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A SUMMONS TO THE MAGISTRATES' COURTS IN SOUTH AFRICA AND UGANDA

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ABSTRACT

The expansive literature on law and justice across Africa emphasizes why people do not use lower state courts. Consequently, a striking lack of attention is paid to how and why people do engage with lower state courts. Drawing on a systematic literature review and a multi-sited qualitative study, we make three contributions on this topic. First, we explore how this academic gap emerged. Second, we critique the procedural justice model that currently underlies much 'access to justice' programming, which seeks to improve citizens' engagements with the courts. In place of what we describe as its arithmetic assumptions about institutional engagement, value, and legitimacy, we propose a trifactor framework. Citizen engagement, we argue, occurs as people reconcile how they think the courts should act, how they expect them to act, and how they need them to act in any given instance. Third, drawing on our empirical studies, we highlight that this framework is flexible enough to capture people's actually existing decision-making in a wide variety of settings and to map how those trade-offs shift throughout the process of their case, providing important insights into ideas of justice and statehood.

Introduction

APART FROM THE POLICE, LOWER STATE COURTS are where most citizens interact with the state justice system. In the vast literature that exists on justice across Africa, relatively little attention has been

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paid to these courts, often called magistrates' courts in common law countries and courts of first instance in civil law countries. Academic research emphasizes peoples' preference for non-state forms of dispute resolution, pointing to widespread distrust of and lack of access to lower state courts in areas of limited or contested statehood.¹ Is it really the case though that citizens eschew these courts? Drawing on empirical research in South Africa and Uganda, we show that the picture is more complicated. Further, we demonstrate how research on citizen engagement with lower state courts can provide crucial insights into an emerging puzzle across the continent: namely that engagement with rule of law institutions is regularly sought in contexts where people are deeply critical of the state.²

Addressing the existing lack of attention to magistrates' courts and their equivalents (termed 'lower state courts' below)³ is important for two central and overlapping reasons. First, scholarship is overlooking an important part of the legal and justice landscape across Africa. The academic emphasis on citizens' lack of familiarity with formal law and courts belies the fact that actually, people are using the lower state courts in large numbers. It has been estimated that on average, 13 per cent of citizens across the continent have had 'contact with courts in the past five years' as claimants, respondents, defendants, or witnesses, yet we know very little about their experiences.⁴ It is critical to appreciate why citizens are turning (or being turned) to lower state courts and granting them a 'right to arbitrate'.⁵ Second, pervasive assumptions about the avoidance of lower state courts have emerged in place of detailed empirical accounts of citizens' actual engagement with these institutions. There is something approaching an academic and policy consensus on widespread problems of inadequate infrastructure, understaffing, costs, backlogs, and corruption in judicial systems at all levels.⁶ Policy is influenced by procedural justice models which tell us

1. Brian Tamanaha, 'Introduction: A bifurcated theory of law in hybrid societies', in Mattias Kötter, Tilmann Röder, Gunnar Schuppert and Rüdiger Wolfrum (eds), *Non-state justice institutions and the law* (Palgrave Macmillan, London, 2015), pp. 1–21; Abdullahi Ahmed An-Na'im (ed.), *Human rights under African constitutions* (University of Pennsylvania Press, Philadelphia, PA, 2003).

2. This puzzle has become more apparent recently in literature on state-society relations in African studies. For different analytical perspectives on this puzzle, see Sarah Dreier and Milli Lake, 'Institutional legitimacy in sub-Saharan Africa', *Democratization* 26, 7 (2019), pp. 1194–1215; Christian Lund, 'Twilight institutions: Public authority and local politics in Africa', *Development and Change* 37, 4 (2006), p. 693; Justice Tankebe, 'Public cooperation with the police in Ghana: Does procedural fairness matter?', *Criminology* 47, 4 (2009), pp. 1265–1293; Susanne Verheul, 'Zimbabweans are foolishly litigious': Exploring the logic of appeals to a politicized legal system', *Africa*, 86 (2016), pp. 78–97.

3. This term excludes other courts in the lower tiers of the state justice system that are, for example, tied to traditional authorities.

4. Caroline Logan, 'Ambitious SDG goal confronts challenging realities' (Afrobarometer Policy Paper 39, 2017), p. 3. Interestingly, this remains constant across urban/rural and class divides.

5. Dreier and Lake, 'Institutional legitimacy', p. 1209.

6. For an interesting collection of essays addressing these points, see: Brian Tamanaha, Caroline Sage and Michael Woolcock, *Legal pluralism and development: Scholars and practitioners in dialogue* (Cambridge University Press, Cambridge, 2012).

that rule-bound, transparent, courteous court processes will build institutional legitimacy, ensure citizens' engagement, and secure compliance with the law.⁷ Yet how relevant are procedural justice models of institutional legitimacy to everyday life? In African studies, there has been little interrogation of this model, even as it is increasingly critiqued in other contexts.⁸ This is despite a rich and growing literature on public authority and statehood across the continent.⁹

This article begins to address major gaps in our knowledge about the functioning of lower state courts and how people relate to the state through them. Findings emerge from a systematic literature review of citizen engagement with magistrates' courts across Africa and multi-sited qualitative research on two magistrates' courts in South Africa and Uganda. This involved three months observing the district (or ordinary) courts of Ntuzuma Magistrates' Court and two months observing Gulu Magistrates' Court, between 2015 and 2018, by the authors and four research assistants. Both research locations are sites of long-term fieldwork by the authors on topics related to law, policing, and justice. Our focus was on retributive justice, which focuses on punishment for offenders. We left aside alternative forms of dispute resolution over issues such as land disputes and inheritance that have been integrated into lower court processes. We observed the routinized conduct of the courts, the practices of court professionals, and the behaviour of citizens in courtrooms, corridors, waiting areas, and behind closed doors. Observation was combined with semi-structured, in-depth interviews with members of the judiciary, prosecution services, legal representatives, and court-based civil society organizations. We interviewed 15 practitioners in Gulu and 11 practitioners in Ntuzuma and conducted a focus group with five court mediators. To better understand citizen engagement and experiences, we selected 10 cases in Gulu and 13 in Ntuzuma to study in greater depth. Documentary trails were explored where possible, and semi-structured interviews were conducted with citizens involved in the case. While we focused on those deliberately seeking contact with the state justice system by reporting criminal cases or filing civil cases, we also engaged (where possible) with individuals compelled to interact with the courts as accused, defendants, or witnesses. We included a mix of civil and criminal cases¹⁰ and ensured a diverse mix in terms of participant age,

7. Tankebe, 'Public cooperation'; Daniel Nagin and Cody Telep, 'Procedural justice and legal compliance', *Annual Review of Law and Social Science* 13, 5 (2017), p. 6.

8. Dreier and Lake, 'Institutional legitimacy'; Tankebe, 'Public cooperation'; 'World development report 2017: Governance and the law' (World Bank, Washington, DC, 2017).

9. See, for example, Lund, 'Twilight institutions'; Achille Mbembe, *On the postcolony* (University of California Press, Berkeley, CA, 2001); Tobias Hagmann and Didier Péclard, 'Negotiating statehood: Dynamics of power and domination in Africa', *Development and Change* 41, 4 (2010), pp. 545–546.

10. In Uganda, we examined four civil cases and six criminal cases; in South Africa nine criminal cases and four civil cases. In this article all interviewees are referred to through pseudonyms and details of their cases may have been redacted at their request.

gender, and occupation. Overall, we interviewed 35 citizens who had been directly involved in court cases, with an additional focus group in South Africa with four men exploring relationships between young men and the courts.

Using interpretive thematic analysis, we coded why people engaged magistrates' courts in the broader life of a dispute and the impact of court experiences on perceptions of state justice and statehood. Our findings advance an important theoretical contribution in this area. Whilst not discounting the importance of procedural justice, we find that this alone has an unpredictable and/or indeterminate impact upon people's perceptions of the courts. Instead, we argue that citizen engagement with magistrates' courts is shaped by the trade-off between normative, strategic, and pragmatic considerations, which deserve further analytical exploration. That is to say: how people 'think' state justice ought to function; how they 'need' it to function, and how they 'expect' it to function in any given instance.¹¹ In this tri-factor formulation, not only is legitimacy fluid and multi-dimensional, it is also just one part of a larger calculation around the utility of courts and the relationship of law to the "rest of life". Although we develop our argument within the context of literature on Africa, there is nothing uniquely 'African' about our findings, as our references to other research in the Global North and Global South demonstrate. Thinking 'empirically' rather than 'judicially'¹² about the lower state courts helps us understand the diverse reasons why citizens are using them as regulatory institutions, even in contexts where widespread distrust of the state and its agents is evident.

The article proceeds as follows. First, we establish why lower state courts have been neglected in studies of law and justice across Africa. This is important because it reveals intersecting political and conceptual commitments in knowledge production in this area. Next, we highlight the limitations of procedural justice theory for conceptualizing citizen engagement with magistrates' courts. Then, drawing on our systematic literature review and original empirical research, we introduce our novel tri-factor framework to explore the complex ways in which citizens interact with the lower state courts and how this interaction shapes judgements about institutional legitimacy, utility, and statehood more broadly.

Explaining the presence of academic blinkers

For all the concern regarding statehood in African studies, our systematic literature review, conducted in June 2016 and repeated in May 2019,

11. S.J. Cooper-Knock, 'Everyday policing, statehood and sovereignty in South Africa: A case study of responses to theft and robbery in eThekweni' (unpublished doctoral dissertation, University of Oxford, 2014); S.J. Cooper-Knock and Olly Owen, 'Between vigilantism and bureaucracy: Improving our understanding of police work in Nigeria and South Africa', *Theoretical Criminology*, 19, 3 (2015), pp. 355–375.

12. Hagmann and Péclard, 'Negotiating statehood', p. 19.

revealed that relatively little academic attention has been paid to citizen engagement with lower state courts. The systematic review involved a database-driven search¹³ of all African countries in combination with the name(s) of the relevant state court of first instance and a snowball search, identifying relevant citations in our search documents. Inclusion criteria required original, contemporary empirical material on citizen perceptions of, and engagements with, courts of first instance; and/or professional identities and performances in these courts; and/or detail on their everyday functioning. We did not include studies that focused on the intended functioning of courts or pieces where magistrates' courts were referenced relatively briefly. The most directly relevant studies were in Benin;¹⁴ Botswana;¹⁵ Côte d'Ivoire;¹⁶ DRC;¹⁷ Ghana;¹⁸ Kenya;¹⁹ Malawi;²⁰ Niger;²¹

13. SCOPUS, ISI, IBSS, EBSCO, African Journals Online, CIAO, Hein Online, West Law, Google Scholar, Refseek, LSE library catalogue, COPAC and WorldCAT. Repeated on Google Scholar in 2019.

14. Sophie Andreetta, 'Why go to court if you overlook the judge's decision? Inheritance disputes and legal consciousness in Cotonou', *Politique Africaine*, 149, 1 (2016), pp. 147–168; Sophie Andreetta and Annalena Kolloch, 'Money, morality and magistrates: Prosecuting and judging in the Republic of Benin', *Journal of Legal Pluralism and Unofficial Law*, 50, 2 (2018), pp. 145–166; Thomas Bierschenk, 'The everyday functioning of an African public service: Informalization, privatization, and corruption in Benin's Legal System', *Journal of Legal Pluralism and Unofficial Law*, 40, 57 (2008), pp. 101–139.

15. Athaliah Molokomme, 'Children of the fence: The maintenance of extra-marital children under law and practice in Botswana' (African Studies Centre Research Report 46, University of Leiden, 1991).

16. Peace Medie, 'Rape reporting in post-conflict Côte d'Ivoire: Accessing justice and ending impunity', *African Affairs*, 116, 464 (2017), pp. 414–434.

17. Benjamin Rubbers and Emile Gallez, 'Beyond corruption: The everyday life of a justice of the peace court in the Democratic Republic of Congo', in Tom De Herdt and Jean-Paul Olivier de Sardan (eds), *Real governance and practical norms in sub-Saharan Africa* (Routledge, New York, 2016), pp. 245–263; Milli Lake, *Strong NGOs and weak states: Pursuing gender justice in the Democratic Republic of Congo and South Africa* (Cambridge University Press, Cambridge, 2018). Milli Lake, Ilot Muthaka and Gabriella Walker, 'Gendering Justice in humanitarian spaces: Opportunity and (dis)empowerment through gender-based legal development outreach in the eastern DRC', *Law and Society Review*, 50, 3 (2016), pp. 539–574.

18. Richard Crook, 'State courts and the regulation of land disputes in Ghana: The litigants' perspective' (Working paper series, 241, Institute of Development Studies, 2005); Richard Crook, Kojo Asante and Victor Brobbey, 'Popular concepts of justice and fairness in Ghana: Testing the legitimacy of new or hybrid forms of state justice' (Africa Power and Politics Working Paper, London, 14, 2010).

19. Ambreena Manji, 'The grabbed state: Lawyers, politics and public land in Kenya', *The Journal of Modern African Studies*, 50, 3 (2012), pp. 467–492; Makau Mutua, 'Justice under seige: The rule of law and judicial subservience in Kenya', *Human Rights Quarterly*, 23 (2001), pp. 96–118.

20. Jessica Johnson, *In search of gender justice: Rights and relationships in matrilineal Malawi* (CUP, Cambridge, 2018); Ashworth, 'Witchcraft, justice and human rights in Africa: Cases from Malawi', *African Studies Review*, 58, 1 (2015), pp. 5–38.

21. Oumarou Hamani, 'L'administration des carrières des magistrats au Niger: Une ethnographie du conseil de la magistrature' (Lasdel Études et Travaux, Niamey, 70, 2008). Alou M. Tidjani, 'La justice au plus offrant. Les infortunes du système judiciaire en Afrique de l'Ouest (autour du cas du Niger)', *Politique Africaine*, 83 (2001), pp. 59–78.

Tanzania,²² South Africa,²³ Uganda,²⁴ and Zimbabwe.²⁵ Whilst using online translation where possible, our inclusion of non-English texts was limited. Moreover, our reliance on published academic work was practically necessary but excluded work in thesis form²⁶ and grey literature. Although our focused search parameters have inevitably limited our coverage, we believe we have still systematically identified an academically under-researched area and located valuable work on which to build.

Clearly, there are myriad forms of knowledge about lower state courts, including those shared in family stories, debated on street corners, spoken at community meetings, captured in state documents, and written in reports. While academic scholarship has no *a priori* claim to superiority over these diverse forms of knowledge, identifying a systematic gap in published scholarship is important because it highlights a space for further research and pushes us to understand the political and conceptual developments that produced this gap in the first place. Studies of contemporary law and justice in Africa can be clustered into four strands, which explore legal decision, interpretation, and case law; legal pluralism; transitional justice; and the judicialization of politics. We now explore how and why the last three strands of work might have addressed the citizen engagement with lower state courts but have not done so.

22. L.L.A. Kyando and C.M. Peter, 'Lay people in the administration of criminal justice: The law and practice in Tanzania', *African Journal of International and Comparative Law*, 5, 3 (1993), pp. 661–682; Andrew Mwakajinga, 'Court administration and doing justice in Tanzania', in Stephanie Elbern and Christina Jones-Pauly (eds), *Access to Justice: The role of court administrators and lay adjudicators in the African and Islamic contexts* (Kluwer Law International, The Hague, 2002), pp. 231–251; Ulrike Wanitz, 'Legally unrepresented women petitioners in the lower courts of Tanzania', *Journal of Legal Pluralism and Unofficial Law*, 23, 30 (1990), pp. 255–271.

23. Lillian Artz, 'Better safe than sorry: Magistrates' views on the Domestic Violence Act', *South Africa Crime Quarterly*, 7 (2004), pp. 1–8; Tsoaledi Thobejane and Dikeledi Thobejane, 'Experiences of women professionals speaking out against gender marginalization at magistrate offices in Limpopo province, South Africa', *Gender and Behaviour*, 15, 2 (2017), pp. 8858–8866; Jameelah Omar, 'Penalised for poverty: The unfair assessment of "flight risk" in bail hearings', *South African Crime Quarterly*, 57, 1 (2016), pp. 27–34; Diana Gordon, *Transformation and struggle: Crime, justice and participation in democratic South Africa* (University of Michigan Press, Ann Arbor, MI, 2009); Lazarus Kgalema and Paul Gready, 'Transformation of the magistracy' (Research paper, Centre for the Study of Violence and Reconciliation, Johannesburg, June 2000). Lake, *Strong NGOs and weak states*.

24. J. Atukwasa, B. Basheka and P. Gadenya, 'The effect of corruption on administration of justice in Uganda', *African Journal of Public Affairs*, 5, 3 (2012), pp. 1–15; Lynn Khadiagala, 'Negotiating law and custom: Judicial doctrine and women's property rights in Uganda', *Journal of African Law*, 46, 1 (2002), pp. 1–13. Cheyanne Scharbatke-Church and Diana Chigas, 'Facilitation in the criminal justice system' (Occasional Paper, Institute for Human Security, The Fletcher School of Law and Diplomacy, Tufts University, 2016).

25. Verheul, 'Zimbabweans are foolishly litigious'.

26. E.g. Nonhlanhla Mbambo, 'The processing of domestic violence cases by the department of justice and constitutional development: The case of Ntuzuma magistrate court in KwaZulu-Natal' (Unpublished doctoral dissertation, University of KwaZulu-Natal, 2016).

Legal pluralism—the presence of ‘more than one “law” or legal system’ in any given ‘social field’—has preoccupied scholars across disciplines for many decades.²⁷ Yet studies of plurality elsewhere in the world analyse the functioning of state courts in a level of detail unmatched across Africa.²⁸ Merry attributed this to the fact that non-state ordering is more prominent in countries with a colonial past and less visible in other contexts.²⁹ Others suggest that the co-development of legal systems with capitalism and liberalism in western countries has rendered the moral and legal expansion of state authority in the judicial field more complete.³⁰ There is truth to these arguments, but they overlook two key factors. First, the evolution of literature on legal pluralism in Africa was shaped by normative ‘anti-statism’.³¹ This began as a conscious challenge to colonial and post-independence scholarship that emphasized legal centralism and the supremacy of state-based law in regulating society.³² Later, legal pluralism scholars challenged the Marxian notion that customary law was a legitimating device for the state, emphasizing the flexibility of customary norms, practices, and institutions, which existed as powerful sites of ‘resistance, refusal, and struggle’.³³

More recently, these efforts have redoubled in response to international development policies seeking to advance state-centric ‘rule of law’ across Africa. Scholars have emphasized the ‘fantasy’ of rule-of-law projects and advocated for a better understanding of ‘actually existing’ governance.³⁴ While donors now recognize the widespread legitimacy of so-called informal or traditional modes of justice, in practice, there is a tendency to instrumentalize these non-state or hybrid systems, pushing them to conform to international justice norms.³⁵ Scholars, in turn, have re-emphasized

27. Margaret Davies, ‘Legal pluralism’, in Peter Cane and Herbert Kritzer (eds), *The Oxford handbook of empirical legal research* (Oxford University Press, Oxford, 2010), p. 805.

28. Bierschenk, ‘Everyday functioning’, p. 102.

29. Sally Engle Merry, ‘Legal pluralism’, *Law and Society Review*, 22, 5 (1988), pp. 869–896.

30. Brian Tamanaha, ‘Understanding legal pluralism: Past to present, local to global’, *Sydney Law Review*, 30 (2008), pp. 375–411; Davies, ‘Legal pluralism’.

31. *Ibid.*, p. 809.

32. Hans Kelsen, *Introduction to the problems of legal theory* (Clarendon Press, Oxford, 1934); Martin Chanock, ‘Neo-traditionalism and customary law in Malawi’, *Journal of Legal Pluralism and Unofficial Law*, 10, 16 (1978), pp. 80–91. Richard Wilson, ‘Tyrannosaurus lex: the anthropology of human rights and transnational law’, in Mark Goodale and Sally Engle Merry (eds), *The practice of human rights: Tracking law between the global and the local* (Cambridge University Press, Cambridge, 2007), pp. 342–369.

33. *Ibid.*; John Comaroff, ‘Colonialism, culture and law: A foreword’, *Law and Social Inquiry*, 26, 2 (2001), pp. 305–314.

34. Bruce Baker and Eric Scheye, ‘Multi-layered justice and security delivery in post-conflict and fragile states’, *Conflict, Security & Development*, 7, 4 (2007), pp. 503–528; Haggmann and Peclard, ‘Negotiating statehood’.

35. Eva Wokowska, ‘Doing justice: How informal systems can contribute’ (United Nations Development Programme (UNDP), New York, 2006), p. 213; World Bank, ‘World development report 2011: Conflict, security and development’ (Washington, DC, 2011), p. 167.

the complexity of these institutions, arguing that they cannot be simply co-opted into hegemonic state-building projects that fail to reflect peoples' political, social, and legal concerns,³⁶ whilst also highlighting the shortcomings of 'vernacular forums' for dispute resolution.³⁷ While acknowledging that non-state actors are not isolated from the state, state laws, actors, and institutions generally appear on the fringes of these accounts to explain how their non-state and hybrid counterparts have been shaped.

The second strand of literature explored here—transitional justice—has exploded, particularly since the mid-nineties, when South Africa's Truth and Reconciliation Commission was established and the International Criminal Tribunals for Rwanda and the former Yugoslavia were set up.³⁸ More recently, academics have explored the controversial role of the International Criminal Court on the continent and other transitional justice processes, such as Rwanda's post-genocide *Gacaca* courts. Whilst producing many valuable insights, this literature has created an unhelpful division between top-down, state-centric 'transitional' justice and 'ordinary,' 'local' justice.³⁹ In fact, interrogations of 'everyday justice' amidst transitional justice have been largely restricted to 'traditional' rituals, with heated debates questioning whether such rituals can be utilized to achieve transitional justice goals.⁴⁰

The third and final strand of literature, which has neglected experiences of lower state justice, explores the degree to which courts have become guardians of the political order. This work focuses on state courts but concentrates on high courts or Supreme Courts and Constitutional Courts.⁴¹ Scholars have, understandably, been drawn to analysing 'the occasional heroic experiences' of statehood, citizenship, and judicial activism.⁴² What this misses, however, are the everyday practices of the lower courts, which

36. Patrick Kyamusugulwa, Dorothea Hilhorst and Gemma Vanderharr, 'Capacity builders for governance: Community driven reconstruction in the eastern DRC', *Development in Practice*, 24, 7 (2014), pp. 812–826.

37. Sindiso Weeks, *Access to justice and human security: Cultural contradictions in rural South Africa* (Routledge, London, 2017), p. 33.

38. Gerhard Anders and Olaf Zenker (eds), *Transition and justice: Negotiating the terms of new beginnings in Africa* (Wiley-Blackwell, Chichester, 2014).

39. Rosalind Shaw and Lars Waldorf (eds), *Localizing transitional justice: Interventions and priorities after mass violence* (Stanford University Press, Stanford, CA, 2010), p. 2; Eric Posner and Adrian Vermeule, 'Transitional justice as ordinary justice', *Harvard Law Review*, 117 (2003), pp. 762–825.

40. Tim Allen and Anna Macdonald, 'Post-conflict traditional justice', in Gerben Bruinsma and David Weisburd (eds), *Encyclopaedia of criminology and criminal justice* (Springer, New York, 2014).

41. A.A. Senghore, 'The judiciary in governance in the Gambia: The quest for autonomy under the second republic', *Journal of Third World Studies*, 27, 2 (2010), pp. 215–248.

42. James Holston, *Insurgent citizenship: Disjunctions of democracy and modernity in Brazil* (Princeton University Press, Princeton, 2008).

deal with less severe, less seminal but no less central practices of everyday justice. There is a rich literature in South Africa, for example, on the Constitutional Court's adjudication of 'non-judiciable' socio-economic rights.⁴³ To the degree that magistrates' courts and their equivalents enter into this literature at all, they do so as the locus of 'landmark' decisions or a precursor to high-level court action.⁴⁴ Indeed, whilst mega-politics might be decided in the higher courts, it is the lower courts that make the daily decisions that bring substance to people's political experiences and subjectivities.⁴⁵

Removing our blinkers: Interpreting citizen engagement with lower state courts

The previous sections demonstrated how and why key academic fields have systematically overlooked citizens' engagements with lower state courts. Despite this, something approaching a policy consensus exists on the obstacles to accessing justice, including lack of infrastructure, understaffing, costs, backlogs, and corruption in judicial system at all levels. This has justified various international interventions, including the UN Sustainable Development Goal (SDG) of 'access to justice for all' by 2030. Such agendas seek to reverse procedural fairness problems in order to bolster institutional legitimacy and are echoed, reinforced, and shaped by national-level policies.⁴⁶ Of course, reformers may share policies without sharing motivations: some might be trying to bolster civic rights, whilst others attempt to amplify state power and coercion through the courts.⁴⁷ In the following section, we explore reformist policies in their sociopolitical context in Ntuzuma and Gulu before highlighting the limitations of procedural justice theory for conceptualizing citizen engagement with lower state courts and suggesting an alternative way forward.

Access to justice in its socio-political context

Both Gulu, the provincial capital of the Acholi region of northern Uganda, and Ntuzuma, a township in Kwazulu-Natal province of South Africa,

43. Mandisa Mbali, *South African AIDS activism and global health politics* (Palgrave Macmillan, New York, 2013); Tshepo Madlingozi, 'Post-apartheid social movements and legal mobilisation', in Malcolm Langerford *et al.* (eds), *Socio-economic rights in South Africa: Symbols or substance?* (Cambridge University Press, Cambridge, 2014), pp. 92–130.

44. Marie Huchzermeyer, 'Housing rights in South Africa: Invasions, evictions, the media, and the courts in the cases of Grootboom, Alexandra, and Bredell', *Urban Forum*, 14, 1 (2003), pp. 80–107.

45. An important exception being Mutua, 'Justice under Siege'.

46. United Nations Development Programme, 'Rule of law and access to justice in eastern and southern Africa' (Geneva, 2013); Organization for Economic Co-operation and Development (OECD), 'Delivering access to justice for all' (Paris, 2016).

47. Matt Andrews, Lance Pritchett and Michael Woolcock, *Building state capability: Evidence, analysis, action* (Oxford University Press, Oxford, 2017), p. 30.

experience high levels of crime and civil disputes relative to other parts of the country. Court usage may also be similar. In both northern Uganda and urban South Africa, Afrobarometer data states 12 per cent of respondents had direct experience with 'government courts' in the last five years.⁴⁸ More broadly, both Gulu and Ntuzuma are located in historically marginalized regions that have experienced high levels of political violence, albeit in very different ways. They are also both areas where the central government is investing in formal legal architecture and access to justice programmes in attempts to consolidate and extend state authority.

In South Africa, the law has arguably played a central role in the imaginary of the transition from apartheid. Under apartheid, residents in the black township of Ntuzuma were oppressed by a 'wicked system of law'⁴⁹ as well as illegal state violence, entangled with clashes between Inkatha and the African National Congress. The post-apartheid state promised to transform, legitimize, and extend access to the legal system. In 2001, the country's Urban Renewal Program announced Ntuzuma, together with the neighbouring areas of KwaMashu and Inanda, as an area of investment and development. Ntuzuma Court is a US\$14 million building serving roughly 1.5 million people in Bridge City, a purpose-built node of commercial and state buildings in the 'INK' development. When the court opened in 2013, the government claimed it as a victory for 'previously underserved communities' that would 'bring justice services closer to the people'.⁵⁰ Previously, residents had to travel approximately 20 km to reach a civil or small claims court. Such construction projects sat alongside forms of judicial and institutional innovation, like the piloting of KwaMashu Community Court in 2005⁵¹ and the use of alternative dispute resolution (ADR) in criminal and civil matters, which attempted to make justice more responsive and fiscally and temporally efficient.

While Ntuzuma Court blends modernist steel brutalism with a tree design intended to invoke the old rural community courts, Gulu magistrates' court mirrors the colonial-era architecture found in surrounding municipal buildings. There has been a magistrates' court in Gulu since the 1960s, but it was barely functional during the 20-year war (1987–2008)

48. Afrobarometer merged data, round 6 (2016), <<https://afrobarometer.org/data/merged-round-6-data-36-countries-2016>>.

49. Arthur Chaskalson, 'From wickedness to equality: The moral transformation of South Africa law', *International Journal of Constitutional Law*, 1, 4 (2003), pp. 590–609.

50. SA Government News Agency, 'State-of-the-art court for Ntuzuma', 28 May 2013, <<https://www.sanews.gov.za/south-africa/state-art-court-ntuzuma>>.

51. Area-based Management and Development Programme, 'Crime and justice' (eThekweni, 2007), <http://www.durban.gov.za/Documents/City_Government/Area_Based_Management/ABM%20Crime%20and%20Justice.pdf>.

between the Government of Uganda (GoU) and the Lord's Resistance Army. Cases have only been heard again regularly for around 10 years. During the war, GoU counter-insurgency policy forcibly displaced civilians into unsafe camps. This legacy, combined with contemporary forms of neoliberal 'state violence,' particularly in relation to land dispossession has kept northern Uganda 'far behind the rest of the country in all development indicators'.⁵² During the war, there was 'little or no judicial presence' across swathes of the Acholi sub-region and the courts sat infrequently, mired by enormous backlogs.⁵³ Since then, the National Resistance Movement (NRM) government has established various development programmes, ostensibly to improve regional governance and economic development. The flagship Peace, Recovery and Development Plan (PRDP), currently in its third iteration, prioritized the 'consolidation of state authority', tackling the 'sketchy' presence of justice institutions and the 'inadequate, vandalized, and in some places non-existent' magistrates' courts in conflict-affected areas of the North.⁵⁴ The programme's focus has now shifted from physical infrastructure to institutional performance.⁵⁵

In sum, both states are seeking to extend the breadth and depth of lower courts through programmes that seek to improve their physical presence and procedure. This, however, is against the backdrop of deeply ambivalent and contested imaginaries of statehood and 'justice' amongst citizenry. In Gulu magistrates' court catchment area, for example, it is widely held that minor criminal offences and small-scale civil disagreements should be resolved 'from the home' using clan elders, village or parish council courts, or a combination of the two. The local council (LC) courts are a hybridized system of dispute resolution, administered by elected local councillors at the village and parish level with reference to notions of customary authority and norms, as well as formal law.⁵⁶ Within the catchment for Ntuzuma court, whilst there is no parallel institutional structure to the LC courts, diverse organizations, including churches, community police forums, street committees, family structures, and political organizations, regularly play *de facto* dispute resolution roles. No systematic data exists to suggest how

52. Adam Branch and Adrian Yen, 'Neoliberal discipline and violence in northern Uganda', in Jorg Weigratz *et al.* (eds), *Uganda: The dynamics of neoliberal transformation* (Zed Books, London, 2018), p. 88.

53. Human Rights Watch, 'Uprooted and forgotten: Impunity and human rights abuses in northern Uganda' (Human Rights Watch, Washington, DC, 2005).

54. *Ibid.*; Government of Uganda, 'Peace and recovery development plan 2007–2010' (Republic of Uganda, Kampala, 2007), 4.1.3; Government of Uganda, 'Peace and recovery development plan phase two: 2012–2015' (Republic of Uganda, Kampala, 2011), p. ii.

55. Government of Uganda, 'Peace and recovery development plan 3 for northern Uganda: 2015–2021' (Republic of Uganda, Kampala, 2014), pp. 14–15.

56. Julian Hopwood, 'Elephants abroad and in the room: Explicit and implicit security, justice and protection issues on the Uganda/S Sudan border' (Justice and Security Programme Research Paper No. 22, London School of Economics, 2015), pp. 6–10.

central magistrates' courts are in this landscape, but institutional and regulatory multiplicity does not crowd them out in either setting. Magistrates' courts remain a means—however imperfect—of accessing state power, law, judgement, and adjudication for those in search of redress and dispute resolution.

Beyond procedural justice

For the last 30 years, the dominant theoretical approach to understanding citizen perceptions of state legal systems has been the procedural justice–legitimacy model, most commonly associated with social psychologist Tom Tyler and colleagues.⁵⁷ Tyler models a linear, causal relationship between citizens' perceptions of procedurally just treatment by legal officials and public perceptions of the system's legitimacy.⁵⁸ Procedural justice is broken down into four dimensions, which reflect an individual's perception of being treated with, and subject to 'dignity and respect, trustworthy motives, neutrality and voice'.⁵⁹ Procedural justice advocates vary in their definition of 'legitimacy' but converge around a core question: 'whether a powerholder is justified in claiming the right to hold power over other citizens' and, therefore, deliver binding judgements.⁶⁰

While there has been a great deal of academic and policy consensus on procedural justice theory, we concur with critical scholarship that questions the 'elegant set of causal relationships' at the heart of these models.⁶¹ Our scepticism is illustrated by a puzzle emerging from the 2016 Afrobarometer survey data. In both South Africa and Uganda, the vast majority of respondents perceived high levels of corruption, inefficiency, and unfairness in the police and judicial system, and yet in apparent contradiction to procedural justice predictions, these institutions were overwhelmingly regarded as 'legitimate' in so far as a significant majority either agreed or strongly agreed that state courts have 'the right to make decisions that people always abide by'.⁶² Two central critiques of procedural justice theory

57. Anthony Bottoms and Justice Tankebe, 'Beyond procedural justice: A dialogic approach to legitimacy in criminal justice', *The Journal of Criminal Law and Criminology*, 102, 1 (2012), pp. 119–170.

58. *Ibid.*, p. 120; Nagin and Telep, 'Procedural justice', p. 6; Tom Tyler, *Why do people obey the law? Procedural justice, legitimacy, and compliance* (Yale University Press, New Haven, 1990); Tom Tyler, 'Enhancing police legitimacy', *Annual Review of the American Academy of Political Science*, 593 (2004), pp. 84–99; Tom Tyler, 'Psychological perspectives on legitimacy and legitimation', *Annual Review of Psychology*, 57 (2006), pp. 375–400.

59. Tyler, 'Enhancing police legitimacy'.

60. Bottoms and Tankebe, 'Procedural justice', p. 124.

61. Devon Johnson, Edward Maguire and Joseph Kuhns, 'Public perceptions of the legitimacy of the law and legal authorities: Evidence from the Caribbean', *Law and Society Review*, 48, 4 (2014), p. 948.

62. See Afrobarometer, 'Summary of results, Afrobarometer, round 6, survey in South Africa' (2016), Q.52H, Q.52J, Q.53e, 53G Q.42A and Afrobarometer, 'Summary of

can help us unpack this puzzle, inviting alternative conceptualizations of citizen-court engagements.

First, the vast corpus of literature on procedural justice and legitimacy concentrates on a small number of states in the Global North and may not be ‘empirically valid’ in these places, let alone in strikingly different contexts.⁶³ Transplanting theoretical models from the idiosyncratic experience of these states creates ‘contextless generalizations’ on legitimacy.⁶⁴ This has generated calls to ‘rethink the conceptual structure of perceptions, judgments, and feelings about the law and legal authorities’ in post-colonial contexts.⁶⁵ Despite decades of scholarship calling for African states and citizens to be understood on their own terms,⁶⁶ citizens are all-too-often characterized as viewing state institutions in Africa with near ‘blanket illegitimacy’ when actually there is widespread faith in ‘the state’s right to arbitrate’ that demands adequate theorization.⁶⁷

Second, the notion of legitimacy itself has been under-theorized in the procedural justice literature. Methodologically, procedural justice models take insufficient account of the complexity of variables—such as trust, obligation, and legitimacy—which are simplistically reduced to tick-box categories in large-scale surveys or treated as synonymous rather than distinct. Analysing the Afrobarometer data at a continent-wide level, for example, Dreier and Lake highlight that ‘individual trust’ and ‘perceived legitimacy’ are not necessarily co-variant.⁶⁸ Contrary to the predictions of procedural justice–legitimacy models, they find that people’s belief in the authority of state legal institutions to arbitrate and govern is ‘surprisingly unaffected’ by ‘negative personal experiences’ of rule of law institutions and personnel.⁶⁹ On the other hand, Tankebe argues that compliance should not be read as a proxy for legitimacy, as compulsion may emerge from ‘fear, a sense of powerlessness, or pragmatic acquiescence’.⁷⁰

These critiques encourage more grounded ways of conceptualizing citizen engagement with lower state courts. As theoretical and empirical studies of statehood across Africa demonstrate, state institutions should be seen as dynamic institutions of public authority ‘deeply embedded in

results, Afrobarometer, round 6, survey in Uganda’ (2016), Q.53e; Q.53g; Q.52H; Q52J and Q42A.

63. Johnson *et al.*, ‘Public perceptions’, p. 947.

64. Justice Tankebe *et al.*, ‘Multi-dimensional model of police legitimacy: A cross-cultural assessment’, *Law and Human Behaviour*, 40, 11 (2016), pp. 11–22.

65. Johnson *et al.*, ‘Public perceptions’, p. 971.

66. Mbembe, *On the postcolony*.

67. Dreier and Lake, ‘Institutional legitimacy’, pp. 1209–1210.

68. *Ibid.*, p. 1194.

69. *Ibid.*, p. 1195.

70. Justice Tankebe, ‘Viewing things differently: The dimensions of public perceptions of police legitimacy’, *Criminology* 51, 1 (2013), p. 106.

social forces' and in 'struggles for social control'.⁷¹ A whole range of influences shape imaginaries of statehood and by extension state institutions, including personal and vicarious experiences of these institutions, as well as broader histories of statehood, citizenship, and subjection; personal and collective struggles for rights and recognition; religious and cultural norms; folk memories; economies of survival, accumulation, and exploitation; and social relations that run the gamut from love to contempt.⁷² From this perspective, legitimacy is not 'a fixed absolute quality against which actual conduct [can] be measured'.⁷³ Instead, it is fluid and multidimensional, being both '*dialogic* and *relational* in character'⁷⁴ and part of a 'continuous and precarious social process'.⁷⁵ Crucially, legitimacy is also only one part of people's ongoing calculation around the utility of courts and the relationship of law to the "rest of life". While engagements with the courts (and perceptions of them) can be based on substantive values and norms; they may also be shaped by convenience and compulsion. Such 'instrumental/prudential' compliance still involves a decision to defer authority to the court but might be based on a range of pragmatic and self-interested calculations that cannot be automatically equated with legitimacy.⁷⁶ By complicating and decentring 'legitimacy' as an explanatory variable for engaging with lower state courts, we are better equipped to analyse the everyday lives of these institutions and the range of influences that shape how judgements are formed about them.

A summons to the magistrates' courts: Normative, strategic, and pragmatic drivers and dynamics

Our tri-factor approach to understanding magistrates' courts in South Africa and Uganda balances the desire to delineate core drivers of court engagement with the need for a flexible, inductive framework of inquiry, namely how people think the courts should act, how they need them to act, and how they expect them to act in any given instance. We do not claim to explain the precise relationship between these considerations, which is always variable, nor can we quantify mono-causal reasons for citizen engagement with, and perceptions of lower state courts, because they are unlikely to exist. More modestly, we seek to show the complex motivations

71. Hagmann and Peclard, 'Negotiating statehood', pp. 542–545.

72. Nagin and Telep, 'Procedural justice', p. 7.

73. Lund, 'Twilight institutions', p. 693.

74. Bottoms and Tankebe, 'Procedural justice', p. 129.

75. Beatrice Jauregui, 'Beating, beacons and big men: Police, disempowerment, and de-legitimation in India', *Law and Social Inquiry*, 38, 3 (2013), pp. 643–669.

76. Anthony Bottoms, 'Compliance with community penalties', in Anthony Bottoms, Loraine Geistorpe and Sue Rex (eds), *Community penalties: Change and challenges* (Willan, Collompton, 2001).

of court users, their varied experiences within the courts, and the different conclusions they draw from these interactions. Thematic analysis of our data allowed us to identify widespread patterns and themes in people's interactions with the courts which proved important across varied intersections of class, age, and gender. Whilst there is limited space within this article to further unpack the impact of people's structural positions and identities on court use, the framework we propose provides the analytical space to do so, and this would be a fruitful avenue for future research. Further, while our multi-sited study was designed for theory-building rather than comparative analysis, we highlight similarities and differences between sites where they emerge.

Normative engagements: How people think the courts should act

The first element in the constellation above is normative. It acknowledges the important role that ideas about the state can play in explaining people's recourse to the courts. In any polity, imaginaries of the state are diverse and can be put to varied ends. Sometimes, officials can hide behind ideas about the state. At other times, state imaginaries may be repurposed and used to resist and challenge state practices. When citizens in Harare appealed to magistrates' courts for justice following politically motivated violence, for example, they held to the idea of a rule-bound state despite their experiences and secured a 'degree of success' in the process.⁷⁷ Similarly, in DRC, despite extensive corruption, access problems, and inefficiency, people use the Justice of the Peace Courts because 'the ideal of the law and the State continues to fuel expectations and hopes among Congolese people with regard to the legal system'.⁷⁸ Meanwhile, in South Africa, eastern DRC, and Côte d'Ivoire, growing numbers of women are reporting cases of sexual violence to state authorities despite unsatisfactory interactions with judicial institutions.⁷⁹

Our empirical findings within South Africa and Uganda suggested similar patterns. The courts exerted some pull as a normative space of public authority and going to the courts could be both an expression and 'performance of citizenship'.⁸⁰ In both sites, many minor criminal or civil cases ended up in magistrates' courts because non-state or hybrid dispute resolution had failed. The decision to enter a magistrates' court, however, was not necessarily choiceless. Even where people expected the process to be slow, expensive, and abstruse, they could be motivated by a more

77. Verheul, 'Zimbabweans are foolishly litigious', p. 83.

78. Rubbers and Gallez, 'Court', p. 103.

79. Lake, *Strong NGOs and weak states*; Lake, Muthaka and Walker, 'Gendering justice'; Medie, 'Rape reporting'.

80. Verheul, 'Zimbabweans are foolishly litigious'.

abstract and normative conviction that taking an issue to court was the correct course of action and that they may find a (comparatively) benign adjudicating authority there rooted, to greater or lesser degrees, in their sociopolitical values.

Thus, for some, acting responsibly—or ‘properly’—was a norm that could be linked to ideas of statehood and/or citizenship and sustained regardless of the costs or the outcomes of the state justice system. Nhlanhla, a young man from KwaMashu, for example, remained committed to reporting issues, despite the criminal justice system failing him personally. He explained this in terms of his own normative notion of civil duty: ‘I will continue to report [to the Police] because what I understand as a civilian person [is that] I need to obey the rules. I don’t have to take the law to my hands.’⁸¹ Similarly, in Gulu, Boniface opened a criminal trespass case against a neighbour, after local leaders failed to resolve the issue, partly due to an uncooperative accused. In some places, he said, we might ‘just pick spears and begin to fight’, but he and his family chose to ‘handle it in the most proper way... we wanted to just to take the legal ways’.⁸² He saw this as an act of ‘wisdom’ to keep things ‘cool’ despite the costly delays and expense it brought and the likelihood that the accused—a wealthy and politically connected individual—would resolve the issue through bribes.

It was not just accusers and complainants who expressed normative faith in the probity of the court. Nobuhle, who had been called to the Ntuzuma small claims court for non-payment of school fees, recalled feeling hopeful that her case was being escalated, ‘I said let me go to court because that is where I will tell them what is happening’: this was an arena in which she felt she could be heard.⁸³ Similarly, in Gulu, Moses, a young subsistence farmer, accused of arson by an older, richer man, endured remand in prison for four long months before being granted bail but still expressed confidence in the court: ‘because that is where the real facts come from’.⁸⁴ Sometimes a normative commitment to the state justice system was expressed as part of an accused’s reasoning for contravening the law in the first place. Nkanyiso faced charges at Ntuzuma Court after assaulting a *whoonga* smoker⁸⁵ who he had been trying to move from outside a neighbours’ house after a call to the police went unheeded. ‘When I hurt [a person] using my hands, I am infringing on their right...’ he acknowledged, ‘I must rather report the problem to the authorities’. However, for Nkanyiso, the failure of state authorities to fulfil their duty was a justification for

81. Interview, Nhlanhla, eThekweni, 5 September 2013.

82. Interview, Boniface, Gulu, 11 August 2017.

83. Interview, Nobuhle, eThekweni, 25 July 2015.

84. Interview, Moses, Gulu, 26 July 2016.

85. *Whoonga* is an opiate based drug.

him to pursue justice by other means: 'if they [the police] are failing, they then tell me to do as I see fit'.⁸⁶

Acknowledging the pull of state imaginaries is important, but we should not constrain what 'statehood' means to different people. When we highlight normative ideas of the state, we are not suggesting that people were attracted by a homogenous imaginary of liberal governance. In both Gulu and Ntuzuma, in different ways, state imaginaries could blur liberal conceptions of the state with notions such as patriarchy, personalized rule, ethnic chauvinism, liberation politics, radical redistribution, and gerontocracy. The pull of the courts, therefore, is more accurately described as the pull of 'general and imprecise' conceptions of statehood, rooted in fluid 'moral matrices'.⁸⁷ In Gulu for example, a magistrate explained that in civil land cases, people regularly turned to the court because they believed he was a 'direct channel' to the President, who, whilst campaigning, had promised favourable land dispute settlements.⁸⁸ While this may be incongruent with idealized, Weberian conceptions of how rational-legal state justice institutions should function, it still represents a normative idea about the role of the state in the arbitration of disputes.

Strategic engagements: How people need the courts to act

A second element in this trifactor highlights instrumental desires that people pursue through the courts. We call this strategic legalism: the calculated use of a court case—and by proxy, 'the state'—as leverage to obtain redress, revenge, or closure in an ongoing dispute. Sometimes, court action might be pursued whilst the same issue was also being negotiated outside the courtroom. Such tactics are evident from debt cases in DRC to land cases in Tanzania.⁸⁹ Alternatively, criminal charges might be brought or fabricated to catalyse resolution in a case that had already reached the courtroom. This was particularly common during civil land cases in Gulu. Following Griffiths and Weeks, we advocate a dispute-focused analysis to make sense of these dynamics.⁹⁰ By exploring the life of a dispute, we can examine an altercation as it moves into, out of, and beyond the courts

86. Interview, Nkanyiso, eThekweni, 11 August 2016.

87. Tim Kelsall, 'Political legitimacy in middle Africa: Father, family, food', *African Affairs*, 102, 409 (2003) pp. 667–669; Michael Schatzberg, 'Power, legitimacy and democratisation in Africa', *Africa*, 63, 4 (1993), pp. 445–461; Lentz, 'The Chief'.

88. Interview, Magistrate, Gulu, 1 July 2016.

89. Rubbers and Gallez, 'Beyond corruption', p. 251; Kelly Askew, Faustin Maganga and Rie Odgaard, 'Of land and legitimacy: A tale of two lawsuits', *Africa*, 83, 1 (2013), pp. 120–141.

90. Anne Griffiths, 'Reconfiguring law: An ethnographic perspective from Botswana', *Law and Society Inquiry*, 23, 3 (1998), p. 613; Sindiso Mnisi Weeks, 'Women's eviction in Msinga: The uncertainties of seeking justice', *Acta Juridica*, 1 (2013), pp. 118–142.

and as it triggers a diverse range of social, economic, political, and legal manoeuvres.

In Gulu, strategic legalism was mainly linked to the area's ubiquitous land conflicts. During the war, almost the entire Acholi population were displaced into camps and on people's return, land boundaries, based on customary usage, became highly contested.⁹¹ The regional State Attorney lamented the quantity of civil land cases mounting on his desk. Other officials were frustrated about the escalation of land disputes using so-called 'manufactured' criminal charges such as 'criminal trespass,' 'malicious damage', and 'simple defilement'.⁹² In the words of one magistrate: 'I read the case summary, you see the story, and you say to the state attorneys, are you going to get a conviction?! Really?! You will not get a conviction. These are concocted summaries'.⁹³ This, of course, raises important questions (beyond the scope of this article) about why and how such cases reach the courts in the first place. Suffice to say, one magistrate estimated that 80 per cent would be dismissed due to lack of evidence.⁹⁴ By this point, however, the accused was likely to have spent many months in prison on remand or have been subjected to the stress, disruption, and expense of several court hearings. In 2017, an estimated 52 per cent of Ugandan prisoners were pretrial detainees and 20 per cent of those had spent three or more years awaiting trial.⁹⁵ For many accusers, this punishing limbo was the end goal: 'it is a way of keeping people out of the way, or hurting them,' explained a magistrate.⁹⁶ To fully appreciate the power and purpose of magistrates' courts, it is important to realize that citizens may be seeking to repurpose this institution to serve a diverse range of ends including, but not limited to, justice.

Strategic legalism could also take the form of launching counter-cases in situations where defendants wanted to re-frame themselves as victims or simply to wear down the resolve of their accuser. These were evident in Ntuzuma's court. Siboniso, for example, had been attacked by his neighbour, who in turn opened up an assault case against him. Whilst these charges were later dropped, Siboniso was forced to attend court as accuser and defendant. Although this had not succeeded in forcing him to drop

91. Julian Hopwood and Ron Atkinson, 'Land conflict monitoring and mapping tool for the Acholi sub-region' (Human Rights Focus, Gulu, 2013).

92. See also: Lynn Khadiagala, 'The failure of popular justice in Uganda: Local councils and women's property rights', *Development and Change*, 32, 1 (2001), p. 60.

93. Interview, Magistrate, Gulu, 11 August 2017.

94. Interview, Magistrate, Gulu, 1 July 2016.

95. Foundation for Humanitarian Rights Initiative, 'Justice delayed is justice denied', (Kampala, 2017).

96. Interview, Magistrate, Gulu, 1 July 2016.

the case, his perseverance had cost him his job as a contractor.⁹⁷ Strategic legalism is also a tactic that could be used by the state. When Sicelo, a young man, attempted to open up a case of assault against the police, the police opened a counter-charge against him. That case was eventually withdrawn because the police did not regularly attend the hearings. Sicelo, on the other hand, had persistently attended every court date, and this had cost him a job contract.⁹⁸ These examples, and others from both sites, are a reminder of the economic, social, and emotional toll that long delays had on court users. Many would have agreed with the conclusion of Malcolm Feeley in his study of lower criminal courts in New Haven, USA: ‘the punishment is the process’.⁹⁹

While a legal case could provide powerful leverage in social disputes, it might also produce relational ruptures that were too costly to maintain.¹⁰⁰ For some, however, exiting the court system could prove challenging. This was particularly true with criminal cases in Uganda and South Africa, which are prosecuted by the state. If a complainant wished to withdraw charges, they had to persuade prosecutors to do so. In Gulu, where monetary exchange was such an integral part of the system, this could be paid for. It was harder in Ntuzuma where this was not an accepted norm. Court officials were judged by successful prosecutions and bound by regulations regarding the withdrawal of cases involving women and children.¹⁰¹ Where these cases continued, people might try to mitigate the social ruptures they caused. In one case of assault against a minor, for example, the original complainants were unable to withdraw their charges against their neighbour, which they now regretted.¹⁰² Consequently, they advocated on their neighbour’s behalf, entering a statement into mitigation.

Whilst a full analysis of ADR is beyond this article’s scope, noting its impact on strategic legalism in South Africa is important. ADR can enter at all stages of the legal process, but typically in Ntuzuma, it entered at the pretrial stage, with authorization of the prosecutor and the agreement of the parties involved.¹⁰³ Mediation was undertaken by trained mediators and social workers, and successful resolution could include a range of actions, including apologies and compensation. Successful pretrial ADR often led to cases being withdrawn.¹⁰⁴ Thus, ADR provided a flexible format for

97. Interview, Siboniso, eThekweni, 30 July 2015.

98. Interview, Sicelo, eThekweni, 29 July 2016.

99. Malcolm Feeley, *The process is the punishment* (Russell Sage Foundation, New York, 1979).

100. Cooper-Knock and Owen, ‘Vigilantism’.

101. Interview, Magistrate1, eThekweni, 29 July 2015.

102. Author one fieldwork diary, 22 July 2016.

103. Interview, Prosecutor1, eThekweni, 21 July 2015.

104. *Ibid.*

those seeking ends other than just prosecution, which was often the case in gendered and intergenerational disputes. Those involved in the process saw this flexibility as a strength, 'people want to know "why did you do it?" or "sorry" or compensation, everybody doesn't want to see you at the back of the court, or in a cell, or with a conviction, no not that'.¹⁰⁵ Many who came through the process were 'friends, relatives, neighbours' and could include those who had initially sought prosecution but changed their minds as well as those who had always maintained sentiments like, 'I don't want him to be arrested I want to just talk'.¹⁰⁶

Once we know how varied people's motives are in coming to court, we start questioning the degree to which conventional measures of success and legitimacy in the state justice system actually reflect grassroots priorities. Conviction rates are often used as a measure of success within the criminal justice system, as debates over SDG 16.3 indicators showed.¹⁰⁷ This assumes, however, that conviction is what people seek.¹⁰⁸ In fact, they may be using court procedures to shame, manipulate, or inconvenience the accused and will attempt to drop the court case when they have achieved this end.¹⁰⁹ Indeed, to see a case through to its conclusion can create a permanent rupture or mark on a relationship that many can ill afford.¹¹⁰ We gain far more insight by looking beyond these figures, to explore how and why people appealed to the law in the first place, and with what broader effects.¹¹¹

Evolving engagements: How people expect the court to function

Finally, we turn to people's evolving expectations of the courts, which are shaped both by engagements with 'real governance' in the courts; shared stories of such encounters; and broader imaginaries of statehood.¹¹² While it may be true, as Tamanaha argues, that state courts are 'frequently seen as corrupt, dysfunctional, biased, too expensive, too distant, too delayed, or too unfamiliar and unaccountable',¹¹³ these sentiments are not a reliable predictor of people's actual interactions with, and perceptions of, the magistrates' courts. As argued above, people could turn to the courts because of their procedural shortcomings, seeking to harness them for their

105. *Ibid.*

106. Interview, Mediator, eThekweni, 28 July 2017.

107. See for example, Gary Milante, Suyoun Jang, Hynjung Park and Kyungnam Ryu, 'Goal 16: The Indicators We Want' (Stockholm International Peace Research Institute, 2015).

108. Cooper-Knock and Owen, 'Between vigilantism and bureaucracy'.

109. Crook, 'State courts', p. 11.

110. Cooper-Knock and Owen, 'Between vigilantism and bureaucracy'.

111. Verheul, 'Zimbabweans are foolishly litigious', p. 80.

112. Thomas Bierschenk and Jean Paul Olivier de Sardan, *States at work: Dynamics of African bureaucracies* (Brill, Leiden, 2014); De Herdt and de Sardan, *Real governance*.

113. Tamanaha, 'Introduction', p. 4.

personal ends. In other cases, people turned to the courts despite these shortcomings, cognizant of the ‘practical norms’ at play.¹¹⁴ In some cases, as Bierschenk noted in Benin, ‘informalization’ and ‘privatization’ strategies clearly served as ‘relief strategies’ to keep the legal system going in a context of severe resource constraints.¹¹⁵

As we argue below, for example, relational ties and/or monetary exchanges are leveraged to different degrees in both South Africa and Uganda. These processes triggered diverse reactions (from resentment to acquiescence), but they did not lead to systematic avoidance or disengagement with the court system. Conversely, people did not always find displays of procedural regularity and professionalism by court officials to be inclusive, appealing, or just.¹¹⁶ Understanding the role of practical norms, as well as deeply context-specific understandings of qualities like ‘professionalism’, presents a real empirical challenge to procedural justice theories, which assume an arithmetic relationship between abstract metrics of procedural regularity, legitimacy, and court usage.

In South Africa, the ability to move a case through the criminal justice system could be facilitated by ‘contact calling’,¹¹⁷ particularly within the police. This broad phenomenon could simply be a plea for procedural attention, as it was when people obtained the cell phone details of a named detective on their case recognizing that, in an overloaded system, cases needed to be actively prioritized to progress. At other times, contact calling occupied a liminal space—for example, ensuring that police discretion was fully utilized in your favour—or subverted formal procedure.¹¹⁸ The relational obligations upon which people drew when contact calling were diverse, and the act did not necessarily include monetary exchange.

Contact calling was not absent in Ntuzuma Court but seemed less prevalent than in the police and beyond the reach of most we interviewed. Within the court, many officials policed a fierce divide between ‘professionalism’ and ‘corruption’. To the degree that money exchanged hands illicitly, it did so in limited and surreptitious ways. Nonetheless, many had a lingering suspicion that corruption lurked in all corners of the state.¹¹⁹ Sometimes, the expectation of corruption itself opened the door to corrupt practices. One official in Ntuzuma, for example, relayed the story of an official in another court who had grown acclimatized to the sentences that a particular magistrate dispensed for certain crimes. The official used the magistrate’s

114. De Herdt and de Sardan, ‘Introduction’, p. 5; Thina Nzo, ‘Provincial-regional ANC politics in the Northern Cape: Corruption or everyday informal practices?’, *Commonwealth Journal of Local Governance*, 19 (2017), pp. 96–118.

115. Bierchenk, ‘Everyday functioning’, p. 105.

116. Bierschenk and de Sardan, *States at work*.

117. Cooper-Knock, ‘Everyday policing’.

118. Interview, Siboniso; Bheka, eThekweni, 15 August 2016.

119. Mbambo, ‘Processing of domestic violence’.

procedural predictability to their advantage, claiming to those awaiting trial that they could purchase a more lenient sentence, which was, in practice, the magistrate's norm.¹²⁰ That official's scheme rested on the paradox of steadfast official practice and imaginaries of corruption.¹²¹ Ultimately, those imaginaries were being simultaneously confirmed and refuted.

In Gulu, the illicit exchange of money was endemic and every interviewee who had engaged in the state legal process—practitioners and citizens—acknowledged it as such. According to one lawyer, corruption 'is' the system. As Hopwood argues, talk of visiting the courthouse to 'buy law' in Gulu is not unusual.¹²² Take Julius, for example, a man who helped his friend (who he believed to be innocent) avoid conviction for 'simple defilement'. After his friend's bail application was, in his eyes, unjustly denied, he paid the court clerks a visit. The clerk explained that he needed 200,000 Ugandan Shillings (UGX), which would be divided between him, the prosecutor, and the magistrate. Subsequently, his friend was granted bail and his case repeatedly adjourned until the complainant 'gave up' because they could not afford the necessary travel costs.¹²³ Another man, Dennis, and his wife, Eunice, also 'took the bribery way', to have a friend released on bail. They were encouraged by a senior prosecution official who explained that it would be 'more cost effective' than hiring a lawyer.¹²⁴

Crucially, though, there was no romanticized binary between a non-corrupt 'traditional' or 'local' system and a corrupt formal state system. There was also no fixed relationship between the exchange of money and the functioning of the system. In some cases, monetary bribes (often called 'appreciation' in Gulu) eased the rate at which information and bureaucracy flowed but did not shift the direction of verdicts. In other cases, justice—or its subversion—came at a clear price. And where people believed that justice had not been served, they did necessarily give up on the process. In Gulu, the appeals that many launched demonstrated a continued confidence in the court as an institution of regulatory authority, despite the negative personal encounters people endured.¹²⁵ As Robert—a schoolteacher embroiled in a long-running civil land case, marked by severe delays, unforeseen costs, and perceived corruption—noted, 'Today, when the court makes a judgment, someone goes to appeal. That appeal will take

120. Author one fieldwork diary, 24 July 2015.

121. For a discussion of perceptions of corruption see Nzo, 'Provincial-regional ANC politics'.

122. Julian Hopwood, 'Truth, evidence and proof in the realm of the unseen', *Africa@LSE*, 23 November 2018, <<https://blogs.lse.ac.uk/africaatlse/2018/11/23/truth-evidence-and-proof-in-the-realm-of-the-unseen-part-i/>>.

123. Interview, Julius, Gulu, 17 August 2017.

124. Interview, Dennis and Eunice, Gulu, 1 August 2016.

125. Interview, DPP official, Gulu, 8 August 2017.

years, until someone dies. That is common practice here – to carry on that case until one dies’.¹²⁶

Just as procedural irregularities did not stop people from using courts, procedural regularities and performances of professionalism did not always make the courts more appealing. Professionalism is a value that is honed relationally: we are what others are not. This process of distinction—in dress, discourse, documentation, and demeanour—often created a sense of mystification amongst court users, something that has been noted in plenty of other contexts.¹²⁷ Sometimes, this was deliberate, with ‘professional’ distinction and distance being produced through direct disdain and ridicule. One man in Gulu, whose untrained brother was acting as attorney in a criminal trespass case, recalled how the magistrate rebuked them for ‘behaving like someone from the bush’ because they did not know what an affidavit was.¹²⁸ In Ntuzuma, those who opted to represent themselves at trial were often publicly quizzed by magistrates on the minutiae of law to demonstrate that this decision was misguided. Those standing in the wrong place, speaking at the wrong time, or attending in clothes that were considered insufficiently ‘respectable’ were quietly mocked or publicly reprimanded. Professionalism was thus neither necessarily positive nor affirming by court users who felt ‘shy... fearful’ and ‘scared’ by their encounters in the court.¹²⁹

Moreover, procedural justice theory claims that the procedurally correct administration of law renders it just.¹³⁰ When courts are implementing laws regarded as fundamentally unjust, however, they can be seen as simultaneously procedurally sound and fundamentally illegitimate. Racist apartheid laws, for example, were not rendered legitimate when enforced in a procedurally correct fashion. Similarly, in the jurisdiction of Ntuzuma Court today, some informal settlement residents break the law by creating informal connections to the national power grid. Considering their actions illegal but legitimate, these residents would consider a sentence against them illegitimate even if it was procedurally just. This relationship is not always straight forward. In Ntuzuma, for example, Nobuhle, who we met above, was distraught when a child rape case in which she was involved reached a ‘not guilty’ verdict. She blamed the level of recall—precise dates and times—that the courts required, which young and traumatized individuals could not offer. In place of what she regarded as procedurally correct injustice, she advocated for magistrates to hold more flexible and punitive powers.

126. Interview, Robert, Gulu, 11 August 2017.

127. Pat Carlen, *Magistrates' justice* (M Robertson, London, 1976).

128. Interview, Boniface, Gulu, 11 August 2017.

129. Interview, Margaret, Gulu, 12 August 2017.

130. Tyler, ‘Police legitimacy’.

Ultimately, what court users craved were professionals who could both render the legal system legible to them and render the realities of their lives legible to the legal system. This was something more than professionalism and procedural regularity could afford, particularly in a context where few could afford private attorneys. In Gulu, legal aid was virtually non-existent. In South Africa, means-tested legal aid was a vital but overburdened service. Legal aid attorneys held private consultations, but on simple criminal cases where clients were pleading guilty, consultations were often muttered from the dock, as the attorneys took instructions and details for mitigation. In both Gulu and Ntuzuma, limited legal representation meant that court users regularly turned to court orderlies, clerks, interpreters, and other administrative staff to literally and figuratively find their way around the court.¹³¹ Such side conversations often happened in the time gaps between court business and in the physical gaps created by court architecture, which shaped who could hear, see, and interact with whom.¹³² The advice that people received was mixed. Officials might take great pride in relaying the system but could also provide hurried responses or use such interactions as a chance to seek bribes from those seeking assistance.

This section demonstrates that by understanding complex expectations of 'real governance' in the magistrates' courts, we gain insights into how statehood is performed and perceived in lower state courts. While not underestimating the damage done when institutions are captured by personal interests, we argue that policy-bound procedures are not necessarily seen as useful, fair, or affirmative by all court users. Equally, 'practical norms' around the exchange of money for services can be seen as playing an effective role in regulating bureaucratic practices in the search for redress.¹³³ Whilst some felt that the courts remained reliable enough insofar as their procedural irregularities were legible and could be managed, others opportunistically sought out courts in order to benefit from their shortcomings, engaging in strategic legalism.

Conclusion

The literature on justice across Africa leaves us with a striking lack of evidence about how and why people actually engage with ordinary magistrates' courts. This article has shown that it is possible to bring lower state courts into focus without analytically pre-supposing that they are central to the ordering of everyday life. We do not contest that there are areas where the 'power and authority of state law is "nominal rather than

131. Mwakajinga, 'Access to justice', p. 234.

132. Linda Mulcahy, 'Architects of justice: The politics of courtroom design', *Social and Legal Studies*, 16, 3 (2007), pp. 383–403.

133. Scharbatke-Church and Chigas, 'Facilitation', pp. 24, 41.

operational”¹³⁴ Nor do we contest that non-state actors can be quicker, cheaper, and more capable of arbitration on issues of socio-economic concern such as land and family disputes. Nevertheless, lower state courts are part of the legal and justice landscape across Africa. Where they exist, they operate. People are turning to the courts in large numbers and governments, donors, and civil society actors are seeking to expand their reach and authority. Their long case lists should be seen not just as a point of critique but a call to inquiry. These are institutions and sociolegal spaces that are clearly worthy of study.

Our analysis has suggested how the academic blinkers on lower state courts may have emerged and, drawing on new evidence from South Africa and Uganda, what we gain by studying these courts. We show the diverse norms, exigencies, and expectations at play when citizens engage with the courts, and we demonstrate how experiences within the court room fulfil, challenge, and disrupt people’s ideas about how state justice should and could function. Our empirical findings present a clear theoretical challenge to the causal predictions of procedural justice–legitimacy models that undergird access to justice programming at the international and national level. We find that people can be simultaneously deeply critical of their government and its agents, whilst also conferring state institutions with a degree of legitimacy. Moreover, there is no fixed relationship between institutional usage, institutional utility, and institutional legitimacy.

Theoretically, our findings contribute to research on public authority and empirical statehood by providing original insights into how people relate to the state through the lower state courts. Our flexible model of institutional engagement embraces normative, strategic, and pragmatic dynamics: it considers how people think the court should act, how they need the courts to act, and how they expect the courts to act in any given instance. Far from being an abstract or detached institution, the magistrates’ courts are a local regulatory arena where the possibilities of statehood remain in motion. People are not simply subjected to magistrates’ courts. These courts are actively drawn into the lives of disputes. In this process, people seek to negotiate the terms of their engagement with these institutions and the meanings they inscribe upon them. The ‘language of stateness’ in the search for redress is not simply imposed, it is shared. This is hardly particular to Africa. Arguments about people ‘personalizing the impersonality’ of the state have been made from farming villages in Turkey to council estates in the UK.¹³⁵ In the midst of these normative, pragmatic,

134. Sally Falk Moore, *Social facts and fabrications: “Customary” law on Kilimanjaro, 1880–1980* (Cambridge University Press, Cambridge, 1986), p. 150.

135. Insa Koch, *Personalising the state: An anthropology of law, politics and welfare in austerity Britain* (Cambridge University Press, Cambridge, 2018); Catherine Alexander, *Personal states: Making connections between people and bureaucracy in Turkey* (Oxford University Press, Oxford, 2002).

and strategic encounters, procedural legitimacy remains unstable and an unreliable guide to the use or value that people find in the courts.

Thus, we should not assume that access to justice programmes promoting procedural fairness will necessarily make lower state courts more 'legitimate' nor that quantitative indicators for SDG 16 chime easily with the motivations of court users. In a period of leveraged national and international support for access to justice, our findings should stimulate debate and further research on the actually existing dynamics of lower state courts and prospects for reform.