



Advancing the Rule of Law in Africa

Trends, barriers and aspirations for the
Rule of Law in Africa from 24 jurisdictions

2021/22

In partnership with

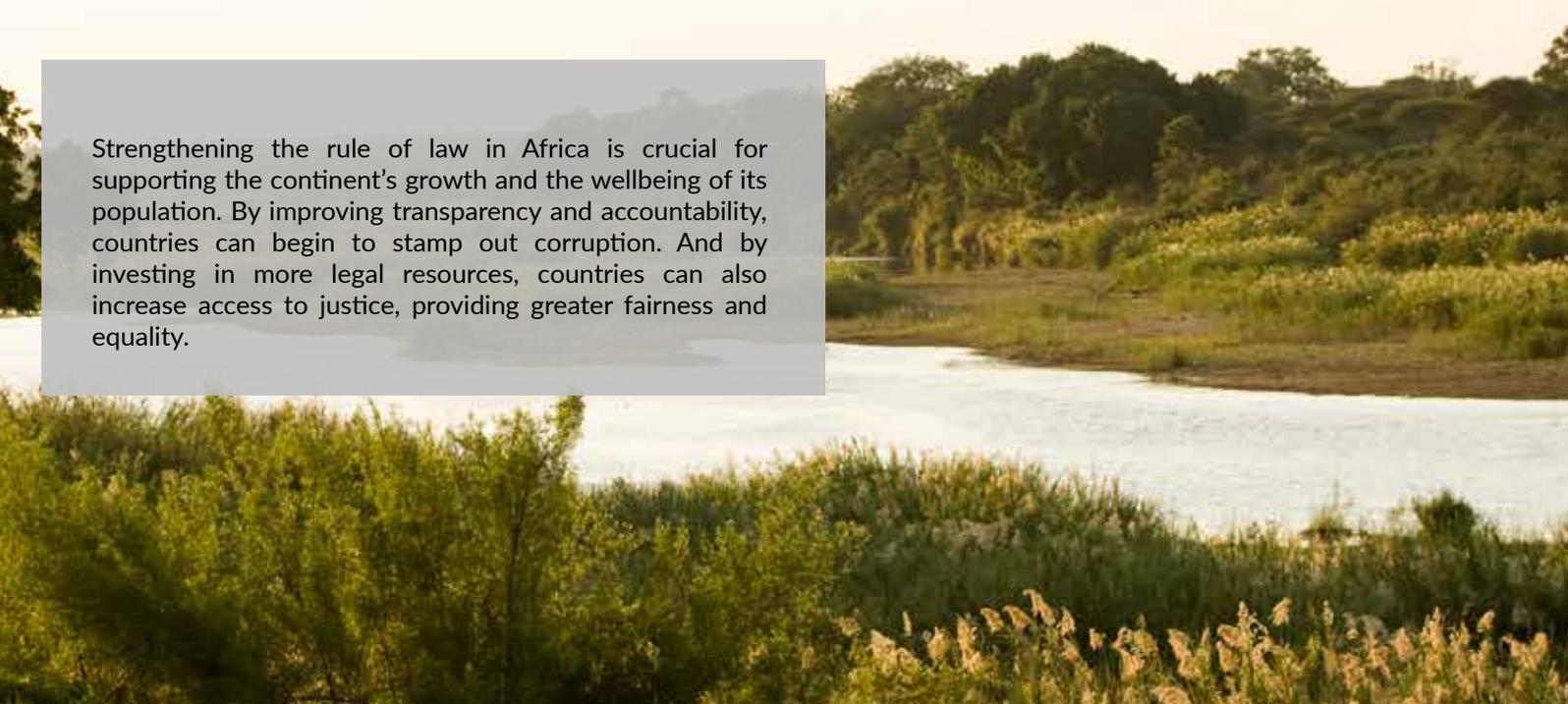




Executive Summary

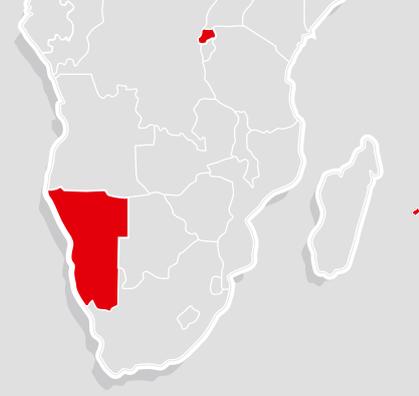
In this report, Africa Legal and LexisNexis surveyed more than 280 legal professionals—from private practice lawyers and in-house counsel to government employees and members of the judiciary—in 24 African nations to understand what the rule of law means in practice and its current level of development.

The survey reveals the major hurdles that African countries need to overcome to improve the rule of law, the impact of the pandemic on development, who has the most responsibility for advancing the rule of law and how it is likely to change over the next five years.



Strengthening the rule of law in Africa is crucial for supporting the continent's growth and the wellbeing of its population. By improving transparency and accountability, countries can begin to stamp out corruption. And by investing in more legal resources, countries can also increase access to justice, providing greater fairness and equality.

The Africa Rule of Law Context



Africa has long struggled with the problems caused by an underdeveloped rule of law. Investors are reluctant to finance projects, unsure if contracts will be honoured. Access to justice is often lopsided, favouring the wealthy and well-connected. And corruption is widespread: according to Transparency International's Corruption Perceptions Index, of the 10 countries that are perceived to be the most corrupt in the world, six are in Africa.

Relative to the rest of the world, Africa's rule of law is lagging. African nations account for more than a quarter of the 139 countries included in the World Justice Project's (WJP) Rule of Law Index, but just three African jurisdictions are ranked inside the top 50 countries that have the strongest adherence to the rule of law—Rwanda (ranked 42nd), Namibia (43rd) and Mauritius (45th). Just over 60% of African countries were ranked 100 or lower, while just 10 African countries—or roughly a quarter of those ranked—scored 0.50 or above in their adherence to the rule of law, according to the WJP, with anything above 0.50 indicating stronger adherence and anything below indicating weaker adherence.

Understanding what the rule of law means is not straight-

forward. The WJP defines it as a durable system of laws, institutions, norms and community commitment that delivers accountability, just laws, open government and accessible and impartial dispute resolution. But as our survey shows, there is no universally agreed definition. Of the 281 respondents who were asked what the rule of law means to them, only one phrase was repeated more than once—*"no one is above the law"*. Many responses were variations on themes relating to equality, justice, rights and principles. For instance, the word *"equality"* or *"equal"* was repeated 62 times, *"justice"* 30 times, *"rights"* 25 times and *"principles"* 15 times.

Another key theme centred on *"respect"* for laws and institutions, a variation that was repeated 43 times. As one respondent put it, the rule of law means *"people and government respect the rights of people and are held accountable when they violate constitutional rights. It is when the government rules with certainty, meaning people know what to expect from those in power. It is when there are progressive efforts to ensure there are systems in place to prevent violations of rights and ensure redress when one violates rights."*



“The compliance with all norms and prescriptions designed to bring about law and order, equality, non-discrimination, fairness and justice.” — private practice lawyer, Senegal



“Obedience to law and order. Equal access to justice, equal reward for compliance and equal punishments for contraventions.” — private practice lawyer, Nigeria



“Principle that everyone is equal before the eyes of the law. Respect for legislation and basic human rights. Fairness in application of justice without special preference to certain people or institutions.” — government employee, South Africa



“Rule of law means separation of powers (executive, legislative and judicial) and above all to respect the law. No one should be above the law or interfere in its legal application.” — private practice lawyer, Mozambique



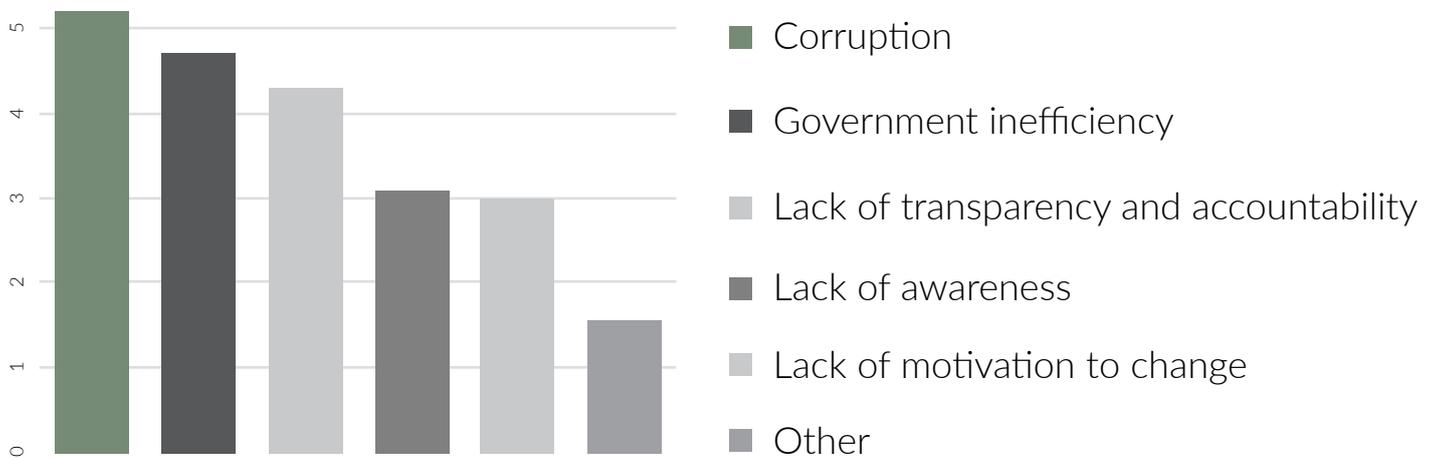
“In reality, it means nothing in my home country. Any definition given here has no relation with the anarchy we live with daily.” — private practice lawyer, Nigeria

Rule of Law in Africa Hurdles Data

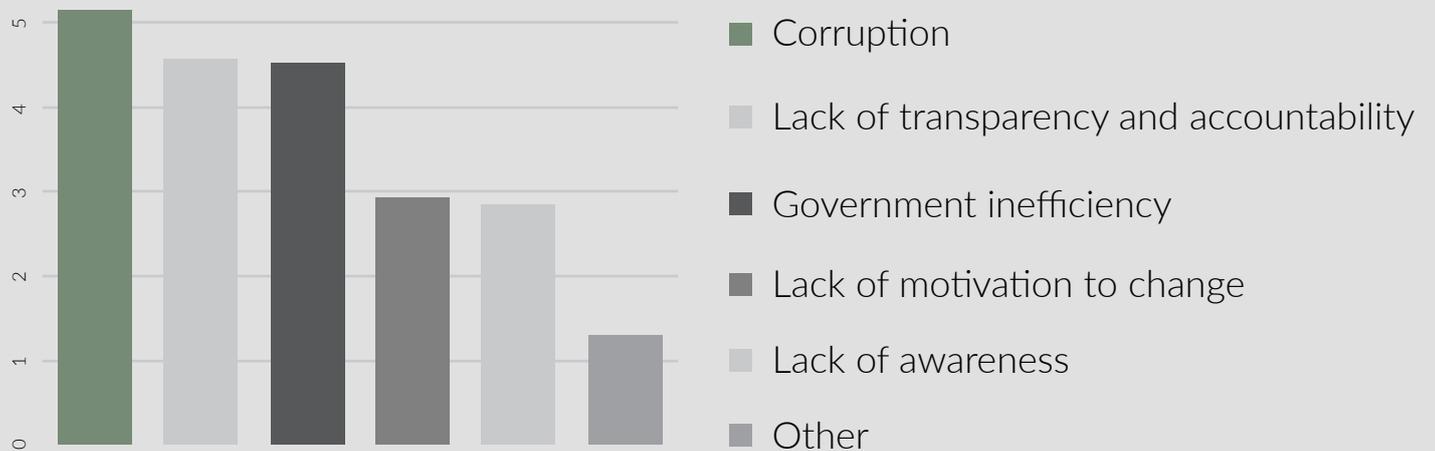
What are the biggest hurdles to the development of the rule of law in your jurisdiction?



Overall

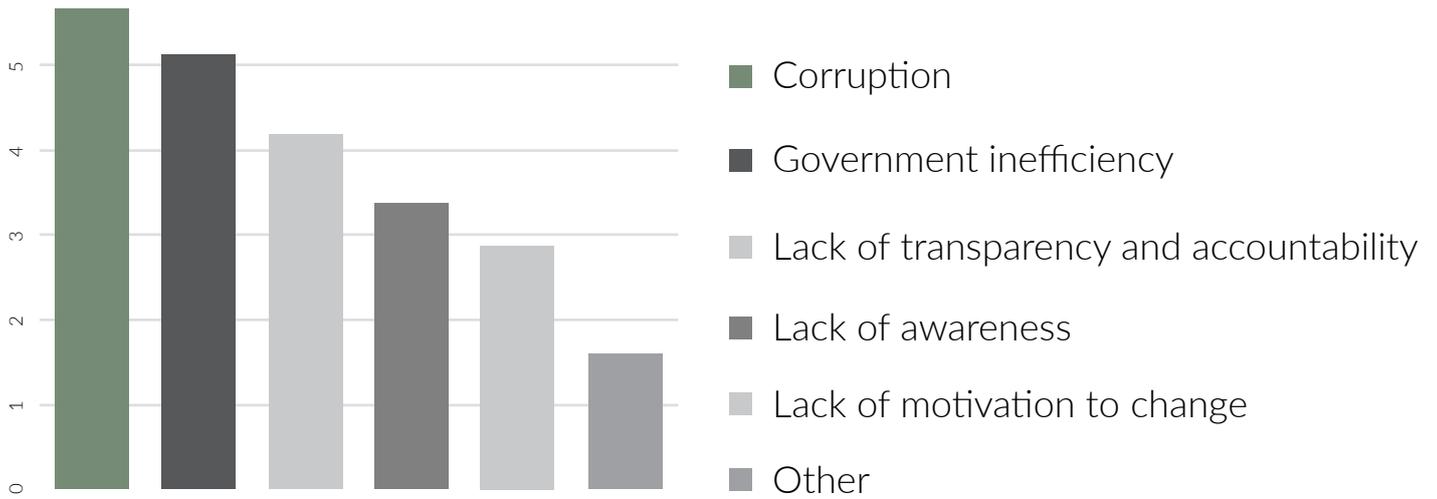


Nigeria

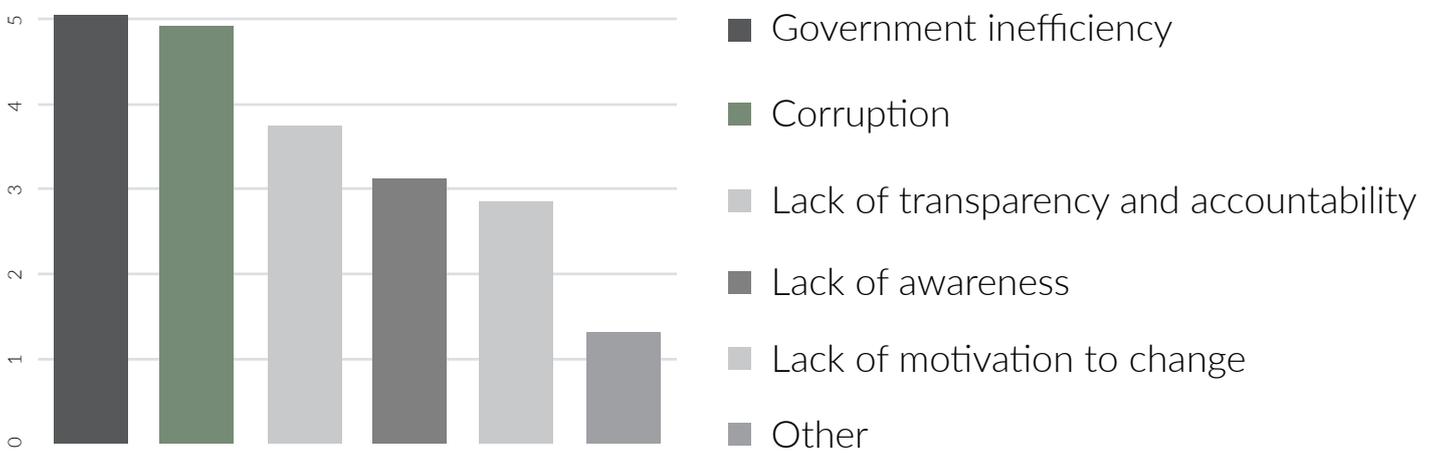




South Africa



Uganda



Rule of Law in Africa Hurdles Narrative



While there are many factors that can contribute to a weaker rule of law, the biggest hurdle to its development is corruption, with 52% of respondents ranking it as the number one impediment. That was followed by government inefficiency; lack of transparency and accountability; lack of awareness; and a lack of motivation to change. There were, however, some jurisdictional disparities.

And, while government inefficiency was ranked second overall, not everyone agreed. For instance, Ugandan respondents ranked government inefficiency as the biggest hurdle, ahead of corruption—despite the country having one of the worst problems with corruption in Africa, according to the WJP Index (Uganda was ranked 125th for absence of corruption, with only Zimbabwe, Mauritania, Cameroon, Egypt and the Democratic Republic of Congo considered worse on the continent).

Other hurdles respondents noted were a lack of leadership, a lack of education and literacy, and poverty. As one Kenyan private practice lawyer noted, poverty “hinders the ability of

the bulk of the population from accessing justice since they are not able to afford legal representation”.

Poor or inconsistent enforcement mechanisms can slow the development of the rule of law. A private practice lawyer in Uganda said when people see others breaking the law and avoiding arrest or not being charged, that can encourage those people to break the law as well. Undue political influence—for instance, when offenders are related to political leaders and are subsequently pardoned—also undermines the rule of law. The same is true for the “constant criticism of judges by political parties” if a judgment does not go their way, a South African-based respondent said.

Fear of violence can also deter people from pushing for change. “Many jurisdictions will have a corrupt system that the public knows is corrupt, but have no means to dismantle it. Whilst a lack of awareness as to how to address strength in the rule of law might play a role, I think many fear the consequences of stepping out of line,” said a trainee lawyer in Zimbabwe.



Q&A

with Brenda Chanda, co-managing partner,
Moira Mukuka, Zambia



Can you talk a little bit about your perceptions of the current state of the rule of law in Africa?

“State capture, in some African countries, has become a significant issue and has had a negative impact on the rule of law as institutions created to check the excesses of government have themselves being compromised and are not able to act independently. Countries experiencing democratic transition are particularly vulnerable to the manipulation of illicit political finance. This is usually aimed at weakening the democratic pillars of society and capturing politicians and political parties, journalists, the media, as well as key state institutions such as the legislature, the executive, the judiciary, and regulatory and enforcement agencies. It should go without saying that the value and integrity of these institutions is immeasurable.”

“Unfortunately, not all transitional states have developed independent institutions, protected by a strong constitution that has the capacity to guard against excess of power. As a result, multiparty elections and open market systems have not always resulted in the consolidation of democracy. Those experiencing democratic transition are particularly vulnerable to the abuse or misuse of state power and resources, and regrettably, this is not a new phenomenon in many African states. Democratic consolidation, however, is rarely a certain outcome of regular and periodic elections alone.”

“The rule of law in Africa has been and continues to be under threat, but Africans have also continually demonstrated that they will continue to demand for the rule of law to be followed and for democratic institutions to be allowed to exercise their mandate independently.”

What are the biggest hurdles to advancing the rule of law on the continent?

“The biggest hurdles to advancing the rule of law on the continent are corruption, lack of strong independent democratic institutions, a weak judiciary, and a shrinking

civic space. The other hurdle is lack of uniform standards in regional blocks when dealing with breaches of the rule of law for member states.”

What steps should be taken to improve the rule of law and who needs to lead this?

“The starting point is having political leadership which recognises the importance that the rule of law plays in the governance system and the trickle-down benefits that come with adherence to the rule of law. It has been argued that there is a strong correlation between the rule of law and economic development. Respect of the rule of law ensures political and social stability. I think the process of change begins with citizens making demands for change and being willing to stand up against any undemocratic tendencies.”

“There has to be awareness of the importance of the rule of law and how its non-observance impacts the lives of citizens generally. Different organs of government created under the constitution should be given true independence and autonomy to operate, and the tenure of office for constitutional offices should be protected so that officers holding these offices are not under continuous threat of losing their jobs if they execute their duties independently and the appointing authority is not happy with them. Freedom of assembly, association and speech needs to be guaranteed.”

“The process in my view should start with citizens making demands for the rule of law to be entrenched in the various pieces of the law. Citizens need to hold leaders and institutions accountable to act in line with the law. Citizens should participate actively in the framing of the constitution so that it reflects their aspirations.”

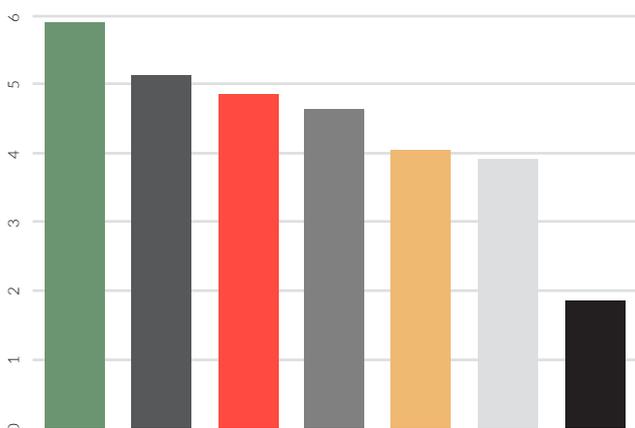
“The approach to the rule of law in different jurisdictions should depend on the unique needs and aspirations of that society. It should be based on the system of government that the people have agreed to adopt.”

Africa Rule of Law Challenges

When asked to rank the greatest challenges currently facing their organisation, our respondents answered:



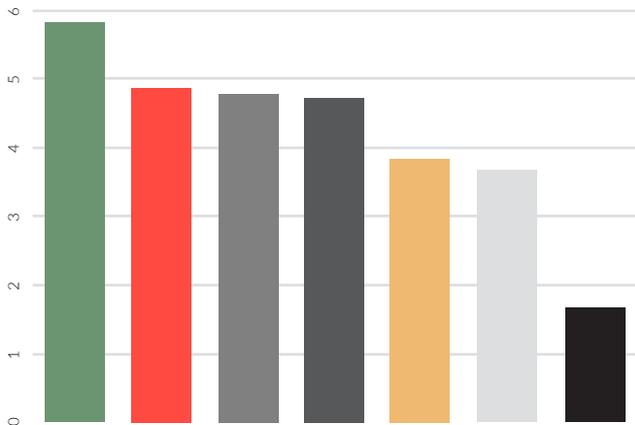
Overall



- Underdeveloped rule of law in my home jurisdiction
- Poor governance, risk and compliance standards
- Underdeveloped rule of law in other jurisdictions where my organisation operates
- Lack of access to reliable legal information in the jurisdictions where my organisation operates
- Keeping up to date with new legislation
- Underinvestment in technology
- Other



Nigeria

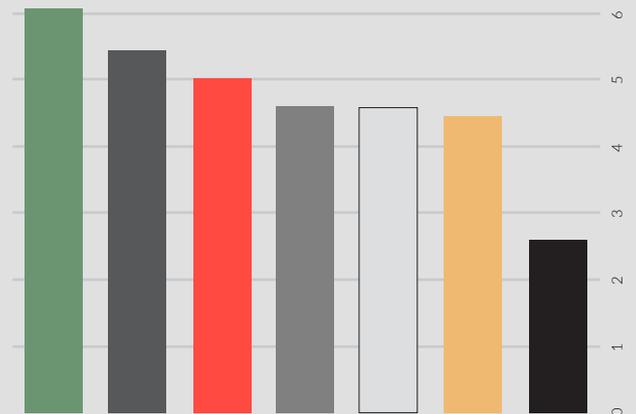


- Underdeveloped rule of law in my home jurisdiction
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- Other

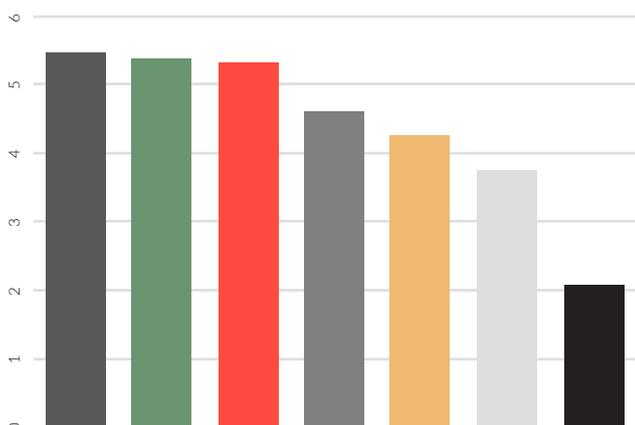
South Africa



- Underdeveloped rule of law in my home jurisdiction
- Poor governance, risk and compliance standards
- Underdeveloped rule of law in other jurisdictions where my organisation operates
- Lack of access to reliable legal information in the jurisdictions where my organisation operates
- Underinvestment in technology
- Keeping up to date with new legislation
- Other



Kenya



- Poor governance, risk and compliance standards
- Underdeveloped rule of law in my home jurisdiction
- Underdeveloped rule of law in other jurisdictions where my organisation operates
- Lack of access to reliable legal information in the jurisdictions where my organisation operates
- Keeping up to date with new legislation
- Underinvestment in technology
- Other

The underdevelopment of the rule of law can have an outsize impact on organisations. Respondents said the underdevelopment of the rule of law in their home jurisdiction is the biggest problem or challenge their organisation is currently facing. Just under half (48%) ranked it as their biggest problem, followed by poor governance, risk and compliance standards; underdeveloped rule of law in other jurisdictions where their organisation operates; lack of access to reliable legal information; keeping up to date with new legislation; and underdevelopment in technology.

Again, when cutting through the data, there were some notable exceptions. Respondents from Kenya, for instance, ranked poor governance, risk and compliance standards as the biggest issue facing their organisation. Meanwhile, respondents from organisations with more than 5000 employees said the biggest problem they face is the underdeveloped rule of law in other jurisdictions where their organisation operates—perhaps a reflection of the fact that those larger organisations are more likely to have operations in multiple jurisdictions and are therefore more likely to bump up against rule of law issues more frequently.



While the top three problems tended to revolve around the underdeveloped rule of law at home and elsewhere, as well as poor governance, risk and compliance standards, respondents in Nigeria said the lack of access to reliable legal information was their third biggest problem—as did respondents from organisations with more than 5000 employees, in-house counsel and trainee lawyers. Respondents from the judiciary across all surveyed jurisdictions ranked underinvestment in technology as their third biggest problem.

Other challenges respondents highlighted included a lack of investment into rule of law institutions, poor accountability and a lack of political will to enforce the rule of law and deal with efforts to undermine it.

As one respondent noted, there is a deliberate refusal and lack of commitment to adhere to the rule of law in their jurisdiction—Nigeria. Meanwhile, a private practice lawyer in Kenya said public servants actively interfere with and sabotage initiatives to make doing business easier, in order to protect vested interests. Another respondent from Nigeria simply said the law is for the poor and the weak, implying a perception of impunity for the wealthy and powerful.

Rule of Law: Pandemic Impact

The pandemic may so far have spared Africa the same headline rate of cases and deaths as other regions, but Covid-19 has still roiled the continent, exacerbating existing economic issues and slowing the development of the rule of law. The range of impacts has been broad, with only 15% of respondents saying Covid-19 had no impact at all on the rule of law. Some 16% of respondents said the pandemic had impeded access to justice or delayed court cases, with the biggest impact in Kenya where roughly a quarter of respondents said the pandemic had in some way hindered the provision of justice. One Kenyan respondent said: “Covid-19 has disrupted the rule of law. One instance is through the automation of court processes in Kenya; this is a great challenge to those who lack access to the internet and good technology, thus in some ways hindering access to justice,” in other words, further impacting the poor.

Overall, 8% of respondents said their government had used the pandemic as cover to seize more control, become more authoritarian or otherwise abusing their power. In Uganda, 16% of respondents said the government had taken advantage of the pandemic to weaken the rule of law. For instance, one Ugandan respondent said: “The government has taken the chance to constitute decrees disguised as concern for the citizens whereas it’s an organised scheme to evade the rule of law and cripple it further.” Another Ugandan respondent said: “It led to closures of major institutions that promote the rule of law and left all powers in one man—the head of state.”

Some 6% of respondents overall said the pandemic had led to more corruption or the opportunity for more corruption—in line with responses from South Africa and Kenya. Some 12% of respondents in South Africa also said the pandemic had led to an increase in crime, compared to 5% for all respondents. One South African respondent noted: “The pandemic has highlighted the blatant disregard for the rule of law... South Africa is currently experiencing a situation that could be described as anarchy, amid the protests and vandalism of public property.”

A snapshot of responses



“

“Many cases have been delayed hereby making it difficult for people to access justice when their rights have been violated.” — member of judiciary, Malawi

”



“

“The pandemic has provided a blanket and a shield for people who are bent on infringing rights.” — private practice lawyer, Zimbabwe

”



“

“More corruption, more violence, more disregard for even the little bit of law. For example the police—our law enforcers—are openly joining looters. And have been videoed doing so, and there is absolutely no consequence.” — business owner, South Africa

”



“

“The pandemic allowed the state to trigger exceptional regimes such as the ‘State of Emergency’ and the ‘State of Calamity’. The powers of public authorities, in particular the security forces, have been strengthened, which allows for constant abuses and violations of human rights and fundamental rights of citizens.” — private practice lawyer, Mozambique

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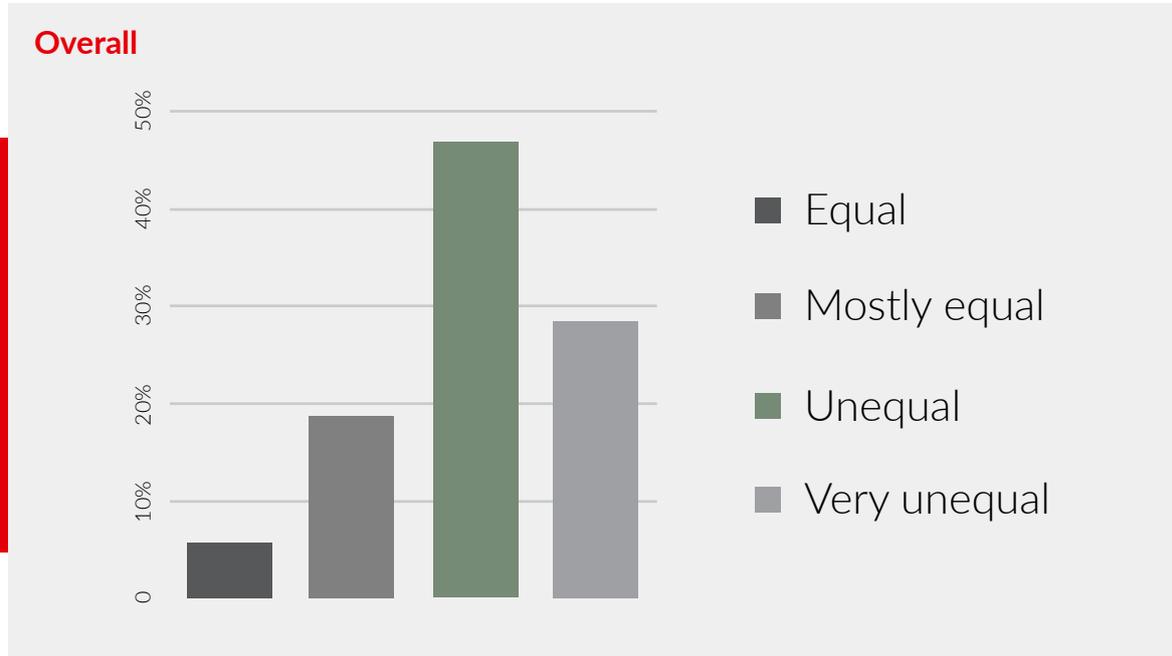
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“I am not sure it has affected development as much as it has affected respect for the rule of law—it seems the longer the pandemic goes on and the more desperate people become, the less inclined they are to have due regard for the rule of law.” — in-house lawyer, South Africa

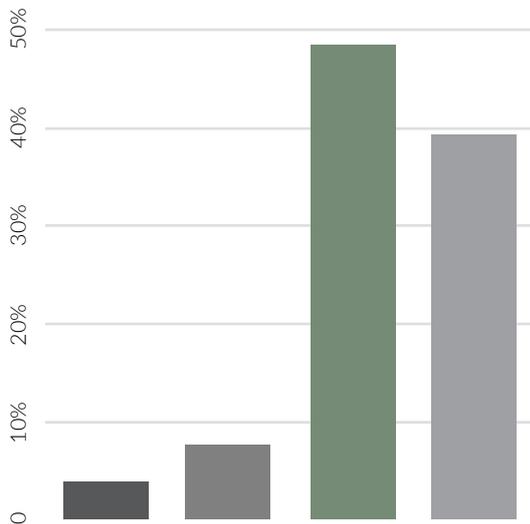
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Lack of justice

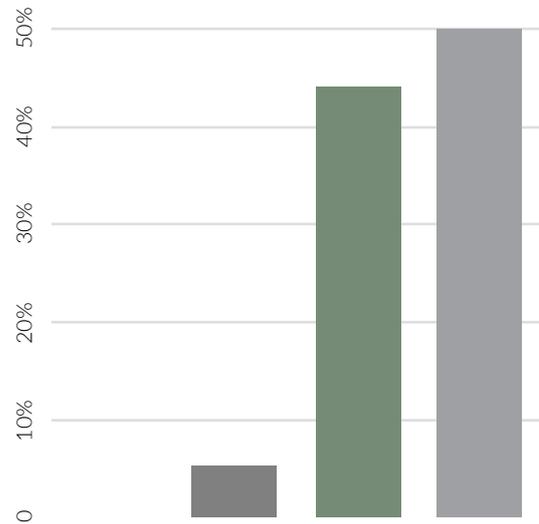
How equal would you say the provision of justice is in your jurisdiction?



Nigeria

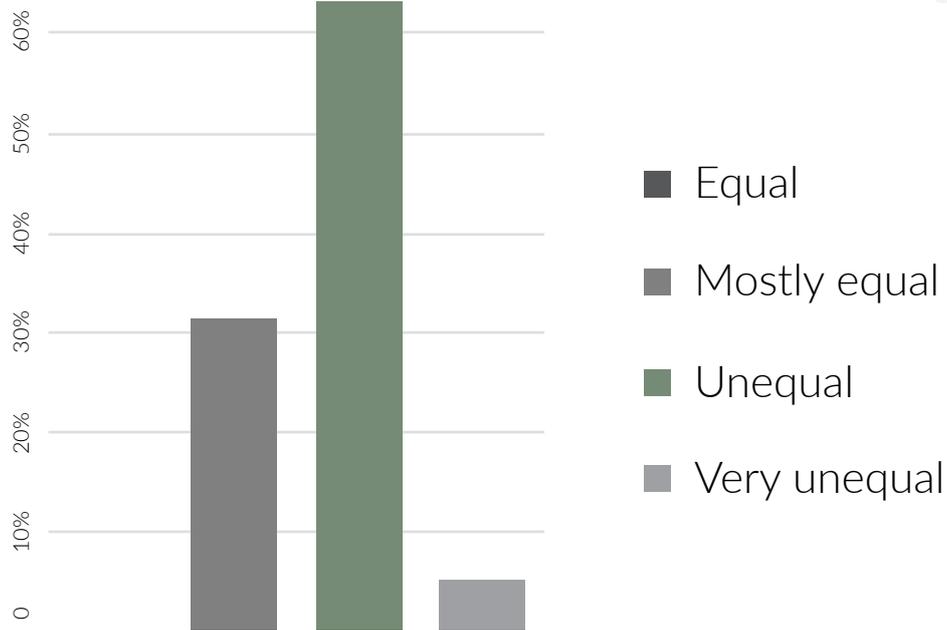


Uganda





Kenya



Given how many respondents believe equality is a defining characteristic of the rule of law, it is damning for the continent that just 6% said the provision of justice is equal in their jurisdiction, with more than three-quarters saying that justice is either unequal or very unequal. When taking a deeper dive into the data, there are clear differences in perceptions depending on where respondents are located or what type of job they do. For instance, 0% of respondents in Kenya and Uganda think the provision of justice is equal in their countries, though in Kenya 32% say it is mostly equal, compared to Uganda, where just 6% say it is mostly equal. That means nearly all of Ugandan respondents (94%) believe justice is unequal (44%) or very unequal (50%). Nigeria is the second most unequal jurisdiction, with 89% of respondents saying the provision of justice is either unequal (49%) or very unequal (40%).

At the other end of the spectrum, among all those surveyed, respondents who work in organisations with more than 5000 employees believe the provision of justice in their jurisdiction is equal (26%), followed by 25% of those who work in the judiciary.

In fact, the bigger the organisation that respondents work for, the more likely they are to view their jurisdiction as equal.

For instance, in total 47% of those who work in organisations with a 5000+ headcount say their jurisdiction is equal or mostly equal (21%), while for organisations between 501 and 5000 employees, 7% say it is equal and 20% mostly equal. Compare that to the smallest organisations—those between 1 and 50 employees—where just 4% say it is equal, while 17% say it is mostly equal, highlighting concerns that the scales of justice tend to be tipped in favour of those with the deepest pockets.

A similar split applies to the amount of experience lawyers have. Some 30% of lawyers with more than 10 years of post qualified experience say the provision of justice is equal (8%) or mostly equal (22%) in their jurisdiction, compared to trainees who are even more likely to believe it is unequal, with only 3% saying it is equal and 13% saying it is mostly equal.

But that still leaves a vast number of lawyers who believe that justice is not meted out fairly. Almost two-thirds of barrister respondents believe it is unequal (64%) or very unequal (16%), while 45% of in-house lawyers reckon it is unequal and another 30% say that it is very unequal. Even half of all judiciary respondents believe that the provision of justice is unequal, underscoring the scale of the challenge.

Solving the problem

Who has the greatest role to play in advancing the rule of law in your home jurisdiction?



Facing up to the extent of Africa's rule of law deficit is one part of the equation, the other part is actually figuring out how to fix it. All respondents—including government employees—believe the entity that has the greatest role to play in advancing the rule of law is the government, followed in nearly all cases by the judiciary. The only outlier was respondents from organisations with more than 5000 employees, who believe that the general population has a greater role to play than the judiciary. And, while respondents overall believe that lawyers have the third most important role to play in advancing the rule of law, respondents from 5000+ headcount organisations think lawyers are the least important, behind the government, general population, judiciary and organisations such as law societies, non-governmental organisations and lobby groups. Likewise, respondents from South Africa and government employees overall, also think lawyers have less of a role to play than the general population and organisations. Respondents in Uganda, meanwhile, believe that organisations have a greater role to play than lawyers and the general population, which they ranked last, as did respondents overall.

One trainee attorney in Zambia believes lawyers do have a critical role to play: *"If lawyers become reluctant to ensure that the rule of law is adhered to at all cost, we will have ourselves to blame when the legal profession loses credibility. We need to rise up to the occasion and have the rule of law at our core."*

Meanwhile, a private practice lawyer in Kenya says the general population could potentially play a greater role: *"With more civic awareness and education, it is expected that the population would be more aware of their rights and more vigilant, and this is expected to enhance and improve the rule of law in future."*

A South African barrister with more than two decades of experience believes the responsibility to advance the rule of law should be shared by all parties:



"We can't have the judiciary upholding the rule of law as the last line of defence without the legal profession, civil society and government upholding their end of the bargain. The government has largely left us to a 'judocracy' in the last 10+ years. This has to change and the government must be seen to be upholding the rule of law, which includes the manner in which judges are appointed, how courts are run and how court orders are respected."

What next?

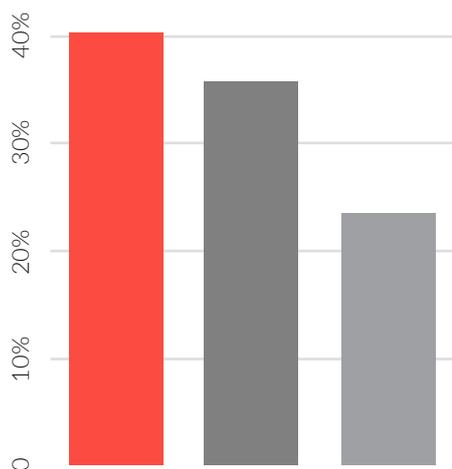
The survey makes it clear that advancing the rule of law in Africa is complex and not uniform across all jurisdictions—some are more pessimistic about the challenge than others. For the most part, the awareness and motivation to improve the rule of law is there, the difficulty is how to make that happen. What the survey findings tell us is that while the government must lead from the front, it is incumbent on all stakeholders—the general population, as well as lawyers, the judiciary and legal organisations—to share in that undertaking and proactively seek to drive change.



Optimism for change

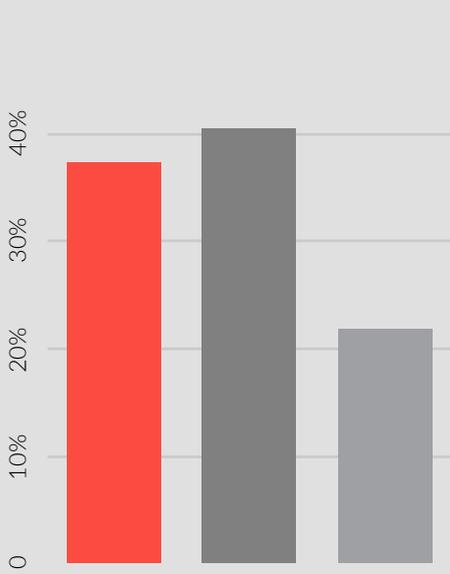
Will the rule of law improve or decline in your home jurisdiction across the next 5 years?

Overall

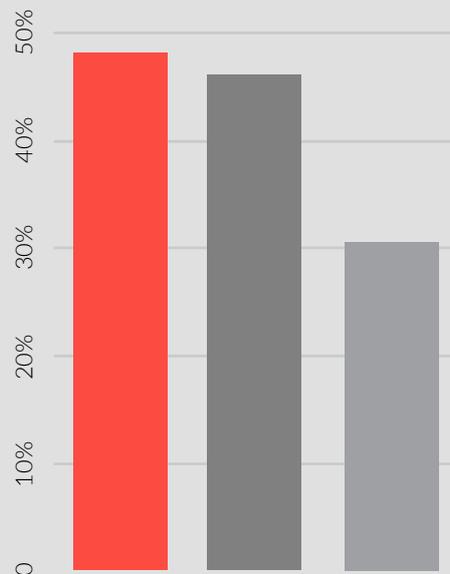


- Improve
- Decline
- Stay the same

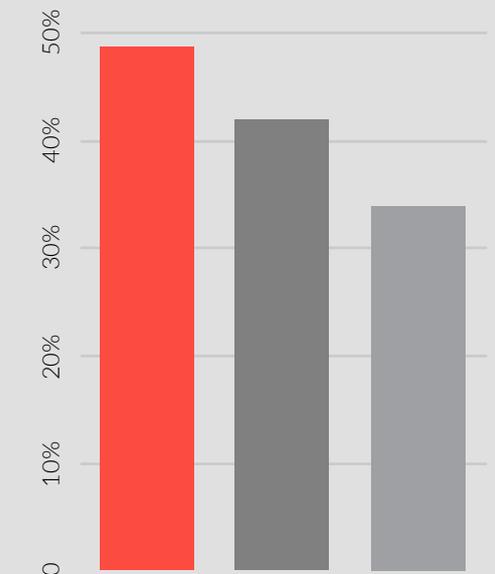
Trainee - 3 Years' experience



3-10 Years' experience



10+ Years' experience



While there is much work to do to advance the rule of law across all jurisdictions, the outlook is relatively positive. Overall, 40% of respondents believe the rule of law will improve in their home jurisdictions over the next five years, compared to 36% who believe the rule of law will decline. Just under a quarter (24%) expect it to stay the same.

Some respondents are more optimistic than others. Members of the judiciary have the highest hopes, with 75% expecting the rule of law to improve, while in Kenya, where no respondents believe the provision of justice is currently equal, more than two-thirds (68.5%) believe the rule of law will improve over the next five years. Ugandans are the most pessimistic, with 78% of respondents expecting the rule of law to get worse over the next five years (compared to just 16.5% who reckon it will improve).

Respondents from organisations with more than 5000 employees are also more likely to believe the rule of law will decline than improve over the next half decade (40% vs 30%). The same is true for trainee lawyers (41% vs 37%) and in-house counsel (42.5% vs 35%).

Nigeria has the highest proportion of respondents who believe nothing will change over the next five years (31%), followed overall by barristers (30%) and respondents from 5000+ headcount organisations (30%). Meanwhile, Ugandans are the most likely to expect change, with just 5.8% predicting the rule of law will stay the same, followed by 12% of government employees overall, 46% of whom believe it will improve.



Q&A

with Geoffrey Kiryabwire, Justice of the Court of Appeal, Uganda



What is your perspective on the state of the rule of law in Africa?

"The current rule of law in Africa is still a work in progress; it's a progressive absorption of what are the generally accepted tenets of rule of law. The institutional set up is still a work in progress—the courts, the police, the legal society organisations—all of these are being developed, and there is a greater move towards constitutionalism compared to the last 30 or 40 years. Many African countries now have stable constitutions. Courts are likely manned by nationals, there are more local lawyers, and also you find organisations like the African Union pushing for the respect for law. In terms of access, it's still a problem. There are few courts, and it takes a long time to get to a court in most African countries. Some people even have to travel for 300 or 400 kilometres to get to a courthouse. Judges are few. Take Uganda for example. We have 400 judges for the whole country and for the courts of record about 80. I sit on the Court of Appeal of Uganda, and we are about 11. So even though we want to do the job we are assigned to do, the real challenge is that we don't have the manpower, we don't have the funding to do what we are supposed to do, so we struggle with what is popularly referred to as a backlog. That is probably viewed as a failure of the rule of law but it is a systemic problem. It is not that the courts don't want to do it, it's just technically impossible to do the workload that is assigned to us. In Uganda, in the Court of Appeals we have for the 11 justices a workload of about 7500 to 8000 matters sitting on our tables."

How do you attempt to resolve that backlog?

"The watchword here is how can we be more efficient, how can we be more effective, how can we think outside the box, and how can we innovate around the challenges that we have in order to provide the service of justice to the people who need it in a timely manner?"

I do not think the position is fundamentally different in other African countries. And so we're looking to get our procedures more efficient. We still have a lot of the processes that were left here during colonial times when the cases were fewer and there were other means of dispute resolution at the customary level which used to deal with them. Now, with countries going through social and economic development, the desire to go to a formal court has gone up, so we need to make the processes more understandable to the local population, we need to make them shorter and we need to make them more efficient."

What steps need to be taken more broadly to improve the rule of law, what does the roadmap look like and who needs to lead this?

"First of all there has to be the political will to take that journey because it is a call on a nation's resources—both funding and manpower. So the first step really has to be from the government; they have to recognise they need to provide more boots on the ground, they have to provide more funding, not just for the cost to operate but in terms of court buildings, court infrastructure, in terms of continuous judicial training to make sure that the judges are also current on what is necessary to resolve disputes. So, it starts right at the top. We're talking to heads of state, we're talking to governments, we're talking to parliament—those who have the constitutional duty to provide the service because the judiciary can't provide the service on its own. But also, within the judiciary there must be a willingness to reform. If you have stakeholder buy-in on the need to reform within the judiciaries themselves, within the local bars and the various justice players, then and only then can you start to make progress in the way you want to go. It is two levels—the level of government leadership and then there is a second level within the judiciary itself."

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