF JUSTICE





## 2.1 The institution of traditional leadership during the colonial era

- 2.1.1 The role of traditional institutions in the administration of justice can be traced back since time immemorial. Bennet<sup>3</sup> explains that the institution of traditional leadership has its origin from ancient times when communities sharing the same beliefs and kingship were allocated land for occupation and grazing. The leader stood at the head of the traditional government and below the leader there were two tiers of authority: the wardhead and the family head. The leader played a leadership role in all facets of community life, from rural development to leading the soldiers during wars and resolving disputes in the community. Traditional government differed from the modern democracy concepts. It did not recognise the principle of separation of powers and its functions integrated aspects relating to judicial, administrative and legislative competencies.<sup>4</sup> The role of the institution is important in understanding the challenges faced by this institution under the current democratic order. The recognition of courts of traditional leaders, it was generally argued, was justifiable, since they subjected those under this system to the laws and processes to which they were accustomed.
- 2.1.2 The advent of colonialism brought about a complete change in the administration of justice by traditional leaders. The colonial and apartheid governments intervened in the structures dispensing justice by developing a system of separate courts for African people. The recognition of "Courts of Chiefs" during the colonial era was seen as an essential part of the colonial administration under the policy of indirect rule.<sup>5</sup> The policy of indirect rule, apart from being a practical administrative necessity for the success of the colonial experiment, was also said to be based on the notion that there was a cultural gap between the colonisers and the African community that required African affairs to be administered separately from those institutions

and structures reserved for the White section of the population.<sup>6</sup>

- 2.1.3 According to Olivier, by the end of the British Colonial period in Africa (between 1957 and 1967), legal dualism was in place. This was a dual court system that combined the imported (western) law and the customary law.<sup>7</sup>
- 2.1.4 Although Africans still used these courts during this period, concerns were raised about their operation. These courts, like other aspects of traditional African society, were dominated by patriarchy. Sexism in the composition of the court was an issue. In some communities women were not allowed to preside over or participate in the proceedings of "Courts of Chiefs", except as litigants, and then only if they were assisted by men.<sup>8</sup> The "Courts of Chiefs" were still regarded as a useful and desirable mechanism for the speedy resolution of disputes, given their nature as an easily accessible, inexpensive (virtually free) and simple system of justice.

## 2.2 The institution of traditional leadership under the apartheid era

- 2.2.1 After the union of the four colonies in 1910, "Courts of Chiefs" were used to promote tribalism. They never enjoyed statutory recognition before 1927. The British policy of indirect rule was used to control and manipulate their powers.
- 2.2.2 As a result of the enactment of the Black Administration Act, "Chiefs" became state functionaries, exercising authority and constituting courts, no longer under the mandate of the people, but in terms of the mandate of the government of the day. Under the colonial system of indirect rule and under subsequent apartheid governments, the "Courts of Chiefs" were subject to considerable government manipulation through the use of wide discretionary powers in terms of which the status, role and functions of "Chiefs" and the "Courts of Chiefs" were used to the advantage or convenience

3 T Bennet and C Murray, "Traditional Leaders" in S Woolman (et al) Constitutional Law of South Africa, 2nd Edition (2006) Juta Law, p 26 - 25

4 T Bennet and C Murray, above, p 26 - 27

5 See K Mann and R Roberts, *Law in Colonial Africa* (1991), p 18-23, and RB Mqoke, *Customary Law and the New Millenium* (2003) (Lovedale Press, Alice), p 29.

6 See ZN Jobodwana, *Courts of Chiefs and Human Rights: Comparative African Perspectives* (2000) 15, South African Public Law 26, p 34.

7 NJJ Olivier, *Indigenous Law* (Volume 32)(2000), p197-198, par 192.

8 B Oomen, *Chiefs in South Africa: Law, Culture, and Power in the Post Apartheid Era*, p209

# Policy Framework on the Traditional Justice System under the Constitution

of the state.<sup>9</sup> During this period the long tradition of checks and balances in terms of which the traditional leader ruled on the advice of his councillors and subject to the wishes of his subjects was eroded and replaced with a system whereby “Chiefs” were placed under the supervision of the Lieutenant-General and later the State President who held the office of the Paramount Chief in the colonial and apartheid eras.<sup>10</sup> In order to maintain control, a system was created in terms of which Commissioners’ courts (which were presided over by Whites) served as the appeal courts against the decisions of the “Chiefs”.

- 2.2.3 The end result of the incorporation of courts of traditional leaders into the national judicial system was a dual legal system with formal Western-style courts dispensing justice according to the “law of the land”, while the less formal “Courts of Chiefs” and Commissioners’ courts dispensed justice according to customary law.<sup>11</sup> The notion of “duality” placed “Courts of Chiefs” in an inferior position to the formal courts and seems to presuppose equality. However, the general attitude shared by many people was that “Courts of Chiefs” were inferior.
- 2.2.4 The Commissioners’ courts were abolished in 1986 by the Special Courts for Blacks Abolition Act, 1986 (Act 34 of 1986), and the “Courts of Chiefs and Headman” were retained. This followed on the recommendation of the Hoexter Commission in 1983.
- 2.2.5 The establishment of the homelands and self-governing states brought about changes to the traditional court system. The homelands and self-governing states were assigned the power to regulate their own traditional court systems. This resulted in different homelands and independent states adopting different systems of “Courts of Chiefs”, influenced by the traditions and culture applicable in their areas.
- 2.2.6 In the former Transkei and Zululand, the “Courts of Chiefs” exercised similar powers and had a similar jurisdiction to the magistrates’ courts. Appeals in the former Transkei from traditional leaders went to the

regional authorities on which the kings and queens had representation.

- 2.2.7 In the former Bophuthatswana, by virtue of the Bophuthatswana Traditional Courts Act, 1979 (Act 29 of 1979), the authority to deal with criminal and civil matters was conferred on structures (tribal authorities) and not on individual traditional leaders. Appeals from these traditional structures went to a special court in each magisterial district, consisting of a magistrate and two additional members (experts from tribes in the district).
- 2.2.8 In the former Ciskei, “Chiefs” and headmen had automatic jurisdiction to deal with criminal and civil matters arising from customary law and custom by virtue of their appointment as traditional leaders.
- 2.2.9 Despite the enactment of provincial legislation, the KwaNdebele Traditional Hearings of Civil and Criminal Cases Act, 1984, still applies in those parts of Mpumalanga that formed part of the former KwaNdebele.
- 2.2.10 In the former Gazankulu, Lebowa and Qwaqwa, the dispensation provided for in the Black Administration Act applied. In terms of this Act, the Minister conferred criminal and civil jurisdiction on “Chiefs” and headmen.
- 2.2.11 In the former Venda, sections 24(1) and 25(1) of the Venda Traditional Leaders Administration Proclamation, 1991 (Proclamation 29 of 1991), provided for the conferment of civil and criminal jurisdiction upon “Chiefs” and headmen by the former Chairman of the Council for National Unity.
- 2.2.12 Traditional courts have continued to exist and function largely under the old dispensation provided for in the Black Administration Act and other Provincial legislation. The Constitution allows for the continued existence and functioning of these courts, subject to the Constitution and the repeal or amendment of the legislation by a competent authority. The Black Administration Act was amended in certain respects to remove elements that were in conflict with certain constitutional values, such as corporal punishment. Corporal punishment was found to be contrary to the right to human dignity in the Bill of Rights. The right to impose imprisonment by regional authorities in the former Transkei was found to be procedurally unfair.

9 Bennet and Murray, above p 188.

10 Bennet and Murray, above P 26 - 27

11 Bennet and Murray, above p 69



# COMPARATIVE STUDIES



**Policy Framework on the Traditional Justice System  
under the Constitution**



### 3.1 Indigenous justice system in selected countries

3.1.1 Dispute resolution outside of court is not a new phenomenon. Societies worldwide, including indigenous/traditional communities in South Africa, have long been using non-judicial, indigenous methods to resolve conflicts. The indigenous systems of Botswana, Malawi, India, South Australia and Canada were examined in order to establish a traditional court system suited to the South African situation.

3.1.2 A comparative analysis of the traditional justice systems of Botswana, Malawi and India are set out briefly below as models from which South Africa could possibly draw lessons.

#### (a) Botswana

3.1.3 Botswana has a dual court system. Customary courts function parallel to the formal court system. These are established by the Minister of Local Government in terms of the Customary Courts Act, 1974. The courts are structured at three levels: the Customary Court Commissioner, the Customary Court of Appeal and the customary courts.

3.1.4 At the lowest level of this traditional dispute resolution structure is the family, consisting of a man, his wife and his children. Parties usually attempt to settle their disputes, especially in family matters, at the level of the family. When this fails, they may be brought before a household group, which is usually made up of one or more families living in the same collection of huts. Another level is that of the family group, which is composed of one or more closely related households living together in the same part of the village. Where one or more family groups are organised and live together in a well-organised local administrative unit, this is called a ward. The wards come under the leadership and authority of a headman, whose position is often hereditary. In large tribes like the Bangwaketse and the Bamangwato, the headmen are graded (from A to G in respect of the former, and from A to K in respect of the latter). In other tribes, such as the Bakwena, Batawana and Bamalete, there are both headmen and subchiefs. In the case of the Bakwena, these subchiefs are graded from A to C. Each of these

traditional authorities has judicial powers, which enables them to settle disputes. The unrecognised headmen's courts are often referred to as the Headmen's Courts of Arbitration, probably influenced by section 3 of the Customary Courts Act.<sup>12</sup>

3.1.5 The customary courts, headed by presidents and appointed by the Minister of Local Government, operate in the main urban centres in the country (Gaborone, Francistown, Lobatse, Selebi-Pikwe, Jwaneng, Ghanzi and Kasane). These courts handle minor offences involving land, marital matters and property disputes. Foreigners may be tried in customary courts. Legal representation is not allowed in the customary courts and there are no specific rules of evidence. Tribal judges, appointed by the tribal leader or elected by the community, determine sentences, which may be appealed against in the civil court system. The quality of decisions reached in the customary courts varies considerably. In some cases tribal judges may mete out sentences such as public lashings.

3.1.6 There are also formal courts established by the Minister of Local Government in accordance with the Customary Courts Act. The Act specifies the courts' jurisdiction in respect of causes of action, as well as their geographical limits. The Act also prescribes the constitution of the court, the order of precedence among its members and the powers and duties of any persons who may be appointed to act as assessors.<sup>13</sup>

#### (b) Malawi

3.1.7 Malawi, which has recently undertaken a similar process of reviewing its court structures and has sought to harmonise the laws applicable to the administration of justice, has an interesting customary law system. The country established customary justice forums, reported to be in the region of 24 000, at the village level. These customary justice forums, which operate under 217 court centres that are presided over by magistrates, are said to handle between 80 and 90% of all disputes. The most

12 Charles Formbad, Customary Courts and Traditional Justice in Botswana: Present challenges and Future Perspectives, *Stellenbosch Law Review*, 2004, Volume 1, p 17.

13 Formbad, p 176 -177.



# Policy Framework on the Traditional Justice System under the Constitution

common disputes brought before the customary justice centres are family disputes, land disputes and property matters.<sup>14</sup>

- 3.1.8 The customary justice forums deal with disputes at village level and refer disputes to the relevant court centres if they are unable to resolve them.<sup>15</sup>

## (c) India

- 3.1.9 Despite the fact that the judicial system in India is well organised, with a high level of integrity, the courts are confronted with four main problems: the number of courts and judges in all grades are alarmingly inadequate, there has been an increase in the flow of cases in recent years due to multifarious acts enacted by the central and state governments, the costs involved in prosecuting or defending a case in a court of law are high due to heavy court fees, lawyers' fees and incidental charges, and delays are experienced in the disposal of cases, resulting in huge backlogs in all the courts.

- 3.1.10 The poor find it difficult to prosecute or defend a case due to the high costs involved. Eminent judges of the Supreme Court and high courts have emphasised the need for free legal aid to the poor. The other alternative methods, among others, being used are, the *Lok Adalat* (people's courts), where justice is dispensed summarily without too much emphasis on legal technicalities.

- 3.1.11 The *Lok Adalat* system initially started in Gujarat in March 1982 and has now been extended throughout the country. The evolution of this system was part of a strategy to relieve heavy burdens in the courts with pending cases.<sup>16</sup> These courts were established to deal with pending cases and to provide some form of relief for litigants.

- 3.1.12 The Parliament of India enacted the Legal Services Authorities Act, 1987, and one of the aims of this Act was to organise *Lok Adalat* in order to ensure that

the operation of the legal system promotes justice on the basis of equal opportunity. The Act gives statutory recognition to the resolution of disputes by means of compromise and settlement through *Lok Adalat*. The concept originates from the system of *Panchayats*, which has its roots in the history and culture of India.

- 3.1.13 Litigants derive many benefits from *Lok Adalat*. There is no court fee and even if the case is already filed in the regular court, the fee paid is refunded if the dispute is settled at the "no court fee" stage. There is no strict application of procedural laws and the Evidence Act while assessing the merits of the dispute. The parties to the dispute, although they may be represented by their advocates, can interact with the *Lok Adalats* judge directly and explain their position in the dispute and advance arguments, which is not possible in the formal courts. Disputes can be brought directly before *Lok Adalat* instead of going to a formal court and then to *Lok Adalat*. The decision of *Lok Adalat* is binding on the parties to the dispute and its order is capable of execution through the applicable legal process.

- 3.1.14 No appeal lies against an order of *Lok Adalat*, whereas in the formal courts there is always an opportunity to appeal to a higher forum against the decision of the trial court, which causes delays in the settlement of disputes.

## (d) Ghana

- 3.1.15 The institution of chieftaincy is guaranteed by Article 270 of the Constitution of the Republic of Ghana, 1992. The Chieftaincy Act of 1970 (Act 370) regulates chieftaincy in Ghana and sets up the traditional councils, as well as regional and national Houses of Chiefs. The National House of Chiefs, the Regional Houses of Chiefs, and the traditional councils each have judicial committees with the authority to decide and resolve disputes affecting chieftaincy.<sup>17</sup>

- 3.1.16 Despite the recognition of chieftaincy, traditional courts ceased to exist after independence. The institution of chieftaincy does not have any legislative, administrative

14 W Scharf, *Non-State Justice Systems in Southern Africa: How should Governments Respond?*, p 42.

15 Scharf, p 43.

16 M Galanter and JK Krishnan (2003) *Bread for the Poor: Access to Justice Via Lok Adalats in India*, Paper presented at the DFID workshop on Non-State Justice Systems, London, March 6-7 2004.

17 Article 273 and 274 of the Constitution of the Republic of Ghana.





or judicial functions. Nevertheless, chiefs still exert considerable authority, respect and influence at the local level, and fulfil quasi-judicial roles. Chiefs and their traditional councils have extended their jurisdiction beyond strictly chieftaincy-related matters to family and property matters, including divorce, child custody and land disputes. They determine cases called *efisem* by the Akans (literally, private matters) or civil (as opposed to criminal) cases. The essentials of the traditional justice system are well articulated in the case law in Ghana, and customary law is also enforced in the district and other courts, depending on the nature of the dispute.

- 3.1.17 The Chief Justice of the Republic of Ghana, Justice George Kingsley Acquah<sup>18</sup> reminded his audience that “chiefs are custodians of land, and they indeed settle quite a large a number of land disputes. Chiefs therefore remain ‘tribunal of preference’ for most citizens, especially in the rural areas. They also settle a number of domestic and customary law disputes in their locality. The informality of these tribunals makes them user-friendly and public participation makes the process popular in the sense of people regarding the process as their own, and not something imposed from above.”
- 3.1.18 Traditional leaders have informally retained the judicial power that they continue to exercise despite the abolition of traditional courts in the first years of independence. Dr Seth Twum has proposed that since traditional leaders still wield considerable authority over their subjects and access to the regular courts is difficult and expensive, the traditional court system, as established under the Native Jurisdiction Ordinance (1883), should be reintroduced.<sup>19</sup>
- 3.1.19 Although the Constitution does not recognise any traditional court, traditional leaders and traditional councils have nevertheless extended their jurisdiction beyond strictly chieftaincy-related matters to family and property disputes, including divorce, child custody and land. The Ministry of Justice and the Attorney-General’s

Department are guiding a process on the reintroduction of the traditional court system established under the Native Jurisdiction Ordinance (1883). Training in ADR and other paralegal issues has been intensified and the necessary legal framework will be established to back such an important process. Recognising such important de facto jurisdiction, individual institutions such as the World Bank have supported the provision of training to traditional chiefs in basic law and ADR mechanisms. This has assisted in the overhaul of these institutions in Ghana.

(e) *Australia*

- 3.1.20 In an article in the *Information Bulletin* published by the Government of South Australia, John Tomaino wrote that aboriginal courts in South Australia, which were first established as pilots in 1999, developed as a result of a lack of trust in the formal justice system. The aboriginal people felt that they, as litigants, had limited input into the judicial process in general, and sentencing in particular. They also saw the courts as culturally alienating, isolating, and unwelcoming to the community and family groups. He mentions some of the features introduced to allay the fears of the aboriginal people. All parties, including the magistrates, are seated at the same level and are in close proximity to each other in order to facilitate direct communication. The magistrate sits with a member of the aboriginal community who has a sound knowledge of the culture and can advise the courts on certain issues. Extensive use is made of pre-sentencing information, including bail enquiry reports, to shape sentencing decisions. Government and non-government agencies attend and offer support to the clients, opening up opportunities for rehabilitation. Magistrates who preside over the courts develop a rapport with the aboriginal communities, which, in turn, builds knowledge of local issues that results in better quality sentencing decisions.<sup>20</sup>
- 3.1.21 While the functioning of the aboriginal courts, to some extent, resembles a version of what the South African community courts could or should be, their points of

18 Addressing a conference on traditional justice in Ghana on 5 December 2005.

19 Report of the 7<sup>th</sup> National Governance Workshop, *Traditional Authority and Good Governance in Accra*.

20 Above, p 4-5.

# Policy Framework on the Traditional Justice System under the Constitution

similarity with the traditional courts are in respect of their accommodation of culture, participation by all who attend the proceedings and their restorative justice approach.

## (f) Canada

3.1.22 Similar to South Australia, there has been a strong emergence of an aboriginal justice system in Canada. The Canadian system is based more on restorative justice than on the harmonisation of culture with the formal court system. In a recent publication, *Reclaiming Aboriginal Justice, Identity and Community*<sup>21</sup>, the author initiates the debate in the Canadian legal environment on whether, traditionally, aboriginal justice was always healing, restorative and rarely retributive. The author gives a detailed explanation of the concept of restorative justice as part of aboriginal justice and he remarks as follows:

“Restorative justice provides a mode to decolonialise justice for these aboriginal people. They want to move away from abstract, rationalistic, and universalistic theories of justice in the Eurocentric justice tradition toward defining justice in terms of their awareness of their knowledge, tradition and values. This form of justice is about relearning ‘how we should suppose to be’ and ‘relearning our traditional responsibilities’ ... It is conceived of as healing because social disorder and crime are seen as illnesses to the spiritual, emotional, physical and mental wellbeing of individuals and the community that must be treated through traditional means. Part of this process involves reconciling the accused with his or her conscience through counselling by elders or other community members. It involves reconciling with the individual or family who has been wronged through offender acceptance of responsibility and restitution. It empowers individuals and assists in reclaiming community ownership of justice and other community members.”

3.1.23 In order to realise the ideals of restorative justice, Canada has established a Community Council Project as

a diversion programme, with the objectives of reversing the uneven imposition of serious sanctions onto those already socially disadvantaged, avoiding the harsh and criminogenic impact of prison, providing a range of alternatives for decision-makers to choose from, providing satisfying justice for victims and communities, of dealing with the social, economic and personal factors associated with crime in preference to the often punitive-orientated alternatives.<sup>22</sup>

3.1.24 The experiences of South Australia and Canada are relevant to traditional courts and emphasise the restorative justice elements that should characterise these forms of justice.

## 3.2 Features that suit the envisaged South African model of traditional courts

It is clear from the analysis above that there are also models of conflict resolution in traditional societies in Africa, Asia, Australia and Canada. However, the question immediately arises whether these models are in all respects suited for our traditional courts? These models, although there are similarities, can and should not be extended to our traditional courts for the following reasons:

- The Botswana model creates overlaps between the formal court system and the parallel traditional court system.
- The Malawi model allows for magistrates and not traditional leaders to preside in customary justice forums.
- The Indian model allows for parties to the disputes to be represented by their advocates and is purely based on alternative dispute resolution.
- In Ghana the institution of chieftaincy does not have any legislative, administrative or judicial functions.
- In Australia and Canada magistrates and not traditional leaders preside in traditional courts.

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21 Written by Craig Proulx, Purich Publishing (2003).

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22 Above, p 81-82.



# THE IMPACT

OF THE CONSTITUTION ON TRADITIONAL LEADERSHIP





#### 4.1 *The recognition of traditional courts under the new democratic dispensation*

4.1.1 The Constitution recognises the institution, status and role of traditional leadership according to customary law, but subject to the Constitution. It recognises that a traditional authority observing a system of customary law may function, subject to any applicable legislation and customs.

4.1.2 During the certification proceedings, a contention that the final Constitution failed to establish traditional or customary courts (as required by the Constitutional Principle XIII) was dismissed. Under the final Constitution the customary courts qualify as 'any court established or recognised in terms of an act of Parliament'. However, because traditional rulers also exercise legislative, and especially, executive powers, it has been argued that, as judges, they are neither independent nor impartial, as required by FCs 156(2). In *Bangindawo and others v Head of Nyanda Regional Authority and others* 1998(3) SA 262 (Tk), the applicants used this argument to object to the Transkeian Regional Courts. The High Court dismissed the objection on the grounds that the usual common-law tests for independence and impartiality were not applicable. It held that, in Africa, although no clear distinction is drawn between the executive, judicial and legislative functions of government, no reasonable African would perceive bias on the part of traditional leaders merely because they exercise executive powers.

4.1.3 In *Mhlele v Head of the Tembuland Regional Authority; Feni v Head of Western Tembuland Regional Authority* 2001 (1) SA 574 (Tk); 2000 (9) BCLR 979 (Tk), the court disagreed with the ruling on Regional Authority Courts. The court maintained that some of the functions involved controversial public issues and might therefore lead to the perception of an unduly close relationship with the executive. In paragraphs 616 – 7 and 1017 – 18 the court held that traditional leaders do not enjoy the security of tenure guaranteed to other judicial officers by section 177 of the final Constitution. The *Mhlele* case did not overrule the *Bangindawo* case, which was concerned only with jurisdiction over civil matters. According to

Bennet<sup>23</sup>, this result is correct because in civil cases, the question of compatibility with the Constitution must be weighed against consideration of access to justice. To annul the judicial powers of traditional rulers would be to deprive the rural population of local courts in which they usually litigate, their disputes. The *Mhlele* case confirmed the South African Law Reform Commission's opinion on traditional courts and the judicial function of traditional leaders in its discussion paper<sup>24</sup> with regard to the criminal jurisdiction of traditional courts. The Commission favoured the preservation of traditional courts. The Commission argued that the perception of impartiality and independence were less important than the fact of freedom from executive interference. This is a problem that is especially acute in criminal cases, where presiding officers could scarcely be considered impartial when, at one and the same time, they are "complainant", "prosecutor" and "judge"<sup>25</sup>.

4.1.4 According to a survey by Barbara Oomen<sup>26</sup> in the Sekhukhune area, members of the community in that area prefer customary courts compared to the mainstream courts or magistrates' courts.<sup>27</sup> Sixty-five percent of the respondents in the jurisdiction of "Courts of Chiefs" are in favour of having their disputes adjudicated in the traditional courts. It shows that people in the rural areas are comfortable with the way in which cases are dealt with because they are dealt with and finalised speedily. The other issue that makes the majority of people favour the traditional courts is the language used, which is well known in the traditional community concerned.

4.1.5 Some of the common disputes that are dealt with by the traditional courts are theft, common assault, malicious damage to property, land issues, domestic violence, witchcraft, marriage matters and *crimen injuria* (insults), while the most common civil disputes involve damage to crops by stray animals, impregnating another man's

23 T Bennet and Murray, above p 127

24 82 of 1999: Project 90: Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the judicial functions of traditional leaders.

25 Para 42 of the SALR paper above

26 Oomen, above p 205.

27 Oomen, above p 205.

# Policy Framework on the Traditional Justice System under the Constitution

wife, impregnating a young girl or woman, and disputes over lobola payments.

- 4.1.6 In the Sekhukhune area, one of the magistrates indicated that it is the most boring place to work because people solve their cases at home.<sup>28</sup> He mentioned that he only has one session a week when he deals with assault and theft and, like his colleagues, he refers cases deemed to be customary law issues, land disputes, family fights and insults to the "Court of Chiefs". A survey undertaken in Sekhukhune illustrates the following:<sup>29</sup>

Subject	Kgosi	Magistrate
Marriage matters	53	57
Family matters	71	22
Petty theft	67	19
Maintenance cases	19	77
Land issues	62	35
Assault/bodily harm	49	38
Theft other than petty theft	9	90
Witchcraft	68	35

## 4.2 The impact of the Constitution on the institution of traditional leadership

- 4.2.1 With the advent of the new constitutional order it was realised that it would only be possible to transform the legislation existing on 27 April 1994 over a period of time. Because a comprehensive rationalisation process would be necessary in respect of existing legislation, both the Interim Constitution and the final Constitution (in preparation of this rationalisation process) contained the following important transitional provisions:

- (a) Laws existing at the commencement of these Constitutions would continue to apply in the

geographical areas in which they applied before the Interim Constitution and the final Constitution took effect until they are amended or repealed by a competent authority.<sup>30</sup>

- (b) Where necessary, the administration of existing laws would be assigned to the appropriate authorities at the appropriate levels of government, as envisaged by both constitutions.<sup>31</sup> (The reason for this particular mechanism emanates from the fact that both the Interim Constitution and the final Constitution provided for legislative authority to be vested at different levels of government. The legislative competences of the national and provincial levels of government are clearly determined.<sup>32</sup> Such a concept was not well defined in the pre-1994 constitutional dispensation. Moreover, the former homelands also had their own legislation, which continued to apply after 27 April 1994 and had to be administered at the appropriate level of government, and not necessarily in the area where it had applied before.)
- (c) Every court, including courts of traditional leaders, existing when the new Constitution took effect, would continue to function and to exercise jurisdiction in terms of the legislation applicable to them, subject to any amendment or repeal of that legislation.

28 Oomen, above p 207.

29 Oomen, p 206.

30 Section 229 of the Interim Constitution and item 2 of Schedule 6 to the final Constitution.

31 Section 235(8) of the Interim Constitution and item 14 of Schedule 6 to the final Constitution.

32 Schedule 6 to the Interim Constitution and Schedules 4 and 5 to the final Constitution.



# CHALLENGES

SOUGHT TO BE ADDRESSED BY THE POLICY FRAMEWORK





## 5.1 Introduction

Despite its continued existence under the democratic era the traditional court dispensation continues to experience constitutional and operational challenges. Allegations of abuse of the conferred judicial authority by some traditional leaders, patriarchal stereotypes and the prevalent exclusion of women in the traditional court structures and bias against women litigants or parties to the proceedings continue to gloom the picture over these courts. Challenges arising from the conflicts of the system with some of the constitutional values overlap with the formal judicial system, fragmentation and inconsistencies and lack of enforceability of traditional courts' decisions are highlighted in the succeeding paragraphs. The following case studies illustrate this:

## 5.2 Embracing the new constitutional values

5.2.1 The commencement of the new constitutional dispensation, among others, abolished the principle of parliamentary sovereignty/supremacy. This watershed event also heralded a dispensation that recognised South Africa as a sovereign, democratic state founded on, among others, the following values:

- Human dignity, the achievement of equality and the advancement of human rights and freedom.
- Non-racialism and non-sexism.
- Supremacy of the Constitution and the rule of law.

5.2.2 Against this backdrop, the Constitution is the supreme law of the Republic and any law or conduct that is inconsistent with it is invalid.<sup>33</sup>

5.2.3 The Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all the people in the country and affirms the democratic values of human dignity, equality and freedom, providing that the state must respect, protect, promote and fulfil the rights contained in the Bill of Rights.<sup>34</sup>

5.2.4 The greatest challenge facing the institution of traditional leadership is the alignment of some of the practices of traditional leadership emanating from cultures and customs with the values underpinning the Constitution, such as equality and the eradication of unfair discrimination based on, in particular race, gender and age. For instance, the provision in the Black Administration Act, that requires traditional leaders to hear civil disputes between blacks<sup>35</sup> and criminal cases where the accused is black, amounts to racial discrimination. The role and functions of traditional leadership in the administration of justice should be seen against this background.

5.2.5 A further important issue on the jurisdiction of traditional courts is corporal punishment. Traditional courts still regularly administer this sanction in forms varying from few lashings to ferocious beatings.

## 5.3 Exercise of judicial functions by traditional leaders

5.3.1 The Constitution requires judicial officers appointed in any court to be appropriately qualified women or men who are fit and proper persons. The appointment, promotion, transfer, dismissal of, or disciplinary steps against judicial officers must take place without favour or prejudice. Before judicial officers perform their functions, they must take an oath or affirm, in a manner prescribed by the Constitution, that they will uphold and protect the Constitution.

5.3.2 Although traditional leaders were assigned judicial functions under the Black Administration Act, they do not necessarily fall under the definition of judicial officer envisaged by the Constitution. Judicial officers are judges and magistrates appointed in terms of the Constitution and the Magistrates' Act.<sup>36</sup> Traditional leaders are not appointed to any judicial position, but ascend to the throne. Therefore, the requirements relating to the qualifications, being fit and proper persons, and the

33 Section 2 of the Constitution.

34 Section 7 of the Constitution.

35 Section 35 of the Black Administration Act defines "black" as a member of an aboriginal race or tribe of Africa.

36 Act 90 of 1993.



promotion and dismissal of judicial officers do not necessarily apply to traditional leaders.

## 5.4 *Fragmentation of the traditional justice system*

5.4.1 The 1993 Constitution provided for the assignment of the administration of a law to a province if that law, among others, fell within the functional area that was specified in Schedule 6 to the 1993 Constitution. “Traditional authorities” and “indigenous law and customary law” were among these functional areas. A number of laws pertaining to the administration of justice was assigned to the respective provinces.

5.4.2 In order to have a single set of laws applying nationally (as opposed to former RSA laws and former homeland laws dealing with the same subject matter applying in different areas of the country), soon after 1994 most national departments promoted legislation to rationalise the laws for which they were responsible (ie former homeland legislation and former RSA legislation). This rationalisation of legislation invariably repealed the legislation of the former homelands, which still applied in those areas, and the corresponding RSA legislation was made applicable throughout the country. However, not surprisingly, this did not happen in the case of legislation dealing with the role and functions of traditional leaders in the administration of justice. This was due to the complexity and sensitivity of the issues in question, as well as the fact that the whole issue of aligning the institution of traditional leadership with the new constitutional dispensation would require a policy review process that would culminate in new legislation.

5.4.3 In order to ensure that the different laws that existed on 27 April 1994 were dealt with at the appropriate level of government, as contemplated by the Interim Constitution, the administration of numerous laws was either assigned upwards (to the national level of government) or downwards (to the provincial level of government). In this process, the administration of all the laws regulating the role and functions of traditional leaders in the administration of justice, which were, at the time, still administered at provincial

level, was temporarily assigned to the national level of government under the responsibility of the Minister of Justice. Shortly after that, the administration of a number of these statutes was reassigned to the various provinces. A number of statutes also remained under the administration of the Minister for Justice and Constitutional Development.

5.4.4 Many of the above-mentioned statutes regulating the role and functions of traditional leaders in the administration of justice, which are now administered by the various provinces, have their origin in the dispensation created by sections 12 and 20 of the Black Administration Act and other legislation passed during the homeland era. There are, however, deviations from the Black Administration Act. In certain provinces judicial authority vests in senior traditional leaders, while in others it vests in the headmen and, in others in traditional councils.

5.4.5 For instance, in North West (in the former Bophuthatswana), the authority to deal with criminal and civil matters is conferred on structures (tribal authorities) and not on individual traditional leaders.<sup>37</sup> Appeals from traditional structures go to a special court in each magisterial district, consisting of a magistrate and two additional members (experts from the communities in the district). In the former Ciskei, chiefs and headmen have automatic jurisdiction to deal with criminal and civil matters arising from customary law and custom by virtue of their appointment as traditional leaders. Appeals from traditional leaders go to regional authorities, on which kings and queens have representation.

## 5.5 *Institutional challenges*

5.5.1 Despite considerable support for a traditional form of justice, there are people who are less positive about traditional courts, saying that they have not lived up to their expectations, especially in the new dispensation. Allegations of abuse of the conferred judicial authority by some traditional leaders, patriarchal stereotypes, the prevalent exclusion of women in the traditional

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37 Bophuthatswana Courts Chiefs Act, Act 2908, 1979.





court structures and bias against women litigants or parties to the proceedings continue to cast gloom over the picture of these courts. In a case where a woman married another woman(man) in order to bear children for the husband, she was reprimanded that, as a married woman, she should not talk while standing.

5.5.2 Although the institution of traditional leadership and traditional courts formed one of the institutions used by the apartheid government to maintain a separate system for blacks, they were not funded adequately by the government. They relied on tribal levies and fines imposed by the tribal courts, as they were called, to sustain themselves. On the other hand, the Commissioners' courts were funded by the state and the white commissioners who supervised the traditional leaders received additional remuneration in the form of an inconvenience allowance. The fact that the system continues to function despite the lack of adequate official funding is testimony to the way in which the communities embraced the system. It was only after the recognition of traditional leadership by the new constitutional order that government provided resources for it, mainly from the provincial governments that fulfil an administrative role. Of importance are the accounting responsibilities that came with the funding. This is an aspect that was absent during the apartheid era. There were no requirements to establish a proper accounting system for the receipt and use of tribal levies, and the salaries of "Chiefs", headmen and tribal police were prioritised above community interests. No form of remuneration is given for participation in the proceedings of the traditional courts. It is perceived to be a community service.

5.5.3 No training programmes were introduced to prepare traditional leadership for the new constitutional order. The values and systems brought about by the democratic order were foreign to the cultural way of doing things. The handling of public funds in the form of tribal levies was taken away from traditional leaders and funding was provided by organs of state. Governance aspects were coordinated through the newly established Houses of Traditional Leaders. The institution was not provided with skilled personnel to provide support during the transition to democratic rule. Some of the persons who

volunteered their services in the traditional courts could not be absorbed into the public service due to a lack of the required qualifications.

5.5.4 Corporal punishment, which was the most common type of sentence meted out by the traditional courts, was abandoned for being inconsistent with the right to human dignity in the Bill of Rights, and the use of tribal police as peace officers was also done away with as it overlapped with the functions of the police, who are statutorily empowered to effect arrests. The weakening of the enforcement mechanisms without the introduction of alternative mechanisms that were in line with the Constitution, reduced the effectiveness of the traditional courts.

5.5.5 The Constitution introduced institutions such as the South African Human Rights Commission, the Commission on Gender Equality and the Public Protector with constitutional mandates to investigate any violation of rights in the Constitution. These institutions, to some extent, provided services relating to conflict resolution and mediation of conflicts arising from the Bill of Rights and competed with traditional courts in some respects.

5.5.6 There is, moreover, an overlap in jurisdiction between traditional courts and magistrates' courts in respect of certain matters, for instance petty theft and crimen injuria, and this leads to forum-shopping. This has further weakened the role of the traditional courts as custodians of good morals and culture.

5.5.7 The following case studies illustrate some of the challenges and anomalies which still exist in the traditional justice system:

(i) A dispute arose in August 1997 in a village called Mononono among the Bakgatla-ba-Kgalefa tribal authority which falls under Kgosi Pilane's jurisdiction. A woman lost her husband and she objected to the observance of the Bakgatla mourning custom which requires her to sprinkle a herb called 'mogaga' on her pathway each time she left her yard. She refused to do so because of her religious beliefs which do not recognise this custom. She was brought before the authority and sentenced to confinement to her yard for a period of 12 months. The widow in Mononono

# Policy Framework on the Traditional Justice System under the Constitution

village was aware that as she was living among the Bakgatla-ba-Kgalefa, she was expected to subscribe to the culture of Bakgatla. However, the Constitution of South Africa makes provision for individuals to exercise their own rights. This problem is complex because it involves two different belief systems. The widow found herself in a dilemma because of her husband's culture and her own religious beliefs. To add to the complexity of the matter, the Bakgatla tribal authority sentenced her to confinement to her yard for 12 months without taking cognisance of her religious beliefs.<sup>38</sup>

- (ii) A case study was done by Barbara Oomen in the area of Sekhukhune.<sup>39</sup> It examined a dispute decided at Sekhukhune at Mamone kgoro between two families, the Magakalas and the Monagedis. In this case, the husband from the Magakalas threatened to kill his wife. The wife's family took a letter to the senior traditional leader's kraal, where it was agreed that the two families would follow the procedure in bringing the case to the senior traditional leader's kraal. The discussion suggested that the man should respect his wife; he should not assault his wife and they should live in peace. In the end Mr Magakala accepted his wrongdoings. In imposing a sanction,

there was disagreement among the councillors. Some were in favour of corporal punishment, while some were in favour of a fine.<sup>40</sup>

- (iii) A third case study, also by Barbara Oomen, examined the case of Jerry Lethamaga. Mr Lethamaga was a supporter of Mr Mohlahla, who had fought with the chief's mother over the throne for the past number of years. As his headman, he started allocating sites in Mokwete, where there was also a headman appointed by the chief. In May 1999, Mr Lethamaga was dragged to the kgoro, beaten up and tied to the thorn tree for the red ants to punish him further. He was also fined R3 500 and the people to whom he had allocated the sites were required to leave the village. Mr Lethamaga opened a case against the Momone.<sup>41</sup>

- 5.5.8 From the above case studies, it is evident that the policy framework should seek to address specific challenges in the traditional courts, such as the types of cases opened, the sanctions imposed, the use of alternative dispute resolution methods and restorative justice, gender equality, and corporal punishment.

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38 An unreported case of Elizabeth Tumane and the Human Rights Commission vs Bakgatla-ba-kgalefa and kgosi Nylala Pilane. Case No. 618 of 1998 heard in the Bophuthatswana Provincial Division of the High Court of South Africa

39 Oomen, p 209 – 210.

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40 Oomen, p 4.

41 Oomen, p 4.



# POLICY CONSIDERATIONS





### **6.1 Cultural values enhancing social cohesion, peace and harmony**

6.1.1 The role of the institution of traditional leadership in the administration of justice is not confined purely to dispute resolution. This role is traditionally twofold in nature, namely

- (i) a proactive role to promote social cohesion, co-existence, peace and harmony; and
- (ii) a reactive role to resolve disputes that have arisen.

6.1.2 Cultural values, deriving from customary law and custom are unique to traditional communities. Inherent in these values are customary practices that seek to and do in fact promote social cohesion, co-existence, peace and harmony, sometimes known as ubuntu, by inculcating a deep respect for law and order/orderliness, on the one hand, and authority, on the other. The institution of traditional leadership has always been the custodian of these values and must continue to do so. It plays a crucial role in promoting them, transforming them and developing them, where necessary. The institution of traditional leadership is destined to play a crucial role in the transformation or development of these values and practices.

6.1.3 There are instances of real or perceived contradictions between some of these values and practices and the values enshrined in the Constitution. These contradictions are indicative of the need to further develop customary law to be consistent with constitutional values. The Constitution enjoins all courts, including traditional courts, tribunals or forums, when interpreting any legislation and when developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.

6.1.4 The following are areas in respect of which the institution of traditional leadership or traditional leaders can fulfill a proactive role in promoting social cohesion, co-existence, peace and harmony in their areas of jurisdiction:

- (i) General practices and cultural events that are known to build and enhance solidarity, such as mass gatherings to pray for peace or rain or conduct cleansing ceremonies after a tragedy has befallen a community or observance

of particular days and heritage sites to commemorate historic events (e.g. Shaka's Day).

- (ii) Promotion of family values, responsible parenting and moral regeneration, in conjunction with the relevant social sector governance structures.
- (iii) Crime prevention, in conjunction with the SAPS and other law enforcement structures, for instance Community Police Forums and Community Safety Forums.

6.1.5 The institution of traditional leadership could further play a role in the implementation of policies and programmes which have a bearing on the administration of justice. For example in programmes such as the Victims Charter, the institution of traditional leadership may be capacitated to empower traditional communities through awareness campaigns to exercise their rights and privileges contained in the Charter.

### **6.2 The traditional justice system suited for the South African constitutional dispensation**

6.2.1 The traditional justice system should promote and preserve the African values of justice, which are based on reconciliation and restorative justice. The Constitution protects cultural rights and the institution of traditional leadership. Traditional leaders, in particular, are the custodians of this culture and tradition. The allocation of a role and functions to the institution of traditional leadership must be done in a manner that preserves the values on which the institution of traditional leadership is founded.

6.2.2 Traditional courts differ from formal courts in that they are readily accessible, they serve to restore and bind the relationship between traditional people, and are highly visible, with a transparent decision-making process in which there is community participation. Formal courts, on the other hand, follow complex legal rules and focus on retribution.

6.2.3 The essence of the traditional justice system lies in the participation of communities in resolving their disputes. This differs from the formal judicial system where disputes are deferred to the courts to be adjudicated by judicial officers who pass arbitrary judgments. The traditional

# Policy Framework on the Traditional Justice System under the Constitution

methods of dispute resolution were not litigious in the courts as they are understood in the Western concept of justice. Communities met in the *makgotla* to resolve their disputes, and the chief, as Sachs puts it, invariably acted as spokesman for his councillors, who, in turn, sought to uphold and reinforce the established norms of the tribe. Sachs notes further as follows:

“In this context, the good chief was reckoned not by the terror he could inspire or magnanimity he could display, but by his skill in articulating the sense of justice (just-ness) of a relatively homogeneous community, which involved his applying universally accepted rules and precedents to particular disputes in a manifestly appropriate way”.<sup>42</sup>

- 6.2.4 The Constitution enshrines the “right of everyone to have any dispute that can be resolved by the application of the law in a fair and public hearing in a court or, where appropriate, another independent and impartial forum”. In terms of the Constitution, any form of court, tribunal or forum may be established to resolve particular disputes, provided that such a court, tribunal or forum meets the constitutionally entrenched requirements of independence and impartiality.
- 6.2.5 Traditional leadership has been administering justice in traditional communities for centuries. Before the colonial presence, civil and criminal disputes were resolved by applying indigenous law in the communal context of *inkundla* or *lekgotla*, presided over by a traditional leader. Although decisions were made through democratic deliberations, the system fell short of true, holistic democracy as understood in modern thought, largely due to the fact that women in certain cultural practices were not allowed to attend and debate within the *lekgotla*.<sup>43</sup>
- 6.2.6 National legislation should affirm the traditional institutions or forums sitting as traditional courts at which traditional leaders exercise their role and functions relating to the administration of justice. The envisaged

legislation should provide for the procedures to be followed by the traditional courts.

- 6.2.7 The policies proposed in this policy framework seek to affirm these traditional methods of administering justice inherent in the values of the indigenous/traditional communities. This system is not a substitute for the formal judicial system. It complements and supports the judicial system. Therefore one should guard against interpreting the principles of the traditional justice system in the context of due process as applied or understood in the retributive justice system. For example, an accused person, as defined in the Criminal Procedure Act, 1977, has a different meaning to an accused person in the context of the traditional justice system. In this context an accused person in the criminal justice system is entitled to legal representation, while an accused person in the traditional justice system is not.
- 6.2.8 These policies are intended to increase access to justice for social groups that are not adequately or fairly served by the formal judicial system – thus reducing the cost and time taken to resolve minor disputes. The greater the reflection of community values in the laws and dispute resolution processes, the greater the respect the process will get from members of the traditional community.

## 6.3 The procedures followed in the traditional justice system

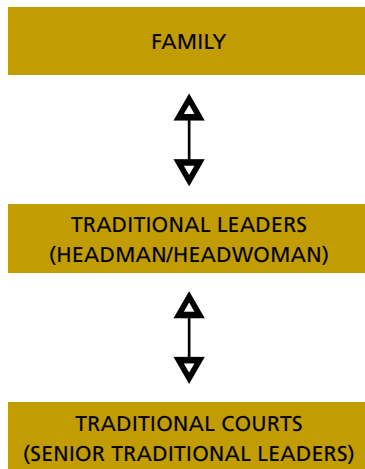
- 6.3.1 The traditional justice system, commences at the family or local level. The elders in a family would attempt to resolve the dispute. If they are unable to do so, they then escalate it to the local level (headman or headwoman). Dispute resolution at the family or local level is regulated by customary law. Taking a matter to the traditional court is usually seen as a last resort, and is only done after the initial attempts to resolve the dispute have failed.

42 A Sachs, Justice in South Africa, Berkeley, Los Angeles: University of California Press, 1973 p 96

43 Justice Moseneke at the Magistrates’ Conference of 15-16 September 2007.



6.3.2 The structure is generally as follows:



6.3.3 Generally a matter will only be taken to the traditional court as a last resort and only after other processes have failed. The complaint starts at the family level and if it is not resolved at that level it is referred to the level of headman/headwoman for resolution. If the matter is not resolved by the headman/headwoman the matter is referred to the senior traditional leader who convenes a traditional court. Complaints and disputes are heard at the traditional authority offices, either in the chief's office or in the traditional authorities' boardroom. These complaints are heard informally and generally involve discussions between all the affected parties with the inclusion of the traditional leader and other members of the traditional council. They adopt dispute resolution mechanisms and seek to reach an agreement between all the parties. If no agreement is reached, it becomes a formal hearing before a traditional court.

6.3.4 The court sitting is open to members of the community, who are permitted to comment and asked questions to either party. At the end of the trial the traditional leader pronounces the decision of the traditional court. In areas where senior traditional leaders fall under a king or a queen, there is a further right of appeal against a decision of such a court to the king or queen.

6.3.5 Dispute resolution at a family and headman/headwoman level is regulated entirely by customary law. The envisaged legalisation will therefore only regulate dispute resolution once the dispute has been referred to a traditional court.

#### 6.4 *Affirming the principles of restorative justice within the traditional justice system*

6.4.1 Throughout history, traditional leaders have had dispute resolution mechanisms in place, which have been successful in resolving disputes in rural communities. The primary aim of the traditional courts is to achieve reconciliation between the parties.

6.4.2 While it is true that a traditional court, when adjudicating a dispute, hands down a "verdict" (i.e. finds someone guilty or innocent), it is also true that the ultimate objective of the proceedings is dispute resolution and the restoration of a healthy relationship between the parties. Elements of restorative justice, which appear to be an innovation in the formal justice system, have existed since time immemorial in the traditional justice system.

#### 6.5 *Provision of reasonable resources for the exercise of the role and functions of the traditional leaders in the administration of justice*

6.5.1 Unlike formal courts where magistrates and judges are appointed to deal specifically with judicial functions, the institution of traditional leadership has a range of other functions emanating from culture and custom, which are assigned to it by legislation. Unlike judicial officers, traditional leaders are not appointed to their positions by virtue of their competence or capability, but ascend to the throne through succession. They are not appointed, but are "born leaders".

6.5.2 Traditional leaders perform their role and functions closest to the community. The Traditional Leadership and Governance Framework Act enjoins government to provide the resources necessary for traditional leaders to perform their functions. It expressly provides that every organ of state must strive to ensure that the allocation of any role or function to the institution of traditional leadership is accompanied by the necessary resources, and must ensure that a proper accounting system is put in place. It is necessary to provide an environment that will facilitate and promote an integrated approach in the exercise of the role and functions that cut across all the spheres of government. Within this context, the

Department of Justice and Constitutional Development is expected to provide the capacity and resources that may be required specifically for the exercise of the role and functions of traditional leaders in the administration of justice, such as resources necessary to provide training and administrative support to the traditional courts.

### 6.6 The report of the South African Law Reform Commission on traditional courts and judicial functions of traditional leaders

6.6.1 In 1999, the South African Law Reform Commission conducted an investigation to consolidate the different laws and provisions governing traditional courts in order to bring them in line with the principles of democracy and other values underlying the Constitution. The investigation led to the publication of a discussion paper entitled *Traditional courts and the judicial functions of traditional leaders*. Extensive consultation at national, provincial and local level followed the publication of this discussion paper. This culminated in the publication of a final report and a draft bill.

6.6.2 The recommendations of the report can be summarised as follows:

- (i) The Department should enact legislation, establishing customary courts with civil and criminal jurisdiction, as prescribed in the Act, and a monetary ceiling should be prescribed in respect of their civil jurisdiction.
- (ii) The legislation should provide for the representation/participation of women in customary courts.
- (iii) Legal representation should not be permissible in proceedings before customary courts.
- (iv) Customary courts should be empowered to impose fines and suspended sentences.
- (v) Defendants in proceedings before customary courts should have the right to opt out and take their matters to the mainstream courts.
- (vi) Appeals against the decisions of customary courts should lie with the customary court of appeal

established to hear appeals of the courts of first instance.

- (vii) Judgments of courts of traditional leaders should be enforceable in the magistrates' courts.
- (viii) A registrar of customary courts should be established in each province to provide administrative support to the customary courts in the province.

6.6.3 While the report contains recommendations that seek to reform and strengthen the traditional court dispensation, some of its recommendations, in particular those that relate to the imposition of suspended prison sentences, appeals and keeping records of court proceedings, are based on Western courts and may be found to be inconsistent with the African values of justice.

### 6.7 Policy proposals

#### 6.7.1 Designation of traditional leaders to preside in traditional courts

6.7.1.1 The Minister should designate kings, queens and senior traditional leaders as presiding officers of traditional courts established within their areas of jurisdiction, defined in terms of legislation.

6.7.1.2 National legislation should provide for the designation to be in writing. The attendance of prescribed training programmes should be one of the requirements for a traditional leader to be designated to exercise his or her role and functions in the administration of justice. Similarly, legislation should provide for the withdrawal of the designation in cases of abuse of the given authority.

6.7.1.3 A headman/headwoman or a member of the royal family may also be designated as a presiding officer to perform functions of a senior traditional leader where the latter is unavailable.

#### 6.7.2 Accountability of traditional leaders in exercising their role and functions in the administration of justice

6.7.2.1 There are no mechanisms to ensure that traditional leaders exercise their role and functions in the administration of justice within the ambits of the law. The lack of a mechanism to ensure that traditional





leaders exercise their role and functions in the administration of justice in accordance with the requirements of the Constitution and the law, presents serious challenges. Just as national legislation requires judges and magistrates to take an oath of office before a senior judicial officer, so should national legislation require traditional leaders who have been designated as presiding officers to take an oath of office before a magistrate of the magistrate's court in the area of jurisdiction of the traditional court.

- 6.7.2.2 National legislation may provide for the development of a code of conduct for traditional leaders designated to exercise their role and functions in the administration of justice, and should prescribe measures to be taken against any breach of such ethical conduct by any traditional leader. Such measures may include recommendations to undergo a particular training programme or temporary or even permanent withdrawal of the designation if the breach is serious enough to warrant withdrawal.

**6.7.3 Attendance of a prescribed training programme by traditional leaders**

- 6.7.3.1 Traditional leaders should undergo a prescribed training programme on, among others, human rights, diversity and social context for eligibility to be designated as presiding officers in traditional courts. The training should also be extended to any headman, headwoman or any other member of the royal family who has been designated as a presiding officer.
- 6.7.3.2 Legislation should provide for such training programmes (in consultation with Justice College) as may be necessary for the efficient functioning of traditional courts. The training programme should include human rights education, diversity and social context training.

**6.7.4 Traditional courts to have jurisdiction in respect of civil disputes arising from customary law and certain criminal offences**

- 6.7.4.1 In the past, traditional courts were perceived to be competent to handle only disputes arising from customary practices. Customary law is an unwritten body of law and differs from area to area and among

the different traditional communities. Customary law is a body of practices, rules, institutions and values that are applied by a traditional community.

- 6.7.4.2 The distinction between disputes that emanate from customary law and those based on the common law is often not very clear. According to Sachs, the boundaries between custom and the common law have become soft and permeable. He states that although these terms are used separately in the Constitution, they can be seen as having been employed in a descriptive and fluid, rather than in a normative and categorical manner. He further observes as follows:

"Both need to be infused with the values of the Constitution. In the days of segregation they were kept apart, both conceptually and institutionally. Today there is no reason not to recognise and welcome the fact that each has osmotically and irreversibly seeped into and reinforced the other. Furthermore, both have been profoundly and irrevocably affected by legislation; if ever pure fonts of common law and customary law existed, they do not exist anymore today."<sup>44</sup>

- 6.7.4.3 The extension of criminal and civil jurisdiction to traditional courts may raise constitutional challenges. There is a fine distinction between crimes that arise from customary law and practices and those that arise from common law. Following research in this regard, there are no known customary law crimes separate from those that emanate from common law. This is so because customary law is unwritten and differs from one community to another. Although in civil law there are certain disputes which are based purely on customary law, it is necessary to determine the extent to which traditional courts may be given jurisdiction to hear civil disputes and common law crimes. The extension of criminal and civil jurisdiction should be consistent with the requirements of the Constitution.

- 6.7.4.4 It is necessary for traditional courts to be conferred with jurisdiction to hear less serious crimes and minor

44 A Sachs, Towards the Liberation and Revolution of Customary Law (published in Law in Africa (1999) by S Nthai)



## Policy Framework on the Traditional Justice System under the Constitution

civil disputes arising from customary law and common law crimes.

6.7.4.5 The jurisdiction of traditional courts should be in respect of offences and disputes that have arisen within the area of jurisdiction of the traditional court concerned.

6.7.4.6 The Minister should, from time to time, by notice in the Gazette, determine the maximum monetary value of disputes or claims to be heard by traditional courts. Serious disputes such as domestic violence and indecent assault should not be heard by traditional courts.

6.7.4.7 Because South Africa does not have a single, unified system of customary law, traditional courts are and will continue to be confronted with instances where they have to decide which of two or more different systems of customary law apply to the facts of the dispute in question. In practice such conflicts are usually resolved by consensus between the parties to a dispute. In the absence of any form of agreement between the parties to a dispute, the applicable law is the law of the area of the traditional community in question, or the law with which the case has its closest connection.

### 6.7.5 *Traditional courts to impose sanctions of a restorative (justice) nature*

6.7.5.1 Traditional courts should not impose any form of imprisonment or suspended sentence.

6.7.5.2 Historically, traditional leaders could impose severe sanctions such as banishment and expulsion from the community. However, these sanctions would not be justified under the Constitution.

6.7.5.3 Traditional courts may impose fines and or monetary compensation. In relation to traditional courts, the focus has always been on reconciliation and restorative justice rather than on punishment. A fine is seen as an acceptance of guilt and the fine is often self-imposed. Choudree cites the following example to illustrate the point:

"If a person realises that he is wrong, or it is apparent to him that his fellow lineage members deem him so, he may impose a fine of a sheep, goat or even a beast

on himself to indicate his contrition and to wash away his offence. This ukuzidla is sometimes also resorted to in the headman's court, constituting an admission of guilt. It is known as *imali yo ku zithandanzela* (money for begging for mercy) and is an indication to the court of the sincerity of repentance. In case where the guilty party imposes a fine on himself that the members of the *inkundla* regard as inadequate, they regard this as proof that he is not really sorry, and may increase the fine; on the other hand if he fines himself too heavily, they are likely to reduce it."<sup>45</sup>

6.7.5.4 Traditional courts should be empowered to impose innovative community sanctions, particularly sanctions that facilitate restorative justice, in keeping with the traditional role of traditional leadership. Historically, traditional leaders were charged with maintaining peace and harmony in their communities. The legislation regulating equality courts may give useful guidance in this regard, for instance, that an unqualified apology be given or an order that the accused person compensate the complainant for any damages caused, subject to certain limitations.

6.7.5.5 National legislation should empower the Minister to determine the maximum fine that may be imposed by a traditional court. The fine must be in monetary terms. Compensatory fines may be in the form of monies and livestock. Monies paid as fines should be part of state revenue and must be dealt with as prescribed.

### 6.7.6 *Service of notices and court processes and enforcement of decisions of traditional courts*

6.7.6.1 After the advent of the new democratic era the system of traditional police which was essential for the enforcement of decisions of traditional courts, collapsed. One of the functions of the traditional police was to serve notices, directing parties and members of the community to attend the courts and overseeing the enforcement of court decisions. In the absence of traditional police, it is necessary to provide capacity for the exercise of this function.

45 RB Choudree, Conflict Resolution Procedure among the indigenous societies of India, Australia and South Africa, LLM Dissertation, University of Durban-Westville, 1996, p 18



### 6.7.7 *Exclusion of legal representation in proceedings before traditional courts*

6.7.7.1 The rights to legal representation in the mainstream courts is pursuant to section 35 of the Constitution and this right is non-derogable. However, in the traditional justice system the right to legal representation does not find application as the traditional justice system is distinct from the ordinary courts envisaged by the Constitution (section 35(3)(c)). The purpose of traditional courts is not to convict, so much as to restore harmony and reconciliation. Sachs remarks as follows in this regard:

"I am not proposing that community courts in the rural areas, headed by traditional leaders and functioning according to the informal procedures of customary law, be given powers to send people to jail. Nor should they be permitted to impose corporal punishment. If anybody is threatened with loss of liberty, there must be due process of law, defence lawyers, charge sheets, a system of appeal and formal procedures. That is what the Constitution requires. But resolving family and neighbours' disputes and dealing with petty assaults and small thefts requires other techniques and processes."<sup>46</sup>

6.7.7.2 Legal representation should not be permissible due to the fact that traditional courts do not deal with technical legal questions that require lawyers to interpret.

### 6.7.8 *Decisions of traditional courts to be final and appeal to be allowed only against certain orders*

6.7.8.1 Judgments and decisions of traditional courts are usually based on consent by the defendant/accused person, and these decisions arrived at also translate into decisions of the community as everyone participates in the resolution of the disputes. The concept of appeal is consequently not a feature of the traditional court system. It was introduced by colonialism and apartheid systems through which the western form of government

monitored the traditional leadership. Appeals also protract the legal process.

6.7.8.2 In exceptional cases an appeal to the magistrate's court having jurisdiction should be allowed against orders for payment of an excessive fine or compensation.

### 6.7.9 *Review of decisions of traditional courts*

6.7.9.1 Decisions of traditional courts should be reviewable by the magistrate's court having jurisdiction and grounds for review should be provided for in legislation. These grounds should include absence of jurisdiction on the part of the court, gross irregularities, interest in the cause and bias.

### 6.7.10 *Mechanisms to be established for referral of cases from traditional courts to magistrates' courts and vice versa*

6.7.10.1 It should be possible for matters to be referred from a traditional court to the magistrates' court having jurisdiction if, in the opinion of the traditional court, the matter under consideration is so serious that it warrants referral to a formal court.

6.7.10.2 Similarly, a matter should be able to be referred to a traditional court by a senior or control prosecutor if, in the opinion of the senior or control prosecutor, the matter falls within the jurisdiction of the traditional court.

### 6.7.11 *The role of traditional courts in the criminal justice system*

6.7.11.1 Traditional courts should also be utilised as one of the diversion programmes where cases are diverted from the ordinary courts, applying the formal criminal justice system to be dealt with through the use of alternative dispute resolution or restorative justice.

6.7.11.2 The following are some of the advantages of restorative justice discussed by Schmid:<sup>47</sup>

- (i) Victim participation and increased satisfaction: The ordinary courts are perceived to be offender focused and the victim is not a central focus as crime is an offence against the state. The restorative

<sup>46</sup> Towards the liberation and Revolution of Customary Law, above p 14.

<sup>47</sup> Schmid, above p114 - 128

# Policy Framework on the Traditional Justice System under the Constitution

justice initiatives focus on both the victim and the offender.

- (ii) Acceptance of responsibility: The interaction between the offender and the victim provides an opportunity for the offender to admit his or her wrongs and accept responsibility for redressing them.

- (iii) Reduced recidivism: Studies done show that recidivism is reduced by a restorative justice approach, compared to the conventional criminal justice methods.

- (iv) Problem-solving approach to crime: The participation of the police in restorative justice conferences helps the police and other criminal justice agencies to understand the causes of criminal conduct in certain areas and how to approach them in their investigations.

- (v) Additional strength: Giving stakeholders in the criminal justice process the opportunity to participate and make decisions in restorative justice conferences is empowering. As Schmid puts it:

“It is a hallmark of restorative justice that decisions about how to deal with the aftermath of crime are reached after the views of the participants have been canvassed and considered. After this consideration and collaboration, a group decision emerges and is implemented. In this way, it is possible for larger groups (offenders, victims and police) to feel “ownership” of the conference outcome.”<sup>48</sup>

- 6.7.11.3 The institution of traditional leadership, through traditional courts, has a significant role to play in respect of incorporating and operationalising the restorative justice programme on dispute resolution.

## 6.7.12 Keeping of certain records

- 6.7.12.1 Legislation should provide for the nature and extent of records to be kept in the proceedings of traditional courts. The records kept should be adequate so as to

reflect the record of the decision and the reasons for the decision of the traditional court (in order to allow for the exercise of any right, for instance the rights to appeal against certain orders of the court or the right to seek review of the proceedings of the court).

## 6.7.13 Traditional leaders and traditional courts must advance the values and principles of the Bill of Rights

- 6.7.13.1 Through human rights education and social context training programmes, traditional leaders should be sensitised about gender equality in the handling of disputes relating to women and other vulnerable members of society, and the observance and respect of rights enshrined in the Bill of Rights.

- 6.7.13.2 Although there is some commitment in certain traditional communities to eradicate the past prejudices against women and their exclusion from participation in traditional court structures, there are still some instances of gross inequalities and gender insensitivities in the traditional court system.

- 6.7.13.3 Legislation regulating traditional courts should affirm the right to equality enshrined in the Constitution and should provide for programmes that will ensure the full participation of women, the youth and the disabled in the traditional courts.

## 6.7.14 The need for national legislation to ensure uniformity

- 6.7.14.1 The administration of justice is a national competence, implying that there are no functional areas relating to the administration of justice that are devolved by the Constitution to the provincial or local spheres of government. Provinces have legislative competence on matters relating to indigenous and customary law, subject to Chapter 12 of the Constitution, and have no legislative competence on matters relating to the administration of justice as provided for in Chapter 8 of the Constitution.

- 6.7.14.2 It is necessary to enact national legislation to ensure that uniform standards apply across the country.

48 Schmid, above p125



## 6.8 Transitional arrangements

6.8.1 Transitional arrangements are necessary to give effect to the traditional court dispensation proposed in this policy framework and these will be dealt within the envisaged legislation. The following are areas in respect of which transitional arrangements are necessary.

- (i) Application of different statutes in different provinces:

6.8.1.1 Due to the assignment of laws of former homelands to various provinces in 1994, different statutes have, to date, been applicable in various parts of the Republic. Some of the provinces have repealed the provincial legislation assigned to them, while legislation still applying in certain parts of Mpumalanga and the Eastern Cape, namely the KwaNdebele Traditional Hearings of Civil and Criminal Cases Act, 1984, and the Regional Authorities Courts Act, 1982, were never assigned to Mpumalanga and the Eastern Cape. A single Act of Parliament regulating the role and functions of traditional leaders in the administration of justice is required. This will require the repeal of all the statutes which are administered by the national government and any other provincial statutes which regulate the role of traditional leadership in the administration of justice and which have not been repealed by the respective provincial legislatures. There is a need to coordinate the repeal of these different pieces of legislation to allow for the smooth phasing out of the existing legislative framework and to usher in a single Act of Parliament that will be applicable throughout the Republic. Provinces should also be afforded reasonable time to repeal their statutes in this regard.

- (ii) Pending cases

6.8.1.2 When the repeal of the different statutes, providing for the role and functions of traditional leaders in the administration of justice takes effect, it will be necessary to allow traditional courts to finalise part heard matters in terms of the laws which existed when these matters first commenced. Appeals which are pending or which have not been given effect to when the new traditional court dispensation comes into effect should be proceeded with under the legislation which applied before the commencement of the new dispensation.

- (iii) Designation of traditional leaders as presiding officers of traditional courts, training and oath of office

6.8.1.3 In order to ensure continuity, traditional leaders whose conferment to hear civil and criminal cases has not been revoked in terms of the provisions of Black Administration Act, 1927, or any other law, should be allowed to continue to hear disputes as presiding officers until they are designated in terms of the new dispensation. These traditional leaders should undergo the prescribed training and take the oath or make an affirmation of office in order to be eligible to continue in office. These traditional leaders should be given reasonable time within which to undergo training and take the oath or make an affirmation. This period should be limited to a prescribed date, affording a reasonable period to comply with the requirements of the new dispensation.

# CONCLUSION





## 7.1 *The development of legislation on traditional courts*

7.1.1 This policy framework seeks to revive and strengthen the traditional justice value system which is vital in attaining the goal of access to justice. The document is the outcome of extensive research and consultation with stakeholders in the administration of justice within and beyond the Republic. It lays the basis for the proposed new legislation which is intended to give effect to the provisions of the Traditional Leadership and Governance Framework Act, which enjoins the Department, as an organ of state, to allocate roles and responsibilities to the institution of traditional leadership in the administration of justice. A Bill on Traditional Courts will be promoted in Parliament to give effect to the policy considerations contained herein.

## 7.2 *The consultation process*

7.2.1 The national Conference of Magistrates hosted by the Department in September 2007 which was attended by more than 500 delegates, including senior judges, magistrates and Ministers and judicial officers from selected SADC countries, discussed in one of its commissions, the importance of the role of traditional leadership in promoting social cohesion and dealing with dispute resolution. The Conference viewed the policy and legislative initiatives undertaken through this process as invaluable lessons that may assist in building social cohesion and restitution in post conflict countries.

7.2.2 The Conference, which was the beginning of an intense dialogue on the role of traditional courts, was followed by further consultations when the Department met with the National House and Provincial Houses of Traditional Leaders to discuss policy initiatives that should form the basis of the envisaged legislation. Consultative workshops with representatives of the traditional leaders in the various provinces were held as indicated hereunder:

- (i) On 7 November 2007 in Mafikeng (at which representatives of the traditional leaders in the North West, Gauteng and the Northern Cape were present);

- (ii) on 9 November 2007 in Nelspruit (at which representatives of the traditional leaders in Mpumalanga were present);
- (iii) on 15 November 2007 in Polokwane (at which representatives of the traditional leaders in Limpopo were present);
- (iv) on 19 November 2009 in East London (at which representatives of the traditional leaders in the Eastern Cape were present);
- (v) on 21 November 2007 in Harrismith (at which representatives of the traditional leaders in the Free State were present);
- (vi) on 23 November 2007 in Durban (at which representatives of the traditional leaders in KwaZulu-Natal were present); and
- (vii) on 12 – 13 December 2007 in Gauteng (at which representatives of the National House of Traditional Leaders and a representative of each Provincial House of Traditional Leaders met with the Department to discuss a consolidated report from the comments made at the provincial workshops, as well as a draft Bill on Traditional Courts).

7.2.3 The National House of Traditional Leaders was represented at each of the consultative workshops by members of the Constitutional Development Committee of the National House of Traditional Leaders. Each consultative workshop was opened formally by the Chairperson of the Provincial House of Traditional Leaders in question. Besides representatives of the traditional leaders in each province, representatives of the judiciary, prosecuting authority, the Chapter 9 Institutions and the South African Association of Local Government (SALGA) were also invited, attended and participated in the proceedings. The components of the provincial departments responsible for traditional affairs also attended and participated in the workshops.

7.2.4 The consultative workshops took the following form:

Welcome and opening by the Chairperson of the Provincial House of Traditional Leaders

- Presentation by the Department on the following:

# Policy Framework on the Traditional Justice System under the Constitution

- The purpose of the consultative workshop.
- the process leading to the finalisation of a policy and legislative framework for the traditional justice dispensation suited to the Constitution, as set out in Chapter 1.
- challenges facing the current traditional justice system, as set out in Chapter 5.
- areas identified for possible policy intervention, as set out in Chapter 6.

Break-away groups (commissions), where the areas identified for policy intervention were discussed in detail.

Detailed report backs/feed back by the individual commissions and further general discussions in plenary.

## 7.2.5 The purpose of the consultative workshops was –

- to obtain the views and participation of roleplayers, particularly the traditional leaders, in the formulation of policy and the promotion of legislation, emanating from the policy, relating to the role and functions of traditional leaders in the administration of justice;
- to propose solutions to address challenges facing the traditional justice system;
- to affirm the importance of the role and functions of the institution of traditional leadership in the administration of justice; and

- to elicit views on areas requiring policy consideration.

7.2.6 After each consultative workshop participants were requested and encouraged to consult further within the structures supporting the system of traditional leadership in their areas and to submit further considered comments on the issues in question, to the Department.

7.2.7 From the views given at the workshop and submissions received thereafter, there was apparent consensus on numerous areas relating to the traditional court system, among others, the designation of traditional leaders as presiding officials of traditional courts to be based on the attendance of a prescribed training programme, the development of a code of conduct for designated traditional leaders in the exercise of functions relating to the administration of justice, the provision of an appeal system within the hierarchy of the institution of traditional leadership, the exclusion of legal representation in proceedings before traditional courts and the implementation of programmes to promote gender equality. There were, however, a few divergent views between the provinces, for example some provinces felt that appeals must be processed through the magistrates' courts.

7.2.8 All views and submission made during and after the consultative workshops with the institution of traditional leadership have been taken into consideration in policy proposals contained in the policy framework.





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# Policy Framework on the Traditional Justice System under the Constitution

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# **Policy Framework on the Traditional Justice System under the Constitution**



**the doj & cd**

Department:  
Justice and Constitutional Development  
**REPUBLIC OF SOUTH AFRICA**

REPUBLIC OF SOUTH AFRICA

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# TRADITIONAL COURTS BILL

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*(As introduced in the National Council of Provinces (proposed section 76), on request of the Minister of Justice and Constitutional Development; explanatory summary of Bill published in Government Gazette No. 34850 of 13 December 2011) (Bill originally introduced in National Assembly as Traditional Courts Bill [B 15—2008], and withdrawn on 2 June 2011)*  
*(The English text is the official text of the Bill)*

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(SELECT COMMITTEE ON SECURITY AND CONSTITUTIONAL DEVELOPMENT)

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# BILL

**To affirm the recognition of the traditional justice system and its values, based on restorative justice and reconciliation; to provide for the structure and functioning of traditional courts in line with constitutional imperatives and values; to enhance customary law and the customs of communities observing a system of customary law; and to provide for matters connected therewith.**

## PREAMBLE

**SINCE** the Constitution recognises the institution, status and role of traditional leadership, including a role in the administration of justice, as well as the application of customary law, subject to the Constitution;

**AND SINCE** the traditional justice system, which is based on customary law, forms part of the legal system of the Republic;

**AND SINCE** the Traditional Leadership and Governance Framework Act, 2003, recognises a role for the institution of traditional leadership in the administration of justice;

**AND SINCE** it is necessary to transform the traditional justice system, in line with constitutional imperatives and values, including the right to human dignity, the achievement of equality and the advancement of human rights and freedoms;

**AND SINCE** it is necessary to have a single statute applicable throughout the Republic, regulating traditional courts,

**B**E IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

## ARRANGEMENT OF SECTIONS

### *Sections*

1.	Definitions	5
2.	Objects of Act	
3.	Guiding principles	
4.	Designation and training of traditional leaders	
5.	Settlement of certain civil disputes of a customary law nature by traditional courts	10
6.	Settlement of certain criminal disputes by traditional court	
7.	Nature of traditional courts	
8.	Sessions of traditional court	
9.	Procedure of traditional court	
10.	Sanctions and orders that may be given by traditional court	15
11.	Enforcement of sanctions of traditional courts	
12.	Order of traditional court final	
13.	Appeals to magistrates' courts	
14.	Procedural review by magistrates' courts	

15.	Oath or affirmation of office	
16.	Incapacity, gross incompetence or misconduct of presiding officers	
17.	Assignment of officers to assist traditional courts	
18.	Record of proceedings	
19.	Transfer of cases	5
20.	Offences and penalties	
21.	Regulations	
22.	Delegation of powers	
23.	Transitional provisions and repeal of laws	
24.	Short title and commencement	10
	Schedule	

## Definitions

1.	In this Act, unless the context indicates otherwise—	
	“ <b>Black Administration Act</b> ” means the Black Administration Act, 1927 (Act No. 38 of 1927);	15
	“ <b>Constitution</b> ” means the Constitution of the Republic of South Africa, 1996;	
	“ <b>Department</b> ” means the Department of Justice and Constitutional Development;	
	“ <b>Director-General</b> ” means the Director-General of the Department;	
	“ <b>headman or headwoman</b> ” means a headman or headwoman contemplated in the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by the Traditional Leadership and Governance Framework Act, and includes a person who is appointed to act or deputise for a headman or headwoman, as is contemplated in sections 13, 14 and 15 of the Traditional Leadership and Governance Framework Act;	20
	“ <b>king or queen</b> ” means a king or queen contemplated in the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by the Traditional Leadership and Governance Framework Act, and includes a person who is appointed to act or deputise for a king or queen, as contemplated in sections 13, 14 and 15 of the Traditional Leadership and Governance Framework Act;	25
	“ <b>Minister</b> ” means the Cabinet member responsible for the administration of justice;	30
	“ <b>prescribed</b> ” means prescribed by regulation;	
	“ <b>presiding officer</b> ” means a king, queen, senior traditional leader, headman, headwoman or member of a royal family who has been designated as a presiding officer of a traditional court by the Minister in terms of section 4 and who —	35
	(a) presides over proceedings in the resolution of disputes contemplated in this Act; or	
	(b) pronounces judgment at the end of such proceedings after being advised in terms of customary law and custom;	40
	“ <b>regulation</b> ” means a regulation in terms of section 21;	
	“ <b>Repeal of the Black Administration Act and Amendment of Certain Laws Act</b> ” means the Repeal of the Black Administration Act and Amendment of Certain Laws Act, 2005 (Act No. 28 of 2005);	
	“ <b>royal family</b> ” means royal family as defined in the Traditional Leadership and Governance Framework Act;	45
	“ <b>senior traditional leader</b> ” means a senior traditional leader contemplated in the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by the Traditional Leadership and Governance Framework Act, and includes a person who is appointed to act or deputise for a senior traditional leader, as is contemplated in sections 13, 14 and 15 of the Traditional Leadership and Governance Framework Act;	50
	“ <b>this Act</b> ” includes any regulation;	
	“ <b>traditional community</b> ” means a traditional community recognised as such in terms of section 2 of the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by the Traditional Leadership and Governance Framework Act;	55
	“ <b>traditional council</b> ” means a traditional council which has been recognised and established under section 3 of the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by the Traditional Leadership and Governance Framework Act;	60

**“traditional court”** means a court established as part of the traditional justice system, which—

- (a) functions in terms of customary law and custom; and
- (b) is presided over by a king, queen, senior traditional leader, headman, headwoman or a member of a royal family who has been designated as a presiding officer of a traditional court by the Minister in terms of section 4, and which includes a forum of community elders who meet to resolve any dispute which has arisen, referred to in the different languages as—
  - (i) *“eBandla”* in isiNdebele
  - (ii) *“Huvo”* in Xitsonga;
  - (iii) *“inKantolo yeNdabuko”* in isiZulu;
  - (iv) *“iNkhundla”* in siSwati;
  - (v) *“iNkundla”* in isiXhosa;
  - (vi) *“Kgoro”* in Sepedi;
  - (vii) *“Kgotla”* in Sesotho;
  - (viii) *“Khorro”* in Tshivenda;
  - (ix) *“Lekgotla”* in Setswana; and
  - (x) *“Tradisionele hof”* in Afrikaans.

**“traditional justice system”** means a system of law which is based on customary law and customs;

**“traditional leader”** means a person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position, and is recognised in terms of the Traditional Leadership and Governance Framework Act;

**“Traditional Leadership and Governance Framework Act”** means the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003).

## Objects of Act

2. The objects of this Act are to—

- (a) affirm the values of the traditional justice system, based on restorative justice and reconciliation and to align them with the Constitution;
- (b) affirm the role of the institution of traditional leadership in —
  - (i) promoting social cohesion, co-existence and peace and harmony in traditional communities;
  - (ii) enhancing access to justice by providing a speedier, less formal and less expensive resolution of disputes; and
  - (iii) promoting and preserving traditions, customs and cultural practices that promote nation-building, in line with constitutional values;
- (c) create a uniform legislative framework, regulating the role and functions of the institution of traditional leadership in the administration of justice, in accordance with constitutional imperatives and values; and
- (d) enhance the effectiveness, efficiency and integrity of the traditional justice system.

## Guiding principles

3. (1) In the application of this Act, the following principles should apply:

- (a) The need to align the traditional justice system with the Constitution in order for the said system to embrace the values enshrined in the Constitution, including—
  - (i) the right to human dignity;
  - (ii) the achievement of equality and the advancement of human rights and freedoms; and
  - (iii) non-racialism and non-sexism;
- (b) the need to promote access to justice for all persons;
- (c) the promotion of restorative justice measures;
- (d) the enhancement of the quality of life of traditional communities through mediation;
- (e) the development of skills and capacity for persons applying this Act in order to ensure the effective implementation thereof; and
- (f) the need to promote and preserve African values which are based on reconciliation and restorative justice.

(2) In the application of this Act, the following should be recognised and taken into account:

- (a) The constitutional imperative that courts, tribunals or forums, when—
  - (i) interpreting the Bill of Rights, must promote the values that underlie an open and democratic society, based on human dignity, equality and freedom; and
  - (ii) interpreting any legislation, and when developing the common law or customary law, must promote the spirit, purport and objects of the Bill of Rights;
- (b) the existence of systemic unfair discrimination and inequalities, particularly in respect of gender, age, race, as a result of past unfair discrimination, brought about by colonialism, apartheid and patriarchy;
- (c) the need to promote and preserve the African values of justice which promote social cohesion, reconciliation and restorative justice; and
- (d) the principles underlying the traditional justice system are not, in all respects, the same as in the context of due process, as applied or understood in the retributive justice system.

### **Designation and training of traditional leaders**

4. (1) The Minister may, in the prescribed manner, after consultation with the Premier of the province in question, designate a senior traditional leader recognised as such by the Premier, as is contemplated in the Traditional Leadership and Governance Framework Act, as presiding officer of a traditional court for the area of jurisdiction in respect of which such senior traditional leader has jurisdiction.

(2) The Minister may, in the prescribed manner, after consultation with the President, designate a king or queen recognised as such by the President, as is contemplated in the Traditional Leadership and Governance Framework Act, as presiding officer of a traditional court for the area or areas of jurisdiction in respect of which such king or queen has jurisdiction.

(3) Any designation made by the Minister in terms of subsection (1) or (2) is effective from the date of the recognition of the traditional leader as king, queen or senior traditional leader, by the Premier or President, as the case may be, as contemplated in the Traditional Leadership and Governance Framework Act.

(4) The Minister may, at the written request of a king, queen or senior traditional leader contemplated in subsection (1) or (2), in the prescribed manner, designate any headman, headwoman or a member of the royal family as an alternative presiding officer of the traditional court, in the absence of such king, queen or senior traditional leader.

(5) Any king, queen, senior traditional leader, headman, headwoman or member of the royal family who has been designated in terms of subsection (1), (2) or (4) must—

- (a) save where such king, queen, senior traditional leader, headman, headwoman or member of the royal family is exempted from attending a prescribed training programme or course in the circumstances prescribed in section 21(1)(c); and
- (b) subject to section 23(3)(a)(i) or 23(3)(b)(i),

as soon as is practicable after he or she has been so designated, but within a period of at least 12 months after such designation, attend the prescribed training programme or course contemplated in section 21(1)(b).

(6) The Minister may, in the prescribed manner, revoke any designation made under subsection (1), (2) or (4) if the designated king, queen, senior traditional leader, headman, headwoman or member of the royal family fails to attend the prescribed training programme or course within the period contemplated in subsection (5) and such failure is due to the fault on the part of such person.

(7) The Director-General must establish and keep a prescribed register of all kings, queens, senior traditional leaders, headmen, headwomen and members of the royal family who have been designated in terms of subsection (1), (2) or (4) or whose designation has been suspended or revoked in terms of subsection (6) or section 16.

(8) The Director-General must establish and keep a prescribed register of all traditional leaders who have completed the prescribed training programme or course as contemplated in section 21(1)(f).

### Settlement of certain civil disputes of a customary law nature by traditional courts

5. (1) A traditional court may, subject to subsection (2), hear and determine civil disputes arising out of customary law and custom brought before the court where the act or omission which gave rise to the civil dispute occurred within the area of jurisdiction of the traditional court in question. 5

(2) A traditional court may not under this section or any other law hear and determine—

- (a) any constitutional matter;
- (b) any question of nullity, divorce or separation arising out of a marriage, whether a marriage under the Marriage Act, 1961 (Act No. 25 of 1961), a customary marriage under the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), or a civil union under the Civil Union Act, 2006 (Act No. 17 of 2006); 10
- (c) any matter relating to the custody and guardianship of minor children;
- (d) any matter relating to the validity, effect or interpretation of a will; 15
- (e) any matter arising out of customary law and custom where the claim or the value of the property in dispute exceeds the amount determined by the Minister from time to time by notice in the *Gazette*; or
- (f) any matter arising out of customary law and custom relating to any category of property determined by the Minister from time to time by notice in the *Gazette*. 20

### Settlement of certain criminal disputes by traditional court

6. A traditional court may, subject to section 10(1), hear and determine offences brought before the court if the offence occurred within the area of jurisdiction of the traditional court in question and if such offence is listed in the Schedule. 25

### Nature of traditional courts

7. Traditional courts are distinct from courts referred to in section 166 of the Constitution, and operate in accordance with a system of customary law and custom that seeks to—

- (a) prevent conflict; 30
- (b) maintain harmony; and
- (c) resolve disputes where they have occurred, in a manner that promotes restorative justice and reconciliation and in accordance with the norms and standards reflected in the Constitution.

### Sessions of traditional court 35

8. Sessions of a traditional court are held at the time and place determined by the presiding officer of the traditional court, in accordance with customary law and customary practices.

### Procedure of traditional court

9. (1) Subject to subsection (2)— 40

- (a) the procedure at any proceedings of a traditional court; and
- (b) the manner of execution of any sanction imposed by a traditional court,

must be in accordance with customary law and custom, except in so far as the Minister prescribes otherwise under section 21(2)(a).

(2) During proceedings of a traditional court, a presiding officer must ensure that— 45

- (a) the rights contained in the Bill of Rights in Chapter 2 of the Constitution are observed and respected, with particular reference to the following:
  - (i) That women are afforded full and equal participation in the proceedings, as men are; and
  - (ii) that vulnerable persons, particularly children, disabled persons and the elderly, are treated in a manner that takes into account their particular vulnerability; and 50



- (b) the following rules of natural justice are adhered to:
  - (i) The *audi alteram partem* rule, which means that persons affected by a decision must be given a fair hearing by the decision-maker before the decision is made; and
  - (ii) the *nemo iudex in propria causa* rule, which means that any decision-making must be, and must be reasonably perceived to be, impartial. 5
- (3) (a) No party to any proceedings before a traditional court may be represented by a legal representative.
- (b) A party to proceedings before a traditional court may be represented by his or her wife or husband, family member, neighbour or member of the community, in accordance with customary law and custom. 10
- (4) (a) Where two or more different systems of customary law may be applicable in a dispute before a traditional court, the court must apply the system of customary law that the parties expressly agreed should apply.
- (b) In the absence of any agreement contemplated in paragraph (a), the traditional court must decide the matter in accordance with the following guidelines: 15
  - (i) The system of customary law applicable in the area of jurisdiction of the traditional court should take precedence over any other system of customary law; or
  - (ii) the traditional court may apply the system of customary law with which the parties or the issues in the dispute have their closest connection. 20
- (5) (a) The traditional court must, in the prescribed manner—
  - (i) issue a receipt to every person in respect of any fine paid by such person;
  - (ii) pay any fine collected in terms of subparagraph (i) into the provincial revenue fund of the province in question; and 25
  - (iii) cause records to be kept of all financial transactions relating to any money paid into the provincial revenue fund as fines, in terms of subparagraph (ii).
- (b) The records and financial transactions of every traditional court relating to fines must be audited when the financial statements of traditional councils are audited, as contemplated in section 4(2)(b) of the Traditional Leadership and Governance Framework Act, read with the provincial legislation required by that Act. 30

### **Sanctions and orders that may be given by traditional court**

- 10. (1) In the case of a criminal dispute, a traditional court may not impose the following sanctions:
  - (a) Any punishment which is inhumane, cruel or degrading, or which involves any form of detention, including imprisonment; 35
  - (b) banishment from the traditional community;
  - (c) a fine in excess of the amount determined by the Minister from time to time by notice in the *Gazette*; and
  - (d) corporal punishment. 40
- (2) A traditional court may, in the case of both civil and criminal disputes, but subject to subsection (1) in the case of criminal disputes, after hearing the views of the parties to the dispute, make any appropriate order in the circumstances, including the following:
  - (a) An order for the payment of a fine, sounding in money, not exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, payable in instalments, if necessary; 45
  - (b) an order, expressed in monetary terms or otherwise, including livestock—
    - (i) making a settlement between the parties to the proceedings an order of court;
    - (ii) for the payment of any damages in respect of any proven financial loss; 50
    - (iii) for the payment of compensation to a party; or
    - (iv) for the payment of damages to an appropriate body or organisation;
  - (c) an order prohibiting the conduct complained of or directing that specific steps be taken to stop or address the conduct being complained of;
  - (d) an order that an unconditional apology be made; 55
  - (e) an order requiring the accused person or defendant to make regular progress reports to the court regarding compliance with any condition imposed by the court;
  - (f) an order directing that the matter be submitted to the national prosecuting authority for the possible institution of criminal proceedings in terms of the common law or relevant legislation; 60

- (g) an order that one of the parties to the dispute, both parties or any other person performs some form of service without remuneration for the benefit of the community under the supervision or control of a specified person or group of persons identified by the traditional court;
- (h) an order that one of the parties to the dispute, both parties or any other person performs some form of service for or provides some benefit to, a specified victim or victims; 5
- (i) an order depriving the accused person or defendant of any benefits that accrue in terms of customary law and custom;
- (j) an order discharging a person with a caution or reprimand in the case of a criminal dispute; 10
- (k) an order, containing a combination of any of the sanctions contemplated in paragraphs (a) to (j), except where the matter is referred to the national prosecuting authority under paragraph (f), in which event the decision of the national prosecuting authority will prevail; and 15
- (l) any other order that the traditional court may deem appropriate and which is consistent with the provisions of this Act.

### **Enforcement of sanctions of traditional courts**

11. (1) If it comes to the attention of a traditional court that a person upon whom the traditional court has imposed a sanction, has not complied with the sanction in question, including the payment of a fine, sum of money or livestock, in whole or in part, that traditional court must, in the prescribed manner, cause such person to appear before it. 20

(2) (a) When a person appears before a traditional court as contemplated in subsection (1), the traditional court must inquire into the reasons for the person's failure to comply with the sanction imposed by the traditional court and make a determination as to whether the failure is due to fault on the part of the person or not. 25

(b) If it is found that the failure is not due to fault on the part of the person, the traditional court may make an appropriate order which will assist the person to comply with the sanction initially imposed.

(c) If it is found that the failure is due to fault on the part of the person, the traditional court may deal with the matter in accordance with customary law and custom and may impose further sanctions for such non-compliance. 30

(d) Any order made by a traditional court as contemplated in paragraph (c) in the form of the payment of a fine, as contemplated in section 10(2)(a), or in the form of compensation to a person, as contemplated in section 10(2)(b), has the effect of a civil judgment of the magistrate's court having jurisdiction and is enforceable by execution in that magistrate's court, in accordance with the provisions of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and as may be prescribed, and the person to whom such compensation is payable may proceed as if the order was made in the magistrate's court in his or her favour. 35 40

### **Order of traditional court final**

12. An order of a traditional court is final, except where a party to the proceedings exercises his or her rights as contemplated in section 13 in respect of appeals or section 14 in respect of procedural review.

### **Appeals to magistrates' courts** 45

13. (1) A party to a civil or criminal dispute in a traditional court may, in the prescribed manner and period, appeal to the magistrate's court having jurisdiction against an order of a traditional court, as contemplated in section 10(2)(a), (b), (h) or (i), as well as section 10(2)(k), to the extent that the order in terms of section 10(2)(k) relates to an order contemplated in section 10(2)(a), (b), (h) or (i). 50

(2) An order of a traditional court in respect of which an appeal is lodged, as contemplated in subsection (1), is suspended until the appeal has been decided (if it was prosecuted in the time and in the manner so prescribed) or until the expiry of the prescribed period if the appeal was not prosecuted within that period, or until the appeal has been withdrawn or has lapsed. 55

(3) Notwithstanding any other law to the contrary, a magistrate's court hearing an appeal as contemplated in this section has the power to —

- (a) confirm the order of the traditional court;
- (b) amend or substitute the order of the traditional court, as it deems appropriate in the circumstances, with any order contemplated in section 10(2); or
- (c) dismiss the order of the traditional court.

#### **Procedural review by magistrates' courts**

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**14.** (1) A party to any proceedings in a traditional court may, in the prescribed manner and period, take such proceedings on review before a magistrate's court in whose area of jurisdiction the traditional court sits on any of the following grounds:

- (a) The traditional court acted *ultra vires* (outside the scope of the Act);
- (b) absence of jurisdiction on the part of the traditional court;
- (c) gross irregularity with regard to the proceedings; or
- (d) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No.12 of 2004), on the part of the presiding officer.

(2) Notwithstanding any other law to the contrary, a magistrate's court has the powers, as may be prescribed, relating to a procedural review contemplated in this section.

#### **Oath or affirmation of office**

**15.** (1) A traditional leader who has been designated as presiding officer of a traditional court must, subject to section 23(3)(a)(ii) or 23(3)(b)(ii), take the prescribed oath or make the prescribed affirmation that he or she will uphold and protect the Constitution before the magistrate of the magistrate's court having jurisdiction or any additional magistrate of that court who has been authorised thereto in writing by the said magistrate, before he or she may perform any of the functions contemplated in this Act.

(2) The Director-General must establish and keep a prescribed register of every traditional leader in the traditional court in question who has taken the prescribed oath or made the prescribed affirmation, as contemplated in this section or section 23(3)(a)(ii) or 23(3)(b)(ii).

#### **Incapacity, gross incompetence or misconduct of presiding officers**

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**16.** (1) Any person may, in the prescribed manner, lodge with the Minister a complaint relating to the role of a presiding officer in the administration of justice.

(2) A complaint must be lodged by means of a prescribed affidavit or an affirmed statement, specifying—

- (a) the nature of the complaint; and
- (b) the facts upon which the complaint is based.

(3) The grounds on which any complaint against a presiding officer may be lodged, are the following:

- (a) (i) Incapacity, giving rise to a presiding officer's inability to perform his or her functions as a presiding officer;
- (ii) gross incompetence; or
- (iii) misconduct,

which has a bearing on the administration of justice;

- (b) any wilful or grossly negligent breach of the code of conduct contemplated in the Traditional Leadership and Governance Framework Act, or any code of conduct under any provincial legislation required by the Traditional Leadership and Governance Framework Act, which has a bearing on the administration of justice;

- (c) any wilful or grossly negligent conduct, other than conduct contemplated in paragraph (a) or (b), that is incompatible with or unbecoming of, the office of presiding officer; or

- (d) any contravention of a provision of this Act.

(4) (a) Upon receipt of a complaint as contemplated in subsection (1), and if the Director-General or an official in the Department above the rank of Director or any official of equivalent rank, authorised thereto in writing by the Director-General, has in the prescribed manner satisfied himself or herself that the complaint falls within one of the grounds as contemplated in subsection (3), the Minister must immediately refer it to the Premier concerned for investigation by the mechanism contemplated in section 27(3)(a) of the Traditional Leadership and Governance Framework Act, established in terms of legislation applicable in the province concerned. 5

(b) The Premier must, after the investigation contemplated in paragraph (a) has been finalised, submit a report to the Minister, with any of the following recommendations: 10

- (i) That the designation of the presiding officer be revoked, together with a recommendation regarding the designation of a substitute presiding officer;
- (ii) that the designation of the presiding officer be suspended for the duration of any specific remedial measure suggested by the Premier, as contemplated in paragraph (c)(v) to (vii); 15
- (iii) that the presiding officer be subjected to any specific remedial measure suggested by the Premier, as contemplated in paragraph (c); or
- (iv) that the complaint be dismissed.

(c) Any one or a combination of the following remedial measures may be imposed on a presiding officer, if his or her designation is not revoked: 20

- (i) An apology to the complainant;
- (ii) a reprimand;
- (iii) a written warning;
- (iv) any form of compensation;
- (v) any appropriate counselling; 25
- (vi) the attendance of a specific training course; or
- (vii) any other appropriate corrective measure.

(5) Upon receipt of the report and recommendation contemplated in subsection (4), the Minister must consider the matter and, in consultation with the Premier, decide on how the matter must be dealt with. 30

(6) After a decision has been reached as contemplated in subsection (5), the Minister must immediately, in writing, inform the presiding officer and the complainant of his or her decision.

(7) A traditional leader who is removed from office in terms of the Traditional Leadership and Governance Framework Act, is deemed to have had his or her designation as a presiding officer revoked. 35

### **Assignment of officers to assist traditional courts**

17. The Minister may, within the resources available at the magistrate's court in which jurisdiction the traditional court sits, assign one or more officers to assist a traditional court in performing its functions under this Act. 40

### **Record of proceedings**

18. A traditional court must, in the prescribed manner, record or cause to be recorded—

- (a) the nature of each dispute or charge;
- (b) a summary of the facts of the case; and 45
- (c) the decision of the court, including the sentence, order or sanction of the court.

### **Transfer of cases**

19. (1) If a presiding officer of a traditional court is of the opinion that a dispute before it is not a matter in respect of which a traditional court has jurisdiction, as contemplated in section 5 in the case of civil disputes or section 6 in the case of criminal disputes, or if the matter involves difficult or complex questions of law or fact that should be dealt with in a magistrate's court or a small claims court, he or she may, in the prescribed manner, transfer such dispute to the magistrate's court or small claims court having jurisdiction and notify the parties to the dispute of the transfer. 50

(2) If a prosecutor, in the case of a criminal matter, before an accused person has pleaded to a charge as contemplated in section 6(a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or a magistrate or a commissioner of a small claims court, in the case of a civil matter before him or her, is of the opinion that a dispute before him or her— 5

- (a) in the case of a civil dispute—
  - (i) is a matter that can be dealt with appropriately in terms of customary law and custom in a traditional court; and
  - (ii) is a matter in respect of which a traditional court has jurisdiction, as contemplated in section 5; or 10
- (b) in the case of a criminal dispute, is a matter in respect of which a traditional court has jurisdiction, as contemplated in section 6,

the prosecutor, magistrate or commissioner of a small claims court, as the case may be, may, in the prescribed manner, transfer the dispute to the traditional court having jurisdiction and notify the parties to the dispute of the transfer. 15

### Offences and penalties

20. Any person who—

- (a) wilfully insults a presiding officer during proceedings of a traditional court; or
- (b) wilfully interrupts the proceedings of a traditional court or otherwise misbehaves himself or herself in the place where the proceedings are held; or 20
- (c) having received a notice to attend court proceedings, without sufficient cause fails to attend at the time and place specified in the notice, or fails to remain in attendance until the conclusion of the proceedings in question or until excused from further attendance by the presiding officer,

is guilty of an offence and liable on conviction to a fine. 25

### Regulations

21. (1) The Minister must make regulations regarding the following:

- (a) The manner in which a traditional leader is designated as a presiding officer of a traditional court, as contemplated in section 4(1), (2) or (4);
- (b) the training programmes or courses and the contents thereof for traditional leaders who have been designated as presiding officers, as contemplated in section 4(5); 30
- (c) the circumstances in which a traditional leader may be exempted from attending a training programme or course, as contemplated in section 4(5)(a);
- (d) the manner in which the designation of a traditional leader as a presiding officer of a traditional court is revoked, as contemplated in section 4(6); 35
- (e) the register to be established and kept by the Director-General of all traditional leaders who have been designated as presiding officers of traditional courts or whose designations as presiding officers of traditional courts have been suspended or revoked, as contemplated in section 4(7); 40
- (f) the register to be established and kept by the Director-General of all traditional leaders who have completed the training programmes or courses, as contemplated in section 4(8);
- (g) the manner in which a traditional court, as contemplated in section 9(5)(a), must— 45
  - (i) issue receipts in respect of fines paid;
  - (ii) pay any fines received into the relevant provincial revenue fund; and
  - (iii) keep records of financial transactions relating to money paid into the relevant provincial revenue fund;
- (h) the manner in which a traditional court must cause persons, who have not complied with any sanctions imposed by it, to appear before it, as contemplated in section 11(1); 50
- (i) the manner and period in which an appeal must be lodged, as contemplated in section 13(1);
- (j) the manner and period in which a matter may be taken on procedural review, as contemplated in section 14(1); 55
- (k) the powers of a magistrate's court relating to procedural reviews, as contemplated in section 14(2);

- (l) the oath to be taken or affirmation to be made by a presiding officer of a traditional court, as contemplated in section 15(1);
  - (m) the register to be established and kept by the Director-General, containing the particulars of every traditional leader who has taken an oath or made an affirmation, as contemplated in section 15(2); 5
  - (n) the manner in which a complaint relating to the role of a presiding officer in the administration of justice must be lodged with the Minister, as contemplated in section 16(1);
  - (o) the affidavit or affirmed statement on which a complaint must be lodged with the Minister against a presiding officer, specifying the nature of the complaint against the presiding officer and the facts upon which the complaint is based, as contemplated in section 16(2); 10
  - (p) the manner in which a complaint against a presiding officer must be verified as falling within one of the grounds for initiating an investigation against a presiding officer, as contemplated in section 16(4)(a); 15
  - (q) the manner in which a traditional court must keep records, as contemplated in section 18;
  - (r) the manner in which matters may be referred from traditional courts to magistrates' courts and from magistrates' courts to traditional courts, as contemplated in section 19; or 20
  - (s) any other matter which is necessary to prescribe in order to give effect to this Act.
- (2) The Minister may make regulations regarding the following:
- (a) The procedure applicable in proceedings of a traditional court and the manner of execution of any sanction imposed by a traditional court, as contemplated in section 9(1); 25
  - (b) the manner in which an order of a traditional court must be executed in a magistrate's court, as contemplated in section 11(2)(d);
  - (c) the collation and processing of information relating to the functioning of traditional courts, which must be submitted annually by the Minister to Parliament and the National House of Traditional Leaders; or 30
  - (d) any other matter which may be prescribed in order to give effect to this Act.
- (3) Any regulation envisaged under this section must be made after consultation with the Cabinet member responsible for traditional leadership matters and the National House of Traditional Leaders. 35
- (4) Any regulation made in terms of subsection (1) or (2) may provide that any person who contravenes a provision thereof or fails to comply therewith, is guilty of an offence and, on conviction, is liable to a fine.

### Delegation of powers

22. The Minister may, in writing, delegate any of the powers conferred on him or her under this Act, to the Deputy Minister responsible for the administration of justice, the Director-General or any official in the Department above the rank of Director or any official of equivalent rank. 40

### Transitional provisions and repeal of laws

23. (1) For purposes of this section— 45
- (a) **“affected area”** means any area in the national territory in which the provisions of the Black Administration Act, dealing with the judicial role and functions of traditional leaders, did not apply before the commencement of this Act; and
  - (b) **“affected law”** means any law applicable in an affected area, dealing with the role and functions of traditional leaders in the administration of justice, and includes— 50
    - (i) the Regional Authorities Courts Act, 1982 (Transkei);
    - (ii) the KwaNdebele Traditional Hearings of Civil and Criminal Cases by the Lingwenyama, Amakhosi, Amakhosana and Linduna Act, 1984 (Act No. 8 of 1984); 55
    - (iii) the KwaZulu Amakhosi and Iziphakanyiswa Act, 1990 (Act No. 9 of 1990);

- (iv) the Venda Traditional Leaders Administration Proclamation, 1991 (Proclamation No. 29 of 1991);
- (v) the Bophuthatswana Traditional Courts Act, 1979 (Act No. 29 of 1979);
- (vi) the Transkei Authorities Act, 1965 (Act No. 4 of 1965);
- (vii) the Chiefs Courts Act, 1983 (Act No. 6 of 1983);
- (viii) the Ciskei Administrative Authorities Act, 1984 (Act No. 37 of 1984);
- (ix) the QwaQwa Administration Authorities Act, 1983 (Act No. 6 of 1983).

(2) (a) The provisions of this Act shall, subject to paragraphs (b) and (c), be of no force or effect in any affected area until 31 December 2008.

(b) The affected laws referred to in subsection (1)(b)(iii) to (ix), if they have not been repealed before the commencement of this Act, are deemed to be repealed on 31 December 2008, except where they have been repealed on such earlier date by the competent provincial authorities, whereupon the provisions of this Act shall apply.

(c) The provisions of this Act are applicable in any affected area upon commencement of this Act, if any of the laws referred to in subsection (1)(b)(iii) to (ix) and applicable in such affected areas, were repealed prior to the commencement of this Act.

(3) (a) A king, queen or senior traditional leader upon whom jurisdiction was conferred under section 12(1) or 20(1) of the Black Administration Act, to deal with certain civil and criminal disputes prior to its repeal by the Repeal of the Black Administration Act and Amendment of Certain Laws Act, and which jurisdiction, at the commencement of this Act, has not been revoked under section 12(2) or 20(4) of the Black Administration Act, shall be deemed to have been designated by the Minister under section 4 of this Act as a presiding officer of the traditional court in respect of the area over which such traditional leader has jurisdiction, subject to that traditional leader—

- (i) undergoing the prescribed training programme or course, as contemplated in section 21(1)(b) before 30 June 2009; and,
- (ii) taking the prescribed oath or making the prescribed affirmation, as contemplated in section 15(1), within three months after the commencement of this Act, failing which such designation by the Minister under section 4 of this Act is deemed to have been revoked.

(b) A king, queen or senior traditional leader upon whom jurisdiction was conferred under any provision similar or corresponding to section 12(1) or 20(1) of the Black Administration Act, in any affected law in force in any affected area, to deal with certain civil and criminal disputes, and which has not been revoked under any similar or corresponding provision to section 12(2) or 20(4) of the Black Administration Act, in any affected law in any affected area, shall, when the laws contemplated in subsection (1)(b)(iii) to (ix) are repealed as contemplated in subsection (2)(b) or when this Act becomes applicable in an affected area as contemplated in subsection (2)(c), be deemed to have been designated by the Minister under section 4 of this Act as a presiding officer of the traditional court in respect of the area over which such traditional leader has jurisdiction, subject to that traditional leader—

- (i) undergoing the prescribed training programme or course, as contemplated in section 21(1)(b), before 30 June 2009; and
- (ii) taking the prescribed oath or making the prescribed affirmation, as contemplated in section 15(1), within three months after the commencement of this Act, failing which such designation by the Minister under section 4 of this Act is deemed to have been revoked.

(4) (a) Nothing in this Act affects proceedings pending at the commencement of this Act or at the time of the repeal of the laws referred to in subsection (1)(b)(iii) to (ix) as contemplated in subsection (2), and such proceedings, arising out of the application of the provisions of the Black Administration Act, or the laws referred to in subsection (1)(b)(iii) to (ix), dealing with the judicial role and functions of traditional leaders, continue as if this Act had not been passed and, for this purpose the said provisions of the Black Administration Act, notwithstanding their repeal by the Repeal of the Black Administration Act and Amendment of Certain Laws Act, and the laws referred to in subsection (1)(b)(iii) to (ix), continue to be applicable solely for purposes of finalising all pending proceedings.

(b) Proceedings, for purposes of this subsection, are deemed to be pending if, at the commencement of this Act or at the time of the repeal of the laws referred to in subsection (1)(b)(iii) to (ix)—

- (i) a civil claim has been lodged or a civil summons has been issued but judgment has not been passed or a civil hearing has not commenced; or 5
- (ii) an accused in criminal proceedings has pleaded but judgment or sentence has not been passed or a criminal hearing has not commenced.

(5) The following Acts are hereby repealed:

- (a) Regional Authorities Courts Act, 1982 (Transkei); and
- (b) the KwaNdebele Traditional Hearings of Civil and Criminal Cases by the 10  
Lingwenyama, Amakhosi, Amakhosana and Linduna Act, 1984 (Kwa-Ndebele).

(6) Until such time as regulations are made in terms of section 21, the regulations made under section 12 and 20 of the Black Administration Act, and any regulations made under any law referred to in subsection (1)(b)(iii) to (ix), shall, in so far as they are 15  
not inconsistent with this Act or are not otherwise clearly inappropriate, continue to apply and any proceedings commenced under those regulations immediately before the coming into operation of the regulations made in terms of section 21 of this Act, shall continue and be disposed of under those regulations.

#### **Short title and commencement**

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**24.** This Act is called the Traditional Courts Act, 2008, and comes into operation on 29 June 2008 or on such earlier date fixed by the President by proclamation in the *Gazette*.



**Schedule**

Offences which may be tried by a traditional court under section 6:

Theft, whether under the common law or a statutory provision, including the theft of stock where the amount involved does not exceed an amount determined by the Minister by notice in the *Gazette*. 5

Malicious damage to property, where the amount involved does not exceed an amount determined by the Minister by notice in the *Gazette*.

Assault, where grievous bodily harm has not been inflicted.

*Crimen injuria*, where the amount involved does not exceed an amount determined by the Minister by notice in the *Gazette*. 10

## MEMORANDUM ON THE OBJECTS OF THE TRADITIONAL COURTS BILL, 2012

### 1. BACKGROUND

- 1.1 The Traditional Courts Bill, 2012 (the Bill) emanates from the Policy Framework on the Traditional Justice System under the Constitution. The aim of the Bill is to provide for the structure and functioning of traditional courts, in line with constitutional imperatives and values.
- 1.2 The Bill was introduced in the National Assembly in 2008 in terms of section 76(1) of the Constitution. The Portfolio Committee on Justice and Constitutional Development (the Portfolio Committee) to which the Bill was referred, held public hearings during which a number of concerns were raised. A decision was subsequently taken to withdraw the Bill from the National Assembly and to introduce it in the National Council of Provinces in terms of section 76(2) of the Constitution, with the intention of addressing the concerns raised in the Portfolio Committee during the deliberations of the Bill in the National Council of Provinces. The Bill was withdrawn from the National Assembly on 2 June 2011.

### 2. OBJECTS OF BILL

- 2.1 The objects of the Bill, as set out in **clause 2** of the Bill, are, among others, to—
  - (i) affirm the values of the traditional justice system, based on restorative justice and reconciliation and to align them with the Constitution;
  - (ii) affirm the role of the institution of traditional leadership in enhancing access to justice;
  - (iii) create a uniform legislative framework, regulating the role and functions of the institution of traditional leadership in the administration of justice, in accordance with constitutional imperatives and values; and
  - (iv) to provide a framework to enhance the effectiveness, efficiency and integrity of the traditional justice system.
- 2.2 **Clause 3** sets out the principles that should guide the application of the Bill, among others, the following:
  - (a) The need to align the traditional justice system with the Constitution in order for the traditional system to embrace the values enshrined in the Constitution;
  - (b) the need to promote access to justice to all persons;
  - (c) the promotion of restorative justice;
  - (d) the enhancement of the quality of life of traditional communities through mediation;
  - (e) the development of skills and capacity of persons applying the legislation in order to ensure the effective implementation thereof; and
  - (f) the need to promote and preserve African values which are based on reconciliation and restorative justice.
- 2.3 **Clause 4** provides for the designation of senior traditional leaders, kings and queens as presiding officers of traditional courts, the revocation or suspension of their designation and the attendance of a training programme within the timeframes set. It also requires the Director-General of Justice and Constitutional Development to keep a register of traditional leaders who have been designated and whose designation has been suspended or withdrawn.
- 2.4 **Clause 5** deals with the civil jurisdiction of traditional courts and sets out the matters in respect of which traditional courts do not have jurisdiction.
- 2.5 **Clause 6** deals with criminal jurisdiction of traditional courts and refers to a Schedule containing offences in respect of which traditional courts have jurisdiction.

- 2.6 **Clause 7** deals with the nature of traditional courts and makes it clear that they are distinct from courts referred to in section 166 of the Constitution.
- 2.7 **Clause 8** provides for the sessions of traditional courts.
- 2.8 **Clause 9** provides for the procedure at the proceedings of traditional courts, which must be in accordance with customary law and custom, except if the Minister prescribes otherwise in regulations. It also requires presiding officers to give effect to the Bill of Rights and the rules of natural justice during proceedings. Legal representation in traditional courts is prohibited, but parties can be represented by any person of their choice in terms of customary law and custom. This clause also makes provision for the situation where two or more different systems of customary law may be applicable in a dispute before a traditional court. Lastly, it regulates how the payment of any fines imposed by a traditional court must be dealt with.
- 2.9 **Clause 10** sets out —
- (a) specific sanctions that cannot be imposed by a traditional court; and
  - (b) a whole range of orders that a traditional court can make, many of which are of a restorative justice nature.
- 2.10 **Clause 11** deals with the enforcement of the sanctions or orders made by traditional courts.
- 2.11 **Clause 12** provides that orders of traditional courts are final, except where an appeal is lodged or where a matter is taken on review. **Clause 13** sets out the powers of a magistrate's court when it deals with an appeal from a traditional court in respect of certain orders made by a traditional court. The grounds for review are contained in **clause 14**.
- 2.12 **Clause 15** obliges senior traditional leaders and kings and queens who have been designated as presiding officers to take a prescribed oath of office or make a prescribed affirmation before a magistrate before they may preside in a traditional court. It also requires the Director-General: Justice and Constitutional Development to keep a register of every traditional leader who has taken the oath of office or made an affirmation.
- 2.13 **Clauses 16** establishes a mechanism to lodge, receive and deal with complaints against presiding officers. The grounds for lodging a complaint are the following:
- (a) Incapacity, giving rise to a presiding officer's inability to perform his or her functions as a presiding officer, gross incompetence or misconduct which has a bearing on the administration of justice;
  - (b) any wilful or grossly negligent breach of the code of conduct contemplated in the Traditional Leadership and Governance Framework Act, 2003, or any code of conduct under any provincial legislation required by the Traditional Leadership and Governance Framework Act, 2003, which has a bearing on the administration of justice;
  - (c) any other wilful or grossly negligent conduct which is incompatible with or unbecoming of, the office of presiding officer; or
  - (d) any contravention of a provision of this Bill.
- 2.14 **Clause 17** empowers the Minister to assign officers who will assist traditional courts in performing their functions under the Bill.
- 2.15 **Clause 18** sets out what records are to be kept by traditional courts.
- 2.16 **Clause 19** creates a mechanism which regulates the transfer of cases in certain circumstances from a traditional court to a magistrate's court or small claims court and from a magistrate's court or small claims court to a traditional court.

2.17 **Clause 20** creates offences and penalties.

2.18 **Clause 21** empowers the Minister to make regulations in respect of a number of matters, among others, the training programmes which traditional leaders must attend, the designation of traditional leaders as presiding officers, registers to be kept by the Director-General, the lodging of appeals and procedural reviews, powers of magistrates in respect of procedural reviews, the oath or affirmation of office to be taken or made by presiding officers of traditional courts, the manner of dealing with fines, the keeping of records, the referral of matters from a magistrate's court to a traditional court and vice versa, the lodging of complaints against a presiding officer and the manner of execution of judgements of a traditional court in a magistrate's court.

2.19 **Clause 22** provides for the delegation of the powers of the Minister under the Bill to senior officials in the Department of Justice and Constitutional Development.

2.20 **Clause 23** contains a range of different transitional arrangements in order to ensure a smooth implementation of the proposed legislation.

2.21 **Clause 24** contains the short title and commencement of the Bill.

### **3. FINANCIAL IMPLICATIONS FOR THE STATE**

Financial implications will result from the implementation of training programmes for presiding officers of traditional courts. The funds for this purpose will be accommodated within the Department's allocated budget.

### **4. PERSONS AND INSTITUTIONS CONSULTED ON THE BILL**

4.1 The Department of Justice and Constitutional Development consulted with the structures of traditional leaders and the South African Local Government Association. Consultation with the structures of traditional leadership took place at national and provincial level. At national level a Conference of Magistrates to which members of the National House of Traditional Leaders were invited, took place during September 2007. The Conference discussed the policy initiatives that should be considered in drafting the Traditional Courts Bill. Flowing from the Conference, the Policy Framework and the Bill supporting the policy were drafted in consultation with the Constitutional Affairs Committee of the National House of Traditional Leaders.

4.2 Further provincial consultative workshops were held with provincial Houses of Traditional Leaders and SALGA, at which the South African Human Rights Commission, the Commission on Gender Equality, magistrates and prosecutors participated.

4.3 During the consultation process the policy thrust enunciated in the Policy Framework and Traditional Courts Bill was largely supported by the structures within the institution of traditional leadership, SALGA and members of the lower court judiciary.

### **5. PARLIAMENTARY PROCEDURE**

5.1 At the time of the introduction of the Bill in the National Assembly, the State Law Advisers and the Department of Justice and Constitutional Development indicated that the Bill must be dealt with in accordance with the procedure established by subsection (1) or subsection (2) of section 76 of the Constitution since it falls within a functional area listed in Schedule 4 to the Constitution (indigenous and customary law).

5.2 At the time of the introduction of the Bill in the National Assembly, the State Law Advisers indicated that the Bill must be referred to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership

and Governance Framework Act, 2003 (Act 41 of 2003), since it contains provisions relating to customary law or customs of traditional communities. This was done.

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