

# 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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## JUDICIARY STATS

### MALAWIAN JUDICIARY

**35 JUDGES**



Supreme Court of Appeal (SCA):  
9 Justices of Appeal: 8 men 1 woman  
High Court: 26 judges: 17 men 9 women

### NAMIBIAN JUDICIARY

**30 JUDGES**



Supreme Court of Namibia (SCN) + High Court  
30 superior court judges:  
22 men 8 women

### SOUTH AFRICAN JUDICIARY

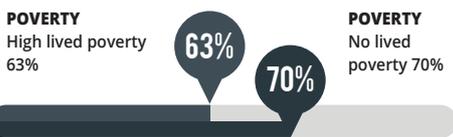
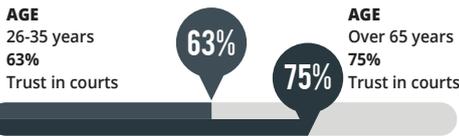
**245 JUDGES**



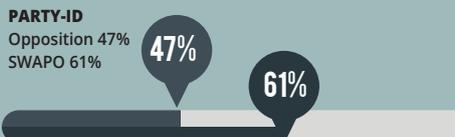
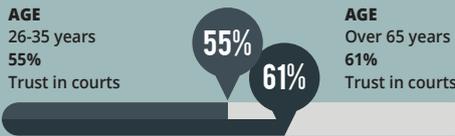
Constitutional Court (CC) + Supreme Court of Appeal (SCA) + High Court 2020:  
245 superior court judges: 147 men 98 women

## TRUST IN THE COURTS (Respondents with higher levels of lived poverty are less likely to trust the courts)

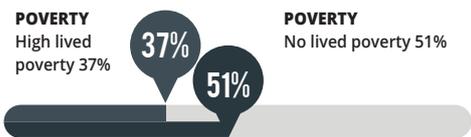
### MALAWI



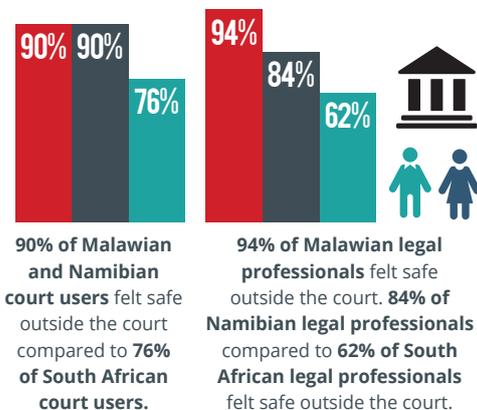
### NAMIBIA



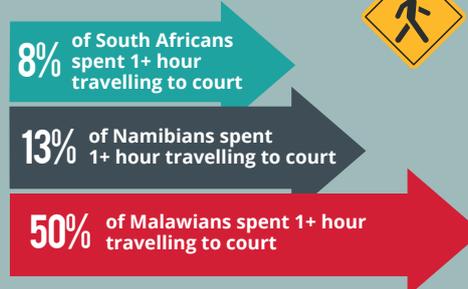
### SOUTH AFRICA



## FEELING SAFE OUTSIDE THE COURTS



## COURT USER TRAVEL TIME



## HOW PEOPLE LEARN ABOUT THE COURTS



Among traditional news media channels, the radio was most dominant in Malawi (36%), while in Namibia newspapers played a more prominent role (27%). South Africans were more likely to learn about the courts via personal experience, followed by online media at 27%.

## LEGAL PROFESSIONALS BEING OFFERED A BRIBE



## CITIZEN PERCEPTIONS

People treated unequally under the law (always/often)



## COURT EXPERIENCE



Data used 8 rounds of Afrobarometer surveys. Court user surveys (Below is all part of the survey) Malawi: 280 face-to-face interviews, Namibia: 355 face-to-face interviews, South Africa: 350 telephonic interviews 52 High Court judges interviewed in the 3 focus countries

## INTRODUCTION

This report investigates the state of the judiciary in the High Courts in three Southern African countries, namely Malawi, Namibia and South Africa. Inspired by the European Commission's EU Justice Scoreboard, the report also draws on Transparency International's Combating Corruption in Judicial Systems Advocacy Toolkit, and indicators developed by the European Network of Councils for the Judiciary.

By using existing research best-practice guidelines and original research (court users' and judges' surveys), we aimed to identify the challenges faced by the main stakeholders and proposed areas of reform.

**All references and additional resources can be found in the main report:**

<https://bit.ly/3ODFyT1>

The overarching consideration is that the wellbeing of the judiciary is essential to the functioning of a modern state and the wellbeing of its citizens.

We examined the key issues of independence, efficiency and operations, and accountability in these judiciaries. We conducted court user surveys that aimed to establish how the lay person and legal professionals using the court felt about the judicial system in their country, with key areas including fair treatment, safety, efficiency of court proceedings, availability of legal representation, corruption, and trust in judges, among others.

***“The overarching consideration is that the wellbeing of the judiciary is essential to the functioning of a modern state and the wellbeing of its citizens.”***

We also relied on data from Afrobarometer,<sup>1</sup> a non-partisan, pan-African research institution that regularly conducts public attitude surveys on

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<sup>1</sup> More information about Afrobarometer can be found at <http://www.afrobarometer.org>.

democracy, governance, the economy, and society in over 30 countries. This information is freely available to the public. We also tracked trends of public trust in the courts in Malawi, Namibia and South Africa using eight rounds of Afrobarometer surveys. This information allowed us to evaluate public trust in the judiciary compared to the other two branches of government, the executive, and the legislature.

Additionally, we conducted interviews with judges in all three countries. Our questions further probed issues such as perceived corruption, judges' workloads, infrastructure support, access to tools of the trade (e.g. IT systems and competent researchers) and working conditions (including remuneration, pensions, and benefits).

This report was originally earmarked for completion in 2020, with a focus period of 2018 to 2019, but with the Covid-19 pandemic and subsequent lockdowns, we experienced significant delays and limitations with data collection. The review period was therefore extended to include the years 2020 and 2021. While conducting our research, all Covid-19-related protocols and regulations were adhered to, in accordance with the requirements prescribed in all three countries featured in our report.

**To read the full report visit: <https://bit.ly/3ODFyT1>**

## **Background**

To establish context, we focussed on four key indicators of the judiciaries in Malawi, Namibia and South Africa, namely:

- 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 structure and composition of the judiciary**

For each jurisdiction we unpacked the hierarchy and structure of the judiciary, i.e., the Supreme Court of Appeal, Constitutional Court, High Court, Magistrates' Courts, and any number of smaller courts, such as the Child Justice Court, Labour Court, Land Claims Court, and so on. We looked at who presides over these courts; who selects and appoints judges; the number (and gender) of judges present; and any applicable affiliations and memberships of international and regional judicial associations.

## **The independence and accountability of the judiciary**

This section examined how effectively the judiciaries are able to function in each jurisdiction, without influence or direction from outside persons or authorities. It also covers the security of judges' tenure, their benefits, criteria for appointment, conditions for removal, effective reporting of judgments, transparency of court proceedings, and case-flow management systems.

## **The efficiency and functioning of the judiciary**

Here, we examined the actual performance and efficiency of the courts by looking at the number of criminal and civil cases heard, concluded, pending, and backlogged in the various superior courts in each country. We also unpack issues around administration, caseloads, resources (people and funding) and security, and we identify any reforms introduced by judiciaries to aid efficiency and functioning.

## **The jurisprudence produced by the courts**

General comment was made on the state of jurisprudence in each country, with examples of landmark judgments being discussed. In some cases, these contradicted the general perceptions of (the lack of) independence of courts. In Malawi, for example, we highlight the Supreme Court of Appeal's decision in the matter of the 2019 presidential elections, where the Electoral

Commission was found to be severely lacking in proper management of the elections. In Namibia, we examine two cases relating to civil liberties and freedom of the media. And in South Africa, we take a closer look at former president Jacob Zuma's legal battles with the Judicial Commission of Inquiry into State Capture. In each case, the decisions made by the courts demonstrated an encouraging degree of independence.

## **PUBLIC CONFIDENCE IN THE JUDICIARY**

In this section, we asked questions around citizens' trust in the courts, and how the levels of trust in our three subject countries compares with other African states. We used Afrobarometer data that revealed substantial variation across the continent, even though 50% of respondents said they trusted the courts "Somewhat" or "A lot". We conducted a comparative analysis of how much citizens trusted the courts, in relation to their level of trust in the two other branches of government, the legislature and the executive. We noted that the judiciary remained the most trusted arm of government in Malawi and South Africa, whereas, in Namibia, the presidency was the most trusted. The report provides graphs that depict support for each arm of the government over a 20-year period.

***"While there has been some loss of confidence in the courts, the courts remain the most trusted branch of government in Malawi and South Africa. In Namibia, the presidency was the most trusted branch of government."***

We then examined more closely each of our subject countries' trust in branches of government over time (2000-2021). When we look at the data collectively, it shows how citizens have related to the courts in their countries since the turn of the century. We observed different trajectories of citizen trust across the three countries during the decade. While there has been some loss of confidence in the courts, the courts remain the most trusted branch of government in Malawi and South Africa. In Namibia, the presidency was the most trusted branch of government.

## **How demographics affect public trust in courts**

We used Afrobarometer data to compare how demographics affect trust in the courts in Malawi, South Africa and Namibia. Factors that are likely to influence public trust in the courts include age, education, gender, political affiliation, and the standard of living of citizens. We noted that the most consistent results come from standard of living – respondents who experience higher levels of material deprivation (lived poverty) are less likely to trust the courts. This finding is significant, as it is likely that those suffering from material deprivation are less likely to make use of or directly engage with the courts. We also observed that ruling-party supporters trusted the courts substantially more than opposition party supporters or non-partisans in several African countries.

## **How citizens view the judiciary as a whole**

In this section, we examined how citizens' perception of the courts were formed in each of our subject countries. Taking into account the findings of the 36-country Afrobarometer study which revealed that about 1 in 8 Africans had direct contact with the court in the preceding five years, we noted that not all opinions about the courts come from first-hand experience. Instead, in most cases, opinions were garnered from secondary sources of information, via friends and family, the radio, TV, newspapers, and online media.

## **Lived experience of the law**

We examined a number of issues relating to the lived experience of the law (by citizens and legal professionals), including accessibility and basic functions of the court, including travel time/distance to courts, safety and court schedules, legal representation, courtroom procedures, discrimination, and corruption.

## **ACCESSIBILITY AND BASIC FUNCTIONS OF THE COURT**

Considering that Malawi, Namibia and South Africa differ in terms of wealth and level of urbanisation, accessing courts is an important issue. In Malawi for instance, less than 20% of the population live in urban areas, resulting in longer travel times for citizens who have to attend court. In Malawi, 50% of court users spent at least an hour travelling, compared with 13% of Namibians and 8% of South Africans.

Another issue that affects court users is perceived safety, both inside and outside the court. South African court users and legal professionals feel the most vulnerable outside the court building. The last part of this section examined court schedules, particularly start times, and possible causes of delay. 67% of respondents in Malawi indicated that courts started on time, while this figure increased to 77% in Namibia and 84% in South Africa. We suggested that factors such as travelling times and infrastructural issues are likely causes of delays.

### **Legal representation**

Here we focussed on the parties to court cases. Due to Covid-19 restrictions and the consequent small number of respondents we were able to access in South Africa, we concentrated solely on findings from Malawi and Namibia, even though these numbers were also somewhat limited. Nevertheless, they gave us insight into important aspects of access to justice and how these might vary across countries. For instance, on average, fewer Namibian respondents had legal representation compared with their Malawian counterparts. This issue was corroborated by several of the Namibian judges interviewed, who stated that people representing themselves was causing delays and hampering court proceedings, an issue not regularly experienced by Malawian judges. Malawians involved in criminal cases were more likely to be represented by legal aid, with criminal cases seeing significantly more

investment in representation than civil cases. While this was also the case in Namibia, the numbers were smaller.

### **Procedural aspects of justice**

This section looked at everyone entering a courtroom, as opposed to only those individuals who are party to a case. Here we asked whether the judges and courtroom staff were able to deliver on procedural and substantive aspects of justice to the satisfaction of both legal professionals and ordinary citizens. The procedural dimension of justice includes whether proceedings were clear and easy to understand. It was encouraging to see that in 9 out of 10 cases, court users found this to be the case, in all three subject countries. Another question asked was whether the presiding judge had all the necessary information at hand to ensure informed decisions were handed down. The majority of respondents, in all three countries “strongly agreed” that this was the case.

Another important issue relating to procedural aspects of court proceedings is how often court users experienced delays when attending court. Around a third of respondents in Malawi and Namibia experienced what they perceived to be unnecessary delays, while this number was closer to a quarter in South Africa. Lay court users may have a skewed sense of how quickly the wheels of justice should be turning and might not necessarily be able to distinguish between what is a “normal” and what is an “unnecessary” delay, so we also examined legal professionals’ opinions on the matter. This group was less likely to say there were unnecessary delays. The reasons for court users’ perceptions of delays hinged on the type of representation they received (paid-for representation or legal aid lawyer), which in turn affected their perception of the quality of representation they received, and therefore their overall perception of the courts. Judges expressed views that a lack of resources (such as insufficient numbers of legal aid lawyers) sometimes

resulted in an accused representing themselves, which was suggested as a cause of delays. Delays for civil vs criminal cases were also examined.

Other causes identified included the court's location, court staff experiencing high caseloads and lack of resources. Overall, respondents felt that the judges listened to all sides of the story before making a decision. Court users also interact with a number of members of the judicial system, aside from the judges, including court officials, prosecutors, and their own and opposing lawyers. In all three countries, the majority of citizens had positive interactions with these members of the courts, although some differences were identified between categories.

***“Across all three countries, 77% of respondents believed people from all races/ethnicities were treated fairly, 74% believed the same to be true for treatment of men and women, but only 56% said that rich and poor were treated alike by the court system.”***

## Discrimination

This relates to the procedural and substantive aspects of the justice system. Findings were gleaned by asking court users what their personal experience was of courts' efficiency and fairness. Moreover, we asked respondents whether they experienced any issues relating to discrimination based on gender, race, wealth, and political power. Findings varied across countries and across types of discrimination. Across all three countries, 77% of respondents believed people from all races/ethnicities were treated fairly, 74% believed the same to be true for treatment of men and women, but only 56% said that rich and poor were treated alike by the court system.

Regarding discrimination based on economic means, the most interesting difference was between Namibia and South Africa, with 75% of wealthy respondents from Namibia believing the courts treat rich and poor fairly, while only 56% of wealthy South Africans were of the same opinion.

We then broadened our analysis to include Afrobarometer data that examined people's perceptions around being treated unfairly, as well as the issue of officials who commit offences going unpunished. A third question focused on ordinary citizens who break the law regularly and go unpunished.

## Judges

Here we asked court users about their perceptions of how courts apply the law. Do judges understand and apply the law correctly? Lay court users across all three countries responded positively, with 84% of South African, 76% of Namibian and 70% of Malawian respondents "agreeing" or "strongly agreeing" with the statement. Here, we uncovered both consistencies and meaningful differences between how ordinary citizens and legal professionals, in our three subject countries, evaluate judges. Further investigation, using a bigger sample of court users, will likely provide more insight as to why this is the case.

## Corruption

To probe the issue of corruption in the justice system we examined Afrobarometer data as well as information obtained from our court user survey. We compared perceptions of corruption between our three subject countries, and other African states. On the one end of the spectrum, only 1 in 10 respondents in Tanzania, Cabo Verde and Mauritius felt most or all judges were corrupt, compared with 6 out of 10 in Gabon, Cameroon, and Mali. Malawi and South Africa are close to the continental average (30% and 36% respectively), while Namibia is below the average (23%).

There is a correlation between citizens' trust in a system like the judiciary, and perceptions of corruption in that institution, especially among key officials. What is interesting to note, for the purpose of 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 may also have a substantial influence on citizens' evaluations of the courts, such as landmark court cases.

We then turned our attention to a comparison of trust in the judicial officers compared to other branches of government. We have already noted 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). Corruption among police is an important factor and an issue in our considerations, however, as this group of officials is crucial to upholding the law.

***“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 perception of corruption poses a real threat to the confidence in the rule of law, but it also begs the question of what personal experiences court users have of corruption. So, we posed some pointed questions in our court user survey asking: “Have you been asked to participate in corruption?” “If so, how would you respond to it?” “Would you report it?” “And who would you report it to?” We compared our court user findings with the Afrobarometer data, and then examined the discrepancies we found. These centred around the more broader scope of corruption probed by Afrobarometer, and the variety of the respondents questioned in both the Afrobarometer questionnaire and our court users survey.

Findings from the studies revealed that lay court users and legal professionals across the focus countries were not regularly asked to participate in

corruption (a request for a bribe, gift, or favour), and most respondents said they would report it if they were. When asked who they would report corruption to, answers varied from the judge president, and head of court administration, to the police, judicial service commission and the respondents' own lawyer or a law firm. Where respondents were reluctant to report corruption, answers ranged from "It wouldn't make a difference" to "Fear or repercussions." In the former, public information drives showing where corruption by law officials had been successfully prosecuted could be beneficial, and in the latter (more complicated result) individuals' fears need to be addressed through reform at an institutional level.

## **JUDGES' PERSPECTIVE**

Judges are central figures in the judiciary, and yet relatively little is known about their views of the judicial system. The common notion that judges should speak only through their judgments makes it more difficult to know what judges themselves think about the state of the judiciary. Yet, their perspectives on what is happening in the courts is 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 insights on these issues, and examine issues around interference, salaries and pensions, efficiency and operations, and major challenges faced by judges.

### **Interference**

Here, we asked the question whether judges can go about their business impartially, without interference from the authorities or other influences. We referred to Varieties of Democracy's (V-Dem) expert evaluations, as well

as data from our interviews with judges. According to V-Dem experts, South African judges score 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. Where improvements were noted in Malawi between 2018 and 2019, and a deterioration in Namibia in the same period, it is not certain whether the latter trend was caused by high profile cases such as the election case in Malawi, and the fish rot case in Namibia, or is based on a systemic review of politically salient court decisions. The data we collected does, however, allow us to shed light on an important related issue of who is most likely to interfere with judges' decision-making. (Interestingly, our focus countries fared higher in the V-Dem findings as being the least likely to be subject to outside influence, when compared with other countries in sub-Saharan Africa.)

In our interviews with judges, we asked where interference was most likely to come from, offering the following options: 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). We included typology that identifies two types of interference (direct and indirect), as well as various degrees of severity. We also expanded our range of stakeholders to include, among others, private business and other members of the judicial system. Taking all this into account, our findings revealed substantial differences, both within and across our focus countries. Severe interference was identified in Malawi following the landmark decision to annul the 2019 elections, when attempts were made to force both the country's chief justice and most senior judge out of office into early retirement. On the other end of the spectrum, we discovered direct, but not as severe, interference in the form of attacks on judges accusing them of following public opinion rather

than the law. In between these two extremes, other forms of interference were noted at an institutional level, included the negative effect budget allocation has on judicial independence.

Other issues gleaned from the interviews we held with judges across the three focus countries included conditions of service, internal pressures from colleagues within the judicial system, being informally approached by MPs or similar stakeholders for information, and open criticism from colleagues.

### **Salaries and pensions**

The financial security of judges is a key component of judicial independence, and in assessing the strength of the judiciary. So, we asked whether the salaries, benefits and retirement arrangements of High Court judges were adequate. (Inadequate remuneration and benefits have been identified as a leading cause of corruption in the judicial system.)

To gain an overall picture of how judges felt about their remuneration and benefits, we asked judges to rate their current salary and benefits, as well as anticipated pension benefits on a scale from 1 (low) to 5 (high). Namibian judges were the most satisfied with their salaries and benefits. The same level of satisfaction was not present for South African and Malawian judges. Of the latter, 11 of 16 judges scored their current salary as inefficient, citing the discrepancy between cost-of-living hikes and inadequate salary increases. One judge mentioned salaries were paid late, and that the supposed fuel benefits he was entitled to had not been paid in four months. While South African judges were more positive, they too were dissatisfied with lack of cost-of-living adjustments to their salaries. Interestingly, despite these dissatisfactions, judges in Malawi and South Africa were united in the importance they attached to civic mindedness, viewing their conscience as their best protection against interference.

## Efficiency and operations

In this section we examined whether High Court judges have everything they need at their disposal to perform their roles effectively. Issues raised included caseloads, and the quality of support and administrative staff. It was found that increasing caseloads were not met with increased support or, indeed, the appointment of more judges, or the timely filling of vacant positions for judges. It is often left to the judges themselves to devise innovative ways to streamline systems. Research support, professionalism, and the level of skill of court stakeholders were also identified as challenges for judges on an operations level.

Regarding the availability of researchers, judges in Namibia are the most well supported with a 1:1 ratio of judges to researchers. The situation is quite different in Malawi (1:3) and South Africa (1:20), with the pool of researchers being shared. Generally, researchers have a law degree, with some having been admitted to the bar or side bar. A common complaint in Malawi and South Africa is that researchers are often overworked and/or inexperienced or not skilled enough; that senior judges get priority, and that the turnover of researchers is high, which drastically affects continuity. The situation, while challenging, does provide an opportunity for the courts across the three countries to learn from one another, and highlights the importance of introducing programmes that build capacity and training for researchers.

The competence of other court stakeholders is also examined. These include prosecutors, legal practitioners, interpreters, and administrative support staff. Across all three countries, the most faith was shown in prosecutors. Our findings suggest that additional resources are needed in terms of better salaries and/or more training for interpreters, who scored on average or below average, in Malawi and Namibia.

## Major challenges

Our study concluded with an examination of the major challenges judges face in their courts, and in the performance of their duties. Judges in Malawi cited insufficient court personnel, high caseloads, poor building infrastructure and budget limitations. One judge stated that these factors negatively impacted public opinion of the courts.

For Namibian judges, challenges included not having adequate access to tools of the trade (e.g. laptops, law reports, electronic services); a shortage of judges in the face of increasing workloads; limited funding for legal aid resulting in people representing themselves; and inadequate training by other stakeholders in the justice system, such as police. Respondent judges felt that police should be trained in all aspects of the law so that an accused's rights are protected from the outset.

We found more variation in the challenges faced by South African judges. These included access to tools of the trade (an issue exacerbated by remote work), which included insufficient online resources and poor digital infrastructure (an issue that compromises the security of the institution on a broader level). One judge cites the expiration of software licences, breaches in online security (email) due to lack of firewalls, and suspended services for online resources as major challenges. Another problem faced was that of building infrastructure, particularly broken air-conditioning (which makes court conditions extremely taxing on all stakeholders when temperatures rise).

The Office of the Chief Justice (OCJ), an institution that was established to provide administrative support, was criticised for being staffed by personnel ill-equipped to deal with the needs of the judiciary. In fact, the OCJ was seen by some respondents as a hinderance, rather than a help. Judges' responses to the OCJ suggests that there is a need to re-examine how this office can best serve the needs of the judiciary.

We offer tabulated comparisons of these challenges as faced by judges in our focus countries and discuss the implications of the similarities and differences in these three jurisdictions.

## CONCLUSIONS AND RECOMMENDATIONS

In the concluding section of this report, we highlight our main findings with regard to court users' perceptions of judges and the judiciary, across Malawi, Namibia and South Africa, how they are treated by stakeholders, and what biases are experienced. We sum up our findings on corruption, noting that a key concern is a fear of repercussions inhibiting its reporting.

We summarise our findings on judges' perceptions of interference, including related issues such as underfunding of the judiciary, as well as inadequate remuneration for judges themselves. Other concerns identified by judges include the effects of shortcomings or the lack of skills of other stakeholders, and a lack of adequate support or resources (tools of the trade).

### Recommendations

In summary, we highlight what opportunities may exist for improvement and suggest, among others, the following:

- better communication between judiciary and citizens
- judicial training should emphasise clear, concise communication with lay court users
- comparing the state of the judiciary in three jurisdictions opens up opportunities for sharing and learning
- strengthening the skills and training of legal researchers
- addressing the issue of access to tools of the trade
- assessing the judicial complement within courts
- reviewing judges' salaries and benefits