

Public confidence in the judiciary: a South African perspective

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Introduction

Despite the importance of public confidence in the judiciary, legal scholars have done relatively little research to explore what levels of public confidence in African judiciaries actually are, and what might inform these views. This article aims to offer some thoughts on this issue by analysing data from Afrobarometer public opinion surveys relating to public confidence in the judiciary in South Africa.¹ The very concept of public confidence in the judiciary is an elusive one that could be a topic of discussion on its own.² This article will not seek to delve into this debate. Rather, the Afrobarometer survey data will be taken as a starting point for an attempt to explain some of the most striking results of this public opinion survey, insofar as it relates to the judiciary and the courts.

The focus of this article is primarily on results relating to South Africa, although this will be placed in some comparative context by identifying where key results fall in relation to other African judiciaries. It begins by analysing the legal framework to highlight the importance of public confidence in the courts, then provides details on the Afrobarometer project, including a brief overview of the methodology employed. Key findings of Afrobarometer's survey will be presented and analysed. The article concludes by offering some thoughts about what the results mean for the judiciary generally as well as for judicial training initiatives specifically. Limitations of the data and implications for further study of this issue will also be discussed.

Public confidence in the courts: why does it matter?

The South African Constitution³ vests significant powers in the courts. The courts are required to declare “any law or conduct that is inconsistent with the Constitution ... invalid to the extent of its inconsistency”,⁴ and are themselves “independent and subject only to the Constitution and the law”.⁵ The Constitution itself is the supreme law of the land, and any “law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”⁶

Structuring the legal system this way brings into stark focus the well-known “counter-majoritarian dilemma”. Briefly put, this concept raises the question of how, in a

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¹ This article forms part of a broader research initiative called the “Judiciaries in Africa” project, which aims to further understanding of judiciaries in Africa by collecting systematic comparative information focusing on judicial independence, legitimacy, and access to justice. The authors are two of the co-principal investigators of the project. Further information is available at: www.idcippa.uct.ac.za/jia, accessed 17 April 2020.

² A Miller, “Public confidence in the judiciary: some notes and reflections” (1970) 35(1) *Law and Contemporary Problems* 69.

³ *The Constitution of the Republic of South Africa*, 1996 (Constitution).

⁴ Constitution, s 172(1)(a).

⁵ Constitution, s 165(2).

⁶ Constitution, s 2.

democracy, “a group of unelected, unrepresentative judges are free to overrule the will of the people and/or their elected representatives.”⁷ Again, it is beyond the scope of this paper to enter into a detailed discussion of this issue. But the question is significant, as the absence of democratic checks over the powers of the judiciary make it important for the long-term survival of South Africa’s constitutional democracy that the judiciary maintains a reasonable degree of public confidence. This does not mean that a significant majority have to agree with all of the courts’ decisions all of the time. Nevertheless, the above suggests that the judiciary should be regarded as an institution that acts with credibility and integrity, if this system is to endure in the long term.

Former Chief Justice Sandile Ngcobo has described public confidence in the judiciary as “vital to the preservation of the rule of law, and, ultimately, to the preservation of our constitutional democracy.”⁸ Ngcobo endorses Barak’s famous observation that the judiciary has “neither sword nor purse”, but only the confidence of the public, meaning that “the public recognises the legitimacy of judicial decisions, even if it disagrees with their content.”⁹ Absent such public confidence, Ngcobo suggests, people may abandon the courts and resort to self-help.¹⁰ Put another way, “the courts cannot act with effective authority (as opposed to brute force) if those with whom they deal do not take them seriously.”¹¹ Other writers have made the link between public confidence and the legitimacy of the judiciary. Le Roux and Davis argue that:

The more the public respects and heeds the importance of court decisions, recognising that their content broadly reflects the moral convictions of the community, the more legitimate the courts become as an institution.¹²

The need for the judiciary to enjoy public confidence is captured repeatedly in the Bangalore Principles of Judicial Conduct. The Principles identify one of the indicators of judicial independence as the need for a judge not only to be free from inappropriate connections with and influence by other branches of government, but to “also appear to a reasonable observer to be free therefrom.”¹³ They identify the need for a judge to show and promote high standards of judicial conduct “to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.”¹⁴ Regarding judicial impartiality, the Principles emphasise the need for judicial conduct to “enhance ... the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.”¹⁵ As to judicial integrity, the Principles require that:

The behaviour and conduct of a judge must reaffirm people’s faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.¹⁶

⁷ K Morgan and W Young, “What counter-majoritarian dilemma? Experimentally evaluating citizens’ views of the democratic nature of the Supreme Court” (2019) 5 *Constitutional Studies*, 1 at 2.

⁸ S Ngcobo, “Sustaining public confidence in the judiciary: an essential condition for realising the judicial role” (2011) 128(1) *South African Law Journal* 5 at 6.

⁹ *ibid* at 6.

¹⁰ *ibid* at 10.

¹¹ S Kenny, “Maintaining public confidence in the judiciary: a precarious equilibrium” (1999) 25 (2) *Monash University Law Review* 209 at 210.

¹² M Le Roux and D Davis, *Lawfare: judging politics in South Africa*, Jonathan Ball Publishers, 2019 at p 33.

¹³ *The Bangalore Principles of Judicial Conduct* (2002), Art 1.3.

¹⁴ *ibid*, Art 1.6.

¹⁵ *ibid*, Art 2.2.

¹⁶ *ibid*, Art 3.2.

Under South African domestic law, an acknowledgement of the importance of public confidence in the judiciary is evident in the legal tests for judicial independence and recusal. In articulating the test for assessing the independence of the courts from other branches of government, the Constitutional Court of South Africa has held, drawing on Canadian jurisprudence, that “the appearance or perception of independence plays an important role in evaluating whether courts are sufficiently independent cannot be doubted.”¹⁷ And in defining the test for the circumstances under which a judge would be required to recuse themselves on the grounds of a reasonable apprehension of bias, the court has held that:

[f]undamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial.¹⁸

The court held further that one of the factors to be balanced in taking into account whether a judge should recuse themselves is “the pre-eminent value of public confidence in the impartial adjudication of disputes.”¹⁹

This discussion shows that public confidence and trust in the judiciary is an extremely important matter, both at a theoretical level and at a practical level in giving effect to key legal tests and standards.

Prior to examining what can be said about the actual levels of public confidence in the courts, it will be necessary to introduce the Afrobarometer project, from which this information is obtained.

The Afrobarometer project

Afrobarometer is a pan-African, non-partisan survey research project that measures citizen attitudes on democracy and governance, the economy, civil society and other topics.²⁰ It began by conducting surveys in 12 African countries in 1999.²¹ By the time of round 6 of surveys in 2014–2015, Afrobarometer had expanded to 36 African countries. Round 7 surveys were conducted in 2016–2018. This paper will focus on the most recent data, while drawing on comparisons from the time period from 2000 onwards.

Surveys are conducted through face-to-face interviews with a randomly selected sample of 1,200 or 2,400 people in each country.²² Surveys are conducted in collaboration with a national partner in each country. National partners are responsible for training interviewers prior to the collection of data and ensuring that interviewers have the necessary skills and qualifications to implement the survey.²³

The survey results

This section sets out key results from the Afrobarometer surveys insofar as they relate to perceptions of the judiciary in South Africa. To contextualise these results, some remarks about what one might expect to find given the country’s history will be given first.

¹⁷ *Van Rooyen v The State (General Council of the Bar of South Africa intervening)* 2002 (5) SA 246 (CC) at [32].

¹⁸ *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) at [28].

¹⁹ *ibid* at [37].

²⁰ Afrobarometer, *About Afrobarometer*, available at www.afrobarometer.org/about, accessed 7 April 2020.

²¹ *ibid*, *Our History*, available at www.afrobarometer.org/about/our-history, accessed 7 April 2020.

²² *ibid*, *Surveys and Methods*, available at www.afrobarometer.org/surveys-and-methods, accessed 7 April 2020.

²³ *ibid*.

During the apartheid era which preceded the introduction of the Constitution, it would be fair to anticipate that many South Africans would have had low levels of trust in the courts. In light of the role of the courts in enforcing apartheid laws, the judiciary has been described as follows:

[T]he courts were an important part of the apartheid project. Many litigants inevitably left the courts without justice and with their dignity impaired. It is undeniable that the courts were often engines of injustice.²⁴

However, in the constitutional era, it might be anticipated that the courts have enjoyed a resurgence in their public image. The Constitutional Court in particular has been the recipient of much academic praise for its jurisprudence — Theunis Roux describes the Constitutional Court in its early years as having “built an unrivalled reputation in the comparative constitutional law community for technically accomplished and morally enlightened decision-making.”²⁵ And, perhaps most pertinently for the time period under consideration, the South African judiciary has been seen as being at the forefront of pushback against the phenomenon of “state capture” which is seen by many as defining the administration of former President Jacob Zuma.²⁶ The judiciary has been said to have been the only governance institution to have “lived up to its constitutional mandate” during this time,²⁷ with the courts having “held firm” in spite of being:

[d]eluged with cases challenging the state capture project, seeking to hold the executive accountable, demanding that office-bearers perform their functions rather than maintain their loyalty to Zuma and the endemic spread of corruption under his term of office.²⁸

This view of the role of the courts in responding to the phenomenon of state capture is one that appears to be shared by many, particularly by academics and political commentators. To be sure, there is a very real risk of the courts being drawn into contested issues where the political stakes are so high. The issues raised by the counter-majoritarian concerns discussed earlier are squarely raised when the courts have to step in to resolve issues that would normally be expected to be resolved in the political or other realms. Former Deputy Chief Justice Dikgang Moseneke has argued that:

This excessive use of the courts speaks to the concern that democratic arrangements in our land are virtually devoid of non-litigious sites for mediation of conflict. Why would party faithful rush off to court to resolve an internecine dispute? Why is the state the chief of all litigators? How does it happen that labour federations should seek solace in court processes? It is not unusual to hear activists or senior politicians vowing to go to the Constitutional Court ... The more this trend continues, the more the courts are drawn into the political arena.

But courts are not and should not be a substitute for the obligation to move our society to spaces envisioned in the Constitution.²⁹

There may therefore be a current of opinion which is concerned about judicial overreach due to the extent to which the courts had been drawn into the resolution of some highly political

²⁴ C Forsyth, “The judiciary under apartheid”, in C Hoexter and M Olivier (eds), *The judiciary in South Africa*, Juta & Co Ltd, 2014, p 26.

²⁵ T Roux, *The politics of principle: the first South African Constitutional Court, 1995–2005*, Cambridge University Press, 2013, p 2.

²⁶ See M Le Roux and D Davis, above n 12, pp 267–273.

²⁷ *ibid*, p 273.

²⁸ *ibid*. For an overview of judgments where the courts were called on to engage with these issues, see pp 273–296.

²⁹ D Moseneke, “Reflections on South Africa’s constitutional democracy — transition and transformation”, Keynote Address at the MISTRA–TMALI – UNISA Conference, *20 years of South African democracy: so where to now?*, 12 November 2014, p 21, available at <https://constitutionallyspeaking.co.za/dcj-moseneke-reflections-on-south-african-constitutional-democracy-transition-and-transformation/>, accessed 7 April 2020.

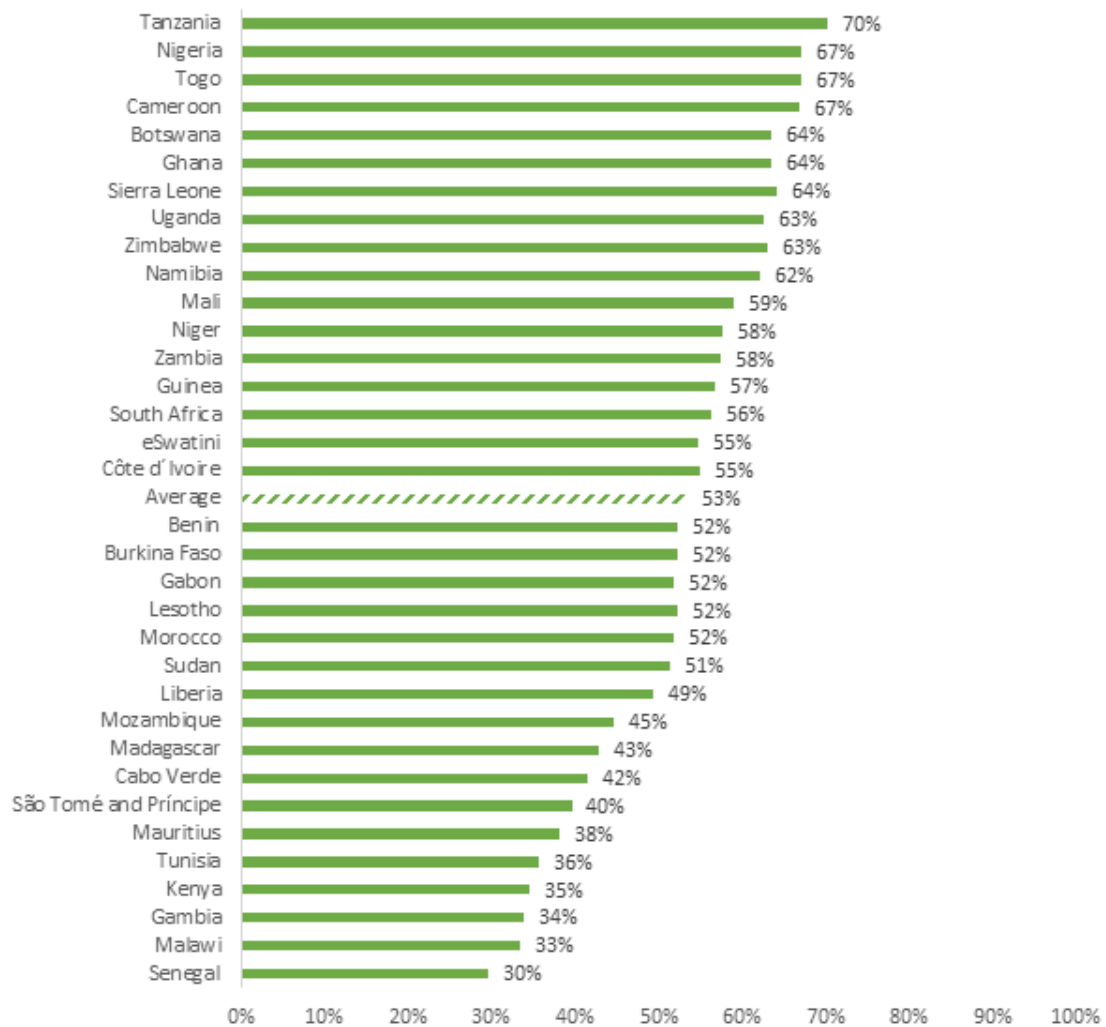
disputes. However, it might also be expected that the view that the courts have been a “force for good” in resisting the highly publicised phenomenon of state capture would have a significant positive impact on South African’s view of the judiciary. It is to that data that we now turn. First, a descriptive overview of the survey questions will be given, followed by a more detailed analysis of specific findings.

Notable findings in relation to the judiciary include:

- When asked how much they trust the courts, how many judges and magistrates are corrupt, and whether they accept that the courts make binding decisions for everyone, South Africans often reflect the continental average.
 - More than half (56%) of South Africans trust their courts of law “somewhat” or “a lot”, close to the 34-country average.
 - One in three (32%) South Africans say that “most” or “all” judges and magistrates are involved in corruption, close to the 34-country average.
 - A significant majority (68%) of South Africans accept that courts have the right to make decisions that are binding for everyone. This is less than the 34-country average of 74%.
- Since the year 2000, the judiciary has remained the most trusted among the three branches of government in South Africa. However, citizens have lost faith in various actors within the justice sector since 2011.
- According to citizen perceptions, presidential compliance with the rule of law has suffered markedly between 2012 and 2015.

Graph 1 shows the results on trust in the rule of law across 34 surveyed African countries between 2016 and 2018. Respondents were asked how much they trusted courts of law. The percentage reflects the number of respondents who said they trusted the courts “somewhat” or “a lot”.³⁰

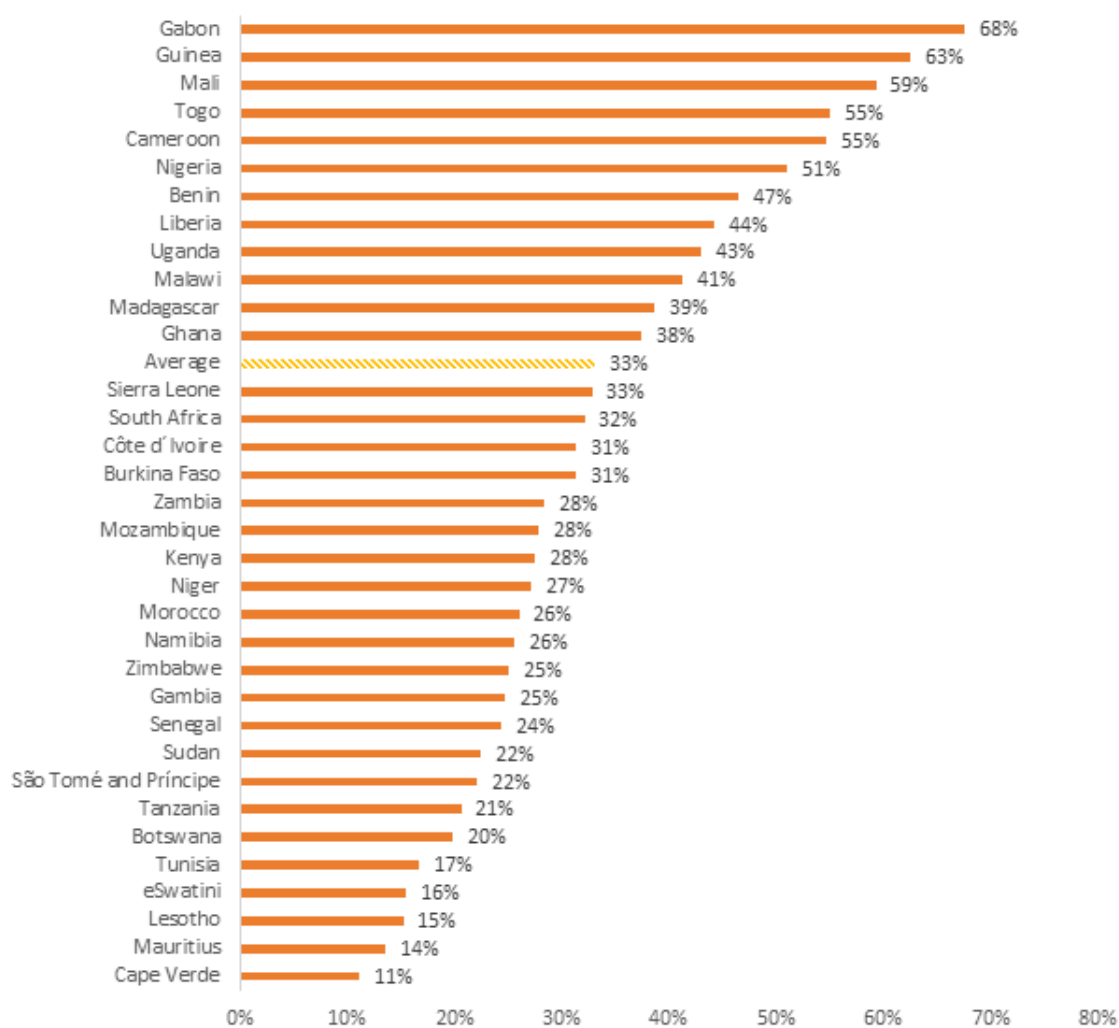
³⁰ Other answer options were “not at all” and “just a little.”

Graph 1: Trust in courts of law | 34 countries | 2016/2018

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?" (% who say they trust them "somewhat" or "a lot")

As the graph shows, South Africa finds itself in the middle, slightly above the continental average. This is a somewhat surprising outcome in light of the praise the judiciary has received from commentators and analysts, described above. It suggests that ordinary South Africans have a less sanguine view of their judiciary than expert analysts do.

Subsequent graphs offer some clues as to what factors may be contributing to this greater than expected level of scepticism. The next graph reflects respondents' answers to the question: "How many judges and magistrates are corrupt?" The percentage reflects the number of respondents who said that "most of them" or "all of them" were corrupt.

Graph 2: Corruption among judges and magistrates | 34 countries | 2016/2018

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?” (% who say “most of them” or “all of them” are corrupt)

These results are alarming for anyone who cares about the South African judiciary. Whilst few formal complaints of corruption have been levelled against South African judges, the results show that almost 1 in 3 respondents (32%) say that “most or all” judges or magistrates are corrupt. This level of perceived corruption does not bode well for public confidence in the judiciary.

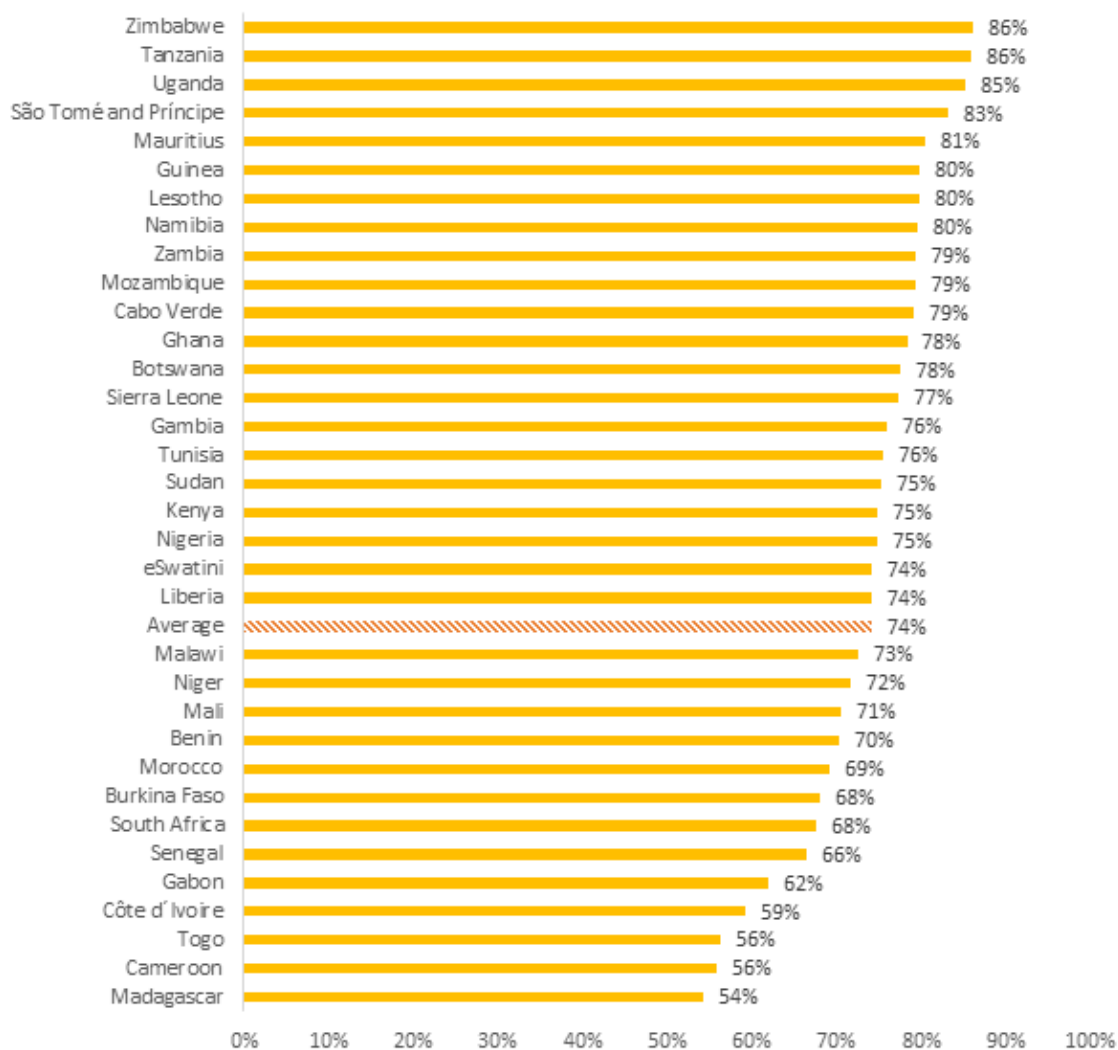
How is this data to be interpreted in light of the absence of any proven cases of corruption against individual judges in the course of South Africa’s constitutional democracy? One possible explanation is that, where allegations of judicial misconduct have been made, the system of dealing with those complaints has proved to be lengthy and indecisive. To give one example, a complaint against Western Cape Judge President John Hlophe by the judges of the Constitutional Court made in 2008 remains unresolved at the time of writing.³¹ Commentators have suggested that the failure to resolve this and other complaints quickly and transparently have “done considerable damage to the legitimacy earned by the post-apartheid judiciary as

³¹ For a full discussion of the complaint, see H Corder, “Judicial accountability”, in C Hoexter and M Olivier (eds), above n 24, pp 200 – 244, 215 – 219.

a secure and independent protector of the Constitution.”³² It is also possible that corruption is serving as a proxy for general mistrust of the courts. As has been discussed, allegations of state capture featured prominently in South African political discourse over the past decade. It could be that this has caused people to attribute perceived ills with institutions of governance as being due to corruption, whether or not there are concrete examples of individual wrongdoing.

In light of the data considered so far, which painted a less rosy picture of public perceptions of the South African judiciary than might have been expected, it is worth asking a broader question about the country’s judiciary. Would South Africans agree that courts are entitled to make binding decisions? **Graph 3** reflects responses to the question of whether the courts have the right to make decisions that people always have to abide by. The percentage reflects those respondents who answered “agree” or “strongly agree”.

Graph 3: Court decisions are binding | 34 countries | 2016/2018



Note: Respondents were asked “For each of the following statements, please tell me whether you disagree or agree: The courts have the right to make decisions that people always have to abide by.” (% who “agree” or “strongly agree”)

Again, the results are remarkable for how much lower the judiciary scores than most legal scholars and commentators might expect. The positive responses of 68% may constitute a

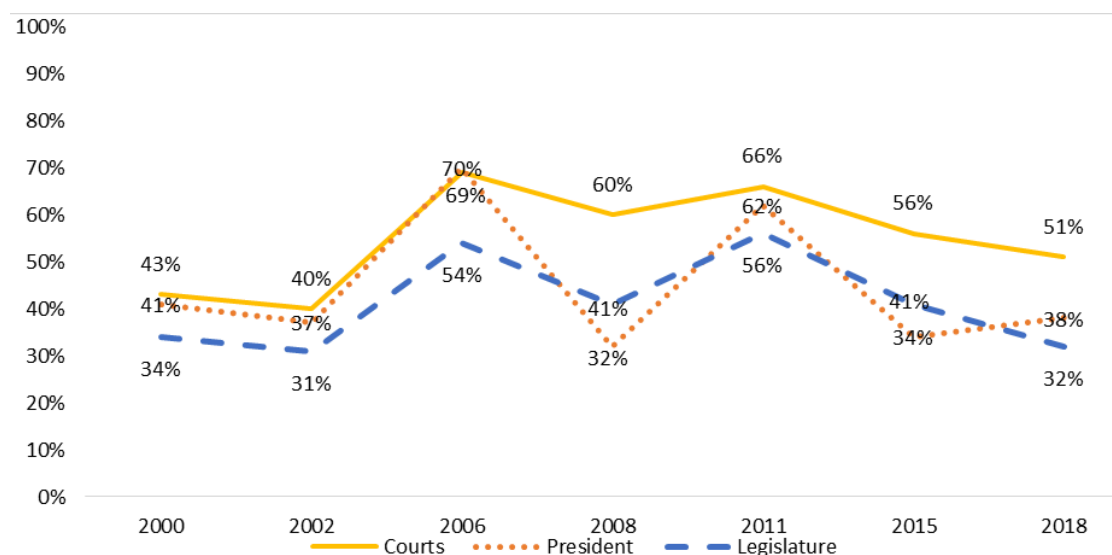
³² *ibid*, p 221.

majority, but puts South Africa below the continental average of 74%. South Africa also falls a long way below countries such as Zimbabwe, which is arguably surprising given the numerous governance challenges that country has experienced over the same time period. The results are also alarming considering the central role given to the judiciary under South Africa's constitutional democracy, as described above. This role is far-reaching, ranging from holding the executive and other government actors accountable to enforcing the realisation of expansive socio-economic rights.

While the cross-country comparisons provide important reference points for this analysis, the Afrobarometer data also allows for a longitudinal comparison of South African courts covering almost the entire post-Apartheid period.

First, though courts might garner less support than some might expect, do they still receive more public support than other branches of government? We examine this question by comparing citizens' trust in different branches of government. **Graph 4** below shows responses to the question of how much respondents trust the courts of law, the president and the legislature, with the percentages including those who trust each institution "somewhat" or "a lot."

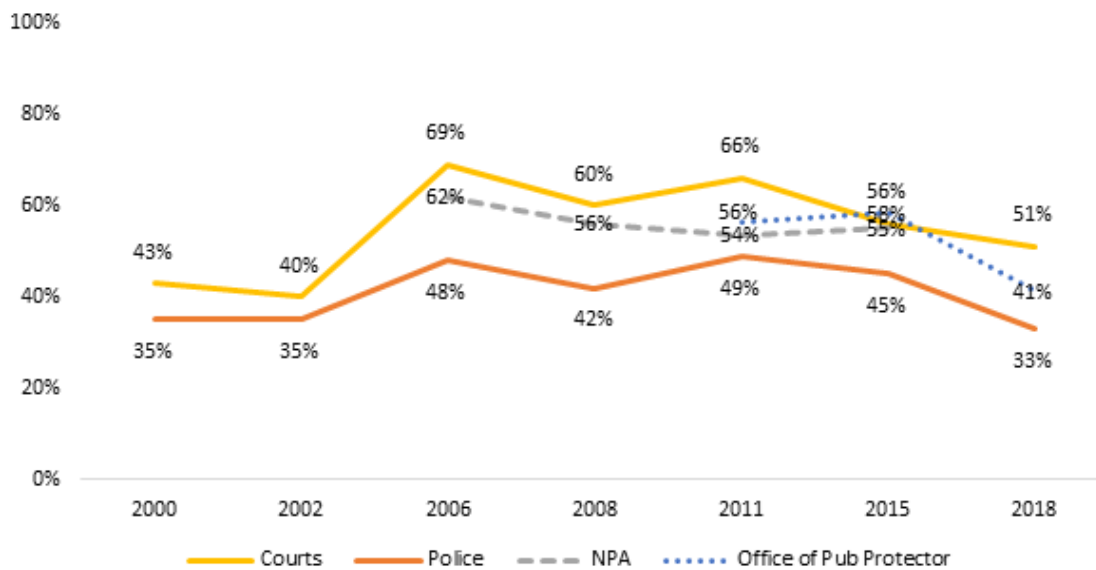
Graph 4: Trust in branches of government| South Africa |2000-2018



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? President? Legislature?" (% who say they trust them "somewhat" or "a lot".)

It will be apparent that the courts have consistently, and often dramatically, outperformed other branches of government over this time period. Thus, while experts might over-estimate absolute levels of public support for the judiciary, they seem to be better at gauging South African's views of the judiciary compared to other key institutions.

Second, it is instructive to look at the levels of trust in the courts relative to other institutions in the justice sector. **Graph 5** depicts responses to the question of how much respondents trusted each of the listed institutions, with the percentage again reflecting those respondents who answered "somewhat" or "a lot".

Graph 5: Trust in institutions within the justice system | South Africa | 2000-2018

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? Police? National Prosecuting Authority? Office of the Public Protector? (% who say they trust them “somewhat” or “a lot”)

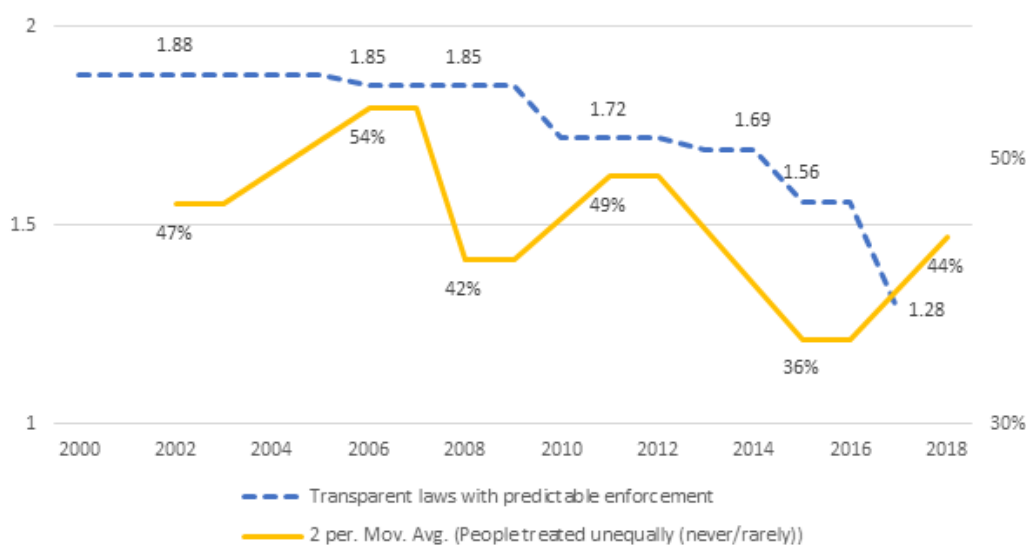
Even allowing for the fact that not all institutions are covered across the full time period, the judiciary is the most trusted of all the justice sector institutions. However, since 2011 South Africans have lost trust in all actors in the justice sector to varying degrees. It may therefore be that the unexpectedly low levels of public confidence in the judiciary are part of a general loss of confidence in governance institutions and particularly justice sector institutions. In other words, the lower levels of public confidence in the judiciary may not be due to meta-narratives about jurisprudence, but more to do with systemic general problems with the justice system being imputed to the judiciary.³³ Public frustration with the failure of prosecuting authorities to act promptly against those implicated in state capture may also contribute to a decrease in public confidence.³⁴

Further, a significant factor may also be found in the following graph. **Graph 6** depicts responses to the question of how often people are treated unequally under the law, with percentages reflecting respondents who said people “were never” or “rarely” treated unequally. The bottom graph reflects respondents, the top reflects experts’ opinion from Varieties of Democracy (V-Dem) of how transparent and predictably enforced the country’s laws are.³⁵

³³ For a discussion of issues afflicting institutions in the criminal justice sector during the state capture period, see Le Roux and Davis, above n 25, pp 269–273.

³⁴ See Professor Balthazar, “Time is not on the side of the NPA to prosecute state capture culprits”, *Daily Maverick*, 12 March 2020, at www.dailymaverick.co.za/opinionista/2020-03-12-time-is-not-on-the-side-of-the-mpa-to-prosecute-state-capture-culprits/, accessed 17 April 2020.

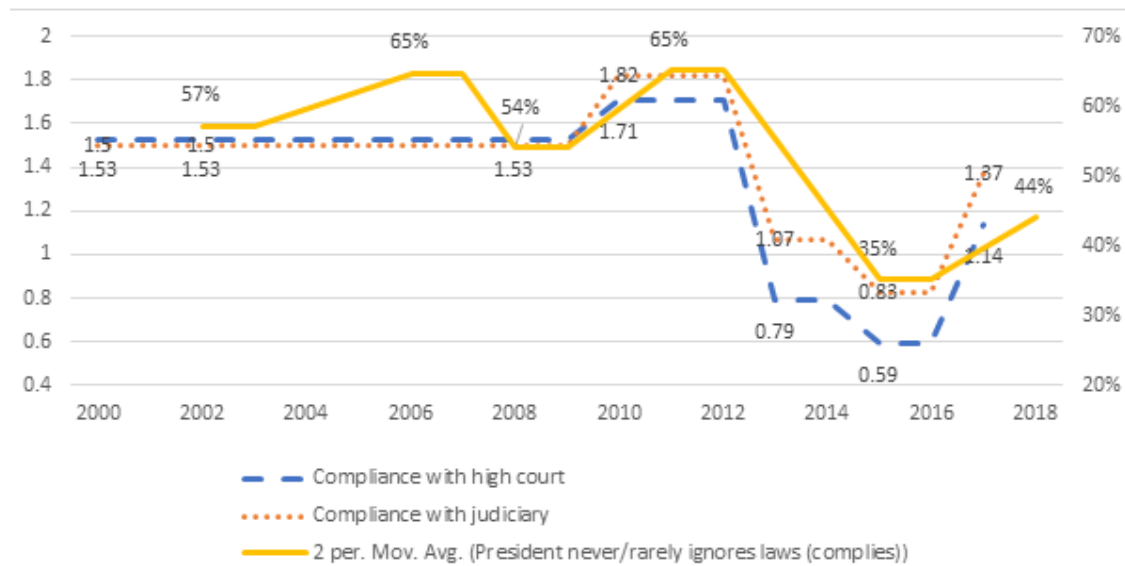
³⁵ The data is drawn from the Varieties of Democracy data set. The exact question that was posed to country specialists is: “Are the laws of the land clear, well publicized, coherent (consistent with each other), relatively stable from year to year, and enforced in a predictable manner?” Higher scores indicate that transparency and predictability are very strong. The laws of the land are created and enforced in a non-arbitrary fashion. Lower scores connote reduced levels of transparency and predictability.

Graph 6: Equal treatment under the law| South Africa |2000-2018

Note: Respondents were asked “In your opinion, how often, in this country: Are people treated unequally under the law?” (% who say “never” or “rarely”).
Additional source: Varieties of Democracy (transparent laws with predictable enforcement)

Since 2006, a group of country experts surveyed by V-Dem observed the worrisome trend that the predictable enforcement of laws in South Africa has progressively decreased (from 1,85 in 2009 to 1,28 in 2018 on a 4-point scale). It is therefore perhaps not surprising that this erosion coincides with citizens’ views about how equal ordinary South Africans are treated under the law. While in 2006 more than half of South Africans said that people are treated equally under the law, in 2015 only 36% of citizens were of the same opinion. These developments might go some way towards explaining the concurrent decrease in public confidence in the courts.

Finally, it is worth taking into account how South Africans view the relations between the country’s judiciary and the executive. In many jurisdictions, this is a locus of high-stakes conflict over accountability for the exercise of power. We have seen how the South African Constitution has given the courts extensive powers to hold the executive (and other branches of government) to account. We have also seen how the courts have been increasingly called on to exercise that power in highly politically contentious situations, in a context where former President Zuma himself was frequently implicated in allegations of state capture. The impact of these developments is reflected in **Graph 7** below, which shows responses to the question of whether the President ignores the courts and laws of the country. Percentages reflect those respondents who answered “never” or “rarely.”

Graph 7: Executive compliance with judiciary| South Africa |2000-2018

Note: Respondents were asked “In your opinion, how often, in this country does the President ignore the courts and laws of this country?” (% who say “never” or “rarely”). Additional source: Varieties of Democracy (Compliance with high court [in this case Constitutional Court] and compliance with judiciary as a whole)

According to citizen perceptions, therefore, presidential compliance with the rule of law has suffered markedly between 2012 and 2015. This suggests that there is merit in the argument that it is harmful for courts to be drawn into the political arena as frequently as South African courts have been over this time. Even if the courts’ decisions may be legally unassailable, the mere fact of them having to decide such issues, in an often drawn out manner with technical points being taken and all avenues of appeal being utilized, may have a harmful impact on levels of public confidence.

Conclusion

One must be cautious of drawing overly far-reaching conclusions from this data. While the picture that the survey results paint is fascinating and in several respects unanticipated, some dynamics may not be fully captured by the survey. For example, respondents may not always be able to distinguish between different levels of the court system in their responses, and there may be some conflation of problems with other actors in the justice system. It is also not clear to what extent opinions are driven by the influence of media reporting of high-profile cases as opposed to first-hand experience with the courts. However, if public opinion ought to be taken seriously — as the discussion above would suggest — these findings should not be ignored. Rather, the findings ought to encourage all stakeholders to reduce the dissonance between the work of the judiciary, and how it is perceived by South Africans.

Overall, the levels of public confidence in the South African judiciary are not as high as was anticipated. This suggests that it is not grand narratives about the importance and intellectual purity of the courts’ decisions that are influencing public confidence. The courts do, however, fare well compared to other governance institutions, and may be suffering some reflected negativity towards these institutions. Yet that is surely not the whole story. How judges conduct themselves both on and off the bench surely also plays a significant role in how the judiciary is perceived. This, it is argued, makes it vitally important for judges and others in the judiciary

to be mindful of the need for judges to explain their findings clearly in their judgments, and for the judiciary as an institution to use public education and other outreach methods to explain clearly its role and mandate.

Considering the importance of carefully explaining judicial decisions (especially on politically contested issues), there is surely great value in incorporating sessions on public perception into judicial training programs. The Judicial Institute for Africa (JIFA) has incorporated presentations on Afrobarometer data into its training sessions for African judges since 2018. For judges, simply to be aware of the state of play has value. Judicial decision making can obviously never pander to the vagaries of public opinion. But there is value in being aware of the context in which the courts are operating, in terms of public perceptions of the courts. If nothing else, such awareness may alert judges and judicial administrators to shortcomings in communication and public awareness, which can form the basis for interventions which respond to actual problems. All steps to increase public confidence in the judiciary, without compromising the decision-making independence of judges, are to be welcomed and encouraged.