

TRUST IN THE JUDICIARY AND PERCEIVED STRENGTH OF THE RULE OF LAW



PREPARED BY: EBEN DE KLERK AND CHRISTIE KEULDER
ISG RISK SERVICES IN PARTNERSHIP WITH
SURVEY WAREHOUSE

FUNDED BY: LEGAL PRACTITIONERS' FIDELITY FUND

30 OCTOBER 2021



TRUST IN THE JUDICIARY AND PERCEIVED STRENGTH OF THE RULE OF LAW

**PREPARED BY: EBEN DE KLERK AND CHRISTIE KEULDER
ISG RISK SERVICES IN PARTNERSHIP WITH SURVEY WAREHOUSE
FUNDED BY: LEGAL PRACTITIONERS' FIDELITY FUND**

OCTOBER 2021

TABLE OF CONTENTS

BACKGROUND	4
What is Trust and Why it Matters	5
Public Trust in Namibian Institutions 1999-2019	6
KEY CONCEPTS	9
Rule of Law	9
The Judiciary vs The Judicial System	9
Trust in the Judiciary	10
METHODOLOGY	12
SURVEY RESULTS	13
Professional experience	15
Corruption	16
Competence of the Judiciary	30
Independence of the judiciary	20
Factors Affecting the Independence of the Judiciary.....	21
Personal Convictions	21
Loyalty to the Government.....	22
Loyalty to the ruling party	23
Powers of the Judicial Service Commission.....	24
Bribery.....	25
Government interference with work or residency permits	26
Fear of reprisals or acts of revenge by unsuccessful litigants	27
Fear of reprisals or acts of revenge if the unsuccessful litigant is the Government	28
Office of the Judiciary	29
Legal Costs.....	30
CONCLUSION	31
BIBLIOGRAPHY	31

TABLE OF FIGURES

Figure 1: Public trust in courts 1999-2019	6
Figure 2: Perception of Judges and Magistrates involved in Corruption 2003 to 2019.....	7
Figure 3: Support for democracy 1999-2019	8
Figure 4: Current working arrangement	13
Figure 5: Demographics and Experience.....	14
Figure 6: Litigious experience by Court.....	15
Figure 7: Perceptions on corruption	16
Figure 8: Judges involved in corruption	17
Figure 9: Judgments are legally sound by Court	17
Figure 10: Juristic competence of judges by Court	18
Figure 11: JSC Appoints judges on merit and nothing else.....	19
Figure 12: Non-merit appointment of judges.....	19
Figure 13: Litigious success depends on specific judge	20
Figure 14: Personal convictions of judge will influence outcome of a case by Court	21
Figure 15: Judges influenced by loyalty to government by Court.....	22
Figure 16: Judges are influenced by loyalty to the ruling party by Court	23
Figure 17: Judges not influenced by the powers of the JSC.....	24
Figure 18: Judges taking bribes by Court	25
Figure 19: Foreign judges fear Government interference in work or residency permits by Court	26
Figure 20: Judges fear retaliations by unsuccessful litigants by Court.....	27
Figure 21: Fear of reprisals or acts of revenge if unsuccessful litigant is Government	28
Figure 22: The Office of the Judiciary strengthens the separation of powers.....	29
Figure 23: The Office of the Judiciary enhances the ability of the judiciary to uphold the rule of law.....	29
Figure 24: Legal costs deter many from approaching courts.....	30
Figure 25: Legal practitioners advising clients not to approach courts due to high costs of litigation.....	30

BACKGROUND

An independent, well-functioning, judicial system is one of the necessary institutional components of any democracy. A competent, independent, and impartial judiciary is vital and absolutely necessary to uphold the Constitution; preserve the rule of law; safeguard democracy; protect property rights and foreign investment; sustain the division of the powers of State; protect human rights; dispense justice to all; and ultimately, to preserve public confidence in the judicial system and in the moral authority and integrity of the judiciary. Without an impartial, non-partisan, competent and apolitical judiciary, performing in a manner that inspires trust and confidence among the public, there is no meaningful democracy.

It is therefore crucial that the judiciary and those responsible for appointing the judiciary be held in the highest esteem by all. Trust is arguably the most important attitudinal component of legitimacy, and wide-spread legitimacy is a necessary condition for all democratic dispensations and institutions. Without sufficient levels of trust, it is very difficult, if not impossible, for institutions of democracy, including courts, to fulfil their mission and perform their functions.

Some 20 years ago, Namibia's erstwhile Chief Justice Johan Strydom warned that the delivery of justice was undermined by two factors: delays in hearings and finalising both civil and criminal cases; and the rising costs associated with the delivery of justice (see Links 2018).

More recently, the current Chief Justice, Peter Sam Shivute, in consultation with the Judicial Service Commission (JSC) issued guidelines for the delivery of reserved judgments in the Supreme Court, and in 2014 introduced the "Practice Direction 61 of the High Court Practice Directions: Rules of the High Court of Namibia" (GRN 2014)¹ to reduce the reserved judgment backlog in higher courts. In 2017 he pointed to several reasons why Namibians are losing faith in their judicial system, inter alia:

- Bottlenecks and backlogs continue to undermine the delivery of justice and fuel negative perceptions of the rule of law and criminal justice sector.
- Judicial authorities are struggling to come to grips with system-wide institutional weaknesses.
- Shortcomings of the justice system are contributing to negative perceptions of the state's and especially the whole criminal justice system's handling of corruption cases (see Links 2018:5)

It is the last consideration that points to the politicisation of public opinion about courts. It is the courts' perceived role in combatting corruption, and court officials' perceived involvement in acts of corruption, that could become crucial drivers of public perceptions about the judicial system.

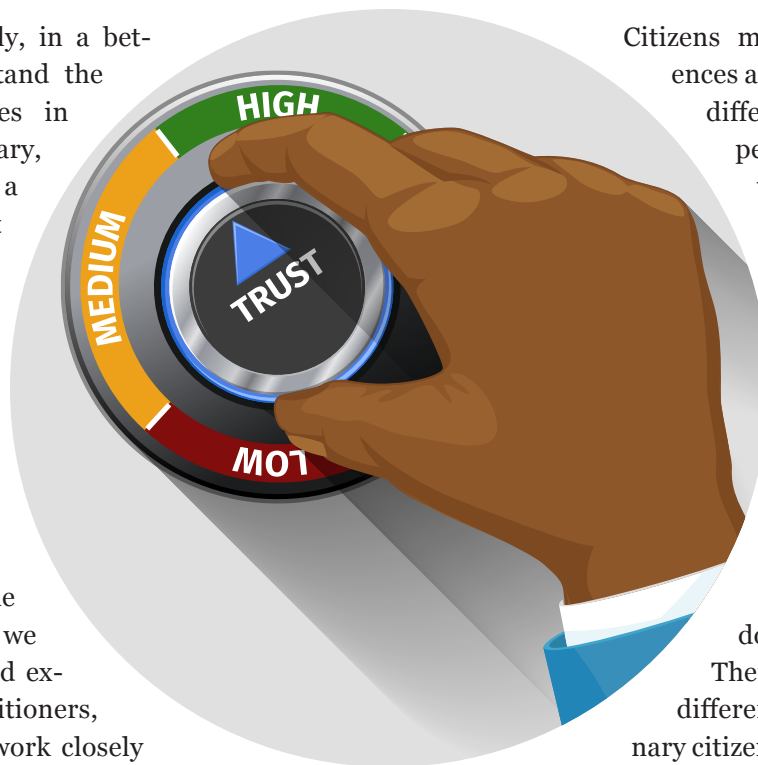
Public criticism of higher court rulings is also becoming more prevalent. For instance, a recent Supreme Court judgment attracted substantial criticism, both locally and abroad. The case involved the use of electronic voting machines. The general basis for the criticism against this ruling can be found in a quote from an article by Dr Ndjodi Ndeunyema published on the Oxford Human Rights Hub²: "Once the Court vindicated the Applicants on paperless EVMs as unconstitutional, the matter ought to have cantered all citizens' inalienable right to elect their political representatives using a credible, verifiable and transparent voting mechanism. In declining to nullify the election, the Court rendered hollow its own assertion of the "indispensable" requirement of paper trails in electoral transparency, credibility and verifiability when exercising one's right to vote. The non-negotiable essential content of the right to vote was thus effectively negated (Article 22), with the Court's acquiescence."

To better understand the current decline in the public's trust in the judiciary, it is important to measure and analyse the experiences of those dealing with the judiciary directly, namely Namibian legal practitio-

1 GRN, 2014, Amendment of High Court Practice Directions: Rules of High Court of Namibia, 2014, Notice 10, Office of the Judiciary, Windhoek

2 Article retrieved from <https://ohrh.law.ox.ac.uk/vote-but-you-cannot-verify-the-namibian-supreme-courts-presidential-election-decision/>

ners. They are, arguably, in a better position to understand the processes and legalities in the sphere of the judiciary, which places them in a better position to reflect on the state and performance of the courts and the individuals that control them. It is our argument that the performance of judges will determine the degree to which courts are trusted, and in our assessment of the performance of judges, we rely on the opinions and experiences of legal practitioners, the professionals who work closely with them.



Citizens may have diverse preferences and may use a multitude of different criteria to evaluate performance, and perceptions (in the absence of direct experience) are often key to explaining how citizens adjudicate the performance of institutions. Practical experience, on the other hand, may play a much larger role in shaping legal practitioners' views on courts and judges than it does for ordinary citizens.

Their views may therefore be different from the views of ordinary citizens who have much less access to and experience with the judiciary and judicial system.

What is Trust and Why it Matters

Easton (1965) declared that trust in government represents the confidence of citizens in the actions of a "government to do what is right and perceived fair". Expectations are thus essential for trust. Several factors, such as increased levels of education, changes in living conditions and income increases, may cause expectations to rise. If an institution's performance does not meet rising expectations, satisfaction and trust could decline.

According to Dalton (2005), changed expectations of citizens in advanced democracies resulted from social change and modernisation that often went unnoticed by political leaders. In addition to declining levels of trust, confidence in institutions, party attachments, support for political parties, and public confidence in key institutions such as parliament and courts were similarly affected.

Citizens' trust towards key institutions are also influenced by the quality of their experience (i.e. positive or negative experience) with service delivery. Presumably, negative experiences have a much stronger, and more negative impact on trust than a positive one.

What then are the consequences of declining trust in institutions? Answers vary and depend very much on the type of institution. If the declining trust is in the fundamental structures and institutions (such as courts, and electoral bodies, for example) that make up the democratic regime, then the consequences are more serious and impactful. If, on the other hand, the decline in trust is aimed at elected political leaders for example, the consequences may be less impactful.

To this effect, Inglehart (1999:236-256) argued that whilst trust in politicians and elected officials declines, support for democratic institutions and values are on the increase, meaning that the decline in trust does not pose a threat to the democratic regimes of the West. Norris (1999) argues the same point when she states that citizens have become critical of how democracy currently works, but without withdrawing their support for and commitment to democracy. In Namibia, declining trust occurs with declining support for democracy (See Figure 3 below) which is evident of the more serious scenario that links declining trust with declining support for democracy.

Public Trust in Namibian Institutions 1999-2019

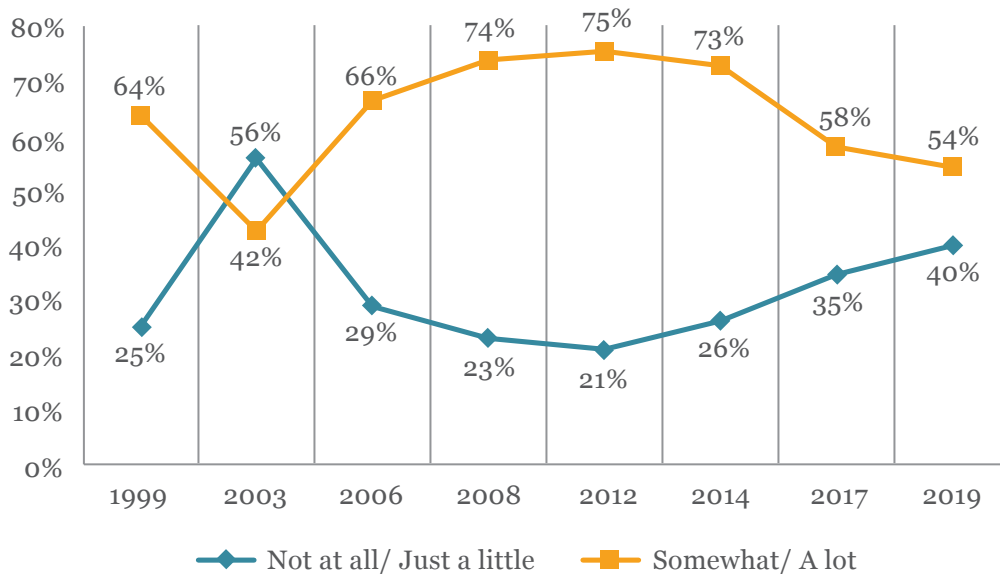
Mishler and Rose (2001:31) distinguish between cultural and institutional theories of trust. Within the *cultural* tradition, trust in institutions is exogenous, i.e., it originates outside the realms of politics “in long-standing and deeply seeded beliefs about people that are rooted in cultural norms and communicated through early-life socialisation”. *Institutional* theories of trust, on the other hand, propose that trust in institutions is endogenous, i.e., that trust is a consequence, and not a cause, of institutional performance. In the institutional view, “trust in institutions is rationally based; it hinges on citizen evaluations of institutional performance. Institutions that perform well generate trust; untrustworthy institutions

generate scepticism and distrust” (Mishler and Rose 2001:31).

The Afrobarometer survey tracked public trust in Namibian institutions for the past 20 years.

Figure 1 below shows that public trust has declined significantly during that time, and that the decline has been most prominent over the past five years. Trust in the courts is now at its lowest point in thirteen years; only a small majority (54%) of adult Namibians trust the courts “somewhat” or “a lot”. Conversely, two-in-five adult Namibians (40%) trust the courts “not at all” or “just a little”.

Figure 1: Public trust in courts 1999-2019

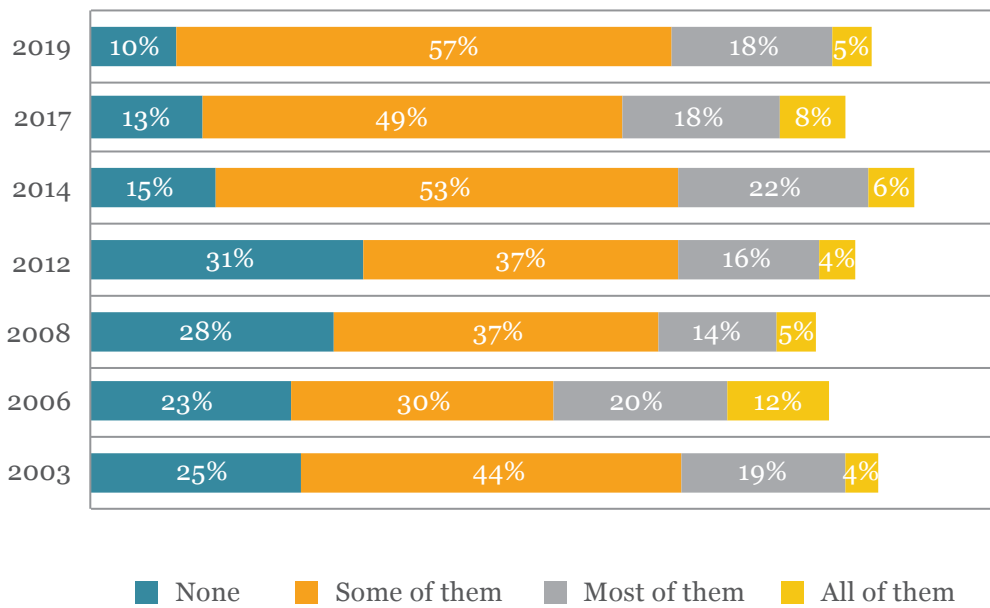


Note: Respondents were asked: “How much do you trust each of the following, or haven’t you heard enough about them to say?” “Courts of Law”. Read out options: “Not at all”; “just a little”; “somewhat”; “a lot”; “Don’t know/Haven’t heard”.

Figure 2 below maps public opinion trends about the perceived involvement of judges and magistrates in corruption since 2003. It shows 2012 to be a threshold of some sort. The perception that “some” or “most” judges and magistrates are involved in cor-

ruption increased by 23%, from 53% in 2012 to 76% in 2019. Conversely, over the same time period, perceptions that “none” of them are involved in corruption fell by 22%, from 31% to just 9% over the same period of time.

Figure 2: Perception of Judges and Magistrates involved in Corruption 2003 to 2019

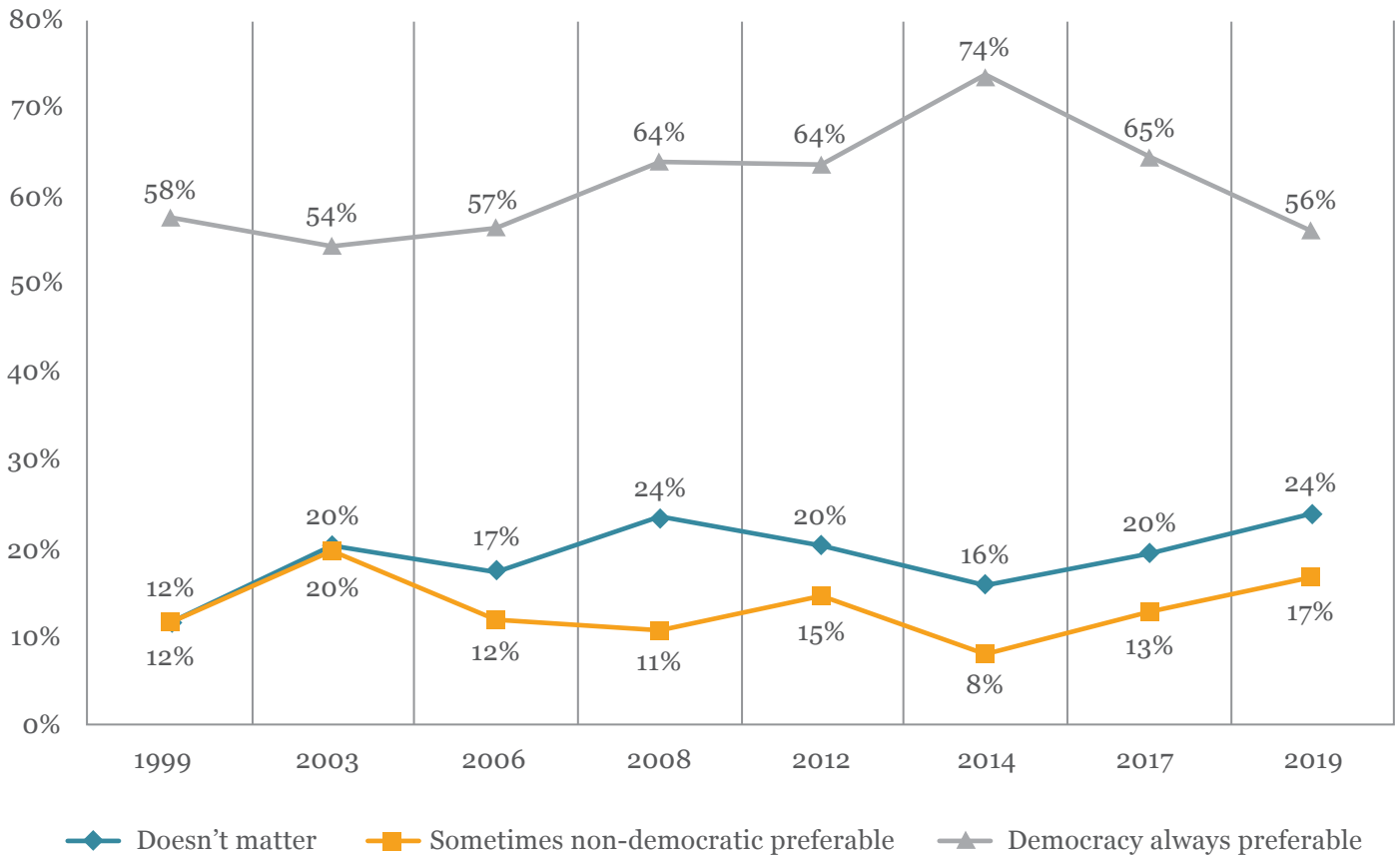


Note: Respondents were asked: “How many of the following people do you think are involved in corruption, or haven’t you heard enough about them to say?” “Judges and Magistrates”: “None”; “Some of them”; “Most of them”; “All of them”; “Don’t Know/Haven’t heard”.

Figure 3 overleaf tracks popular support for democracy in Namibia over the past twenty years. It shows a clear shift in public sentiment toward democracy, especially since 2014. Three trends are observed. First, outright support for democracy has declined by 20 percentage points from an all-time high of 76% in 2014 to

an all-time low of 56% in 2019. Second, the proportion of Namibians who possibly prefer non-democratic alternatives more than doubled from 8% in 2014 to 17% in 2019. Third, the proportion of the citizenry who felt democracy was inconsequential increased by nearly 10 percentage points from 15% in 2014 to 24% in 2019.

Figure 3: Support for democracy 1999-2019



Note: Respondents were asked: Which of these statements is closest to your own opinion? Statement 1: Democracy is preferable to any kind of government. Statement 2: In some circumstances, a non-democratic government can be preferable. Statement 3: For someone like me, it does not matter what kind of government we have.

Even if taken only at face value, all three graphs provide good reason for concern. **Figure 1** shows that the number of Namibians who trust the courts has been declining significantly over the last eight years, and given this trend, it is likely that, unless something drastic is done, this downward trend could continue, and possibly lead to a serious legitimacy crisis in the judicial system.

Figure 2 shows that there is a fast-growing perception that corruption in public institutions - including the courts - is on the increase. This holds true for most of Namibia's political institutions: The Presidency; Parliament; The Electoral Commission; The Namibian Police, Local Authority Councillors and so forth. Cynicism is on the increase, and this too sug-

gests a possible legitimacy crisis in the making. No doubt recent developments around major corruptions cases such as those pertaining to the failed SME Bank, the Kora Awards and "Fishrot" will have a major impact on perceptions that are already quite negative. The courts and those who preside over them will be watched closely when these and other corruption cases eventually go to court.

Figure 3 shows that a growing number of Namibians are losing faith in democracy as their preferred system of government. This is likely because democracy "fails to deliver"; in this case, it may well be the result of the courts failing to inspire trust and to remain above the influence of corruption, the institutional cut-worm that continues to plague African democracies.

KEY CONCEPTS

This section describes some key concepts used in the research and this report.

Rule of Law

The rule of law is the commonly accepted principle that “all persons and institutions in a country, including the government, must follow laws which are publicly known to everyone, applied fairly to everyone, and enforced by independent courts. This principle also requires that a country’s laws must be consistent with basic international human rights, norms and standards.” (LAC n.d.) In essence the rule of law serves to restrict the arbitrary exercise of power by subordinating it to well-defined and established laws. It is one of the main pillars of any democracy. Put differently, no country can be considered a democracy if there is a lack of support for and practice of the principles of the rule of law.

The principles of the rule of law (see LAC n.d.) are *inter alia*:

- a) The country must be governed by law, not by force.
- b) The law must apply to everyone. No one is above the law.
- c) The law must treat everyone equally.
- d) The processes for enacting and applying laws must be fair and transparent.
- e) The law must protect basic human rights.

The judiciary plays a crucial role in upholding the rule of law and as a result, public trust in the judiciary is pivotal to the support and advancement of the rule of law. The performance of the judiciary is therefore closely connected to the extent to which the rule of law prevails, and any failures and shortcomings in this regard are bound to have a negative impact on public trust in the judiciary.

The Judiciary vs The Judicial System

On 31 December 2015 the Office of the Judiciary (OJ) was established by statute. Before that, the Ministry of Justice was responsible for providing support

to the Judiciary. There were directorates within the Ministry of Justice that were responsible for the administration of the Judiciary. Since the Ministry of Justice belongs to the executive arm of the State, the fact that the Judiciary resorted, administratively, under the Ministry of Justice, resulted in an insufficient separation of powers and raised questions over the independence of the Judiciary.

The OJ is an office within the public service, dedicated to serving the judiciary. It consists of staff members and judicial officers. Staff members, who are all civil servants, are appointed by the Prime Minister on the recommendation of the Chief Justice. Staff members who were previously assigned by the Ministry of Justice to the judiciary automatically became members of the OJ on the date the Act came into operation. The judiciary now has its own Executive Director, prepares its own budgets, and determines its own policies and priorities. The Chief Justice supervises the Judiciary, exercises responsibility over it and monitors the norms and standards for the exercise of judicial functions of all the courts.

The Judicial Service Commission (JSC) was established in terms of Article 85 of the Namibian Constitution³ and further mandated by the Judicial Service Commissions Act, 1995 (Act No. 8 of 1995)⁴. As per Article 85 (1), the Commission consists of the Chief Justice, the Deputy Chief Justice, the Attorney-General and two members of the legal profession. The mandate of the JSC includes the nomination of members from the legal profession as members to the Judicial Service Commission; prescribing the tenure of the members of the Judicial Service Commission; consolidating all functions of the Commission and balancing the structure as well as functions of the Judicial Office.

Article 78 of the Namibian Constitution states that judicial power shall be vested in the courts of Namibia. It further states that the courts shall be independent and subject only to the Constitution and the law. Generally, the term “judiciary” can be defined in broad or

3 Republic of Namibia (1990)

4 Republic of Namibia (1995)

narrow terms. The broad definition typically refers to the judiciary as a “system of courts of law”⁵ or a “branch of authority in a country which is concerned with law and the legal system”⁶. The narrow definition defines the *judiciary* as “the judges of a country or a state, when they are considered as a group”⁷.

To limit the scope and demarcate the focus of this study, the judiciary is defined using the narrow definition of the concept: the judiciary thus refers to the judges who are the presiding officers over Namibia’s courts. To further operationalise and measure this key concept, the study is limited to judges who are presiding officers of the country’s High Courts and Supreme Court. Magistrates’ courts and their presiding officers are thus excluded from this study.

For purposes of this research the construct of “judiciary” refers to the narrow definition, i.e., to the presiding officers of the High Courts and Supreme Court. Although Magistrates’ Courts form part of the judiciary, this research focused on trust in the judiciary limited to the High and Supreme Courts.

The concept of *judicial system* refers to the broader administrative system to which all legal matters are subjected before they can be adjudicated upon. This administrative system is governed by a legal regime consisting of laws such as the Criminal Procedure Act, the High Court Act and the Magistrates Court Act, the Rules to these Acts, as well as a plethora of practice directives.

For this study, it is important to distinguish between the judiciary and the judicial system and to be able to link specific agents (judges) with performance and, ultimately, trust and the state of the rule of law. Confounding the two concepts may lead to conceptual confusion, which in turn may have a significant impact on the way the analysis is presented.

For example, it is possible that the judiciary is independent and highly competent, and thus performing well, but at the same time, the judicial (administrative) system is failing for some reason. In such a

situation, this may lead to the public distrusting the judiciary itself as the public may perceive the two entities as one and the same. Bottlenecks, rising costs, extended timeframes and delays are examples of factors that may cause public frustration and distrust. This frustration and distrust should however not be regarded as a sign of a failing judiciary, but rather a failing judicial system.

Trust in the Judiciary

Trust in the judiciary will depend on numerous factors, including, but not limited to:

- Certainty that there will be a logical, proper application of all applicable legal principles in every judgment.
- Quality of judgments should be independently verifiable as being a logical, proper application of prevailing legal principles.
- Sufficient access to and oversight of judgments within the judicial process, and otherwise.
- Independence and integrity of the appointing authority, the JSC.
- The unfettered discretion of judges to provide impartial judgments.

For the rule of law to function, judges must be independent from personal, individual or organisational interference. The independence of judges can therefore be affected by numerous factors including:

- Personal convictions or ideologies.
- Bribes to influence the outcome of judgments.
- Direct threat by a party to the proceedings, including government.
- Loyalty to the “appointing authority”, or ultimately politicians from the ruling party.
- Fear of reprisal by an unsuccessful party to proceedings, possibly government.
- Fear of loss of job security, for example the cancellation of work / residency permits or, in the case of acting judges, non-renewal of an employment contract or, in respect of acting judges, refusal to appoint on a permanent basis.

When there is trust in the judiciary, there is a general belief that the judiciary is capable of upholding the

5 See for example Merriam-Webster <https://www.merriam-webster.com/dictionary/judiciary>

6 See Collins Dictionary <https://www.collinsdictionary.com/dictionary/english/judiciary>

7 Oxford Dictionary <https://www.oxfordlearnersdictionaries.com/definition/english/judiciary?q=judiciary>

principles of the rule of law free from any factors that may hamper its independence.

Traditionally the judiciary enjoyed some protection against public critique. This serves a valuable purpose, for should a disgruntled, unsuccessful party have carte blanche to launch a scathing public attack on a judge with impunity, trust in the judiciary may be eroded, undeservingly so, and ultimately, support for the rule of law may diminish as a result. In such circumstances the Law Society of Namibia and the Society of Advocates would usually come to the defence of the judiciary, i.e., the judge concerned. A judge cannot stand in his or her own defence, outside of formal legal proceedings, in the face of such public critique. It would not be befitting of a judge to do so.

The same factors that may derogate from the independence of judges may also be present and influence the independence of the JSC when appointing judges.

In 2020, the OJ spoke out in defence of the judiciary. Following public critique of a Supreme Court judgment on the constitutionality of certain actions by the Electoral Commission during the 2019 national elections, the OJ issued a press release on 17 February stating: “It is not customary for the Judiciary to make public statements in defence of itself. It is preferable that it

is done by civil society and other organs of the State, whose responsibility it is to protect and safeguard the dignity and effectiveness of the courts.” (Office of the Judiciary 2020)

The press release further states: “These attacks are however becoming all the more persistent and insidious and may create the impression that the Judiciary’s silence amounts to an acceptance, or indeed justification, of these sentiments. It has therefore become imperative for the Judiciary to reply to these allegations and attacks.”

This is likely the first time that Namibia’s judiciary has spoken out in public in its own defence, outside of official judicial proceedings (for example in an appeal judgement).



METHODOLOGY

Meaningful critique of judgments mostly originates from sufficiently experienced, educated jurists and legal scholars. This critique is mostly found in academic or peer-reviewed articles, in specialist publications such as law journals and academic textbooks often used to train lawyers. This is an important aspect of any country's legal development, and such publications and textbooks are frequently cited as authority in court cases.

Public opinion, on the other hand, does not constitute a technically astute critique of the judiciary. In the words of Speier (1950), public opinion are opinions on "matters of concern to the nation freely and publicly expressed by men outside the government who claim a right that their opinions should influence or determine the actions, personnel, or structure of their government" and it is therefore "a communication from the citizens to their government".

This study is based on a survey conducted among legal practitioners. As such it is not a public opinion survey. Instead, it is a survey of experts, i.e. individuals who have special insight by virtue of their training

and profession into the often technical world of legal principles, the judiciary and the judicial system. Expert surveys are especially useful "for measuring concepts that would be difficult or impossible to measure through alternative strategies and permits scholars to create indicators that are comparable across diverse contextual settings" (Maestas 2018).

The survey was conducted among members of the Law Society of Namibia (LSN), who are all admitted legal practitioners. The LSN distributed the link to the online survey, and no member data was provided to the researchers. Responses were received by the researchers directly, without any identifiers on participants. A total of 221 responses were received.

The study looks at two primary research questions:

- How do legal practitioners, especially practicing legal practitioners, view the efficiency and independence of the judiciary?
- To what extent do legal practitioners, and especially practicing legal practitioners, regard the judiciary as trustworthy to uphold the principles of the rule of law?

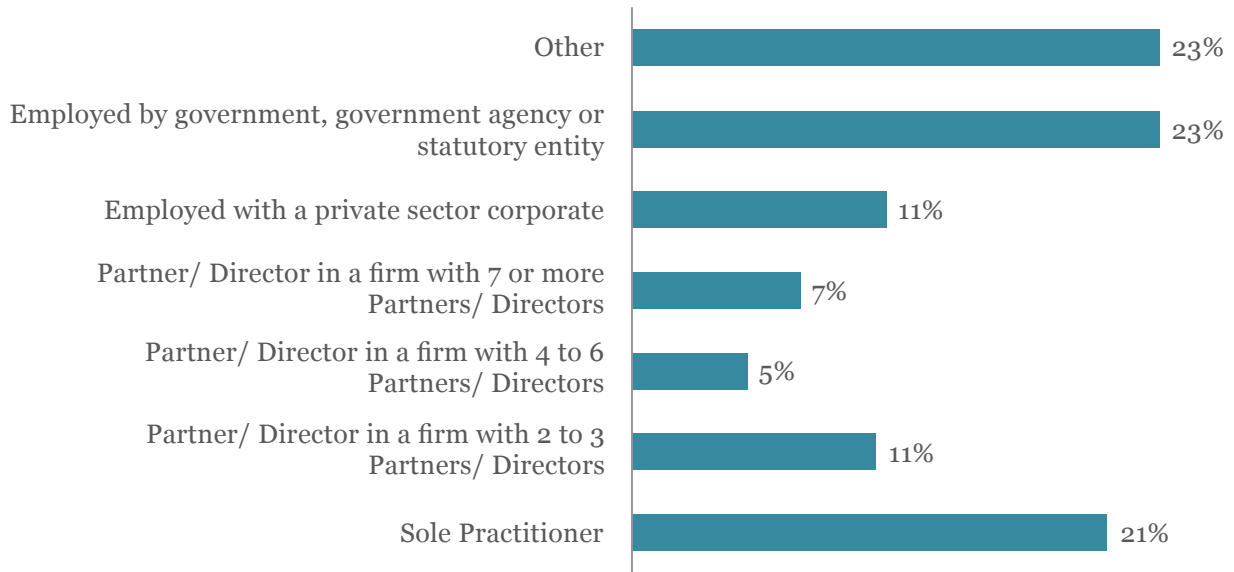
SURVEY RESULTS

Sample demographics

Figure 4 below shows that one in five respondents (21%) work as sole practitioners and nearly the same number (23%) is employed by government. One in ten (11%) is employed in the private corporate sec-

tor whilst the same proportion (11%) is employed as a partner in a firm with 2 to 3 directors. Some 23% work in “other” capacities.

Figure 4: Current working arrangement



Note: Respondents were asked: Select 1 statement that statement best identifies your current working arrangement. I practice as a:

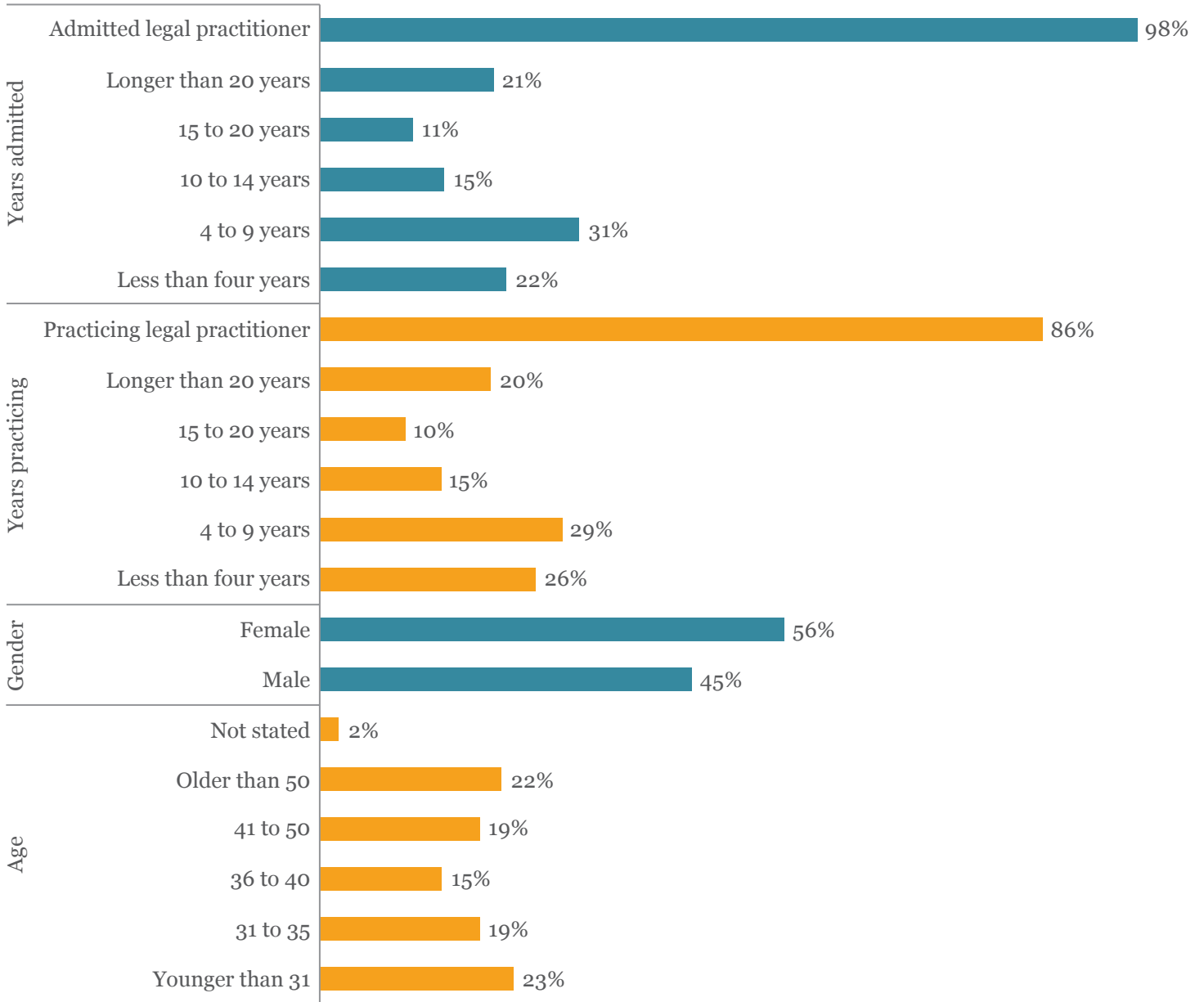
Figure 5 overleaf summarises key demographics and work experience of respondents. More than half (56%) of respondents are female practitioners, and most 57%, are of the age group 40 years or younger. One in five are younger than 31 years of age and almost the same proportion (22%) is older than 50 years.

Almost all respondents in the sample (98%) are admitted legal practitioners whilst a slightly lower num-

ber (86%) are practicing legal practitioners. Nearly half (47%) have been admitted for more than 10 years, whilst 45% of practicing legal practitioners have been practicing for 10 years or more.

Only 23 respondents are currently or have in the past practiced as members of the Society of Advocates.

Figure 5: Demographics and Experience

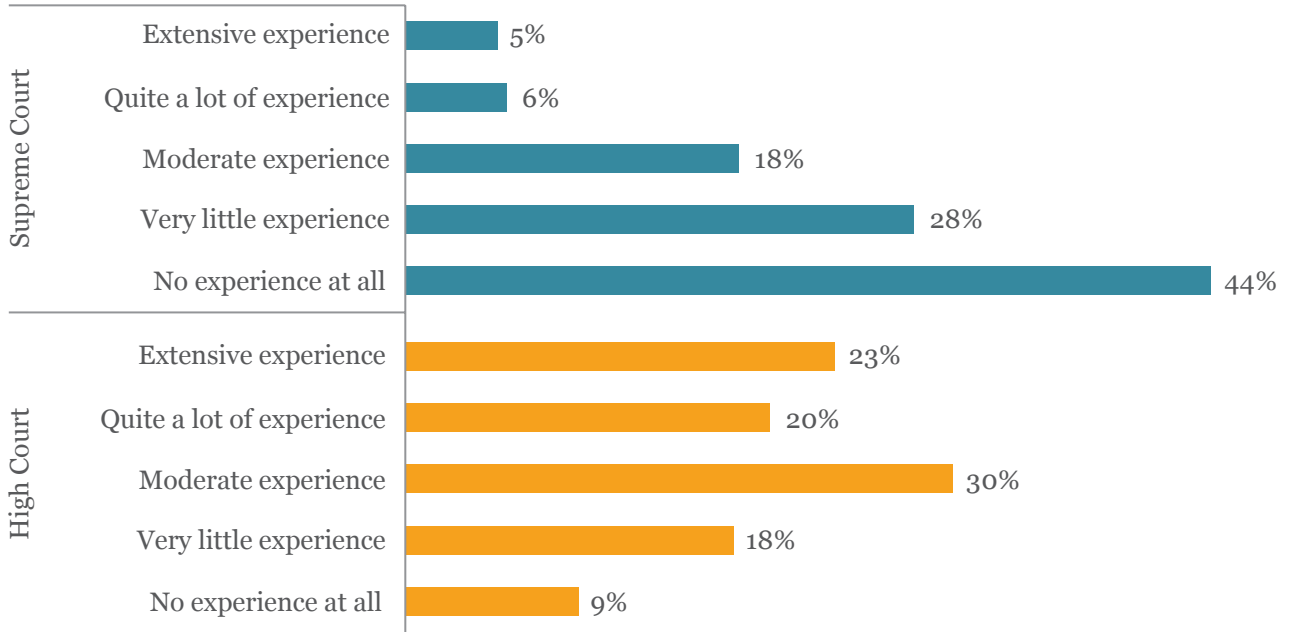


Professional experience

Nearly half (44%) of respondents have no litigation experience in the Namibian Supreme Court. A further

28% reported very little experience whilst only 5% had extensive experience (Figure 6).

Figure 6: Litigious experience by Court



Note: Respondents were asked: A. How much experience have you got dealing with litigious matters in the High Court of Namibia over the past five years? (No experience at all; very little experience; moderate experience; quite a lot of experience; extensive experience). B. How much experience have you got dealing with litigious matters in the Supreme Court of Namibia over the past five years? (No experience at all; very little experience; moderate experience; quite a lot of experience; extensive experience).

Close to a quarter (23%) of respondents have extensive experience in the country’s High Court with one in five (20%) report quite a lot of experience. Less than

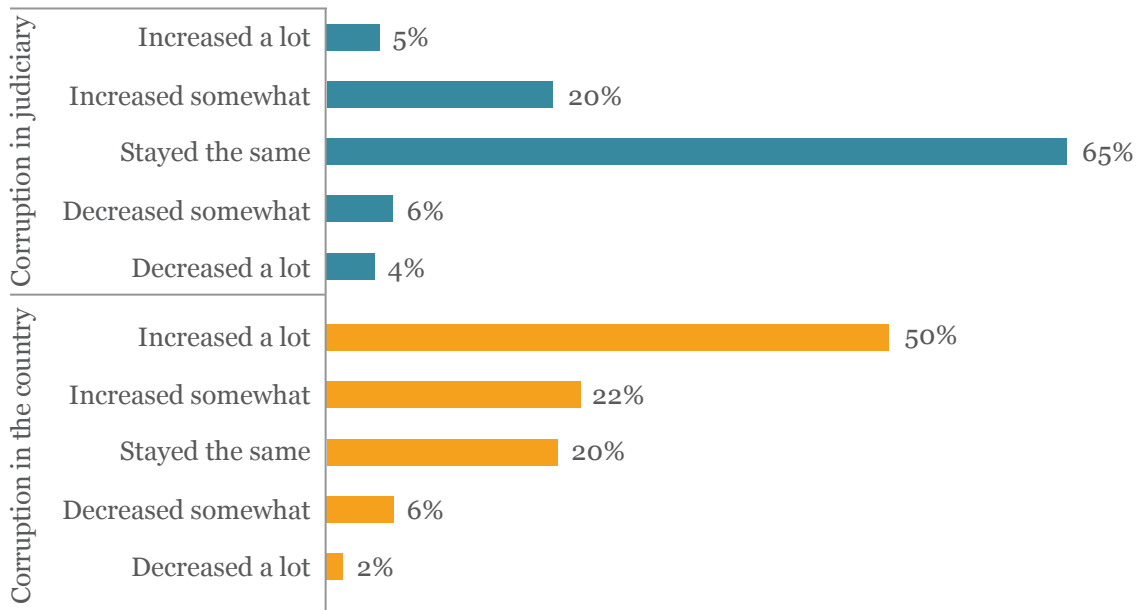
one in ten (9%) report not having any experience at all, whilst a further 18% report very little experience.

Corruption

Two questions were asked on corruption in general to compare the public perception, as measured by the Afrobarometer, with the perception of legal practitioners

as measured by this targeted survey. On the question of corruption in the country, legal practitioners' responses are reported in **Figure 7** below.

Figure 7: Perceptions on corruption



Question: “In your opinion, over the past year, has the level of corruption [in the country] or [in the judiciary] increased, decreased or stayed the same?”

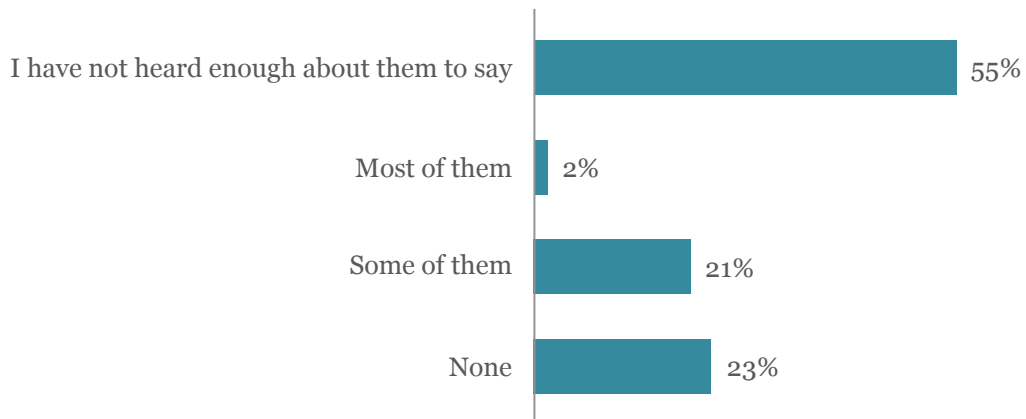
There is no previous data from legal practitioners on this indicator, i.e., a baseline indicator, to make a meaningful assessment of how legal practitioners viewed the level of corruption in the judiciary before this study, with 65% now having stated it “stayed the same”. It could have stayed the same from any different previous perceived levels of corruption. It is however telling that substantially more legal practitioners are of the opinion that corruption in the judiciary is increasing (25%) as opposed to decreasing (10%).

In contrast, nearly three in four (72%) respondents felt that corruption in the country has increased, either

“a lot” or “somewhat”. Only 8% felt corruption in the country decreased, either by a “a lot” or “somewhat”.

Asked on how many judges are possibly involved in corruption, most respondents (55%) felt they have not heard enough about them to say. This is an extraordinarily high instance of non-committal responses (Figure 8). One in five respondents (21%) believed “some of them” were involved in corruption, whilst a slightly higher proportion (23%) felt that “none” were involved in corruption.

Figure 8: Judges involved in corruption



Note: Respondents were asked: How many judges do you think are involved in corruption, or haven't you heard enough about them to say?

Male respondents were far more likely to state that judges are involved in corruption while 62% of females stated they don't know enough to respond and 47% of males stated they don't know enough to answer. Se-

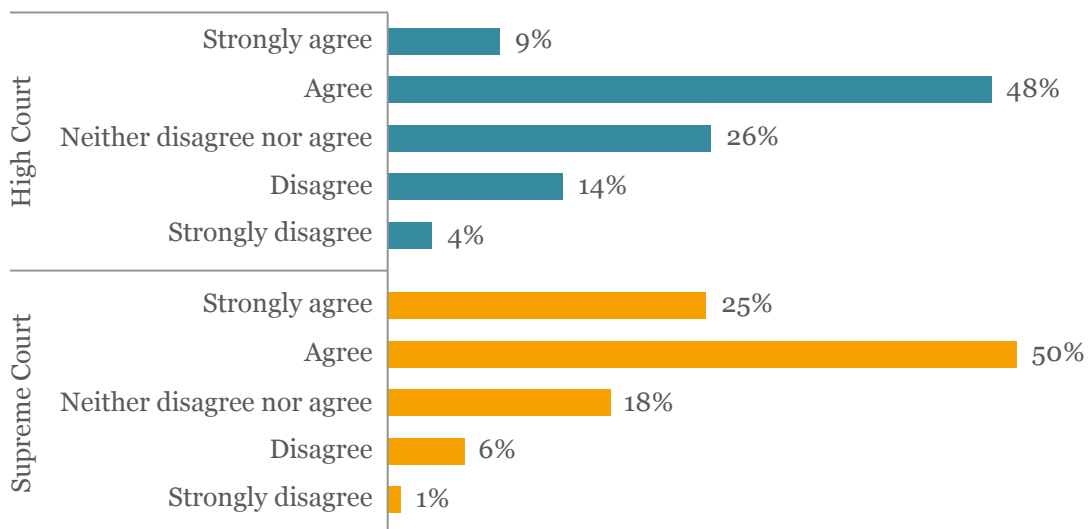
nior practitioners, in terms of years of experience in litigation, were significantly more likely to state that fewer judges are involved in corruption than their junior colleagues.

Competence of the Judiciary

A quarter of respondents were non-committal on this question. Close to 57% agree or strongly agree that High Court Judgments are legally sound, while just over 17% are of the opinion that they are not legally sound. In response to this question there is a strong statistical significance to the seniority of legal practi-

tioners. Senior practitioners (in terms of years admitted and experience with litigation in the High Court) were more likely to disagree with the soundness of High Court judgments. Gender and the fact that respondents are or were advocates did not show a strong statistical relationship with the responses.

Figure 9: Judgments are legally sound by Court



Note: Respondents were asked: Please tell us whether you disagree or agree with each of the following statements: Are the judgments of the high court legally sound?

There is more trust in the legal soundness of Supreme Court judgments than in judgments of the High Court (**Figure 9**). A substantial majority of practitioners (75%) agreed or strongly agreed that Supreme Court Judgments are legally sound. There is little statistical significance in the seniority, gender or the fact that respondents are or were practicing as advocates.

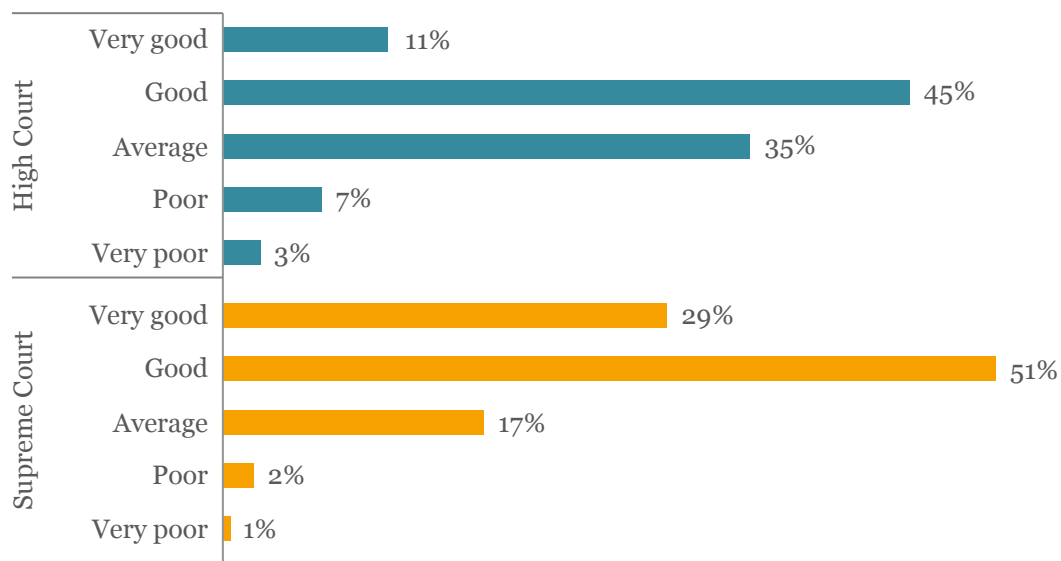
Figure 10 shows that a small portion of respondents (9%) do not trust the juristic competence of judges of the High Court, although it must be noted that a large portion (35%) remained non-committal to this question. Senior practitioners were far more likely to distrust the juristic competence of High Court judges than their less experienced colleagues. So, for instance, of those respondents admitted for less than four years, 84% trusted the High Court judges' juristic competence and 0% stated poor or very poor competence levels. On the other hand, only 23% of those ad-

mitted for over 20 years trusted the High Court judges' juristic competence. Amongst the senior practitioners of over 20 years, 65% answered "average". This disparity remains largely the same when compared to the number of years' experience as practicing legal practitioners, as well as the number of years' experience in litigious matters in the High Court.

Furthermore, there is statistical significance when the responses of advocates (past and present) are assessed, with advocates far less likely to believe that the High Court judges' juristic competence is good or very good.

Gender has a statistically significant effect on perceptions on juristic competence, with female respondents more likely to rate High Court judges' juristic competence as good or very good (70%) compared to the male respondents (40%).

Figure 10: Juristic competence of judges by Court

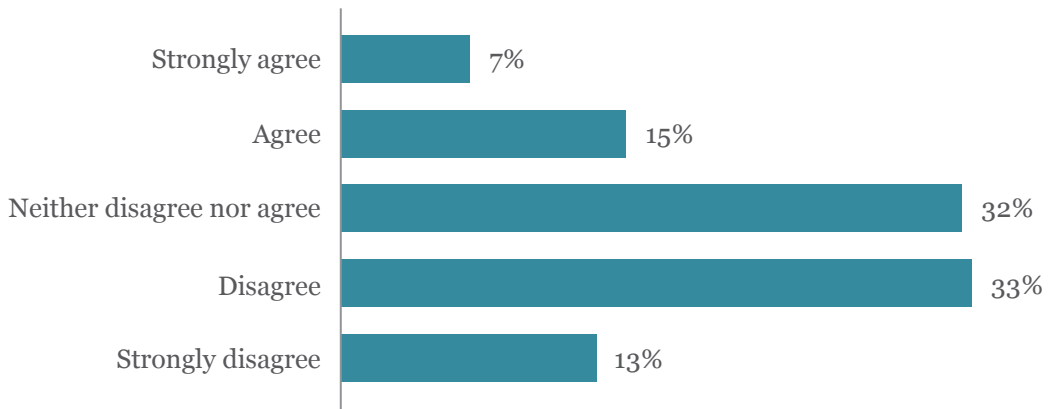


Note: Respondents were asked: How do you rate the general juristic competence of judges of the High Court; Supreme Court?

Figure 10 also shows that an insignificant portion of respondents (3%) do not trust the juristic competence of the judges of the Supreme Court, with an overwhelming portion (80%) expressing trust in the juristic competence of Supreme Court judges. The responses from the group of past and present advocates are statistically significant: fifteen per cent of

this group rate general juristic competence of judges of the Supreme Court as poor (compared to only 1% of all other respondents) and 60% of this group rated general juristic competence of judges of the Supreme Court as good or very good (compared to 83% of all other respondents). Advocates are thus more skeptical of the juristic competencies of judges.

Figure 11: JSC Appoints judges on merit and nothing else



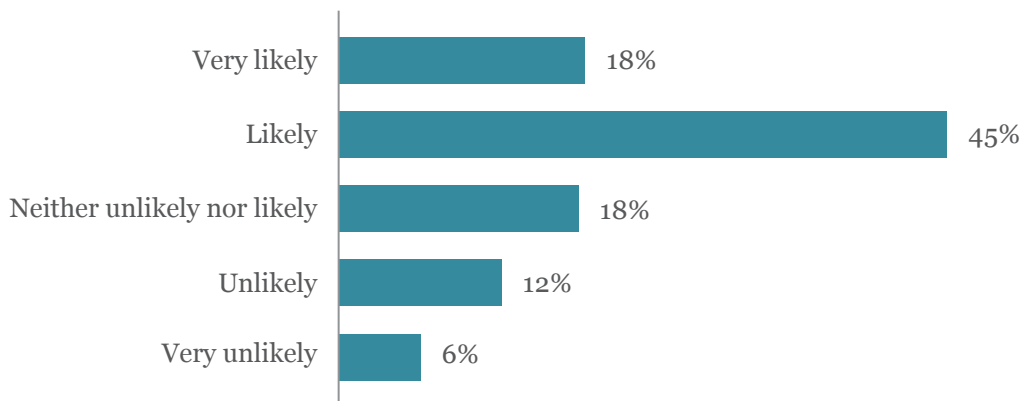
Note: Respondents were asked: The Judicial Service Commission (JSC) appoints judges based on merit and nothing else?

Figure 11 shows there is widespread skepticism about judges being appointed solely on merit, with 46% disagreeing that this is the case and 22% agreeing that judges are appointed solely on merit. There is a strong statistical significance to several variables relating to the demographics of respondents. Senior practitioners, in terms of years admitted and years of practicing experience, were far more likely to disagree or strongly disagree with the statement, i.e., not be-

lieving that judges are appointed on merit alone. Also, male respondents were more likely (20%) to strongly disagree than their female colleagues (8%).

Figure 12 shows a concerning 64% of respondents believe that reasons other than merit (for example: personal convictions or political motivation) influence the appointment of judges by the JSC. Only 18% do not believe this is the case.

Figure 12: Non-merit appointment of judges



Note: Respondents were asked: How likely or unlikely is it that reasons other than merit (for example: personal convictions or political motivation) influence the appointment of judges by the Judicial Service Commission (JSC)?

Those with 10 or more years' experience as a legal practitioner, are far more likely to believe that it is

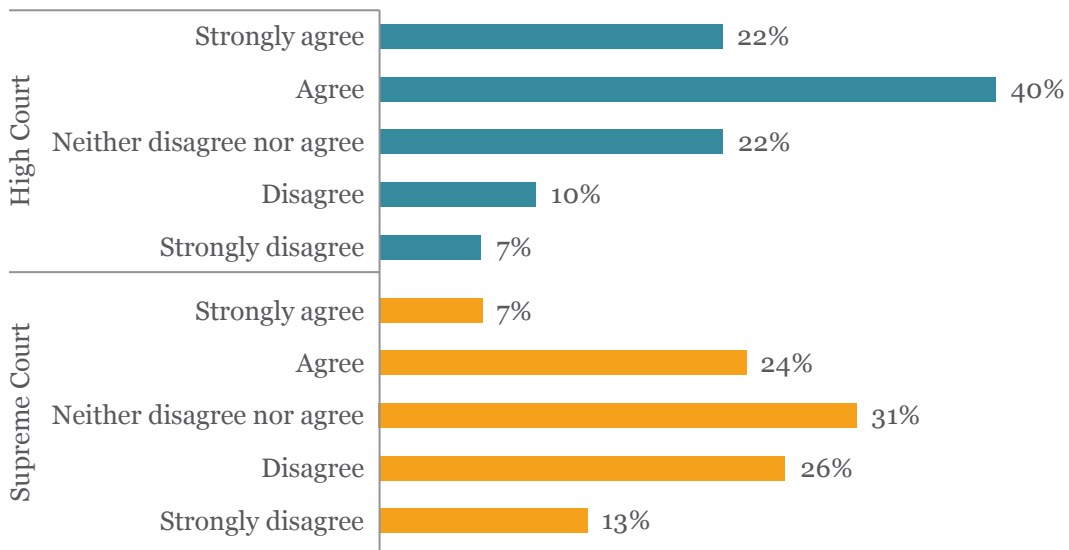
“likely” or “very likely” that judges are appointed by the JSC for reasons other than merit.

Independence of the Judiciary

An overwhelming number of respondents (62%) believe that the judge assigned to adjudicate a matter influences a successful outcome. In stark contrast, only 17% believe that judges of the High Court are equally impartial in adjudicating a matter. This indicates a substantial level of distrust in some High Court judges, the possible reasons for which are examined later in this report.

Almost a third of respondents were non-committal to this question, with the remainder being divided. About 40% disagreed or strongly disagreed, and about 30% agreed or strongly agreed. Seniority, gender, and advocates showed no statistical significance in these responses.

Figure 13: Litigious success depends on specific judge



Note: Respondents were asked: Success in a litigious matter in the High Court/Supreme Court depends on the specific judge assigned to adjudicate the case.

Trust in the impartiality of judges in the Supreme Court is substantially higher than judges of the High Court, but respondents are still fairly equally divided

between trusting and distrusting some Supreme Court judges. The possible causes for the mistrust are examined later in this study.

Factors Affecting the Independence of the Judiciary

The survey contained questions aimed to report on several factors that may influence the independence of the judiciary. These included:

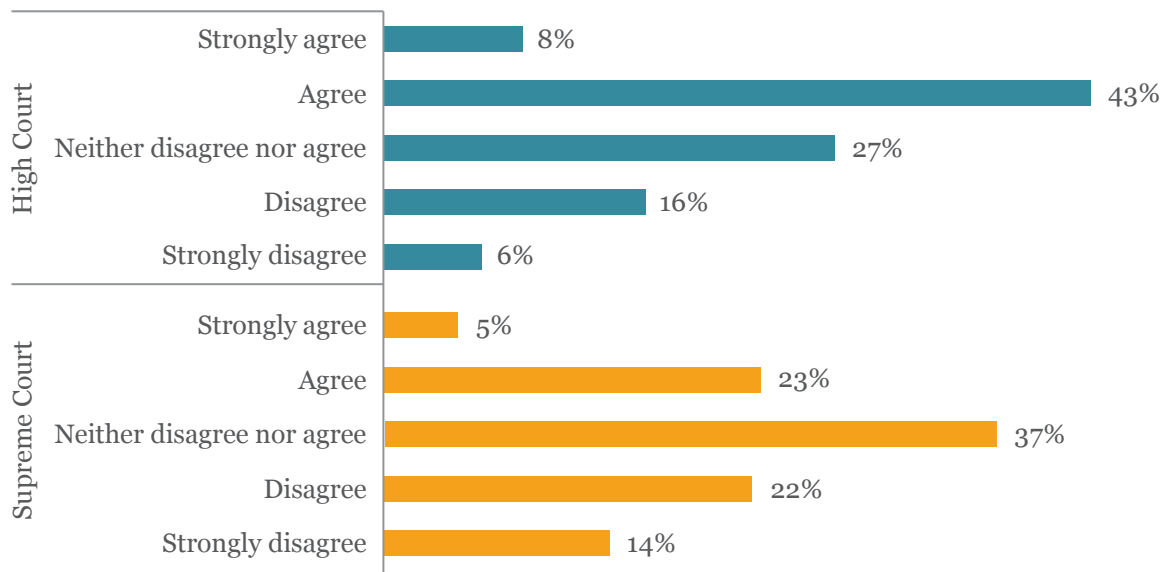
- Personal convictions
- Loyalty to the Government
- Loyalty to the ruling (political) party
- Powers of the Judicial Service Commission
- Bribes
- Government interference with work or residency permits
- Fearing reprisals or acts of revenge by unsuccessful litigants
- Fearing reprisals or acts of revenge if the unsuccessful litigant is the Government

Personal Convictions

There appears to be a concern that personal convictions of judges in the High Court may interfere with the delivery of impartial judgments, with 51% of respondents agreeing that this may be the case, and only 22% disagreeing. There is no statistical significance on

the cross-tabulation of any group, which means that the result holds true for practitioners of all age groups, experience and whether having practiced as an advocate or not.

Figure 14: Personal convictions of judge will influence outcome of a case by Court



Note: Respondents were asked: Below are a number of statements about High Court [Supreme Court] judges. Please tell us whether you disagree or agree with each of them. In Namibia today, the personal convictions of a Judge in the High Court will influence the outcome of a case.

Nearly three in ten (27%) of respondents agreed that personal convictions may influence the outcome of a case in the Supreme Court while 36% disagreed. There is no statistical significance on the cross-tabulation of

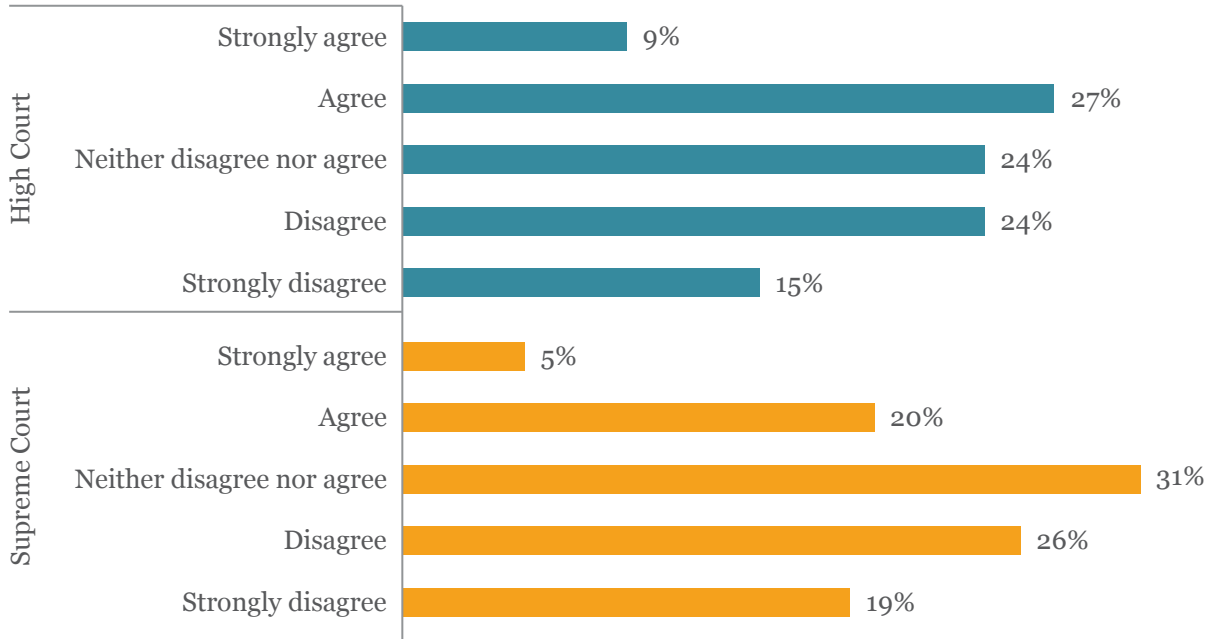
any group, which means that the result holds true for practitioners of all age groups, experience and whether having practiced as an advocate or not.

Loyalty to the Government

Figure 15 shows that the legal profession stands divided on this matter, with 39% disagreeing and 37%

agreeing with judges being influenced by their loyalty to government.

Figure 15: Judges influenced by loyalty to government by Court



Note: Respondents were asked: Judges of the High Court/Supreme Court are influenced by loyalty to the Government when delivering important judgments that affect the government.

Respondents are of the opinion that Supreme Court judges are less likely to be influenced by loyalty to government, with 46% disagreeing with the statement and 25% agreeing. Almost a third of the respondents

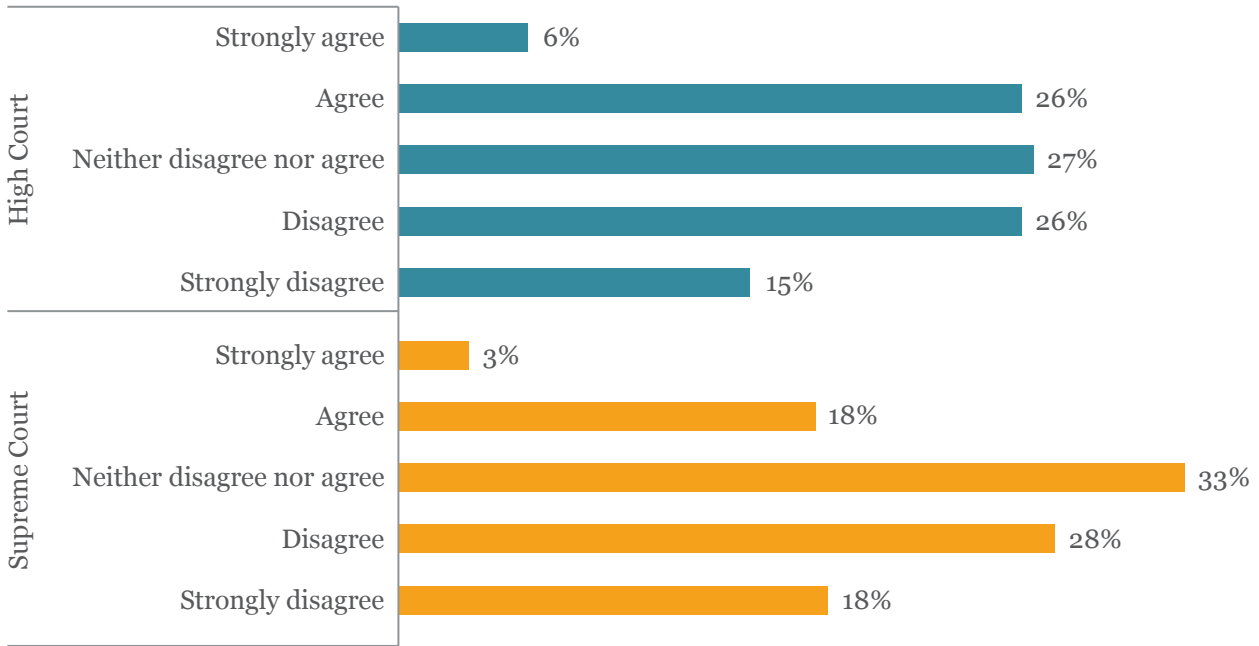
opted to neither agree nor disagree. Advocates are more likely to agree that judges of the Supreme Court are influenced by loyalty to government; 50% agreed and 35% disagreed.

Loyalty to the ruling party

The legal profession stands divided on this matter too (Figure 16). More than two in five (41%) disagreed that

High Court judges are influenced by loyalty to the current ruling party, whilst slightly fewer (32%) agreed with it.

Figure 16: Judges are influenced by loyalty to the ruling party by Court



Note: Respondents were asked: Judges of the High Court/Supreme Court are influenced by loyalty to the ruling political party when delivering judgments that affect the ruling party, its leaders, and its members.

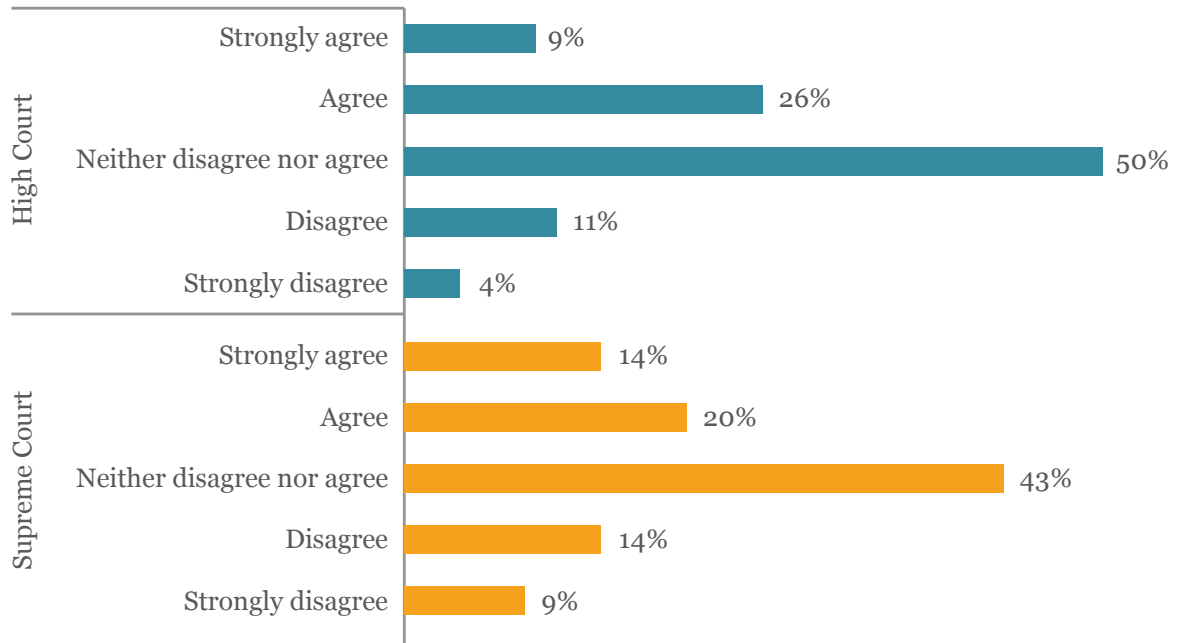
Respondents are of the opinion that Supreme Court judges are less likely to be influenced by loyalty to the ruling party, with 46% disagreeing with the statement and 20.7% agreeing. There is no significant statistical difference in the responses from advocates, which indicates they are less concerned about loyalty to the ruling party than about loyalty to Government influencing judgments.

Results for “loyalty to Government” and “loyalty to the ruling party” in both courts are remarkably similar, which could indicate that respondents view “Government” and “ruling party” as essentially the same thing, or at least posing the same risk of influence over judges.

Powers of the Judicial Service Commission

Figure 17 shows that only 15% of respondents agree that the JSC’s powers may influence judges of the High Court, while 35% disagree. Significantly, 50% remain non-committal to this statement, neither agreeing nor disagreeing.

Figure 17: Judges not influenced by the powers of the JSC



Note: Respondents were asked: Judges of the High Court/Supreme Court are not influenced at all by the powers of the Judicial Service Commission (JSC) when delivering judgments.

Nearly one quarter (23%) of respondents agree that the JSC’s powers may influence judges of the Supreme Court, while 34% disagree. Significantly, 43% remain non-committal to this statement, neither agreeing nor disagreeing.

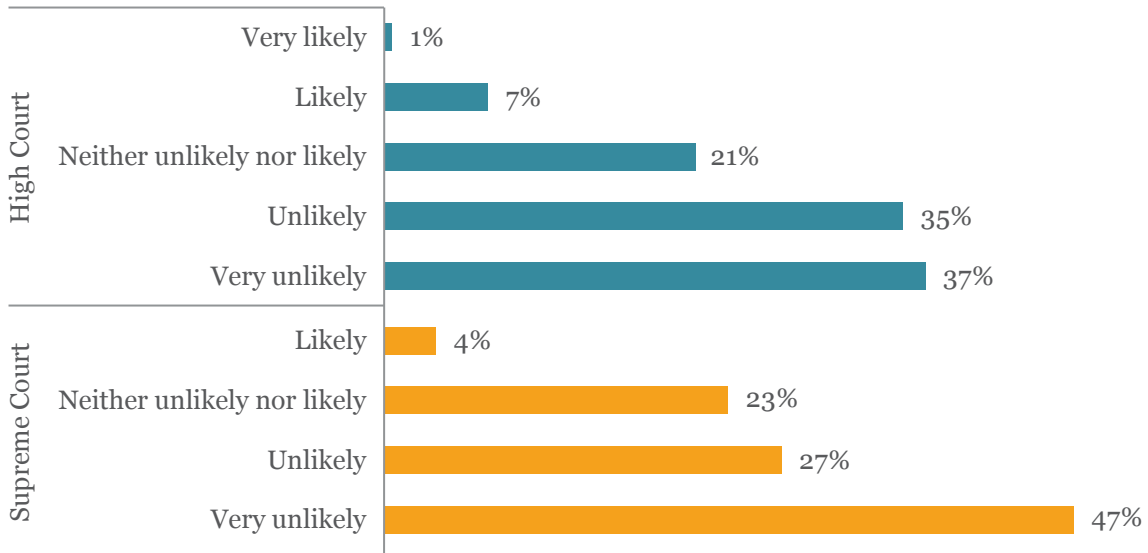
Interestingly, respondents are of the opinion that Supreme Court judges are more likely to be influenced by the powers of the JSC than judges of the High Court. Senior legal practitioners, by number of years admitted, were less likely to agree that the powers of the JSC influence Supreme Court judges.

Bribery

Figure 18 shows that there is substantial trust that judges of the High Court are not taking bribes to influence the outcome of cases. Some 72% of respondents

stated it is unlikely or very unlikely, while only 8% stated it is likely or very likely.

Figure 18: Judges taking bribes by Court



Note: Respondents were asked: How likely is it that judges of the High Court/Supreme Court are taking bribes to influence the outcome of a case?

Figure 18 also shows that there is substantial trust that judges of the Supreme Court are not taking bribes to influence the outcome of cases; 73% of the respon-

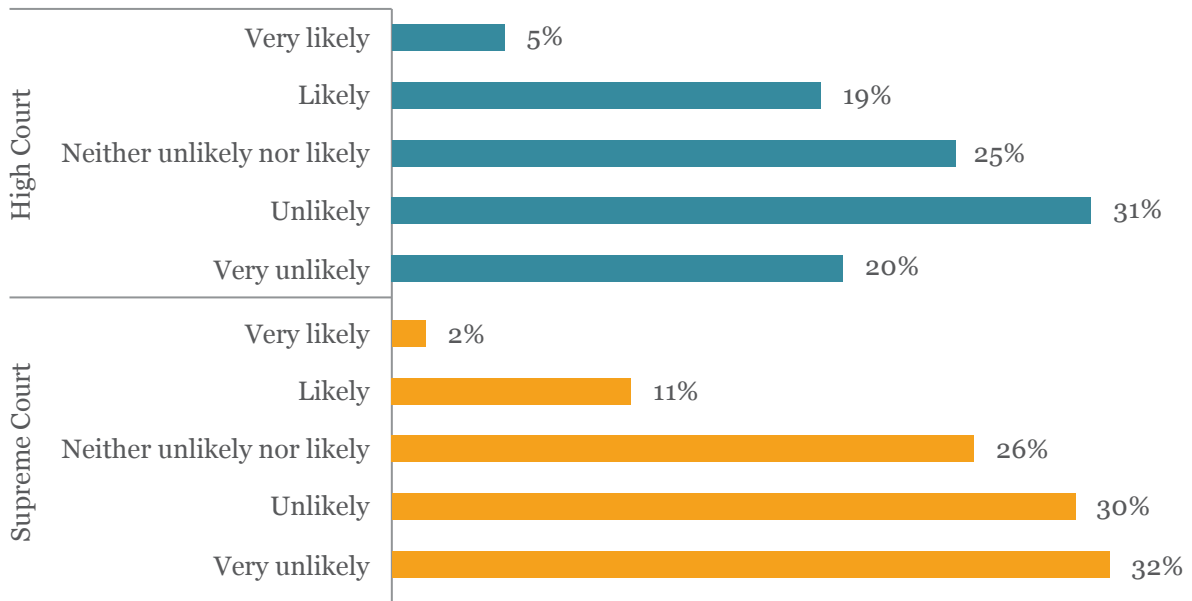
dents stated it is unlikely or very unlikely, while 4% stated it is likely.

Government interference with work or residency permits

Figure 19 shows that 24% of respondents are of the opinion that the possibility that Government may interfere with work or residency permits of foreign

judges serving in the High Court may influence their judgments. The majority (51%) believe this is unlikely or very unlikely.

Figure 19: Foreign judges fear Government interference in work or residency permits by Court



Note: Respondents were asked: Do foreign judges serving in the High Court/Supreme Court fear Government interference with their work or residency permits when delivering a judgment?

Trust that the possibility of Government interference with work or residency permits will **not** influence judgments is substantially higher for foreign Supreme Court judges than for foreign High Court judges. Just more than one in ten (12%) of respondents are of the

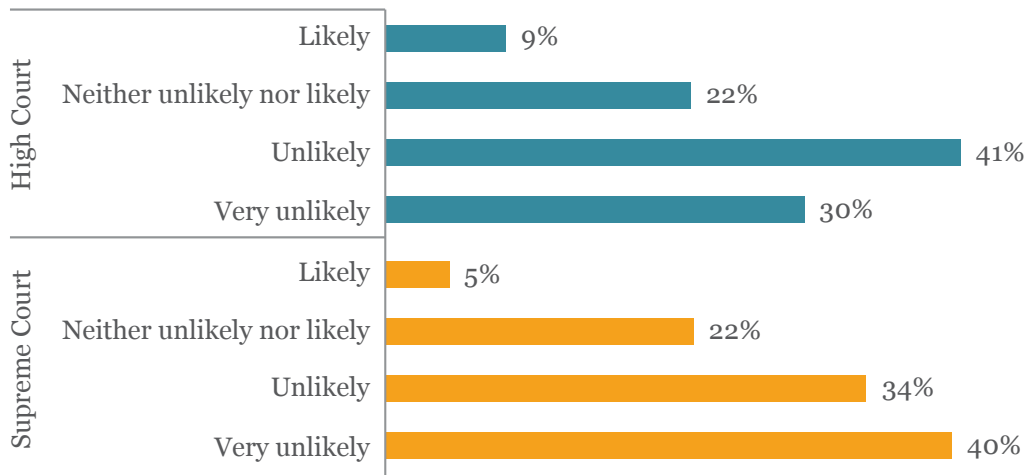
opinion that the possibility that Government may interfere with work or residency permits of foreign judges serving in the Supreme Court may influence their judgments and 62% believe this is unlikely or very unlikely.

Fear of reprisals or acts of revenge by unsuccessful litigants

Less than 5% of respondents believe that the possibility of reprisals or acts of revenge is likely to influence judges of the Supreme Court, while 74% believe this is unlikely or very unlikely (**Figure 20**). Advocates were more inclined to agree that reprisals or acts of revenge

may influence judges of the Supreme Court, with 26% of them of the opinion that such influence is likely, as opposed to only 7% of the non-advocate respondents believing such influence is likely.

Figure 20: Judges fear retaliations by unsuccessful litigants by Court



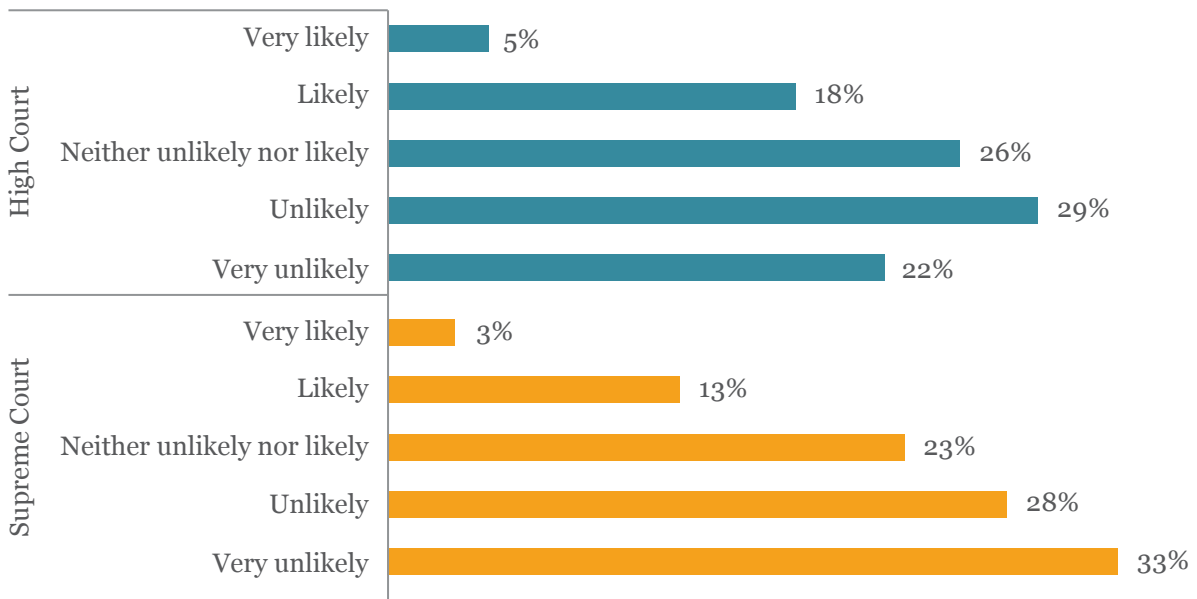
Note: Respondents were asked: Judges of the High Court/Supreme Court fearing reprisals or acts of revenge by unsuccessful litigants in delivering a judgment?

Fear of reprisals or acts of revenge if the unsuccessful litigant is the Government

Slightly more than one in five (22%) of respondents believe that the possibility of reprisals or acts of revenge is likely to influence judges of the High Court where the unsuccessful litigant is Government, while 52% believe this is unlikely or very unlikely. There is a substantially greater fear that reprisals and acts of

revenge may influence High Court judgments when the Government is a party to proceedings before that court than in general. This is worrying as it relates to the core principles of the rule of law as well as constitutional protection.

Figure 21: Fear of reprisals or acts of revenge if unsuccessful litigant is Government



Note: Respondents were asked: Judges of the High Court/Supreme Court fearing reprisals or acts of revenge if the unsuccessful litigant is the Government of Namibia in delivering a judgment?

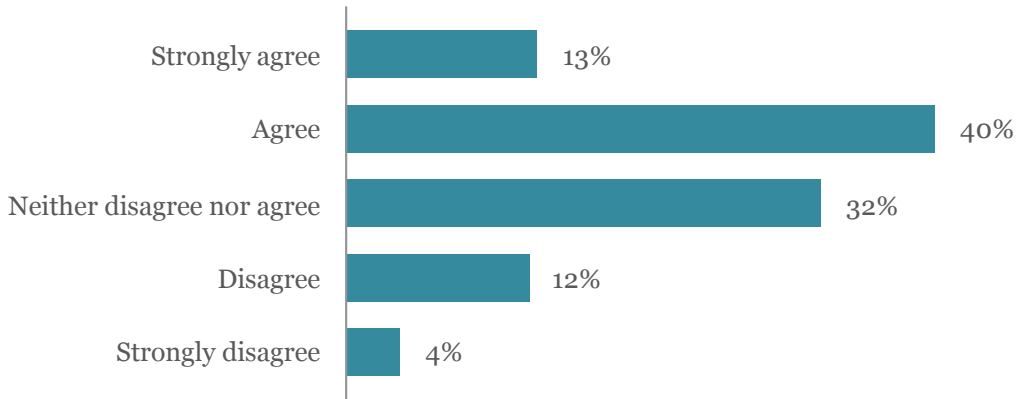
Close to one in five (16%) of respondents are of the opinion that the possibility of reprisals or acts of revenge is likely to influence judges of the Supreme Court where the unsuccessful litigant is Government, while 61% believe this is unlikely or very unlikely. Again, there is a substantially greater fear that retri-

sals and acts of revenge may influence Supreme Court judgments when the Government is a party to proceedings before that court than in general. It is also noteworthy that 23% of respondents remain non-committal to the question.

Office of the Judiciary

Figure 22 and **Figure 23** report opinions on the contribution of the Office of the Judiciary in strengthening the rule of law.

Figure 22: The Office of the Judiciary strengthens the separation of powers

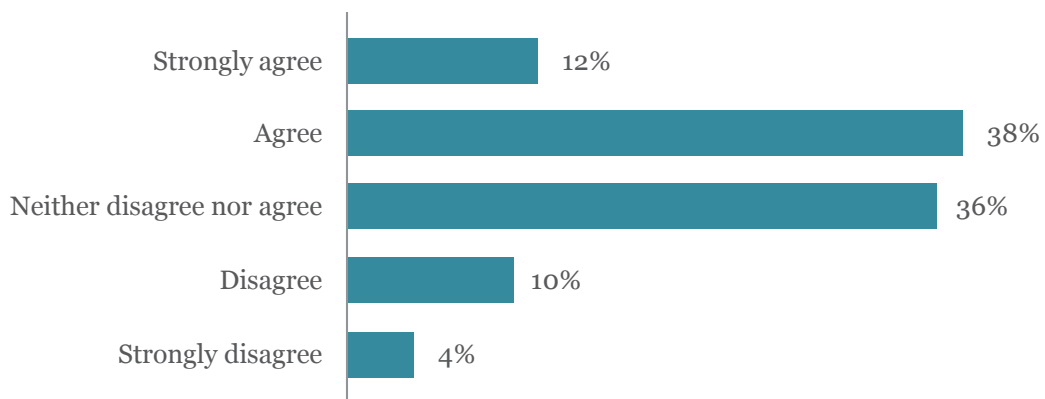


Note: Respondents were asked: The statutory Office of the Judiciary strengthens the principle of separation of powers.

There is fairly strong support for the opinion that the Office of the Judiciary strengthens the principle of separation of powers, with 52.3% agreeing and 15.9% disagreeing. The results are very similar as to wheth-

er the Office of the Judiciary enhances the ability of the judiciary to uphold the rule of law, as per **Figure 23** below.

Figure 23: The Office of the Judiciary enhances the ability of the judiciary to uphold the rule of law



Note: Respondents were asked: The statutory Office of the Judiciary enhances the ability of the judiciary to uphold the rule of law.

Legal Costs

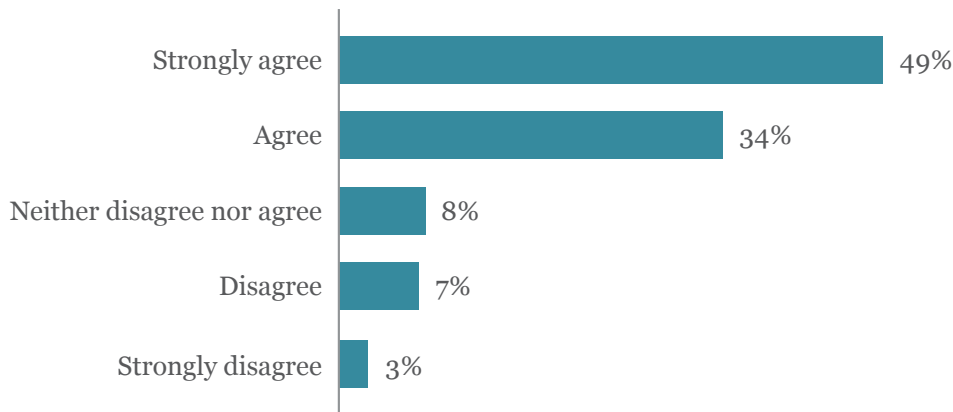
Past research amongst clients of legal practitioners, conducted through the Law Society of Namibia Change Project, assessed opinions on the cost of litigation. Four in five (81%) of respondents in that survey indicated that legal costs are too high. Legal practitioners interviewed in this current survey largely agreed with that popular opinion (63%).

In this survey, legal practitioners were asked whether they agree or disagree that the cost of legal represen-

tation deters many from approaching the courts and **Figure 24** contains their responses.

The latest data shows that legal practitioners themselves are increasingly concerned about legal costs being too high. This may well be a major factor in not only limiting access to justice, and ultimately upholding the principles of the rule of law, but also in the public's sense of distrust in the judiciary, whether justified or not. Senior practitioners, however, were less likely to agree or strongly agree.

Figure 24: Legal costs deter many from approaching courts

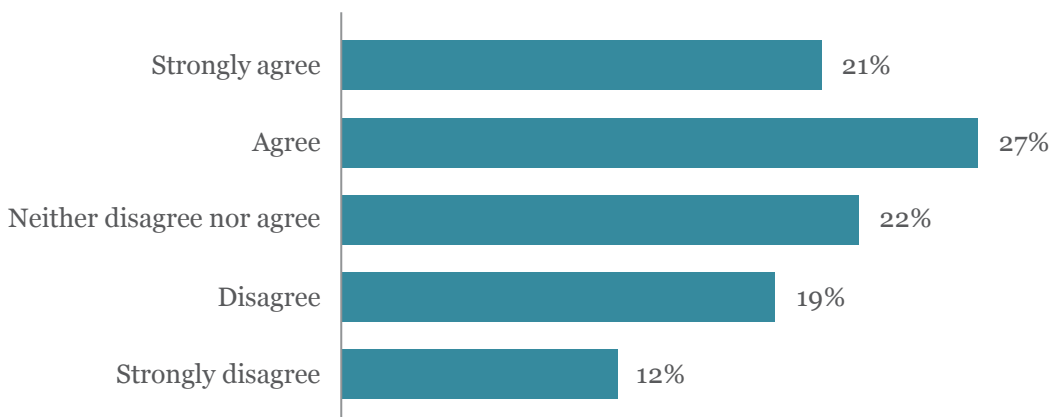


Note: Respondents were asked: Does the cost of legal representation deter many from approaching the courts?

Legal costs appear to present an obstacle to obtaining justice through the judicial system, as almost half of legal practitioners themselves advise their own clients against

litigation solely for reasons of high legal fees. Only about 30% disagree that costs are a deterrent to litigation.

Figure 25: Legal practitioners advising clients not to approach courts due to high costs of litigation



Note: Respondents were asked: I advise clients not to approach the higher courts due to the high costs associated with it.

CONCLUSION

Generally, respondents trust the Namibian judiciary. Trust in the competence of the judiciary is strong, albeit lower amongst more experienced respondents.

Some variables measured may raise concern. For instance, 46% of respondents did not believe that judges are appointed on merit and 63% are of the opinion that judges are appointed for reasons other than merit. 62% of respondents are of the opinion that success in the High Court is dependent on the judge assigned to a case. The majority (51%) are of the opinion that a judge's personal convictions influence the outcome of a High Court case. More respondents (35%) are of the opinion that the powers of the JSC may influence judges than those who believe the JSC's powers do not influence judges (15%).

The majority of respondents (53%) believe that the Office of the Judiciary supports the principle of separation of powers. A substantial portion of respondents believed that high legal fees pose an obstacle to approaching the courts - 83% agreed that high legal fees deter people from taking higher court legal actions, and 48% stated that they in fact advise clients not to approach the courts due to high legal costs.

There is a strong perception amongst legal practitioners, as is the case amongst the general public, that corruption in general is increasing. The majority of legal practitioners are of the opinion that corruption in the judiciary has not increased or decreased over the past years.

BIBLIOGRAPHY

- DALTON, R. J. (2005). The social transformation of trust in government. *International Review of Sociology*, 15(1), pp.133–154.
- DALTON, R. J. (2004). *Democratic Challenges, Democratic Choices: The Erosion of Political Support in Advanced Industrial Democracies*. Oxford: Oxford University Press.
- EASTON, D. (1965). *A framework for political analysis*. New Jersey: Prentice Hall.
- GRN. (2014). *Amendment of High Court Practice Directions: Rules of High Court of Namibia, Notice 10*, Office of the Judiciary, Windhoek
- HOOGHE, M. AND MARIEN, S. (2013). A comparative analysis of the relation between political trust and forms of political participation in Europe. *European Societies*, 15(1), pp.131–152.
- INGLEHART, R. (1999). Trust, Well-Being and Democracy. In M. E. Warren (Ed.), *Democracy and Trust*. Cambridge: Cambridge University Press. pp. 88-120.
- KLINGEMANN, H-D. AND FUCHS D. (1995). *Citizens and the state*. Oxford; New York: Oxford University Press
- LAC. (n.d.). *Rule of Law, Law in Namibia: Factsheet Series No. 1 of 6*, Legal Assistance Center, Windhoek
- LINKS, F. (2018). *Creaking Under Its Own Weight: How backlogs, bottlenecks and capacity constraints undermine the criminal justice system's contribution to Namibian anti-corruption efforts*, IPPR, Windhoek.
- MARIEN, S. AND HOOGHE, M. (2011). Does political trust matter? An empirical investigation into the relation between political trust and support for law compliance. *European Journal of Political Research*, 50(2), pp. 267–291.
- MAESTAS C. (2018). Expert Surveys as a Measurement Tool: Challenges and New Frontiers, in Atkeson L.R. and R. M. Alvarez. (2018). *The Oxford Handbook of Polling and Survey Methods*, Oxford University Press, Oxford.
- MISHLER W AND R ROSE. (2001). What Are the Origins of Political Trust? Testing Institutional and Cultural Theories in Post- Communist Societies, *Comparative Political Studies*, Vol. 34 No. 1 (February), pp. 30-62.
- NORRIS P. (ed) (1999). *Critical Citizens: Global Support for Democratic Governance*. New York: Oxford University Press.
- OECD. (2013). "Trust in government, policy effectiveness and the governance agenda", in *Government at a Glance 2013*, OECD Publishing, Paris
- OFFICE OF THE JUDICIARY. (2020). *Judiciary Speaks Out On Recent Attacks Against The Courts And Judicial Officers*, Media Statement, Windhoek, 17 February 2020.
- REPUBLIC OF NAMIBIA. (1995). *Judicial Service Commission Act 18 of 1995*, Windhoek, <https://www.lac.org.na/laws/annoSTAT/Judicial%20Service%20Commission%20Act%2018%20of%201995.pdf>
- REPUBLIC OF NAMIBIA. (1990). *Namibia: The Constitution of the Republic of Namibia*, Windhoek, <https://www.lac.org.na/laws/annoSTAT/Namibian%20Constitution.pdf>
- SPEIER, H. (1950). Historical Development of Public Opinion. *American Journal of Sociology*, 55(4), 376–388.

