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## **Access to Justice?: Dispute Management Processes in Msinga, KwaZulu-Natal, South Africa**

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SINDISO MNISI WEEKS

## Access to Justice?: Dispute Management Processes in Msinga, KwaZulu-Natal, South Africa

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This article is based on empirical research that will be published in the author's forthcoming book, titled ACCESS TO JUSTICE? TRADITIONAL JUSTICE AND THE SEARCH FOR HUMAN SECURITY IN RURAL SOUTH AFRICA, which has been accepted for publication by Ashgate.

## I. INTRODUCTION<sup>1</sup>

### A. *Between a Rock and a Hard Place*<sup>2</sup>

Zama<sup>3</sup> grew up in Msinga, a deep rural area in the easternmost province of South Africa, KwaZulu-Natal.<sup>4</sup> Zama married Nkani under customary law when they were both just out of high school. They lived with Nkani's family and never registered their marriage. After a few years of marriage, ignoring Zama's strong objections to polygamy, Nkani took another wife.<sup>5</sup>

Nkani and Zama's marriage was already on the rocks because he did not treat her well, but with the arrival of the second wife, it fell apart completely. Zama says that Nkani did not provide for her or their children and emotionally and verbally abused her, and they fought often; she was treated, she says, like the family's workhorse or slave. Feeling neglected, rejected, and no longer like Nkani's wife, Zama decided to take her children and leave.

At the time of our interviews, Zama had been living with her children in Newcastle, 141 kilometers away, for approximately seven years. She worked as a nurse at a nearby hospital and was raising their children on her own. A few months before our first interview, however, Nkani had initiated a claim with the headman<sup>6</sup> of their families' ward<sup>7</sup> to obtain custody of Zama's four children. The three eldest

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1. This article is based on empirical research and a study I completed as a Senior Researcher in the Centre for Law and Society at the University of Cape Town for the Rural Women's Action-Research project. The study was conducted between October 2009 and June 2015 with the bulk of data collected between March 2011 and January 2012 (inclusive) in the form of daily recording of headmen's activities and day-to-day work, observation of traditional dispute management processes such as hearings for the disputes that the headmen participated in managing, follow-up interviews with parties to the disputes and traditional authorities, and focus groups with the members of the traditional councils and groups of local men and women. Preliminary interviews and observations were conducted from October 2009 to February 2011, and follow-up interviews, focus groups, and report back sessions were conducted from February 2012 to June 2015.
  2. While the facts of this matter are true, the names have been changed to protect the parties' privacy.
  3. Two interviews were conducted with Zama: one in December 2009 and another in March 2010.
  4. Though never formally made part of the bantustan homelands, Msinga was a reserve for traditional black people under colonialism and then later apartheid.
  5. Nkani's second wife, Nokwakhe, came to the family homestead, where Nkani built her a big house, but she did not stay for long. Zama said that Nkani had told her that the marriage only lasted approximately two to three years. Nkani's marriage with Nokwakhe was registered. Zama believed Nkani and Nokwakhe's marriage was a civil marriage and that Nkani and Nokwakhe had not formalized their separation.
  6. The structure of authority in traditional communities in South Africa is typically that there is a senior traditional leader (formerly known, under colonialism and apartheid, as a "chief") under whom serve a number of headmen who, in turn, oversee a few "headmen's policemen" (better known, historically, as "tribal policemen"). *See generally* BEN COUSINS WITH RAURI ALCOCK ET AL., *IMITHETHO YOMHLABA YASEMSINGA: THE LIVING LAW OF LAND IN MSINGA, KWAZULU-NATAL* (Inst. for Poverty, Land & Agrarian Studies, Research Report 43, 2011) [hereinafter *LIVING LAW OF LAND IN MSINGA*].
  7. In territorial terms, the senior traditional leader is the ultimate authority responsible for the traditional community (previously referred to as a "tribe"); the headman is similarly responsible for the sub-group called a "ward"; and the headman's policeman is responsible for the sub-sub-group that is known as a "subward." Associated with each territorial jurisdiction and responsible authority is a dispute management

are children from their marriage, and the youngest is a child Zama subsequently had with another man, Ndoda, with whom she had been in what was initially a rebound relationship. Ndoda was still in Zama's life, but theirs was an informal romantic partnership. Zama's oldest child, a girl, was living with and helping Zama's mother, Gogo, in Msinga.

Zama had initiated a claim against Nkani in the Magistrate's Court for maintenance of their three children. She believes that Nkani bribed a Magistrate's Court official to thwart the maintenance case and claims that the court clerk was rude to her whenever she phoned and refused to assist her in setting a suitable date for a hearing. The hearing was finally scheduled for a day when Zama would be at work. Nonetheless, she bent over backwards to attend. In the hearing, she felt that the maintenance officer was overly sympathetic to her husband's argument that he could not afford to pay the child maintenance amount Zama was requesting (ZAR400<sup>8</sup> per child). The court held that the matter should be resolved at home, between their families.<sup>9</sup>

This prescription from the Magistrate's Court allowed Nkani to exert meaningful power over Zama. Pursuant to Nkani's rapid procession with his claim, a hearing before the dual family council and headman was called for the matter. Zama was not notified and says that she only learned of the hearing when her sister phoned her to say that Nkani's family had arrived at Gogo's home. Zama felt fortunate that when the call came in, she was buying groceries at a store in Tugela Ferry, a town close to Msinga. She was able to phone her uncle to alert him that she was on her way to the custody hearing.

At the hearing, Zama was advised by Nkani and his uncles that the customary law required that either she and the children return to Nkani's home, or all four children return to Nkani without her.<sup>10</sup> Under the patrilineal Zulu culture of Msinga, Nkani's home was the children's "home" and his family was "their family."<sup>11</sup>

Toward the end of the gathering, Zama's mother suggested that Ndoda, as the father of the fourth child, reimburse Nkani for the difference between what Nkani

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forum. Families and neighborhoods also have their own dispute management forums—in the family, this is chaired by the patriarch of the extended family (the oldest living male), and the neighborhood council might be more loosely chaired by one or more senior men living in the area. Each authority chairs the proceedings of the relevant dispute management forum and announces the decision made by the "community in council"—that is, the ordinary community members who participate by asking questions and deliberating over the outcome of the proceedings. Most cases go to the headman's council for hearing—either as mediation or an approximation of adjudication or arbitration—and some headmen play a more active and determinative role in the proceedings they oversee. *See generally* LIVING LAW OF LAND IN MSINGA, *supra* note 6.

8. ZAR refers to Rand, South Africa's currency.
9. I am unable to verify the outcome of this hearing because Magistrate's Court proceedings are neither recorded nor reported.
10. They argued that the fourth child was also technically Nkani's child because Nkani had paid *lobolo*, or bridewealth, for Zama in full. For more information on *lobolo* in Msinga, see LIVING LAW OF LAND IN MSINGA, *supra* note 6, at 59–60.
11. *See id.* at 32.

paid for Zama's bridewealth and what Nkani would have had to pay in "damages" for his three children if he had not married Zama. In this way, a divorce would be effected whereby Zama's family would return the eleven cattle paid for her bridewealth to Nkani's family, but then Nkani's family would pay four of the cows back to Zama's family as damages for the children that Zama bore them<sup>12</sup> and for the youthful years that she spent working for them. Ndoda would pay the remaining seven cows to Zama's family as discounted bridewealth for Zama (because she had already been married before and had children) and damages for the child he had with Zama out of wedlock. In this scenario, Zama's family would experience no financial loss—effectively, the seven cows paid by Ndoda would go directly to reimbursing Nkani and releasing Zama.

In one sense, this was an ingenious strategy because it meant that Nkani would not receive all the bridewealth or all the children back. Nkani, however, would have custody of his three biological children. Moreover, this strategy assumed that Ndoda would pay the damages when Zama did not even seem sure she wanted him to do so in the first place. After all, she had wilfully remained in an informal relationship with him for nearly eight years; she had been burned by marriage before and preferred to remain independent. Effecting this solution might therefore require that she raise the money to repay the bridewealth that Nkani had paid for her while she was already bearing the financial burden of raising their children on her own.

At the conclusion of the joint family deliberations, Zama was given an ultimatum. She could choose between the two sets of options presented to her: return to Nkani with the children or let her children return without her. Zama says she felt helpless because neither option was palatable. More than anything, Zama did not want any of her children to live with Nkani's family. She believed that Nkani was initiating this dispute because his mother was now elderly and his second wife had left, making it clear that she had no intention of being his mother's caregiver. Nkani therefore wanted Zama or the children to fulfill that role.

Zama had initially been very concerned by the ultimatum presented to her, especially because she did not know her rights under the customary law of marriage or the Constitution, although it seems that neither Nkani nor the headman pursued the matter any further after the hearing. The last I heard from the headman was that Zama was stubbornly refusing to return to her husband, which the headman thought would have made matters easy.

Three months later, Zama told me that she was greatly troubled by the decision but she was avoiding the matter and continuing with her independent life. Zama's primary links with the area were her mother and eldest daughter, both of whom she continued to visit. Nkani and his kin, who were attempting to impose contested local norms and values on Zama, were her other (tenuous) link to the area. Neither they nor the headman could effectively enforce the order from the mediated discussion against Zama. She was able to act defiantly and passively resist conservative (and, in

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12. Two cows would be paid in damages for the first child (one for Zama's loss of virginity and one for the child herself) and one cow each would be paid per subsequent child.

her case, oppressive) local norms because she was not “trapped” in the area and her employment provided her with some mobility and financial independence. This is a luxury few women in Msinga have traditionally enjoyed but a kind of contestation that younger women are increasingly displaying.<sup>13</sup> That did not stop Nkani from bothering Zama from time to time with phone calls asking that she return to him and threatening suicide because he felt his life was ruined. Each time, Zama would just tell him she had no plans to return and could not get involved in his matters but she said she still wanted him to have a role in the children’s lives and the children to have a relationship with his family.<sup>14</sup> Culturally, she said, this is important.

### *B. Dispute Management Trajectories*

In this article, I discuss the processes by which matters, or disputes, are managed by the vernacular forums in the deep rural area of Msinga, where traditional authorities are the form of local government with the most salience in people’s lives. In short, disputes follow a trajectory that scholars have previously described as progressing from having a grievance, to self-help or negotiation, then to more formal mediation or arbitration, and finally, adjudication.<sup>15</sup>

When I refer to a “dispute management trajectory” in this article, I am referring to the progression of a dispute from its original context as a social grievance into a forum, then from one forum to another within the dispute management system, and then possibly back into its social context. This is distinct from the “dispute management process” to which a matter is subject in a single dispute management forum’s attempt to resolve the conflict, or prior to reaching a dispute management forum, as is the case where the parties choose self-help or negotiation.

Below, I set out the details of the various dispute management processes available to people living in Msinga. Primary emphasis is placed on mediatory-arbitration<sup>16</sup> and mediatory-adjudication<sup>17</sup> because these are the main processes in use within Msinga’s dispute management system. One topic that stands out in this discussion is the

13. The findings of the present study show that younger women in Msinga are pushing back against these norms more than older women have done in the past. See generally Sindiso Mnisi Weeks, *Women’s Eviction in Msinga: The Uncertainties of Seeking Justice*, 2013 ACTA JURIDICA 118.

14. Zama also returned to the Magistrate’s Court to try to initiate her maintenance claim anew. This time, the maintenance officer suggested she get a lawyer, which she did. In our final interview, Zama reported that she had been granted the maintenance she had requested, but because Nkani had been absent for the hearing, the order was subject to his objection.

15. See Sally Engle Merry, *Going to Court: Strategies of Dispute Management in An American Urban Neighborhood*, 13 LAW & SOC’Y REV. 891, 899–901 (1979); see also Adeyinka Theresa Ajayi & Lateef Oluwafemi Buhari, *Methods of Conflict Resolution in African Traditional Society*, AFR. RES. REV., Apr. 2014, at 138, 149. See generally William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631 (1980); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y REV. 525 (1980).

16. As will be explained below, mediatory-arbitration is a hybrid of mediation and arbitration.

17. Mediatory-adjudication intertwines mediation and adjudication.

dynamism of the dispute management system as a whole. There is a normative ideal for the hierarchy of forums and the manner of escalation that disputes follow toward a solution.<sup>18</sup> There is also plenty of accepted—and, hence, arguably acceptable—deviation from this normative ideal.

The nature of dispute processes and the trajectory that disputes follow in Msinga necessitate the adoption of a theory that is not solely institutionally bound. The empirical context compels one to perceive disputes as undergoing significant dynamics and inflections both before and after they enter the institutional arena.

This article largely adopts the “transformations studies approach” enunciated by William L.F. Felstiner, Richard L. Abel, and Austin Sarat, which “approaches disputing through individual perceptions, behavior, and decision making.”<sup>19</sup> My study, however, focuses on perception, naming, blaming, and claiming in matters that are at least partly managed in an institutionalized context, such as the vernacular forums featured in Figure 1<sup>20</sup>—if only because a claim is registered with them.

As a lens through which to assess the effectiveness of the vernacular dispute management system, I am interested in the transformation of claims in their movement from the most immediate forums (family or neighborhood councils) to those most distant from the individual (chiefs’ councils or magistrates’ courts) and, thus, also from vernacular forums to state institutions. This article emphasizes the processual links between forums and discusses the manner in which disputes move between them to form dispute management trajectories. I argue that the normative ideal framing dispute management in Msinga is not particularly representative of the empirical reality and explain the vast and common deviation from the ideal. I ultimately conclude that perhaps the supposed deviation should be seen as conventional practice and suggest that, under severe strain and with limited capacity, the vernacular dispute management system is struggling.

Part II of this article defines the dispute management processes that have been identified by scholars and reviews the theories behind them. I discuss the particular relevance of the conventional definitions of mediation, arbitration, and adjudication in Msinga and argue that the context of disputes in Msinga confounds these categories. I deduce from this that, rather than focus on the composition of the forums, we should focus on the actual processes that forums use.

Part III discusses the normative ideal, as articulated by Msinga residents, for how disputes are managed locally and argues that dispute management in practice is often at variance with how the forums describe particular proceedings or the operation of the dispute management system as a whole. Part IV details the regular

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18. This normative ideal is found in local people’s articulations of how their system operates, as I learned from the various interviews and focus groups conducted in March 2011. Scholarship has also made reference to a normative ideal pertaining to hierarchy, as well as practical deviation from the normative ideal, in various regions of southern Africa. For a discussion of the normative ideal in Msinga, see *infra* Part III. For a general overview of this hierarchy and escalation process in Msinga, please refer to *infra* Figure 1.

19. Felstiner, Abel & Sarat, *supra* note 15, at 649.

20. See *infra* Figure 1.

deviation from the norm in Msinga's internal processes, addresses the other forums that exist in competition with the ones that form part of the official system, and summarizes the ways in which disputes form variable trajectories in the process of their management. Part V concludes this article by discussing the problems vernacular forums face in attempting to finalize the disputes that come to them.

## II. DISPUTING IN THEORETICAL TERMS

### *A. Dispute Management Processes Defined*

All dispute management processes depend on at least one party observing that certain conduct or words have offended them, thus creating a perceived injurious experience, or PIE, and giving rise to some claim of wrongdoing on the part of another.<sup>21</sup> When an injured party fails to perceive an injury as a wrong that calls for a remedy, the result is an unperceived injurious experience, or un-PIE.<sup>22</sup> Dispute management processes can only become relevant if an injurious experience is recognized because that is the only instance in which a person seeing herself as wronged will act to try to address the problem.<sup>23</sup>

The dispute management processes available in Msinga are self-help, negotiation, mediation, arbitration, and adjudication. Self-help refers to the process of people taking matters into their own hands to resolve a matter or dispute. Self-help involves doing nothing or taking action even when that action might violate the law.<sup>24</sup> Self-help options include continuing to tolerate the behavior perceived to be offensive without doing anything to curtail it (endurance)<sup>25</sup>—or even evading the individual believed to have committed the offense (avoidance).<sup>26</sup> Of course, a common form of self-help is violence, whether as self-defense or retaliation.<sup>27</sup>

In the absence of such self-help measures, or (most commonly) if such measures have failed, people frequently turn to negotiation.<sup>28</sup> Negotiation can take place directly between the parties or through their appointed (or even self-appointed) representatives.<sup>29</sup> Negotiation entails a bilateral attempt to reach an agreement about

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21. See Felstiner, Abel & Sarat, *supra* note 15, at 633–37.

22. See *id.* at 633–34. For example, there are many Msinga women for whom the forum's conclusion in Zama's mediation would be an un-PIE.

23. See *id.* at 633.

24. See Merry, *supra* note 15, at 900–01. Individuals might also avoid direct confrontation. See *id.* at 900–03 (discussing self-help mechanisms such as endurance and avoidance); see also Miller & Sarat, *supra* note 15, at 531–32, 539.

25. See Merry, *supra* note 15, at 903.

26. See *id.* at 902–03; see also Miller & Sarat, *supra* note 15, at 539.

27. See Merry, *supra* note 15, at 900–01, 905.

28. See Galanter, *supra* note 15, at 16–17 (citing Miller & Sarat, *supra* note 15).

29. See generally *id.* at 28.



the problem.<sup>30</sup> Unfortunately, if negotiation is unsuccessful, it can lead to further tensions and even to self-help measures, including violence.

Disputing parties can opt for their negotiations to be facilitated by a third party, which is commonly known as mediation. In mediation, a person, typically with some authority over the parties, will attempt to facilitate discussions to reach a mutually-satisfactory settlement.<sup>31</sup> It is usually desirable that such person be, to some degree, impartial or, at the very least, meaningfully capable of taking an impartial stance in performing his mediatory role. This was likely the role that the headman was called to play in Nkani and Zama's case. His mediatory capacity was *ex officio*—in other words, it was assumed from his institutional position and concomitant authority in the community.

In principle, what lies at the core of the mediation process is the setting of goals—usually, at least, reconciliation and a resolution that will satisfy both parties.<sup>32</sup> For example, if the cause of conflict is some injurious action, the resolution, at a minimum, should include the cessation of the injurious action. The mediator adopts a set of strategies and techniques to achieve the predetermined goals.<sup>33</sup> Usually, these strategies are conciliatory and relationship building rather than adversarial.<sup>34</sup> These strategies ideally direct the interactions between the mediator and disputants in a constructive manner and lead to outcomes that largely resemble the intended goals. The absence of these goals and strategies in Nkani and Zama's case was arguably an important factor in the mediation's failure. Additionally, the fact that Zama did not substantially participate in the proceedings and was treated more like an object than one of the agents in the case may have contributed to the proceedings' ultimate failure to reach a mutually-satisfactory outcome.

Arbitration is different from mediation in that the proceedings are decidedly adversarial and the third party makes the final decision as to which of the parties wins and loses the matter. Unlike mediation, arbitration does not require the parties

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30. See Merry, *supra* note 15, at 919.

31. See Ajayi & Buhari, *supra* note 15, at 149–50; see also Gordon R. Woodman, *A Survey of Customary Laws in Africa in Search of Lessons for the Future*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW* 9, 14 (Jeanmarie Fenrich et al. eds., 2011).

32. See Sonia Nourin Shah-Kazemi, *Cross-Cultural Mediation: A Critical View of the Dynamics of Culture in Family Disputes*, 14 INT'L J.L. POL'Y & FAM. 302, 305 (2000); Andrew Stimmel, Note, *Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code*, 18 OHIO ST. J. ON DISP. RESOL. 197, 217 (2002) (“The main goal of mediation . . . is to promote settlement between the parties . . .”).

33. See generally Lisa A. Kloppenberg, *Implementation of Court-Annexed Environmental Mediation: The District of Oregon Pilot Project*, 17 OHIO ST. J. ON DISP. RESOL. 559 (2002) (reviewing a pilot project involving the use of court-annexed mediation for dispute resolution); Tarrell Awe Agahe Portman, *Faces of the Future: School Counselors as Cultural Mediators*, 87 J. COUNSELING & DEV. 21 (2009) (reviewing cultural mediation techniques and strategies for school counselors); Stimmel, *supra* note 32, 207–12 (2002) (outlining beneficial characteristics of mediation, generally, and in relation to will disputes).

34. See Nancy D. Erbe, *Appreciating Mediation's Global Role in Promoting Good Governance*, 11 HARV. NEGOT. L. REV. 355, 373 (2006) (acknowledging mediation as generally being “collaborative consensus-building rather than adversarial”).

to the dispute to reach an agreement on the content of the arbitrator's decision for such decision to be, technically, enforceable. This is so because before proceeding in arbitration, the disputing parties usually enter into an agreement with the arbitrator that permits him to decide the dispute and enforce his decision.<sup>35</sup> Thus, more than mediators, arbitrators are required to be impartial, and will usually have some pre-existing authoritative status on the basis of which they are called upon to arbitrate in the first place.

Adjudication is much like arbitration except that the third party, in the role of a judge, is required to be strictly impartial and has pre-existing authority that allows him to decide the matter. Thus, unlike the arbitrator whose authority is decided on a case-by-case basis, at the invitation of the parties to the dispute, the adjudicator has standing authority derived from the state and exercised in the context of a state institution or tribunal. An adjudicator has the ability to decide a matter regardless of whether the respondent or defendant accepts the court or tribunal's authority, and the order handed down by the adjudicator can be enforced by force. The adjudicator's decision is constrained only by the law.

#### *B. Mediation, Arbitration, and Adjudication in Msinga*

It is evident that the headman was playing a hybrid role in Nkani and Zama's case. Headmen often combine mediatory and arbitrational methods in a single dispute.<sup>36</sup> They often use mediatory strategies in adjudication—hence, mediatory-adjudication. This makes sense because headmen's limited enforcement capacity renders them little able to compel the parties to do anything they have not agreed to on at least some level. This rationale applies even when headmen have legitimate authority to resolve disputes and hand down orders.

In contrast, when the headmen use arbitration or adjudication tactics in mediations, or when they patently cannot compel the parties to comply with their orders, their dispute management effectiveness is weakened. In Nkani and Zama's case, the process the headman was using to resolve the dispute was not entirely clear. What was clear was that the headman did not have Zama's buy-in for the proceedings; Zama had not even been informed of them in advance. Thus, there was evidently no basis on which the headman could arbitrate the matter.<sup>37</sup> Moreover, the headman's

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35. See generally Joseph B. Akamba & Isidore Kwadwo Tufuor, *The Future of Customary Law in Ghana*, in *THE FUTURE OF AFRICAN CUSTOMARY LAW*, *supra* note 31, at 202, 207–08 (referring to customary arbitration in Ghana).

36. A headman might therefore try to reconcile the parties through an amicable process of discussion but end the dispute by imposing a finding at which the parties did not arrive themselves. The headman would thus expect the parties to comply with his order because of his position of authority and attempt to enforce the order.

37. It is worth observing that, according to traditional culture in Msinga (which was deeply patriarchal), Zama's legal personality was significantly shaped and controlled by her family. It would therefore be sufficient for the headman to hear the matter with Zama's family representing her and not concern himself with whether or not she was present for the hearing or bought into the process. Yet, this traditional principle no longer holds. During the report back workshop conducted with Msinga

jurisdiction to make an adjudicatory decision on a matter concerning Zama was highly questionable because Zama no longer lived in his area. This suggests that all the headman could do was mediate the dispute. The importance of Zama's contribution and full agreement to the solution that emerged from the "mediation," however, was overlooked. The headman performed the task of mediation as though he were only constrained by his understanding of the customary law.

While the definitions above derive from years of scholarship on what types of conflict management strategies work, the reader will see how they are problematized by two facets of the practical context of Msinga.<sup>38</sup> First is the ambivalence of the people in Msinga themselves. Msinga residents desire two distinct vernacular processes of mediation and arbitration and have absorbed the idea of what distinguishes the processes from state law. At the same time, they still have a strong sense of the import of an adjudicatory sphere. The vernacular authorities especially recognize that it is only adjudication that is perceived as validating their forums' legal existence, which is what motivates them to arbitrate in a manner that strives to be adjudication.<sup>39</sup>

Second, the kinds of disputes that arise, the circumstances that give rise to them, and the relationships of the parties whom the disputes typically concern make pure adjudication all but impossible. These needs and desires drive the forums toward more of a mediatory style of dispute management. In essence, there is meaningful ambivalence in the goals of the dispute management in Msinga and the methods that are used. I describe this ambivalence below in terms of a tension between the normative ideal and the complex reality.

In the remainder of this article, I make descriptive use of the labels—mediation, arbitration, and adjudication—in various combinations to describe the particulars of the processes used by (rather than the composition of) the forums in Msinga. The point is not to judge the forums against universal standards but to use universal standards and language to help determine where the forums may be struggling to achieve their articulated goals in their own context.

### III. THE NORMATIVE IDEAL

#### A. *Internal Processes*

Participants in preliminary focus groups I conducted in Msinga told me that two kinds of dispute management processes exist: "*icala*" (a case) and "*isikhalo*" (a cry or

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headmen and a senior traditional leader in June 2015, the traditional leader participants opined that, in such a case, it is essential for the woman concerned in the matter to be present and to be able to express her wishes for how the matter should be resolved.

38. For discussion of cultural influences on conflict and resolution style preferences, see Frank R. C. de Wit, Lindred L. Greer & Karen A. Jehn, *The Paradox of Intragroup Conflict: A Meta-Analysis*, 97 J. APPLIED PSYCHOL. 360 (2012).

39. I do not dismiss the feeling that the vernacular authorities are the default courts in their communities because they existed before the colonizers introduced state courts and therefore have adjudicatory power of origin. However, the present discussion focuses on the contemporary reality and what is pragmatic in the circumstances.

plea).<sup>40</sup> In *icala*, the complainants pay a fee to launch their cases with the appropriate formal authority.<sup>41</sup> The forum that hears *icala*—typically, the headman and his council or, on appeal, the chief and his council of headmen—hands down a decision of guilt along with a remedy deemed appropriate by the forum (usually negotiated down from what was initially requested by the wronged party). In other words, participants effectively described the procedure of *icala* as adjudication.

The second process, *isikhalo*—more often referred to in the plural, *izikhalo*—is initiated without payment of a fee. The complainant goes to the chief (though some participants reported that the headman provides a similar service) to declare her complaint. Participants emphasized that this is not *icala* and often described it in the negative: “It is not a case . . . it is a plea/cry.” This process is a petition for (mediatory) arbitrational intervention from a locally-recognized authority.

The chief hears *izikhalo* on a specific morning each week. People therefore need not give the chief advance notification of their intent to bring *isikhalo*; they can just come to his home or office (wherever he hears such disputes). Once the chief has heard the complainant’s account of her differences with the other party, who is typically absent from the initiating session, the chief writes a letter for the complainant to deliver to her opponent, summoning him to the next session. At that session, the opponent will have the opportunity to explain his side of the story. The chief makes a decision (arbitration) that is aimed at reconciling the parties (mediation).

According to the focus group participants, it is evident from the manner in which *icala* is initiated, and ultimately resolved, that the complainant is approaching the forum for adjudication. It is equally evident that the process for *izikhalo* is meant to be arbitrational-mediation from its inception.

### *B. Processual Links Forming Dispute Management Trajectories*

There is a normative ideal of the hierarchy of forums, the processes they use, and the way in which disputes proceed from one forum within the dispute management system to another. In keeping with the nature of most articulations of rules, the ideal dispute management trajectory is linear and consistently forward-moving. The best way to describe the normative ideal of dispute management trajectories in Msinga is through case-by-case illustrations. I used this method in my focus groups to help participants explain how common local disputes proceed through the management system.

The first matter discussed with participants presented a marital problem involving domestic violence. In this case, participants generally agreed that the matter would first be discussed among the marital family members (the family into which the woman had married). If the marital family were unable to adequately settle the matter, they would meet with the woman’s birth family for resolution in a

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40. These focus groups were conducted with our non-profit partner organization, Mdukatshani Rural Development Trust, two traditional councils, two groups of ordinary male members of the community, and two groups of ordinary women in Msinga in February and March 2011.

41. In one of the two communities studied, respondents are also required to pay a fee at the start.

joint sitting.<sup>42</sup> Failing adequate resolution there, the matter would proceed to the headman and finally to the chief's council.<sup>43</sup> While participants could, abstractly, imagine the matter proceeding from the chief's council to the Magistrate's Court, as the lowest court in the state system, they seemed scarcely able to imagine it actually doing so.

The second matter—namely, of someone eating a neighbor's chicken without permission—would ideally follow a similar trajectory to the first but would originate in a different microsystem of forums.<sup>44</sup> Because this matter is outside the realm of the marital family, the matter would not go to the family forums but to the neighborhood forums.<sup>45</sup> Figure 1 shows that the matter would begin in the “Neighborhood Gathering” rather than the “Single Family Council.”<sup>46</sup> Thus, the wronged neighbor would first gather together surrounding neighbors before whom to lay her charge against the neighbor she believed had wronged her. If the neighborhood gathering could not resolve the matter, it might move to the “(Sub)Ward Gathering.”<sup>47</sup> Failing resolution there, the matter would escalate to the same forums that the marital dispute would—that is, the headman's and chief's councils.

“Blood matters” (*amacala egazi*) present yet another category of grievance. “Blood matters,” such as common and grievous assault, rape, and murder, are reported to the headman, who determines in each instance whether a matter is serious enough for him to call the police or whether he should manage the dispute himself.<sup>48</sup>

#### IV. REGULAR DEVIATION FROM THE NORM

By nature, practice does not accurately reflect the normative ideal. This is partly because the normative ideal is a simplistic articulation of what occurs in practice.<sup>49</sup> When people are asked to describe and reflect upon what they do in practice, they rarely get it right, tending instead to express their aspirations. Thus, in Msinga, what participants reported in their descriptions of the dispute management system and its processes does not reflect anything near the level of complexity and diversity that exists.

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42. *See infra* Figure 1.

43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. Participants explained that the headman typically does not resolve cases pertaining to murder, rape, and assault leading to grievous bodily harm or similar wrongs. In such an instance, the dispute will go to the state police and, thereby, the Magistrate's Court. Where disputes arise between people who reside in different wards (*izigodi*) or traditional communities (*izizwe*), they are to be managed by a forum comprised of the headmen and men from both wards, or chiefs from both wards, as appropriate. In such a situation, the gathering is typically held in the locality where the offense occurred.

49. *See generally* JOHN L. COMAROFF & SIMON ROBERTS, RULES AND PROCESSES (1981); LIVING LAW OF LAND IN MSINGA, *supra* note 6, at 1, 39.

*A. Internal Dispute Management Processes*

The binary of *icala* and *izikhalo* that defines the normative ideal of internal disputing processes in Msinga suggests that there is a clear distinction between adjudication and arbitration or mediation, but that is not the case. As the normative ideal reflects, there are indeed two primary forms of dispute management processes available in Msinga's vernacular dispute management systems, but these are more appropriately described as mediatory-adjudication and arbitrational-mediation.

What is significant here is that despite the normative ideal, it is actually very difficult to distinguish between the two (or three) kinds of processes—and unsurprisingly so. They are more similar and overlap more consistently than the ideal representation would lead one to believe. This means that one is able to determine whether a matter is dealt with as a mediation, arbitration, adjudication, or combination of some or all of these only on a case-by-case basis and only after the fact.

In conventional Msinga discourse, the paying of money in order to initiate *icala* indicates that the forum before which the case is presented is being recognized as having the authority to adjudicate the matter and thus hand down a decision that formally—and materially—binds the parties. Msinga residents, however, also speak of the function of the forums that perform *icala* as one of reconciling (*blanganisa*) the parties that come before them—an indication that these proceedings are, at least in part, conceived of locally as achieving mediatory objectives.

Indeed, when people present their cases, that is often at least part of the remedy they request: to be reconciled. Even when they do not specifically request that remedy, the headman and his council will often steer parties in the direction of forgiveness and reconciliation. Implicit in all dispute management is the idea that reconciliation is part of the ultimate goal.<sup>50</sup>

Once a decision is handed down that one party was in the wrong, the remedy is negotiable. The wronged party requests a remedy that suits her. If the wronged party requests damages or compensation or the forum seeks to levy a fine, the party due to pay the sum can petition the forum for mercy and a lesser penalty. The wronged party is then typically asked by the forum, on behalf of the party due to pay for his wrong, to accept a lower amount. The forum might also suggest an appropriate amount by which to reduce the requested sum.

In this way, even if the forum is acting in a purportedly adjudicatory capacity, the remedy is usually negotiated as a settlement. Take, for instance, the matter in which an accused in a murder, who had been falsely implicated by his friend and thus had to hire a lawyer to defend him in the criminal case before the Magistrate's Court, then brought a claim against his friend for the cost of the lawyer. His claim was for ZAR4,000, and though the headman's council found in favor of the complainant, the settlement was negotiated in the context of the dispute management proceedings. The final reimbursement amount agreed upon was ZAR3,000.<sup>51</sup>

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50. This is one of the findings of the study from which this article draws and is based on multiple records of dispute management, focus groups, and interviews.

51. Observation of dispute before headman's council in Msinga on April 11, 2011.

Perhaps this combined process is a natural consequence of the fact that the headmen and their councils perform both adjudication and arbitrational-mediation.<sup>52</sup> They may struggle to keep adjudication and arbitrational-mediation separate in terms of their own role in them and thereby muddy the processes.

On the evidence, I therefore conclude that there are no pure adjudications in Msinga. Supposed adjudications are almost always infused with mediatory and arbitrational elements—especially the submission of the parties to the authority of the headman or chief and the dependence of the agreed outcome’s enforceability on the parties’ buy-in. This combination of processes is fundamentally necessitated by the entwined nature of relationships in which the disputes are embedded. It is also related to the significantly reduced authority, resources, and support by the state apparatus that the vernacular forums have relative to the state courts. I would therefore refer to all *amacala* (the plural of *icala*, or “cases”) in Msinga as predominantly arbitrations or mediatory-adjudications.

Like *icala*, the *izikhalo* process is somewhat of a hybrid. While described both in the language of arbitration and mediation, it is primarily intended to be mediation—with the solution arrived at collaboratively, if not mutually and consensually. As seen with Nkani and Zama’s matter, such mediations take on arbitrational inflections as well. A party pursuing the *izikhalo* path—as well as asking the authority to “reconcile” her with the party who she feels has wronged her—will often use the language of asking the forum to “guide” or “show her the way.” The forums are liberal in their provision of counsel and guidance, often issuing what amount to orders.

Indeed, *izikhalo* can take the form of arbitration if the party deemed to be in the wrong (or more wrong than the other) by the chief or headman as mediator resists agreement, thus compelling the forum to declare an order. Participants described what the chief or headman is doing in that instance as “*ukularwula*”<sup>53</sup>: reconciling parties with differences, with the responsibility placed primarily on the authority to effectively arbitrate. In such a situation, the relevant authority will use the inherent authority of his position, and sometimes even the legitimacy of his person, to try to compel compliance with the ostensibly-mediated solution. In other words, the relevant authority will then perform the role of an arbitrator, *ex officio*.

In one case, for example, the chief was approached about a man’s eviction of his third wife from their home. She had refused to conceal a firearm at his request. As if in *icala*, the chief gave a definite ruling that the woman should be able to return to her home.<sup>54</sup> The woman later informed the chief that she subsequently received notice that her husband had initiated legal proceedings against her through the civil law system. She said she also feared that her husband wanted to kill her. The chief responded that he had reached the end of his powers and advised her to report the matter to the police.<sup>55</sup>

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52. This applies equally to *iphoyisa* (the headman’s policeman) or their councils in subward gatherings.

53. Another meaning of “*ukularwula*” is “to break up a fight.”

54. On the woman’s return, the husband and his other wife moved elsewhere.

55. Observation of *isikhalo* hearing on January 26, 2011.

The hybrid nature of the *izikhalo* process, as well as the ambiguity of how those who uphold it describe it, raises the question of whether, contrary to my initial assessment, it is meant to be more arbitrational than mediatory. The goals pursued by means of *izikhalo* suggest not. Furthermore, like Nkani and Zama's matter, the above example demonstrates how the forums' limited ability to enforce decisions suggests that they should perhaps prefer mediatory strategies to arbitrational ones if they are to achieve more effective results. The focus group participants intimated that forums' authority to enforce the guidance they provide is limited. Their conclusion was that when the *izikhalo* process fails, *icala* becomes a back-up process. However, there are structural challenges—even obstacles—to *icala* serving as an effective back-up procedure.

The primary parties constituting the forums that conduct both processes are typically the same. If one rejects the guidance of the chief or the headman (and perhaps his council) in the *izikhalo* process, one has to bring one's case to the headman's council and, on appeal, ultimately to the chief's council. This can serve as a disincentive to bring the matter as *icala*. These kinds of matters typically languish without enforcement as, in the end, even a proactive complainant will tire of trying to have her matter enforced through the vernacular forums and eventually give up or turn to a separate forum altogether, such as *isikebbe* (a "private security" or "vigilante" group) or the state courts.

While the forums involved in *izikhalo* reflect the same trends, there are also vertical and horizontal differences in the process tools used by the forums. Horizontally speaking, the extent to which *izikhalo* at the chiefs' level in Msinga are mediations or arbitrations varies from one area to another. Thus, the *izikhalo* process before the Mchunu chief is less formalistic and much more mediatory than that before the Mthembu chief. This may also, at least partly, relate to the relative public satisfaction with which these chiefs are met by their constituencies.

Vertically speaking, there is definitely less formality in the *izikhalo* process before the headmen in the Mchunu and Mthembu communities than there is before the chiefs. In most wards, it is sufficient for people to report their complaint to the headman informally at his home as and when an injury occurs. The headman will set up a time to meet with the other party to the dispute and then gather a handful of local men whom he trusts and whom he has perhaps appointed to assist in this function to hear and mediate the dispute between the two parties. Sometimes, the headman will gather one or two local men and go to the parties' home area for the mediation.

I deduce that the reason focus group participants seemed confused or unclear about the headmen's procedures and authority is the reduced formality of the *izikhalo* sessions that take place before the headmen. This informal process accounted for the bulk of the headmen's participation in the dispute management that we recorded in our study.<sup>56</sup>

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56. During the data collection period of March 2011 to January 2012, we recorded 183 instances of the informal process, as contrasted with seventy-one formal hearings across six wards that were the sites of our research.



*B. Competitive Forums and Their Processes*

Forums that do not form part of the core vernacular dispute management system—whether they are peripheral to the system or not part of the system at all—nonetheless compete with the core vernacular forums’ authority over disputes. This results in added potential for dispute trajectories to deviate substantially from the normative ideal.

When a dispute arises strictly between men, according to the normative ideal, mediation is available through *igoso* (the headman of men in a ward) or *iphini* (the headman of men in a subward)<sup>57</sup> and the local men, who jointly sit with him under his tree. *Igoso*, and the ward men gathered around his tree, may also take arbitrational and even disciplinary action when they deem it necessary. Their methods seemingly lie at the border between institutional interventions—because *igoso* is a legitimate forum within the vernacular system—and self-help, because some of their methods can be reminiscent of “mob justice.” From the outside, the methods used by *igoso* to address a dispute can appear more like vigilantism. Nevertheless, this kind of process touches importantly on the question of whether vernacular legal authority is legitimate when it falls outside of the strict precepts of state law.

From the evidence collected in Msinga, it is apparent that there is an uneasy relationship between the processes adopted by *igoso* and the men—and even more so, *isikebhe* (the “private security” or “vigilante” group)—on one hand, and state law enforcement, especially the police, on the other. It remains to be investigated exactly how this relationship manifests, but it would seem that the key point of tension between these forums pertains to the use of force.

*Igoso* and the men predominantly use arbitrational-mediation and group persuasion (peer pressure) to manage disputes among their own, although there is definitely the potential for them to use force (often as a threat). The basis of *igoso*’s authority to use force is vernacular law. This could be seen in a matter in which a man was misusing his gun, especially when drunk, to threaten other people. The men gathered under *iphini*’s tree and agreed that, with the man’s brother’s help, they would forcibly confiscate the illegal firearm from his home. The headman (in attendance at the time) would then deliver it to the police.<sup>58</sup>

*Isikebhe* uses a combination of arbitration, shaming, threats, intimidation, corporal punishment, and sometimes even worse forms of violence to manage disputes affecting those who subscribe to its services. The basis of *isikebhe*’s claimed authority is consent by its members, who pay fees to *isikebhe* as though to a cooperative or private insurance, and the broader socio-legal “need” for its services resulting from the state and vernacular authorities’ composite failure to maintain order. Somehow, *isikebhe* interprets this public demand as unofficial jurisdiction to enforce its version of “justice” on those who have not subscribed to its services, which are largely illegal.

The police are the only ones authorized by state law to use reasonable force, but they often exceed that mandate by using excessive force and unauthorized violence in

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57. *Iphini* is subordinate to *igoso*.

58. Observation of dispute before *iphini* in Msinga on January 24, 2012.

managing disputes. Focus group participants repeatedly, and passionately, brought up incidents of police assaulting members of households during their search and seizure operations. The police also often use unauthorized “mediation”—referring some matters that come to them to the vernacular forums instead without a legal mandate to do so. For instance, in one conflict, a young man had been severely assaulted by his cousin, who accused him of stealing his cell-phone.<sup>59</sup> The injured young man’s mother reported the matter to the police, who discouraged her from pressing charges and told her to consult the headman and have the matter resolved at home instead. Her local headman, however, had referred the woman to the police in the first place.

### C. *Variable Disputing Trajectories*

The core tenet expressed in the normative ideal is that the forum at the level of social organization within which the dispute arose will typically be the first to discuss a matter, but evidence shows that the normative ideal is not always observed. The existence of *isikebhe* as an alternate forum that people turn to when they perceive vernacular forums as weak is one example.

The faulty assumption that disputes will move logically and progressively from the most local and immediately-concerned forum to more removed forums is grounded in two beliefs. The most local forums are assumed to have the greatest incentive and greatest prospects of resolving the matter—especially in a relatively low-stakes and low-cost manner. The more distant forums are assumed to have increased capacity to resolve matters, particularly, where lower forums have been unsuccessful. Empirical evidence places these beliefs in question.

First, while the lowest forums do indeed have overwhelming incentive to resolve matters as best they can, it is not evident that they actually have the greatest prospects of doing so. Second, the stakes in the lower forums’ successfully resolving the matters with which they are tasked are very high. The symbiosis that marks living arrangements means that if the lower forums fail to resolve matters, the deep and intimate connections, as well as regular contact between local people, all but guarantee that the conflict will flare up again, and with potentially worsening consequences.

Third, with matters that the vernacular grouping would categorize as more serious (“blood matters”), the forum of first instance is situated at a higher level of social organization than that which is most local. This is so even when the matter arises in the most local sphere. The headman, as an individual (often acting with his council), constitutes the forum in which serious matters are first heard. Therefore, the forum of first instance is further removed from the most local sphere of social organization, where the offense occurred and the dispute probably first arose—such as the family or neighborhood.

According to the ideal, lower forums are insulated and protected from more serious disputes and higher forums are largely reserved for matters perceived by the vernacular grouping to be of greatest magnitude. Even that is not always true,

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59. Observation of dispute before headman in Msinga on January 15, 2012.

however, because sometimes the higher forums will refer potentially serious conflicts back to the lower forums. We collected several examples of higher forums (the chief's council or, as seen in the example above, even the police) referring disputes that they were unable to address back to family councils. Moreover, the idea that the higher forums hear the most serious cases is based on another erroneous assumption: that forums' authority, and thus ability to resolve disputes, increases at each level of social organization. This is ostensibly supported by the belief that the highest forum, in particular, is a sacred space to be protected from defilement or not to be bothered with petty matters and, hence, not to be approached unless absolutely necessary.

To illustrate the practical error in these ideal assumptions, I provide a more controversial example. I mentioned that the normative ideal pertaining to severe "blood matters," as explained to me by participants, is that they are immediately referred to the police. Only when I asked if there were ever deviations from this practice did some (and very few) focus group participants confess—with what appeared to be an awareness that this was not supposed to occur—that this principle is sometimes violated. In other words, "blood matters," particularly of grievous assault and rape, are sometimes "discussed at home" (*ukukhuluma isikhaya*). To further illustrate this deviation, I present two disputes pertaining to the "blood matter" of rape: one a case of attempted rape, and the other a case of gang rape.<sup>60</sup>

In the first case, a young bride was walking to collect water at dusk when a man she knew—a distant relative of her husband's—approached her, intoxicated, and said that he had finally gotten her alone and that now he would "take" her. At first, she thought he was joking, but he grabbed her roughly and attempted to sexually assault her. She wrestled with him and managed to escape, primarily because he was intoxicated and unsteady.

The young bride ran to her marital family to tell them what happened. Her male family members reported the matter to the headman, and together with the headman they confronted the accused. The accused explained that he was intoxicated at the time and had not meant any harm. When the headman asked the parties if they wanted to attempt to resolve the matter between them at home or if he should report the matter to the police, the parties together chose the former. The matter concluded with the guilty party paying a sum of money in damages.

With respect to the other matter, a sixteen-year-old girl was raped by five young teenage boys. The girl was visiting her boyfriend's home when some boys who were playing soccer nearby stopped at the house to ask for water. They threatened her boyfriend, who then left. The boys then sexually assaulted her.<sup>61</sup>

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60. In the eleven-month data-collection period of this research project, three disputes pertaining to "blood matters" related to rape came to our attention. One was a matter of gang rape, another one of attempted rape, and yet another of rape that only surfaced as a cause and explanation for a matter of a culpable homicide. I will only discuss the gang rape and attempted rape because those assaults occurred during the field research period.

61. It later emerged that the boyfriend may have informed the other young teenage boys that the girl would be there, virtually alone. We were unable to accurately establish whether her boyfriend had returned, but he was at least implicated for having coordinated the sexual offense with the others.

The girl took a bath after the violation, making it difficult to collect evidence for a trial, but she still wanted to press charges against the boys. Her parents decided, on her behalf, to attempt to resolve the matter at home by discussing it with the boys' families and agreeing on compensation for the boys' wrongdoing (a cow was the offer on the table). The boys' parents argued that the boys were themselves teenagers and their going to prison over this would ruin their lives. In addition, the girl's family and that of one of the boys were (at least distantly) related; they shared the same surname.

What these examples demonstrate is that, though the normative ideal is that rape disputes are to go to the police and Magistrate's Court (because that is what the state law requires), they do not necessarily do so. The primary reason for deviation, illustrated by both cases, is that the parties involved are often people who know and are even related to each other. A second and associated justification is that engaging the police is seen as an extreme solution that can ruin one's life rather than provide rehabilitation. Rarely do people wish such punishment on someone to whom they are intimately connected. A third reason is that often the perpetrators of even extreme violence are acting under the influence of mind-altering substances—most commonly, alcohol.

#### *D. Difficulty Finalizing Disputes*

A key element of the findings in this article is the inherent flexibility of the dispute management system in Msinga. Outcomes reached in any set of proceedings are seldom final even though they are often presented as such.

One main reason that disputes in Msinga are seldom finalized by the dispute management forums is that they constantly evolve. Scholars describe this phenomenon as one of transformation.<sup>62</sup> Aggravating and mitigating circumstances are typically the primary causes of transformation of disputes. Such circumstances commonly transform a matter so significantly that the terms in which a dispute is presented by the time it reaches a dispute management forum make the core issue that is under contestation barely recognizable.

In other words, disputes evolve so much before they are presented as claims in front of dispute management forums that they are sufficiently altered as to conceal their true causes. In the most extreme cases of transformation, the issue that the ultimate dispute management forum faces at the end of the dispute management trajectory bears little, if any, resemblance to the issue that was originally presented for resolution at the matter's incipience.

A pattern of social and economic ills regularly manifests itself in the disputes that the management forums are tasked with resolving. These ills include severe poverty and unemployment, wide availability of mostly illegal firearms, and widespread alcohol use and abuse, which contribute to the rapid escalation of local conflicts to violence. These socioeconomic problems make many of the disputes managed by the forums in Msinga actually seem intractable. In the face of such

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62. See Felstiner, Abel & Sarat, *supra* note 15, at 632–33.

problems, the forums look extremely ineffective and their value highly questionable to outside observers and sometimes even internal participants.<sup>63</sup>

This is linked to a second reason why dispute management by forums in Msinga does not necessarily lead to finality in a matter. The forums themselves are often not very successful at arriving at or implementing effective solutions. Matters fail to reach a conclusion because of the use of ineffectual dispute management strategies and lack of enforcement. Zama's case at the beginning of this article demonstrates this.

## V. CONCLUDING REMARKS

To their credit, many headmen are aware of their limitations. In this vein, it is not uncommon to see a headman immediately pass a matter on to the chief's council without hearing it first because he recognizes that he would not be able to resolve it.<sup>64</sup> After all, circumspection can be said to be a central attribute of judicial temperance. On the other hand, one might be forgiven for thinking that this practice by the headmen contributes to the significant reporting error that the vernacular forums are able to successfully reach a conclusion and make a factual or legal determination of guilt in all matters that are heard by them.

The key point I mean to make in this article is not just that the normative ideal is an inaccurate account of vernacular dispute management in Msinga. I mean to argue that the deviation from the ideal is establishing the norm. Much of the deviation from the normative ideal is accepted and, consequently, arguably acceptable. In this way, the deviations themselves, while not viewed as ideal, are in a way normative.

Unfortunately, the norm that the deviations are establishing is mostly cause for concern. In practice, the forums only just manage to contain the social conflict represented by the disputes that are brought to them and, in fact, the conflict very often spills over. The vernacular dispute management system is cracking under the combined weight of expectation imposed by the very challenging socioeconomic conditions in Msinga and captured by the normative ideal.

Contrary to what is expected of them, lower vernacular forums are rarely able to resolve the disputes with which they are presented. While the highest forums are assumed to have the greatest ability to resolve these disputes—should the disputes reach them by virtue of necessity—this also does not appear to be true. Rather, the highest forums refer matters that defy their attempts to settle them back to the lowest forums (or issue weak orders that eventually cause conflict in other spaces). Thus, lower forums are actually not insulated from having to address serious disputes, all while the stakes in the matters they are tasked with are very high.

Furthermore, a noteworthy number of disputes referred to the chief's council either without or after having been heard by a lower forum are ultimately not heard

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63. It is questionable, however, whether they are completely ineffectual because, despite their limited success in the circumstances, one wonders how insecure the area would be if these forums did not exist at all.

64. This is setting aside the personal risks headmen face that make them pass on certain matters as too dangerous to their own lives.

by the chief's council. Parties, understandably, would rarely want to pursue their disputes that far. The chief's council is relatively far away, both geographically and symbolically. A headman's council provides little help when it refuses to hear a matter and refers it directly to the chief's council (unless it absolutely must) or tells people dissatisfied with the headman's council proceedings that they can appeal the matter to the chief's council for greater satisfaction.

In the broader context of what I describe, the fact that intended mediation in these forums tends to look more like arbitration is likely to be socio-politically significant. It is a sign of forum authorities with little control grasping for more. This is even more apparent, perhaps, when viewed alongside the persistent yet dissonant rhetoric that says that the decisions made by the forums are final, authoritative, and to be effectively enforced. In a very real sense, looking at internal dispute management processes as performance spaces, one can see that the vernacular forums are performing authority—to those appealing to them for assistance, especially, but also to themselves and to the state.<sup>65</sup> The dispute management processes they select are modalities for these performances, attempting to portray and defend the message that the forums have legal and judicial authority.

Popular defenses of vernacular dispute management forums as important in especially remote rural areas primarily refer to their accessibility in terms of proximity, cost, speed, form, and language or discourse.<sup>66</sup> They also place heavy emphasis on the justification that the central function of these forums is to enable members of the vernacular groupings they serve to live well together again, after a conflict has erupted, as people depending on one another for security and often survival.<sup>67</sup> In such a milieu, they argue, “justice” may sometimes, or even often, look different from how it looks in a state court.<sup>68</sup> Some argue that the way vernacular forums resolve disputes prioritizes and facilitates peace and harmony.<sup>69</sup>

The evidence collected in this study, however, suggests that the “solutions” provided by vernacular forums that are trying to be “courts” (adjudicative forums) may in fact be contrary to securing long-term peace and security because they do not afford real, long-standing relief to the complainants or respondents. The empirical evidence suggests that the processes employed by the forums are key and, in order to become conducive to long-term effectiveness, the vernacular forums should focus on goals and strategies associated with mediation processes.

In the competition that presently prevails between local and state forums, imposition of adjudicated or arbitrated “solutions” and finality of the “solutions” arrived at through adjudication or arbitration processes is what is expected of a “court” or “truly authoritative” dispute management forum. Therefore, though

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65. See Sindiso Mnisi Weeks, *Securing Women's Property Inheritance in the Context of Plurality: Negotiations of Law and Authority in Mbuzini Customary Courts and Beyond*, 2011 ACTA JURIDICA 140, 163, 172–73.

66. See Ajayi & Buhari, *supra* note 15, at 141–42.

67. See *id.* at 154.

68. See generally *id.*

69. See, e.g., *id.*

outcomes reached in any single process in Msinga are rarely final, they are still presented as such. This points to another reason why dispute management, especially by lower-level vernacular forums in Msinga, does not necessarily conclude a matter. Forums infrequently implement—or are truly capable of implementing—the effective remedies they sometimes prescribe. Disputes heard by vernacular forums are therefore often not finalized as a result of this limited capacity and ineffectiveness.

This rarity of finality would not indicate system incapacity but for the two contextual conditions already canvassed. First, the assumption that higher-level forums have the greatest authority and ability to resolve serious matters and are therefore to be relied upon in instances of lower forum failure is inaccurate. Second, the failure by the vernacular forums at lower levels to conclude local disputes does not necessarily mean that the disputes then proceed to other forums within the vernacular dispute management system as it formally exists. Often enough, a dispute simply transforms into a different form altogether.

The unsettled disputes often manifest as self-help through avoidance, endurance or often violence, social upheaval, or an appeal to a forum that is not formally part of the vernacular dispute management system. People tolerate perceived wrongs until they no longer can. Some relocate from their homes while others turn to physical violence using firearms that are readily available to them. Another fight may erupt about something that appears to be simple—a stolen cell-phone, an insult or an accusation—but actually is grounded in a seemingly different unresolved conflict. Other parties turn to *isikebhe* for assistance.

More revealing still is that, the non-vernacular dispute management forums to which people often turn rarely include state institutions. While people can appeal their cases from the chief's council to the Magistrate's Court, they often do not. Thus, when one looks at the system diagram I have provided, one sees that the "Conventional Escalation" is actually more the normative ideal.<sup>70</sup> It is supplemented by the "Conditional Escalation" of matters to certain irregular forums that also form part of the vernacular dispute management system.<sup>71</sup> What adds intricacy to the system diagram—and, likewise, provides the most complexity to the reality of the system's functioning—is the "Regular De-Escalations" and "Vernacular System Exit Points."<sup>72</sup> The "Regular De-Escalations" are supposed deviations from the norm, but in fact, they themselves are the norm. Ultimately, the deviations also hint at, or in some instances are patently indicative of, the system's weaknesses and failings.

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70. *See infra* Figure 1.

71. *Id.*

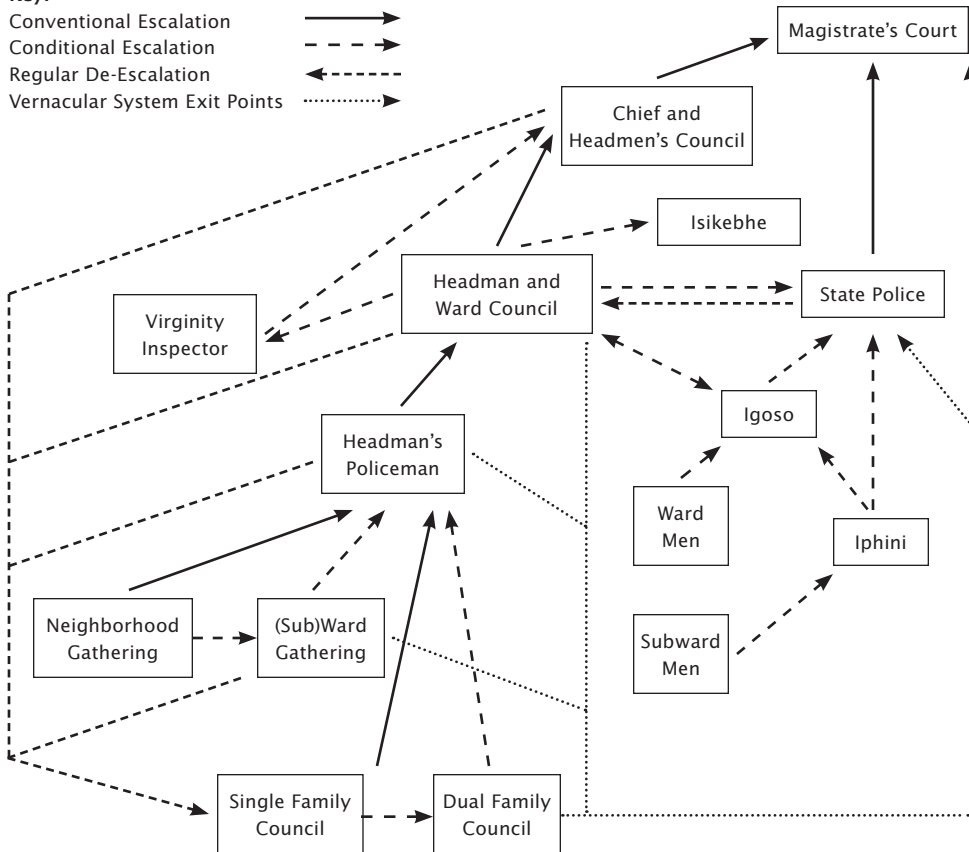
72. *Id.*

Figure 1: Vernacular Dispute Management Forums in Msinga<sup>73</sup>

**Vernacular Dispute Management Forums in Msinga**

**Key:**

- Conventional Escalation →
- Conditional Escalation - - - →
- Regular De-Escalation ← - - -
- Vernacular System Exit Points ····· →



73. The vernacular name for the “Virginty Inspector” is *Umbhlozi Wezintombi*.