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**Access to Justice?**

*Traditional Justice and the Search for Human Security in Rural South Africa*

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**SECTION ONE**

**Chapter One**

**Introduction:**

**Where Do Vernacular Forums Fit in the South African Legal Order?**

A bullet pierced through the window and shattered not only the window itself but also the silence of that night.

In rapid succession followed another shot. Then another.

She had been hit.

Another shot fired narrowly missed her. Panicked, she rolled over on her bed and threw her body onto the floor, quickly trying to get under the bed. But she could not go beyond the place where she had landed on the floor. She just lay there, trying to be as still as she could.

She heard someone moving swiftly round the outside of her small hut.

Another shot. Then another.

The person outside sounded so near. This, even as her heart beat faster than she had ever known it could – thumping loudly within her chest to the point that everything else but its almost deafening beat seemed relatively inaudible.

She felt the blood pouring rapidly out of her open wound. She could scarcely breathe.

Through bleary eyes, she thought she saw the person look through her shattered window. She assumed it was to see if she was still alive. She was not entirely certain that she was. She could not make out his face in the darkness of night.

Then, just as quickly as he had approached it, she thought she saw him move away from the window.

Was he coming to the door?

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Or was he leaving now, perhaps satisfied that she was dead?

Right then, before she could establish which of those possibilities was true, she lost consciousness.

“Kwenzekani emva kwalokho? [What happened after that?]”, asked the chief headman of the middle-aged shooting victim who sat as a witness before him.

“I woke up in the hospital. My nephew came to visit me. While we were talking, he asked me if I knew who had done this to me. But I told him that I did not. He said that, surely, this could not have been random. He insisted that I think of who of my acquaintances might have a grudge against me and might, therefore, have sought to harm me.

“I named two sets of people with whom I had had minor differences in the past: one was the family that are my neighbours. I had chastised their son when I had found him beating the children. But I told my nephew that I did not think it was them.”

One of the people named was her nephew’s drinking buddy. When her nephew went drinking with him the next time, he blurted out to him, “I’m not like you: one of those guys who shoots women”.

When it was his turn to testify by sharing his story in narrative form, the young man accused (that is, the drinking buddy) claimed that the nephew had actually said “I’m not like you: one of those guys who is hired by women to shoot people”. From his family (namely, his mother), the rumour seems to have later developed that there were two women in particular who were thought to have hired this young man to shoot the victim. Now, the two women’s husbands were the ones who had brought the case – pursuing it right up to the chief’s court, where it was now being heard.

The two men had initially brought the matter to their local headman’s policeman. They were objecting to the nephew’s having defamed his friend and, at least according to the rumour that followed, their wives. The headman’s policeman had gathered the parties to discuss the matter under his tree, which was his dispute management forum.

He told the members of the chief’s court that he had phoned the woman who had been shot to ask her to attend the hearing as a witness. She had told him on the phone that she had not seen the person who had shot her and therefore could not contribute anything to the proceedings. The headman’s policeman had accepted her explanation and proceeded to hear the matter with the remaining parties in attendance.

Unsurprisingly, there had been no resolution to the dispute. The two men who had brought the matter on behalf of their wives therefore appealed it to the headman who said he would not hear it. He, the headman, said it should go directly to the chief’s court. It was there that the headman’s policeman was taken

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to task by the court for not having compelled the victim of the shooting that had given rise to the conflict to come to the original hearing.

What quickly became murky in the chief's court proceedings was whether the woman who had been shot was a witness or a party to the dispute. This murkiness was first apparent when, at the start of the hearing, the chief headman called all the parties to pay R30 for the dispute to be heard. The shooting victim was asked to pay R30 among them, which she enquired about. She told the court she had not understood herself to be a party to the dispute but a mere victim, and to thus be attending the hearing as nothing but a witness. Without offering a real explanation, the chief headman said that she had to pay the R30 also. Begrudgingly, or so it seemed, she did.

Later in the hearing before the chief's court, what first appeared a side issue arose: before her shooting and the alleged defamation took place, the victim had had several goats die on her property – goats belonging to other people. One of the goats had belonged to the family of the young man who was allegedly accused of shooting her. The reason why this initially appeared to be an auxiliary matter was that it seemed to emerge only as a potential reason why people might have wanted to harm her. Thus it was discussed as maybe being a reason why even the neighbours who were bringing the defamation dispute against her nephew might not have been defamed, after all.

The victim had not raised this issue. It had been raised by the young man (that young man being the drinking buddy) who had allegedly been accused of shooting – or at least being hired to shoot – people, and hence possibly the shooting victim. The court's attention reverted to the middle-aged woman who had been shot.

"How many goats were there?" One of the local headmen was interrogating the woman who had been shot.

"A few – four died while I was present at home."

There was some disagreement between the woman and the family that had brought her to the chief's court about the number of goats. The suggestion was made that the number may even be as high as 11. The members of the court ultimately accepted that the number was around nine.

"Did you know anything about this rumour that you were responsible for the deaths of the goats on your property?" The vocal headman continued his questioning.

"Yes."

"So, with this rumour, what were you accused of doing to the goats, exactly?"

"I heard that they said that I killed them with Tamaron [a lethal substance technically known as "methamidophos"] ..."

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“Did you?”

“I did not. I don’t know why the goats came and died on my property.”

“Why didn’t you tell anyone?”

“I thought it best to ignore the rumour because I was innocent. I thought it would go away on its own.”

“Nine goats die on your property and you don't tell anyone. You don't even go to your neighbours to see if they can help you find out what is causing the deaths of these goats on your property?”

“I try to keep to myself. I prefer not to stir trouble. I believe that if I just mind my own business things will be fine.”

The woman seemed mildly distressed. Her older brother, who was there to represent her, did not seem to be putting up a very strong defence. She also seemed somewhat surprised – mainly, it would seem, because she had been called to the matter as a witness but it was starting to feel like she was the one on trial.

I was perplexed along with her.

I was attending the hearing because I was interested in observing how traditional courts function in practice. I was relatively new to the Msinga area and at the start of constructing my methodology for data collection on a substantial ethnographic study that I would conduct there.

The bulk of literature and my experience on the subject had prepared me for slow-paced dispute resolution (what I call dispute management) proceedings – and, in many ways, this was that. Yet, this matter was also very fast-moving in that it had transformed before my eyes in ways that made little sense to me. Specifically, the focus of the matter had very quickly seemed to move to why the victim had not told anyone about the deaths of the goats and took on undertones of placing culpability for her attempted murder on the victim, due to her silence.

The victim was substantially challenged in the chief’s court for her not having reported the goat deaths to anyone long before her shooting. Those authorities and attendants who raised their voices in her matter before the chief’s court were of the belief that her speaking up ahead of time might have prevented her shooting. They wanted to know more about this aspect of the dispute so they adjourned the matter until they could get further witnesses in to testify. They especially wanted the woman who had told the victim a year before the shooting that people were upset about the goats and had hired someone to kill her.

The victim and I had exchanged phone numbers when the rest of the hearing was postponed to the following week when I would not be able to attend. I told her

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that I was interested in learning the outcome of the dispute. She had then called me a few days later to say that she had picked up a rumour (from people who were not even present at the case hearing on Tuesday) that she was going to be fined by the chief's court. She told me that she did not understand why she would be the one to be fined because she was innocent and was just a lone woman with no problems or differences with anyone. She asked me to investigate the legality of the situation and advise her of any solutions that might suit. I recommended that she wait until the judgment was handed down (rather than act on a rumour) then let me know and I would then see what I could do.

I was still in Msinga completing the same field research visit when she called me. If the rumour was true, then I shared her confusion at the case's outcome. Yet, even if the rumour was not true, I was still perplexed by the entire dispute proceedings that I had observed. My local research assistant, however, was not. He helped me to try to get clarity and better understanding of what had happened in that case. He took me to some ordinary residents in the Msinga area to hear their thoughts on the dispute.

In the words of an older man whom I interviewed, "a person's livestock is like a person – would you keep quiet about a person's death on your property?" He and the middle-aged woman I was interviewing together were of the view that, after the death of the second animal, at the latest, the victim should have gone to her neighbours to ask them to help her enquire into what had happened and why these animals had died on her property. Her failure to do this, especially as a single woman who they assumed would ordinarily count on her neighbours to help her in any eventuality (the implication being that she should), was understood to strongly suggest that she must be guilty of killing the goats with Tamaron, as she had been suspected of doing, according to rumour.

Why did the victim remain silent about the numerous goats' deaths when the social expectation was that she would speak up after the second, if not the first, and thereby avoid personal suspicion? The victim herself claimed that her Christian beliefs led her to keep to herself and not talk too much because she believes that "quiet breeds peace while talk breeds dissension/discord".

By contrast, living "as an island", as the community members saw it, was not an option that was to be entertained. In their view, it just does not happen; no matter what one's beliefs, otherwise. Thus, as far as the chief's court and ordinary community members present (as well as absent) for the hearing were concerned, the victim's fault was not so much that she had remained silent about *the threat made against her* but that she had not told a soul about *each of the livestock deaths that preceded it*. Therefore, whatever the outcome of the case in the chief's court for any other parties to the dispute(s), the woman who was shot would have to pay a fine, as well as the woman who alerted the victim to the threat (presuming that the third woman, who witnessed this, would testify that she had heard it said).

I later learned from the victim by phone that the woman who had alerted her to the threat (who was a colleague at the irrigation scheme farms) had appeared

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before the court but had not told the court from whom she had heard of the threat. The third woman (another colleague in the same place) – summoned to the chief's court as a witness because the victim had named her as being present when she had heard of the threat – refused to appear before the court. The latter woman said that she did not remember ever hearing such and therefore could not be a witness in the matter.

In the end, according to the shooting victim, as of August 2010 (which was the last time I was able to check in with her), the matter lay unresolved. The court had asked the primary witness (that is, the woman who had told the victim of the threat) to pay money to it to close the case. The woman who had been shot said she was not contented. She still wanted to know from this primary witness who it was that had accused her of killing people's goats and had hence most likely hired someone to shoot her. The victim told me that she felt fearful and insecure, as a consequence of this unsatisfactory failure to properly resolve the matter. She also bemoaned the chief's court's receipt of money when she had gone uncompensated although she was the one who had suffered personal harm.

### *This Case in Wider Context*

At the time of writing this prologue in August 2014, Alice Goffman's book, *On The Run: Fugitive Life in an American City*, had just come out. It was met with both resounding applause (two celebratory pieces were published by the *New York Times*) and utter disdain (a scathing review was published in *Slate*<sup>1</sup> followed by another in *The New Inquiry*).<sup>2</sup> While the research represented in my book was not obtained using such deeply immersive participant observation as Goffman had done, the limited controversy around her telling of the story of her research and findings struck a chord with me.

To me, the most notable critique of Goffman's account by Dwayne Betts in *Slate* and Christina Sharpe in *The New Inquiry* is that, rather than challenge prevailing ideologies around poor, inner city communities and their young men, she has reinforced them. Goffman claims to have meant to tell the story of nefarious police monitoring and surveillance practices that lead young men to avoid workplaces, hospitals, even funerals where the police might find them. Instead, in Betts' assessment, Goffman has ended up telling a story that affirms all the stereotypical beliefs about the communities at issue that (are, at least, *claimed* by law enforcement to) lead police to use those very perverse practices that Goffman claimed to be interested in exposing.

In Betts' words:

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<sup>1</sup> Betts, Dwayne. "The Stoop Isn't the Jungle" (July 10, 2014) [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/07/alice\\_goffman\\_s\\_on\\_the\\_run\\_she\\_is\\_wrong\\_about\\_black\\_urban\\_life.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/alice_goffman_s_on_the_run_she_is_wrong_about_black_urban_life.html) (accessed on 15 August 2014)

<sup>2</sup> Sharpe, Christina (Aug 8, 2014) <http://thenewinquiry.com/essays/black-life-annotated> (accessed on 19 August 2014)

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In the end, however, her unrelenting focus on criminality is just as likely to encourage *more* arrests and surveillance than to convince people that mass incarceration should end. The book suffers because it panders. Unwittingly, Goffman gives ammunition to tough-on-crime politicians who want to believe that urban areas are breeding grounds for crime and lawlessness.

I'll say what should be obvious, but isn't: Most young black men are not committing armed robberies and burglaries, are not engaging in armed battle from moving cars, and are not murdering acquaintances at dice games. They are not shooting into homes. If Goffman wants to reveal the abuses of a surveillance state, why not focus on characters that aren't so entrenched in the worst criminal activity? Why not give us a picture of Mike and his friends' lives that is broader than the last felony they committed? Instead Goffman only gives us young men who seem to be committing crimes with relative impunity. If these are the targets of surveillance, is the level of policing in urban communities really a problem as opposed to a solution?<sup>3</sup>

Sobering words, to say the least – perhaps mostly because of how legitimate and true they are, and how potently they raise the question of the ethical responsibility that scholars owe to the communities in which they conduct research. As Betts and Sharpe demonstrate, at the very least, this responsibility is to refrain from making the communities we study more vulnerable than they already are to misunderstanding and oppression by outside (and inside) authorities. In other words, we should at least be careful not to simply reinforce negative stereotypes as we purport to challenge them through our work.

This powerful critique centring on the unintended consequences of Goffman's work gave me huge pause about my account in this book. Granted, unlike Goffman, I could not seriously be accused of making myself the hero of this story for supposedly surviving doing 'courageous' research in the community of study. (I hope no reading of 'personal heroism' in doing research in such a context as Msinga can be given to this prologue at all. Just to be clear: I was not there when the crime occurred and was never at risk in the way that others were.) In conducting this research, I have never had the boot of a policeman on my neck, gotten close enough to my subjects relationally that I have lost friends to killing, been in a car chase, been physically present for a police raid, or even been so proximate to harm that I saw someone get shot as he exited my car.

Yet, I cannot deny that the story told in my book is similarly grim. The opening case illustrates this all too well. It is important to me, then, to try and ward off as best I can the unintended consequences that Betts and Sharpe fairly describe. I

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<sup>3</sup> Betts, Dwayne. "The Stoop Isn't the Jungle" (July 10, 2014) [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/07/alic\\_e\\_goffman\\_s\\_on\\_the\\_run\\_she\\_is\\_wrong\\_about\\_black\\_urban\\_life.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/alic_e_goffman_s_on_the_run_she_is_wrong_about_black_urban_life.html) (accessed on 15 August 2014)

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therefore want to start by framing for readers what I *do* and *do not* hope are the overarching conclusions that they will reach from this opening illustrative case and the many like it – albeit mostly at much smaller scale – that feature in the narrative of this book.

Firstly, it is crucial that the reader keep at the forefront of his/her mind that the nature of researching conflict and its management is that one sees the most hostile and unpleasant slice of a group of people's common existence. Indeed, such research deliberately highlights and focuses on the instances in which cooperation, social trust and mutual respect fail. This can give a very warped view of a group of people, detracting from any sense of balancing perspective.

It is therefore important for the reader to keep in mind the fact that, that young men in Msinga are more prone to being involved in violent or potentially violent disputes, for example (as I go on to argue in the book), does not mean that all or even most young men are involved in such. This finding about young men's greater proclivity is not by any means descriptive of the whole of the reality of Msinga or all of its young men. It is, however, a strong caution and clarion call to those in power to intervene in *effective* ways to reduce the risk of young men getting drawn into such by the dire nature of their circumstances and the limited alternatives and opportunity available to them as aids to their escaping that fate. This book sets out potential solutions that can replace the very *ineffectual* ones currently proposed or in use.

Of African literature, which is particularly prone to stereotypical tropes of 'the life of the natives', Njabulo Ndebele once argued for a 'rediscovery of the ordinary'. In that set of essays, he wrote what should be but is evidently not obvious: that even in the worst of times (such as, in the instance of his writing, at the height of apartheid) the ordinary rhythms of life continue in substantial part. People have birthdays, get married and have babies – all of which occasions are met with celebration even in the midst of awful suffering and brutality of socio-economic and political circumstance.

Likewise, the most banal or pedestrian of frustrations, disappointments and sadnesses also strike people in disadvantaged circumstances. These include worldview and lifestyle tensions between older and younger generations (which parents experience as their children's disobedience), marital problems (such as disagreements over key decisions or the unfaithfulness of a spouse), sickness, mishap and death. Yes, they happen more frequently in disadvantaged communities but, from the way in which these communities' realities are often sensationalised by literature, one would think them unique to people living in such communities.

More than that, the baser of human emotions and behaviours are not exclusive to people living in the worst conditions either. Jealousies and squabbling, even crimes of passion, are not limited to poor or oppressed people. I cannot therefore adequately stress how important this caveat of Ndebele's is for the reader to hold ever near in reading this book. It is my sincere regret that the book must largely by its nature violate the principle of emphasising the ordinary and that I



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must therefore leave it to the reader to maintain his/her own balanced perspective.

Secondly, it is a common reaction of policy makers and society more generally to conclude from accounts of social and legal breakdown in communities of colour that the communities themselves are to blame for their plight. Often these assumptions are racialised and even when expressed as being attributable to 'cultural differences', they carry with them racist undertones. That is, in those discussions, 'culture' is typically a mere proxy for race and black communities and black 'culture(s)' are vilified, condemned and even criminalised in reaction to the problematic assumptions made about them. That reaction, as a consequence of this book, is truly unintended by me.

The technical term for the common reaction I am describing is 'victim blaming' and such a reading of this book's narrative or interpretation of its implications would be an absolute travesty of the research and its findings. I use the particular term, 'victim blaming', purposefully. This is because I truly believe the data to support the conclusion that, while the reality depicted in this book may, on the surface, suggest that the individuals involved or even the community is largely to blame for its dire situation, that is based only on a very superficial reading of it. It is wholly more accurate to perceive the local community described here and its members as victim to a bigger system and set of forces – a political economy – largely beyond their control.

This is not to deny that the individual members of the communities under discussion have some agency and thus capacity for progressive joint/collective action. The reader will repeatedly see me flag people's exercises of such agency. Yet, the important thing to remember in observing individual people's exercises of their agency is that their agency is extremely limited by systematic and chronic socio-economic and political forces that overwhelmingly impact them negatively. The individuals concerned are certainly not exclusively victims of their wider circumstances, but they are largely victims of structural forces that are beyond almost any individual to overcome – whether single-handedly or with a number of others locally situated, if they attempt to join forces.

In short, the communities described here are groups of people with extremely limited resources and virtually no outside support (even from the government) and they are trying to do the best they can in their circumstances. It just happens that the best they can do is not very much and, in fact, often seems to make things worse for themselves or at least for a number of those among them. This is explained in the book mostly in terms of the sense of relative deprivation experienced by people in the local area and their perceived competition with those in community with them locally. This is as opposed to local authorities and individuals having a clear vision of the local problems as structurally embedded. (If there were more room for it, I could go on to discuss the cognitive psychology and behavioural economics aspects of the story also. Alas, that shall have to be left to another to do.)

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Though 'culture' does play a role, I argue that, viewed in isolation, it is a red herring. The fact is that the 'culture' that people fall back on to justify their actions – local authorities, ordinary individuals and the state alike – has been significantly shaped and in many instances determined by socio-economic and political conditions. It too can therefore be traced back to wider systemic problems.

The story that can be read here, ultimately, is one of a failure in governance at multiple levels that should be mostly blamed on the levels of government with the greatest means to repair the situation. Hence, I would argue that the real failure of this story is that of the state, not the people of Msinga. Yet, because I do recognise and respect the agency of the people of Msinga, and think it of utmost importance to protect, I end the book with recommendations of change that can be made not just by the government but by the people of Msinga as well – whether or not they are aided and supported by the government.

With those critical contextualising provisos declared, I can turn to what I think are the detailed lessons that can be drawn from the opening case, which lessons are what I go on to set out comprehensively in the rest of the book.

### *Lessons To Be Drawn from the Case*

Of several really jarring disputes that I have come across in the process of completing this project, the case opened with in this prologue has haunted me more than any other. Yet it has also probably taught me the most about the nature of disputing and its management in Msinga. At numerous points, I have found myself returning to it as a reference point – either to ground me again in the basics of what I learned early through it about disputing in Msinga or to compare and contrast disputes that presented what (at least, looked like or) were notable differences. I open the book with it because it holds a whole lot in it and therefore, by it, I can show the reader the essence of what I hope they too will learn about disputing and dispute management in vernacular groupings in reading this book.

First of all, this case reveals a multitude of key points about the nature of disputes in Msinga. To begin with, it can help the reader appreciate the setting of disputes in Msinga. People's lives are very entwined but often people live in relatively dispersed arrangements because there is space in Msinga. In one sense it is crowded because, pre-colonially, people had much more space and territorial freedom. It was with forced removals during colonialism and apartheid that people were compelled into closer living arrangements. Yet, it is also very spacious as there are vast distances between clusters of homes, especially considering that very often people must walk between them because there is limited transportation available in the area.

People's homesteads tend to be arranged in clusters with a few neighbours' homesteads surrounding them or nearby. Individual homesteads are comprised of a handful of individual rondavels (small huts) quite spread out on the family

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property. More modern houses are becoming more common – as complements to the huts on some people’s properties – and outside toilets have become commonplace. There are no street lamps and mostly only unpaved, gravel roads or footpaths. With these spatial arrangements, one can understand how an assassin could easily reach a lone woman who slept in a hut on her own, her neighbours at some distance, by attempting to kill her around 11pm when most people had gone to sleep anyway.

The next thing that stands out as important is that people’s lives are very entwined with their relations – neighbours and kin – and so their disputes are almost always with people they know. More than that, because of the regularity of their interaction with those near, it is common for there to be tensions and differences between them that can then take a malicious turn. One sees this in the victim’s nephew’s first question to her being who might have done this to her and insisting that her shooting could not have been random.

The nephew was so acutely aware of the commonality of this as a source of conflict that he insisted that the victim think of acquaintances of hers who might have a grudge against her and might, therefore, have sought to harm her. She notes two sets of people with whom she had had what – in her testimony – were minor differences in the past. Of course, the fact that she did not perceive something to be an injurious experience for another does not preclude the other from perceiving a shared experience as being injurious. The goats’ deaths are a case of precisely this: taking the victim of the shooting at her word that she had not deliberately killed the goats, she had not perceived their deaths as an injurious experience that would warrant her murder. Yet it would seem that, for at least one party, they had been.

Within this context, it is unsurprising that some prior (in this case, civil) wrong – in this instance, the goats – surfaces as grounds for the present wrong of her shooting. This is in keeping with the relational nature of conflict. More consistent with this deep-seated relationality of conflict still, what escalates the conflict is the nephew’s accusing his drinking buddy. Three things can be highlighted here: first, the escalation of the conflict by means of the spoken word, especially an accusation made; second, the role played by alcohol in many conflicts, especially those to do with verbal offences, and such altercations often escalate to the use of firearms; and, third, the profiles of those involved in the escalation of the conflict – namely, young men and older women. Let me address these each in turn.

One finds that, in Msinga, conflicts often and rapidly begin as rather minor and scale up to interpersonal violence usually involving a firearm because of the wide availability of illegal guns. Very often what escalates the conflicts is something someone says. Rumour plays a substantial role in conflicts – that is, often people will end up in an outright dispute because of something someone said to someone else. It is most frequently the case that ‘the something that was said’ was said by an older woman. Thus, it is in keeping with the rest of the data that the dispute here was escalated, at least in part, by the mother of the drinking

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buddy who it seems spread the rumour that she and another woman related to her were the ones accused of hiring her son to kill the shooting victim.

Yet it is not absolutely out of the pale that the young men should have participated in escalating the dispute by what the nephew said to his drinking buddy. In fact, when alcohol is concerned, men (young and adult) are most often involved and when violence is combined with it, young men are the common actors, at least, the most commonly accused. Indeed, it is young men who are often hired as assassins, even if they are not the only ones in possession of (usually illegal) firearms – adult men very often ‘pack heat’ too.

It is important to note the potency here of rumour. In my naïveté, when she had called me for assistance because she was concerned about the rumour that she would be fined by the chief’s court, I had told the shooting victim to wait until the judgment was handed down (rather than act on a rumour). This was before I had developed a better appreciation for just how much potency rumours carry in Msinga. It would seem that she had only recently developed that same appreciation: after all, she had not reported the alleged murder threat of which she had learned a year ago.

Put simply, accusatory rumours can be enough to get a person killed. The first attempt on this woman’s life had, it would seem, been the consequence of a rumour that she had in fact killed the goats that had (she maintained, mysteriously) died on her property. She had then heard a rumour that a contract was out on her life for this rumoured offence of killing people’s goats. She was now hearing a rumour that she was going to be fined by the chief’s court – a rumoured outcome that my sources confirmed as likely and even reasonable.

And she is not alone in falling victim to rumour. Witchcraft accusations and the allegation that one is a snitch or stockthief are classic instances in which rumour puts a person’s life in severe danger. I only later learned that these are categories of ‘personae non grata’, and as I also then realised, stock killing and stock theft (or, for that matter, witchcraft) are not that far apart in the context of this reality and value system.

To an outsider, it might seem strange that a woman should be killed for the suspected killing of people’s goats, as it initially did to me. Yet, when one takes into account the fact that goats are an essential commodity – in fact, all livestock are an important source of livelihood or wealth – one appreciates their value to people in Msinga. Adding to this the fact of the extreme poverty that is prevalent in Msinga, it is even more understandable, even if not justifiable. Thus, indeed, her killing of goats was a potential reason why people might have wanted to harm her. As the older man that I interviewed so clearly stated, “a person’s livestock is like a person”.

This brings me to the second major set of revelations of this case: namely, local attitudes to disputes, culpability and what social expectations surround disputes. Especially the latter (social expectations) are typically highly gendered. These considerations also arise in the wider dataset of this research as important. In

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their manifestation in the case illustration provided, specifically, we see how naïve it seems the shooting victim was about her circumstances. When asked why she had not reported the deaths of the goats, she answered that she had thought that if she minded her own business then she would stay out of any problems with other people. This was a significant error of judgment on her part.

What my informants said, when I interviewed them about the case, essentially expressed the overwhelming importance placed on community and membership. Underlying their observations was that, for them, the shooting victim's situation was really one about inclusion and relying on the community for a multitude of purposes (above all, protection) versus exclusion and marginality. By keeping to herself, she said, she believed herself to be keeping out of trouble with her neighbours. Instead, she was keeping herself out of community and the protections that come with being part of it.

While the victim perceived herself as just a lone woman with no problems or differences with anyone, she was actually very vulnerable by being a single, middle-aged woman. Community members thus assumed that she should lean heavily on her surrounding neighbours for support and assistance but, instead, she had rendered herself even more vulnerable by not doing so. Being a Christian, as she claimed, led her to keep to herself and in that way stay out of trouble, but in her neighbours' eyes this did not excuse her from this obligation. She was perceived as isolating herself and anyone who does that is thought to have something dark to hide.

In her community's view, she was most likely culpable of something nefarious. Hence, when she was accused by rumour of killing the goats, she was presumed guilty of what she was rumoured to have done and had no one (powerful or credible) to defend her. As the chief's court and ordinary community members insisted, then, the victim could have done a whole lot to protect herself by going to her neighbours to ask them to help her enquire into what had happened and why as soon as the first or second goat had inexplicably died on her property.

Yet, even if she had not gone to report her concerns to her neighbours early on when the goats started dying on her property, there was another positive intervention that she could have later made to advocate on her own behalf. Namely, she could have brought the matter of the threat against her life to a public forum. This tactic of publicity as a form of protection occurred repeatedly in the data – specifically in the context of accusations of publicly detested activities such as witchcraft, whistleblowing and large-scale stocktheft. In essence, those accused (or sometimes the community that believed it was being wronged by the accused) brought the matter to the headman for investigation.

In most instances of these disputes brought to a vernacular forum for publicity's sake, the accusations failed on grounds of there not being (sufficient) evidence of that of which the person was accused. While this strategy was by no means foolproof, and depended on the extent of the accused's social capital, it often served to demarginalise them somewhat, which is very helpful in the

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circumstances of such a fatal accusation of social wrong. It is in this way that publicity served as a form – albeit modest – of protection.

This leads me to the final category of lessons demonstrated by the case under discussion: those pertaining to the dispute resolution process. Since this is the focus of this book, one would probably expect that I would delve into this in greater detail than any of the other sets of points I draw out of the case. However, as you will find in the book, I choose to give equal attention to the question of how disputes arise in Msinga and what causes and contributes to their regularity as to the dispute resolution process. Indeed, I argue that this wider context is critical to understanding and regulating dispute resolution for the purposes of advancing access to justice in rural communities like Msinga.

One of the things that stands out in this case is that the initiation of the case in a formal dispute management forum is at the behest of the husbands of the two women who are allegedly accused of hiring the drinking buddy to kill the shooting victim. While the matter that initially presents – that of defamation – actually pertains to the women, it is the men who bring the matter as a case. Moreover, at least in the chief's court, the shooting victim was represented by her older brother. In the witness stand, the shooting victim spoke for herself – but she was still not very successful at defending herself, partly because of her ambivalent position as witness and defendant. Witnesses are only supposed to answer the questions asked of them. Unfortunately for the shooting victim, the one who was meant to defend her ended up putting up what seemed a weak defence – partly because he lacked confidence in the forum (or so it appeared). Incidentally, such ambivalence as to the role in which a party is participating in a dispute – whether as witness or defendant – is not unique to this matter.

The gendered pattern is very common: conventionally, men are typically the ones who get to make the decision of whether to bring a dispute to a management forum and are required to provide representation. Women really only have the right to appear as witnesses. Yet, this is mainly the 'normative ideal' from which people in Msinga are deviating in practice. Thus, I recorded several instances of women making the decision of whether to bring a matter to a forum and representing themselves and their children.

However, this deviation from the ideal norm really happened at the lower levels – in the headman's policeman and headman's forums. In the chief's court, there was greater compliance with the normative ideal, though even there deviation sometimes occurred. Even in this case, when the chief's court had said they wanted to postpone the case, the shooting victim and her brother expressed concern around the fact that her brother worked and would have some difficulty attending her case on the date that the court had scheduled it for ongoing hearing. When deviation in the chief's court did occur in another matter, however, the case did not turn out well for the young woman concerned (though this was also due to other reasons pertaining specifically to her unfavourable identity and the bad reputation of her brothers).

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The manner in which the case was adjourned on the day that I observed it was not unusual. It happened numerous times that disputes were postponed in order to bring in the appropriate witnesses. In several cases, disputes ended with the request for witnesses who either could not be found or refused to appear, just as happened in this case where the third woman who had allegedly heard the second woman tell the shooting victim of the threat made on her life would not appear because she said she did not remember such a conversation. The shooting victim had done the same in the court of first instance when she had told the headman's policeman that she had nothing to say to the forum because she had not seen her shooter. In other instances, matters terminated because the dispute management forum could not get the primary witness to tell it what she knew, such as where she had heard of the threat on another's life. The present example was one of a handful of such cases.

The reader can imagine that this would contribute to the frustration of the management forums' ability to resolve the dispute. This is exactly what happened in the hearing before the local headman's policeman. And, when the matter went to the chief's court (not having been heard in the headman's forum because he said he wanted it directly escalated to the chief's court) there was no real resolution arrived at there either, for similar reasons as in the court of first instance.

This is interesting if for no other reason than that the 'normative ideal' is that the higher the forum, the greater its ability to resolve a matter. Yet, as one sees in this case and a few others, headmen sometimes pass cases on directly to the chief's court without hearing them. This then means that some cases do not get discussed in the forums that deal with the largest proportion of disputes in the area. Why this is significant is because these forums also use much less formal dispute management methods than do the chief's courts. It therefore also means that people might be disincentivised thereby from pursuing their matters further because the chief's court is more geographically and socially removed from them. (One sees this even in the number of intended – or threatened – appeals from the headman's courts to the chief's courts that are not followed through.) But, because that concerns relatively fewer cases, it is less important than the fact that the chief's court does not manage to settle all disputes even when they have followed the ideal route through the headman's courts.

The reality as revealed by this case is that the chief's courts only successfully resolve a fraction of the cases that come before them. Though they are the highest vernacular dispute management forums, when they fail to finalise a dispute, they either refer it to the family council (which is technically at the bottom of the forum hierarchy) or the police (which people in the area either find alienating because they are not user-friendly or do not know how to effectively use to meet their justice and security needs).

In the least successful of instances, disputes not finally resolved by the highest court take on a more destructive turn. The parties either appeal to self-help measures, which can include relocation or violence, or turn to vigilante groups to remedy their problem for them. The same happens when matters terminate at

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the headman's forum level but are not resolved to the complainants' satisfaction. In one matter heard by the chief's court, the family had brought a couple of young men to the chief's court for it to discipline them and stop them from stealing local people's cattle. This matter was not decided there but instead referred back to the family council. The chief said that it should not even have come to his court but should have been settled by the family. Informants later suggested to me that the chief's referral back to the family council was a kind of code to say that the family should resolve the issue amicably but, if they could not, they should settle it by killing the young men as is in keeping with the local honour code. In this instance, the family killing the young men would prevent outsiders killing them and thus giving rise to a feud.

With respect to the proceedings in the chief's court, one observes that – contrary to conventional wisdom of today – the chief did not play a role like that of a judge. Instead, questions were asked of the parties and witnesses by the chief headman and headmen (especially one very outspoken local headman). A few questions also came from members of the audience made up of members of the legislative-administrative traditional council constituted under the Traditional Leadership and Governance Framework Act 41 of 2003 and some ordinary community members (a number of whom were there for different cases). As 20<sup>th</sup> century ethnographers report of vernacular dispute management forums around the country, the chief only spoke toward the end and handed down the decision to adjourn the matter after it had become clear that the matter had to be postponed because forum members had said they wanted a witness.

I have already mentioned too that the matter very quickly transformed before my eyes from one focusing on defamation to one focusing on the killing of people's goats. While this is one of the most radical transformations that I saw take place in the course of a dispute, it is not the only transformation of a dispute in the data. It happens that transformation of disputes – either before they come before a forum as in the instances of escalation like those described above or once in the forum – is rather common. This is underscored in the focal case by the articulation by the shooting victim of her lack of satisfaction once the case ended. She still wanted to know who had accused her of killing people's goats and had probably hired someone to try to kill her. She was also feeling afraid and insecure. In other words, the case (as a contained process in a dispute management forum which had not and could not address all of the issues raised) may have been over but the conflict (which had existed long before the case and now survived it) was not.

This is the reason why anthropologists espouse the 'case method' of researching conflict. This method of study follows conflicts from their inception in their social environment of origin to their entry into a dispute management forum (if they ever enter one) to their unfolding after any attempt at formal resolution. Within the limited timeframe of February 2011 to January 2012 – and in some instances (where I conducted follow up interviews outside of that time period) beyond that – I have attempted to incorporate this 'case method' into my data collection methodology.



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In the chief's court proceedings we see that money is very significant. For the matter to be heard in the chief's court, as a case (as opposed to being a mere mediation), each party had to pay R30. As I noted, the shooting victim was disturbed by being required to pay that sum – this sum very clearly flagged her as a party (or, at least, a potential party) to the dispute rather than a mere witness. At the end of the case (from the chief's court's perspective, that is), the court asked the primary witness to pay money to the court to close the case. Happily for her, the shooting victim was spared. Yet she still bemoaned the court's demand of money for itself in the absence of her having been compensated for her injuries, pain and suffering.

The issue of money paid to the forums, though I explore it only to a very limited degree in the book, is actually important and demands further discussion elsewhere. In communities where people are poor, it is a matter of substantial tension how high legal costs are in some areas: in one of the two chief's courts, the chief often fined the losing party in a dispute before the court an additional cow (valued at about R1,500) which would go to the court's coffers. This was the source of some disgruntlement in this traditional community.

At the time of doing the research, though headmen (and sometimes headmen's policemen) received money for the opening of cases to be heard in their forums, they did not keep the money – it went to the chief's council. The headmen also did not earn an income from the government though they did much administrative, support and mediatory work in their areas of jurisdiction. Many of them were absolutely poor and were taking extremely limited resources from their families to put toward this honourable task of being a 'chief's headman' (*induna yenkosi*). For those who were not as poor, their engagement in their other money-making activities (one was a medicineman/*inyanga* and another sold snacks out of the back of his bakkie/truck) both took them away from their duties as headmen and made them less able to pursue their income-generating enterprises. Since then, the government has decided to pay headmen a standard sum.<sup>4</sup>

With respect to damages and compensation demanded in lower forums, some of the monies at stake were substantial – even from the perspective of an outsider like myself. But, in these instances, people would typically negotiate the damages or compensation amount demanded by the party found to have been wronged. Hence, the one found to be in the wrong would often end up paying a more manageable – albeit, usually still substantial – amount (for instance, R2,000 in damages for a false witchcraft accusation). Monies owed would often also only be paid in installments. This, of course, made it that much more difficult for the headmen to enforce the decisions they made – especially considering that they have to claim payment from people who often are short on money, hear many cases and mediations and handle other administrative obligations as well. What was interesting in some cases was that the full or part of the sum owed as damages or compensation for a wrong would be paid on 'pension day'. In other

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<sup>4</sup> Ref

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words, the money would be paid out of the party's social grant income from the government.

The final element of the dispute resolution process pointed to by the case used here as an entry into the book's themes and findings is the courts' treatment of evidence. The clearest facet of this is that evidence rests heavily on people. As I mentioned earlier, adult women tend to make up the largest proportion of witnesses to what has been said as well as what others have told them that they have done or intend to do. In this very limited sense, women have a substantial amount of power, as well as responsibility and even vulnerability. Their power and responsibility can be seen in how they can put a person's life at risk by means of direct accusation or rumour. This is very evident in this case but also played out, for instance, in two matters in which young men were (it seemed, falsely) accused of raping young women. Their vulnerability is visible in their common refusal to tell the forums where they heard, for example, of a threat to another's life. Should they reveal this, the risk to their own lives as 'snitches' would be immense.

In evidentiary terms, the community also has a significant amount of social capital and credibility. Take for instance the social belief (embedded in the community's values and ethics, and protecting its ultimate role as protector) that her speaking up ahead of time might have prevented her shooting. Additionally, one observes the emphasis on her having not told a soul about each of the livestock deaths that preceded the threat made to her life. Finally, note the regular use (not made in this matter) of the publicity defence: that is, publicising an accusation against oneself by bringing it to a forum in the form of a challenge of that accusation and requirement that the accuser provide evidence of the truth of their accusation.

#### *Access to Justice – or Access to Human Security?*

This book began with an interest in the pursuit of justice and the extent to which, and ways in which, ordinary rural people can achieve this apparently patent good. In the end, the research process has led me to question the meaning of justice and what forms of it are realistically available to people like those in Msinga, given the comprehensively challenging circumstances in which they live. This has consequently moved me far beyond the simple question, with which I began this research, of whether the Traditional Courts Bill (B8-2008/B1-2012) or legislation like it could effectively regulate vernacular dispute management forums so as to ensure ordinary rural people adequate access to dispute resolution services. I have had to understand that disputes and the processes through which they are mediated in pursuit of solutions are means to a variety of goods that people hold dear as well as processes of apportioning power. They are therefore spaces of notable 'meaning-making'.

I suppose, the question to which I have progressively gravitated, as a consequence of delving deeply into the data collected, is whether 'access to justice' in the simplistic form in which lawyers typically mean it – namely, access

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to dispute resolution through the courts – is achievable (or, perhaps, even desirable) on its own. The answer I have come to is ‘no’. The reason is simple: though ordinary people in Msinga would undoubtedly benefit from vernacular forums improving their dispute management strategies and tools, the relatively limited practical changes that they can make are insufficient to ensure the satisfaction of the enormous needs that underlie the repeated interpersonal conflicts in the area.

At the end of the book, I make suggestions for what changes the vernacular dispute management forums should ideally make, but the ultimate solution lies in wider systemic change. Put differently, the solution ultimately depends on changes to the system of cooperative governance to which the vernacular forums are party as well as resource support by the state. With that being the conclusion to which the data has led me, the project at hand seems significantly broader than access to ‘justice’ in narrow terms. It would seem to me that it is one of access to ‘social justice’.

Looking squarely at the conditions in which ordinary people in Msinga live, this book makes the case that access to ‘justice’, narrowly construed, is virtually impossible for people in Msinga without their being ensured access to justice in the comprehensive form of ‘social justice’. I call this social justice ‘human security’. While ‘human security’ – especially as used by the United Nations – has become a controversial term,<sup>5</sup> I can find no other term that as well lends itself to being shaped to accommodate the totality of needs that surfaced as a precondition to ‘justice’ in the narrow sense for people in Msinga.

The ‘human security’ that I describe as a fundamental need for people in Msinga is not just a *physical* security (that is, freedom from violence) – though they certainly need that. Rather, it is also *social* and *material* security. Thus, I consider ‘human security’ to encompass *freedom from fear and violence*, and yet argue in this book that it depends heavily on *freedom from want* (relative economic security). Put differently, physical or personal security and social or community security demand material security. This points to the intimate relationship between development and security in as far as it refers to defence or protection. This book therefore makes the case for why access to justice for individuals in places like Msinga is not realistically possible without access to sufficient resources (as individuals and communities) as will render the people who live there materially secure.

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### **Access to Justice?**

*Traditional Justice and the Search for Human Security in Rural South Africa*

*Sindiso Mnisi Weeks\**

## **Chapter Ten**

### **Conclusion – A Vision Far Beyond the Traditional Courts Bill: Where Could Vernacular Forums Fit in the South African Legal Order?**

This research project began with an interest in justice – narrowly construed as due process of law and fair outcomes as primarily obtained through the courts – and the avenues by which ordinary rural people can gain access to something that resembles it, especially using headmen’s and chief’s courts. With the exclusion of incorporating headmen’s courts,<sup>6</sup> this was the focus of the Traditional Courts Bill (B8-2008/B1-2012) as provided in its Preamble. This research project was intended as an assessment of the proposed legislative framework and content’s viability in South Africa’s poorest communities, the former homelands. The goal was to gather ethnographic data that would provide a more holistic understanding of how ordinary rural people use vernacular forums and how these forums dispense justice so as to compare this to the vision of reform in the Traditional Courts Bill. The project therefore initially had the title, “Dispute Management in Vernacular Forums in Rural KwaZulu-Natal”.

As the book’s title reveals, “Traditional Justice and the Search for Human Security in Rural South Africa”, it has evolved into a more ambitious project. It is no longer just about access to justice through vernacular forums, but the broader concern of human security as a precondition for any kind of justice that these forums (or state courts) could provide. The argument I have presented thus far is that the conflicts that come to the vernacular forums in Msinga are the product of severe material, social and physical insecurity as well as a weak (and sometimes corrupt) presence of community social services. The consequence is that of wider systemic failure such as these vernacular forums cannot single-handedly address.

Yet, the vernacular forums too are part of the problem in that, when cases come before them, the methods of dispute management they use do not lead to long-term resolution. In fact, they often compound the conflict, if only by attempting to suppress it, as when the resolution headmen come to is telling people to forgive each other without creating space for them to be fully heard and their conflict histories and narratives thoroughly worked through.

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<sup>6</sup> Ref.

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This finding has meant that I can no longer focus solely – or even mainly – on whether the Traditional Courts Bill or legislation of its kind could effectively regulate “traditional courts”, as it refers to them, to ensure “access to justice” (by which is meant reasonably accessible dispute resolution services that lead to reasonably effective relief) for ordinary rural people. The questions to be asked are just so much bigger than that. Consequently, the Traditional Courts Bill, as a draft piece of legislation, does not warrant a clause-by-clause analysis in this chapter. Besides, such has been exhaustively provided elsewhere.<sup>7</sup>

Rather, what is obviously needed is comprehensive social policy analysis and systems review far greater than I can provide in this last chapter of the book.<sup>8</sup> I will therefore restrict myself to analysis and review of institutional arrangements (that is, systems) – their agents and forums – that ordinary rural people turn to and depend on for assistance or relief in the final instance of continued social conflict or crisis. After all, courts of any kind are typically the last institutional port of call in a seemingly intractable dispute.

This focuses me on the gaps in institutional arrangements and social policy implementation that exist in Msinga and surfaced in the data represented in this book. It also spotlights how these gaps undermine the potential for any kind of justice for Msinga’s residents; hence making the Traditional Courts Bill obsolete, if truly intended to secure rural people access to justice. In other words, aside from the substantive problems with the Traditional Courts Bill when it is read in historical and contemporary context,<sup>9</sup> its framework and the social and institutional assumptions on which it is based are so faulty as to be non-existent.

Contrary to the Bill’s troubled assumptions, “traditional communities” like Msinga do not operate according to the harmony model. The communities themselves are prone to significant social conflict and upheaval, particularly as a result of misguided government intervention in the colonial and apartheid past. Among the problematic colonial policies that have had a disturbing impact on Msinga are the forced migrant labour system, the widespread possession of guns, the breakdown in family relations and the long-standing land and boundary conflicts. Without adequately considering the contemporary implications of the historical regimes’ policy approaches, the present government seems unable to address those, among these issues, that it has attempted to tackle. For instance, pursuing state imposition as a strategy for resolving boundary disputes – which, in fact, abound – seems counter-productive.

The disputes that vernacular forums are tasked with managing are not disembodied. They are embedded in a complex and challenging socio-economic environment, historical conditions and close relationships. Therefore, a policy and legislation that addresses “dispute resolution” as though all disputes were the same, regardless of context, and their resolution therefore similarly uncomplicated is unable to achieve “access to justice”. As this book shows, we ought to take the particular socio-economic and relational context in which the

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<sup>7</sup> Ref Himonga et al., *Mnisi Weeks (OUCLJ, SACQ), Submissions to NA and NCOP etc.*

<sup>8</sup> For such, readers may like to refer to the following, to begin with: **REF!!!**

<sup>9</sup> Ref

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vernacular forums operate seriously. Legislation that seeks to secure rural people justice ought then to address itself to their particular needs and the true capabilities of the local forums. Vernacular forums, even if we call them “traditional courts”, cannot become tantamount to state courts. It is unreasonable to expect them to take on that role for which they are ill-equipped, poorly resourced and unsupported. Furthermore, they have their own role to fulfill. And I would argue that there is a need even for that. The development and proliferation of vigilante responses to social problems is evidence of this.

As things currently stand, institutions – whether state or vernacular – do not ensure ordinary rural people security. Therefore, centralising and strengthening the power of institutions is unlikely to be the solution to people’s insecurity and lack of access to justice. “Traditional courts” would seem to lessen their local authority, legitimacy and effectiveness by taking on the character of state courts. Hence, arbitration and adjudication appear to be less effective modes of dispute management and governance than the seemingly more humble option of mediation. Yet, by infiltration by western models of “dispute resolution” – and, more than anything, adjudication – vernacular forums have been substantially robbed of their mediation processes. Muddled by expectations that they function as state-like courts in order to be legitimate and authoritative in the state’s eyes, vernacular institutions have become unskilled in effectively mediating local disputes while local disputes have become increasingly more challenging to resolve.

Lack of clarity, communication and effective collaboration between the police and vernacular authorities (especially, headmen) has undermined both the headmen’s and police’s ability to manage and reduce social conflict. In the context of competition, while trying to bolster their own position, authority and income (and in some instances shade their corrupt dealings from view), both institutions show limited willingness to collaborate. The police are most guilty of this as they tend to exclude and not effectively engage the headmen and appear to rather use them capriciously – and only when convenient – in order to shore up their own authority. They undermine the headmen’s (in some ways, more limited) authority in the process.

Yet, with all these gaping problems overlooked by the Traditional Courts Bill, it seems to me that there are solutions for much of the breakdown that has and is continuing to take place in Msinga. I will therefore end with a discussion of what possibilities exist for short- and medium-term systemic reform to improve human security conditions for the people who live there. In this respect, I will focus on the duo of local conflict management institutional failure that has continued to resonate through this project: the vernacular mediation system and the cooperative governance system. As I argue, a significant part of the solution is to intervene in these two systems that account for much of the continued interference with, and incapacity and repeated failure to address, human security in Msinga.

Yet, intervention in one or other will not yield the same results. While very necessary, changes to the manner in which vernacular forums manage disputes

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to emphasise mediation will improve the outcomes of individual cases and have limited impact on relationships and thus social conditions at large. However, without the wider systemic changes to accompany it, they cannot assure justice to ordinary rural people. Combined, the interventions would have a potent effect on Msinga society and the level of conflict and insecurity experienced by its people. Without either of them, regulatory legislation that purports to try to make the “traditional courts” operate better, like the Traditional Courts Bill, would be totally ineffectual at fulfilling its aimed purpose of ensuring ‘access to justice’.

### *What is Justice?*

I have described what has changed during the process of conducting this study. Readers might therefore wonder if anything has stayed constant. The thing that has remained with me almost from the start is a fascination with the concept of justice. From quite near the beginning, I have been struck by the concept’s ability to be so viscerally powerful that all agree on it as a patent good but so broad and vague as to allow for different conceptions of it to exist under the guise of the same name. Terms like traditional justice (which is the subject area that the Traditional Courts Bill is intended to regulate), criminal justice (presumed to be the domain, almost exclusively, of the police and particular state courts), social justice (thought to be concerned with human rights as effected both inside and outside of the courts) are widely used and accepted. All are based on the noun, justice, yet can it truly be said that the justice at the core of each is the same? This is assumed to be a self-evident truth yet it is not at all clear to me that it is. Even as it affirms that there are perhaps universally shared aspects of what people refer to as justice, the research presented in this book amounts to problematisation of the assumption that justice is itself universal.

I have already argued that the justice that is meant and intended by the legislature when it seeks to regulate “traditional courts” through the mechanism of the Traditional Courts Bill, as drafted, is a very narrow conception thereof. It refers to access to courts that function efficiently and fairly in terms of process, as a result of which, it is assumed, the parties that come before them will obtain fair judgments. Enforcement of those judgments is not even considered essential as the Traditional Courts Bill is silent on this essential point. The findings presented in this book do not disagree with the need for the forums to which people take their courts to function properly. That is why addressing the functional aspects of the vernacular forums is an important point of intervention in order to ensure the rural people that turn to them just outcomes. However, the data presented decidedly refute the idea that functional forums are the primary means by which people will obtain just outcomes. In fact, I argue that the data show that functional forums are inadequate to the task.

In this sense, the data point us to human needs theory as it has been developed in the field of conflict resolution, primarily by John Burton.<sup>10</sup> What is meant by

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<sup>10</sup> Burton, John (ed.) (1993) *Conflict: Human Needs Theory*. Palgrave Macmillan

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human needs theory is that human beings have some essential needs that cultivate deep and seemingly intractable, long-term conflict. It is founded in behavioural theory in so far as it perceives this as essential to understanding conflict, analysing and predicting it and resolving it.

The human needs that are described as forming the basis for conflict are the following. The first essential is safety and security, as represented by the freedom from fear and reduced or lack of anxiety that comes with stability, predictability and structure. It has been clearly demonstrated that this physical aspect is an element of human security that is severely wanting in Msinga.

The second is a sense of belonging, love and acceptance within one's social circles (family, friends and identity group). As demonstrated, while Msinga community is heavily built on embedded social relationships, these do not so much live up to the stereotype of the "harmony model". Instead, almost all conflict in Msinga (among which are violations of the worst kind) occurs between people who are in intimate relationships. This insecurity within the purview of one's core relationships – from which one draws one's identity and should find safety – substantially undermines any attempts at resolution of long-term conflict. The inverse is true too: when one's identity group holds a common value of "retaliation" or "revenge" against those outside of one's group, the social rewards of violence are difficult to resist because then one may need to perpetrate violence in order to earn one's acceptance among one's own.

While the third essential of self-esteem may seem too soft to be of real significance for conflict, it is actually very important by virtue of Msinga residents' unfulfilled need to be seen to be strong and capable by those around them and, in turn, by themselves. Consider the fact that Msinga people are so materially insecure and socially excluded that they feel powerless to influence or shape their circumstances. Most feel like victims of their environment. This is what I have referred to as helplessness (and hopelessness) in the previous chapter.

The fourth essential of identity is entwined with it. Specifically, the sense of self one has relative to society and the world at large – that is, the feeling of legitimacy concerning one's identity that one is denied or feels is threatened by the world – can lead one to feel inferior or threatened by others. Msinga residents (the men above all) feel, in part, that they must perform their identity in a world in which they feel that their ways are being imposed upon, compromised and are generally not respected. Likewise, the fifth essential of cultural security – feeling that one's religious and cultural values and traditions, language, ideas and concepts are recognised and respected. The police's attitudes and practices which disregard and impose upon the headmen's ways of governing in their community are one representation of the absence of both of these essentials, as perceived and experienced by the headmen. Deeply linked to both the third, fourth and fifth essentials is Msinga residents' want of the sixth essential of personal fulfillment. As I showed, all Msinga residents but especially the young and adult men experience hopelessness that they could possibly reach their potential in *any* areas of their lives, let alone *all* of them.



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The final three essentials are interwoven in their absence in Msinga. While, with apartheid ended, Msinga people are now physically, politically and civilly free of restraints, they can hardly be called completely free. Their freedom is significantly curtailed by their incapacity to make choices in all areas of their lives. This is largely due to their lack of sufficient resources as a consequence of want of distributive justice (fair allocation of resources) in South Africa. Put differently, the people in Msinga are desperately poor and this limits the choices that they are able to make immensely. Finally, they are not even able to participate effectively in civil society and influence decisions made concerning their circumstances and affecting their lives. The Traditional Courts Bill and how it was passed – without the ordinary residents of Msinga being consulted – is a case in point.

All of this only reinforces the unfulfilled human needs previously mentioned because people feel very helpless and, thus, hopeless about the future. This degrades their self-esteem and they consequently feel useless and lack personal fulfillment, not being invested in their social context because of a lack of faith that their investment will lead to different results that meet their needs. As we see, many men spend their days getting drunk, minor altercations are a common occurrence and are always accompanied by the risk of severe violence and men's attendance of dispute management forums is quite low. Young men get into these negative activities in their teenage years and some go on to even worse forms of criminal and violent activity. Women are mostly timid and left to do the hard work of trying to feed their families without the men; some of them also turn to liquor for comfort. Many resort to more "subtle" forms of violence than the men: unconstructive gossip and caustic rumours such as witchcraft, rape and murder accusations.

This is obviously uncondusive to the resolution of enduring conflict and securing long-term peace in the area. As I have argued, it is due to their sense of helplessness and hopelessness felt about the options that are presented to them for the management of the conflicts with which they are faced (and the human needs in which those conflicts are grounded) that Msinga residents fall prey to destructive modes of conflict management. When they don't endure or avoid conflict, such as by relocating, they may turn to violent self-help measures like arson and shootings (attempted murder) or enlist the services of hired assassins or local vigilante groups. Here, purely institutional interventions would obviously not be enough to address the problems. The ordinary people of Msinga themselves must be part of the solution.

Human needs theory as an indispensable element of conflict resolution emphasises what decision-making skills individuals and groups need to equip them to effectively confront conflict. This is termed "provention", as distinct from "prevention". As Burton writes:

The significant and historical contribution that the theory of conflict resolution can make is to decision making – that is to the provention of conflict – and ultimately to providing a philosophy and a political-social system that could replace those presently dominant. Indeed, taking account of the magnitude of environmental problems, increasing levels of

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deprivation and violence at all social levels, and dramatically the falling quality of life, civilizations have no option but to substitute long-term problem solving for their traditional short-term policies of interest group expediency.

It follows that research needs to be directed towards improved decision making (in all organizations including industry, and at all societal levels from the community to the international), rather than have an exclusive focus on interactive processes.<sup>11</sup>

What Burton is communicating is what I have observed, above, of Msinga. Namely, the interactive processes that occur within forums are what is emphasised by the Traditional Courts Bill's institutional focus but this is not where the solution for solving the existing problems is (solely) to be found. Rather, what is needed is a shift in focus from institutions as the primary power-holders to an emphasis on how people interact in institutions and communities. Hence, the cooperative governance system that I have said, above, requires intervention needs to be broadly construed as including ordinary rural people.

Burton expresses this clearly in his description of the need to shift from the "interest-driven" "traditional power political frame" or system to a pragmatic alternative.

The only option, in politically realistic terms, was to resolve the social and behavioural problems that led to specific conflicts, and not try merely to suppress them or to settle them by coercion.

Let it be noted that there is no normative connotation in this alternative. There is no moral or idealistic basis. There is, however, the assertion that there are certain human drives or needs that will be pursued, regardless of cost and consequences, which, as is argued later, cannot permanently be suppressed. Hence, in time, institutions must conform to human drives, and not, as has been assumed to be the case, the other way around.<sup>12</sup>

A key part of this shift is also a differentiation between, in Burton's terminology, "disputes" that are "settled" in institutionally defined forums to "conflicts" that are bred by human problems that are in need of being "resolved".

As readers know, I have elected to use "managed" instead of "resolved" as I understand resolution (very similarly with Burton's understanding of "settlement") to be very particular to the state system – and, even in that context, to be a fiction. However, "management" sounds like avoidant or evasive when one is referring to genuine human needs and might allow state institutions to shirk their responsibility to meet those needs. I would therefore say that these problems must be "addressed". Whatever one calls that which must be done with respect to these long-standing socially-embedded conflicts, I agree with Burton and others<sup>13</sup> that these must be addressed by the parties involved and supportive social and political institutions must be established around them that will focus on problem-solving as opposed to using processes that are adversarial or confrontational.<sup>14</sup>

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<sup>11</sup> Burton, John. 'Conflict Prevention As A Political System', *International Journal of Peace Studies*. [http://www.gmu.edu/programs/icar/ijps/vol6\\_1/Burton2.htm](http://www.gmu.edu/programs/icar/ijps/vol6_1/Burton2.htm) (accessed on Nov 10, 2014)

<sup>12</sup> Ibid

<sup>13</sup> E.g. Avruch, Kevin and Christopher Mitchell (eds.). (2013) *Conflict Resolution and Human Need*. Routledge.

<sup>14</sup> Burton, 'Conflict Prevention As A Political System'

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The ultimate point of all of this theory is that, to effectively address the existing long-term conflicts that are undeniably embedded in the very human needs of people in Msinga, much more is needed than is conceived of by the government or provided by the Traditional Courts Bill. But before discussion can even be had about the best solutions to deal with the problems, agreement must be reached on the problems themselves. In other words, the government must acknowledge the range of problems and their relevance to its enterprise of providing “access to justice”. This is yet to occur; hence, this is why human needs theory is an important place to begin.