

The State of the Judiciary

in Malawi, Namibia and South Africa

Court Users' and Judges' Perspectives

DEMOCRATIC GOVERNANCE AND RIGHTS UNIT UNIVERSITY OF CAPE TOWN



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Democratic Governance
and Rights Unit



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**A scoping study conducted by the
Democratic Governance and Rights Unit**

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SUMMARY

This report investigates the state of the judiciary (in particular, the High Courts) in Malawi, Namibia, and South Africa. Using interviews with court users and judges, we identify key issues impacting on themes of independence, efficiency and operations, and accountability.

Key findings include general positive views by court users of how judges in all three jurisdictions are doing their work. It was also noticeable that perceptions of corruption in the courts were significantly lower in our user survey than in opinion surveys of the general population.

Judges in Malawi and South Africa expressed some dissatisfaction with their salaries and benefits. Major challenges identified by judges included increasing workload, problems with accessing tools of the trade such as IT systems and computers, and issues with court building infrastructure.

We make a variety of recommendations in response to these findings, including improving communications with the public; emphasising responsive, clear and understandable communication in judicial training; greater sharing of learning experiences between the jurisdictions; strengthening processes for reporting corruption in the courts; improved training of legal researchers; addressing infrastructural and tools of the trade issues; improving the support provided by judicial administration; re-evaluating the complement of judges as well as judges' salaries and benefits; and improving personal safety at high courts.

INTRODUCTION

This report examines the state of the judiciary in Malawi, Namibia and South Africa. Inspired by the European Commission's EU Justice Scoreboard,¹ the report also draws on Transparency International's Combating Corruption in Judicial Systems Advocacy Toolkit,² and the European Network of Councils for the Judiciary Indicators.³

The overarching aim of the report is to provide a snapshot of how the judiciaries in each of the countries are faring, what challenges they are facing, what successes they are experiencing, and what possible areas for reform might be identified. This report is supplemented by specific thematic discussions relating to gender and the impact of the Covid-19 pandemic on the judiciary. These discussions are contained in separate reports and should be read in conjunction with this report.

In this report we highlight the commonalities and differences of the three jurisdictions in three key aspects: 1) *How do citizens view the judicial system as a whole?* 2) *How do citizens and legal professionals experience the courts?*, and 3) *How do judges view the current functioning of the courts?* The report concludes by proposing recommendations arising from the research and identifies potential areas for future research.

We hope that this series of reports will be useful and informative for a range of stakeholders, including judges and judicial administrators, policy makers, lawyers, academics, NGOs, and ordinary citizens with an interest in the functioning of the judiciary in these three countries. A strong and effective judiciary is vital to the wellbeing of a modern state. Not only does the judiciary act as a guardian of rights, but functional judicial systems play a key role in determining economic performance. The Organisation for Economic Co-operation and Development (OECD) has identified the protection of property rights and enforcement of contracts as crucial to encouraging savings and investment "while promoting the

¹ See https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf.

² 2007, pages 23-30.

³ Available at https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/Projects/Indicators_Questionnaire_Scoring.pdf.

establishment of economic relationships, bringing positive impacts on competition, innovation, the development of financial markets and growth".⁴

It will be evident that this report touches on a wide range of issues. Some of these are within the judiciary's control, while others may be out of the direct control of the judiciary, and yet still impact on its ability to deliver justice and fulfil its constitutional role. While the first part of this report analyses citizens' views on the judicial system as a whole, the second half focuses on Malawi, Namibia and South Africa's high courts. Throughout the report, we highlight that many of the documented experiences will also help us to better understand the inner workings of other courts in these countries.

The report was initially intended to be completed in 2020 and focus primarily on the two preceding years, i.e. the period from 2018 to 2020. However, the impact of the Covid-19 pandemic and the associated lockdown caused some significant delays and limitations in data collection, particularly in respect of the fieldwork research. This has meant that the time period considered has grown somewhat and extended into 2021. We have endeavoured as far as possible to ensure consistency in the data collection across the three countries. However, in some instances there are unavoidable differences: for example, due to variations in how countries have dealt with the different waves of the Covid-19 pandemic, we were unable to conduct face-to-face interviews with court users in South Africa.

The Democratic Governance and Rights Unit (DGRU) is an applied research unit based at the Department of Public Law at the University of Cape Town. This research was conducted with ethical clearance from the UCT Law Faculty's Research Ethics Committee, under reference number L0019-2020 DGRU PhS1.

⁴ OECD, *Better civil justice systems can boost investment, competition, innovation and growth*, OECD says (21 June 2013). Available at <https://www.oecd.org/economy/betterciviljusticesystemscanboostinvestmentcompetitioninnovationandgrowthoecdsays.htm>.

BACKGROUND AND CONTEXT

What factors should we be looking at when evaluating the state of the judiciary? Studies have identified numerous indicators in terms of which the performance of judiciaries can be assessed. In this section, we focus on four key areas:

- 1) The structure and composition of the judiciary
- 2) The independence and accountability of the judiciary
- 3) The efficiency and functioning of the judiciary
- 4) The jurisprudence produced by the courts

The aim of this section is to provide background context within which the research conducted can be understood. We discuss these four areas in respect of each jurisdiction.

Malawi

Structure and composition

There are three levels of courts in Malawi: the Supreme Court of Appeal (SCA), the High Court, and various subordinate courts (including the Industrial Relations Court, the Magistrates' Courts, Child Justice Courts and Local Courts).⁵ The High Court is divided into civil, commercial, criminal, family and probate, and revenue divisions. A panel of High Court judges can also be established as a constitutional court to hear constitutional cases at first instance.⁶

The Supreme Court of Appeal is headed by the Chief Justice. It has jurisdiction to hear appeals from the High Court, and from Tribunals as prescribed by an Act of Parliament.⁷ It has no original jurisdiction.⁸ The High Court has unlimited original jurisdiction to deal with any civil or criminal matters, and may review any law, action or decision of the government for conformity with the Constitution, save as provided

⁵ Established under sections 104, 108 and 110 respectively of the Constitution of Malawi. See also <https://www.judiciary.mw/court>.

⁶ Redson Edward Kapindu, *Update: Malawi Legal System and Research Resources* (2019), section 2.6.1. Available at <https://www.nyulawglobal.org/globalex/Malawi1.html>.

⁷ Constitution of Malawi, section 104(2).

⁸ Kapindu, *op cit*.

by the Constitution.⁹ The High Court has seats at Blantyre, Lilongwe, Zomba and MZUZU.

In the period 2020/2021, the Malawian judiciary consisted of 35 judges. The SCA consisted of nine justices of appeal, only one of whom was a woman. The High Court consisted of 26 judges, nine of whom were women. Of the total number of High Court judges, 14 were based in Blantyre, eight in Lilongwe, and two each in Zomba and MZUZU.¹⁰

Malawi is a member of the Southern African Chief Justices' Forum (SACFJ), and outgoing Chief Justice Nyirenda is the immediate past chair of the SACJF. Malawi is not listed among the member associations of the International Association of Judges,¹¹ and is not a member of the Conference of Constitutional Jurisdictions in Africa.¹² Malawi is a member of the International Association of Women Judges through the Women Judges' Association of Malawi (WOJAM).¹³ Malawi is also a member of the Commonwealth Magistrates and Judges Association.¹⁴

Independence and accountability

Significant concerns have been raised in the past about the independence of the judiciary in Malawi. It has been said that “overall perceptions of judicial independence are weak.”¹⁵ However, during the timeframe of this report, the Malawian judiciary handed down some important judgments which give a more positive indication of judicial independence. These judgments are discussed in more detail in the jurisprudence section.

The Constitution provides for the formal independence of the judiciary by requiring that the courts exercise their function independently of “the influence and direction

⁹ Constitution of Malawi, section 108.

¹⁰ *Malawi Judiciary: List of Judges*, on file with the DGRU.

¹¹ <https://www.iaj-uim.org/member-associations/>

¹² <http://www.cjca-conf.org/members/>

¹³ <http://www.iawj.org/membership/iawj-member-associations/>

¹⁴ <https://cmja.org/links.html>

¹⁵ Rachel Ellett, *Politics of Judicial Independence in Malawi* (Freedom House, 2104), p. 6. Available at

https://freedomhouse.org/sites/default/files/inline_images/Politics%20of%20Judicial%20Independence%20in%20Malawi_1.pdf.

of any other person or authority."¹⁶ The Constitution also protects the structure of the courts by stipulating that no court can be established of superior or concurrent jurisdiction with the Supreme Court of Appeal or the High Court.¹⁷

Academics have described the protection of the tenure of Malawian judges as being "generally considered adequate."¹⁸ However, it is also reported that there have been perceptions that the judiciary is negotiating its salary and benefits, which is damaging to its institutional legitimacy.¹⁹ Judicial officers are entitled to receive a salary and other employment benefits, and on retirement are entitled to receive "such pension, gratuity or other allowance as may, from time to time, be determined by the National Assembly."²⁰ A judicial officer's salary and other benefits may not be reduced without their consent, and "shall be increased at intervals so as to retain its original value".²¹ Historically, there have been significant problems and controversies over judicial salaries, including judges undertaking strike action.²²

The Chief Justice is appointed by the President and confirmed by the National Assembly, by a majority of two thirds of members present and voting.²³ All other judges are appointed by the President on the recommendation of the Judicial Service Commission (JSC).²⁴ The Constitution defines "judicial office" to include acting justices of appeal and acting judges, who are appointed on the recommendation of the JSC.²⁵ The involvement of the JSC in the appointment of acting judges is noteworthy, and distinguishes Malawi from other jurisdictions where concerns have been raised about the process of appointing acting judges (such as in South Africa).

The Constitution specifies criteria for judicial appointment. Candidates must be or have been a judge in a court with unlimited civil and criminal jurisdiction or have

¹⁶ Constitution of Malawi, section 103(1).

¹⁷ Constitution of Malawi, section 103(3).

¹⁸ Siri Gloppen and Fidelis Edge Kanyongolo, "Judicial independence and judicialization of electoral politics in Malawi and Uganda", in Danwood Chirwa and Lia Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Science* (United Nations University Press, 2012), p. 15.

¹⁹ Ellett, *op cit.*, p. 6.

²⁰ Constitution of Malawi, section 114.

²¹ Constitution of Malawi, section 114(2).

²² Ellett, *op cit.*, p. 33.

²³ Constitution of Malawi, section 111(1).

²⁴ Constitution of Malawi, section 111(2).

²⁵ Constitution of Malawi, section 111(3)-(4).

been entitled to practise law for at least ten years.²⁶ It is somewhat surprising that no differentiation is made between eligibility requirements for judges of the Supreme Court of Appeal and the High Court.

The appointments process has been criticized for its lack of transparency, with one commentator suggesting that the process “is undermining judicial legitimacy due to its opacity and the perceived / actual influence of the Executive.”²⁷ JSC interviews are not held in public.

Judges may be removed from office only on the grounds of incompetence or misbehaviour.²⁸ The process for removal requires a motion for removal to be debated in the National Assembly and passed by a majority of members (it is striking that a super-majority is not required), following which a petition is submitted to the President for the removal of the judge. The President may then remove the judge from office in consultation with the JSC.²⁹

The JSC is comprised of five members: the Chief Justice, who chairs the Commission; the Chairperson of the Civil Service Commission; a judge designated by the President after consulting with the Chief Justice; and a legal practitioner and magistrate, both of whom are designated by the President after consulting with the Chief Justice.³⁰ On the face of it, the JSC appears to strike a good balance between the different interest groups represented.

The Judicial Administration Act is said to give the judiciary “administrative autonomy.”³¹ However, in practice this process does not always seem to have run smoothly, as is discussed in the next subsection. The judiciary has been described as being in a situation of “continuing financial dependence on the executive and legislature.”³² The essence of the problem has been identified as follows:

“The judiciary may be independent in forming the proposed budget and the internal allocation within the institution, but they rarely receive the full amount requested. This lack of financial autonomy is a direct threat to judicial

²⁶ Constitution of Malawi, section 112.

²⁷ Ellett, *op cit.*, p. 6.

²⁸ Constitution of Malawi, section 119(2).

²⁹ Constitution of Malawi, section 119(2)-(3).

³⁰ Constitution of Malawi, section 117.

³¹ Ellett, *op cit.*, p. 30.

³² *Ibid.*

independence. The judiciary is so overstretched that budget issues are not simply a matter of increasing the efficiency of the courts; they are a matter of survival for the courts."³³

The judiciary has a website³⁴ that is laid out fairly clearly and appears to contain most essential information but, on further exploration, several gaps and dead links were discovered. The website also lacks information about judicial administration. Judgments are published on MalawiLII (the Malawi Legal Information Institute).³⁵ The extent of annual reporting by the judiciary is unclear.

Efficiency and functioning

Obtaining data on the functioning of the Malawian judiciary proved to be challenging. We found that information was not always up to date or complete, making comparisons with other jurisdictions difficult.

In 2019, the Supreme Court of Appeal heard 205 cases, and concluded 181, a disposal rate of 92%. 61 cases were pending. In the High Court, 4 196 criminal and 7 413 civil cases were registered in 2019, bringing the total number of cases before the High Courts to 16 215 criminal and 124 376 civil cases. The High Court concluded 1 815 criminal and 4 581 civil cases, leaving an alarming 14 397 criminal cases and 119 766 civil cases pending. While limitations with the data mean that some caution must be exercised in evaluating these numbers, it seems clear that the High Courts are facing a serious challenge in dealing with the sheer weight of cases before them.³⁶

On a more positive note, an electronic case-flow management system was rolled out in 2015, and this system has been credited with improving the security of court files and improving the efficiency of the delivery of justice.³⁷

³³ *Ibid.*

³⁴ www.judiciary.mw

³⁵ <https://malawilii.org/>

³⁶ This is by no means a uniquely Malawian, or a uniquely African, problem – backlogs have been reported of 100 million cases in Brazil, and 30 million cases in India. Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2021), p. 27.

³⁷ Africa Judges and Jurists Forum *Digital Transformation of Court Processes in Southern Africa: A Human Rights Approach* (2021), p. 8.

As alluded to in the previous subsection, significant concerns have been raised about the judiciary being inadequately resourced. Studies have suggested that “[c]hronic and acute underfunding has undermined judicial independence in Malawi.”³⁸ Security for judges has been described as “inadequate to non-existent.”³⁹

An office of the Chief Courts Administrator was established under the Judicature Act, and it appears that an official therein is responsible for making the case to government for budget increases. Judicial dissatisfaction with the ability of an official in this position to fulfil the task adequately has been reported,⁴⁰ as have inefficiencies in the distribution of resources.⁴¹

***“In May 2020, legal analyst Carmel Rickard commented that “[w]hen it comes to rule of law, constitutionalism and the judiciary, Malawi is perhaps the most interesting African country right now.”*”**

Jurisprudence

In May 2020, legal analyst Carmel Rickard commented that “[w]hen it comes to rule of law, constitutionalism and the judiciary, Malawi is perhaps the most interesting African country right now.”⁴² Rickard was referring to cases where the courts found that there was no basis in existing laws for lockdown regulations, and perhaps most significantly, to the Supreme Court decision, confirming an earlier High Court (sitting as a Constitutional Court) decision nullifying presidential elections.

The election case drew international attention. Before the High Court, two unsuccessful candidates sought to nullify the results of the Presidential elections.⁴³ A range of irregularities were alleged, including:

³⁸ Ellett, *op cit.*, p. 6.

³⁹ Ellett, *op cit.*, p. 6.

⁴⁰ Ellett, *op cit.*, p. 31.

⁴¹ Ellett, *op cit.*, p. 31.

⁴² Carmel Rickard, “Malawi case flags growing threats to human rights, role of African Court”, *AfricanLii* 13 May 2020. Available at: <https://africanlii.org/article/20200513/malawi-case-flags-growing-threats-human-rights%2C-role-african-court>

⁴³ *Chilima & Anor. v Mutharika & Anor.* (Constitutional Reference 1 of 2019) [2020] MWHC 2 (03 February 2020), para 2.

“the acceptance of results sheets that had been altered with Tipp-Ex (correctional fluid), lack of party monitor signatures on results sheets, [and] failure to conduct a thorough audit of complaints before announcing results ...”⁴⁴

The court found that these irregularities were “widespread, systematic and grave”, and that the Electoral Commission had been “severely lacking” in managing the elections, demonstrating “incompetence” for failing to follow prescribed legal processes. The court further found that the Constitutional requirement that the President be “elected by a majority” meant that a successful candidate had to win 50% + 1 of the votes in order to be elected.⁴⁵

The court candidly acknowledged that:

“We are aware that this is a matter that has attracted widespread public opinion and interest. However, what the Court has been focused on has been to analyse the law and the facts as the Constitution mandates us to do ...”⁴⁶

The matter was then taken on appeal to the Supreme Court of Appeal in *Mutharika and Another v Chilima and Another (MscA Constitutional Appeal No. 1 of 2020)* [2020] MWSC 1 (8 May 2020). The SCA resoundingly upheld the High Court's decision:

“We are in full agreement with the holding by the Court below that the petitioners' complaint alleging undue return and undue election of the first appellant in the election of 21st May, 2019 were made out both qualitatively and quantitatively. ... These irregularities seriously undermined the credibility, integrity and fairness of the return of the President during the general election.”⁴⁷

⁴⁴ Mary Jiyani, “The High Court of Malawi Nullifies May 2019 Presidential Election in Landmark Judgment”, *Oxford Human Rights Hub* 5 February 2020. Available at <https://ohrh.law.ox.ac.uk/the-high-court-of-malawi-nullifies-may-2019-presidential-election-in-landmark-judgment/>.

⁴⁵ *Ibid.*

⁴⁶ *Chilima & Anor. v Mutharika & Anor. op cit.*, para 5.

⁴⁷ *Mutharika and Another v Chilima and Another, op cit.*, page 117.

The court found that the first appellant had not been duly elected to the office of President of Malawi and confirmed the High Court's order that the elections be re-run.⁴⁸

Rickard describes the case as

“a significant shift from the past and represents a new standard to which elections – and the electoral commission – will be held from now on.”⁴⁹

The decision created a considerable reaction. Following the High Court decision, the judiciary found itself under political attack. Allegations were made that attempts had been made to bribe members of the Constitutional Court. The Chief Justice referred the allegations to the Anti-Corruption Bureau.⁵⁰ On 20 February 2020, a joint statement was issued by the Commonwealth Magistrates' and Judges' Association, the Commonwealth Legal Education Association and the Commonwealth Lawyers Association, expressing:

“extreme[] concern that in recent days supporters of the ruling party have attacked the Judiciary of Malawi and in particular five judges on the Constitutional Court for the decisions made in the Presidential Election Case and promoted unsubstantiated allegations of bribery which are misleading the public.”⁵¹

⁴⁸ *Ibid.*, pages 119-120.

⁴⁹ Carmel Rickard, “Malawi Appeal Court judges set new election standards” *AfricanLii* 19 May 2020. Available at <https://africanlii.org/article/20200519/malawi-appeal-court-judges-set-new-election-standards>.

⁵⁰ See statement by the Commonwealth Lawyers' association on 14 January 2020, available at https://www.commonwealthlawyers.com/wp-content/uploads/2020/01/200114-Commonwealth-Lawyers-Association-Malawi-Statement-final.pdf?utm_medium=email&utm_campaign=CLA%20%20Statement%20regarding%20allegations%20of%20attempted%20bribery%20of%205%20Malawian%20Judges&utm_content=CLA%20%20Statement%20regarding%20allegations%20of%20attempted%20bribery%20of%205%20Malawian%20Judges+CID_74004ee31dd622bdb666b581ef980eb2&utm_source=ThinkMailer&utm_term=here

⁵¹ Statement available at https://www.commonwealthlawyers.com/wp-content/uploads/2020/02/CLA-CLEA-CMJA-Statement-on-Malawi200220.pdf?utm_medium=email&utm_campaign=Joint%20Statement%20on%20the%20Threats%20Against%20the%20Judiciary%20in%20Malawi&utm_content=Joint%20Statement%20on%20the%20Threats%20Against%20the%20Judiciary%20in%20Malawi+CID_61e480fe79a105efbb6649218ccd8871&utm_source=ThinkMailer&utm_term=here

Namibia

Structure and composition

Namibia has a three-tier court hierarchy, with the Supreme Court of Namibia (SCN) as the highest court of appeal. The Supreme Court is presided over by a Chief Justice who is assisted by a Deputy Chief Justice.⁵² On the administrative side, the Supreme Court is headed by a chief registrar. As an appellate court, the SCN has jurisdiction over all appeals against any order or judgment of the High Court. It also exercises original jurisdiction over matters involving the application and interpretation of the Constitution.⁵³ However, this constitutional jurisdiction is not exclusive to the SCN as the High Court can also exercise jurisdiction in constitutional matters.

Below the SCN is the High Court. It is headed by a Judge President (who is also the Deputy Chief Justice) assisted by a Deputy President⁵⁴ and comprises two divisions, one based in Windhoek and one in Oshakati. It also operates circuit courts in venues that include Gobabis, Grootfontein and Swakopmund. The High Court also functions as an Admiralty Court and in certain instances is constituted as a Labour Court. These specialist courts are divisions of the High Court and appeals from them go to the SCN. The High Court exercises original and appellate jurisdiction.⁵⁵

There are 30 superior court judges in Namibia, eight of whom are women, who therefore comprise 27% of the total number of superior court judges.⁵⁶

The Namibian judiciary is a member of the Southern African Chief Justices' Forum and the Commonwealth Magistrates' and Judges' Association. However, it is not a member of International Association of Judges or of the International Association of Women Judges. Namibia has played a significant leadership role in the SACJF, with Chief Justice Peter Shivute currently serving as chairperson of the organisation.

⁵² Constitution of Namibia, Article 79(1).

⁵³ Constitution of Namibia, Article 79(2).

⁵⁴ Constitution of Namibia, Article 80(1).

⁵⁵ Constitution of Namibia, Article 80(2).

⁵⁶ *Comments on the State of Judiciary Report: Namibia*, 18 October 2021.

“Judicial independence is formally guaranteed in the Constitution, which provides that the courts are independent and subject only to the Constitution and the law, precludes interference with judges in the exercise of their judicial functions by members of the cabinet or legislature or “any other person” ...”

Independence and accountability

Judicial independence is formally guaranteed in the Constitution, which provides that the courts are independent and subject only to the Constitution and the law, precludes interference with judges in the exercise of their judicial functions by members of the cabinet or legislature or “any other person”, and requires organs of state to assist the courts to protect their independence, dignity and effectiveness.⁵⁷ Judges hold office until the age of 65, although the Constitution curiously provides that the President is “entitled to extend the retiring age of any Judge to seventy”.⁵⁸ Having an extension of tenure in the discretion of the executive raises potential concerns about independence. Judges’ salaries are standardised in terms of the Judges’ Remuneration Act of 1990,⁵⁹ and judges, including their widows or widowers, are entitled to a pension prescribed by law.⁶⁰ It is noteworthy that judges’ salaries and benefits are not protected under the Constitution.

Judges of the High Court and the Supreme Court are appointed by the President on the recommendation of the JSC.⁶¹ Acting judges are appointed by the President at the request of the Chief Justice or Judge President respectively.⁶² This process would invite concerns that acting judges are not appointed in a way that promotes judicial independence, since the power to request an acting appointment is vested exclusively in the head of court, with the final appointment being made by the President. However, in *S v Zemburuka*⁶³, it was held that Article 82(1) of the Constitution, which provides that “[a]ll appointments of Judges to the Supreme Court and the High Court shall be made by the President on the recommendation of the Judicial Service Commission” also applies to the appointment of acting

⁵⁷ Constitution of Namibia, Article 78(2)-(3).

⁵⁸ Constitution of Namibia, Article 82(4).

⁵⁹ Judges’ salaries are dealt with under the second schedule.

⁶⁰ Section 8(2) of the High Court Act and section 8(2) of the Supreme Court Act.

⁶¹ Constitution of Namibia, Article 82(1)

⁶² Constitution of Namibia, Article 82(2)-(3).

⁶³ *S v Zemburuka* (2) 2003 NR 112 (HC).

judges. Therefore, acting judges are also appointed by the President on the recommendation of the JSC, therefore obviating concerns about judicial independence which might otherwise arise from articles 82(2)-(3). In this respect, the appointment of acting judges in Namibia provides for more checks and balances than the system in South Africa.

Namibia does make use of several foreign judges who are employed on a fixed-term basis. This practice was used to aid the gradual transformation of the bench, but concerns have been expressed that foreign judges' relative lack of security of tenure remains a potential threat to judicial independence.

Criteria for appointment and promotion are set out in the Constitution and in legislation. Prospective High Court judges must have held judicial office in a superior court in a Commonwealth jurisdiction, or in another country comparable to Namibia, or have served as a legal practitioner for at least five years, or a magistrate with prescribed qualifications and experience.⁶⁴ Prospective Supreme Court judges must have held office as a judge or acting judge of the High Court, or have served as a superior court judge in a Commonwealth or other comparable jurisdiction, or practised as an advocate or legal practitioner for at least ten years.⁶⁵

These criteria provide quite detailed parameters to guide the JSC in selecting judicial officers. While the requirement of only five years' experience as a legal practitioner to be eligible for judicial appointment may seem short, it is probably realistic for a small country like Namibia. Concerns have been expressed about the small pool of candidates and an apparent unwillingness by practitioners to put themselves forward for judicial office.⁶⁶ It is also notable that the appointment criteria for the Supreme Court allow for the possibility of appointments being made directly from the legal profession, provided candidates have the required ten years' experience. This is again likely a response to the small pool of candidates.

The proceedings of the JSC, including appointment decisions, are done on the record and documentation can be accessed on request to the Secretary of the

⁶⁴ High Court Act 16 of 1990, section 3.

⁶⁵ Supreme Court Act 15 of 1990, section 9.

⁶⁶ Democratic Governance and Rights Unit 'Research Report on The Judicial Appointment Process in Namibia' (2016) p. 8.

JSC.⁶⁷ Concerns have nevertheless been expressed that the system of appointing judges is insufficiently transparent,⁶⁸ and that there are insufficient opportunities for civil society and the general public to engage with the appointment process.⁶⁹ At the time of finalising this report, however, a significant change in the appointment process was underway, with the JSC resolving that candidates would in future be interviewed in public, and that the interviews would be broadcast or livestreamed.⁷⁰

This initiative may well address the concerns regarding a lack of transparency in judicial appointments. The move to hold public interviews was informed by a consideration of the Lilongwe Principles,⁷¹ which were put before the JSC, and a committee identified gaps in the current system where changes could be made to bring the Namibian appointment process within the ambit of the Lilongwe Principles.⁷² The Namibian judiciary and JSC should be commended for proactively assessing the need for potential reforms to the system of judicial appointment in light of regional best practice.

Judges may only be removed from office prior to the expiry of their tenure on the grounds of mental incapacity or gross misconduct. The President removes the judge from office, acting on the recommendation of the JSC.⁷³ For misconduct that is not impeachable, sanctions that may be imposed are either (i) an apology, (ii) counselling for the officer by the JSC, or (iii) a remedy of the wrong by the officer in question.⁷⁴

The JSC is an independent body established in terms of the Constitution and the Judicial Service Commission Act. It comprises five members: the Chief Justice, a

⁶⁷ Democratic Governance and Rights Unit 'Research Report on The Judicial Appointment Process in Namibia' (2016) p. 14.

⁶⁸ <https://neweralive.na/posts/opinion-the-lack-of-transparency-in-the-jsc>

⁶⁹ Democratic Governance and Rights Unit 'Research Report on The Judicial Appointment Process in Namibia' (2016) pp. 4-5.

⁷⁰ Address by Chief Justice Shivute at the Southern African Chief Justices' Forum Annual Conference, 23 September 2021; Commentary on the State of Judiciary Report, 18 October 2021.

⁷¹ *Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers* (Southern African Chief Justices' Forum, 2018). Available at <https://sacjforum.org/sites/default/files/about/files/2020/Lilongwe%20Principles%20and%20Guidelines%20on%20the%20Selection%20and%20Appointment%20of%20Judicial%20Officers.pdf>.

⁷² Address by Chief Justice Shivute, *supra*.

⁷³ Constitution of Namibia, Article 84.

⁷⁴ Regulation 8(1)(a) of the JSC regulations genN 60 in GG 4674 of 24 March 2011.

judge appointed by the president, the Attorney-General, and two lawyers chosen from the legal associations in Namibia.⁷⁵ On paper this appears to be a well-balanced composition, free from obvious opportunities for political interference.

The judiciary operates under the management of the Office of the Judiciary (OoJ), an independent entity that is supervised by the Chief Justice and the Deputy Chief Justice. An accounting officer, known as the permanent secretary of the OoJ, heads the administration of all the judiciary in Namibia and is responsible for the financial management of the judiciary.⁷⁶

The courts in Namibia are public fora and are therefore open to the public, unless in special circumstances where a matter is held in camera. The public can attend court hearings and can request court documents and records from the registry for a fee. The superior courts must provide written reasons for their decisions and judgments. These judgments are usually collected and published online by NamibLII (Namibia Legal Information Institute)⁷⁷ and important judgments are included in law reports. While an annual report for the judiciary is prepared, it seems that publication of these reports is sporadic, and up-to-date reports could not be found on the judiciary's website.⁷⁸ Regularly updating the website with the annual report would be an easy way to strengthen judicial accountability and transparency.

Efficiency and functioning

In his address to mark the opening of the 2021 legal year, the Chief Justice set out statistics for court performance during 2020.⁷⁹ The Supreme Court registered 108 new appeals, with 38 of these being enrolled for hearing. 32 judgments were delivered.⁸⁰ In the High Court, 42 criminal trials were finalised, with a finalisation rate of 28%; 247 criminal appeals were finalised, at a rate of 86%, and 2 118 criminal reviews from

⁷⁵ Constitution of Namibia, Article 85(1).

⁷⁶ See further the Judiciary Act, sections 3,4 and 6.

⁷⁷ See <http://namibialii.org/>.

⁷⁸ <https://ejustice.moj.na/SitePages/Home.aspx>.

⁷⁹ Speech by his Lordship, Mr. Peter S. Shivute, Chief Justice of the Republic of Namibia, on the Occasion of the Virtual Opening of the 2021 Legal Year, Supreme Court, Windhoek, 10 February 2021. Available at <https://ejustice.jud.na/Supreme%20Court/Media/Pages/Speeches.aspx>.

⁸⁰ *Ibid.*, page 24.

Magistrates' Courts were finalised at a finalisation rate of 88%.⁸¹ In civil cases, the High Court finalised a total of 6 491 matters (5 882 actions, excluding matrimonial cases, and 609 applications). 72% of these matters were finalised within the disposal benchmark time of three months (72% for actions, 56% for applications).

As far as the general management of the courts is concerned, the Chief Registrar, with the assistance of the Deputy Registrars and Assistant Registrars of each court, are responsible for performing the administrative functions of the Supreme and High Courts. There is one Chief Registrar for both the High and Supreme Courts who is deputised by three Deputy Registrars; one is responsible for the Supreme Court and judicial support, one for the High Court Divisions (both Main and Oshakati Division), and one focuses on legal, court and auxiliary services. These Deputy Chief Registrars are further assisted by Assistant Registrars.

The Executive Director (legislatively designated as permanent secretary) of the Office of the Judiciary and the Chief Registrar, in consultation with the head of the superior court in question, are responsible for the human resource decisions relating to court staff.

The Namibian superior courts all utilize legal researchers, with an average ratio of around 1 to 1 for judges to researchers in the High Court (17 judges to 18 researchers) and a similar proportion in the Supreme Court.

A significant justice sector reform took place with the introduction of an e-Justice system. Launched in June 2016, the system allows end-to-end electronic filing and case management for the superior courts. It facilitates processes such as filing of papers, summons, warrants, etc, to be done online without any physical meetings between practitioners and court officials. Judges interviewed highlighted the significance of this reform and the positive impact it has made on the conduct of court proceedings.⁸² The system has been nominated for an award for court technology solutions.⁸³

In his 2020 Legal Year Opening Address, the Chief Justice indicated that the judiciary suffers from underfunding and that this is affecting some vital operations such as

⁸¹ *Ibid.*, page 25.

⁸² Namibia judges interviews 1 and 2.

⁸³ See https://nacmnet.org/wp-content/uploads/NAMIBIA_NACM-Nomination-Form-Namibia-eJustice.pdf.

remuneration for witnesses in matters.⁸⁴ Lack of funding has also resulted in judicial vacancies remaining unfilled.⁸⁵ Budgetary constraints are not a new phenomenon, however.⁸⁶

Jurisprudence

Compared to the other countries in this study, Malawi and South Africa, the Namibian courts appear to have dealt with less tumultuous cases. Nevertheless, the courts have handed down some noteworthy decisions during the period under consideration.

In *Namibian Central Intelligence Service & Another v Haufika: Mathias & Another (SA 33/2018)*,⁸⁷ the Supreme Court rejected an appeal by the Namibian Central Intelligence Service (NCIS), which sought to stop a local newspaper from publishing information about alleged corruption in the NCIS. A journalist had uncovered information suggesting that the NCIS had bought properties for significant amounts of money, and that members of an association of former NCIS employees were living on the property. When the journalist asked the NCIS for comment, none was forthcoming. Instead, the NCIS sought to interdict publication of the information.⁸⁸ The High Court refused to grant the interdict, finding that the NCIS had failed to articulate its security concerns sufficiently.⁸⁹

On appeal to the Supreme Court, the NCIS argued that the information had been unlawfully obtained and would threaten national security if published. It was further argued that the NCIS was not legally required to disclose the factual basis of the alleged threat to national security. It was also argued that the court should respect the statutory discretion afforded to the executive to cite issues of security in court to

⁸⁴ Address by Honourable Peter S. Shivute, Chief Justice of the Republic of Namibia at the Opening of the 2020 Legal Year Supreme Court of Namibia, Windhoek 12 February 2020. Available at <https://ejustice.jud.na/Supreme%20Court/Media/Pages/Speeches.aspx>.

⁸⁵ Chief Justice 2020 Address, para. 34.

⁸⁶ See for example: <https://economist.com.na/32868/extra/more-resources-for-the-office-of-the-judiciary-chief-justice/>

⁸⁷ [2019] NASC 7.

⁸⁸ *Ibid.*, paras 24-31.

⁸⁹ *Ibid.*, paras 36-41.

suppress publication. This approach did not find favour with the Supreme Court. The court described the government as having:

“by its own admission, placed not a scintilla of evidence to show how (a) the manner of acquisition of the information breached any law, (b) complete silence about the Association in the founding affidavit, and (c) bald allegations of secrecy and national security which are not apparent on the face of it.”⁹⁰

The Supreme Court rejected an argument that courts were powerless to intervene when the executive invoked considerations of secrecy and national security. The court found that this was inconsistent with an open and democratic society based on the Rule of Law. While it was open to the executive to place evidence before it in camera in order to attempt to justify a prohibition on publication,

“[t]he notion that the court must simply interdict because the state assigns something the label of national security is not consonant with the values of an open and democratic society.”⁹¹

The court accepted that, if a proper case was made out, the courts would be duty bound to suppress publication.⁹² But the NCIS made no reference to any legal provision that the reporter had breached in obtaining his information, and the court had a discretion to refuse a final interdict. The court further held that:

“It needs to be made clear that we do not agree with Government’s refrain ... that once the Executive invoked secrecy and national security, the court is rendered powerless and must, without more, suppress publication by way of interdict.”⁹³

And that:

“The submission that publication of information relating to the NCIS must, without exception, be suppressed [sic] even if doing so would expose a crime

⁹⁰ Ibid., para 77.

⁹¹ Ibid., para 86.

⁹² Ibid., para 103.

⁹³ Ibid., para 85.

cannot be sustained. In an appropriate case relief will be refused if the conduct being exposed is unconscionable.”⁹⁴

Described as a “watershed judgment”,⁹⁵ this decision is notable for the court’s refusing to accept blanket assertions of national security privilege by the executive, thereby holding other branches of government to account. The court’s refusal to accept an assertion of national security privilege without supporting evidence is an important jurisprudential principle.

As this report was being finalised, the High Court handed down judgment in the case of *Lühl v Delgado*.⁹⁶ Described as a “highly significant judgment ... likely to be persuasive in matters involving equality rights”,⁹⁷ the case involved the eligibility of a child born via surrogacy to obtain Namibian citizenship by descent.⁹⁸ The Minister opposed the child’s eligibility and brought a counter-application that required the applicant and the child to undergo DNA tests in order to determine the child’s paternity. The Minister argued that it was possible that the biological father may have been the applicant’s spouse, who was not a Namibian citizen, and therefore the Minister sought to avoid “granting citizenship by descent when a possibility exists that the ‘father’ to the child, may not be a Namibian citizen.”⁹⁹ The applicant countered that the Minister’s position was discriminatory, and was only being pursued because the applicant was in a same-sex marriage.”¹⁰⁰ The applicant argued that the Minister’s approach violated the child’s right to equality before the law, and the right not to be discriminated against, and that the demand to undertake DNA tests violated the right to dignity of the child and the applicant.¹⁰¹

The court found that the child qualified to obtain citizenship by descent, and that the Minister’s approach “if taken to its logical conclusions, may have dire and

⁹⁴ Ibid., para 106.

⁹⁵ Carmel Rickard, “Lesson in Democracy for Namibia’s Intelligence Services” *AfricanLii* 16 April 2019. Available at <https://africanlii.org/article/20190416/lesson-democracy-namibias-intelligence-services>.

⁹⁶ *Luehl v Minister of Home Affairs and Immigration* (HC-MD-CIV-MOT-GEN-019/00473) [2021] NAHCMD 481 (13 October 2021).

⁹⁷ Carmel Rickard, “Namibian Judge delivers landmark ruling on gay rights and the rights of a child born of gay parents” *AfricanLii* 22 October 2021. Available at <https://africanlii.org/article/20211022/namibian-judge-delivers-landmark-ruling-gay-rights-and-rights-child-born-gay>.

⁹⁸ *Luehl v Minister of Home Affairs and Immigration* op cit., para 3.

⁹⁹ Ibid., par. 5.

¹⁰⁰ Ibid., para 6.

¹⁰¹ Ibid., para 17.

possibly unintended consequences for many a Namibian-born parent and a child applicant for Namibian citizenship by descent", since the Minister's insistence on a biological connection (which was in any event not found in the Constitution) would mean that children adopted outside Namibia by Namibian parents or a child born outside the country via in vitro fertilisation would not be entitled to citizenship by descent.¹⁰²

The court further held that there was no dispute between the parents as to who was the biological father, and the question of which one had "caused the conception" was raised by the Minister, when it was "not clear why it should be regarded as in the best interests of the child for the Minister to do so."¹⁰³ It was "improper" for the Minister to have "create[d] a dispute and friction within the applicant's family regarding issues of paternity, when such disputes do not exist."¹⁰⁴ The court therefore declined to order any of the parties to submit to a DNA test.¹⁰⁵

The court found that the Minister's position appeared to be informed by "the unusual circumstances" of the child's birth, and that had the child been born to a heterosexual couple, even in terms of a surrogacy arrangement, the matter would not even have come before the court.¹⁰⁶ The court held that the Minister's counter-application had been "actuated by discrimination", and that to require a compulsory DNA test violated the applicant's rights to dignity, privacy and bodily integrity.¹⁰⁷ The Minister had failed to act in accordance with the best interests of the child, as required under Namibia's international obligations and the Namibian Constitution.¹⁰⁸ The minor child was declared to be a Namibian citizen by descent, and the Minister was directed to issue a citizenship certificate. The Minister's counter-application to order a DNA test was dismissed.¹⁰⁹

The judgment is a powerful assertion of the rights of a minority group. It is also a further illustration of Namibian courts not shying away from subjecting the actions of other branches of government to rigorous scrutiny.

¹⁰² *Ibid.*, paras 33-34.

¹⁰³ *Ibid.*, para 50.

¹⁰⁴ *Ibid.*, para 52.

¹⁰⁵ *Ibid.*, para 62.

¹⁰⁶ *Ibid.*, para 65.

¹⁰⁷ *Ibid.*, para 69.

¹⁰⁸ *Ibid.*, para 87.

¹⁰⁹ *Ibid.*, para 89.

South Africa

Structure and composition

Before the end of the apartheid era, the South African judiciary operated under the doctrine of parliamentary sovereignty. The 1993 Interim Constitution marked a turning point in that it enshrined constitutional supremacy and the independence of the judiciary. The 1996 (Final) Constitution vests the judicial authority of the Republic in the courts and these courts are independent, subject only to the Constitution and the law.¹¹⁰

At the apex of the hierarchy of the courts is the Constitutional Court. The Supreme Court of Appeal (SCA) is an intermediate appellate court, followed by the High Courts, which are represented in each province. The High Courts also sit periodically as circuit courts away from their main seats. There are several specialist courts at the level of the High Courts, including the Labour Court, the Land Claims Court and the Tax Court. There are also specialist Equality Courts that deal with matters of unfair discrimination, hate speech and harassment. In addition, there is a specialist Competition Appeal Court that hears appeals from the Competition Tribunal, and an Electoral Court that sits on an ad-hoc basis to decide electoral disputes.

Prior to the Constitution Seventeenth Amendment Act of 2012, the Constitutional Court only made decisions about constitutional matters. As well as constitutional matters, the court now has jurisdiction over any other matter for which it grants leave to appeal “on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court”.¹¹¹ The Supreme Court of Appeal hears appeals from the High Court, but does not deal with appeals in labour or competition matters, which are dealt with by the specialist Labour Appeal Court and Competition Appeal Court respectively.¹¹²

The High Courts deal with matters beyond the jurisdiction of the Magistrates' Courts, such as civil claims above a prescribed monetary amount and serious criminal matters, as well as appeals and reviews from the Magistrates' Courts. The High Court also has jurisdiction over any matter involving a person's status (for example,

¹¹⁰ Constitution, section 165.

¹¹¹ Constitution, section 167(3)(b).

¹¹² Constitution, section 168(3)(a).

adoption, insolvency, etc.) The divisions of the High Court have jurisdiction over defined provincial areas in which they are situated, and their decisions are binding on Magistrates' Courts within their areas of jurisdiction.

As of September 2020, there were 245 judges in the South African superior court judiciary, 98 of whom were women.¹¹³

Independence and accountability

The independence of the judiciary is guaranteed under the Constitution, which provides that the courts are "independent and subject only to the Constitution and the law,"¹¹⁴ and precludes any person or organ of state from interfering "with the functioning of the courts."¹¹⁵ Organs of state are further enjoined to take legislative and other measures to "assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."¹¹⁶

The Constitution protects judges' security of tenure by ensuring that they are appointed permanently until retirement, with Constitutional Court judges serving a fixed term that will usually amount to 12 years on the court.¹¹⁷ The Constitution also specifically prohibits judges' salaries, allowances and benefits from being reduced.¹¹⁸

Judges are formally appointed by the President, but a significant role is played by the Judicial Service Commission (JSC). The Chief Justice, Deputy Chief Justice, and President and Deputy President of the SCA are appointed by the President after consulting the JSC and leaders of political parties represented in Parliament.¹¹⁹

Judges of the Constitutional Court are appointed by the President from a list of nominees prepared by the JSC,¹²⁰ and judges of other superior courts are appointed by the President on the advice of the JSC¹²¹, meaning that the JSC effectively makes

¹¹³ Office of the Chief Justice spreadsheet, on file with the DGRU.

¹¹⁴ Constitution, section 165(2).

¹¹⁵ Constitution, section 165(3).

¹¹⁶ Constitution, section 165(4).

¹¹⁷ Constitution, section 176.

¹¹⁸ Constitution, section 176(3).

¹¹⁹ Constitution, section 174(3).

¹²⁰ Constitution, section 174(4).

¹²¹ Constitution section 174(6).

the decision on who is appointed. The JSC consists of 23 members, including judges, lawyers, and politicians.¹²² Although it is frequently subjected to criticism, the JSC does provide a greater degree of independence from the executive than the apartheid-era system, where judicial appointments were made entirely at the discretion of the executive. The JSC interviews candidates in public, and the Constitution provides broad appointment criteria,¹²³ although the JSC is regularly criticised for failing to develop more detailed criteria for selection.¹²⁴ Acting judges are appointed by the President on the recommendation of the Minister of Justice with the concurrence of the Chief Justice, in respect of Constitutional Court judges, and by the Minister after consulting the senior judge of the relevant court, in respect of other superior courts.¹²⁵ The lack of criteria for these appointments, as well as the lack of opportunity for broader input and the potential for gatekeeping, is an often-raised concern.¹²⁶

Removal from office may only take place following a finding by the JSC of incapacity, gross incompetence or gross misconduct, followed by a resolution supported by two-thirds of the National Assembly calling for the judge's removal from office.¹²⁷ No judge has yet been removed from office on these grounds. A judicial code of conduct and a register of judges' interests were established under the Judicial Service Commission Act.¹²⁸

The judiciary is administered through the Office of the Chief Justice, a development that was celebrated as a step closer to full judicial independence, although it has

¹²² Constitution, section 178(1).

¹²³ In terms of sections 174(1) and (2), judges must be appropriately qualified and fit and proper, and the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered.

¹²⁴ See for example Democratic Governance and Rights Unit, *Submission and research report on the judicial records of nominees for appointment to the High Court and Electoral Court, October 2018*, page 3. Available at http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/DGRU%20submission%20and%20research%20report%20JSC%20October%202018.pdf.

¹²⁵ Constitution, section 175.

¹²⁶ See Tabeth Masengu and Alison Tilley, "Is the appointment of acting judges transparent?" *De Rebus* June 2015, pp. 24-26. Available at https://www.derebus.org.za/wp-content/uploads/2016/07/DR_June15.pdf.

¹²⁷ Constitution, section 177(1).

¹²⁸ See sections 12 and 13 of the Judicial Service Commission Act 9 of 1994.

been argued that this process of reform is still ongoing and that court administration effectively remains under executive control.¹²⁹

Judgments are widely disseminated and accessible on free platforms, such as SAFLII (South African Legal Information Institute)¹³⁰ and the websites of the Constitutional Court¹³¹ and the Supreme Court of Appeal.¹³² Hearings can be attended in person, and it is increasingly common for cases to be livestreamed by the judiciary or the media.

Efficiency and functioning

The judiciary's annual report for the 2020 – 2021 financial year¹³³ provides information on the performance of the courts. During this period, the Constitutional Court finalised 273 out of 445 matters before it (a 61% finalisation rate, below the target of 70%). The report indicates a 10% increase in the court's caseload during this period.¹³⁴ The Supreme Court of Appeal finalised 196 out of 241 matters (the rate of 81% being 1% above target), and 1 082 out of 1 092 petitions.¹³⁵ In terms of the performance of the specialist courts, the Labour Courts finalised 2 188 out of 4 168 matters (achieving a rate of 52% against a target of 58%); the Land Claims Court finalised 108 out of 149 matters (72% compared to a target of 60%); and the significantly less busy Electoral Court and Competition Appeal Court finalised 9 out of 9 and 10 out of 10 matters respectively.¹³⁶

Data provided by the judiciary on the performance of the High Courts is disaggregated between criminal and civil matters. The report identifies 870 outstanding criminal trials and 353 backlog cases (at 41%, this is above the target of 30%).¹³⁷ 9 749 out of 11 413 criminal matters were finalised by the High Courts (a rate

¹²⁹ See Hassen Ebrahim, "Governance and administration of the judicial system", in Cora Hoexter and Morné Olivier, *The Judiciary in South Africa* (Juta, 2014) pp. 99-105.

¹³⁰ <http://www.saflii.org/>

¹³¹ <https://www.concourt.org.za/>

¹³² <https://www.supremecourtofappeal.org.za/>

¹³³ *Judiciary Annual Report 2020-2021*, available at <https://www.judiciary.org.za/index.php/documents/judiciary-annual-reports>. The report covers the period from 1 April 2020 to 31 March 2021.

¹³⁴ *Ibid.*, page 26.

¹³⁵ *Ibid.*, page 27.

¹³⁶ *Ibid.*, page 28.

¹³⁷ *Ibid.*, page 30.

of 85%, exceeding the target of 75%).¹³⁸ In respect of civil matters, the High Courts finalised 69 908 out of 83 080 matters (the finalisation rate of 84% exceeding the target of 60%).¹³⁹

A deficiency in the figures provided in the annual report is that it is not apparent how long the cases, either those resolved or the total number of cases given, have been in the court system. The report does give figures for the number of reserved judgments finalised across all superior courts, with 4 526 being delivered, and 3 511 delivered within three months of judgment being reserved. The finalisation of judgments within three months has improved from 76% in 2019/ 2020 to 78% in 2020/2021. However, the figures do not give any indication of how long the remaining judgments have been reserved for.

From the figures, it appears that the Constitutional Court is struggling under its increased case load, with a finalisation rate of only 61% compared to the Supreme Court of Appeal's finalisation rate of 81%. The finalisation rates in the High Court appear to be better than anecdotal perceptions of court efficiency would suggest, while the Labour Courts seem to be struggling, with a finalisation rate of only just over 50%.

¹³⁸ *Ibid.*, page 32.

¹³⁹ *Ibid.*, page 34.

“South African courts have been described as having become “a battleground for contesting political forces”...”

Jurisprudence

South African courts have been described as having become “a battleground for contesting political forces”,¹⁴⁰ and the period of this report was no exception. Perhaps the most striking example was the string of cases relating to former President Jacob Zuma's battle with the Commission of Inquiry into Allegations of State Capture. In the first of these cases, the Constitutional Court, in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma*,¹⁴¹ was faced with an application for an order compelling Zuma to appear before the commission and testify.¹⁴² This followed a lengthy history of Zuma declining to participate in the Commission's proceedings.¹⁴³ The court held unanimously that he should be so compelled, and criticised Zuma's conduct in defying the process as “antithetical to our constitutional order.”

“We must remember that this is a Republic of laws where the Constitution is supreme. Disobeying its laws amounts to a direct breach of the rule of law, one of the values underlying the Constitution and which forms part of the supreme law. In our system, no one is above the law. Even those who had the privilege of making laws are bound to respect and comply with those laws. For as long as they are in force, laws must be obeyed.”¹⁴⁴

The court directed Zuma to “obey all summonses and directives lawfully issued by the Commission.”¹⁴⁵

¹⁴⁰ Michelle Le Roux and Dennis Davis, *Lawfare: Judging politics in South Africa* (Jonathan Ball Publishers, 2019), p. 5.

¹⁴¹ (CCT 295/20) [2021] ZACC 2; 2021 (5) BCLR 542 (CC); 2021 (5) SA 1 (CC) (28 January 2021).

¹⁴² *Ibid.*, para. 80.

¹⁴³ See *ibid.*, paras 29-51.

¹⁴⁴ *Ibid.*, para 87.

¹⁴⁵ *Ibid.*, para 111.

In part two of the trilogy,¹⁴⁶ the Commission again approached the Constitutional Court, seeking an order declaring that Zuma was guilty of contempt of court after he failed to appear before the Commission, or file affidavits in terms of the Commission's directives.¹⁴⁷

Writing for the majority of the court, acting Deputy Chief Justice Khampepe described the judgment as a:

“response to the precarious position in which this Court finds itself on account of a series of direct assaults, as well as calculated and insidious efforts launched by former President Jacob Gedleyihlekisa Zuma, to corrode its legitimacy and authority.”¹⁴⁸

It is clear that the court was aware of the extreme political pressure it was under. Emphasising that it was in the public interest to “send[] an unequivocal message that its orders cannot simply be ignored with impunity”,¹⁴⁹ the Court found that there was no doubt that Zuma was in contempt of court.¹⁵⁰ The majority went on to remark that:

“Never before has the legitimacy of this Court, nor the authority vested in the rule of law, been subjected to the kind of sacrilegious attacks that Mr Zuma, no less in stature than a former President of this Republic, has elected to launch. Never before has the judicial process, nor the administration of justice, been so threatened. ...”¹⁵¹

The majority and minority judgments differed over whether a person committing contempt qualified as an accused person in terms of the fair trial rights under Section 35 of the Constitution. The majority held that they did not,¹⁵² an issue that was to assume central significance in the final case of the trilogy, discussed below.

¹⁴⁶ Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others (CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (29 June 2021).

¹⁴⁷ *Ibid.*, para 2.

¹⁴⁸ *Ibid.*, para 1.

¹⁴⁹ *Ibid.*, para 36.

¹⁵⁰ *Ibid.*, para 38.

¹⁵¹ *Ibid.*, para 138.

¹⁵² See *ibid.*, paras 74 – 75.

The majority found former President Zuma guilty of contempt of court and sentenced him to 15 months' imprisonment.¹⁵³

Former President Zuma, who had not formally opposed the contempt of court sought relief in the second case,¹⁵⁴ then brought an application for the rescission of the order granted in the second judgment.¹⁵⁵ In another split decision, a majority of the Constitutional Court dismissed the rescission application, finding that Zuma could not use rescission to obtain a re-hearing on the merits of the case,¹⁵⁶ and that he had failed to provide a plausible or reasonable explanation for his default.¹⁵⁷ Furthermore, the majority found that Zuma's conduct in the rescission application constituted "an effort to backtrack on a failed, but deliberate, litigious strategy."¹⁵⁸ The majority judgment also expressly highlighted that the rule of law required "not only that litigation must come to an end, but that this Court affirms itself as the final arbiter of disputes of law."¹⁵⁹

It is worth dwelling briefly on the context within which these cases were decided. In July 2021, in the period between the second and third judgments, South Africa was rocked by what a subsequent expert panel described as an "explo[sion] [of] violence" in the KwaZulu-Natal and Gauteng provinces "never before seen in democratic South Africa", characterised as an "orgy of destruction and looting".¹⁶⁰ The panel described former President Zuma's rejection of the decision by the Commission of Inquiry as a "major factor" in the unrest, and noted that his incarceration subsequent to the Constitutional Court's second decision was described by many as the "spark" that prompted the unrest.¹⁶¹ Against this backdrop, it is noteworthy that the court remained undeterred in handing down decisions that were required by the law as the court found it, despite the intense

¹⁵³ *Ibid.*, para 142.

¹⁵⁴ *Ibid.*, para 14.

¹⁵⁵ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021).

¹⁵⁶ *Ibid.*, para 68.

¹⁵⁷ *Ibid.*, para 76.

¹⁵⁸ *Ibid.*, para 94.

¹⁵⁹ *Ibid.*, para 97.

¹⁶⁰ *Report of the expert panel into the July 2021 civil unrest* (29 November 2021), available at <https://www.thepresidency.gov.za/content/report-expert-panel-july-2021-civil-unrest>.

¹⁶¹ *Ibid.*, page 38.

and unprecedented nature of the pressure the court was under. This is indicative of a fearless and independent judiciary.

DATA AND METHODOLOGY

The findings of this report are based on evidence from three distinct sources. First, we relied on Afrobarometer data. Afrobarometer is a non-partisan, pan-African research institution conducting public attitude surveys on democracy, governance, the economy and society in 30+ countries, which are repeated in regular cycles. Afrobarometer collects high-quality, reliable statistical data on Africa, which is freely available to the public.

Using publicly available data from eight rounds of Afrobarometer surveys, we tracked trends of public trust in the courts in Malawi, Namibia and South Africa and compared them with findings from other countries on the continent. These nationally representative surveys also allowed us to see how the courts have fared over time vis-à-vis the other two branches of government – the executive and the legislature. Lastly, we investigated some aspects of the rule of law through questions about the equal treatment of ordinary citizens and government officials.

The second source of evidence in this report, is an original court user questionnaire for citizens and legal professionals who regularly engage with the courts.¹⁶² Here, we were particularly interested in respondents' views on the accessibility of the courts, the availability of legal representation, their experiences in the courtroom with different stakeholders, as well as various dimensions of unequal treatment and corruption.

Initially the court user survey was designed to be administered through about 400 face-to-face interviews with ordinary citizens and lawyers working across several courts in each of the three countries. However, due to the Covid-19 pandemic, we had to revise our fieldwork plans. In collaboration with our national partners in each country, we developed alternative plans that took into account the specific

¹⁶² The full questionnaire can be found in Appendix A 1.1

contextual factors. First, and most importantly, we ensured that government restrictions and best-practice guidelines for fieldwork research would be observed. Second, we considered the arrangements that each of the three judiciaries put in place separately, as they varied in the extent to which they relied on virtual courts. This meant that we timed the interviews to take place between Covid-19 infection waves, and while the courts were at least partially operating in the normal court buildings. While this allowed us to conduct face-to-face interviews in Malawi and Namibia, we had to switch to telephone interviews in South Africa.

The lower overall number of court users, and the higher-than-usual share of legal professionals coming to the courts also meant that we had to adjust the number of respondents, and their profiles, to stay within budget (see **Table 1**). We conducted between 45 and 120 fewer interviews per country, while also having to decrease the share of ordinary citizens as survey respondents. Nevertheless, we are confident that the results of the court user surveys will provide valuable insight into the operations of the High Courts in Malawi, Namibia and South Africa.

The third data set on which this report relies is more qualitative. Our national partners conducted 52 semi-structured telephone interviews with High Court judges across all three countries. The interviews usually lasted between 60 and 90 minutes each.¹⁶³

¹⁶³ *The full interview guide can be found in Appendix A 1.2*

Table 1: Data sources

	Malawi	Namibia	South Africa
Afrobarometer survey	1999-2019 8 rounds 1 200-2 400 interviews per round	1999-2019 8 rounds 1 200 interviews per round	2000-2021 8 rounds 1 600-2 400 interviews per round
Court user survey	280 Face-to-face interviews (227 citizens / 53 professionals) 4 courts	355 Face-to-face interviews (316 citizens / 39 professionals) 2 courts	350 Telephone interviews (195 citizens / 155 professionals) 4 courts
Judge interviews	16	6	30

Note: Professionals primarily refers to advocates, attorneys, candidate attorneys, but also includes interviewees who regularly engage with the High Court such as messengers, interpreters, correctional facility officers.

“Just over half (54%) of Namibians trust the courts, while in South Africa only 43% of respondents had confidence in the courts.”

PUBLIC CONFIDENCE IN THE COURTS

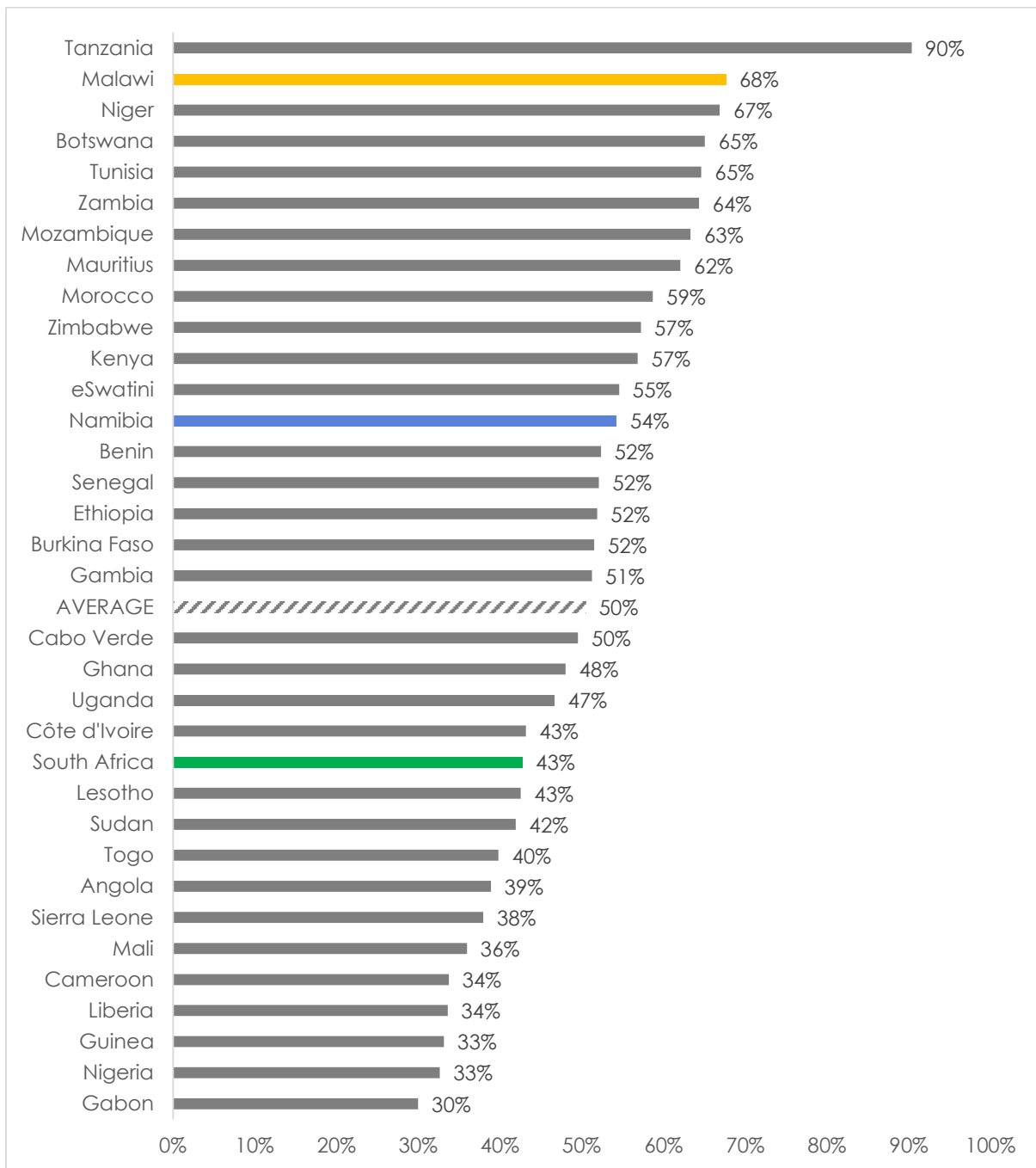
Do ordinary citizens trust their courts? Can Malawian, Namibian and South African courts rely on a deeper reservoir of public confidence than other courts on the continent, or even other institutions in the same country? To answer these and related questions, we turn to nationally representative survey data collected by Afrobarometer.

A very useful question that is regularly posed to respondents is: “How much do you trust the courts of law, or haven’t you heard enough about them to say?” Citizens have the following answer options: “Not at all”, “Just a little”, “Somewhat” or “A lot”. Across 34 countries, only 50% of respondents said that they trust the courts

“Somewhat” or “A lot”. However, the continental average hides substantial variation across countries. On the one hand, almost all Tanzanians (90%), and a clear majority of the citizens of Malawi (68%), Niger (67%) and Botswana (65%) trust the courts. On the other hand, in Guinea (33%), Nigeria (33%) and Gabon (30%), only a third or fewer respondents trust the courts. Compared to Malawi, the courts in our other two focus countries fare substantially worse. Just over half (54%) of Namibians trust the courts, while in South Africa only 43% of respondents had confidence in the courts. In short, we see substantial variation across these three countries.

To get a better sense of how public confidence has evolved in each of these three countries, we now turn to a longitudinal analysis of trust in the courts and the other two branches of government, the legislature and the executive (**Figure 1**).

Figure 1: Trust in courts (somewhat / a lot) | 2019/2021 | 34 countries



Public trust in branches of government

The three branches of government all play important roles in the governance of a country. Their ability to exercise horizontal accountability is particularly important in cases where one branch is alleged to have violated the “rules of the game”, such as binding constitutional or legislative precepts. What is peculiar to the role of the judiciary, however, is that it is the only branch for which the members are not directly or indirectly elected.¹⁶⁴ Therefore, the public’s confidence in this institution becomes a valuable currency that is sensitive to the actions of the courts.

When comparing public confidence in the courts over the past 20 years across the three countries, we can observe at least two important differences. First, all three countries have very different trajectories. While trust in the courts has increased in Malawi from 50% to 68%, public confidence has decreased in Namibia by 10 percentage points (64% to 54%). In South Africa in 2021, trust in the courts had returned to the same level as in 2000 (43%), even though it was substantially higher between 2006 and 2011.

“...even though Malawians and South Africans have lost faith in the courts over the past decade, the judiciaries in both countries remain the most trusted branches of government.”

Second, even though Malawians and South Africans have lost faith in the courts over the past decade, the judiciaries in both countries remain the most trusted branches of government. In contrast, in Namibia the presidency has been the most trusted branch of government throughout the entire period under consideration. To highlight the significance of these trends, we provide some additional context for each of the three countries.

¹⁶⁴ While there are some exceptions to this general rule, such as the election of judges in some state courts in the United States of America, the practice in commonwealth jurisdictions, including Malawi, Namibia and South Africa, is that judges are not elected.

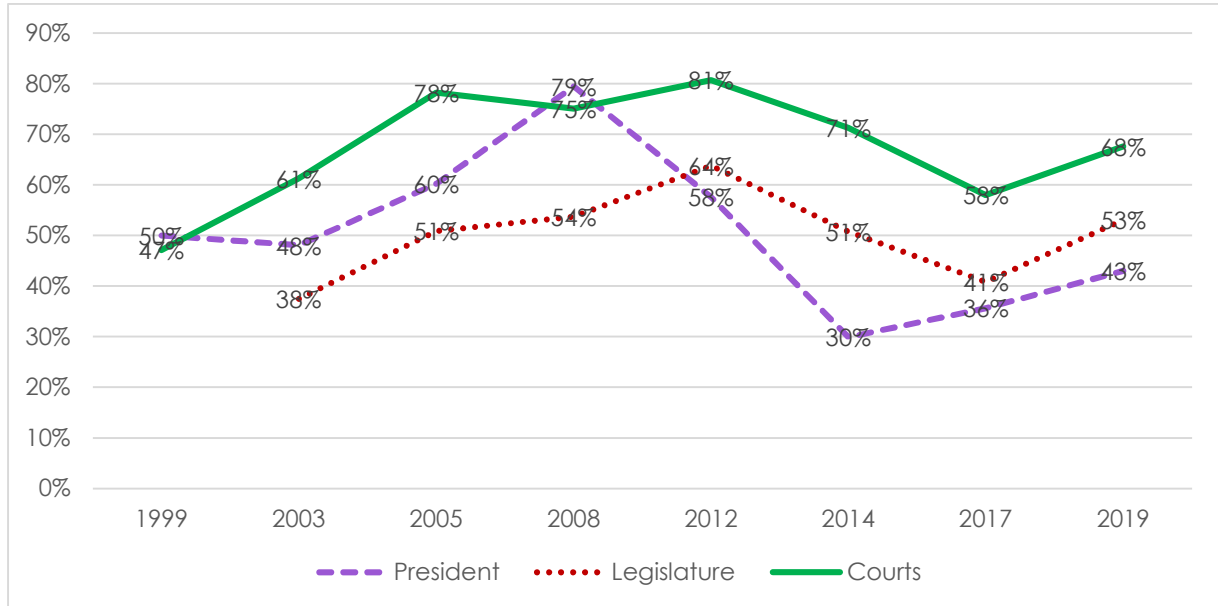
Malawians' trust in the executive, legislature and the judiciary has fluctuated substantially over the past 20 years. At the turn of the century, roughly half of Malawians trusted then President Bakili Muluzi and the courts. By 2008, trust in these two institutions (the presidency and the judiciary) had increased substantially as about 3 out of 4 citizens (75%) trusted the courts, and 79% trusted President Bingu wa Mutharika. Indeed, even though Muluzi and Mutharika took steps to control the judiciary, the courts were able to remain independent.¹⁶⁵ Since then, the courts managed to remain the most trusted of the three institutions even though the overall trust levels dropped to 68% in 2019. Over the same time period, trust in the presidency dropped even further, however, to 30% in 2014, before increasing again slightly to 43% in 2019. Malawians' trust in the legislature has remained lukewarm, oscillating between 40% and 60% throughout the entire period. It is important to note that the most recent survey took place in November and December 2019, and thus, after the 21 May 2019 elections, but before the Constitutional Court's landmark decision to annul the results of the presidential election. In the run-up to the decision, the country experienced months of protest and the worst political crisis since the country's return to multiparty democracy in 1994. While it is unclear to what extent the high level of public confidence emboldened judges at the apex court to become only the second court in sub-Saharan Africa to annul a presidential election result (after Kenya in 2017), there is little doubt that it could have lost a lot of public support, had it mismanaged the decision process.

The timing of the survey also provides a unique opportunity to compare public confidence in the courts before handing down a landmark decision with public confidence in the electoral commission after the commission's poor management of the election (**Figure 2**). Given the election monitoring body's poor performance, it is perhaps not very surprising that only a third of all Malawians (34%) trust the electoral commission. This is the lowest score among all the major political actors surveyed by Afrobarometer in 2019. While electoral commissions rarely are among the most trusted institutions across Africa, such a poor performance relative to other actors is uncommon. Thus, it was crucial that the courts as well as the armed forces had such high public trust, especially in the lead up to the landmark decision to

¹⁶⁵ Von Doepp, 2009.

repeat the presidential elections. We will return to the election case and its impacts on executive-judicial relations in subsequent sections of this report.

Figure 2: Trust in branches of government over time | Malawi



Source: Afrobarometer

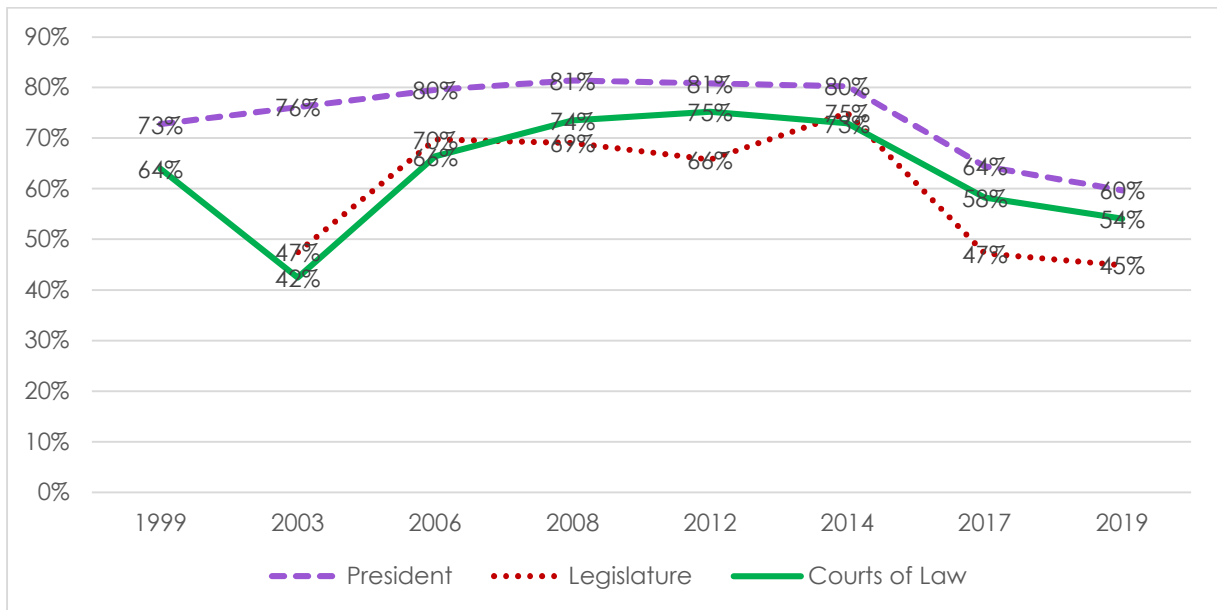
In Namibia, the relationship between the executive and the judiciary was characterised by executive restraint and respect for the judiciary in the first decade of the 21st century.¹⁶⁶ This, together with comparatively fewer instances of the judiciary being asked to adjudicate cases that could curtail the power and interests of the ruling party, are two important differences to the Malawian situation. It is perhaps not surprising that these two developments coincide with increasing levels of public trust in the courts until the early-2010s.

While consistently garnering less public support than the country's president over the past two decades, the Namibian courts have fared similarly to the legislature. Following the peak between 2008 and 2014, the trajectory since then shows that public confidence in the court system is not a given. In fact, following the elections in 2014, the courts have struggled to maintain public trust with only 1 in 2 (54%) Namibians placing trust in the institution in 2019.

¹⁶⁶ Von Doepp, *op cit*.

While trust in the courts should not be equated with the quality of justice, it is nevertheless necessary for the effective and sustained functioning of the rule of law. This becomes evident when comparing trust levels across several state institutions. Among the non-partisan state institutions that Afrobarometer asked Namibians about in 2019, only tax officials were less trusted. By comparison, the army (61%) and police (60%) were on par with trust in the executive.

Figure 3: Trust in branches of government over time | Namibia



Source: Afrobarometer

Trust in the courts in South Africa has varied greatly over time. While previous analyses have found that the country's Constitutional Court failed to build institutional legitimacy in the first decade post-apartheid,¹⁶⁷ looking at South African's trust in the courts more broadly also reveals that public trust has been steadily declining over the past decade.

¹⁶⁷ Gibson, 2016.

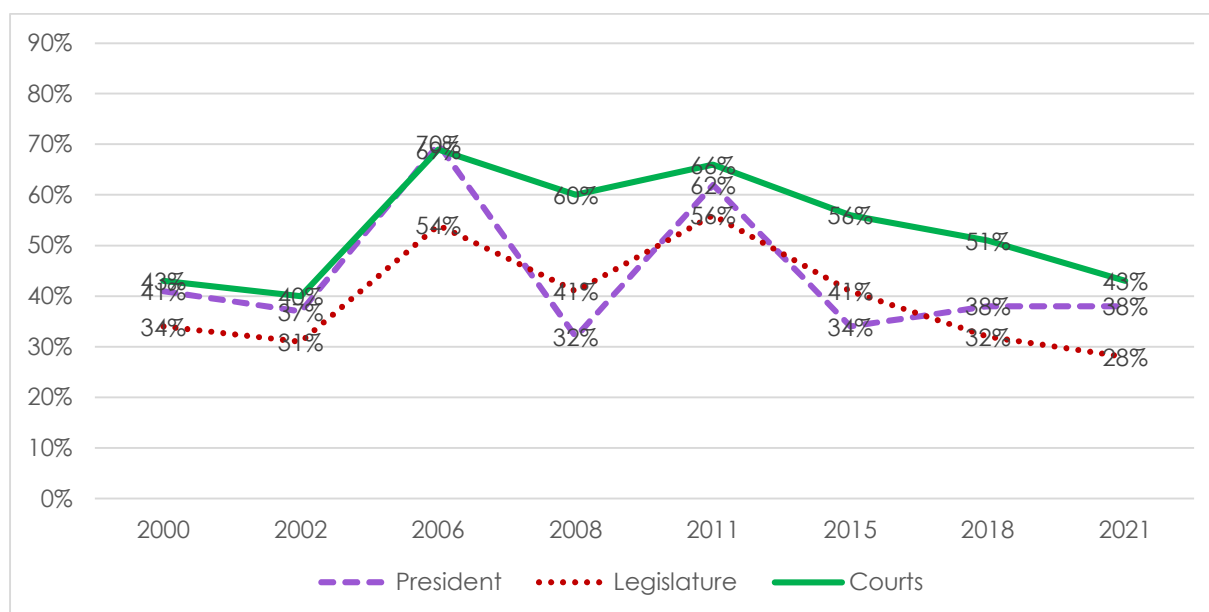
“...judges in South Africa have been required to adjudicate disputes that touch on issues central to the political life of the nation, and in so doing to decide on controversies that, in many other jurisdictions, would be expected to be resolved in the political domain.”

Indeed, since the beginning of the constitutional era but perhaps especially over the past ten years, judges in South Africa have been required to adjudicate disputes that touch on issues central to the political life of the nation, and in so doing to decide on controversies that, in many other jurisdictions, would be expected to be resolved in the political domain. Commentators have remarked that “[t]he courts have become a battleground for contesting political forces, not only between the state and its opponents ... but even between contending forces within the governing party.”¹⁶⁸ This marks a departure from the early years of the country’s multiparty democracy, when political parties were happy for the courts to decide contentious issues such as the constitutionality of the death penalty and of gay marriage, to a situation where the courts’ involvement in making decisions impacting directly on politics has become increasingly contentious.¹⁶⁹ During the Zuma presidency, the courts were often described as the last line of defence for democracy. And while the judiciary has enjoyed comparatively more public support than the executive and the legislature, the courts nevertheless lost a considerable amount of public support (23 percentage points between 2011 and 2021).

¹⁶⁸ Le Roux and Davis 2019, *op cit.*, p. 5.

¹⁶⁹ See generally Le Roux and Davis, *op cit.*

Figure 4: Trust in branches of government over time | South Africa



Source: Afrobarometer

Taken together, these three case studies showcase the diversity of how citizens have related to the courts in their country since the turn of the century. In the next section, we focus on the current state of the judiciary by analysing who is more or less likely to trust the courts.

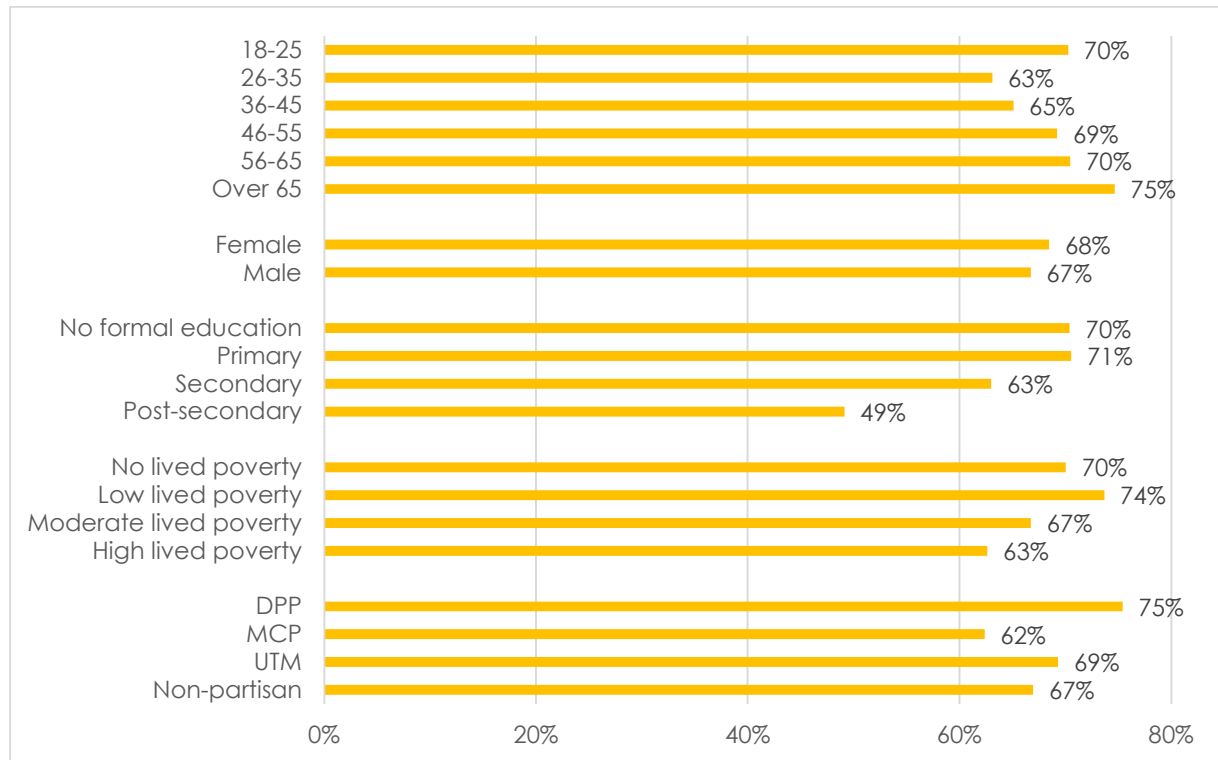
Who trusts the courts?

Trust in a country's courts is generally not uniform across all citizens within that country. This is also true in the cases of Malawi, Namibia and South Africa. To get a better sense of which factors are more likely to increase public confidence in the judiciary, we can break down the data collected in Round 8 of Afrobarometer's research by several demographic and attitudinal factors that are likely to influence trust in courts. For example, previous findings have shown that older citizens tend to have higher levels of trust in courts than their younger counterparts.¹⁷⁰ However, this pattern is only partially confirmed in the case of Malawi, whereas, in Namibia, we do not see any clear pattern and, in South Africa, the relationship is inverse. We also see

¹⁷⁰ Logan, 2017.

divergent patterns in terms of gender and education. Men are more likely to trust the courts in Namibia and South Africa, but not in Malawi, while education seems to increase trust in the courts in South Africa, while decreasing it in Malawi, and has a somewhat more muted effect in Namibia.

Figure 5: Trust in courts by demographics | Malawi



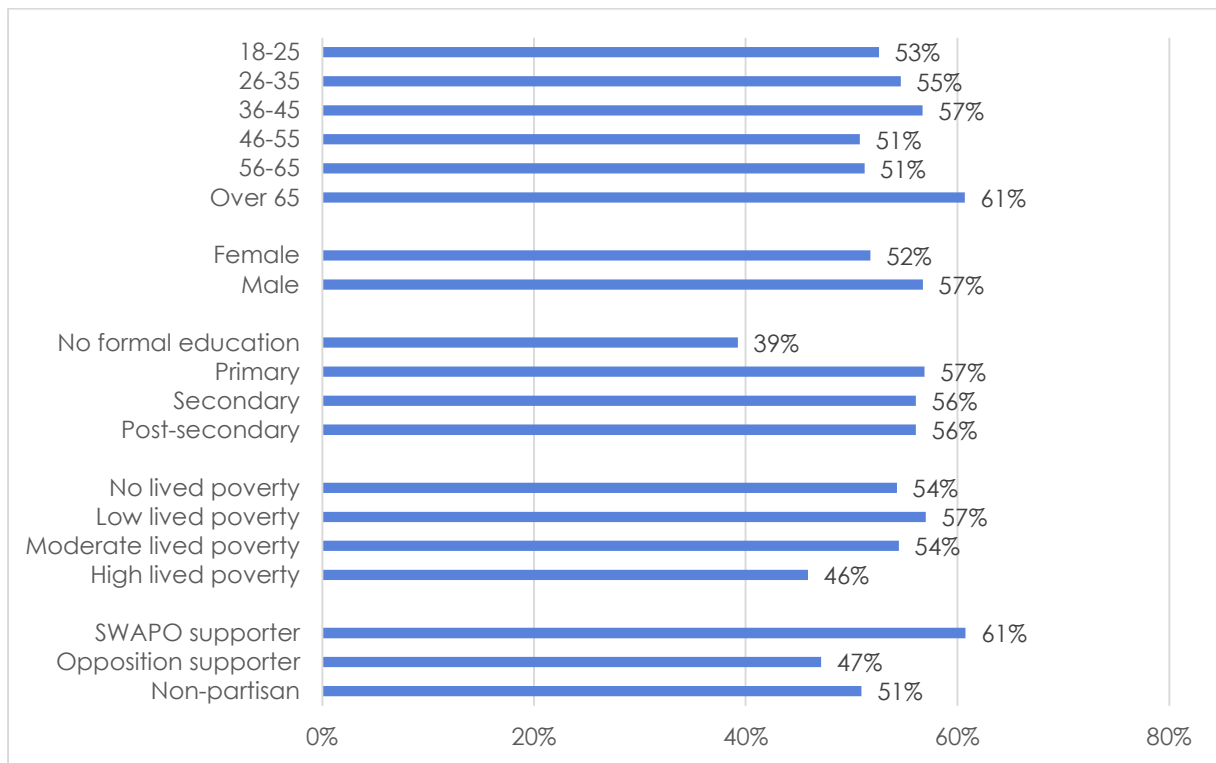
Source: Afrobarometer

However, we find more consistent results in terms of poverty. Respondents who experience higher levels of lived poverty are less likely to trust the courts.¹⁷¹ Given that material deprivation also makes it more difficult for Africans to engage with and make use of the formal legal system,¹⁷² this finding is of particular significance.

¹⁷¹ Afrobarometer assesses poverty through its Lived Poverty Index (LPI), an experiential measure based on how frequently respondents or their families went without five basic necessities (enough food, enough clean water, medicines or medical treatment, enough cooking fuel, and a cash income) during the year preceding the survey. Using response options of “never,” “just once or twice,” “several times,” “many times,” and “always,” LPI scores calculated for individuals or countries reflect the extent of deprivation ranging from no lived poverty to high lived poverty. For more on lived poverty, see “Africa’s growth dividend? Lived poverty drops across much of the continent,” Afrobarometer Policy Paper No. 29, available at <http://www.afrobarometer.org/publications/pp29-africas-growth-dividend-lived-poverty-drops-across-the-continent>.

¹⁷² Logan, *op cit*.

Figure 6: Trust in courts by demographics | Namibia



Source: Afrobarometer

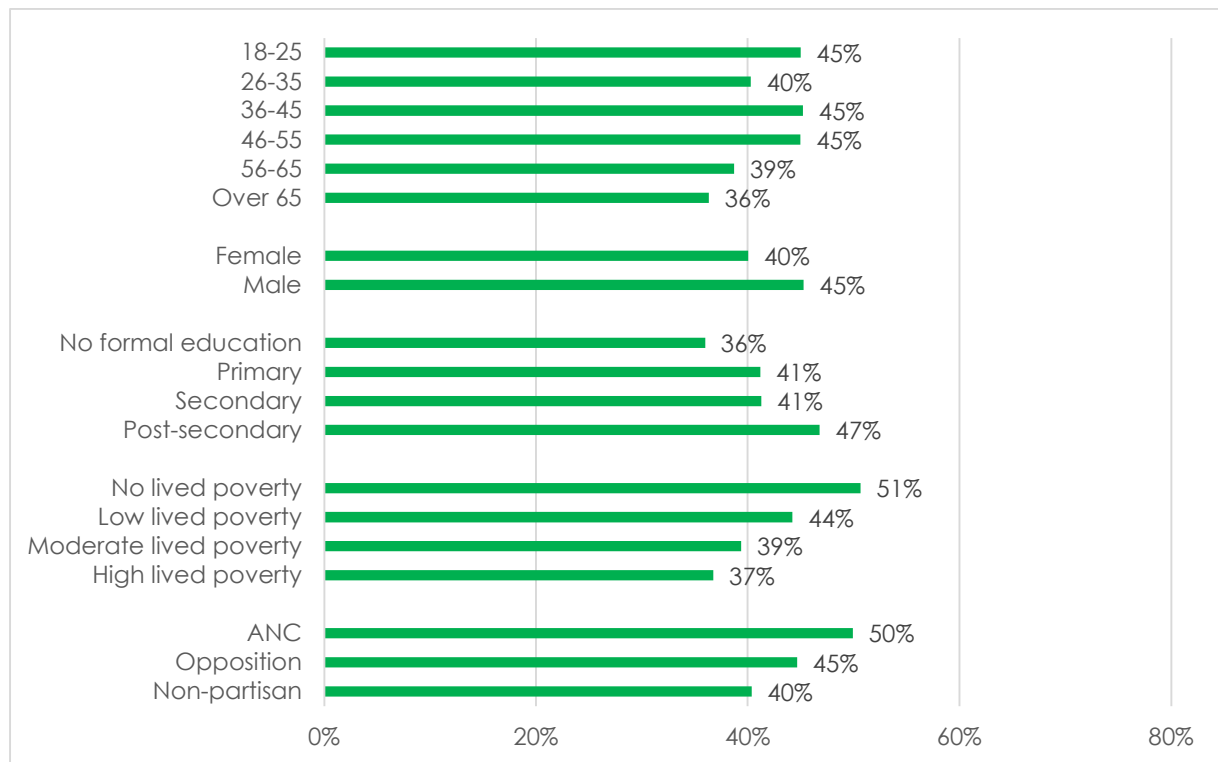
Lastly, and as alluded to in the previous section, courts often have to constrain executive power, or adjudicate the outcome of an election in cases where the electoral commission was unable to ensure free and fair elections. These tasks require diffuse support from citizens across the partisan divide. Yet, in several African countries we observe that ruling party supporters trust the courts substantially more than opposition party supporters, or non-partisans.¹⁷³ In all three countries, supporters of the ruling party are indeed displaying higher levels of trust than opposition party supporters.¹⁷⁴ However, the difference between these two groups varies from 14 percentage points in Namibia, to only 5 percentage points in South Africa. Interestingly, in South Africa, non-partisans have less confidence in the courts than partisans. One possible explanation for this peculiar pattern is that opposition parties

¹⁷³ Kerr and Wahman, 2021, Krönke, 2018.

¹⁷⁴ This is a particularly interesting finding in the South African context, where the courts have frequently been seen as standing against the ruling party, particularly under the presidency of Jacob Zuma. For example, in 2017 the ANC national spokesperson described a judgment ordering President Zuma to disclose the reasons for a cabinet reshuffle as signifying “unfettered encroachment of the judiciary into the realm of the executive – pandering to the whims of the opposition who want to co-govern with the popularly elected government through the courts.” Quoted in Le Roux and Davis *op cit.*, p. 1.

have achieved several victories against the ruling ANC in the courts over the past decade.

Figure 7: Trust in courts by demographics | South Africa



Source: Afrobarometer

So far, the discussion of citizens' trust in the courts has focused on the court system as a whole, while considering courts at several levels from the Magistrates' Courts to the Constitutional Court. The findings show how diverse citizens' views about the judiciary are, both across and within countries. In the remaining sections, we take a closer look at those citizens who directly engage with the courts, specifically the High Courts. Before taking a closer look at court users' lived experiences, however, we first compare how citizens learn about the courts when they do not engage with them directly.

Learning about the courts (and news)

When answering the question of how citizens view the judicial system as a whole, it is important to note that only a fraction of citizens have direct contact with the courts – about 1 in 8 Africans had contact with courts in the preceding five years

according to a recent 36-country study.¹⁷⁵ And even those who do have a direct experience with the court system are more likely to engage with Magistrates' Courts than High Courts. Therefore, most Africans' views of the courts are likely to be shaped by information that they picked up elsewhere.

To better understand what influences citizens' perceptions of the courts, we asked respondents in our court user survey about their top two sources of information about the courts. As can be seen in **Figure 8**, there is substantial variation between Malawi, Namibia and South Africa. About 30% of respondents in Malawi and Namibia learned about the courts through personal experiences, or via friends and family, while this number was somewhat higher in South Africa (41%). Among traditional news-media channels, the radio was most dominant in Malawi (36%), while in Namibia newspapers played a more important role (27%). By contrast, South Africans were more likely to learn about the courts via online media, compared to Namibians and Malawians. These patterns are broadly in line with how citizens consume news in general in these countries.¹⁷⁶

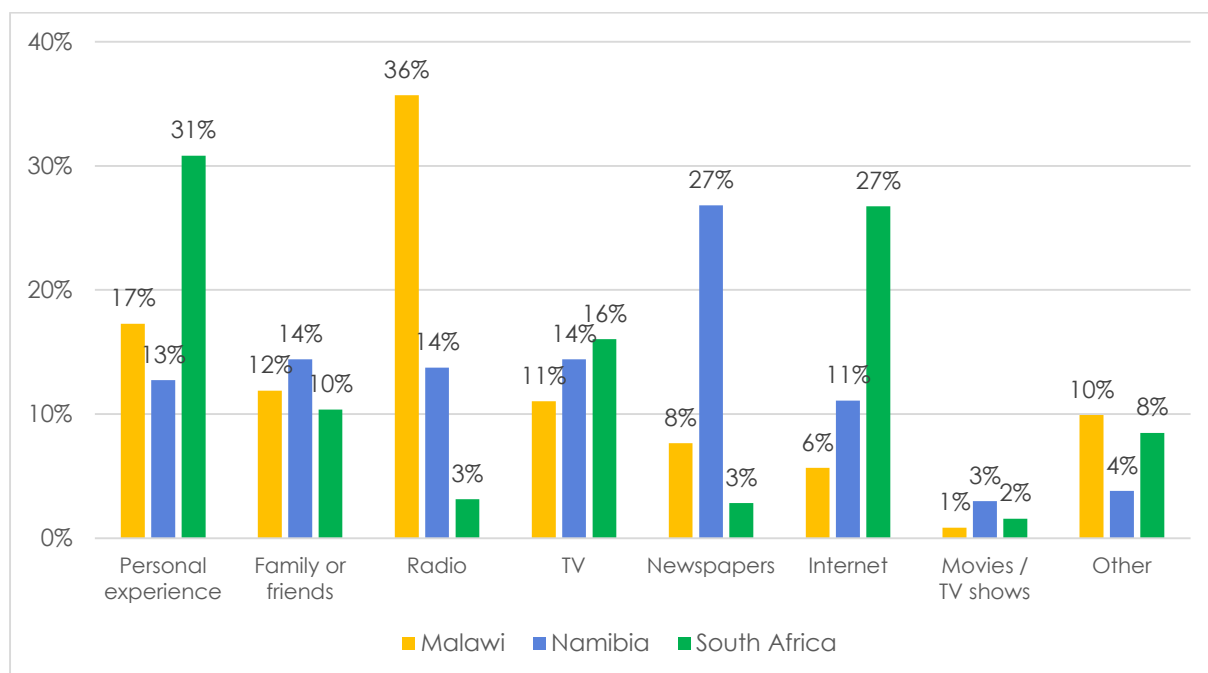
These patterns of how citizens learn about the courts should be kept in mind by activists who intend to develop public education campaigns around the judiciary, the courts and access to justice. While newspaper columns might be more promising in Namibia, and online media campaigns might be most promising in South Africa, these are unlikely to work in a country like Malawi, where smartphone penetration, and internet usage remain, despite recent increases, very low compared to other countries in the continent.¹⁷⁷

¹⁷⁵ Logan *op cit*.

¹⁷⁶ For more information on this, please see Appendix B.

¹⁷⁷ Krönke, 2020.

Figure 8: Sources of information about the courts



Source: Court User Survey

LIVED EXPERIENCE OF THE LAW

Accessibility and basic court functions

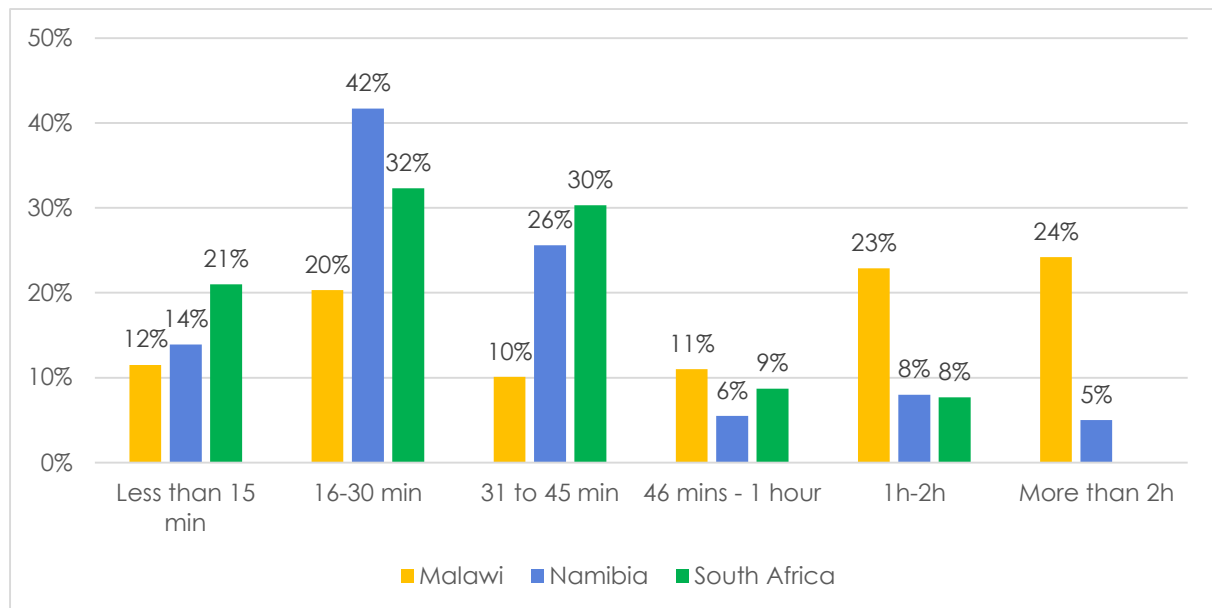
Distance

Every day, citizens and members of the legal profession engage with the courts. Yet relatively little is known about how they view these interactions. A reference point by which we can compare respondents' experiences with the High Courts in Malawi, Namibia and South Africa is how long it takes them to get to the courts. Although this is a very coarse measure, it nevertheless allows us to gauge how easy it is for citizens to access the courts. It is worth keeping in mind that the three countries not only differ in terms of wealth (Malawi has a GDP/capita of USD 625, while Namibia's is USD 4 211 and South Africa's is USD 5 091),¹⁷⁸ but also in terms of urbanisation. Less than 20% of Malawians live in urban areas, making the country one of the least urbanised countries in the world. By contrast, in Namibia 52% of the population live in

¹⁷⁸ The data is drawn from the World Bank Database (2021) and reflects current US\$.

urban areas, while about 67% of South Africans live in urban areas. Thus, it is perhaps not surprising that in Malawi almost half of court users travelled for at least 1 hour to reach the courts, while the same was true for only 13% of Namibian and 8% of South African respondents.

Figure 9: Court user travel time



Source: Court User Survey

The difficulty of access to this level of the court system in Malawi is further illustrated by the fact that almost half of respondents used public transport to get to the courts (47%), and that of those who travelled for 1 hour or more, the majority (60%) used public transport.¹⁷⁹

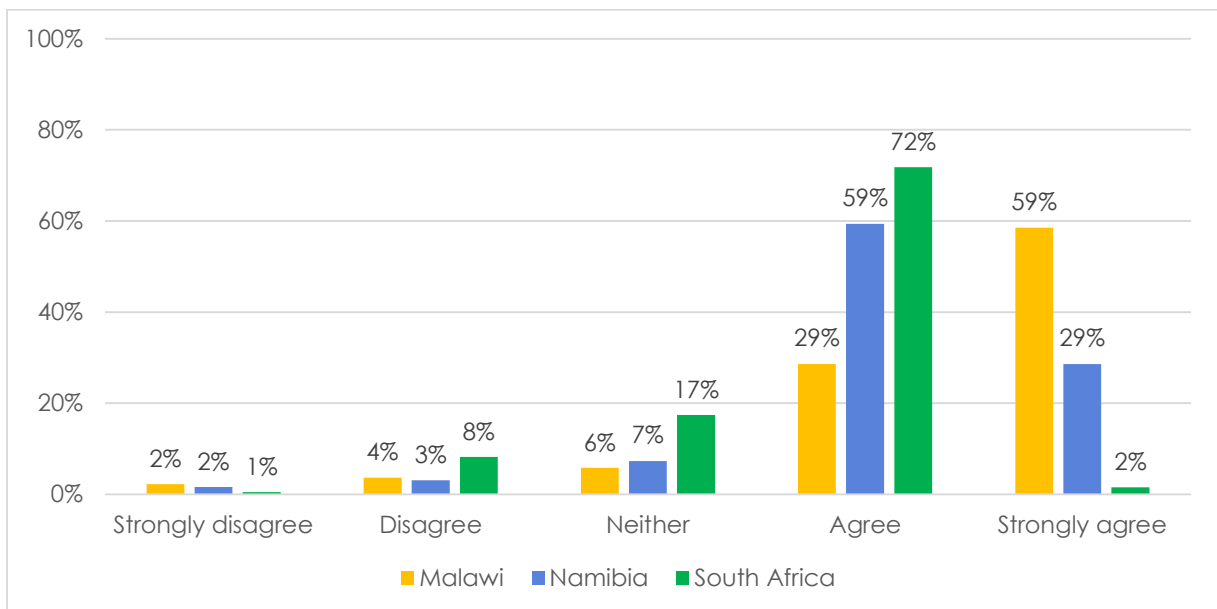
Safety

Once at the court, almost 90% of court users felt safe outside the court building in Malawi and Namibia. By comparison, only 76% of South African respondents felt equally safe. Interestingly, once respondents were inside the court buildings, they felt safe. To better understand why South African court users feel less safe outside court

¹⁷⁹ We pick up the issue of access to the courts and the law in subsequent sections when we analyse the extent of legal representation and issues of discrimination below.

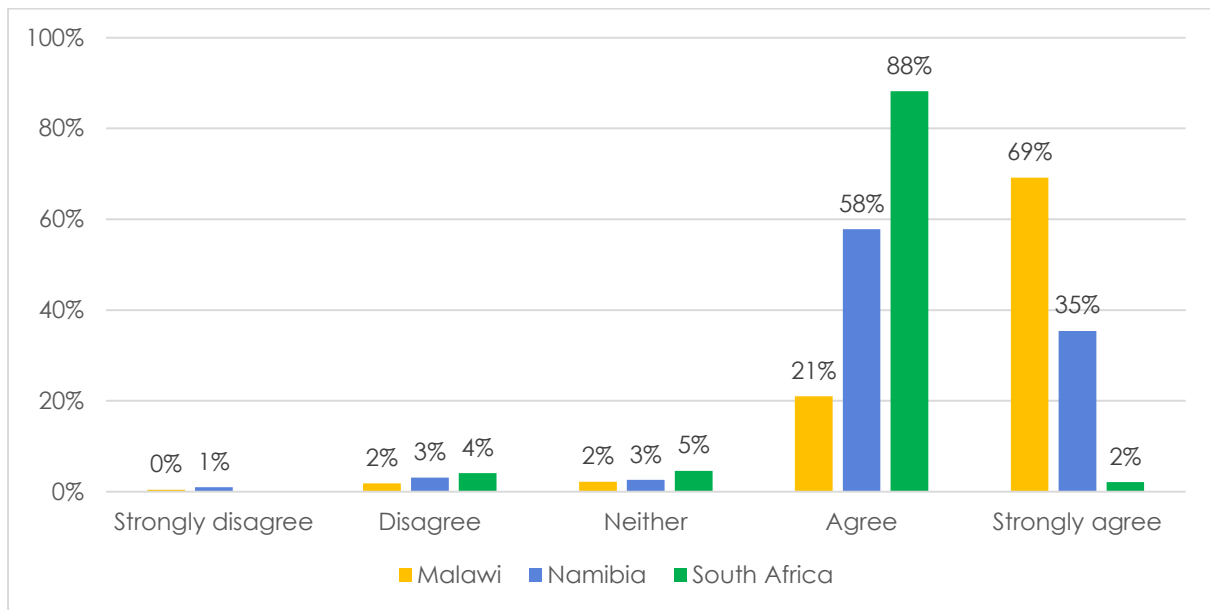
buildings, we also analysed the responses from professionals who regularly visit the High Courts. The results reveal a similar pattern. Only 62% of South African professionals felt safe outside the court building, compared to 84% of Namibian and 94% of Malawian lawyers and other court personnel. Yet, when asked about their sense of safety inside the court building, 9 out of 10 respondents in all three countries said that they felt safe. This suggests that the security measures in place at High Courts across the three countries are quite good. In the case of South Africa, it seems likely that South Africans in general feel less safe when they are out in the open.

Figure 10: Safety outside the court building



Source: Court User Survey

Figure 11: Safety inside the court building



Source: Court User Survey

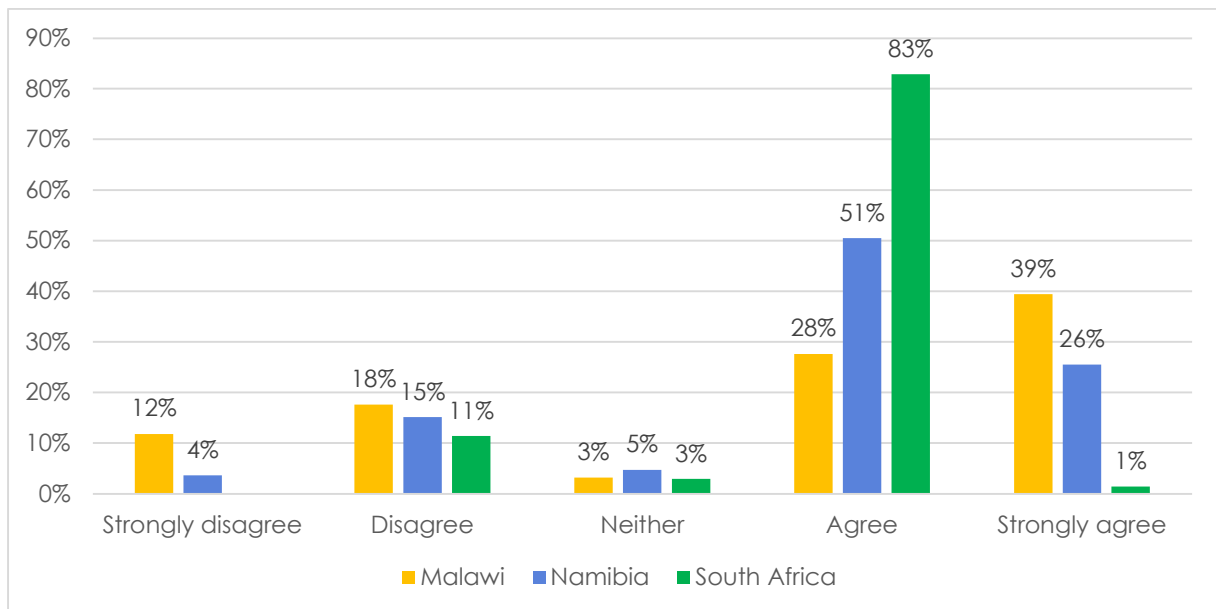
This is supported by Afrobarometer survey evidence which shows that only 41% of South Africans feel safe when walking in their neighbourhood, while both Namibians and Malawians are more likely to feel safe (47% of Namibians and 52% of Malawians never feel unsafe when walking in their neighbourhoods).

Start times

A separate basic court function is that of having proceedings start on time. Here, Namibian and South African courts seem to perform somewhat better than Malawian courts. Overall, only 67% of Malawians said that the court started on time, compared to 77% in Namibia and 84% in South Africa. Once again, professionals mirror the experiences of ordinary citizens in each of the countries. Although we did not ask any follow-up questions on why court proceedings were delayed, survey results as well as evidence from interviews with High Court judges in all three countries allow us to engage in some informed speculation. On the one hand, we already saw that Malawians on average have longer travel times (often using public transport), which is likely to cause delays if all parties are not present. It is more likely, however, that several infrastructural limitations hamper the smooth operating of the courts. For example, Malawian judges were by far the most likely to complain about

having to share courtrooms. While this does not necessarily impact on the quality of judges' rulings, it nevertheless hints at the issue of delaying court proceedings unnecessarily.

Figure 12: Court started on time | Citizens



Source: Court User Survey

Legal representation

Citizens come to the courts for a range of reasons. While some visit the court building to search for records or get information, others join their friends or family members to support them during a trial, or to appear as a witness in a case. Taken together, these groups made up more than 50% of respondents in each of our countries.¹⁸⁰ For now, however, we focus on another group - individuals who were party to a case. We focus on this group to learn more about whether and by whom citizens were represented during an active case. Unfortunately, the restrictions during our fieldwork period did not allow us to interview as many court users who were party to a case as we would have wanted to. In South Africa, in particular, we interviewed

¹⁸⁰ Given the unusual time period during which we conducted fieldwork (between Covid-19 waves) and with courts not fully functioning in a face-to-face mode, we are unable to tell whether these proportions are representative of pre-pandemic court user patterns.

less than 20 respondents who were party to a case. Thus, we exclude South Africa from this part of the analysis.

Even though we have more cases to analyse in the Malawian (67) and Namibian (58) surveys, the number remains somewhat limited, and thus, the results should still be treated as suggestive. Nevertheless, they allow us to probe some important aspects of access to justice and how this might vary across countries, including by types of cases within a country.

At first glance, we can see that, on average, fewer Namibian respondents had legal representation compared to their Malawian counterparts. This is partly corroborated through our interviews with High Court judges. In several interviews Namibian judges mentioned that citizens representing themselves in a case has increasingly become a problem, creating delays, and hampering court proceedings in the country's High Courts. By contrast, the same issue was rarely highlighted by Malawian judges.

The data also reveal that those who were party to a criminal case were less likely to have legal representation. These differences remain relatively small and require further investigation.

On the matter of who citizens were represented by, we see some interesting differences. First, Malawians involved in criminal matters are far more likely to rely on legal aid than those in civil matters (85% and 10% respectively). Second, while we see a similar gap across types of cases in Namibia, it remains smaller (57% and 33% respectively). This suggests that the availability of legal aid, and the types of matters for which legal aid is available, may have an impact on the data.

Table 2: Availability of legal representation

		Malawi		Namibia	
		Civil cases (incl. appeal)	Criminal cases (incl. appeal)	Civil cases (incl. appeal)	Criminal cases (incl. appeal)
<i>Were you represented by an attorney/lawyer?</i>	Yes	83% (20)	64% (21)	64% (21)	56% (14)
	No	17% (4)	36% (12)	36% (12)	44% (11)
	Total	100% (24)	100% (33)	100% (33)	100% (25)

Source: Court User Survey

Table 3: Type of legal representation

		Malawi		Namibia	
		Civil matter	Criminal matter	Civil matter	Criminal matter
<i>By whom are you being represented?</i>	Legal aid (at least partially)	10% (4)	85% (17)	33% (7)	57% (8)
	Private attorney/lawyer	90% (35)	15% (3)	67% (14)	43% (6)
	Total	100% (39)	100% (20)	100% (21)	100% (14)

Source: Court User Survey

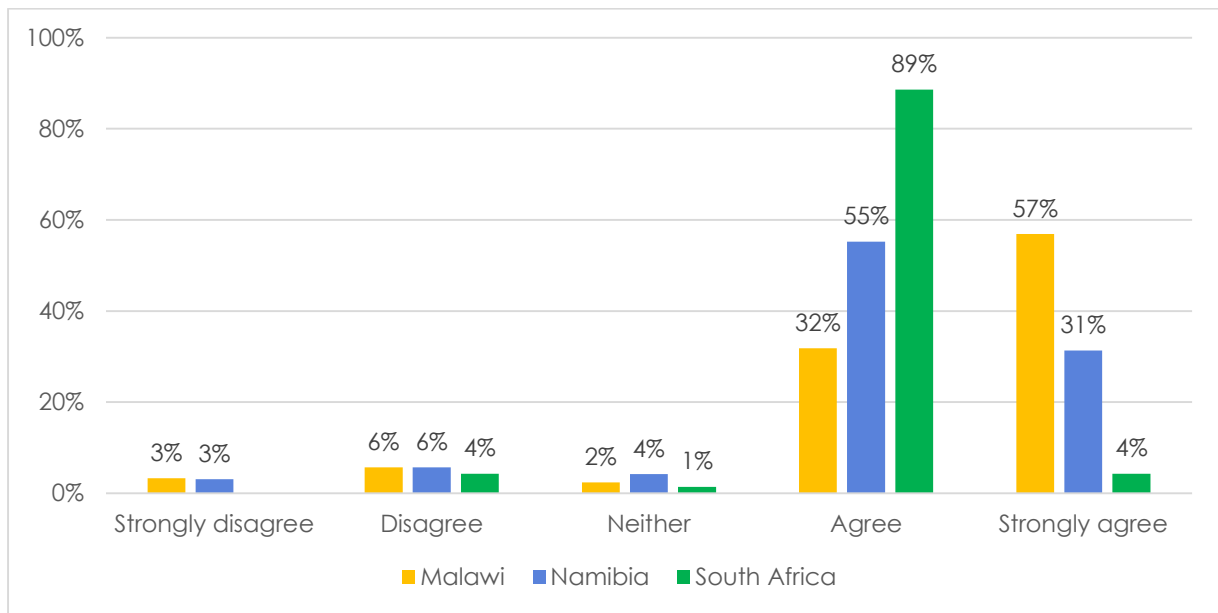
Procedural aspects of justice: The courtroom

The quality of justice experienced by both professionals as well as ordinary citizens hinges on procedural as well as substantive aspects. Given the complexity of the law and legal procedures, it is particularly important that both legal professionals and ordinary citizens are satisfied with both aspects. By comparing the two perspectives, it is possible to gauge whether the judge as well as the courtroom staff are able to deliver on procedural and substantive aspects to the satisfaction of both constituencies, and how this varies across countries.¹⁸¹ By contrast with the previous section, we now include everyone who entered a courtroom prior to being interviewed. In other words, we include not only respondents who are a party to a case, but also their friends and family, as well as those who appeared as witnesses in the courtroom.

A basic aspect of the procedural dimension of justice, is whether the proceedings were clear and easy to understand. While it is to be expected that professionals would have no problem following the proceedings, it is very positive to see that the overwhelming majority of court users (9 out of 10) across all three countries views the proceedings in the same light (**Figure 13**). Furthermore, judges need to have all the necessary information at their disposal to arrive at a fair and just verdict. As can be seen in **Figure 14**, although most citizens say that the judge has access to the necessary information, the overall level of confidence that judges have access to the necessary information is somewhat poorer than their evaluations of the proceedings overall, and there is slightly more variation across countries. In Malawi 85% of respondents (strongly) agree with the statement, while it is 82% in South Africa and 75% in Namibia. To put these results into perspective, professionals in all three countries almost universally agreed that the proceedings were easy to understand and that the judge had the necessary information. Therefore, when considering this dimension of justice, the courts seem to do quite well.

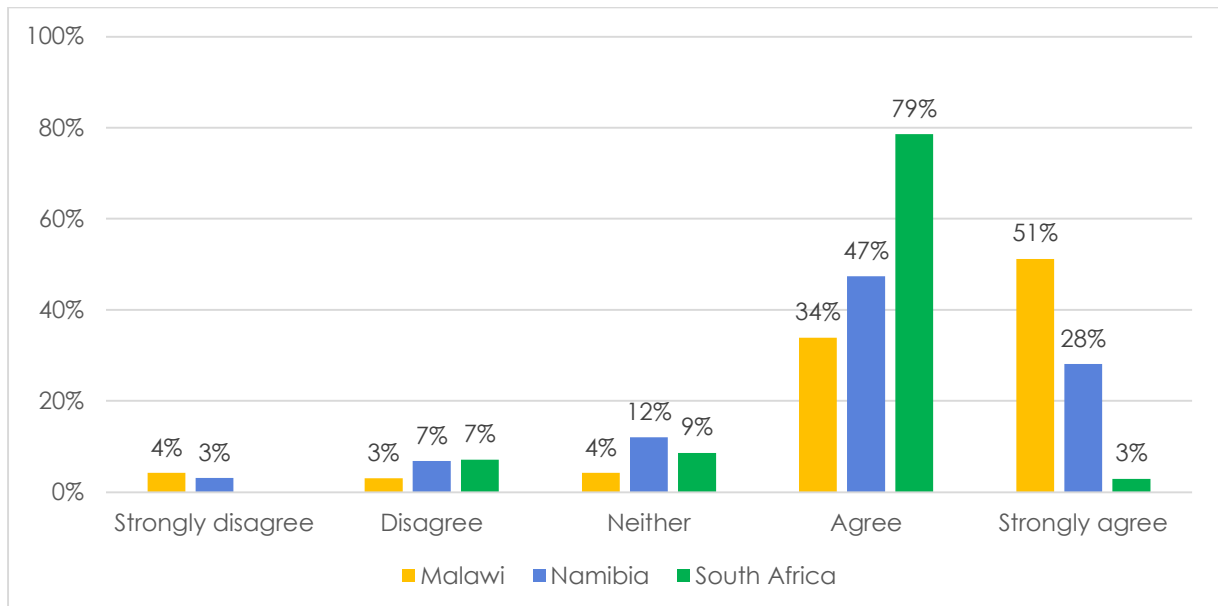
¹⁸¹ Although we discuss the perspective of both lay court users as well as professionals here, the graphs only include data about non-professionals only. However, the graphs in the respective country reports include data from both types of actors.

Figure 13: Proceedings were clear and easy to understand



Source: Court User Survey

Figure 14: Judge had the necessary information to make a decision about the case



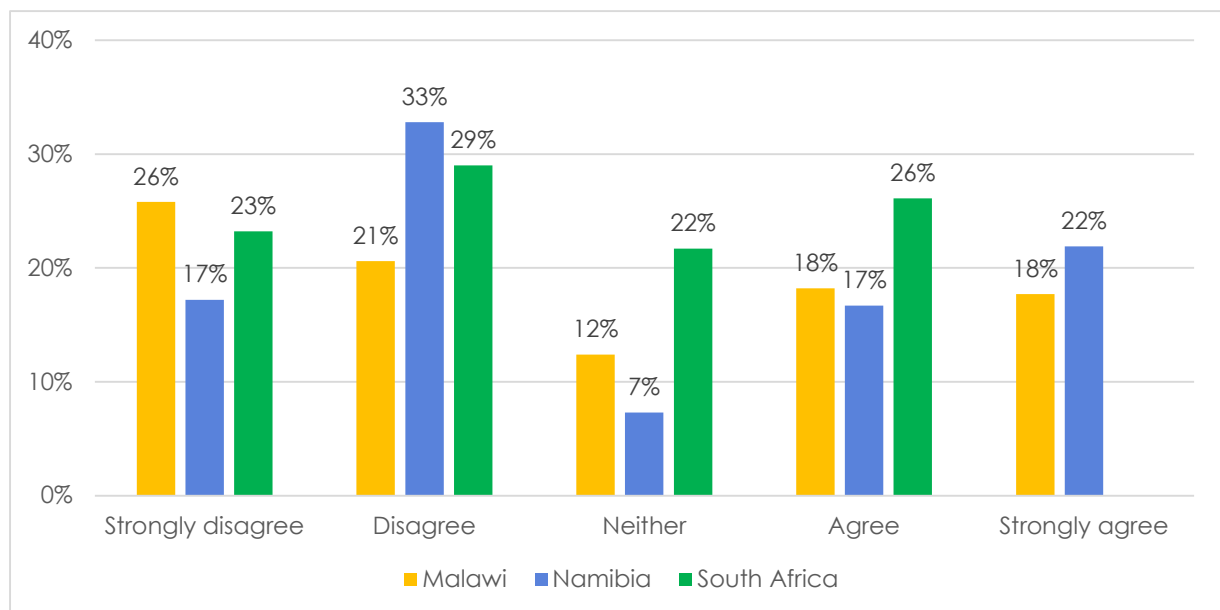
Source: Court User Survey

A separate procedural issue is that of cases being delayed. During unprecedented times where courts must adjust to a constantly changing environment, as was the case with Covid-19, it is likely that High Courts anywhere, but particularly in less well-

resourced countries, will experience delays. Even during such challenging times, however, there are still several possibilities as to why citizens and professionals might experience unnecessary delays.

In contrast with the previous two questions, **Figure 15** illustrates substantial variation both within and to some extent even across countries in terms of how court users view the issue of unnecessary delays. In Namibia (39%) and Malawi (36%), more than a third of respondents said that there were unnecessary delays, whereas only 26% of South Africans were of the same view. It is, of course, possible that citizens have a skewed sense of how quickly the wheels of justice turn, as they are unlikely to have a lot of experience with how quickly court cases get processed and what constitutes a normal versus an unnecessary delay. Therefore, we also analysed the responses of legal professionals. Indeed, professionals were less likely to say that cases get delayed unnecessarily – 19% in Malawi, 14% in South Africa, and 11% in Malawi.

Figure 15: Case was delayed unnecessarily



Source: Court User Survey

What explains citizens' different experiences regarding unnecessary delays?

Although respondents were not asked to elaborate on the reasons behind the perceived delays, other survey questions allow us to explore the likely reasons behind this variation. For example, it is possible that citizens who can afford to pay

for legal representation are less likely to experience unnecessary delays compared to those who are represented by a legal aid lawyer.¹⁸² When comparing responses from citizens who were represented by a private lawyer to those who were represented by legal aid, we see substantive differences in Namibia, but not in Malawi.¹⁸³

In Namibia, 38% of respondents who were represented by a private lawyer said that there were unnecessary delays, compared to 53% of respondents who were at least partially represented by a legal aid representative. The negative effect of this on the quality of justice and the related issue of lay representation is also corroborated by Namibia's High Court judges. In the words of one judge: "The quality is literally affected by lack of resources. Or it can be. [...] If legal aid does not have enough lawyers, your case gets delayed and delayed and delayed because [...] It is your right. And legal aid wants to help you. But they only have this many lawyers. So, later on, the accused says no, I am tired of waiting. Let me just do the case on my own." By contrast, in Malawi there was virtually no difference between the two groups: 42% of respondents with private representation and 45% of those represented by legal aid said that there were unnecessary delays.

There are at least two other structural factors that could impact on court users' perceptions of delays in how their cases are handled. Since Malawi and Namibia, unlike South Africa, have dedicated administrative streams for civil and criminal cases, it is possible that delays are more likely to occur in one than the other. In Malawi, this difference was a negligible 5 percentage points. 42% of respondents who went to court because of a criminal law case complained of unnecessary delays, compared to 38% of those who came to court because of a civil case. In Namibia, the gap was 12 percentage points (38% for criminal vs 50% for civil law cases).

Another contributing factor to perceived unnecessary delays could be that of location. Since some courts might experience a higher case load, be under-staffed, or be reliant on other stakeholders who do not have the necessary resources to

¹⁸² Although we were not able to find research on this point in the three countries studied, it seems reasonable to anticipate that legal aid lawyers may be burdened by higher caseloads and less administrative support than many of their colleagues in private legal practice.

¹⁸³ As mentioned above, it was not possible to analyse this for South Africa, given the low number of interviewees who had any legal representation.

meet deadlines, we might expect that court users are more likely to perceive delays in some courts compared to others. As **Table 4** illustrates, the variation across courts is more substantial across Malawi's four seats of the High Court, compared to Namibia's High Courts. However, given the relatively low number of respondents for some of the courts, one should not draw overly strong conclusions based on these findings.

Table 4: Case was delayed unnecessarily | by High Court

		(Strongly) disagree	Neither	(Strongly) agree	Number of respondents
Malawi	Blantyre	45%	11%	40%	108
	Lilongwe	53%	13%	34%	64
	Mzuzu†	33%	24%	14%	21
	Zomba	44%	6%	44%	16
Namibia	Windhoek	50%	8%	40%	162
	Oshakati	52%	4%	42%	24

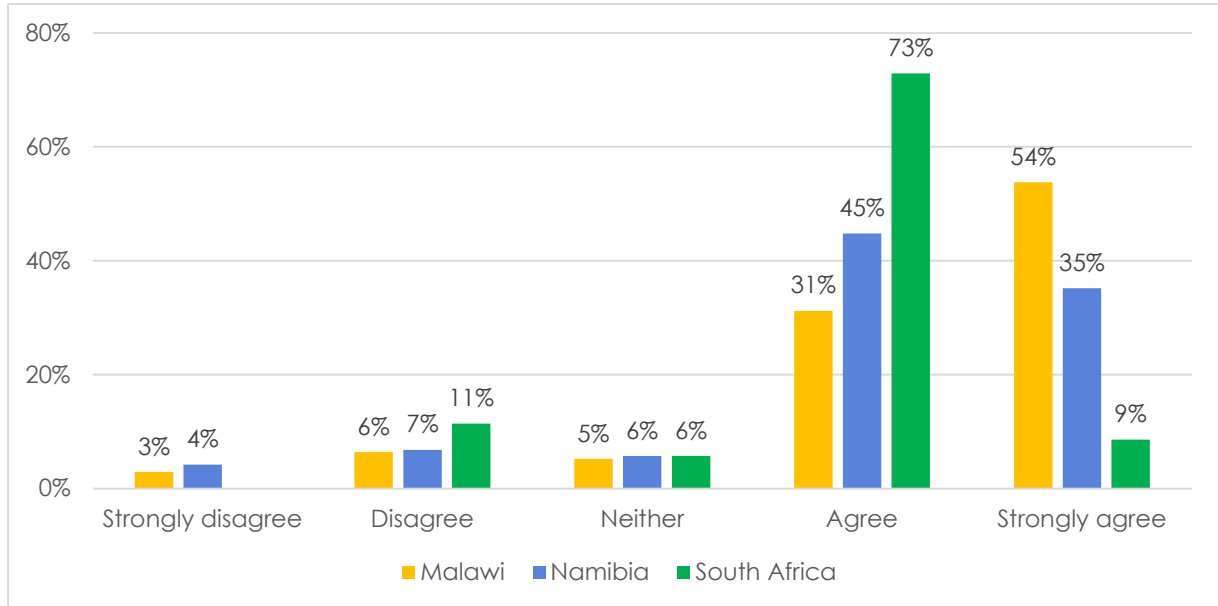
Source: Court User Survey

Note: The difference between the percentages displayed and 100% were "Don't know" responses.
 †=Mzuzu had a comparatively high number of "Don't know" responses (29%)

Judges have the important task of applying the law to the facts of the case. Before doing so, however, each party must have a chance to tell their side of the story. Therefore, an important question in terms of procedural justice is whether judges listened to all sides and handled the matter fairly before reaching a verdict. It is encouraging to see that between 80% (Namibia) and 85% (Malawi) of respondents said that the judge listened to all sides of the story before making a decision (**Figure 16**). These positive evaluations are also confirmed by the survey responses of legal

professionals (at least 85% [strongly] agree with the same statement in each country).

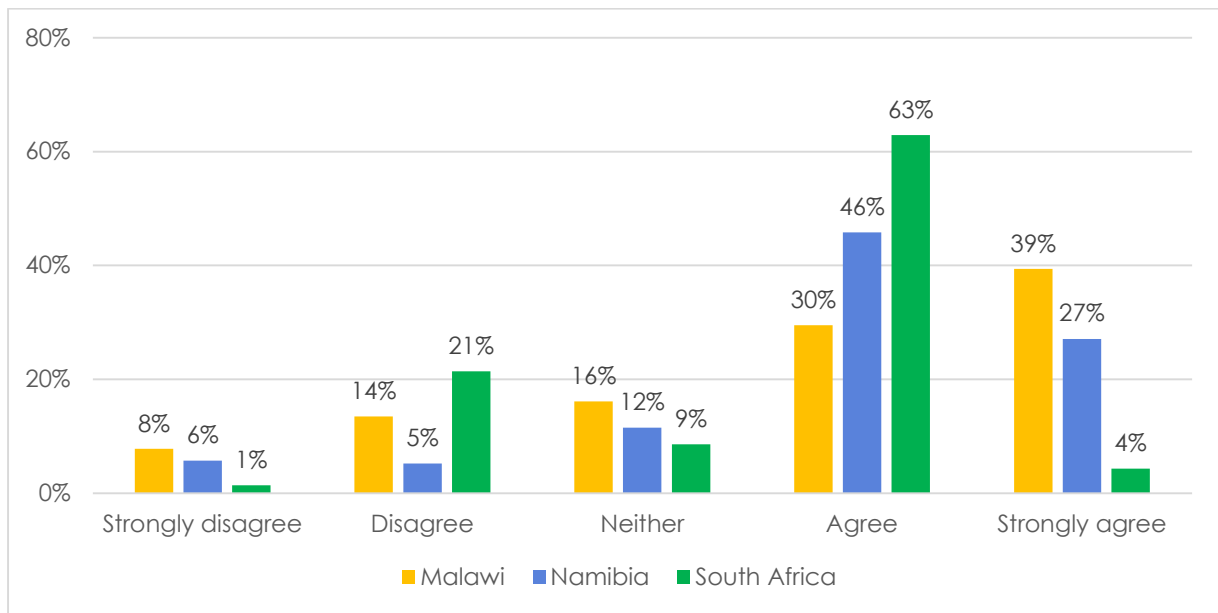
Figure 16: Judge listened to all sides of the story before making a decision



Source: Court User Survey

To understand whether a case was handled well from an overall procedural standpoint, we asked if a case was handled fairly. Here we see interesting differences among South Africans, Namibians and Malawians. One in 5 South African court users (22%) said that the case was not handled fairly. In contrast, only 1 in 10 (11%) were of the same opinion in Namibia.

Figure 17: Case was handled fairly



Source: Court User Survey

So far, we have analysed different aspects of court proceedings. While some of these issues were quite rudimentary and spoke to issues of administrative coordination (court starting on time), others were more demanding and focused on interpersonal interactions (judges listening to all sides). This then begs the question: what matters most for citizens in terms of overall procedural fairness? One way to measure this is through bivariate correlation analyses. This type of analysis allows us to estimate the degree to which two measures are associated with each other.¹⁸⁴

The results in **Table 5** provide some intuitive insights. First, whether citizens said that the court started on time or not, is a poor predictor of citizens' perceptions of the fairness of the trial. This finding is expected, and it is consistent across all three countries. Second, when citizens view the court proceedings as clear and easy to understand, and the judge as having all the necessary information to make a decision, they are significantly more likely to view the handling of the case as fair. Third, the most demanding measure of procedural fairness, whether judges listen to

¹⁸⁴ The results can range between -1 and 1. A value close to 1 represents a strong positive relationship (more of the one also means more of the other), while a negative value represents a negative relationship (more of the one means less of the other). A value close to zero represents a lack of a systematic relationship.

all sides before making a decision, is the best predictor of perceived fairness in Namibia and South Africa, while it is on par with the previous two factors in Malawi.

These results are broadly confirmed in a separate analysis among professionals in each country. Even though these patterns might be less surprising to most astute observers, it nevertheless reinforces the importance of training judges in how to handle court proceedings in ways that are easily accessible and understandable to ordinary citizens.

Table 5: Correlates of perceptions of a fair trial

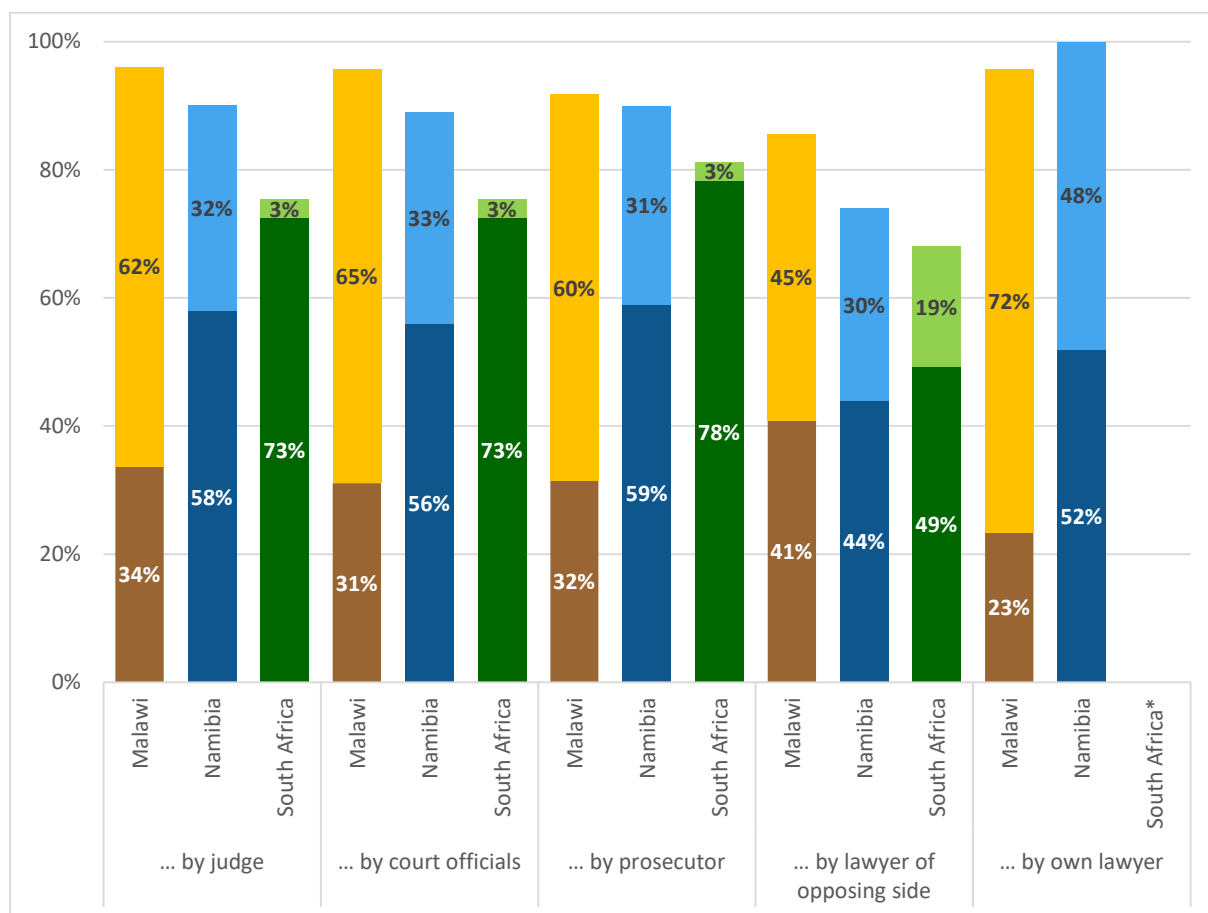
	The way the case was handled was fair		
	Malawi	Namibia	South Africa
Court started on time	.085	.306**	-.020
Court proceedings clear and easy to understand	.386**	.462**	.357**
Judge had necessary info to make decisions about case	.378**	.634**	.370**
Judge listened to all sides of the story before making decision	.325**	.747**	.554**

Note: ** Correlation is significant at the 0.01 level (2-tailed). Number in brackets reflects the number of observations for each bivariate correlation.

Judges are, of course, not the only actors that citizens engage with in the courtroom. To gauge how different stakeholders interact with court users, it is useful to compare the responses to a simple question: "Were you treated with courtesy and respect by each of the following members of the judicial system (if applicable): judge, court officials, prosecutor, lawyer of opposing side, own lawyer?"

Overall, it is worth noting that a clear majority of citizens across all countries have positive views about their interactions with judges, other court officials, prosecutors and, importantly, their own lawyers. However, we can also identify differences between countries. Across four of the five categories, Malawians said that they feel treated best. Although the differences between Malawian and Namibian respondents are often fairly small, the differences between Malawians and South Africans respondents are between 12 (prosecutor) and 20 (judge, lawyer of opposing side) percentage points.

Figure 18: Treated with courtesy and respect by stakeholders of judicial system



Source: Court User Survey
 Note: *N = < 10 respondents for question

Procedural and substantive aspects of justice: Discrimination

The preceding section investigated court users' personal experiences of procedural efficiency and fairness. In this section, we focus on perceptions of different types of discrimination (based on gender, race, wealth and political power) in the judicial system as a whole.

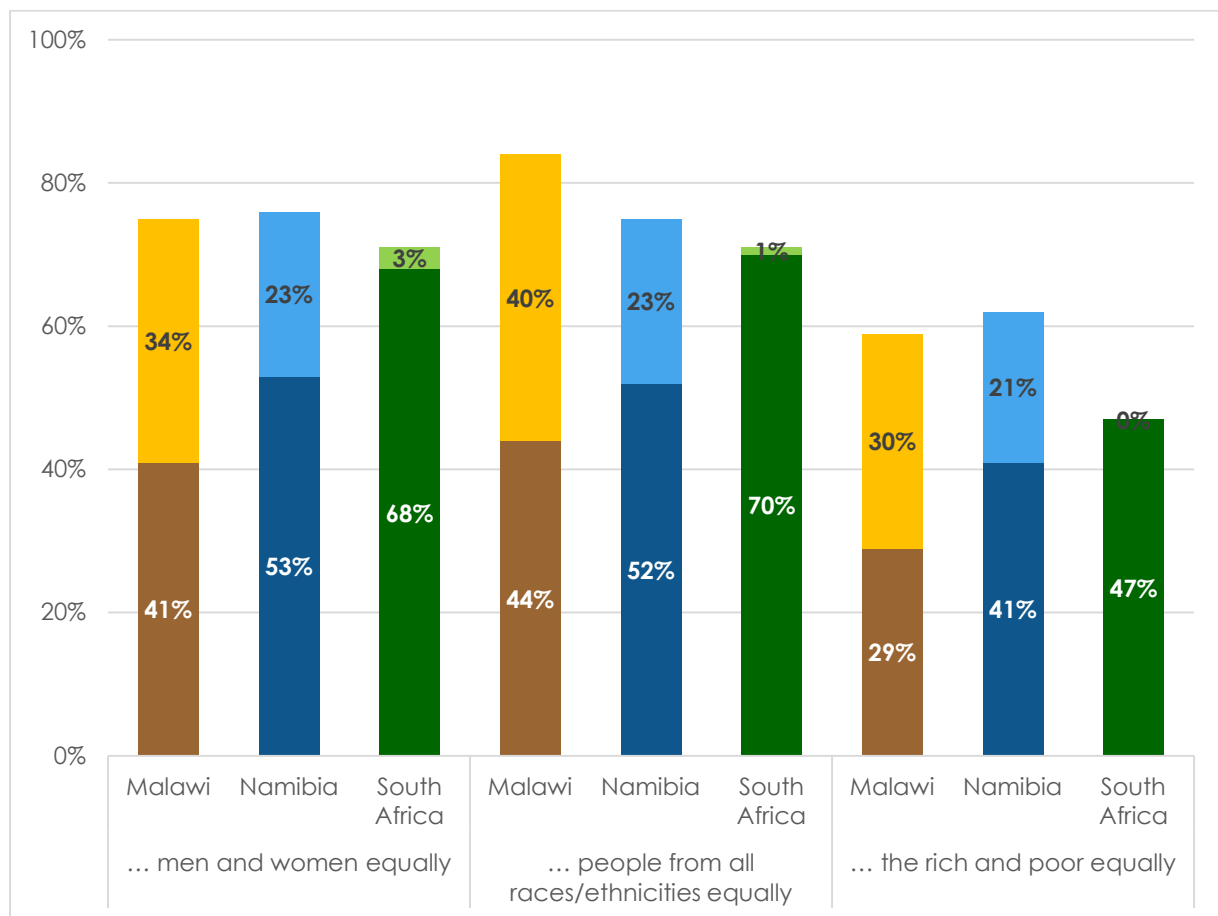
In a set of three questions, we asked court users to tell us how they view the court system as a whole and whether it treats men and women, people from all races/ethnicities, and the rich and the poor, equally. Unlike in the previous section, these questions were asked to all court users, not just those who were an active party to or a witness in a case. The results in **Figure 19** reflect, once again, not only differences between countries, but also across categories.

“Across all three countries, on average 77% of respondents said that the court system treats people from all races/ethnicities equally... However, only 56% said that the rich and poor are treated equally by the court system.”

Overall, Malawians and Namibians were more likely to say that the legal system does treat people the same irrespective of citizens' gender, race/ethnicity, or class, whereas South Africans were comparatively more pessimistic. Surprisingly, the biggest gap was between Namibia and South Africa and the legal systems' perceived treatment of the rich and the poor (62% and 47% perceived the treatment as equal respectively). This is despite the fact that both are among the most unequal countries in the world (World Bank, 2021).¹⁸⁵ Another surprising finding is the way in which perceptions of unequal treatment vary according to the type of treatment. Across all three countries, on average 77% of respondents said that the court system treats people from all races/ethnicities equally. A similar share of respondents said the same about equal treatment of men and women (74%). However, only 56% said that the rich and poor are treated equally by the court system.

¹⁸⁵ According to the most recently available World Bank Data, South Africa was the most unequal country with a Gini coefficient of 63 (2014), while Namibia was the second most unequal country with a Gini coefficient of 59,1 (2015). In contrast, Malawi had a Gini coefficient of 44,7 (2016)

Figure 19: Court system treats people equally



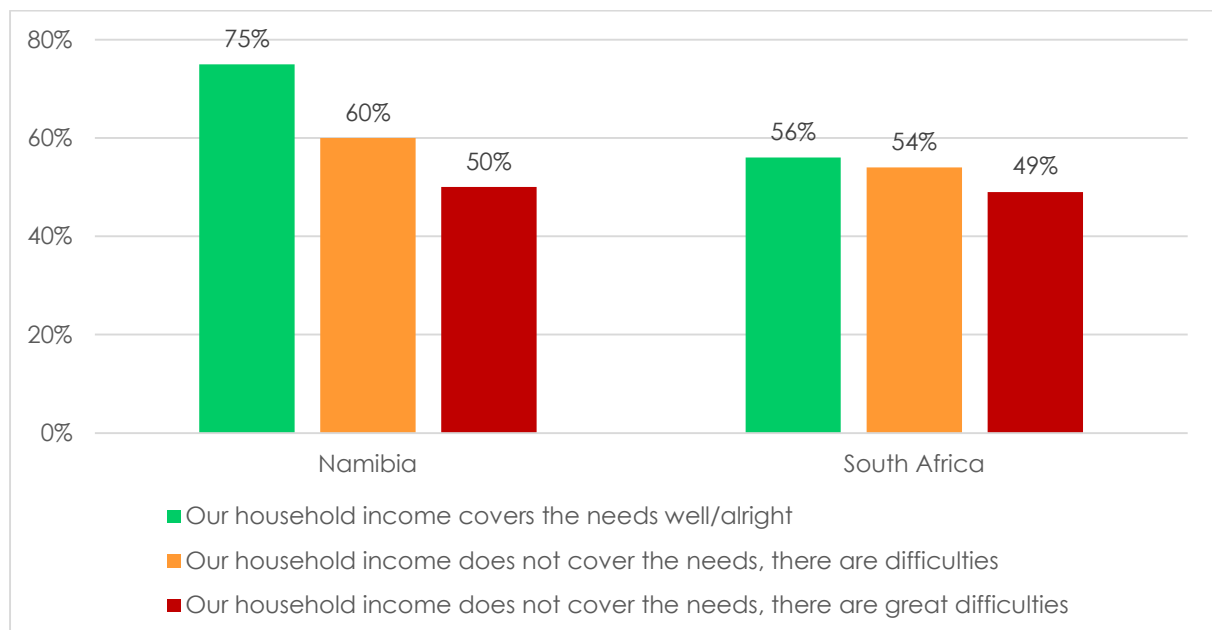
Source: Court User Survey. Note: Dark shading = "Agree"; light shading = "Strongly agree"

In addition to these aggregate comparisons, we can also analyse the answers of court users by gender, and level of wealth to estimate differences within countries. Unfortunately, the number of respondents is too small for a meaningful comparison across racial or ethnic groups within a country. When comparing the evaluations of men and women on whether the court system treats everyone equally irrespective of one's gender, we find no statistically significant differences (see **Appendix B**). That is, men and women in each of the three countries are equally likely to say that the court system treats men and women the same.

By contrast, court users' perceptions of whether the court system treats rich and poor citizens alike vary to some extent. For various reasons it is often difficult to accurately estimate citizens' income in survey research. Therefore, we asked respondents to categorise their current living conditions more broadly by selecting one of four options: 1) Our household income covers the needs well – we can save,

2) Our household income covers the needs alright – without much saving, 3) Our household income does not cover the needs – there are difficulties, and 4) Our household income does not cover the needs – there are great difficulties. While this is a less precise measure of a respondent's income or personal wealth, the advantage of this question is that more people are likely to answer it.¹⁸⁶ When comparing the share of court users who say that the courts treat rich and poor people the same across these different categories, we see an interesting difference between Namibia and South Africa. In Namibia, 75% of wealthier respondents (those saying that their household income covers the needs well/alright) are statistically more likely to say that the court system treats everyone equal, compared to those who struggle to cover their needs (see **Appendix B**). In contrast, across the board, South Africans are less likely to say that the court system treats the rich and poor the same.

Figure 20: Court system treats rich and poor people equally | by wealth of respondent



Source: Court User Survey

Taken together, these comparisons provide preliminary, yet important insights about how court users view the broader court system. Future research could analyse these

¹⁸⁶ We also included a question about household level income, but more than 10% of Malawian and 60% of South African respondents refused to share this information with the interviewer.

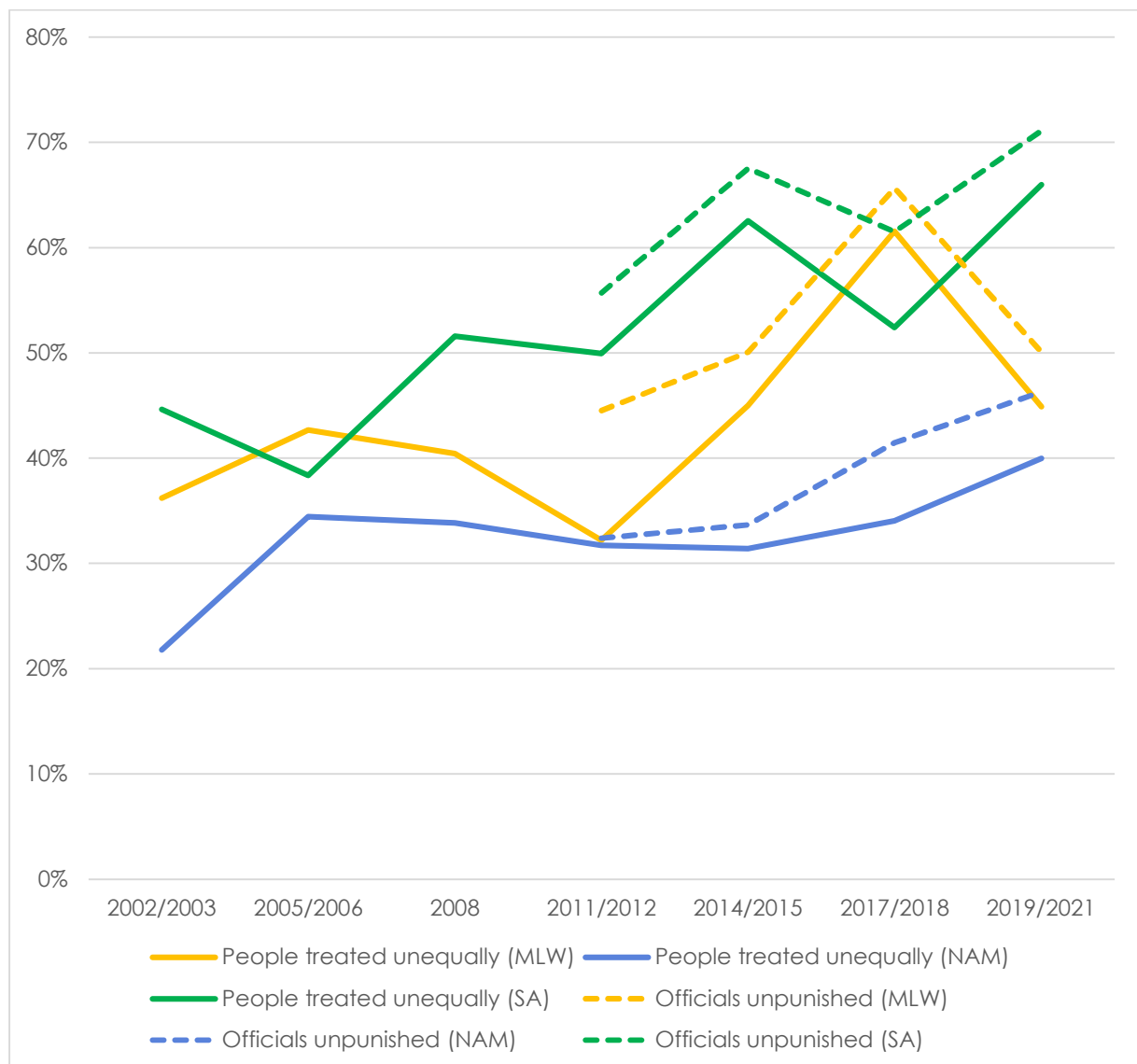
differences in more detail, as well as analyse how citizens' personal experience at a court influences the view of the larger system.

“...in 2021 a clear majority of South Africans said that people are treated unequally under the law.”

One drawback of the analysis in this section so far, is that it is only a once-off snapshot in time and is focused on court users. Therefore, in the rest of this section we take a longitudinal view and look at a representative sample of the entire population in each country. To do so, we return to data from Afrobarometer. Since 2002, Afrobarometer asked the following question: *“In your opinion, how often, in this country do people have to be careful of what they say about politics?”* The answer options are: “Always”, “Often”, “Rarely” or “Never”. The solid lines in **Figure 21** represent the share of the population that responded with “Always” or “Often”. At least two things stand out. First, over the past two decades, the share of respondents who said that people are regularly treated unequally has increased substantially in all three countries. In South Africa, it increased by 21 percentage points (45% to 66%), in Namibia it rose by 18 percentage points (22% to 40%), and in Malawi, it increased by 9 percentage points (36% to 45%). Second, in 2021 a clear majority of South Africans said that people are treated unequally under the law. By comparison, less than 50% were of the same view in Namibia and Malawi.

What explains these increases in perceived unequal treatment? One way to explore this is to make use of a set of questions that Afrobarometer introduced in 2011. Respondents were asked *“In your opinion, how often, in this country do officials who commit crimes go unpunished?”* The response options were the same as in the previous question on unequal treatment. When comparing the share of respondents who said that officials regularly go unpunished (dashed lines in **Figure 21**) with the responses to the previous question, we can see that these move in tandem in all three countries. This suggests that citizens derive their perception of the rule of law in no small part from their views on whether officials are treated equally under the law. Although we cannot directly compare the results regarding officials with the other categories (e.g. gender, race/ethnicity and wealth) discussed earlier, these findings are still instructive.

Figure 21: People treated unequally under the law and officials going unpunished



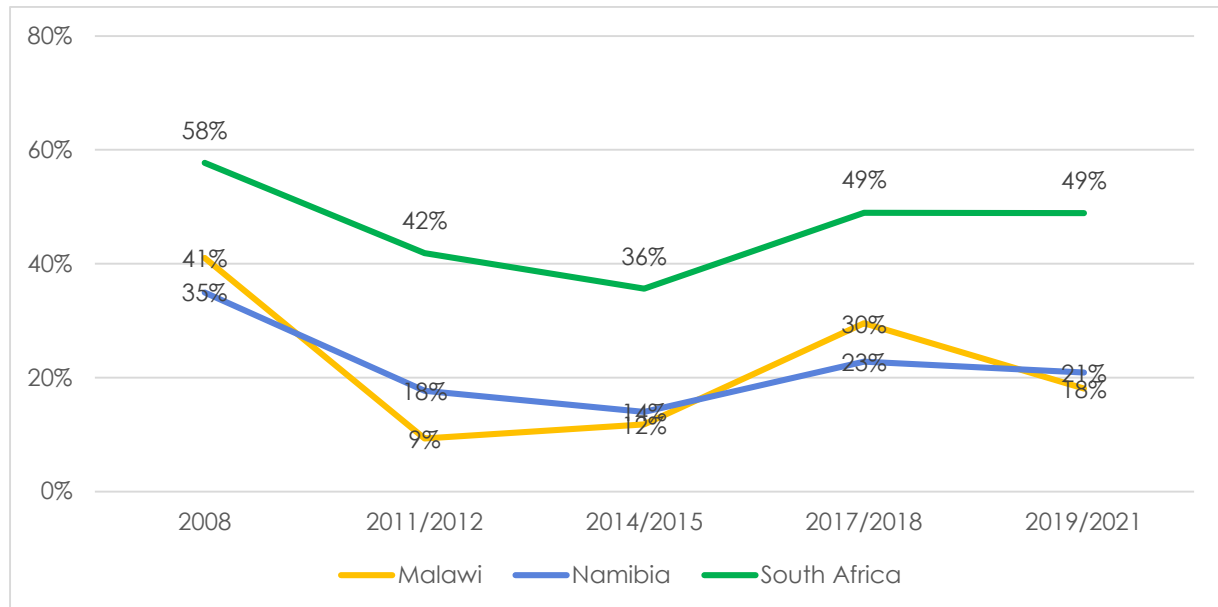
Source: Afrobarometer

Note: Respondents were asked: "In your opinion, how often, in this country 1) are people treated unequally under the law; 2) do officials who commit crimes go unpunished?" Solid and dashed lines represents % of people who said "Always" or "Often" respectively.

To make the point more clearly, we can compare the results in **Figure 21** with those of another question that was introduced in 2008: "In your opinion, how often, in this country do ordinary citizens who break the law go unpunished?" Response options are identical to the previous questions. As can be seen in **Figure 22**, the share of citizens who said that ordinary people who break the law regularly go unpunished has actually decreased over the past decade and remained comparatively more stable since 2011. This is further supporting evidence that perceptions of unequal

treatment under the law are primarily driven by how officials, who often form part of a country's elite, are subjected to the law.

Figure 22: Ordinary people go unpunished



Source: Afrobarometer

Respondents were asked: "In your opinion, how often do ordinary people who break the law go unpunished?". Solid line represents % of people who said "Always" or "Often".

In summary, this section provides new evidence about perceptions of different aspects of procedural and substantive justice. While the court user data suggests that some forms of discrimination are perceived to be more prevalent than others, the Afrobarometer data has illustrated that citizens have tended to judge whether the rule of law is applied equally to everyone at least to some extent based on how officials are treated. Although a statistically more demanding analysis of this data is beyond the scope of this report, it nevertheless provides valuable information for such undertakings in future.

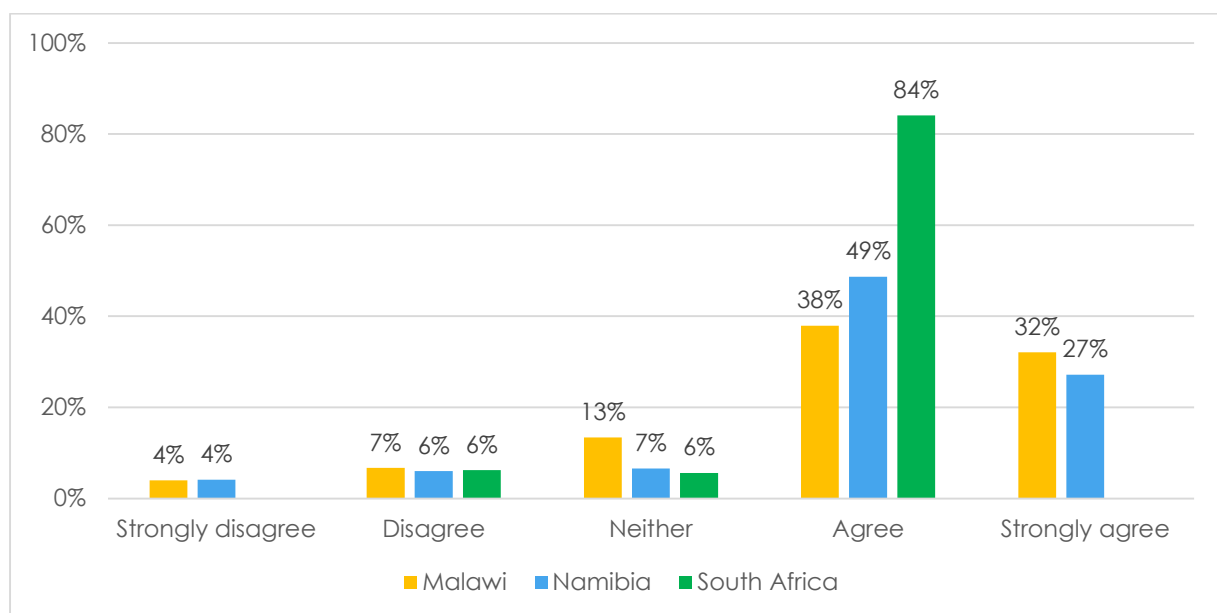
Substantive aspects of justice: Judges

As the arbiters of the law, judges play a pivotal role in the substantive outcomes of court cases over and above the procedural aspects of justice described above. Therefore, we asked court users about their perceptions of how judges apply the law. We start by investigating whether judges are perceived to understand and apply the law correctly. Overall, we see that South African judges are seen to perform best (84% [strongly] agree), followed by judges in Namibia (76%) and Malawi (70%). Given that the application of the law is a highly technical exercise, and an evaluation of how well this is done requires some expert knowledge, one might be hesitant to put too much weight on the responses of lay court users.

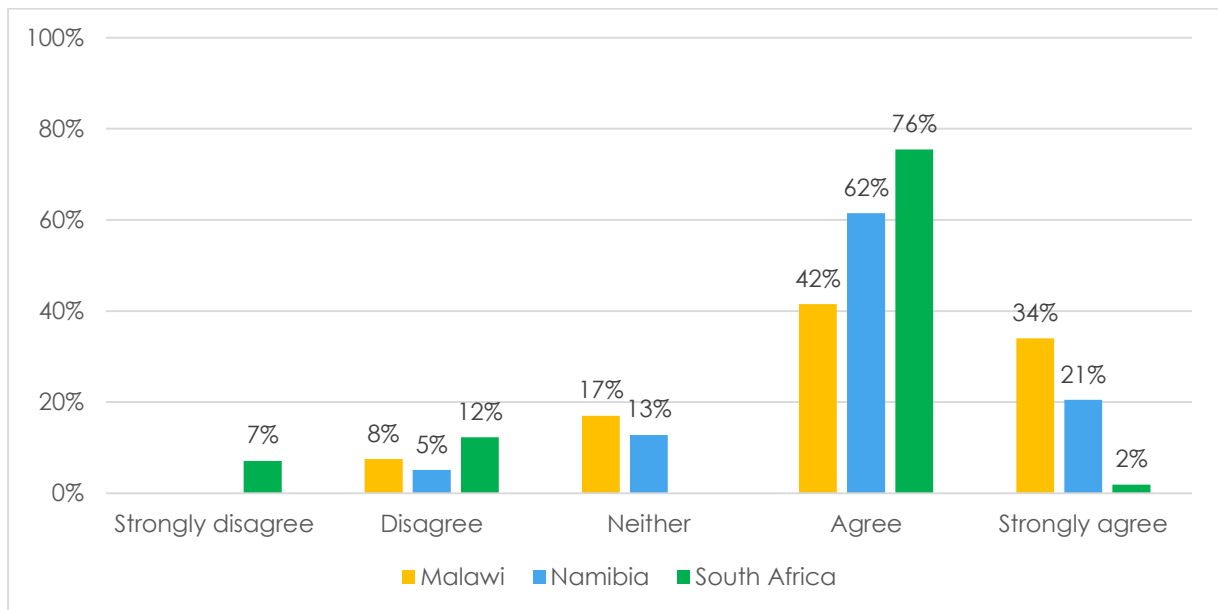
Therefore, we also asked legal professionals the same question (**Figure 23, Panel B**). On average, the responses from legal professionals provided a remarkably similar picture, with only a 6-7 percentage point difference across a combined “Strongly agree” and “Agree” category. Interestingly, South African legal professionals had the highest share of respondents who disagreed outright with the statement (19%) out of all groups, and the only group of legal professionals that was less positive compared to lay court users.

Figure 23: Judges understand and apply the law correctly | Citizens (Panel A) and Legal professionals (Panel B)

Panel A



Panel B



Note: Missing columns = no response in this category

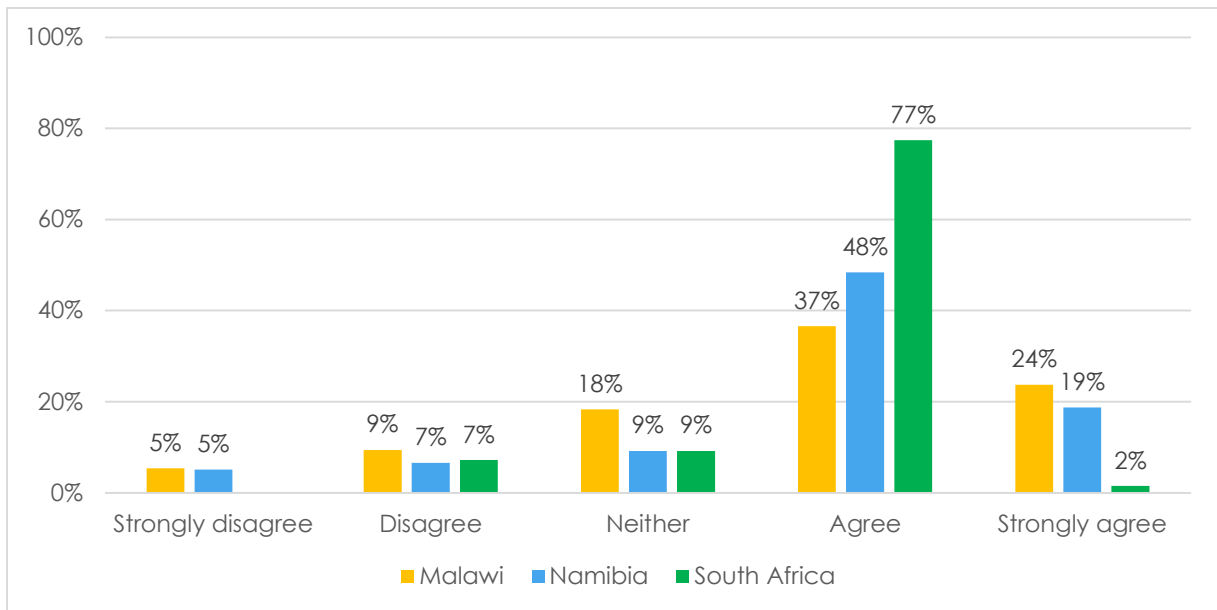
In addition to asking about judges' technical knowledge of the law, we also asked a second question that probes issues of personal bias. Specifically, we asked respondents to agree or disagree with this statement: "Judges don't let their personal feelings influence their decisions". Once again South African lay respondents were the most positive with four out of five (79%) respondents (strongly) agreeing. In contrast, in Malawi, only 3 out of 5 (61%) felt the same way. Unlike in the previous question, however, we see a drastically different evaluation between Malawian lay court users and legal professionals. Only 2 out of 5 (41%) of the latter said that judges make decisions without letting their personal feelings influence their decisions. This is also substantially lower when compared to Namibian (72%) and South African (74%) legal professionals (whose responses are very similar to their non-professional counterparts).

Based on this exploratory analysis, it is also possible to make some tentative suggestions about how future research could build on these findings. First, we have seen both consistency as well as meaningful differences between the evaluations of different types of court users. At this point, it is difficult to say whether the evaluations diverge because of real differences, or because of the explanations that judges provide when they apply the law. By including a question that probes this, it would be possible to use the results (similarities and differences) to develop a measure of

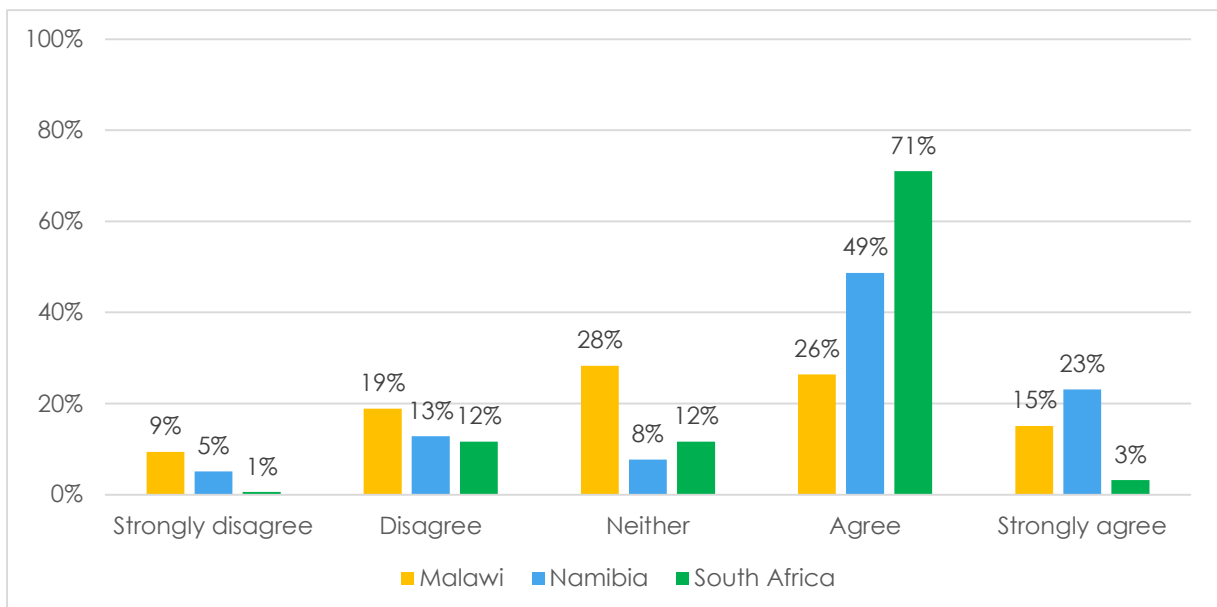
how the law is applied substantively. If the surveys are large enough, this could then be applied at court level.

Figure 24: Judges don't let personal feelings influence their decisions | Citizens (Panel A) and Legal professionals (Panel B)

Panel A



Panel B



Note: Missing columns = no response in this category

Corruption

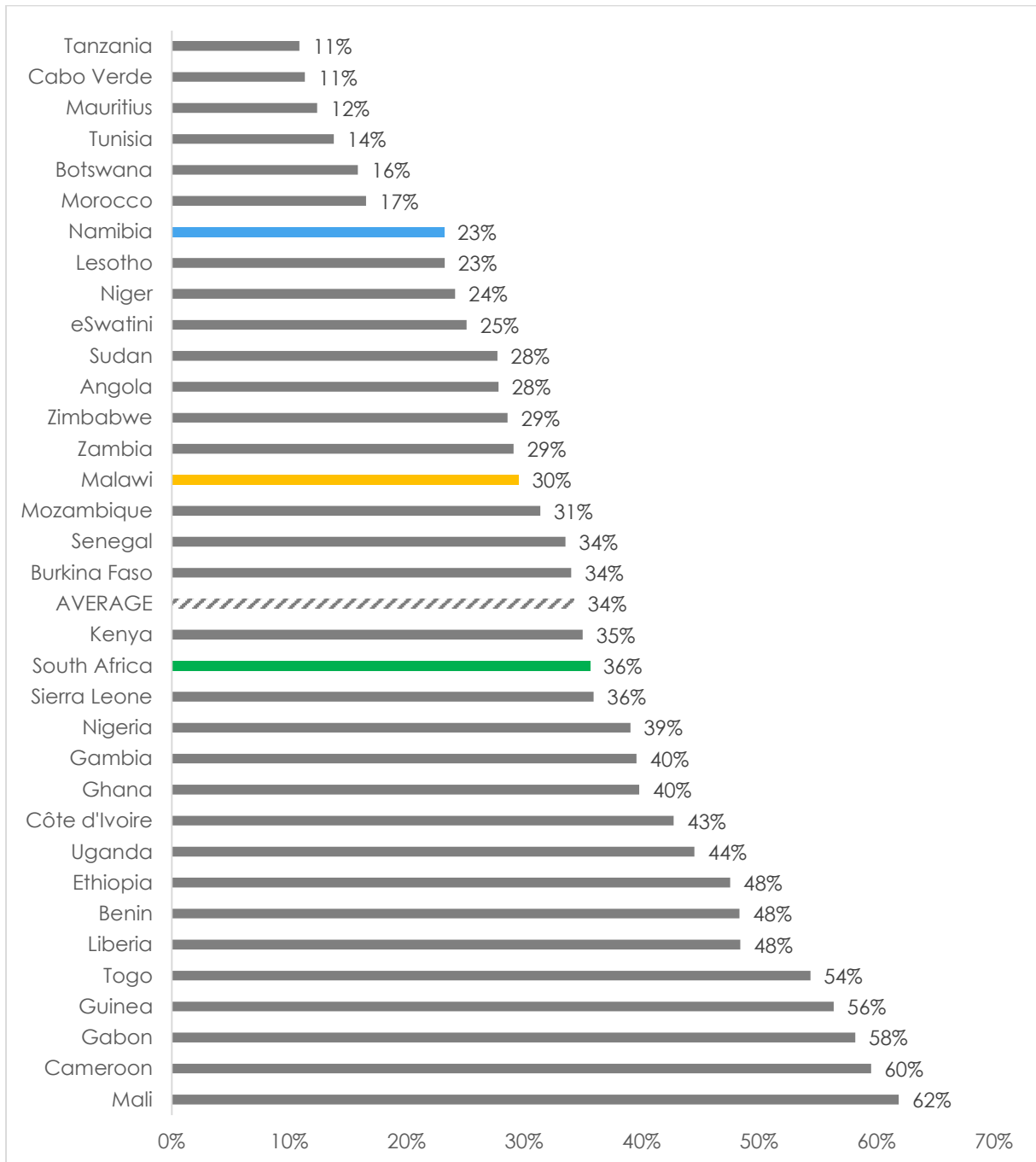
The United Nations Office on Drugs and Crime (UNODC) has remarked that:

“It is widely understood that “corruption in the justice system – whether actual or perceived – poses a real threat to confidence in the rule of law.”¹⁸⁷

Therefore, we now turn to a comparison of these two dimensions by employing Afrobarometer as well as court user data. To contextualise the findings, we start, once again, by locating perceptions of corruption in Malawi, Namibia and South Africa in relation to other countries on the continent. Afrobarometer regularly asks the following question: “*How many of the following people do you think are involved in corruption, or haven’t you heard enough about them to say: Judges and Magistrates?*” with the following response options: “None”, “Some of them”, “Most of them” or “All of them”. As can be seen in **Figure 25**, Africans differ significantly in their evaluations of judges and magistrates in their countries. On the one end, only 1 in 10 respondents in Tanzania (11%), Cabo Verde (11%) and Mauritius (12%) say that most or all judges and magistrates are corrupt. On the other end, 6 out of 10 respondents in Gabon (58%), Cameroon (60%) and Mali (62%) are of the view that most or all judges and magistrates are corrupt. Two of our focus countries – Malawi (30%) and South Africa (36%) – are close to the continental average, while Namibians (23%) are somewhat less of the opinion that their judicial officers are corrupt.

¹⁸⁷ UNODC, 2021.

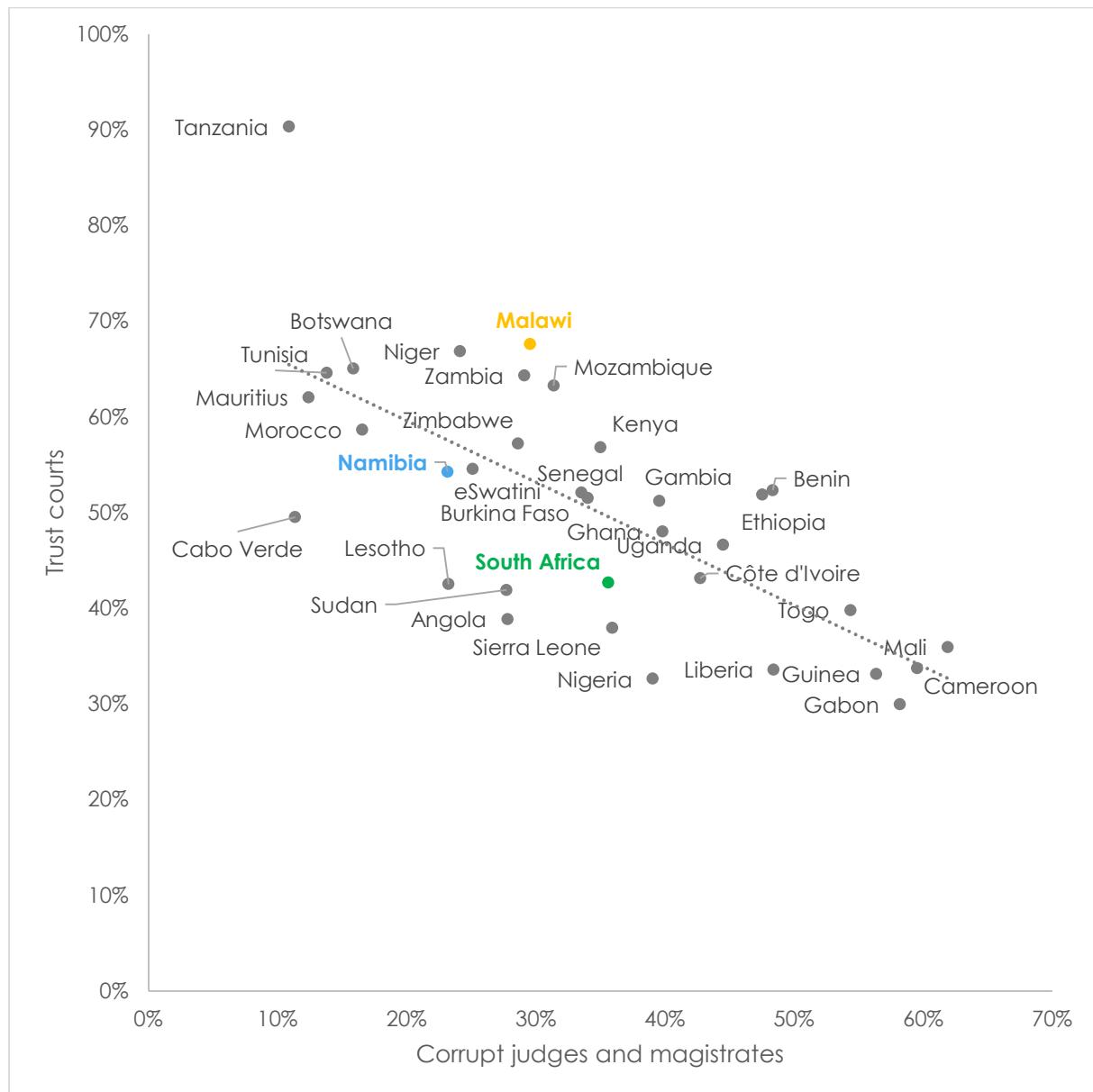
Figure 25: Corrupt judges and magistrates (most / all of them) | 2019/2021 | 34 countries



Source: Afrobarometer

Respondents were asked: How many of the following people do you think are involved in corruption, or haven't you heard enough about them to say: Judges and Magistrates? Response options: None, Some of them, Most of them, All of them. Bars show % Most / All of them.

Figure 26: Corrupt judges and magistrates and trust in the courts | 2019/2021 | 34 countries



Source: Afrobarometer

Previous analyses have shown that the type of general trust that citizens have in an institution such as the judiciary is often strongly correlated with citizens' perceptions of corruption, specifically among the key actors in these institutions.¹⁸⁸ As can be seen in **Figure 26**, we can observe a similar pattern in the 2019/2021 Afrobarometer data. Countries in which citizens view the majority of judges and magistrates as corrupt also have less trust in the courts. What is interesting to note for the purpose of

¹⁸⁸ Logan, op cit.

our focused comparison, however, is that Malawians display higher levels of trust in the courts than Namibians, even though they are also more likely to say that judges and magistrates are corrupt. This suggests that other factors can also have substantial influence on citizens' evaluations of the courts. While a more detailed analysis of this relationship is beyond the scope of this analysis, previous research has shown that perceptions of whether the president, military and police adhere to the rule of law, as well as geographic location, and partisanship and attitudes towards democracy shape citizens' trust in the courts.¹⁸⁹ Further research could explore to what extent these and other factors, such as the impact of landmark judgments, play a role in South Africa, Namibia and Malawi.¹⁹⁰

“Across all three countries, judges and magistrates are perceived as less corrupt than elected officials (local government councillors, members of parliament, Office of the Presidency) and civil servants (including police).”

The evaluation of perceived corruption among judicial officers across countries, can be complemented with a comparison to other state actors within each country. In the previous analysis of trust in the different branches of government, we already saw that the judiciary fared best in Malawi and South Africa but was less trusted than the presidency in Namibia. When focusing on perceptions of corruption, the picture is quite similar. Across all three countries, judges and magistrates are perceived as less corrupt than elected officials (local government councillors, members of parliament, Office of the Presidency) and civil servants (including police).¹⁹¹

It is worth pointing out that the police – the other group of officials in this comparison that is crucial for the proper functioning of the justice system – is consistently perceived as the most corrupt. The difference between the two groups varies from 13 percentage points (Namibia) to 20 percentage points (Malawi). A positive interpretation of these gaps would be that citizens do not view all actors within the justice system as the same. A more cautious interpretation of the results would

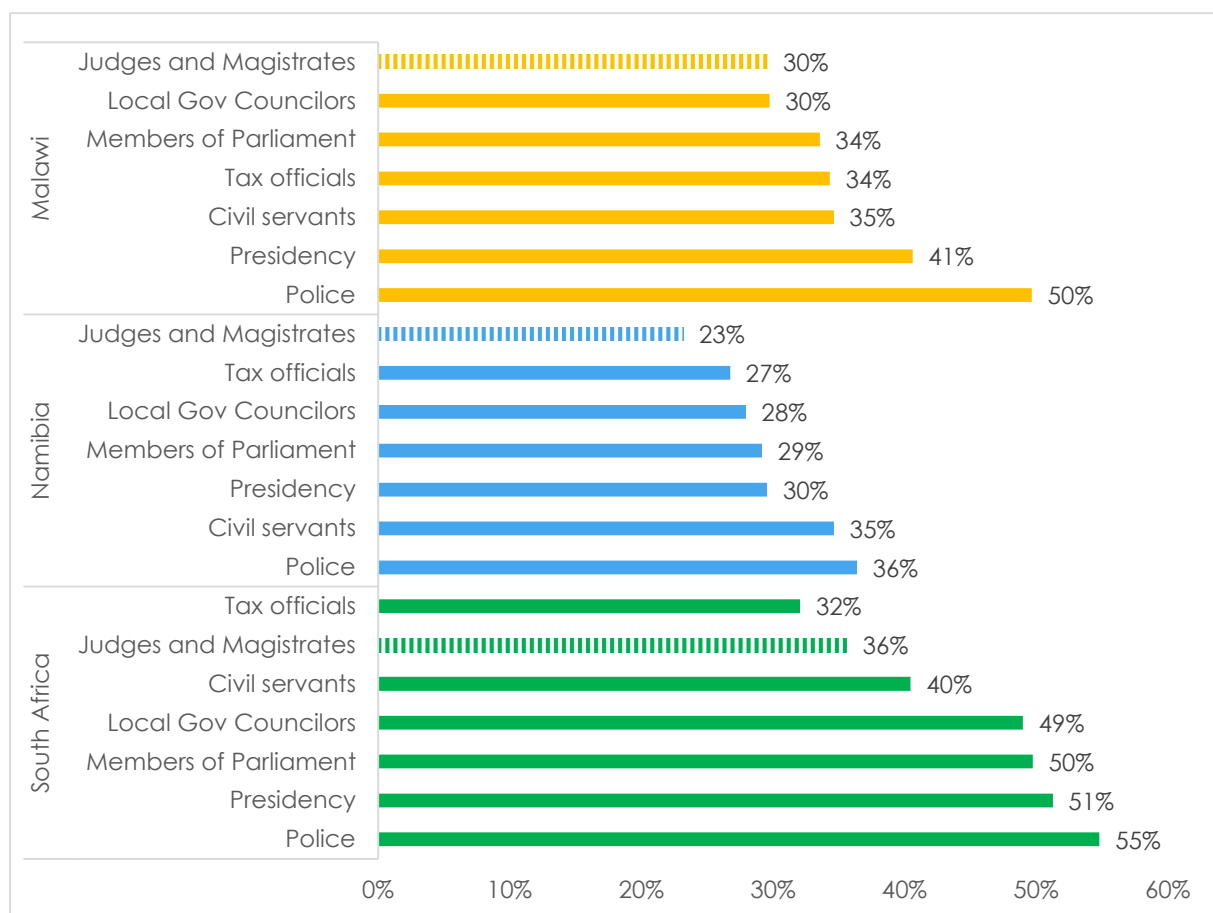
¹⁸⁹ Krönke, 2018.

¹⁹⁰ See Kerr and Wahman, 2021.

¹⁹¹ The only exception to this pattern is the perception of tax officials in South Africa. This is not entirely surprising, as it enjoys high levels of public confidence within South Africa, and its officials are perceived among the least corrupt tax officials in Africa (Isbell, 2017).

highlight the various levels of vulnerability to the reputation of judges and magistrates. Arguably, the larger the gap between court officials and the police, the more likely it is that, over time, citizens could become more cynical in their views of other stakeholders in the justice system.

Figure 27: Corrupt judges and magistrates (most / all of them) | 2019/2021 | 34 countries



Source: Afrobarometer

The previous paragraphs have illustrated how the perception of corruption poses a real threat to the confidence in the rule of law. However, what are the experiences of those who do go to the courts? Have they been asked to participate in corruption? If so, how would they respond to it, and who would they report it to, if at all? To find answers to these questions, we return to the court user survey.

The positive finding is that only 5% of the Namibians and South Africans who were interviewed at the courts reported that they, or someone they know, had to pay a

bribe, give a gift, or do a favour for a court official to get the assistance they needed. In Malawi, this number was higher (14%), though the smaller sample size of the court user surveys compared to the Afrobarometer surveys does not allow us to put too much weight on the country differences for this question in the court user survey. The broader question remains, however. How can we reconcile the huge differences between the perceived levels of corruption from the Afrobarometer data and the comparatively low levels of reported corruption from court users?

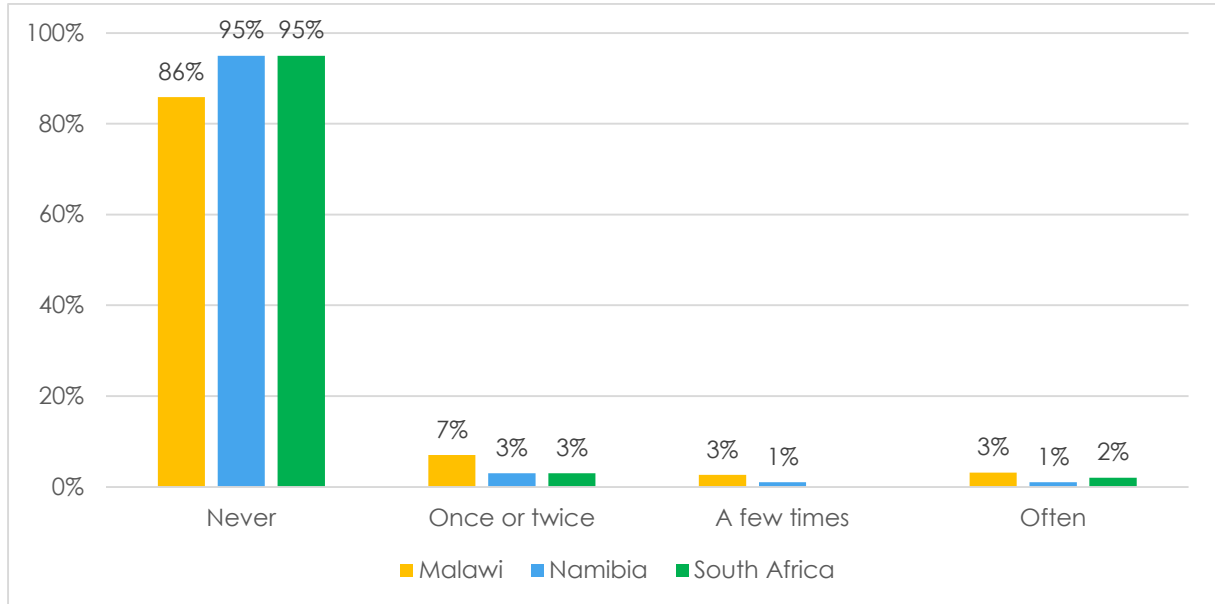
Part of the answer to this question lies in the scope of corruption that the two questions examine. The Afrobarometer question asks about corruption in a broader sense (including the skewed allocation of cases, or aspects of grand corruption), not just the transfer of a bribe, gift or favour. Moreover, the court user survey question only asks about respondents' personal experience, and the experiences of people they know, while the Afrobarometer question asks about all magistrates and judges in the country. Thus, even if the same person was asked both questions, one would likely get different responses. Indeed, in 2014/2015, Afrobarometer asked the same question we asked in our court user survey to citizens who had contact with the courts in the five preceding years. At the time, 1% of Namibians and 5% of South Africans who had gone to the court reported paying a bribe, giving a gift or doing a favour for a judge or court official to get the assistance they needed from the courts, while 24% of Malawians reported the same.¹⁹² In short, the findings from the earlier Afrobarometer survey are broadly consistent with the findings in our three court user surveys.

The court user survey also goes beyond the findings of the Afrobarometer data in several ways. First, we can compare the results of lay court users' experiences with responses from legal professionals. In Namibia, only 5% of professionals (2 out of 39) reported they paid a bribe or similar to get the assistance they needed – an identical share to that reported by lay court users. By contrast, in South Africa, 11% of legal professionals (17 out of 155 respondents) admitted to having to engage in this type of behaviour, while Malawi showed an even higher share of legal professionals reporting such behaviour (17 out of 53 respondents, or 32%). Looking at the Afrobarometer and court user survey data as a whole, the Namibian courts seem to

¹⁹² Logan, 2017.

suffer from the least amount of corruption, while the issue is more widespread in Malawi and South Africa.

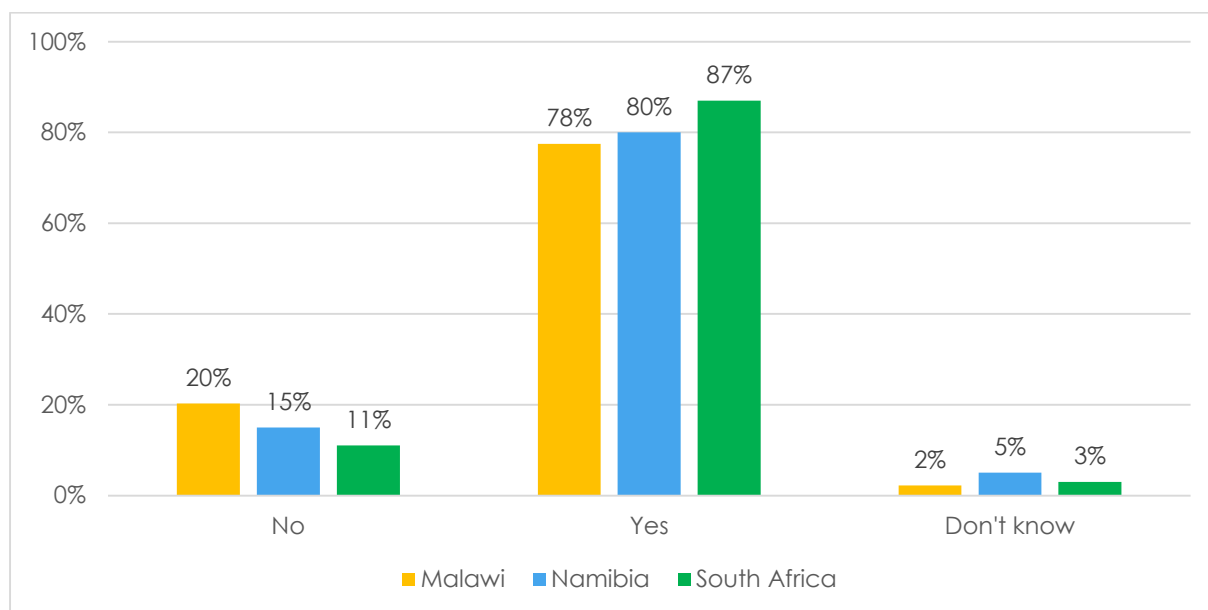
Figure 28: Asked to pay a bribe, give a gift or do a favour for a court official



Source: Court User Survey. Note: Missing columns = no response in this category

What happens once a court user is asked to engage in corrupt behaviour? The answer to this question matters a great deal, as it goes to the heart of individual and institutional accountability. If those who are exposed to corruption feel empowered to report illicit behaviour, the judicial system has a better chance of self-correcting in the long run. Thus, we asked court users several questions about reporting corrupt behaviour. First, we asked: Would you report requests for a bribe, gift or favour? Overall, between 78% and 87% of respondents said they would do so.

Figure 29: Would you report the request for a bribe, gift or favour?



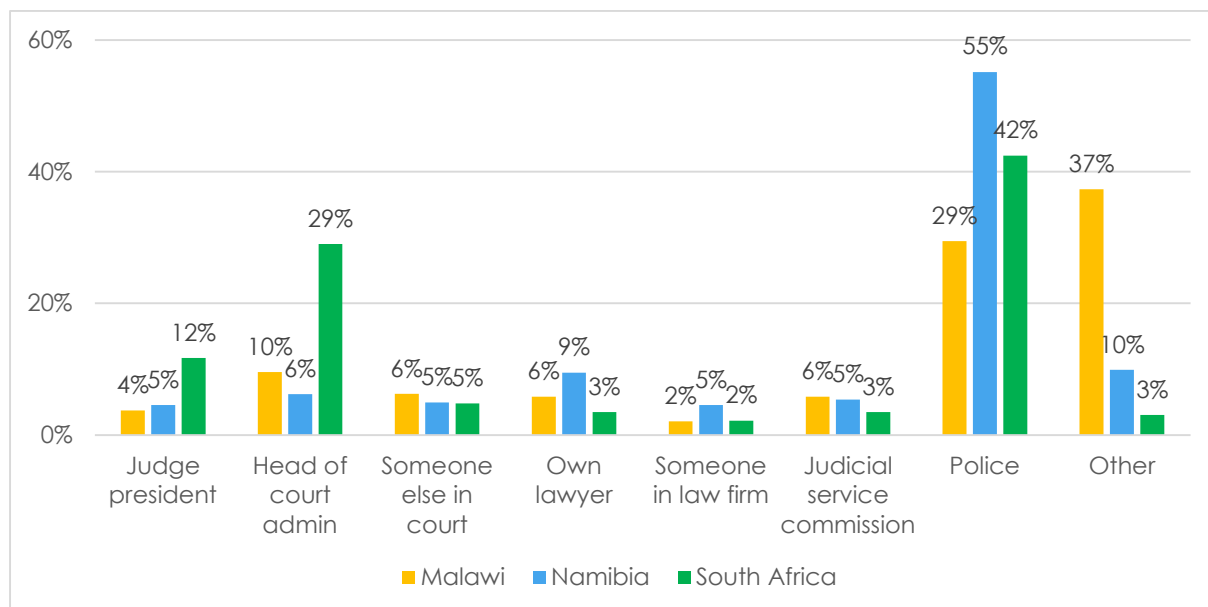
Source: Court User Survey

Because it is socially desirable, and at the same time not costly to say yes to a question like this, we also asked two follow-up questions. If the respondent said that he/she would report this behaviour, we asked who they would report it to. If the respondent said that he/she would not report the behaviour, we asked why they would not report it. As one might expect, most court users in Namibia and South Africa said that they would report this behaviour to the police. In Malawi, however, only 29% said that they would report it to the police, while 37% said they would report it to someone who was not on the list of options provided in the survey.¹⁹³ In South Africa, a surprisingly large share of lay citizens said that they would also report it to the Judge President or the head of the court administration. These were also the top two answers among professional court users in South Africa, and among the top four in Namibia. In Malawi, only the head of court administration was in the top four ("Other" (1), "Police" (2), "Someone else in the court" (4) were the other top answers). This shows that citizens rely on a relatively small list of actors to report corruption, while the range of options is slightly larger for professional court users. Given that the latter are also more familiar with the court system, this is understandable. While this question maps the possible pathways of accountability,

¹⁹³ Unfortunately, there were no follow-up questions that would allow us to probe who these respondents had in mind.

the answers to the next question provides some insight into why some respondents might not approach any of these different actors.

Figure 30: Who would you report the request for a bribe, gift or favour to?



Source: Court User Survey

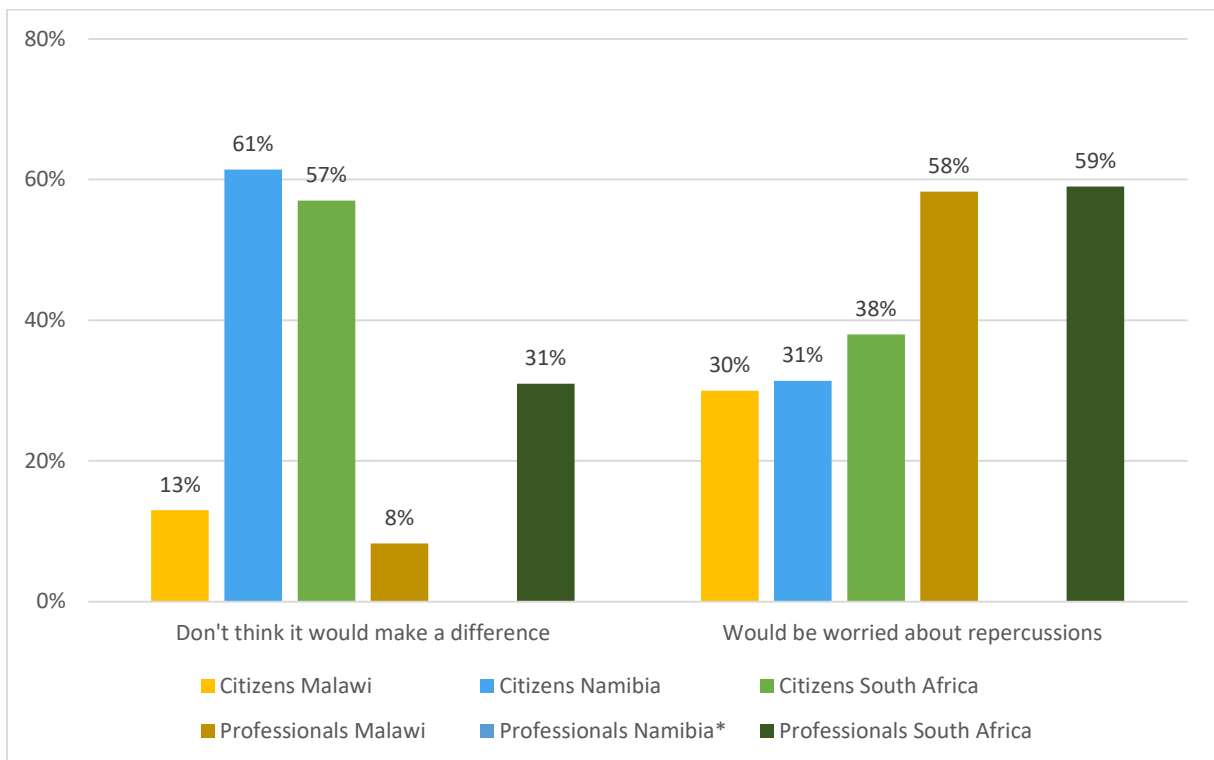
Among those who said that they would not report if they were asked to pay a bribe, give a gift or do a favour for a judge or court official, 13% of lay court users in Malawi said that it would not make a difference. Similarly, 8% of professionals said the same thing. By comparison, far more respondents in Malawi were worried about potentially negative repercussions of reporting any corrupt behaviour. This significantly decreases the possibility of vertical accountability being exercised effectively. Additionally, a large share of Malawian lay court users said they did not know where to report it (46%). Assuming that these were not citizens who were too scared to talk about potentially negative knock-on effects, this is a surprisingly large number of people who might benefit from additional information about what to do when faced with a difficult situation like this.

By contrast, the number of respondents who said they did not think it would make a difference is much higher among lay persons in South Africa (57%) and in Namibia (61%), while South African legal professionals are equally as worried about reprisal as their Malawian counterparts.¹⁹⁴ These results suggest that there is a pressing need to

¹⁹⁴ Unfortunately, the number of respondents in this category among Namibian professionals was too small to be analysed.

take steps to assuage concerns about the feared negative repercussions of reporting corrupt behaviour, which may even require reforms of the institutions in question. The number of lay court users who felt that reporting would not make a difference, and were unaware of who to report to, suggests that a public information drive in all the countries would be beneficial. It would also be helpful for instances where corruption was successfully prosecuted and sanctioned to be publicised.

Figure 31: Why would you not report the request for a bribe, gift or favour?



Source: Court User Survey

Note: The number of respondents in this category among Namibian professionals was too small to be analysed.

THE JUDGES' PERSPECTIVE

Judges are self-evidently central figures in the judiciary, and yet relatively little is known about their views of the judicial system. This is in stark contrast to the other branches of government and their representatives, who are often the focus of public debate, and frequently contribute to these debates themselves through commentary, speeches and interviews (such as interviews of Members of Parliament, cabinet ministers, or presidential speeches). To a large extent, this difference is rooted in professional norms. The common notion that judges should speak only through their judgments makes it more difficult to know what judges think about the state of the judiciary. Yet, their perspectives on what is happening in the courts are an important aspect of evaluating the state of the judiciary. Do judges regularly have to deal with interference from other stakeholders? Do the High Courts have the necessary physical infrastructure and human resources to operate effectively and efficiently? What are the major challenges for the individual courts and, more broadly, for the judiciary? In this section, we marshal interview evidence from 52 interviews with High Court judges to provide new insights on these issues.¹⁹⁵

Interference

At the beginning of this report, we highlighted the importance of public confidence in the courts as well as the variation of public support for the judiciary vis-à-vis other branches of government over time. In this section, we focus on the actual as well as the potential for interference in the affairs of the judiciary by other stakeholders. To provide some comparative context for this analysis, we rely on expert evaluations from the Varieties of Democracy (V-Dem) project. Although the data is far from perfect, it nevertheless provides a useful reference point in addition to the public opinion data that we introduced earlier in the report. Specifically, it allows us to gauge whether judges are able to resist (attempts of) interference from government. V-Dem experts are asked the following question:

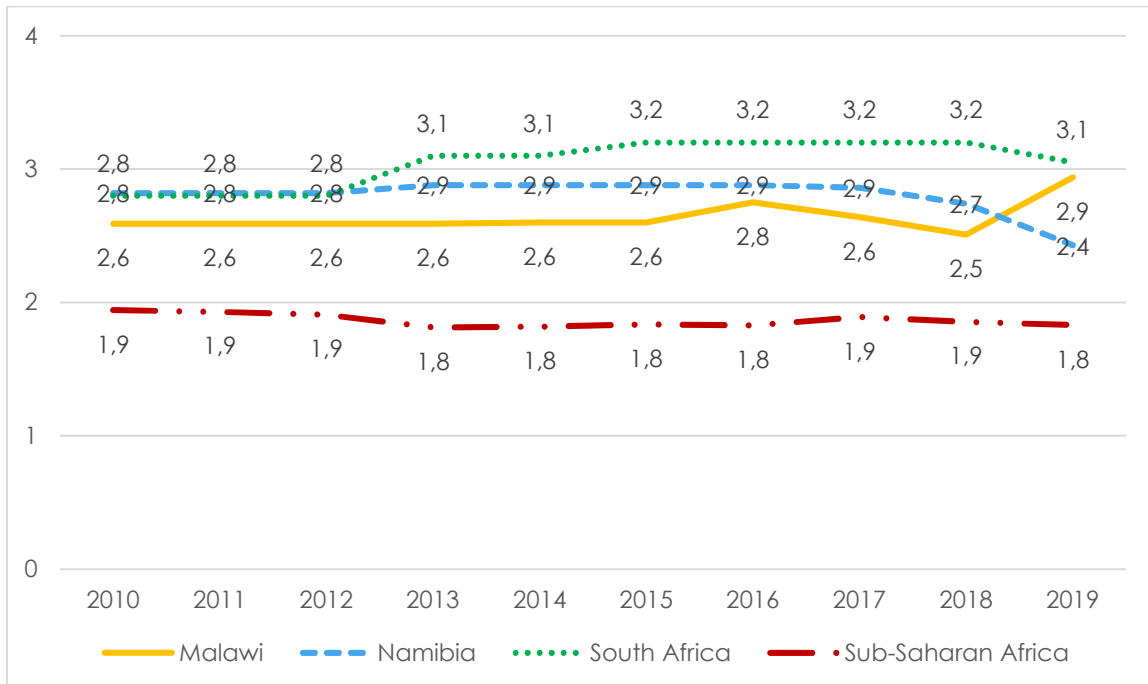
¹⁹⁵ We conducted interviews with 16 (out of 35) judges in Malawi, 6 (out of 24) in Namibia, and 30 (out of 245) in South Africa.

“When judges not on the high court are ruling in cases that are salient to the government, how often would you say that their decisions merely reflect government wishes regardless of their sincere view of the legal record?”

“...judicial officers in Malawi, Namibia and South Africa have consistently been deemed more independent for these politically salient cases than the average judicial officer on the continent.”

The response options are “Always” (0), “Usually” (1), “About half the time” (2), “Seldom” (3) or “Never” (4). As can be seen from the data in **Figure 32**, judicial officers in Malawi, Namibia and South Africa have consistently been deemed more independent for these politically salient cases than the average judicial officer on the continent. Moreover, according to V-Dem experts, South African judges have been scored on par, or more independent than, their peers in Namibia and Malawi. The differences between the three countries were modest in 2010 but started to vary more from 2013. Unfortunately, the V-Dem data set does not provide any additional justifications for the country scores. Thus, we cannot say with any certainty why experts saw an improvement in the way judges decided politically salient cases in Malawi between 2018 and 2019, while experts in Namibia saw a deterioration in the same period. Were these expert evaluations coloured by the fish rot case in Namibia and the election case in Malawi? Or are these changes based on a systematic review of politically salient court decisions? While we cannot answer these questions, the data we have collected allows us to shed light on an important related issue i.e., who is most likely to interfere with the decision-making of judges?

Figure 32: Independence of High Court judges and magistrates when deciding politically salient cases | 2010-2019



Source: V-Dem

In the interviews, we asked High Court judges whether there had been any significant/severe interference from: 1) The executive (President's office or cabinet ministers), 2) Legislators, 3) Members of the judiciary, 4) Private business / Others (e.g. police, prosecutors, lawyers) over the past two years.¹⁹⁶ Rather than capturing the outcomes of decisions (as done by V-Dem), we were interested in possible interference at an earlier stage. We asked this question for two separate reasons. First, considering that we asked the very individuals who would write the judgments, questions about the attempts of interference are likely to yield qualitatively more accurate responses by reducing response bias. Second, asking about the different sources of interference also allows us to gain a deeper understanding of the potential threats to judicial independence.

In order to systematically compare the attempts of interference, we relied on the typology developed by Llanos et al. (2016) who identified two types of informal interference – direct and indirect – as well as various *degrees of severity* across these

¹⁹⁶ The past two years covered the period from approximately mid-2019 to mid-2021 and thus overlapped with the evaluation period for V-Dem.

types of interferences. However, we expand the range of stakeholders by also including other actors (eg private business and other members of the judicial system). The analysis of the interview transcripts revealed substantial differences both within and across countries along these dimensions. We start by providing several illustrative examples for the different categories of interference, before providing a more quantitative comparison.

First, the most direct and severe case of interference occurred in Malawi. Following the landmark decision of the courts to annul the results of the 2019 presidential election, the government attempted to force Chief Justice Nyirenda and the country's next most senior judge, Justice Edward Twea, to leave office by placing them on leave pending retirement. This decision was justified by the claim that the Chief Justice had accumulated more days of leave than the remainder of his working days before retirement. However, an injunction preventing the move was granted.¹⁹⁷ Chief Justice Nyirenda ultimately retired on reaching the mandatory retirement age in December 2021.¹⁹⁸

¹⁹⁷ Charles Pensulo, "Forced retirement of Malawi's chief justice before June election blocked" *The Guardian* (16 June 2020). Available at: <https://www.theguardian.com/global-development/2020/jun/16/forced-retirement-of-malawis-chief-justice-before-june-election-blocked>.

¹⁹⁸ Duncan Mlanjira, "Malawi Judiciary Announces Official Retirement of Chief Justice Andrew Nyirenda - Replaced By Justice of Appeal Mzikamanda" *Nyasa Times* (28 December 2021). Available at <https://allafrica.com/stories/202112280031.html>.

Table 6: Examples for the types and severity of interference

		TYPE	
		Direct/Public	Indirect/Private
SEVERITY	High	<i>Early retirement of CJ (Executive)</i>	<i>Pressuring colleagues (Judiciary)</i>
		<i>Budget allocation (Executive & Legislature)</i>	<i>Shared social circle (Private individuals) Private conversations (Legislators)</i>
	Low	<i>Comments in fish rot case (Advocates)</i>	<i>Pressure to defer based on seniority (Judiciary)</i>

*Note: categorisation is based on typology developed by Llanos et al. (2016)
Source: Judge interviews*

At the other end of the spectrum (direct, not severe interference), we have cases where advocates and other actors in the justice system engage in rhetorical attacks on judges accusing the latter of merely following public opinion, rather than the law. Between these two extremes, we find direct interference at the institutional level. For example, in Malawi several judges complained about how the allocation of the national budget has a negative effect on judicial independence:

“The issue of not giving the Judiciary the moneys or let me say the resources, with which to run the Judiciary. I would say in a way that's interference because we as Judiciary have made pleas so many times asking the executive to give us a portion of the budget so that we can run on our own affairs. We can't run the Judiciary if we don't have money. So, in my view, that's interference.”¹⁹⁹

In addition to issues of budget allocation for the judiciary, several judges also mentioned issues with the conditions of service:

“[...] in view of conditions of service for judges because that has been the biggest thorn in Malawi. [...] What is in place in the constitution, what is in place for condition of service for the judiciary in my view is perfect but to get

¹⁹⁹ Interviewee 3, Malawi.

that implemented is the difficult part and that's where you would have independence of the judiciary undermined either by parliament or by the executive when they are not willing to implement the law as it is."²⁰⁰

The judges in our sample were also exposed to different forms of indirect, or private forms of interference from various stakeholders. Importantly, not all of the informal attempts of interference have come from actors outside the judiciary. For example, in Malawi a judge recounted:

"[I] am aware of incidences where internally there is some unwelcome pressure being put on our colleagues to do certain things and it's quite shocking to some of us."²⁰¹

The potential impact of such behaviour on judicial independence and the endurance of democracy are substantial for both members of the public as well as those inside the judiciary:

"[...] if people cannot see the judiciary as being an independent institution of justice, it undermines their confidence on the outcomes on the judicial processes. So that can undermine the whole democratic project where people don't feel like their disputes in courts are being decided on merit. It can be very dangerous but also it can remove the confidence with which the Judges themselves exercise their mandate. They may be trying to ensure that they don't do things that can annoy the powers that be."²⁰²

A less severe form of private interference can occur through unofficial communication based on perceived social obligations, or private communication:

"The people who sometimes come to you, in a very sketchy and tricky way are the people you go to church with. Sometimes they will say "there is this issue in court". I think they sort of trust you because you pray together. It can be complicated. It's not often but it happens maybe once in five years. And they don't come that openly".²⁰³

²⁰⁰ Interviewee 5, Malawi.

²⁰¹ Interviewee 10, Malawi.

²⁰² Ibid.

²⁰³ Interviewee 4, Malawi.

“So, sometimes you will find that an MP from your home can phone you, but I think they test the waters. They will not directly be saying it but you can read between the lines that this is not genuine.”²⁰⁴

Another mild form of private interference can occur between judges in shared spaces. It can take the form of unwarranted or harsh criticism of a judgment in front of colleagues, or the cultivation of a norm of deference to senior judges. As a South African judge explained:

“Judge X joins the bench and sits in a case, an appeal case with another judge who is our senior and they have a difference of opinion on how to decide the matter and the junior judge feels pressured to defer to the senior judge on the basis of ‘he is my senior, I must take a lead from that person.’ And that is fundamentally wrong.”²⁰⁵

To quantify the judges’ experiences of interference, we combined the above-described categories as follows. First, for each judge the direct and indirect types of interference were grouped together. Next, we ranked judges’ experiences on a scale from 0 to 2. If a judge did not report any interference for a particular actor a score of 0 was allocated. If a judge reported at least one incidence of low/medium severity, we coded this as 1, while severe cases of interference were coded as 2. To arrive at a country level score for each actor, we then averaged the scores of the 16 Malawian, 6 Namibian and 30 South African judges. **Figure 33** displays the results graphically.

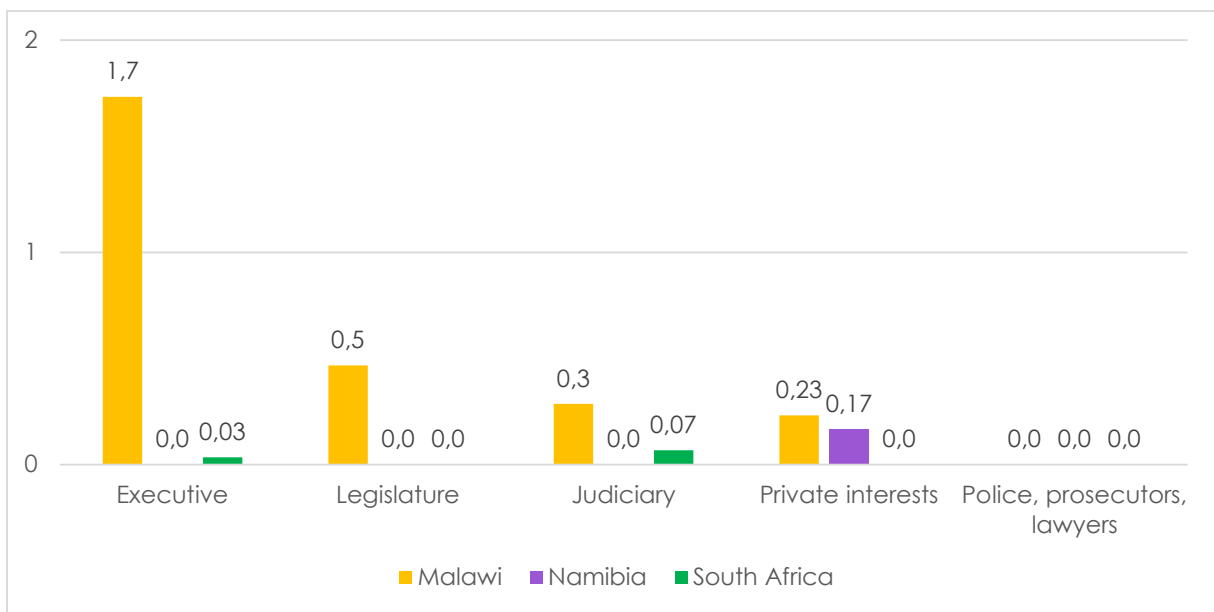
The data reveal clear country-level differences. While Malawian judges have reported severe cases of interference, the same was not the case in Namibia or South Africa. Furthermore, Malawian judges reported moderate forms of interference from the legislature/legislators and members of the judiciary, while these activities were virtually absent in the accounts of Namibian and South African judges. The absence of interference from the police, prosecutors and lawyers seems to be universal across the three countries. These findings expand on previous research by highlighting the variation of judicial interference across the continent, even among more democratic countries in Africa.

²⁰⁴ Interviewee 2, Malawi.

²⁰⁵ Interviewee 20, South Africa.

What are the consequences of these (attempted) interferences? On the one hand, the temporary forced retirement of Chief Justice Nyirenda represents a single high-profile attempt of interference. The silver lining in this case could be that the judiciary's response and the widespread public reaction will make it less likely that such a severe direct attack will repeat itself in Malawi. On the other hand, the less severe institutional interference via budget allocations is unlikely to be resolved in the near future. It is to this issue that we turn to next.

Figure 33: Interference from other actors



Source: Judge interviews

Salaries and pensions

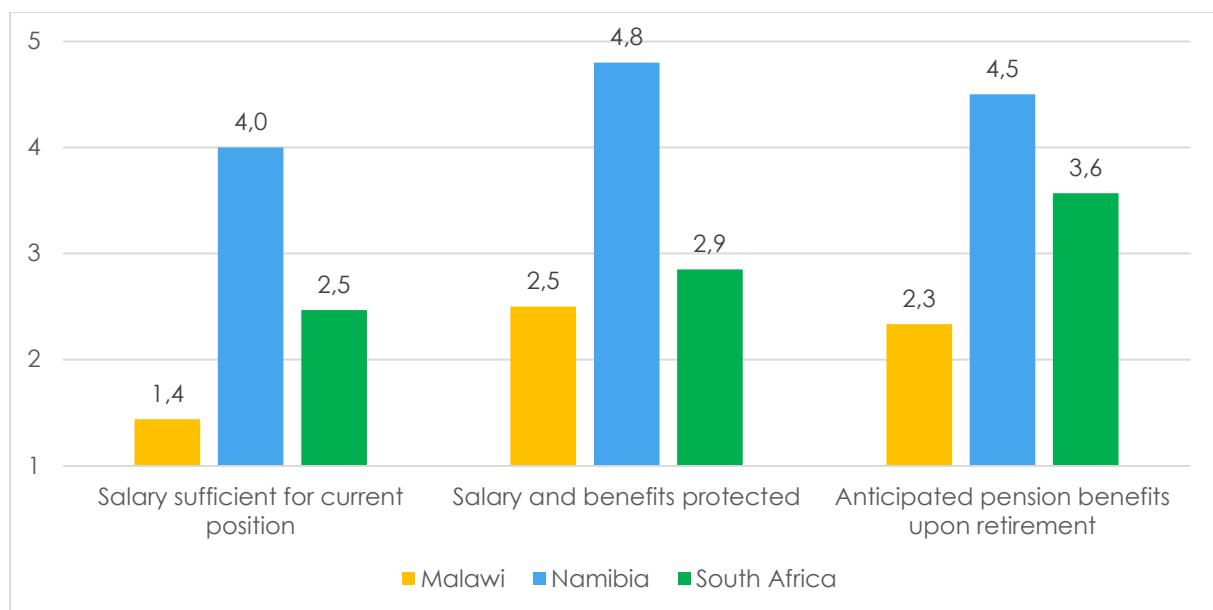
Are the salaries, benefits packages and retirement arrangements of High Court judges in the three countries adequate? The financial security of judges is a key component of judicial independence, and in assessing the strength of the judiciary. The implications of inadequate judicial salaries are potentially serious, as it has been identified as a leading cause of judicial corruption.²⁰⁶ Should they be higher to reduce the likelihood of bribery attempts from interested parties? In the previous

²⁰⁶ UNODC, *Strengthening Judicial Integrity Against Corruption* (2001). Available at https://www.unodc.org/documents/nigeria/publications/Otherpublications/Strengthening_Judicial_Integrity_Against_Corruption_2001.pdf.

section, we observed that several Malawian judges complained about budget allocation issues and the role of the legislature in this process. To probe this issue further, we also asked judges to rate their current salary and benefits, as well as anticipated pension benefits on a scale from 1 (low) to 5 (high).

Overall, Namibian judges were the most satisfied with the current remuneration and anticipated benefits upon retirement. None of the six judges scored below average (3) for any of the three aspects. One interviewee summed up the current situation like this: “I think, I would feel safe when I retire. At this juncture. At some point we were worse off. But that has been corrected recently.” Thus, even though judges frequently complained about long working hours, they do, overall, feel adequately compensated. High Court judges in Namibia receive an annual salary of N\$1 248 636 (equivalent to US\$83 855).²⁰⁷

Figure 34: Rating of salaries, benefits and pensions



Source: Judge interviews

The same levels of satisfaction are unfortunately not present among judges in South Africa and, especially, Malawi. The latter are particularly dissatisfied with their current remuneration, and only slightly more optimistic about their benefits and retirement

²⁰⁷ Judges Remuneration Act 18 of 1990, Second Schedule.

compensation. In fact, 11 out of 16 judges (69%) scored their current salary as very insufficient (1). The most referenced issue is the discrepancy between how judges' salaries should be adjusted to the rising costs of living according to the law, and what happens in practice:

“[O]ne of the things that we are complaining about is that, our salary and the way it's supposed to go up and every so often is supposed to be guaranteed by the constitution but that's not being enforced. No government has ever. You know Judiciary expenditure is supposed to be protected, our salaries, our emoluments are supposed to be protected but I sometimes go months without receiving my entitlements. I can go 4/5 months without any fuel which is part of my salary. So obviously the law is not being followed and our entitlements our whatever. Sometimes the salary will come in very late.”²⁰⁸

Although judges do appreciate the country's budgetary constraints, they are also acutely aware that their budget is also subject to political power dynamics in the executive and the legislature:

“[...] we depend on Parliament, we don't review our own benefits. It is Parliament that does that. There are sometimes you find a good parliament sometimes a parliament that is leaning too much towards the executive branch which perhaps believe that the Judges are up to no good. The Judges are trying to fight government. So, the executive will connive with Parliament especially if the ruling party is in majority in parliament. You present your review and then you know they will slow them down. They will not take them or they will give you too little.”²⁰⁹

Many South African judges are also dissatisfied with their current compensation due to a lack of cost-of-living adjustments over the past several years, and the high costs associated with children's education and other family-related expenditures. On average, however, their evaluations are more positive than those of their Malawian counterparts. One quality that unites many judges from these two countries is their strong civic mindedness despite their dissatisfaction, viewing their conscience as their best protection against interference, not their salary.

²⁰⁸ Interviewee 13, Malawi.

²⁰⁹ Interviewee 11, Malawi.

Efficiency and operations

Do High Courts have the necessary resources to operate effectively and efficiently? How are judges coping with the current workload? Answers to these questions tap into the related, but distinct aspect of the everyday operations of the courts. Before asking judges to evaluate the quality and quantity of support staff and other stakeholders in the judicial system, we asked them about their case load over the previous two years.

More than 80% of judges said that their workload was either consistently high or increasing, while only a minority described it as manageable or decreasing. The reasons behind these assessments vary, though a greater awareness of their rights and better access to the courts among citizens are the most frequently cited reasons. Moreover, judges frequently lament that the increasing case numbers are not matched by a concomitant increase in the number of judges, or the speedy filling of vacant judicial positions. While the former has been particularly prevalent in Malawi, the latter is a common issue in both Malawi and South Africa. In Namibia, we could identify two distinct trajectories. Recent appointments in the civil stream seem to have decreased the overall caseload somewhat, while the opposite was the case in the criminal stream.

A separate issue that was also mentioned in all three jurisdictions is the impact of review proceedings. An increase in the number of magistrates has also increased the demand for reviews that have to be conducted by High Court judges. Although judges and court managers have come up with several innovative solutions to make the caseload more manageable at the court level, these successes need to be complemented by an increase in structural support. A good example of this is the availability of dedicated researchers at each court.

Research support

Across all three jurisdictions, judges can, to various degrees, rely on dedicated researchers who regularly assist with looking up specific legislation and finding specific cases or other precedents in preparation for writing judgments. Virtually all researchers have a law degree, and some have even been admitted to the bar or side bar. However, not all judges who were interviewed made use of the service

provided by the researchers. Although the reasons for this vary across countries, courts and among individual judges, we also found several common complaints. The following list provides an overview of some of the more prominent issues:

Ratio of judges to researchers: Unlike in Namibia, where the ratio was generally 1 judge to 1 researcher (interviewee 6, Namibia), in Malawi and South Africa, judges shared a pool of researchers. The ratio varied from court to court and could range from 1:3 (Malawi) to more than 1:20 (South Africa). Occasionally, judges also mentioned that they contacted researchers at other courts, or at a university, though this was the exception rather than the rule.

A common complaint among Malawian and South African judges was that researchers are overworked and unable to meet the deadlines set by judges. As one Malawian judge noted:

“In [Court X] we have one research assistant versus about eight judges. I still remember research work that I gave him months ago, up to now I haven’t received any feedback.[...] If I wait for him, it means my judgment is going to be delayed.”²¹⁰

However, such delays do not necessarily apply to all judges equally. Several judges mentioned that researchers would prioritise tasks given to them by senior judges, resulting in further delays for tasks given by more junior colleagues.²¹¹

Turnover and rotation of researchers: Based on the interview evidence, it seems that across all three countries, the turnover among researchers is quite high. This creates different types of challenges. On the one hand, it might prevent the development of institutional knowledge because researchers might leave the judiciary.

“They are lawyers. Of course, maybe, some of them are those that maybe they have studied elsewhere but they are yet to get their practising license. But the problem is immediately they get their practice license, others have left. They would rather go and practise elsewhere. It’s been a challenge.”²¹²

Where researchers do not leave the court, they might still rotate between different divisions. Although this provides additional and valuable experience for researchers,

²¹⁰ Interviewee 3, Malawi.

²¹¹ Interviewee 18, South Africa.

²¹² Interviewee 8, Malawi.

it also requires investments of time from judges as they need to establish new working relationships with researchers and upskill them.

“The problem is that they rotate from time to time. You keep on training. You are constantly busy training them. And I have had one, two, three, four... I am now on my fifth researcher since they have been introduced [3-4 years ago].”²¹³

Hiring and training of researchers: As one might expect, the skill and professionalism among researchers varies substantially across courts. Representing one end of the spectrum, a judge describes the ideal scenario of how researchers can support judges' work:

“So I would send an instruction out [...]. [A] senior researcher [...] will in fact read up on it and give me a summary, or in fact a synopsis of the literature that is there. So that is fantastic. If I had done that myself it would have been a day or a day and a half's research. So I get that and digest it in thirty minutes. So that is wonderful from that point of view.”²¹⁴

However, a frequent complaint among judges has been that researchers understand the basics, but do not have a great deal of experience. Representing the frustrations of judges across all three countries, one South African judge commented:

“I find that the quality of the researcher is not at the level of my needs. They understand the basics. You can't go into anything intricate. If you ask them, they are not going to say: 'Oh, but there is this' or 'Oh, but there is that'. It is more a functional thing, than what I believe a true researcher does.”²¹⁵

While the lack of research skills is to a significant extent attributable to a lack of experience among researchers, it is also connected to the hiring processes. One way to improve the quality of researchers has been to include judges in the hiring process. This has shown some positive results and improved the overall quality of the pool of researchers at some courts.²¹⁶

²¹³ Interviewee 4, Namibia.

²¹⁴ Interviewee 20, South Africa.

²¹⁵ Interviewee 25, South Africa.

²¹⁶ Interviewee 10, South Africa.

Taken together, these issues frequently deter judges from utilising the available research support, the quality of which is frequently perceived as unpredictable. However, these challenges also provide opportunities for the different courts to learn from each other, not only within, but also across our three countries. They also illustrate the importance of programmes that offer additional research support to judges, as well as further training and capacity-building for researchers.²¹⁷

Professionalism and skill of other court stakeholders

Judges are far from the only stakeholders who are important to the functioning of the legal system at High Court level. Not only do they rely on administrative support staff, they also depend on other stakeholders when adjudicating cases, such as prosecutors, lawyers and interpreters. In a previous section of the report, we analysed how legal professionals as well as lay court users view these different stakeholders. We also inquired whether citizens view judges as competent, fair and good communicators. In this subsection, we focus on the judges' views. Specifically, we asked judges to rate: 1) Prosecutors' understanding of the case they present, 2) Lawyers' understanding of the case they present, 3) The competence and professionalism of the interpreters (as distinct from administrative support staff), 4) The competence and professionalism of other administrative support staff.

We asked judges to provide ratings for each question on a scale from 1 (very bad) to 5 (very good).²¹⁸ The data in **Figure 35** shows the average score across all judges in Malawi, Namibia and South Africa for each of the stakeholders. The last set of columns ('Overall') displays an aggregate score for all stakeholders in the respective countries. Comparing the responses reveals several interesting findings. First, as a group, prosecutors get the best score across all three countries (average = 3,6),

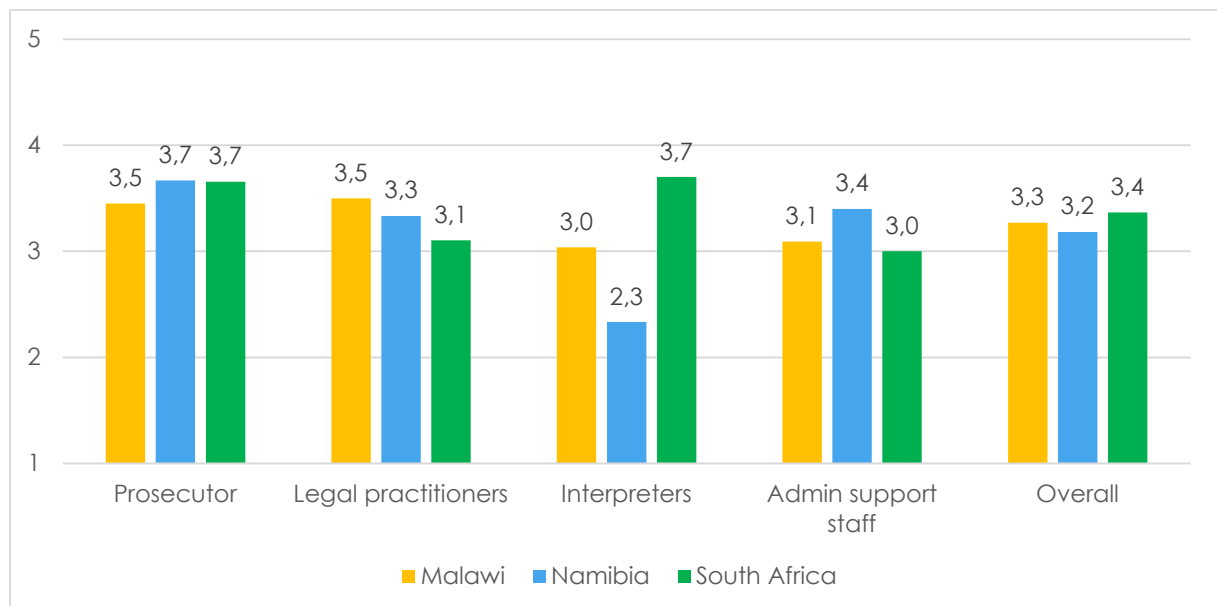
²¹⁷ The DGRU offers a programme to provide research support to judges through "virtual clerks", postgraduate students at the University of Cape Town who provide supervised research in response to requests for support from lawyers and judges. See <http://www.dgru.uct.ac.za/student-opportunities>. The Judicial Institute for Africa (JIFA), a partnership between the DGRU and the Southern African Chief Justices' Forum, provides university – certified short courses to judges and legal researchers. See <http://www.jifa.uct.ac.za/home-247>.

²¹⁸ In cases where judges did not provide a numerical score, but provided a clear answer, we translated their response into a numerical score. If this was not possible, we excluded their evaluation for the specific stakeholder.

while court interpreters score lowest (average = 3,0).²¹⁹ While they have the lowest average score across countries, we also see the largest variation in this group (Namibia = 2,3 and South Africa = 3,7).

Second, the variation across stakeholders varies by country. In Malawi, judges provide relatively similar scores ranging from 3,0 to 3,5 (0,5-point difference), while the scores diverge more in South Africa (0,7-point difference) and Namibia (1,5-point difference). Third, and somewhat surprisingly given the differences in material resources across the three countries, the overall country differences across the judges' ratings are negligible (3,2 – 3,4).

Figure 35: Evaluations of court stakeholders



Source: Judge interviews

Although most judges did not provide detailed additional information for these evaluations, some of them still offered insightful justifications for their scores. For example, in Malawi judges frequently mentioned the lack of formal training for interpreters and admin support staff. In part, this seems to be due to low requirements regarding formal education in the job descriptions for many of these jobs. In Namibia, it seems to be at least in part an issue of funding. Interestingly, the

²¹⁹ Averages for each type of stakeholder is calculated averaging the three country scores, rather than the total number of interviews. This means that the six judges in Namibia count as much as the 16 judges from Malawi, and the 30 judges from South Africa.

effect this issue has on the Namibian system differs depending on the type of case, as one judge pointed out:

“Competent and qualified interpreters are not prepared to work at the rate prescribed by the Government. So, we have a challenge there, in the sense that, in criminal cases it is really a problem. In civil cases, parties can bring their own interpreters. So, on the civil side it is not a problem. But on the criminal side it is really a very big problem. It is a challenge.”²²⁰

Even among the most favourably rated group (prosecutors), judges' responses pointed to some substantial differences. While some of these might be based on experience, the differences often seem rooted in larger structural issues and institutional limitations, as this lengthy quote from a Malawian judge illustrates:

“I think it also depends on the category of the prosecutors. I have worked with prosecutors up to the level of the office of the DPP [Director of Public Prosecutions]. I have found the DPPs are very thorough but not all their officers may be that thorough. I am one of those who wrote letters some time ago to the DPP complaining about certain traits of their officers who came to court unprepared and I found it very frustrating. So those from the office of the DPP most of them I would say are very good including the DPPs that I've worked with. But when we talk about some police prosecutors, some I'm saying, they are not as good. What I have found out is that some of them are just sent to court, they don't know the elements of the cases that they are dealing with. They may not even know what to prove. [...] I find that there is a gap. And sometimes when I ask them, I remember once or twice I took even prosecutors from the office of the DPP into my chambers and I said, 'Can you explain to me what is happening?' And they would say honestly, 'I have just been given the file today. I don't even know what the file is about.' So, I would say, 'Why don't you ask for an adjournment. Go study the file and then we can start all over.' By the time the file is ready there is another prosecutor coming to court. So, they themselves you know are in short supply so they don't have enough time to prepare for a case. So those are some of the things that I have found so it might be a bit difficult to blame them because it

²²⁰ Interviewee 6, Namibia.

may also not be their own doing. But they find themselves in such situations."²²¹

Taken together, this suggests that while there are some issues that require additional resources in the form of better salaries or additional training, some reform can also be implemented in relatively cost-effective ways by studying the processes and workflows of other relevant institutions, and by updating and refining the hiring processes.

Major challenges

The preceding subsections have highlighted that the day-to-day experiences of judges across the three countries vary significantly. Not only do judges experience different types and levels of interferences with their work, but they also have diverging views on their salaries, benefits and pensions, as well as the level of support they receive from others at the courts. Though all these issues are important, anyone attempting to improve the state of the judiciary will face resource constraints, and thus, will be forced to prioritise some issues over others. In this section, we explore what judges say are the major challenges at their courts, as well as for the judiciary as a whole and that they think the leadership of the judiciary or the Ministry of Justice in their country should address.²²² We start by analysing the interview data for each jurisdiction individually, and then examine the similarities and differences across the three countries.

To quantify the interview responses and make them comparable across jurisdictions, we followed the same stepwise procedure for all judges. First, we recorded up to three responses from each judge for issues they highlighted at the court level, and a further set of responses (up to three) regarding the broader institutional level. Second, we grouped the issues into broader categories. This inductive process resulted in 17 substantive categories and one residual category ('other systemic issues') that allowed us to capture all issues across the 52 interviews. In total, judges

²²¹ Interviewee 3, Malawi.

²²² *In your opinion, what are the three most important problems that your court is facing that the [Office of the Chief Justice], or the [Ministry of Justice and Constitutional Development] should address? In your opinion, what are the three most important problems that the judiciary as a whole is facing that the [Office of the Chief Justice], or the [Ministry of Justice and Constitutional Development] should address?*

mentioned 247 issues – 129 at the court level, and 118 at the judiciary level. On average, this translates to 2,5 issues at the court level, and 2,3 issues at the judiciary level. **Figures 36, 37 and 38** display which issues were mentioned most frequently across both levels.

Among Malawian judges, four issues stand out: First, the insufficient number of court personnel such as clerks, secretaries and legal researchers (20%). Although judges describe the quality of their support staff as slightly above average, the judge: staff ratio was frequently deemed insufficient.

Second, judges also pointed to the high case load (17%). Although the complaint of increasing cases per judge was highlighted earlier, it is worth pointing out possible solutions to this problem as suggested by judges. For example, a revision of the law could allow the judiciary to shift some cases to Magistrates' Courts, particularly in respect of cases heard by judges on circuit courts. Since the costs per magistrate (and support staff) are lower than those of a judge (including support staff and travel to different locations), this could reduce the cost per case. Moreover, by increasing the share of professional magistrates, it might be possible to reduce the time judges spend on reviewing magistrates' cases.

A third common complaint was related to insufficient building infrastructure (17%). Although this varied somewhat at the court level, judges regularly raised the issue of having to share their courtroom with other judges. This often leads to scheduling issues as well as delays as some cases might take longer than the allotted time.

Lastly, judges also raised the issue of a limited budget for the judiciary as well as low salaries for judges (17%). These results echo several findings from previous sections which highlighted the indirect interference by the executive and legislative branches (regarding budget), and the related problem of high levels of dissatisfaction among judges about their salary and benefits (and the lack of inflation adjustment).²²³ However, judges also pointed out different ways in which budgetary constraints not only affect their work, but also that of the prosecution services and legal aid. For example, judges scheduled to hear several cases on

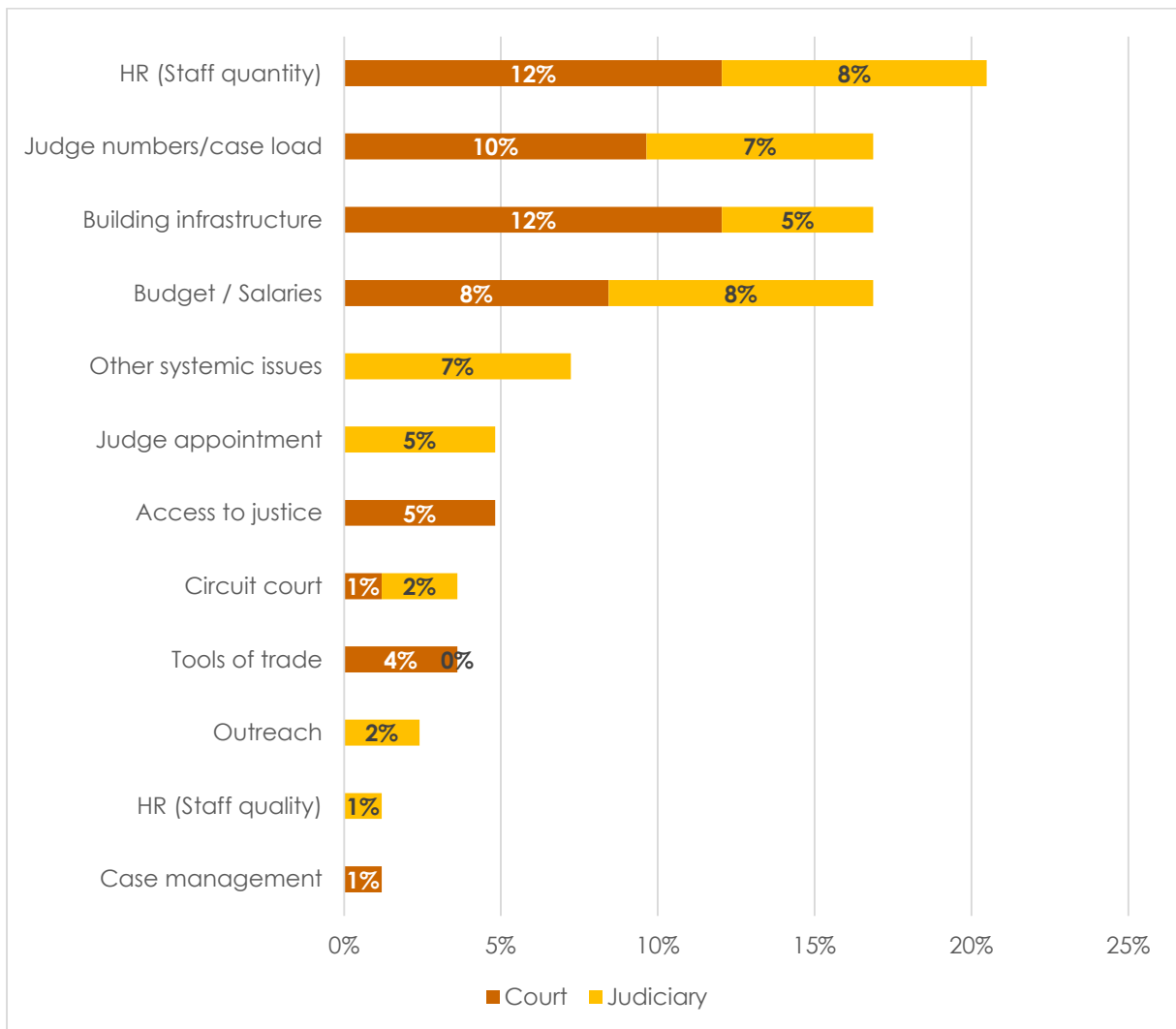
²²³ Although the issue of salaries is technically not the only issue that could be subsumed under the larger issue of budgetary constraints, we combined only these two as they were most frequently mentioned together. In contrast, 'HR staff quantity' and 'judge numbers/case load' were rarely explicitly connected to the budget.

circuit court sometimes do not receive the necessary funds on time. This then creates substantial knock-on effects, as described by one judge:

“So, you end up that you had set these cases to go but we cannot go. [...] and at the end of the day, people say ‘the judiciary this, the judiciary that’ because the judiciary is not independent. So, if you fund for example the Director of Public Prosecution adequately. You fund maybe the Legal Aid adequately. You don’t fund the judiciary adequately, these two will not cooperate because if the judiciary is not sitting because of lack of funding then the other two will not sit. The cases will collapse.”²²⁴

²²⁴ Interviewee 8, Malawi.

Figure 36: Malawi major challenges (courts and judiciaries)



Note: Overall N=83; Courts N=44; Judiciary=39. Six categories were excluded from this figure, because none of the complaints could be allocated to them.
 Source: Judge interviews

When aggregating the concerns of Namibian judges, we can also identify four major challenges. 22% of the issues were related to the tools of the trade. This includes both access to functioning laptops, as well as the availability of law reports and electronic services such as Jutastat. Several judges mentioned that they had to pay for access to the service using their personal funds, as the institutional subscription had run out.

A second recurring theme among the six interviewees was the shortage of judges in the face of the increasing workload. Although there have been some improvements

due to recent appointments, Namibia seems to struggle with a more structural issue that limits the speed at which this issue can be addressed.

“We do not have enough judges. But in our jurisdiction, it is not a question of that the powers that be, do not want, or is not giving attention. Our jurisdiction is also a very small jurisdiction. In South Africa, people want to become judges. In Namibia, it is the other way around. The senior counsel are not prepared to come to the bench. Because of the remuneration. Because they are better off financially in private practice than what you get in the public, as a judge. Unlike in South Africa, where for instance you get these people interviewed by the Judicial Service Commission, and so on, in Namibia, we beg senior counsel to consider, even acting, you know. They are not prepared to. And they are very few.”²²⁵

Unlike the first two major challenges that judges identified, the remaining two are attributable in large part to other stakeholders. Relating to the third theme, several judges mentioned how limited funding for legal aid and the appearance of lay litigants in court creates delays in court. Fourthly, judges also complained that legal practitioners too often do not adhere to court orders, and that some stakeholders (such as police officers and medical doctors) are not properly trained, which then creates delays during trial:

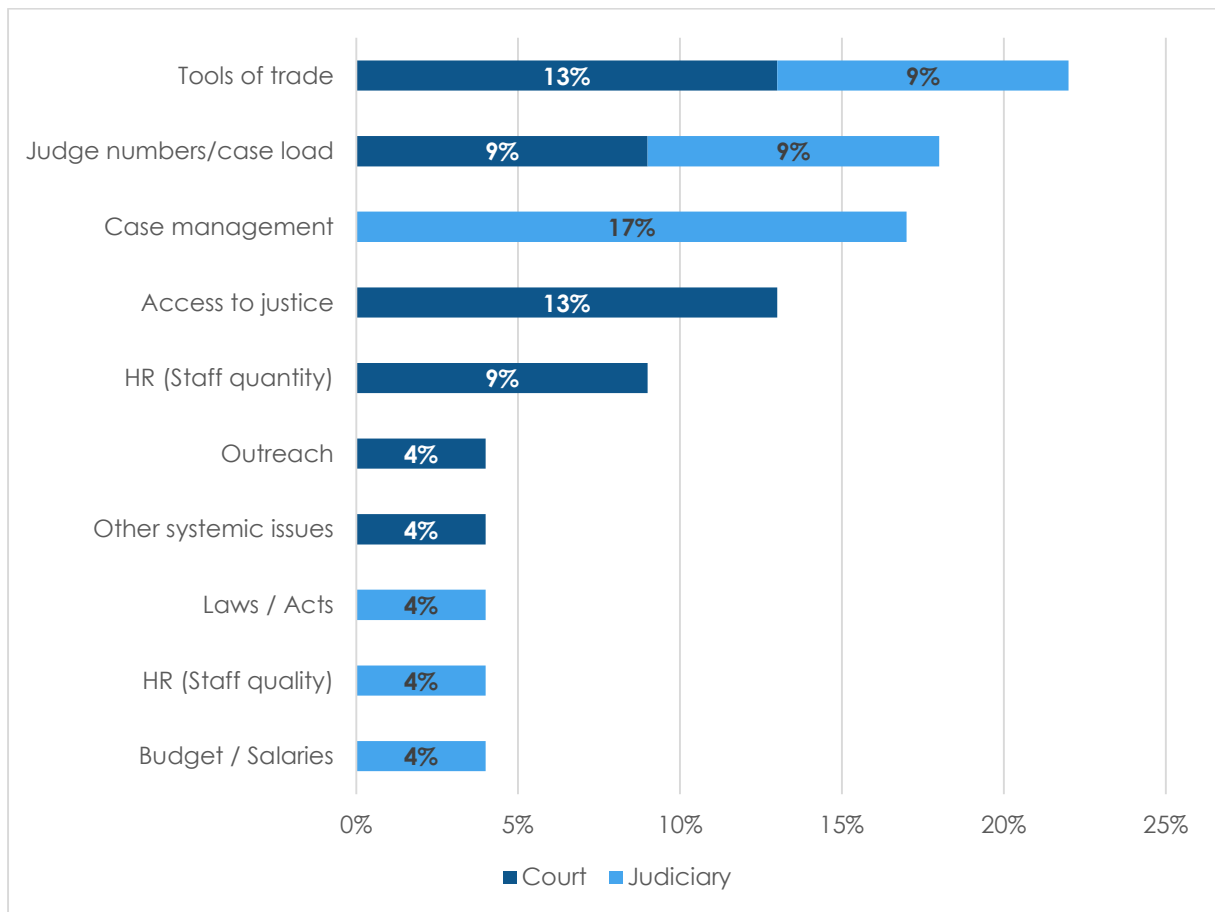
“If we could train police officers what to do in a situation when a person is arrested – the whole process. How to ensure that the accused's rights are protected from the beginning. That would save a lot of time during trials. If they follow a fair process. And if they know what not to do. That would really fast-track cases in the criminal stream. Another example is, if we could train medical doctors to... In rape and murder cases. What to do, how to complete the forms. How to... It would save us so much time. You know, if doctors understand to do in the matter of a rape being reported.”²²⁶

While addressing some of these issues require additional resources, others could be solved with relatively little additional funds through the enforcement of existing rules and better training for other stakeholders in the justice system.

²²⁵ Interviewee 6, Namibia.

²²⁶ Interviewee 2, Namibia.

Figure 37: Namibia major challenges (courts and judiciaries)



*Note: Overall N= 23; Courts N=12; Judiciary=11. Eight categories were excluded from this figure, because none of the complaints could be allocated to them.
Source: Judge interviews*

Compared to their peers in the two other jurisdictions, South African judges' identification of the judiciary's major challenges were more varied, with one outlier: tools of trade (22%). This issue became more salient as remote work and communication became a priority during the country's multiple lockdowns due to the Covid-19 pandemic. Insufficient online resources, as well as a poor digital infrastructure have not only made judges' work processes more cumbersome, but also increased the vulnerability of the institution more broadly.

“[I] don't have the necessary resources i.e., licence expired for Microsoft teams; suspended services for online Nexus (subscription not paid). Also with emails, there is a security breach somewhere, I lost all my folders and cannot access my judicial email address. Lack of IT system infrastructure and firewalls to prevent hacking and nothing is being done. For months I can't receive correspondence from attorneys. Personally, I am very scared to draw up my

draft judgments on a work computer and send the draft judgment to a colleague for their comments, especially if it's a high-profile case. Scared a hacker will get hold of it, too much at risk."²²⁷

"Fully functioning fast fibre Wi-Fi is a must, and up-to-date research facilities. Even getting the university to research difficult perspectives if really needed and should all be a priority."²²⁸

Complaints like these were by far the most frequent ones among South African judges. Though efforts have been made to improve the situation, most judges rely on personal networks to find ways around these issues (such as accessing case law by asking colleagues, friends and family members who work in the profession to share certain cases).

The second biggest issue for judges was the current state of the building infrastructure (12%). Complaints ranged from missing alarm systems or inadequate police protection for judges to broken air-conditioning systems. The latter is not a trivial concern. Many of the country's courts are located in places where temperatures regularly rise above 30 degrees Celsius. This not only affects judges in their chambers, but also everyone in the courtroom:

"The extreme conditions [...] make it physically uncomfortable for everyone, especially the witness. A physically uncomfortable (heat-fatigued) witness finds it hard to function properly, like recall facts particularly when already overstressed."²²⁹

Third, 1 in 10 (11%) complaints by judges criticized the communication and responsiveness of the Office of the Chief Justice (OCJ) with courts on several dimensions. For example, judges lamented that the OCJ "is staffed by people not skilled to deal with the needs of the judiciary"²³⁰ and "has an attitude of not helping/supporting the judges, and in being antagonistic towards judges who bring these matters [access to essential resources] to their attention".²³¹ One judge summarised the relationship between the High Courts and the OCJ as follows:

²²⁷ Interviewee 29, South Africa.

²²⁸ Interviewee 12, South Africa.

²²⁹ Interviewee 2, South Africa.

²³⁰ Interviewee 20, South Africa.

²³¹ Interviewee 21, South Africa.

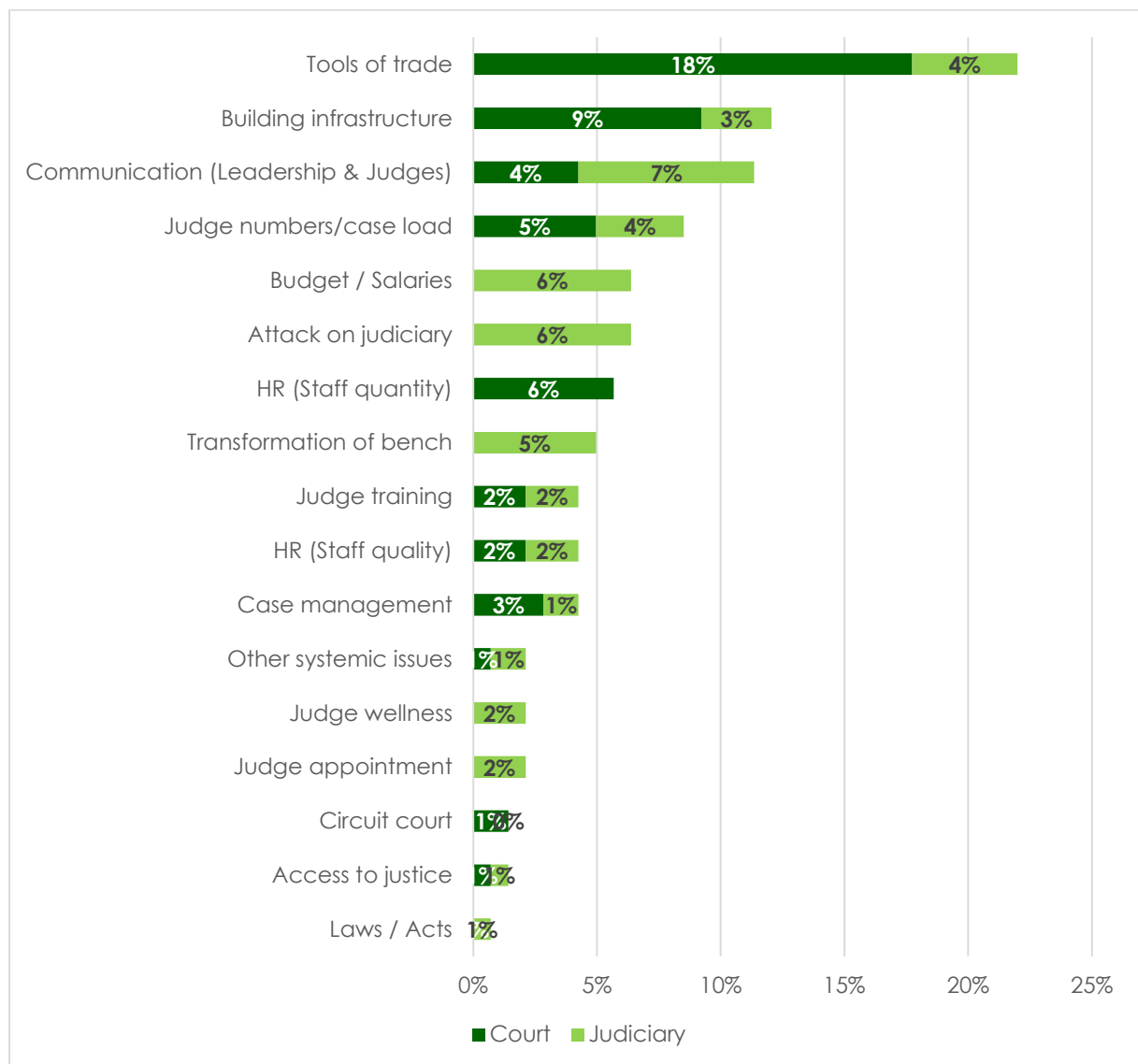
“A lot of the functions that have been performed provincially by the courts themselves, we have now got another tier of administration which frustrates rather than assists.”²³²

This is somewhat surprising. The OCJ was created to “provide administrative and professional support to the Chief Justice in carrying out his functions and duties, in particular as head of the judiciary”.²³³ It would have been expected that this would have included improving the internal organisation, operations and communication of the judiciary. However, the responses of the judges interviewed suggests that there is a need to re-examine how the OCJ can best serve the needs of the judiciary.

²³² Interviewee 25, South Africa.

²³³ Hassen Ebrahim, “Governance and administration of the judicial system” in Cora Hoexter and Morné Olivier *The Judiciary in South Africa* (2014), p. 101.

Figure 38: South Africa major challenges (courts and judiciaries)



Note: Overall N=141; Courts N=73; Judiciary=68. One category was excluded from this figure, because none of the complaints could be allocated to them.

Source: Judge interviews

Taken together, poor IT services and building infrastructure, as well as out-of-date research facilities make it difficult for judges to effectively complete their work. When combined with unresponsive leadership, it is difficult to see how these issues could be resolved in the near future. However, a new South African Chief Justice is due to be appointed in 2022. It is to be hoped that the new leader of the judiciary will make tackling these issues a priority once they are appointed.

Are there challenges that are germane to all three jurisdictions? Which problems rank low among all three countries, and which ones are particular to only one or two countries? In **Table 6** we compare the share of complaints per category across all three countries (combining the data from **Figures 36, 37** and **38**). We also calculated an overall average per issue category by averaging the country scores (weighing each country equally, rather than each response by a judge) in the last column.

By comparing the patterns for the issue categories across the three countries, we can make several observations. First, there is a certain level of concentration regarding the major challenges for the judiciaries. As can be seen in the last column, four of the 18 categories had an overall average of 10% or higher (tools of trade, judge numbers/case load, HR [staff quantity], and building infrastructure). By contrast, for nine categories the country average was 3% or lower (and 5% or lower in individual countries).²³⁴ Despite this concentration on a limited number of factors, however, only the “judge numbers / case load” issue received about 10% or more mentions in each country, making it the most ‘universal’ issue.

Second, most issue categories received a substantial number of mentions in one or two countries. For example, the issue of inadequate tools of trade were prominent in Namibia (22%) and South Africa (22%), but not in Malawi. While this does not mean that Malawian judges are content with the equipment they currently have, other issues are more pressing for these judges. One such issue they share with Namibian judges (case load), and one with South African judges (building infrastructure). A comparison of the interviewee responses reveals that the problems Malawian judges deal with are often more fundamental, but also more costly to resolve. While many South African judges requested air conditioning, and better internet, Malawian judges were concerned about having their own courtrooms.

Additionally, four issue categories were only prominent in one country (HR staff quantity [Malawi]; case management and access to justice [Namibia]; and communication between leadership and judges [South Africa]).

²³⁴ The categories include HR (staff quality), judge appointment, outreach, attack on judiciary, circuit court, transformation of bench, laws/acts, judge training, judge wellness.

Table 6: Comparison of major challenges in Malawi, Namibia and South Africa

Issue category	Malawi	Namibia	South Africa	Average
Tools of trade	4%	22%	22%	16%
Judge numbers/case load	17%	18%	9%	14%
HR (Staff quantity)	20%	9%	6%	12%
Building infrastructure	17%	0%	12%	10%
Budget / Salaries	17%	4%	6%	9%
Case management	1%	17%	4%	7%
Access to justice	5%	13%	1%	6%
Other systemic issues	7%	4%	2%	4%
Communication (Leadership & Judges)	0%	0%	11%	4%
HR (Staff quality)	1%	4%	4%	3%
Judge appointment	5%	0%	2%	2%
Outreach	2%	4%	0%	2%
Attack on judiciary	0%	0%	6%	2%
Circuit court	4%	0%	1%	2%
Transformation of bench	0%	0%	5%	2%
Laws / Acts	0%	4%	1%	2%
Judge training	0%	0%	4%	1%
Judge wellness	0%	0%	2%	1%
Total	100%	99%*	100%	100%

Note: Overall N= 247; Malawi N=83; Namibia N=23; South Africa N=141. Average is calculated by averaging country scores per issue category. *=Deviations from 100% is due to rounding of values. Red shading represents share of judges who mentioned the issue at the court or judiciary level.

Source: Judge interviews

What are the implications of these similarities and differences across the three jurisdictions for those who want to find solutions to these challenges? At a fundamental level, the answers to these challenges will require varying amounts of financial and human resources. In Malawi, increasing the number of judges and courtrooms, hiring and training new support staff, and increasing the salaries of judges all require a substantial amount of funding from the national budget. By contrast, several of the top challenges in Namibia and South Africa could be resolved through other means. For example, the challenges around case management (Namibia) and communication (South Africa) might be difficult because any solution will likely require the involvement of multiple stakeholders in the judiciary and the broader justice system, but the financial implications are likely to be less severe.

Coincidentally, this second set of issues is also limited to individual countries. Thus, the countries in question are likely to benefit a great deal by exchanging experiences with the other jurisdictions.

CONCLUSION AND RECOMMENDATIONS

Main findings

In this section, we highlight some of the key findings from the research set out above. We do not reiterate the detail of the findings here, but rather seek to highlight these points in order to frame the recommendations set out in the next subsection.

Citizen views and lived experience of the law

Court users generally have a positive view of their interactions with judges and court officials across all three countries, with Malawian respondents feeling best treated. Respondents in Malawi and Namibia were more likely to say that the court system treats people the same. Variations in perceived treatment on gender and poverty grounds were noted.

It was notable that there were similar responses among citizen court users and legal professionals on the application of the law by judges. While South Africa had the best results, all three jurisdictions fared well. These findings should give comfort to judges in all jurisdictions that their work is acknowledged and appreciated by users of the courts.

On perceptions of bias, it is notable that while this did not seem to be a big issue in South Africa, in Malawi there was a notable difference in perceptions between lay court users and professionals.

Safety is a significant issue for both court users and judges in South Africa.

On the issue of corruption, one of the most striking findings in the report is the big difference in perceived levels of corruption between the Afrobarometer survey and our court user survey. While this can be seen as encouraging for the judiciary, in that users of the courts do not perceive corruption as a big issue, it does raise questions about how the gap to perceptions of the general public might be closed. It is also notable that concerns about potential repercussions are a potential inhibitor to the reporting of corruption.

Judges' perspectives

While Namibian and South African judges did not report significant instances of interference, Malawian judges made some reports of severe interference. Malawian judges reported moderate interference from the legislature and other judges, which were virtually absent in South Africa and Namibia. Encouragingly, no significant interference from police, prosecutors or lawyers was reported in any of the three jurisdictions.

While Namibian judges were most satisfied with their salaries and pensions, South African and especially Malawian judges, were not.

Increases in workload were highlighted to some extent in all jurisdictions. In South Africa and Malawi, it was reported that these increases were not matched by increases in the number of judges, or the speedy filling of vacancies.

One way to address increases in workload is through assistance from researchers and other support staff. The ratio of researchers to judges is very good in Namibia, but less so in Malawi and South Africa, with reports of researchers becoming overworked and not meeting deadlines. There are also issues with high turnover, and variations in skill and professionalism. As a result of these issues, some judges are deterred from utilising research support which may otherwise be able to assist them.

There was an interesting uniformity in judges' views across the three jurisdictions on the competence of other court stakeholders, with prosecutors scoring the best and interpreters scoring the worst. In Malawi, judges highlighted a lack of formal training for administrative and support staff. In Namibia, funding issues impacting on the availability of interpreters were highlighted.

There is a lot of variation in the major challenges judges identify, both within and between jurisdictions. Some problems are more expensive to fix than others. Some may be largely outside the scope of the judiciary to address, but all are important and worthy of consideration.

In Malawi, judges highlighted issues of a lack of court personnel, high caseloads, inadequate building infrastructure, a limited judiciary budget and low judicial salaries.

In Namibia, judges raised issues of access to tools of the trade, such as laptops and law reports, with some reporting having to pay for subscriptions to legal databases themselves after subscriptions ran out. Namibian judges also emphasised a shortage of judges to deal with increasing workloads. Delays in cases caused by limited funding for legal aid and the appearance of lay litigants was highlighted. Lawyers failing to follow court orders and a lack of training of police and doctors were also highlighted as a major cause of trial delays.

In South Africa, judges also raised issues relating to access to tools of the trade, with complaints about insufficient online resources and poor digital infrastructure. The poor state of building infrastructure was also highlighted, as was a lack of support and communication from the Office of the Chief Justice.

Looking at the three jurisdictions combined, we identified the major challenges highlighted by judges as a lack of sufficient tools of the trade, insufficient judicial numbers and increasing caseload, issues relating to the quality of assistance provided by support staff, and building infrastructure.

Recommendations

- There is a need to ensure that the rule of law is applied and is perceived to be applied equally. Judiciaries could explore ways to communicate better with the citizenry in order to achieve this.
- Further research should be conducted to explore what informs perceptions about differential treatment by judges.
- Judicial training should emphasise enabling judges to be responsive, good listeners, and to communicate clearly with litigants, which will help to build trust and perceptions of fair treatment among citizens.
- A comparison of the issues experienced across jurisdictions suggests that institutional exchanges to share learnings about how to deal with common issues, such as case management and dealing with backlogs, and structuring a responsive and efficient court administration system, could be beneficial.
- Steps need to be taken to identify how to strengthen the process of reporting corruption in the courts, particularly to assuage concerns about potential negative repercussions of reporting. Public awareness campaigns should also be undertaken to make court users more aware of how to report corruption and how they will be protected from adverse consequences.
- Strengthen the training of legal researchers, as is done through the Judicial Institute for Africa at the University of Cape Town.
- Subject to budgetary limits, all necessary steps should be taken to address issues of access to tools of the trade, and shortcomings with building infrastructure. Other government departments (e.g. Public Works) must be engaged in this process.
- Particularly in South Africa, the Office of the Chief Justice should engage with the judiciary in order to address concerns about lack of support and responsiveness.
- A re-evaluation of the judicial complement should be undertaken in jurisdictions where a shortage of judges has been identified as a major issue.
- The adequacy of judges' salaries and benefits should be investigated, particularly in Malawi and South Africa.
- Steps need to be put in place to improve court users' safety at South African High Courts.

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APPENDICES

Appendix A

Court User Questionnaire

This survey questionnaire was adapted to the country context where required.

COURT USER SURVEY CATI DRAFT 20210210 QUESTIONNAIRE
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1.	Thinking of the last time you were at High court, what did you do there?
	Interviewer please check that you code this properly. As you are routed to certain sections depending on the person you are interviewing. Be careful not to only select other (specify) as this skips many questions and routes to Q14. One answer only.

I work at the court	1	Close interview
Bring case in civil matter (e.g. dispute about a contract, claim for damages)	2	Go to Q4
Complainant in a criminal matter (e.g. robbery, assault)	3	
Defendant in case in a civil matter (e.g. dispute about a contract, claim for damages)	4	
Appear as a witness	5	Go to Q8
Support family member / friend	6	
Attending a hearing or trial out of interest	7	
Search records/obtain documents	8	
Get information	9	

(Select if interviewing a lawyer) Lawyer representing a client in court	10	Go to Q13
Other (specify) _____	11	Go to Q8

Scripter: This question must be show for public only – if code 2,3, and 4 in Q3	
2.	Thinking of the last time you were at High court what case was it for?
	One answer only. INTERVIEWER READ OUT

Criminal case (e.g. a robbery, assault)	1	Go to Q5
Civil case (e.g. evictions, claiming for money that someone is owed)	2	
Criminal case on appeal / review	3	
Civil case on appeal / review	4	
Other [Specify]	5	
Don't know	99	

Scripter: This question must be show for public only – if code 2,3, or 4 in Q3	
3.	Were you represented by an attorney/lawyer in your case?
	One answer only. INTERVIEWER READ OUT

Yes	1	Go to Q6
No	2	Go to Q7
Don't know	99	Go to Q8

	Scripter: This question must be show for public only – if code 2,3, or 4 in Q3
4.	If Yes in Q5 By who were you being represented? One answer only. INTERVIEWER READ OUT

By Legal Aid (or similar)	1
By legal Aid and advocate	2
By a private attorney/lawyer	3
By a private attorney and advocate	4
Don't know	99

	Scripter: This question must be show for public only – if code 2,3, or 4in Q3
5.	If No in Q5 Why were you not represented by a lawyer? One answer only. INTERVIEWER READ OUT

Did not know how to access representation	3
Can't afford representation	4
Legal Aid (or similar) not available	5
Other [specify]	6
Don't know	99

	Scripter: This question must be show for public only – if code 2,3,4,5,6,7,8, or 9 in Q3
6.	Thinking of the last time you travelled to the High court name. How long did it take you to get there? One answer only. INTERVIEWER READ OUT.

Less than 15 min	1
16-30 min	2
31 min to 45 min	3
46 mins - 1 hour	4
1 hour -2 hours	5
3 or more hours	6

	Scripter: This question must be show for public only – if code 2,3,4,5,6,7,8, or 9 in Q3
7.	Thinking of the last time you travelled to (auto fill High Court name) Which modes of transport did you use to get to there?
	Multiple mention allowed. INTERVIEWER READ OUT

I walked here	1
Public Transport (e.g. minibus taxi, bus, train)	2
Uber taxi, Taxify or cab	3
Private Vehicle (Car, bakkie, motor bike, etc.)	4
Other [specify]	5

	Scripter: This question must be show for public only – if code 2,3,4,5,6,7,8, or 9 in Q3
8.	How many times in the last 12 months have you been to a High court building in South Africa?
	One answer only. INTERVIEWER READ OUT
Once	1
2 – 3 times	2
4 - 6 times	3
7 or more times	4
Not applicable	5

	Scripter: This question must be show for public only – if code 2,3,4,5,6,7,8, or 9 in Q3
9.	You say that you have been _____ times (scripter: pipe in from Q 10) to a High court building in the past 12 months. How many different cases did you go to court for?
	One answer only. INTERVIEWER READ OUT

1 case only	1
2 cases	2
3 cases	3
4 cases	4
5 cases	5
6 cases	6
7 cases	7
8 cases	8
9 cases	9
10 cases	10
More than 10 cases specify number:	11
Don't know/can't remember	99
Not applicable	12

	Scripter: This question must be show for public only – if code 2,3,4,5,6,7,8,9,10,11 or 12 in Q3
10.	Thinking of the last time you were at (.....high court name). How easy or difficult was it for you to find where you needed to go inside the court building?
	One answer only. INTERVIEWER READ OUT

Very difficult	1
Difficult	2
Easy	3

Very easy	54
Don't know	99

ASK ALL	
11.	When last were you in a court room ? Here I am talking about an actual room where there was a judge dealing with a case?
One answer only. INTERVIEWER READ OUT	

Today	0	Go to Q14
Less than a month ago	1	
Less than a year ago	2	
About a year ago	3	
More than a year ago	4	Go to Q17
Don't know	99	

12.	Please think back to the <u>last time</u> you were in a court room and tell me how much you agree, or disagree with the following statements:
Please use a scale of 1 to 5 where 1 is strongly disagree, 2 is disagree, 3 is neither agree nor disagree, 4 is agree and 5 is strongly agree.	

		Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly agree	Not applicable	Don't know [Do not read]
a.	The court started on time	1	2	3	4	5	8	99

b.	The court proceedings were clear and easy to understand	1	2	3	4	5	8	99	
c.	The Judge listened to all sides of the story before he or she made a decision	1	2	3	4	5	8	99	
d.	The Judge had the necessary information to make decisions about the case.	1	2	3	4	5	8	99	
e.	The way the case was handled was fair.	1	2	3	4	5	8	99	
f.	I was able to understand the language used in the courtroom.	1	2	3	4	5	8	99	
g.	[If Strongly disagree or Disagree] Please ask "Was there an interpreter available in the court room?"	0 = No 1 = Yes				99			
h.	The case was delayed unnecessarily	1	2	3	4	5	8	99	
i.	I was treated with courtesy and respect by the Judge.	1	2	3	4	5	8	99	
j.	I was treated with courtesy and respect by the interpreter	1	2	3	4	5	8	99	
k.	I was treated with courtesy and respect by court officials (i.e. people assisting the magistrate)	1	2	3	4	5	8	99	

l.	I was treated with courtesy and respect by the prosecutor	1	2	3	4	5	8	99
m.	I was treated with courtesy and respect by the lawyer of the opposing side							
n.	Scripter: Item M must be show for public only – if code 2 in Q5 I was treated with courtesy and respect by my own lawyer	1	2	3	4	5	8	99
o.	Scripter: Item M must be show for public only – if code 1 in Q5 I was treated with courtesy and respect by my own lawyer							
p.	I was able to do what I came here to do in a reasonable amount of time.	1	2	3	4	5	8	99

	Scripter: Item M must be show for public only – if code 2 in Q5
13.	Please think back to the <u>last time</u> you were in a court room, do you think that having had your own lawyer would have changed your experience would have been better, worse, or made no difference
Please use a scale of 1 to 5 where 1 is much worse, 2 is worse, 3 is no difference, 4 is better and 5 is much better	

Much worse	Worse	No difference	Better	Much better	Don't Know [Do not read]
1	2	3	4	5	99

14.	Please think back to the <u>last time</u> you were in a court room and tell me how much you agree, or disagree with the following statements:
Please use a scale of 1 to 5 where 1 is strongly disagree, 2 is disagree, 3 is neither agree nor disagree, 4 is agree and 5 is strongly agree	

		Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree	Don't Know [Do not read]
a.	I felt safe inside the court building	1	2	3	4	5	99
b.	[If Disagree or Strongly Disagree] please ask Why did you not feel safe?	Record the verbatim answer _____					99
c.	I felt safe outside, around the court building	1	2	3	4	5	99
d.	[If Disagree or Strongly Disagree] please ask Why did you not feel safe?	Record the verbatim answer _____					99
e.	Before I was in the court room (the last time), my opinion of the court system was positive.	1	2	3	4	5	99
f.	After I was in the court room, my opinion of the court system was positive	1	2	3	4	5	99

15.	For each of the following questions, please think about the <u>high courts in this country in general</u> and tell me how much you agree, or disagree with the following:
Please use a scale of 1 to 5 where 1 is strongly disagree, 2 is disagree, 3 is neither agree nor disagree, 4 is agree and 5 is strongly agree	

		Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly Agree	Don't Know [Do not read]
	Judges understand and apply the law correctly	1	2	3	4	5	99
	Judges don't let their personal feelings influence their decisions.	1	2	3	4	5	99
	The court system treats men and women equally	1	2	3	4	5	99
	The court system treats people from all races/ethnicities equally	1	2	3	4	5	99
	The court system treats the rich and the poor equally						

	ASK ALL
	How often, if ever, have you OR anyone you know had to pay a bribe, give a gift, or do a favour for a court official in order to get the assistance that you or they needed from the courts?
	One answer only. INTERVIEWER READ OUT

Never	1	Go to Q19
Once or twice	2	
A few times	3	
Often	4	

	Ask if Q18 code 2, 3 or 4,
	By whom were you, or the person you know, asked to pay a bribe, give a gift, or do a favour in order to get the assistance you needed from the courts?
	One answer only. INTERVIEWER READ OUT

Court security staff	1
Clerk	2
Prosecutor	3
Interpreter	4
Lawyer	5
Judge	6
Other : Specify.....	7
Don't know	99

Ask if Q18 code 2, 3 or 4,
What was the purpose of this bribe or gift?
Multiple mention allowed. INTERVIEWER READ OUT

Speed up/finalise a process	1
Make documents get lost	2
To get the process go in my favour	3
Other.....	4
Don't know	99

Ask if Q18 code 2, 3 or 4, Did you, or the person you know, pay the bribe/gift and get the service or result they asked for?
One answer only. INTERVIEWER DO NOT READ OUT

Paid the bribe/gift and got the service/result	1
Paid the bribe/gift but did not get the service/result	2
No – did not pay the bribe	3
Don't know	99

	ASK ALL. If a court official were to ask you to pay a bribe, give a gift, or do a favour. Would you report it?
	One answer only. INTERVIEWER READ OUT

No, I would not report it	1	Go to Q23
Yes, I would report it to	2	Go to Q22
Don't know	99	Go to Q24

	If Yes, in Q22. Who would you report it to?
	More than one answer allowed. INTERVIEWER DO NOT READ OUT

Judge president	1
Head of court administration	2
Someone else in the court administration	3
My own Lawyer	4
Some in own law firm / Bar Council	5
	6
Judicial Service Commission (i.e. the institution that deals with disciplining Judge misconduct)	7
Police	8
Other [specify]	9

	If No, in Q22. Why would you not report it?
	One answer only. INTERVIEWER READ OUT

Don't know where to report it	1
Don't think it would make a difference	2
I would be worried about fear of reprisal or negative consequences	3
Other [specify]	4
Don't know	99

Now, let's talk about your experience with other courts for a moment

	If code 3, or 4 in Q4 If case was previously dealt with in magistrate court (i.e. criminal case on appeal/review, or civil case on appeal/review). Are you appealing/reviewing a decision from another court, or are you opposing an appeal/review
	One answer only. INTERVIEWER READ OUT

Appealing a decision	1	
Reviewing a decision	2	
Opposing an appeal	3	

Opposing a review	4	

How long did it take for the appeal/review to be heard at the High Court

One answer only. INTERVIEWER READ OUT

0 – 3 months months	1
4 to 6 months	2
7 – 9 months	3
10-12 months	
More than a year	
Don't know	99

For lawyers only: On a scale from 1 to 5 (1= very poor, 5=very good), how would you describe the communication from the court on getting the appeal / review to be heard in the High Court?

One answer only. INTERVIEWER DO NOT READ OUT

1 Very poor	1
2	2
3	3
4	
5 Very good	
Don't know	99

Background Questions

How do you get most of your information about how the courts work?

INTERVIEWER: Read out

	1 st mention	2 nd mention
TV news	1	1
Movies / TV shows	2	2
Newspapers	3	3
Internet	4	4
Radio	5	5
Personal experience	6	6
Family or friends	7	7
1 st mention - Other [specify]	8	
2 nd mention - Other [specify]		9
No other mentions		10

	Into which of the following age groups do you fall ?
	INTERVIEWER: READ OUT

18 – 19	1
20 – 24	2
25 – 29	3
30 – 34	4
35 – 39	5
40 – 44	6
45 – 49	7
50 – 54	8
55 – 59	9
60 year and older	10

	What is your highest level of education?
	One answer only. INTERVIEWER READ OUT
	Interviewer NB : Do not ask if lawyer/magistrate / prosecutor/legal professional – tick code 9

No formal schooling	1
Informal schooling only (including Koranic schooling)	2
Some primary schooling	3

Primary school completed	4
Some high school	5
High school completed	6
Post-secondary qualification other than university, e.g. a diploma or degree from a technical college, Technikon or EFT	7
Some university only	8
University degree / diploma complete	9
Post-graduate degree	10
Don't know	99

	Which of the following best describes your work status?
	One answer only. INTERVIEWER READ OUT Interviewer NB : Do not ask if lawyer/magistrate / prosecutor/ legal professionals – tick code 1 (working fulltime)

Working: full-time	1	Continue with Q31
Working: part-time/seasonal worker	2	
Self-employed / Own (small) business within the formal sector	3	
Self employed (informal sector e.g. hawkers/vendors/shebeens)	4	
Not working: unemployed	5	

Not working: retired/pensioner	6	Go to Q32
Not working: housewife	7	
Not working: student/scholar	8	
Not working: disabled	9	

What is your occupation (i.e. what type of job do you do)?
One answer only. INTERVIEWER READ OUT.
Interviewer NB : Do not ask if lawyer/magistrate / prosecutor – tick appropriate code

rector / upper management	02
Other management	03
Sales manager	04
Professional / specialist	05
Blue collar – skilled and semi skilled	06
Unskilled	07
State employee / Civil servant	08
Farmer	09
White collar – administrative or clerical	10
LAWYER : Attorney	11
LAWYER: Advocate	
	12
PROSECUTOR	13
Other (Specify)	14

a. R1 - R500	02
b. R501 - R750	03
c. R751 - R1,000	04
d. R1,001 - R1,500	05
e. R1,501 - R2,000	06
f. R2,001 - R3,000	07
g. R3,001 - R5,000	08
h. R5,001 - R7,500	09
i. R7,501 - R10,000	10
j. R10,001 - R15,000	11
k. R15,001 - R20,000	12
l. R20,001 - R30,000	13
m. R 30,001+	14
Lawyer/magistrate/prosecutor	16
Refuse to answer	17
Don't know / Uncertain	18
No income	19

1.	Respondent gender?
	INTERVIEWER: record from Gender of respondent. Ask only if you are not certain of respondent's gender.

Female	1
Male	2

2.	To which community, tribe or population group do you belong or feel closest to?
	[Interviewer: Read out response options. One answer only. Do not read “Don’t know”, “Refused to answer” and “South African only, or doesn’t think of self in those terms”.]

Afrikaans / Afrikaner / Boer	01
Coloured	02
English	03
Indian	04
Ndebele	05
Pedi or Sepedi or North Sotho	06
Sesotho / Sotho / South Sotho	07
Setswana / Tswana	08
Shangaan	09
Swazi	10
Venda	11
White / European	12
Xhosa	13
Zulu	14
Don't know	15

South African only, or “doesn’t think of self in those terms”	16
Refused to answer	17
Other (volunteered, please specify)	18

ASK ALL	
16.	<p>We sincerely appreciate your valuable time and input in this survey. Your feedback as a user of the High Court is crucial to ensure that the judiciary meets your needs and continues to improve access to justice and the independence of the courts. However, we also need to reach out to a broader audience and interview members of the public who have used the courts to understand their experiences.</p> <p>May we send you an email and/ or a WhatsApp message to forward to any beneficiaries, clients or people you know that have used the High Court to give them an opportunity to decide if they would be willing to participate in this survey.</p>

No, refused	1	Go to thank you note then Q48
Yes, email and WhatsApp	2	Ask Q37 and Q38
Yes, email only	3	Ask Q37 only
Yes, WhatsApp only	4	Ask Q38 only

17.	Please confirm your WhatsApp number.

POST-INTERVIEW QUESTIONS FOR INTERVIEWER

3.	Did the respondent check with others for information before answering any questions
	INTERVIEWER FILL OUT

No	1
Yes	2

4.	What proportion of the questions do you feel the respondent had difficulty answering ?
	INTERVIEWER FILL OUT

None	1
A few	2
Some	3
Most	4
All	5

5.	What proportion of the questions do you feel the respondent answered honestly ?
	INTERVIEWER FILL OUT

None	1
A few	2
Some	3
Most	4
All	5

High Court Judge Interview Guide

State of the Judiciary – High Court Judge Interviews

Briefing Guide

Role as a Judge

The objective of this topic is threefold. First, we want to get a sense of how judges allocate their time to different aspects of their job. Second, we are interested in how they view the different roles. Third, we want to get a sense of what they perceive to be the biggest problems at their court and in the judiciary more broadly.

To elaborate: First, judges must balance several important roles and responsibilities. This first set of questions allows us to get a baseline understanding of how judges spend their time and whether they focus primarily on issues related to case management and court administrative tasks, or if they also spend significant time representing the judiciary to the public, or supporting the next generation of judges.

Second, we want to understand their motivations. While judges might spend a lot of time on writing judgments, they might actually be really passionate hearing cases in court, or mentoring others. We want to better understand these tensions. Eventually, we want to identify 'ideal types' of judges (e.g. 'The Administrator', 'The Legal Philosopher', 'The Mentor' etc.) in terms of their preferences and time allocations. We anticipate that there will be some tension between how judges see themselves, and the type of judge one is according to time allocation.

Third, we want to understand whether the problems judges identify are limited to the courts at which they work, or if they perceive them to be a wider problem. This will then also help us to understand if the problems have an effect on the different ideal types. This last aspect should also provide a bridge to the next topic.

Work environment

There are three key objectives for this section. First, we want to find out what resources (material and staff) judges have at their disposal. Second, what their experiences are with other actors in the justice system, and third, the administration of the judiciary more broadly and how judges experience it.

To elaborate: First, when asking judges about the availability of material resources (Q13-16), we want to know whether they have access to the basic necessities to do their work. The questions can be in a fairly survey style manner. Short answers are good. Regarding Q17, we expect that judges do not necessarily have access to clerks (or only shared access, such as shared pool of researchers).

Second, we are interested in the experiences with other stakeholders at the courts. This is intended to give us a sense of how the quality of these other key actors in the judiciary varies across courts. Here, the understanding of the case, and administrative preparedness when presenting the case are particularly important. For administrators, their professionalism and efficiency would be the equivalent.

Third, we want to learn more about the procedures through which judges interact with the judiciary (administration in a broader sense). There are three components to this, circuit court (where applicable), training and addressing of grievances. Are the channels of communication efficient and fair? Are the trainings and workshops meeting the needs and requirements of judges? Do judges feel like they have a proper way to address any grievances and a sense that something is done to meet their demands?

Independence of the Judiciary

There are several ways in which the judiciary as a whole, and judges in particular can be influenced, and the independence of the judiciary can be undermined. First, by not having the necessary formal rules. Second, through the interference from other powerful stakeholders (inside/outside the judiciary). This section is designed to learn more about which of these aspects are most likely to compromise the independence of the judiciary.

Q31 is intended to establish whether the formal rules (what is on paper) is sufficient

Next, we want to know whether outside actors have tried to interfere, how they did it, and what the effects were (Q32 & 33). Here, personal experiences are particularly important.

Q34-38 deal with more subtle forms of undermining the independence of the judiciary. To avoid unnecessary discussions about the salary/pensions, it might be advantageous to employ a fairly survey style way of asking for these questions.

If time permits, a final goal in this topic would be to understand judges views on different organizations, and their ability to support the independence of the judiciary.

Wrapping up the interview

This section is just to get background information. Similar to some of the previous questions, this can be asked in a survey-style manner and does not require in-depth answers.

High Court Judge Interviews

Interview Guide / Questionnaire

Personal Background

Let's start by talking about your personal background a little bit.

1. How old are you?
2. What is your home language?
3. Please tell me all the language that you can either speak or understand
4. What is your current position (e.g. regular judge, judge president)
5. When were you permanently appointed as a judge?
6. How did you arrive at the decision to become a judge?

Role as Judge

Next, let's talk a little about your weekly work routine.

7. In a week, what percentage of your time is devoted to each of the following activities?
 - a. Preparatory reading for a case
 - b. Hearing cases in court
 - c. Writing judgments
 - d. Research, keeping up to date with latest legal developments
 - e. Attending to administrative tasks
 - f. Outreach/public appearances
 - g. Providing or receiving formal mentorship for peers, or other judicial officers?
8. How important vs. how satisfying are each of these activities?
 - a. Preparatory reading for a case
 - b. Hearing cases in court
 - c. Writing judgments
 - d. Research, keeping up to date with latest legal developments
 - e. Attending to administrative tasks

- f. Outreach/public appearances
 - g. Providing or receiving formal mentorship for peers, or other judicial officers?
9. Regardless of what others say the job of a judge is, how would you describe the job of being a judge? What are the most important responsibilities of a judge?
10. There is some debate about how judges should engage with the general public. Some say it is important to explain the work of the judiciary, others say that judges should only "speak through their judgments"
- a. What is your view on the matter?
 - b. How often do you
 - i. accept public speaking engagements (e.g. invited talk at a university, or roundtable discussion) to share your thoughts about the role of the judiciary with the public?
 - ii. have you written newspaper op-eds or other similar pieces to explain an aspect of the judiciary?
 - iii. Have you ever shared something on social media (Twitter, YouTube)?
 - c. How would you describe the feedback you received?

Now, let's turn to your court and the judiciary more broadly.

11. In your opinion, what are the three most important problems that your court is facing that the [Office of the Chief Justice], or the [Ministry of Justice and Constitutional Development] should address?
12. Which of these is the most important? Why? How likely or unlikely do you think it is that it will be solved in the next 2 years? (e.g. case-flow management)
13. In your opinion, what are the three most important problems that the judiciary as a whole is facing that the [Office of the Chief Justice], or the [Ministry of Justice and Constitutional Development] should address?
14. Which of these is the most important? Why? How likely or unlikely do you think it is that it will be solved in the next 2 years? (e.g. case-flow management)
15. What would you say has been the most significant/important justice sector reform?

Work Environment

I would like to find out a bit more about your work environment in the court building.

16. How/where do you get your material (e.g. statutes, laws, regulations etc.) that you need for your daily work?
17. To what extent do you make use of online resources? Have you experienced any issues?
18. What proportion of these documents are up to date (i.e. updated in the last 12 months)?
19. How would you describe your access to each of the following? (very reliable – very unreliable [1-5])
- a. Cases, legal books
 - b. Internet

- c. Legislation / government gazette
 - d. Online legal resources (e.g. Juta, Lexis, or West Law data bases)
20. Let's talk for a moment about your support structure. Do you have regular access to research assistants/clerks?
- a. How many per judge?
 - b. What is their professional status/ level of qualification of the researcher?
 - c. Is the support adequate? [Probe: do you need more access, but sometimes they are unavailable because someone else is using them?]
21. Thinking of the people that work in your court building, how would you rate:
- a. Prosecutors understanding of the case they present?
 - b. Lawyers understanding of the case they present?
 - c. The competence and professionalism of the interpreters? [different from admin support staff?]
 - d. The competence and professionalism of other administrative support staff?
22. How would you describe your case load over the past 2 years?
- a. Has it been increasing/decreasing, or stayed the same over time?
 - b. Could you elaborate on the reasons for this?
23. Are judges at your court going on circuit court?
24. How are circuit duties assigned?
25. Have you ever been on circuit court? If yes, how would you describe the experience?
26. Have you attended any training/professionalisation workshops over the past 2 years? [If yes]
- a. How many?
 - b. Are they helpful?
 - c. Did you discuss issues of gender, [racial, for SA and Namibia] and cultural sensitivity?
27. How would you deal with grievances you may have relating to your work environment?

Appointment, Promotion, and Removal Processes?

28. Would you describe the current appointment procedures as fair and transparent?
29. What are the criteria and processes for allocating and transferring judges to particular courts? [Probe for both]
30. How would you describe the current promotion process? [Probe for aspects of fairness and transparency]
31. What would you say are the major obstacles to the advancement of women (and black judges in SA)?
32. How would you describe the current removal process? [Probe for aspects of fairness and transparency]
33. Are you aware of any cases where judges were reported for potentially impeachable conduct over the past 2 years? What happened in those cases? Has this occurred frequently over the past 2 years [Never, rarely, sometimes, Frequently, all the time]

Independence of the Judiciary

34. Do you think the formal legal framework for securing judicial independence is adequate?
35. Has there been any significant/severe interference from:
 - a. The executive (President's office or cabinet ministers) over the past 2 years?
 - b. Legislators over the past 2 years?
 - c. Members of the judiciary over the past 2 years?
 - d. Private business over the past 2 years?
 - e. Others (e.g. police, prosecutors, lawyers) over the past 2 years?
36. If yes, for any of the above, could you describe the incident(s) and the impact you think it/they had?
37. How would you describe the current process for allocating cases? [Probe for aspects of fairness and transparency]
38. Are you aware of any incidents where case allocations may have been manipulated over the past 2 years? What happened in those cases? Has this occurred frequently over the past 2 years [Never, rarely, sometimes, Frequently, all the time]
39. Would you say your salary is sufficient for your current position? [Not at all – Very much (1-5)]
40. Would you say your salary and benefits are adequately protected against interference? [Not at all – Very much (1-5)]
41. Are you satisfied with your anticipated pension benefits on retirement? [Not at all – Very much (1-5)]
42. Does the judiciary have enough control over its internal organization/management/administration?

Now, I would like to ask you a few things about the role of organizations

43. How would you describe the role of professional associations such as [Malawi: SACJF, WOJAM; Namibia: SACJF, Commonwealth Magistrates and Judges Association; SA: International Association of Judges, SA Chapter of the International Association of Women Judges] and [law society/bar council]? Do you see them as important contributors towards judicial independence? What do you think have they achieved in this regard over the past two years?

Next, I would like to ask you a few questions about some recent judgments.

44. Please share your view on each of the following. Did it strengthen or weaken the judiciary, or did it not make much of an impact? [If case deemed not significant, probe for possible alternative]
 - a. Example A: Gender. 1-liner about the gist of the matter
 - b. Example B: Elections. 1-liner about the gist of the matter
 - c. Example C: Human Rights. 1-liner about the gist of the matter
 - d. Example D: Political Case. 1-liner about the gist of the matter

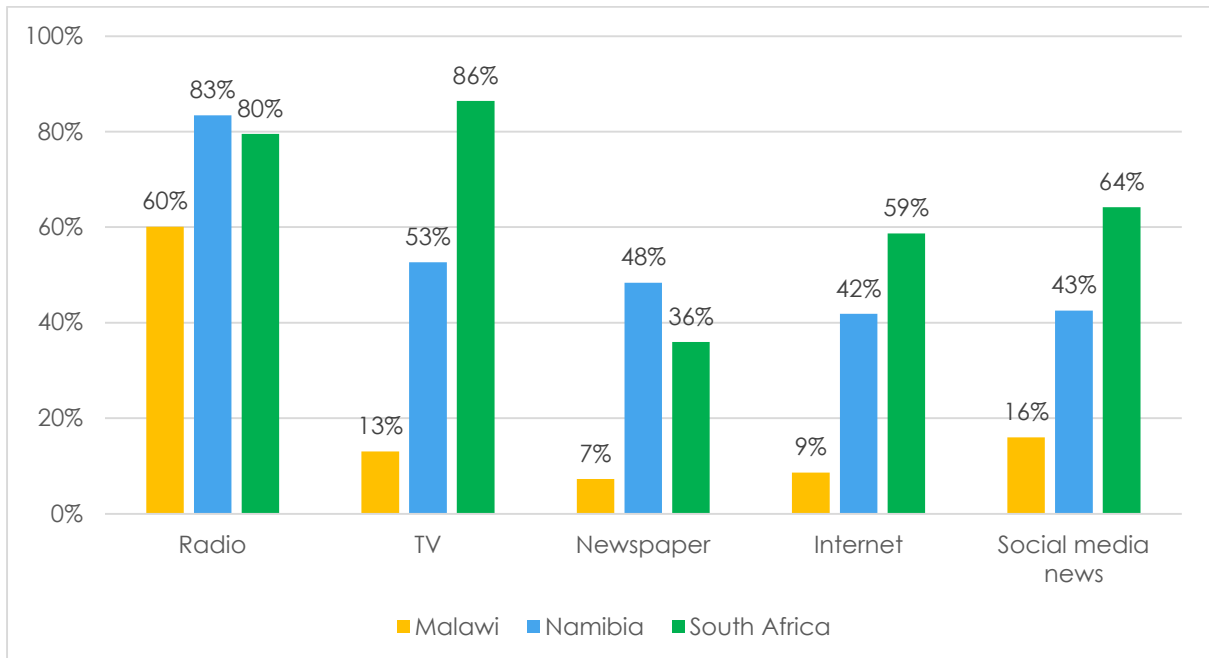
Wrapping-up the interview

45. People are also part of a lot of different communities -- such as ethnic, religious or other communities. Let's start with your ethnic community. What is your primary ethnic community, or cultural group?
46. Religion [which, and extent]?
47. What is your highest level of education?
48. From what college/university did you obtain your education?
49. Do you know if any of your former classmates joined the bench? With how many of them are you still in regular contact, professionally, or personally?

Appendix B

News consumption

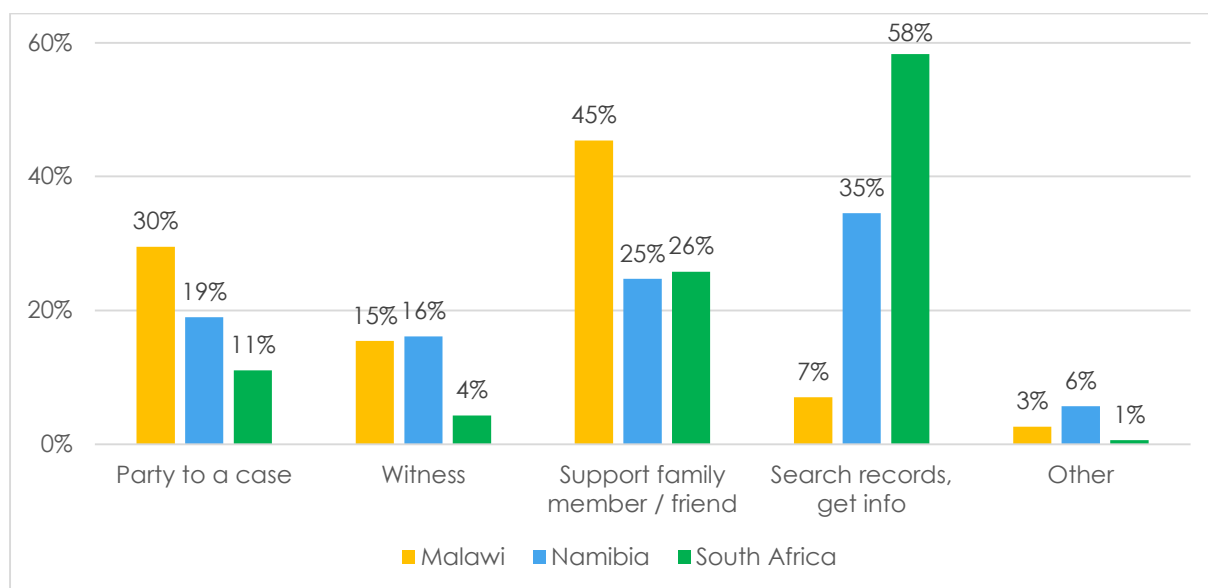
How often do you get news from the following sources?



Source Afrobarometer

Note: How often do you get news from the following sources?

Reason for going to court



Source Court user survey

Note: Thinking of the last time you were at High court, what did you do there?

Equal treatment of court system

Table X: Correlation of men and women treated equally by gender of respondent

	Malawi		Namibia		South Africa	
	Coefficient	N	Coefficient	N	Coefficient	N
Gender	-.099	219	-.030	316	-.102	187

Table X: Correlation of rich and poor treated equally by wealth of respondent

	Malawi		Namibia		South Africa	
	Coefficient	N	Coefficient	N	Coefficient	N
Wealth			-.214**	288	-.054	160

Source: Court User Survey

Note: ** Correlation is significant at the 0.01 level (2-tailed).