

**STRENGTHENING JUDICIAL
REFORMS IN KENYA**

Volume VII

**PUBLIC PERCEPTIONS OF CHAPTER
NINE OF THE DRAFT CONSTITUTION
OF KENYA**

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The views in this report however are those of ICJ Kenya.

Kagwiria Mbogori
Executive Director

Foreword

This is the seventh publication in our '*Strengthening Judicial Reforms*' series of publications that endeavours to support effective interest group demand for judicial reform.

ICJ Kenya continues to perform internal analysis of the Judiciary as well as content analysis of its reform proposals and implementation, mainly to test them for parity with ICJ Kenya and other stakeholders' demands.

Under this project, ICJ Kenya has sought public perceptions to interpret reform needs and leverage reform demand. Information is gathered through quantitative and qualitative surveys carried out by ICJ Kenya on judicial corruption, efficiency and effectiveness in the Kenya Judiciary whose findings have been published in our previous reports¹.

This publication closely examines the public's perceptions of the current Judiciary and the provisions in the draft constitution relating to the Judiciary.

¹ - Strengthening Judicial Reforms – Performance indicators: Public perceptions of the Kenya Judiciary, 2001
- Strengthening Judicial Reforms in Kenya, Volume II: The role of the Judiciary in a patronage System, 2002
- Strengthening Judicial Reforms in Kenya, Volume III: Public perceptions and proposals on the Judiciary in the new Constitution, 2002
- Strengthening Judicial Reforms in Kenya, Volume IV: Public perceptions of the Court Divisions, Children's Court and the Anti-Corruption Court, 2002
- Strengthening Judicial Reforms in Kenya, Volume V: Public perceptions of the Magistrates' Court, 2003
- Strengthening Judicial Reforms in Kenya, Volume VI: Public perceptions of the Administrative Tribunals in Kenya, 2003

INTRODUCTION

On the 27th of December 2002 Kenyans went to the polls to elect a new government that would ensure economic recovery, poverty reduction, elimination of corruption and the observance of the rule of law. The election of the National Rainbow Coalition government (NARC) was a testament of Kenyans dissatisfaction with the past government and evidence of a people's ability to rally for a common cause and achieve the desired results. The question of whether the Narc government will or has put in place structures to ensure good governance and economic growth is open to debate.

The coming into office of the Narc government has brought about certain changes to the legal and judicial sector in Kenya. The creation of the Office of the Ministry of Justice and Constitutional Affairs, Public Complaints Commission and the Governance and Ethics Office; the removal of former Chief Justice Bernard Chunga and the shake up in the Attorney General's office are examples of positive structural and personnel changes made by the Narc government. Political goodwill to propagate good governance is clearly evident, however the public is yet to see the effect of some of these changes.

One must also commend the government for facilitating the continuation of the review process, a process that has been marred by political and judicial interference in the past. Now that the National Constitutional Conference (NCC) has begun, in earnest one cannot help but pay attention to the discourse surrounding the process.

The debate in the media has portrayed the public's dissatisfaction with the pace of the NCC, the number of delegates, poor attendance of delegates at the conference and more critically the substance of motions raised. One cannot forget to mention the behaviour of the NCC delegates and the public backlash against their demand for higher allowances bearing in mind the public outcry not more than two months earlier against Members of Parliament's salary increase amidst a country struggling to pay essential service providers' salaries.

An area of great concern is the public scrutiny and questions arising concerning the contents of the draft constitution. Contentious issues have emerged as well as allegations of misrepresentation; factions of the public have argued that certain provisions in the draft constitution do not reflect the wishes and desires of Kenyans for this nation. Contentious issues highlighted in the draft constitution include the devolution of power, the Prime Minister's post, the recall of Members of Parliament, the Kadhi courts, among others.

The Kenyan Section of the International Commission of Jurists (ICJ [K]) has been the fore running organisation in the debate on the draft constitution, with regard to chapter nine which refers to the judicial and legal sector. Between the 6th and 17th of May 2002 the Constitution of Kenya Review Commission with the technical support of ICJ [K], commissioned five eminent Commonwealth judicial experts to conduct a peer review and give recommendations regarding constitutional proposals relating to the Kenyan Judiciary.

Following the consultative sessions and observations, the Advisory Panel prepared a peer review report and recommendations, which were published in a comprehensive report and followed up with a four-page summary, and media extract. The Judiciary rejected the report in a harsh critique by the former Chief Justice. However, other stakeholders, including some who were not in the original consultative group, welcomed the review report including the CKRC, the Attorney General, the Law Society, NGOs, the donor community and a cross section of interest and pressure groups.

In the aftermath of the dissemination, and given the formal judicial attitude, the CKRC, ICJ (K) and the Law Society of Kenya jointly called a follow up meeting comprising of a cross section of interests on 19 July 2002 'to analyze and adopt suitable recommendations made by the Advisory Panel.' The meeting adopted majority of the panel's recommendations, but from the participants' debate, it was clear that a number of issues remained a source of controversy and dissent on principle matters.

The most contentious issues that emerged include:

- The rationale behind the transition clauses calling upon the resignation and re-application by judicial office holders subject to a new appointment and promotion criteria being in place.
- The design of the Judiciary.
- The theory of the institution of the Kadhi court in the constitution.
- The principal jurisdiction of the Director of Public Prosecutions.
- The constitutional role of a Ministry of Justice.
- The theory and effectiveness of an independent complaints mechanism.
- Adjunct access to justice issues, including the provision of legal aid, the role of the public defender, and expense related to enforcement of rights.

As a follow up activity, the Kenyan Section of the International Commission of Jurists held a Constitutional Symposium between the 8th and 11th of April 2003, which brought together technical experts from civil society, legal practitioners, the Ministry of Justice and Constitutional Affairs and other stakeholders to substantially deliberate on most of these contentious issues ahead of the National Constitutional Conference.

The recommendations made are summarized below: -

- All sitting judges must resign and those willing to continue with the service reapply to the Judicial Service Commission. Their applications should be considered based on specific reappointment criteria that will be developed.
- Schedule 8 section 10(1) should be amended to state that 'upon the coming into force of this Constitution all judges shall vacate office within six months'.
- The Supreme Court should be retained in the draft constitution. The first bench of the Supreme Court should be appointed by a select Committee of Parliament on Judicial Matters and not the interim Judicial Service Commission as stipulated in the eighth schedule, section 10.
- The Supreme Court's jurisdiction should not extend to impeachment of the President.²
- The Supreme Court's jurisdiction should not extend to giving advisory opinions on the constitutionality of Bills.³
- Judges should retire at the age of seventy – four years, and not sixty-five as stipulated in the draft constitution.
- A fixed term of service should be introduced for judges.
- The interim Judicial Service Commission should comprise of:
 - a) The Attorney General
 - b) The Speaker of the National Assembly
 - c) The Chief Justice
 - d) Two Advocates of 15 years standing
 - e) Two law lecturers
 - f) A member nominated by the Council of Legal Education and
 - g) The chairperson of the Public Service Commission
- The office of the Director of Public Prosecutions be established as a constitutional office and be vested with state powers of prosecution.⁴
- The office of the Public Defender be established to provide legal advice and representation to persons who are unable to afford legal services.

² Section 188(1) (a) (iii)

³ Section 188(1) (a) (iv)

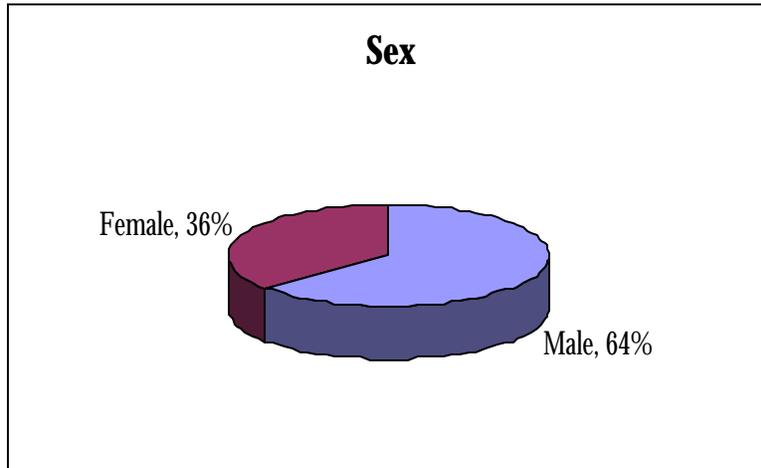
⁴ Section 209(4) Draft Constitution.

- The Judiciary should access the Consolidated Fund directly through the National Assembly. This should be done through the Chief Registrar, who shall be the Judiciary's Chief Accounting Officer. The funds should cover the entire judicial vote including salaries, pensions, gratuities, other recurrent and developmental budgetary items.
- An independent and powerful Judicial Service Commission should be established, with provisions akin to those provided for the Parliamentary Service Commission by sections 45, 45A and 45B in the current Constitution.
- The Kadhi Courts should be retained in the draft constitution but only as per the provisions of section 66⁵ of current Constitution. Thus, sections 199 to 204 of the draft Constitution should be replaced by section 66 of the current Constitution.

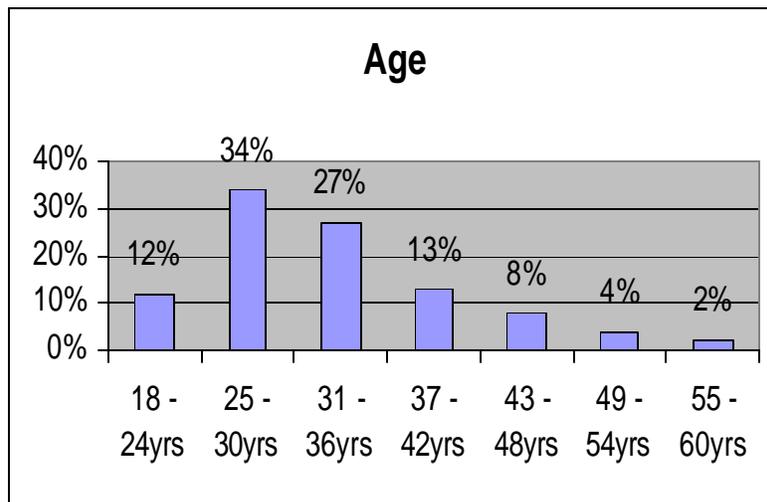
⁵ Note amendment to section 66 (4) of the current Constitution.

SURVEY FINDINGS

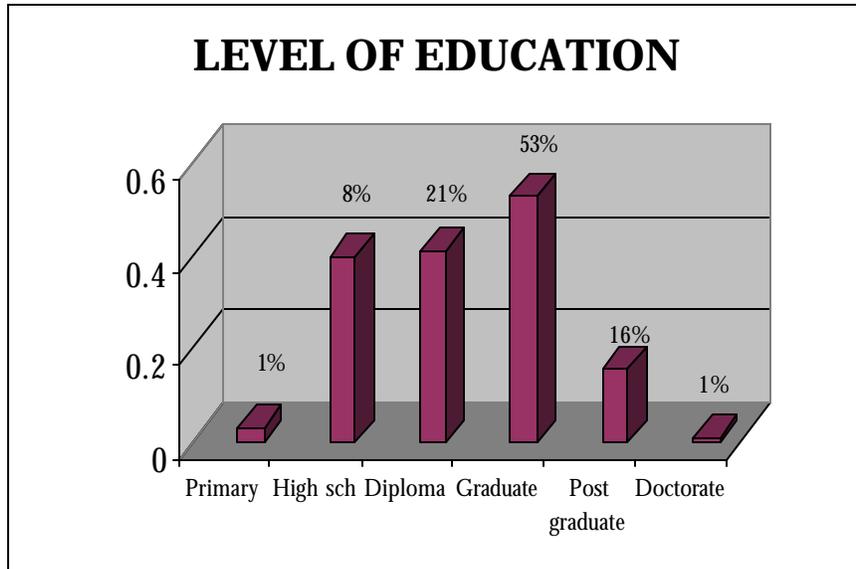
A. GENERAL INFORMATION



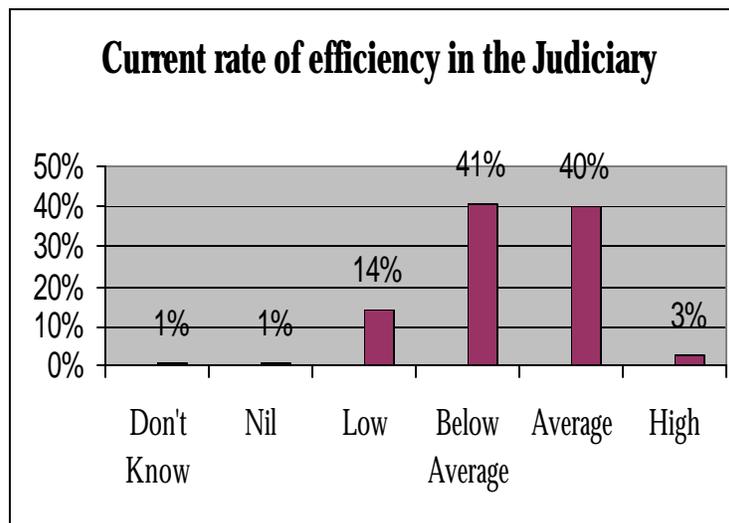
Majority (64%) of the respondents were male.



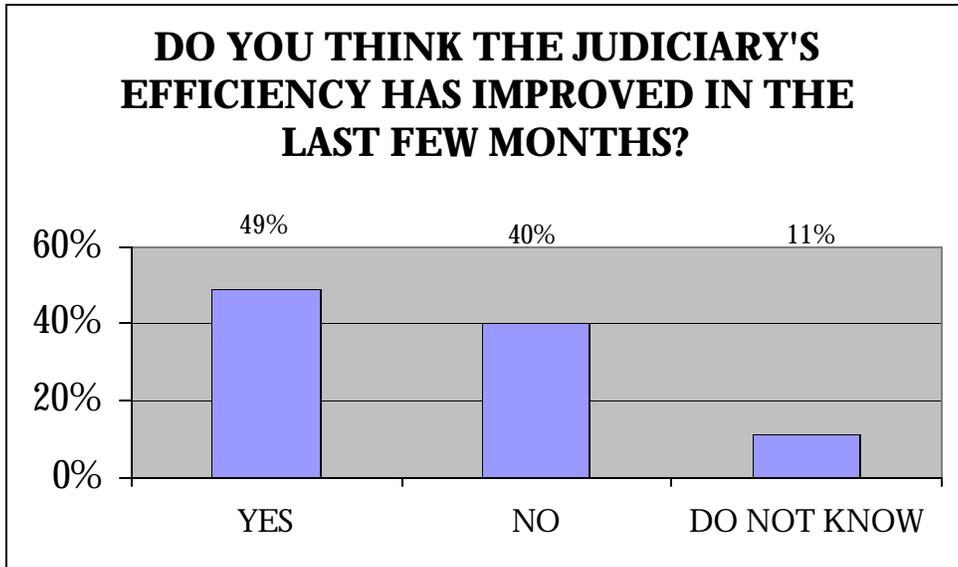
Majority of the respondents were aged between 25 and 36 years.



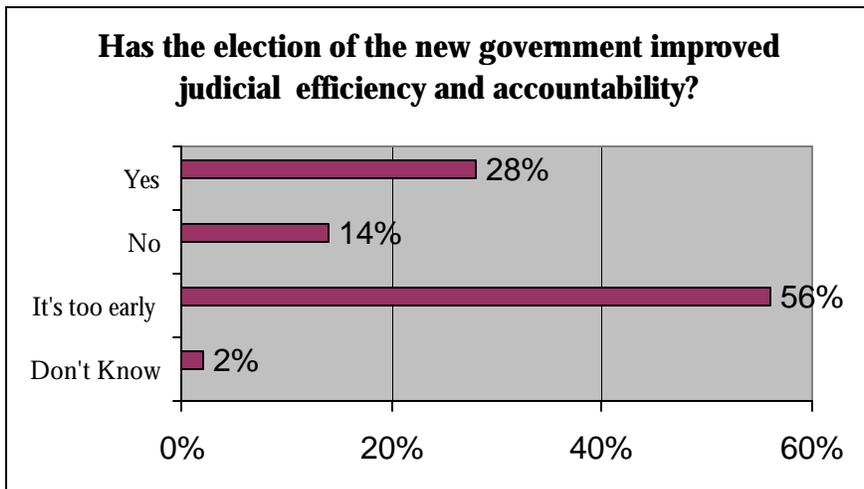
Over 70 % of the respondents were holders of university degrees.



41% of the respondents felt that the Judiciary's efficiency was below average. Only 3% of the respondents felt that the Judiciary's efficiency was high.

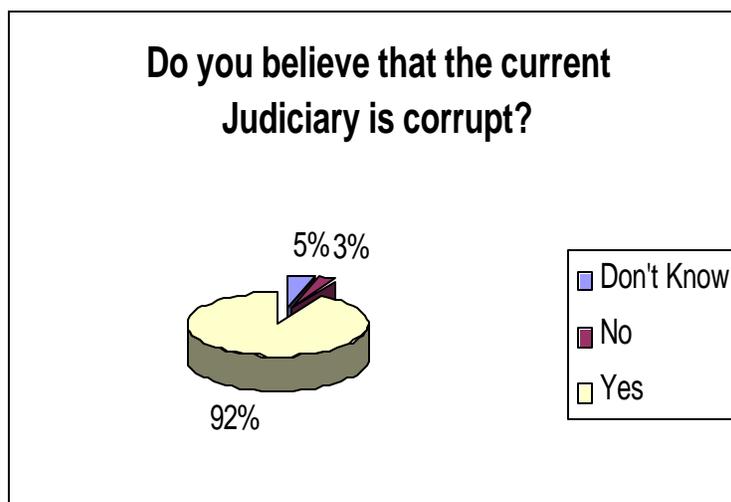


49% of the respondents felt that the Judiciary's efficiency had improved over the last few months.⁶

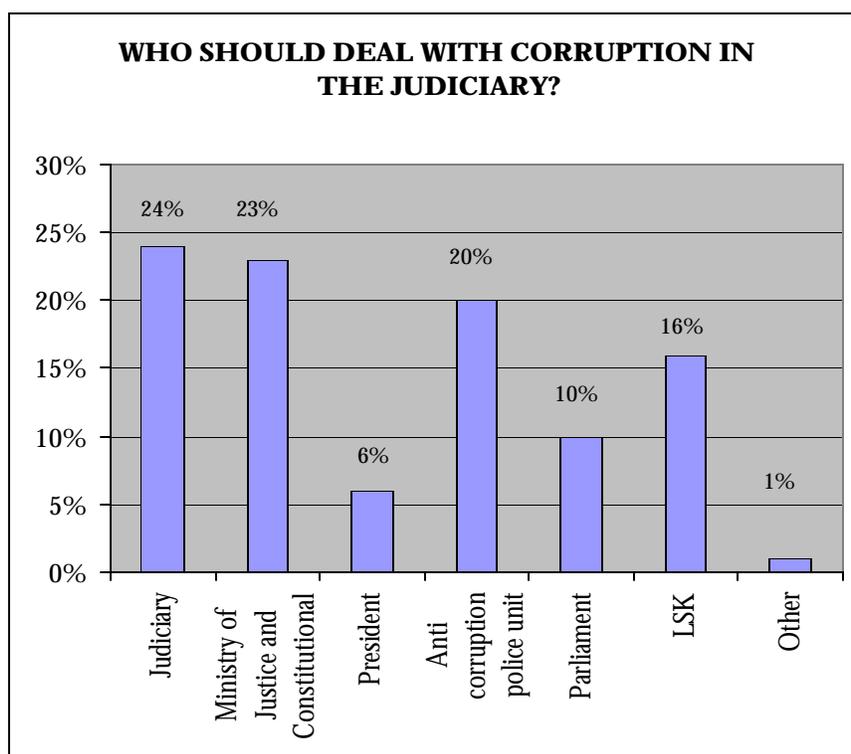


28% of the respondents felt that the election of a new government had improved the Judiciary's efficiency and accountability while majority (56%) of the respondents felt that it was too early to tell.

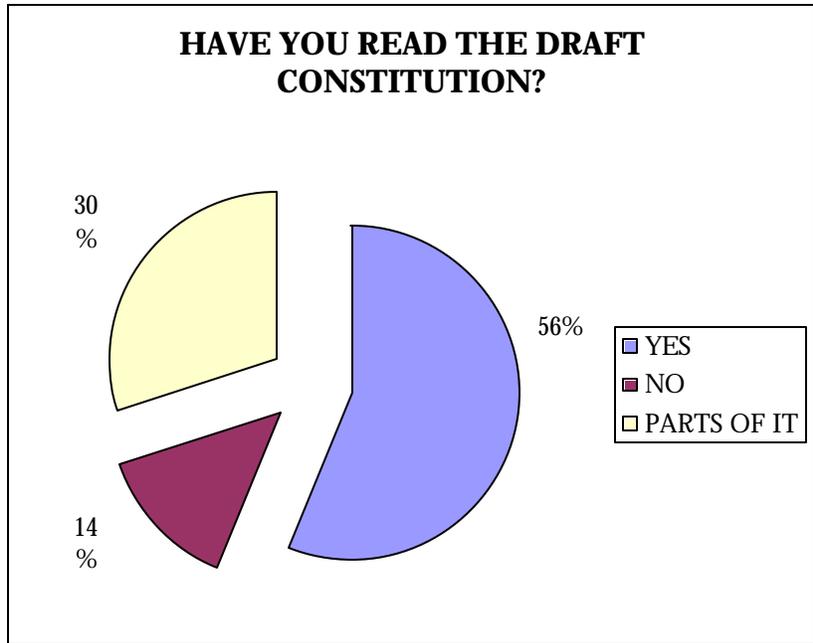
⁶ This survey was undertaken in May 2003.



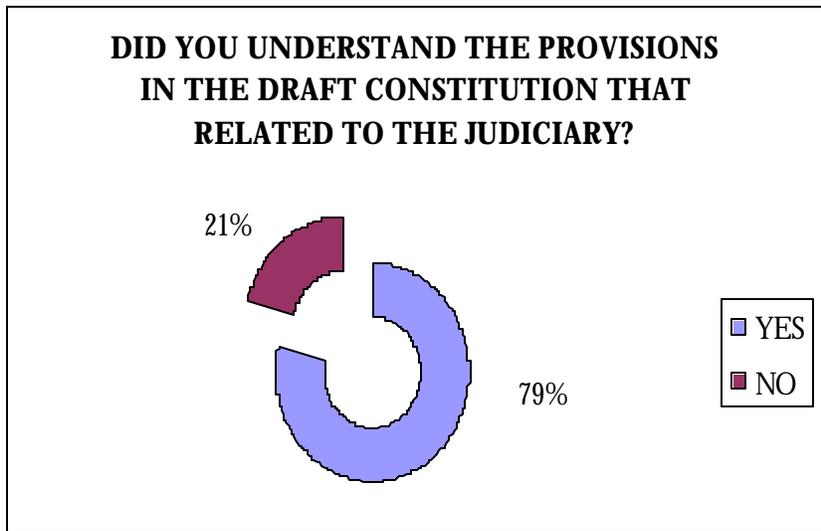
Majority (92%) of the respondents felt that the current Judiciary is corrupt.



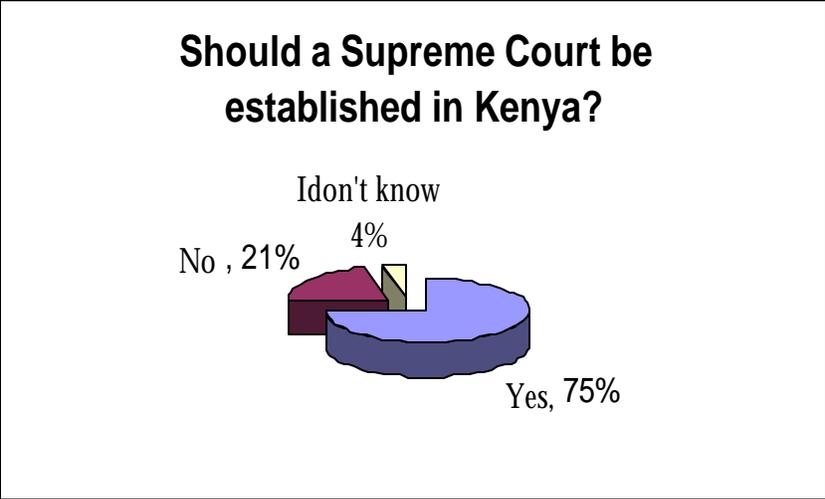
24% of the respondents felt that the Judiciary should deal with its own corruption whilst 23% thought that the Ministry of Justice and Constitutional Affairs should deal with the corruption in the Judiciary.



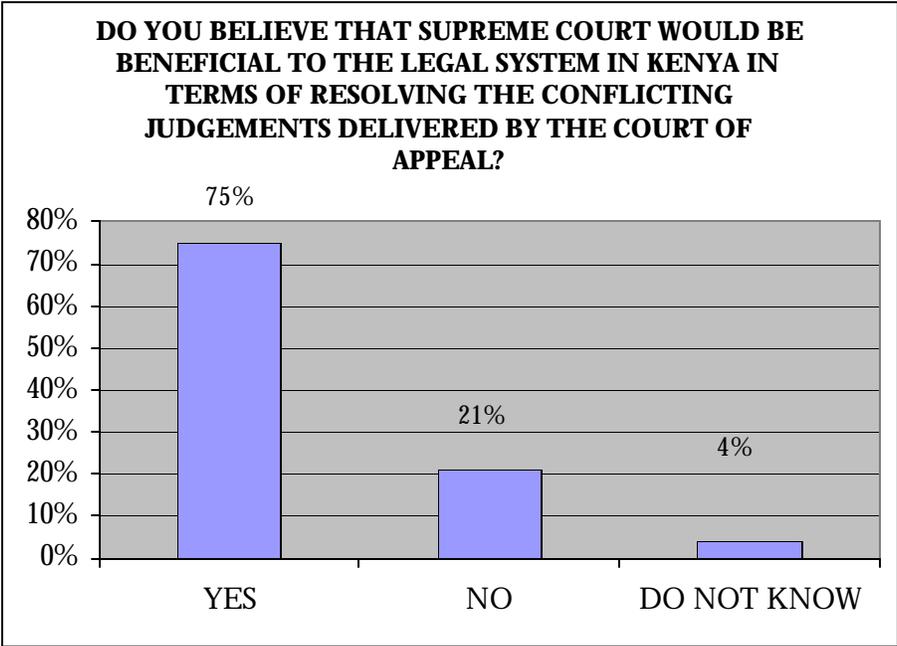
An impressive 86% of the respondents had read the draft constitution. 56% of them had read it in full, while 30% had read the draft in part.



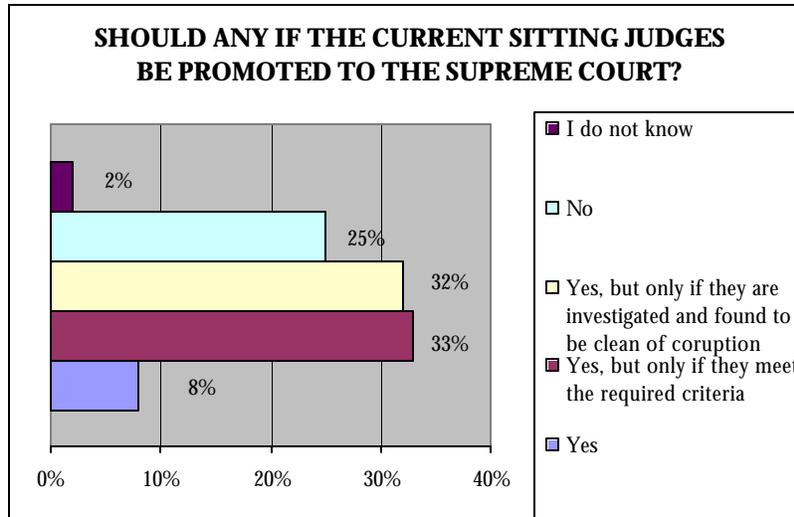
Out of those who had read the draft constitution, 79% stated that they understood chapter nine of the draft constitution.



75% of the respondents felt that a Supreme Court should be established in Kenya.

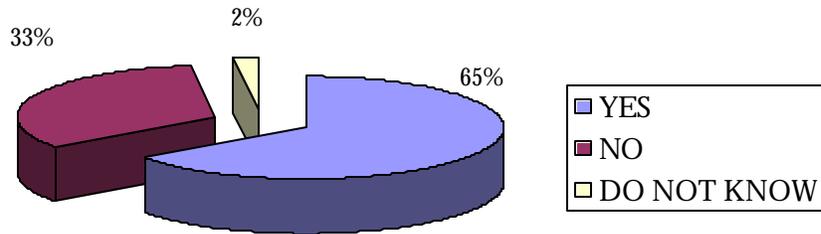


Majority (75%) of the respondents felt that the establishment of a Supreme Court would be beneficial to the legal system.

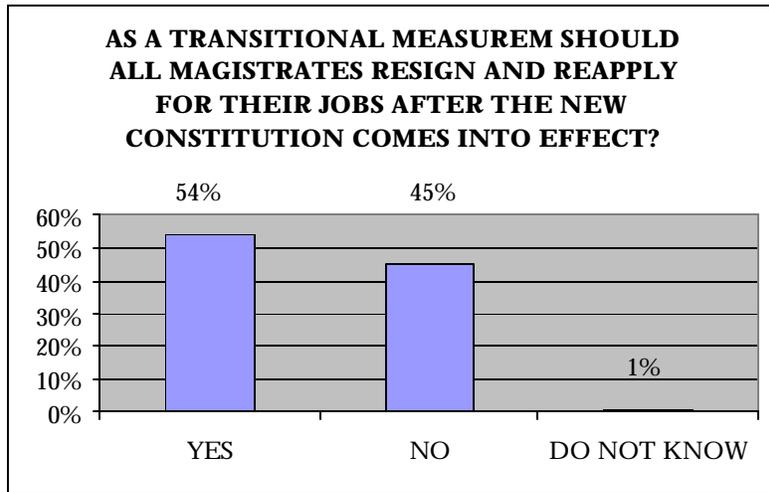


33% of the respondents felt that current judges should be promoted to the Supreme Court if they meet the required criteria. 31% of the respondents thought that the current judges should only be promoted if they are investigated and found to be free of corruption. 25% of the respondents did not feel that current judges should be promoted to the Supreme Court.

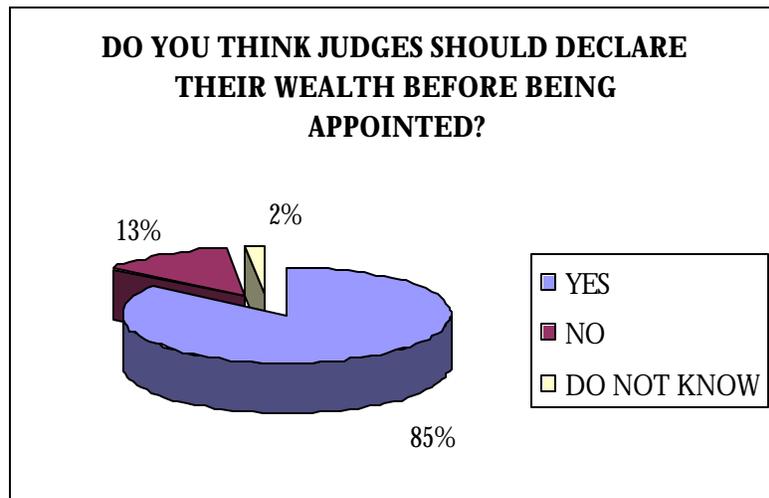
AS A TRANSITIONAL MEASURE, SHOULD ALL JUDGES RESIGN AND REAPPLY FOR THEIR JOBS AFTER THE NEW CONSTITUTION COMES INTO EFFECT?



Majority (65%) of the respondents felt that all current judges should resign and reapply for their jobs once the new constitution comes into effect.

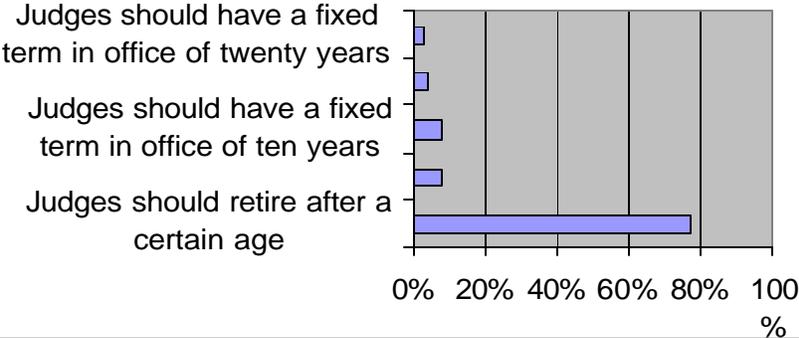


54% of the respondents felt that all magistrates should resign and reapply for their jobs once the new constitution comes into effect.



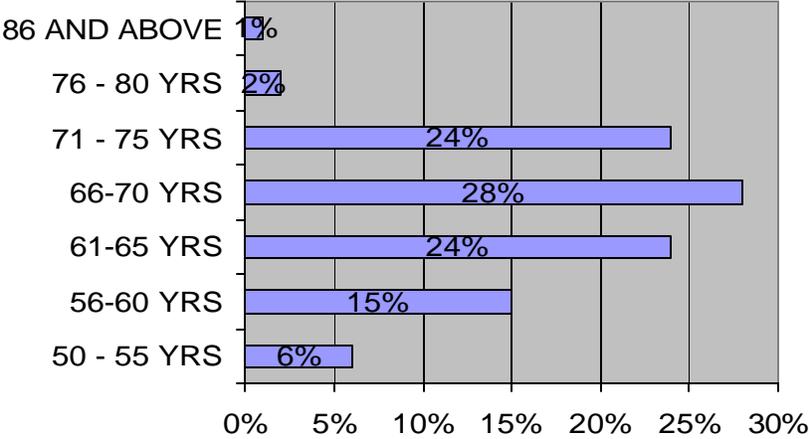
Majority (85%) of the respondents felt that judges should declare their wealth before being appointed.

**Whether Judges should retire at
acertain age or should serve for a
fixed term.**

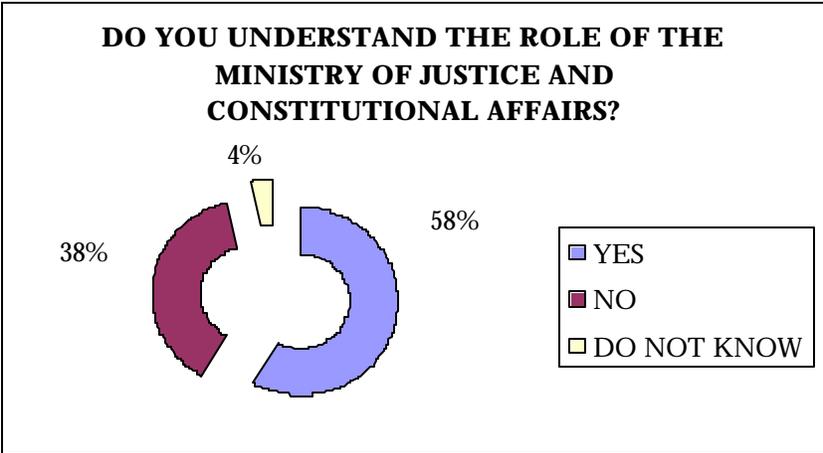


Majority (77%) of the respondents felt that judges should retire after a certain age. An equal number of respondents (8%) felt that judges should have a fixed term of ten and fifteen years.

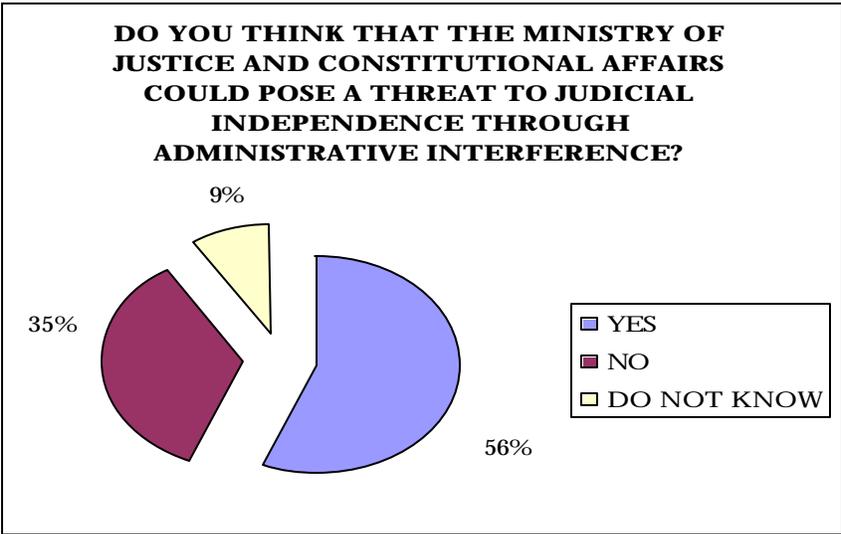
**What would be the desirable retirement
age for judges?**



28% of the respondents felt that judges should retire after reaching between the ages of 66 and 70 years. In essence, most respondents (76%) felt that the retirement age for judges should be fixed between the ages of 61 and 75 years.

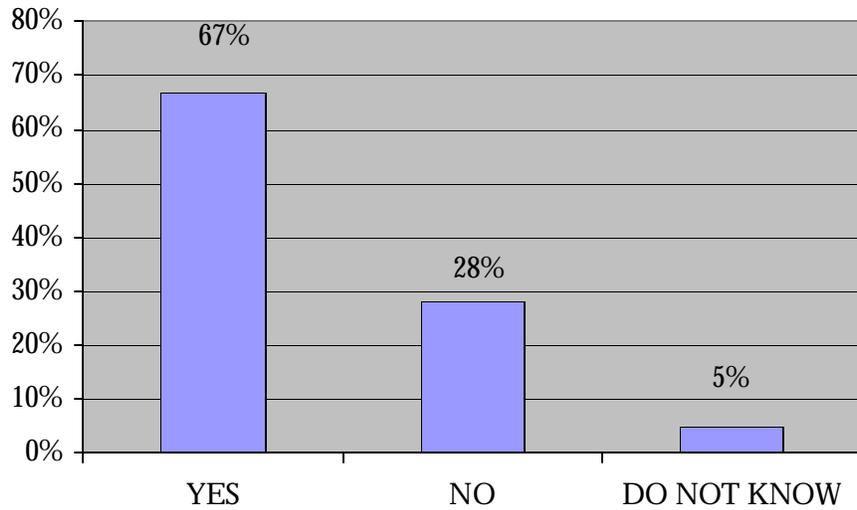


58% of the respondents felt that they understood the role of the Ministry of Justice and Constitutional Affairs.

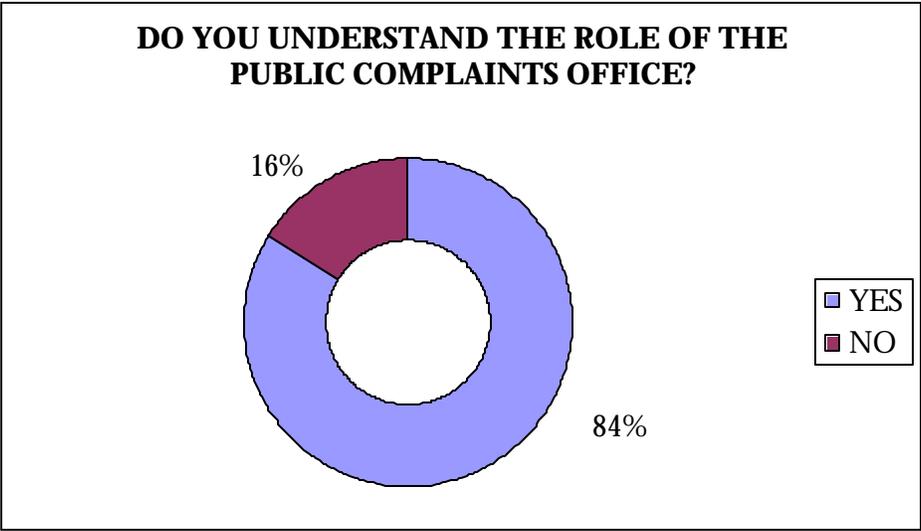


Majority (56%) of the respondents felt that the Ministry of Justice and Constitutional Affairs could pose a threat to judicial independence through administrative interference.

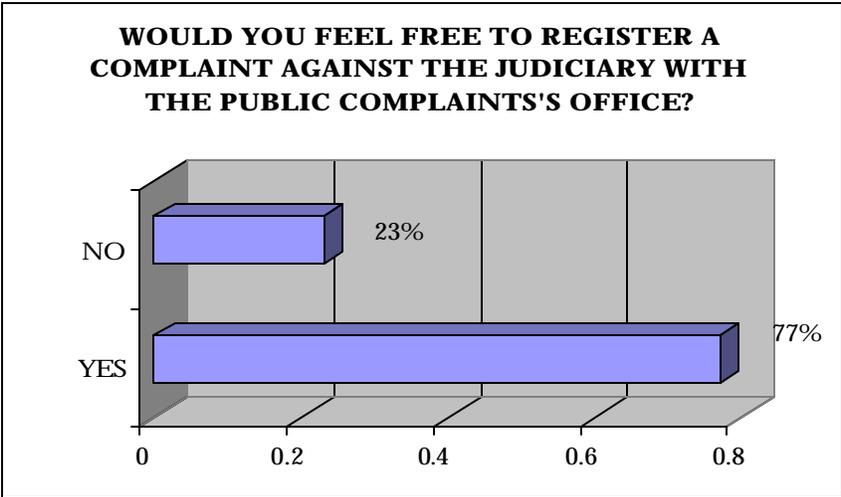
DO YOU THINK THAT THE RELATIONSHIP BETWEEN INSTITUTIONS SUCH AS THE MINISTRY OF JUSTICE , THE ATTORNEY GENERAL AND THE JUDICIARY CAN BE COMPLEMENTARY AND NOT CONFRONTATIONAL?



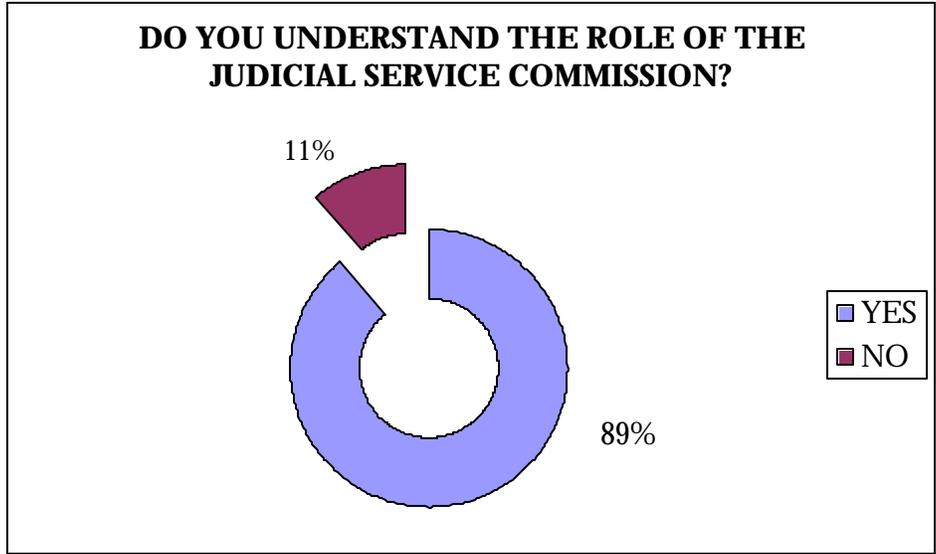
67% of the respondents felt that the relationship between the Ministry of Justice and Constitutional Affairs, the Attorney General and the Judiciary could be complementary and not confrontational.



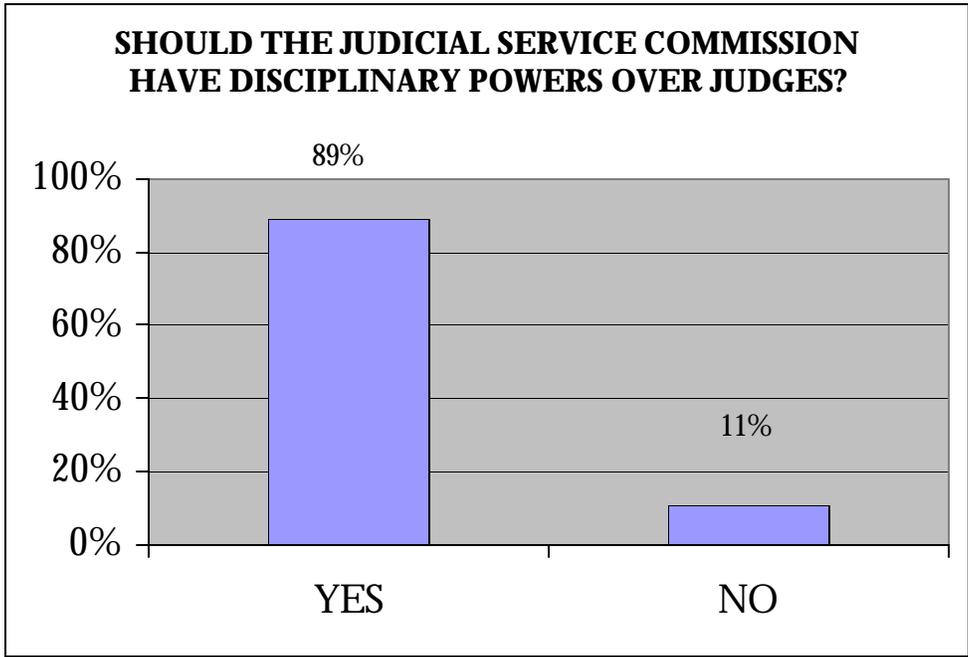
Majority (84%) of the respondents understand the role of the Public Complaints Office.



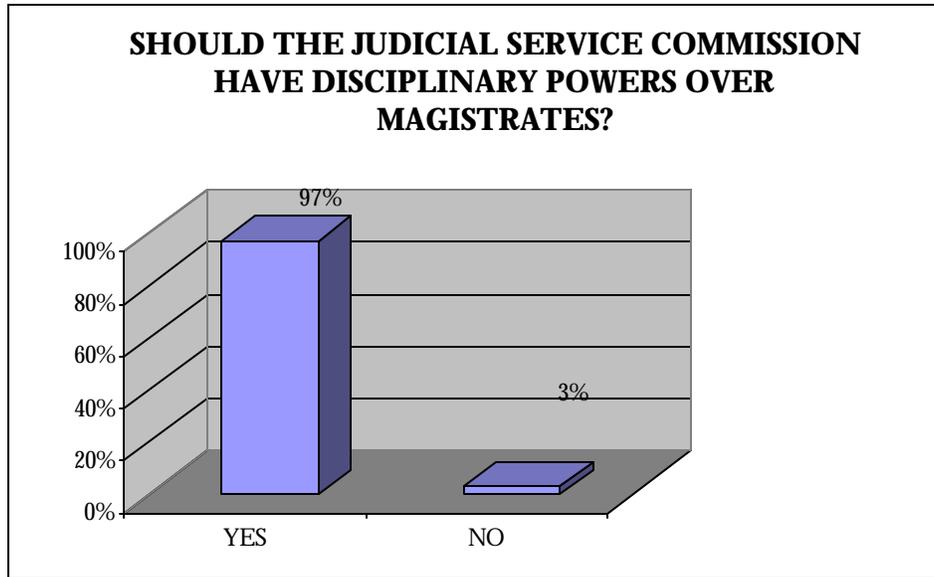
77% of the respondents said that they would feel free to register a complaint against the Judiciary with the Public Complaints Commission.



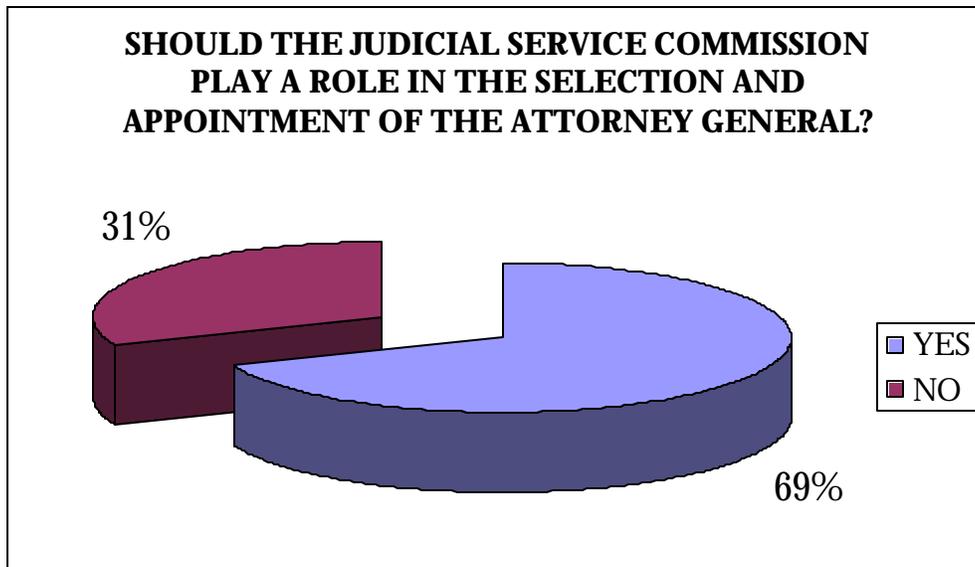
Majority (89%) of the respondents said they understood the role of the Judicial Service Commission.



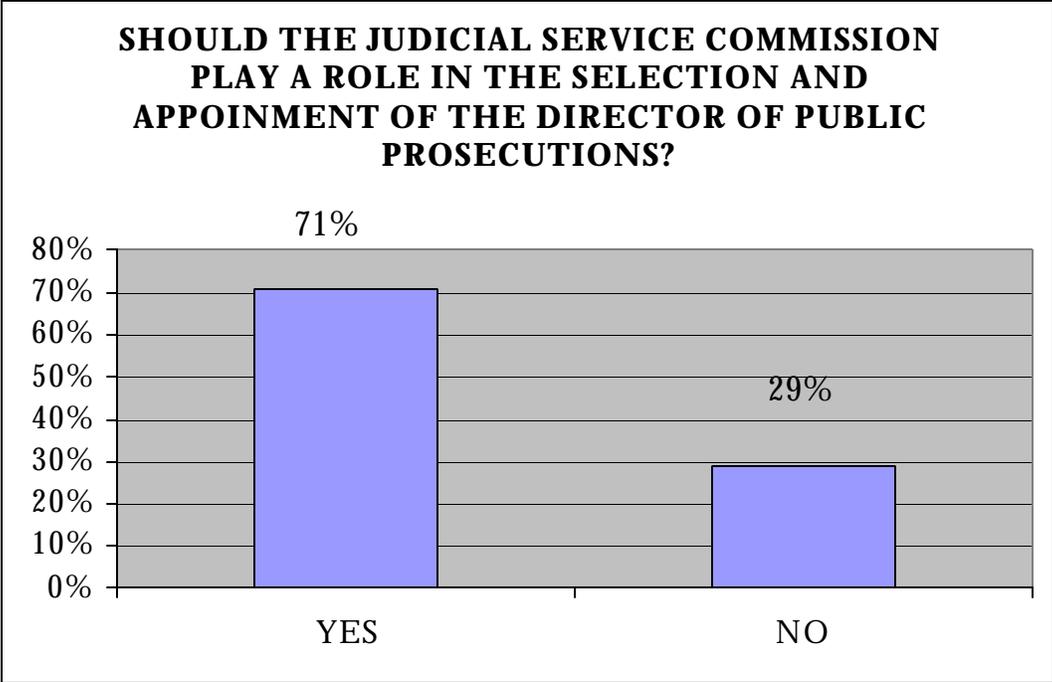
89% of the respondents felt that the Judicial Service Commission should have disciplinary powers over judges.



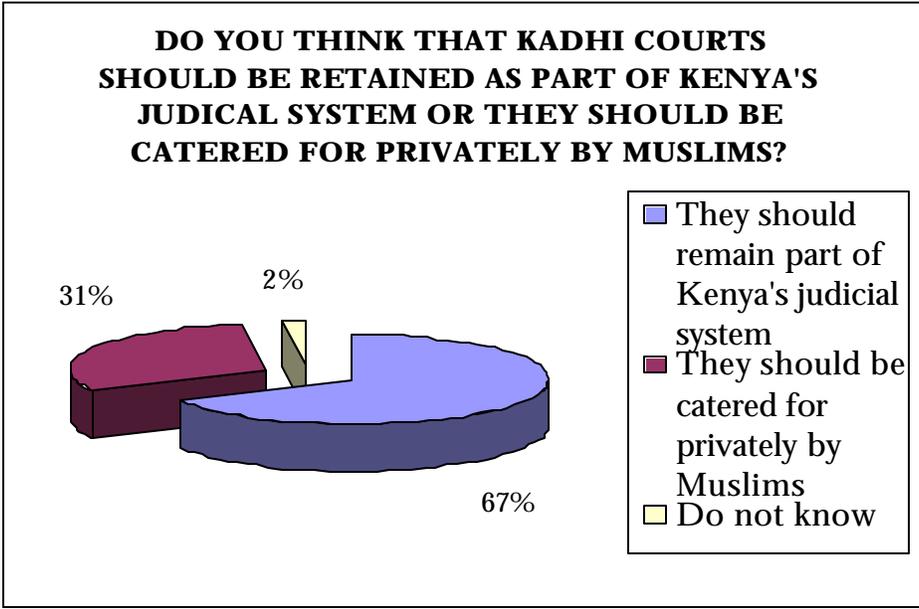
97% of the respondents felt that the Judicial Service Commission should have disciplinary powers over magistrates.



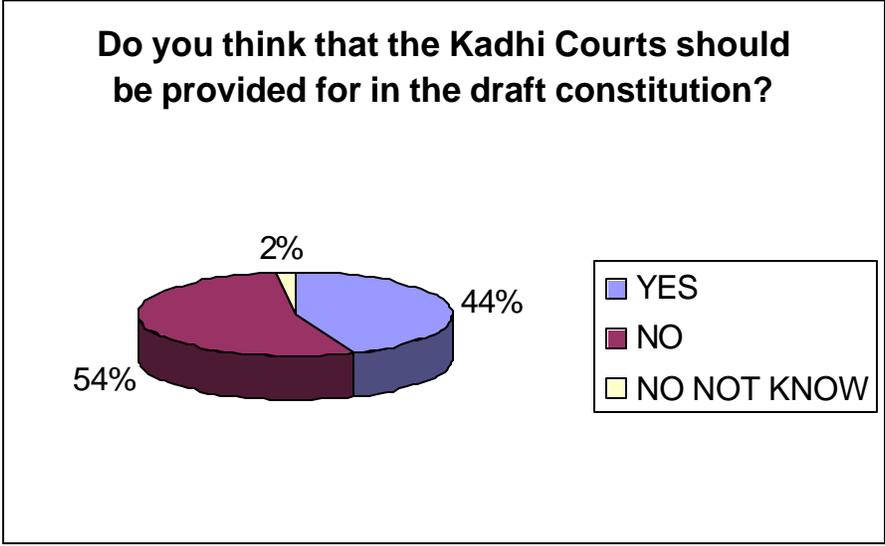
Majority (69%) of the respondents felt that the Judicial Service Commission should play a role in the selection and appointment of the Attorney General.



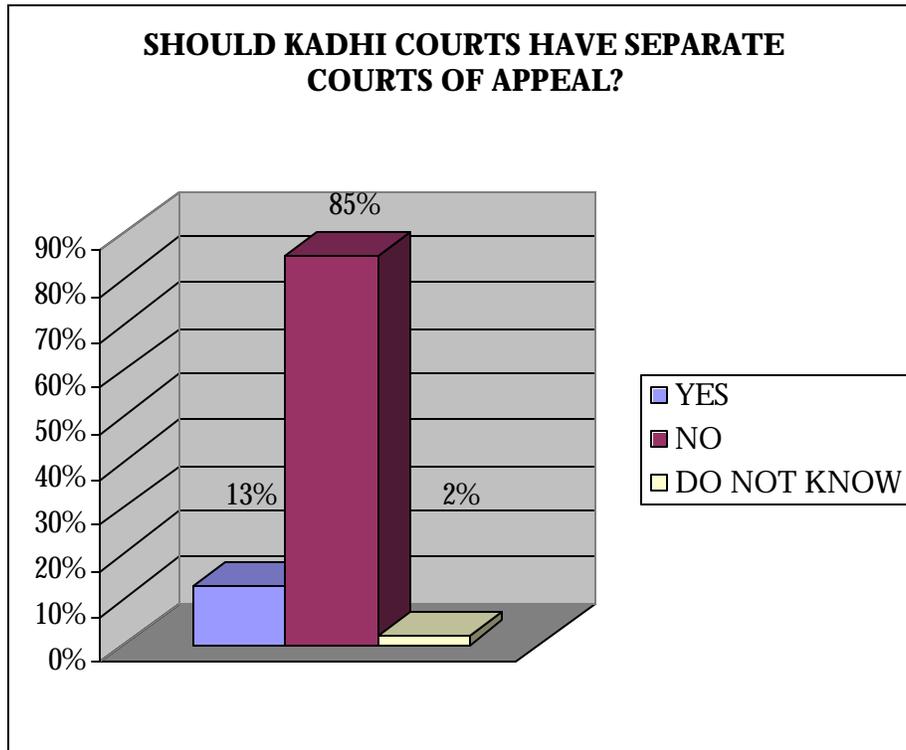
71% of the respondents felt that the Judicial Service Commission should play a role in the selection and appointment of the Director of Public Prosecutions.



67% of the respondents felt that Kadhi Courts should be retained as part of Kenya's judicial system.



54% of the respondents felt that Kadhi Courts should not be provided for in the draft constitution.



85% of the respondents felt that Kadhi Courts should not have separate courts of appeal.

CONCLUSION

As has been the case over the last three years of our survey of the Judiciary's performance, most respondents in this particular survey felt that efficiency in the current Judiciary was below average. On the other hand, corruption was still high therefore, rendering the institution incapable of adequately administering justice in Kenya.

Most respondents though had faith in the new government's ability and goodwill to clean up the Judiciary, most of them thought it was too early to affirm this conviction. This is due to the fact that no proper mechanisms and systems of dealing with the mess in the Judiciary have been put in place yet. Mere goodwill cannot guarantee commitment and success in judicial reform.

Most respondents had very little faith in the Judiciary's own ability and commitment to fight judicial corruption. They instead called for a combined effort from the government, through the Ministry of Justice and Constitutional Affairs and the President, and other key institutions such as the Anti-Corruption unit, Parliament and the Law Society of Kenya to combat this anathema.

From the findings, it was impressive to note that majority of the respondents had read the draft constitution either in part or in full hence making their responses credible and informed.

In summary, some of the key highlight of the findings are:-

- An overwhelming majority of the respondents supported the establishment of the Supreme Court in Kenya. One of the main reasons for this is that, such a court will help streamline the operations of the Judiciary especially as pertains judgments issued. It has been noted with concern that most of the decisions of the High Court and the Court of Appeal are inconsistent which has resulted into confusion on the proper position of the law on certain matters, as well as stagnation in the development of jurisprudence. It was interesting to note that majority of the respondents had no problem with the current judges being promoted to the Supreme Court, as long as they fulfilled certain specific requirements, such as proving their own integrity as far as corruption is concerned and their competence in general.

At the same time, most respondents called for *en mass* resignation of all judicial officers once the new constitution comes into effect and any officer who wishes to continue with service would then reapply for the job. Reappointment would be considered after certain requirements have been met by such an officer, the crucial one, being the declaration of wealth.

- Most respondents also opposed the idea of having judges serve for a fixed terms but instead favoured the system of retirement upon the attainment of a

- certain age. Most respondents stated that such age for retirement should not be less than sixty one (61) years and not more than seventy five (75) years.
- Most respondents supported the creation of a Public Complaints Commission/office because it would offer an arena for members of public to lodge their complaints against public officials and more specifically judicial officers.
 - In addition to having the Judicial Service Commission involved in the appointment and promotion of judges and magistrates, as well as having disciplinary powers over the same, most respondents called for the Commission to be involved in the appointment and discipline of both the Attorney General and the Director of Public Prosecutions.
 - Most respondents claimed to understand the role of the Ministry of Justice and Constitutional Affairs, but feared that unless its terms of reference are properly defined, it posed a threat to judicial independence through administrative interference.
 - On the Kadhi Courts, most respondents stated that it should be retained as part of Kenya's judicial system but should not be provided for in the constitution, neither should it have a separate appellate system.

Overall, most respondents supported the provisions of the draft constitution on the judicial and legal system in Kenya with a few exceptions, the most notable one, being the provisions on the Kadhi Courts.

The issue of Kadhi Courts remain a thorny one and it is important that a compromise is reached on the matter. ICJ Kenya's stand is that, the provisions of the draft constitution be replaced with section 66 of the current constitution⁷.

⁷ **S. 66(1)** There shall be a Chief Kadhi and such number not being less than three, of other Kadhis as may be prescribed by or under an Act of Parliament.

S. 66(2) A person shall not be qualified to be appointed to hold or act in the office of Kadhi unless,

a) he professes the Muslim religion; and

b) he possesses such knowledge of the Muslim law applicable to any sect or sects of Muslims as qualifies him, in the opinion of the Judicial Service Commission, to hold a Kadhi's court.

S. 66(3) Without prejudice to s. 65 (1), there shall be such subordinate courts held by Kadhis as Parliament may establish and each Kadhi's court shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law.

S. 66(4) The Chief Kadhi and the other Kadhis, or the Chief Kadhi and such of the other Kadhis (not being less than three in number) as may be prescribed by or under an Act of Parliament, shall each be empowered to hold a Kadhi's court having jurisdiction within the former Protectorate or within such part of the former Protectorate as may be so prescribed; provided that no part of the former Protectorate shall be outside the jurisdiction of some Kadhi's court.

S. 66(5) The jurisdiction of a Kadhi's court shall extend to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.

APPENDIX ONE

CHAPTER NINE OF THE DRAFT CONSTITUTION⁸

JUDICIAL AND LEGAL SYSTEM

PART I—THE JUDICIAL SYSTEM

Judicial power

- 184.** (1) Judicial power is derived from the people and shall be exercised by the courts -
- (a) in the name of the people;
 - (b) in conformity with the Constitution and the laws; and
 - (c) in conformity with the values, norms and aspirations of the people.
- (2) Judicial power shall vest exclusively in the courts and tribunals established under this Constitution.
- (3) In applying the law to cases of a civil or criminal nature, the courts shall be guided by the following principles:
- (a) justice shall be done to all, irrespective of social or economic status;
 - (b) justice shall not be delayed;
 - (c) adequate compensation shall be awarded to victims of wrongs;
 - (a) reconciliation, mediation and arbitration between parties shall be promoted;
 - (e) justice shall be administered without undue regard to technicalities;

⁸ DRAFT BILL. THE CONSTITUTION OF THE REPUBLIC OF KENYA. DATED AND ISSUED AT NAIROBI AT 11.00A.M. FRIDAY THE 27TH DAY OF SEPTEMBER, 2002

- (f) the protection and promotion of the principles and purpose of the Constitution.
- (3) In the performance of their functions the courts, their officers and persons participating in the administration of justice -
- (a) shall strive to deliver the highest standard of service to the public;
 - (b) are bound by the Leadership and Integrity Code of Conduct; and
 - (c) shall continue to educate themselves in current development in the laws of Kenya and comparative law.
- (4) The state shall provide reasonable resources and opportunities shall be made available for members of the Judiciary to enable them to deliver the highest standards of service to the public.

Hierarchy of Courts

- 185.** (1) The Judiciary consists of the courts, judges, magistrates and other judicial officers of superior courts of record, and subordinate courts.
- (2) The superior courts of record are the Supreme Court, the Court of Appeal, and the High Court.
- (3) The subordinate courts are -
- (a) the Magistrates' courts and the Kadhis' courts,
 - (b) any other courts established by an Act of Parliament subordinate to the High Court, and
 - (c) any traditional or local tribunals with limited jurisdiction in issues of local significance, that may be established by an Act of Parliament.

Independence of the Judiciary

- 186.** (1) In the exercise of judicial power, the Judiciary is subject only to the Constitution and is not subject to the control or direction of any other person or authority.
- (2) The administrative expenses of the Judiciary, including the salaries, allowances, gratuities and pensions payable to, or in respect of, persons serving in the Judiciary are a charge on the Consolidated Fund.
- (3) No judicial officer shall be liable in an action or suit in respect of anything done in the performance of a judicial function.
- (4) The salaries, allowances, gratuities and pensions payable to, or in respect of persons serving in, the Judiciary, shall not be varied to their disadvantage.
- (5) Court fees shall be reasonable and shall not be such as to discourage the use of the court system.
- (6) The Salaries and Remuneration Commission shall ensure that the emoluments and terms of conditions of service encourage and enhance the integrity and independence of the Judiciary.

The Supreme Court

- 187** The Supreme Court consists of-
- (a) the Chief Justice, who is the head of the Judiciary, and
- (b) not more than six judges.

General Jurisdiction of the Supreme Court

- 188.** (1) The Supreme Court has-
- (a) original jurisdiction -
- (i) with respect to advisory opinions requested by the President;
- (ii) in respect of presidential election petitions;

in issues relating to impeachment of the President;

in respect of any challenge to the constitutionality of any Act of Parliament; and

in respect of any dispute between the districts or between a district and the national government.

(b) appellate jurisdiction as conferred by an Act of Parliament.

(2) Where a question relating to original jurisdiction of the Supreme Court arises in any other court, that court shall stay the proceedings and refer the question to the Supreme Court for determination; and the court from which the question arose shall act in accordance with the decision of the Supreme Court.

(3) The Supreme Court may depart from its previous decisions in the interests of justice.

(4) All other courts are bound by the decisions of the Supreme Court.

Supervisory Jurisdiction of the Supreme Court

189. (1) The Supreme Court has supervisory jurisdiction over all Courts and over any person, body or authority which exercises an adjudicating function.

(2) For the purposes of clause (1), the Supreme Court may call for the record of any proceedings before any court or tribunal and make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring the fair administration of justice.

The Court of Appeal

- 190.** (1) The Court of Appeal consists of -
- (a) the President of the Court, and
 - (b) not less than ten judges.
- (2) The Court of Appeal is constituted by three judges.
- (3) The Court of Appeal is bound by the decisions of the Supreme Court and by its own previous decisions.
- (4) The High Court and the subordinate courts are bound by the decisions of the Court of Appeal.
- (5) The President of the Court of Appeal may, in consultation with the Chief Justice, create Divisions of the Courts of Appeal -
- (a) consisting of the number of judges assigned to them by the Chief Justice, and
 - (b) sitting at the places determined by the President of the Court of Appeal in consultation with the Chief Justice

Jurisdiction of the Court of Appeal

- 191.** (1) The Court of Appeal is an appellate Court with jurisdiction in -
- (a) appeals from a decree, judgement or an order of the High Court, and
 - (b) any other appellate jurisdiction conferred on it by any other law.
- (2) An appeal to the Court of Appeal lies as of right from a judgement, decree or order of the High Court.

The High Court

- 192.** (1) The High Court consists of -
- (a) the Principal Judge of the Court; and
 - (b) such number of judges, not being less than fifty, as may be prescribed by an Act of Parliament.
- (2) The Principal Judge may, in consultation with the Chief Justice, create Divisions of the High Court and specify their jurisdiction.
- (3) The High Court shall sit in such places as the Principal Judge may appoint.

Jurisdiction of the High Court

- 193.** The High Court has unlimited original jurisdiction in -
- (a) criminal and civil cases, and
 - (b) any other jurisdiction, appellate or original, conferred on it by or under an Act of Parliament.

Appointment of Judges

- 194.** (1) When there is a vacancy in the office of the Chief Justice, the most senior judge of the Supreme Court by reference to the date of appointment, shall be appointed the Chief Justice.
- (2) When there is a vacancy in the office of the President of the Court of Appeal, the most senior judge of the Court of Appeal by reference to the date of appointment, shall be the President of the Court of Appeal.
- (3) When there is a vacancy in the office of the Principal Judge of the high Court, the most senior judge of the High Court, by reference to the date of appointment, shall be the Principal Judge.
- (4) The other judges of the superior courts of record and the Chief Kadhi shall be appointed by the President acting in accordance with the advice of the Judicial Service Commission and with the approval of the National Council.

Qualifications for Appointment of judges

195. (1)The Chief Justice and Judges of the Supreme Court shall be appointed from persons who possess the following qualifications -

- (a) fifteen years experience –
 - (i) as a Judge of the Court of Appeal or the High Court; or
 - (ii) in practice as an advocate; or
 - (iii) full-time law teacher in a recognised university;
- (b) intellectual ability as demonstrated by academic qualifications and legal practice; and
- (b) high moral character and integrity.

(2)The Judges of the Court of Appeal shall be appointed from persons who possess the following qualifications -

- (a) ten years experience –
 - (i) as a Judge of the Court of Appeal or the High Court; or
 - (ii) in practice as an advocate; or
 - (iii) full-time law teacher in a recognised university;
- (b) intellectual ability as demonstrated by academic qualifications and legal practice; and
- (c) high moral character and integrity.

(3) Judges of the High Court shall be appointed from persons who possess the following qualifications -

- (a) ten years experience –
 - (i) as a magistrate; or
 - (ii) in practice as an advocate; or
 - (iii) full-time law teacher in a recognised university;
and
- (b) intellectual ability as demonstrated by academic qualifications and legal practice.
- (c) high moral character and integrity.

(4) The office of a judge of the superior courts of record shall not be abolished while there is a substantive holder of the office.

Tenure of office of judges

- 196.** (1) A judge and other judicial officers of the subordinate courts shall retire from office, on attaining the age of sixty-five years, but may retire at sixty.
- (2) On attaining the retirement age, a Judge of the superior courts of record may continue in office for a period not exceeding six months in order to enable the Judge to deliver a judgement, or perform any other function in relation to proceedings that were commenced before the Judge prior to attaining the age of retirement.

Removal from office

- 197.** (1) A Judge of the superior courts of record may be removed from office in accordance with this Article and on the grounds of -
- (a) inability to perform the functions of office arising from infirmity of body or mind, or from a sufficient cause; or
 - (b) a breach of the Code of Conduct; or
 - (c) incompetence and misconduct.
- (2) An individual, institution, a society, or group of persons desiring the removal of a judge of a superior court of record may present a petition to the Judicial Service Commission.
- (3) The Judicial Service Commission shall consider the petition and, if it is satisfied that it discloses the existence of a ground under clause (1), it shall send the petition to the President of the Republic.
- (4) On receipt and examination of the petition, the President may, acting in accordance with the advice of the Judicial Service Commission -
- (a) suspend the judge from office; and
 - (b) in the case of a judge who is not the Chief Justice, appoint a tribunal consisting of -
 - (i) the Chairperson;
 - (ii) four other members from among persons who hold or have held office as a judge of a superior court of record; or who are qualified to be appointed as judges of the superior courts of record; and
 - (iii) three other persons with experience in public affairs, at least one of whom shall be a woman.
 - (c) In the case of the Chief Justice, appoint a tribunal consisting of-

- (i) the Speaker of the National Council as Chairperson;
- (ii) two Judges from the member states of the East African Community; and
- (iii) three persons with experience in public affairs, at least one of whom shall be a woman.

(5) The tribunal shall inquire into the matter and report on the facts and make recommendations to the President of the Republic, who shall act in accordance with the recommendations of the tribunal.

Subordinate courts

198. (1) Parliament may, by an Act of Parliament, establish courts subordinate to the High Court that shall have, subject to the Constitution, the jurisdiction and functions conferred on them by the Act or any other law.

(2) No judicial officer in the office of magistrate or Kadhi may be removed from office, except after determination by the Judicial Service Commission on such grounds as may be prescribed by an Act of Parliament.

The Kadhis' courts

199 (1) There are established Kadhis' Courts, the office of Chief Kadhi, office of Senior Kadhi and the office of Kadhi.

(2) There shall be a number, being not less than thirty, of other Kadhis as may be prescribed by the Act of Parliament.

(2) A Kadhi is empowered to hold a Kadhis' court called a District Kadhis' Court, having jurisdiction within a district or districts as may be prescribed by, or under, an Act of Parliament.

Jurisdiction of Kadhis' courts

- 200.** (1) The Jurisdiction of a Kadhis' court extends to
- (a) the determination of questions of Muslim Law relating to personal status, marriage, divorce, including matters arising after divorce, and inheritance and succession in proceedings in which all the parties profess Islam;
 - (b) the determination of civil and commercial disputes between parties who are Muslims, in the manner of a small claims court as by law established, but without prejudice to the rights of parties to go to other courts or tribunals with similar jurisdiction;
 - (c) the settlement of disputes over or arising out of the administration of wakf properties.
- (2) Subject to the Constitution, an appeal lies, as of right, from a judgement, decree or order of the District Kadhis' Court to the Provincial Kadhis' Court, presided over by a Senior Kadhi, in any matter or cause determined by the lower court.
- (3) An appeal lies, as of right, from a judgement, decree or order of the Provincial Kadhis' Court to the Kadhis' Court of Appeal, presided over by the Chief Kadhi and two senior Kadhis.
- (3) An appeal from the Kadhis' Court of Appeal lies to the Supreme Court only on a point of Islamic Law or on an issue affecting the interpretation of the Constitution or any other constitutional issue.
- (4) For the purposes of hearing and determining an appeal within its jurisdiction, the Provincial Kadhis' Court and the Kadhis' Court of Appeal have all the powers, authority and jurisdiction in the court from which the appeal is brought.
- (5) The Chief Kadhi shall, in consultation with the Chief Justice and the Law Society of Kenya, make rules of Court for the practice and procedure to be followed by the Kadhis' Courts.

Appointment of Kadhis

- 201.** (1) Kadhis shall be appointed by the Judicial Service Commission.
- (2) In the appointment of the Kadhis, the Judicial Service Commission shall take into account the qualifications of the Kadhi in Muslim personal law applicable to the different sects of Islam.
- (3) The Chief Kadhi shall have the same status, privileges and immunities as a High Court judge; the senior Kadhi as a Chief Magistrate and the District Kadhi as a District Magistrate in a magistrate court.
- (4) The Chief Kadhi and the other Kadhis shall be full-time judicial officers.

Qualifications for appointment of Kadhis

- 202.** (1) A person is qualified to be appointed as a Chief Kadhi if that person –
- (a) is a Muslim of not less than thirty-five years of age;
 - (b) is an advocate of the High Court of Kenya of at least ten years experience as a legal practitioner and has attended, and obtained a recognized qualification in Muslim personal law, applicable to any sect or sects of Islam, from a recognized University; and
 - (c) has obtained a degree in Islamic law from a recognized University, and has not less than ten years experience in the practice of Islamic Law, or has held the office of a Kadhi for a similar period.
- (2) The qualification for appointment as a Kadhi or Senior Kadhi is the same as the qualification for the appointment of the Chief Kadhi except that the requisite number of years of experience shall be five years.

The Rules Committee

- 203** (1) There shall be a rules committee with authority to make rules of procedure applicable to the various courts set up under this Constitution.
- (2) The rules committee shall consist of –
- (a) the Chief Justice;
 - (b) the President of the Court of Appeal;
 - (c) the Principal Judge of the High Court;
 - (d) the Chief Kadhi;
 - (e) the Registrars of the Supreme Court, the Court of Appeal and the High Court; and
 - (f) two representatives of the Law Society of Kenya
- (3) The rules committee shall have authority to determine the fees payable in respect of any matter or suit filed before any court.

The Judicial Service Commission

- 204.** (1) To ensure and enhance the independence and judicial accountability of the judiciary and the efficient and effective administration of justice, there is hereby established the Judicial Service Commission consisting of-
- (a) a full-time chairperson who is qualified to be appointed a Judge of the Supreme Court, appointed by the President of the Republic and approved by the National Council;
 - (b) a Muslim woman to represent the Muslim community, nominated by the National Muslim Organization;
 - (c) the Attorney-General ;
 - (d) one Supreme Court Judge elected by Judges of the Supreme Court;

- (e) one Court of Appeal Judge elected by the Judges of the Court of Appeal;
 - (a) one High Court Judge elected by the Judges of the High Court;
 - (b) the Chief Kadhi;
 - (c) two magistrates, one of whom shall be a woman, elected by the magistrates;
 - (d) two advocates of fifteen years standing, one whom shall be a woman, nominated by the Law Society of Kenya;
 - (e) two law teachers, one of whom shall be a woman, elected by the faculties of law of public universities;
 - (f) a member nominated by the Council of Legal Education;
 - (g) the chairperson of the Public Service Commission or a nominee of the chairperson; and
 - (h) three lay members, one of whom is a woman, to be nominated by the Non-Governmental Organization, established under the NGOs Co-ordination Act or any other similar legislation in force at the time.
- (2) Members of the Commission shall hold office for a term of five years and are eligible for re-appointment for a further and final term of five years.

Functions of the Judicial Service Commission

- 205.** (1) The functions of the Judicial Service Commission are -
- (a) to recommend to the President of the Republic persons for appointment as judges;
 - (b) to review and make recommendations on the terms of service of Judges, magistrates and other judicial officers, other than salaries and remuneration;
 - (c) to appoint, discipline and remove registrars, magistrates and other judicial officers, including paralegal staff in accordance with the law prescribed by Parliament;
 - (d) to review and investigate complaints against judges in accordance with the Constitution;
 - (e) to prepare and implement programmes for the education and training of judges, magistrates and paralegal staff;
 - (f) to advise the Government on improving the efficiency of the administration of justice, and access to justice- including legal aid;
 - (g) to encourage gender equity in the administration of justice; and
 - (h) any other function prescribed by the Constitution or by an Act of Parliament.

(2) In performing its functions the Commission is subject only to the Constitution and the law.

- (3) The Commission may regulate its own procedures.

Appointment and removal of certain judicial officers

- 206.** (1) The Judicial Service Commission is responsible for the appointment of -
- (a) judicial officers; and
 - (b) the Registrars of the Courts, the Chief court administrator and other officers and employees of the Judiciary,
- (3) A judicial officer shall retire on attaining the age of sixty-five years, but may retire on attaining the age of sixty years.
- (3) A judicial officer may be removed from office by the Judicial Service Commission on the ground of-
- (a) inability to perform the functions of office, arising from infirmity of mind or body or from any other sufficient cause;
 - (b) incompetence;
 - (c) a breach of the Code of Conduct applicable to judicial officers; or
 - (d) any other misconduct.
- (4) For the purposes of this Article, “judicial officer” means a person who holds, or is acting, in the office of -
- (a) magistrate or Kadhi; and
 - (b) registrar or deputy registrar and any other office connected with the Judiciary, as specified in regulations made by the Judicial Service commission.

Salaries and retirement benefits

- 207** (1) The salaries, allowances, gratuities and the pension payable to the judges and other staff of the Judiciary are charged on the Consolidated Fund.
- (2) The salaries, allowances, privileges and other conditions of service of the judges and of superior courts of record shall not be varied to the disadvantage of the judges.

PART II—LEGAL SYSTEM

Attorney-General

- 208.** (1) The office of the Attorney General is established as a constitutional office.
- (2) The Attorney General shall be appointed by the President on the recommendation of the Judicial Service Commission and with the approval of the National Council.
- (3) The qualifications for appointment as Attorney General are the same as for appointment to the High Court.
- (4) The Attorney General is the principal legal adviser to the National Government.
- (5) It is the special responsibility of the Attorney General to promote and uphold the rule of law.

Director of Public Prosecutions

- 209.** (1) The office of the Director of Public Prosecutor is established as a constitutional office.
- (2) The Director of Public Prosecutions shall be appointed by the President on the recommendation of the Public Service Commission and with the approval of the National Council.
- (3) The qualifications for appointment as Director of Public Prosecutions are the same as for appointment to the High Court.

- (4) The Director of Public Prosecutions shall exercise state powers of prosecution. In the exercise of that power he shall not be subject to the control of any other person or authority.
- (5) The Director of Public Prosecutions shall have power to direct the police to investigate any information or allegations of criminal conduct.
- (6) Parliament may confer powers of prosecution on other authorities.
- (7) The Director of Public Prosecutions may not withdraw a prosecution without the permission of the court.
- (8) The Director of Public Prosecutions does not require the consent of any person or authority for the commencement of prosecution proceedings.
- (9)
 - (i) In exercising his or her powers under this Article, the Director of Public Prosecutions shall have, to the public interest, the interest of the administration of justice and the need to prevent abuse of the legal process.
 - (ii) The Director of Public Prosecution shall have authority to appear' as a friend of the court, in any criminal prosecution commenced before any court or tribunal.

Public Defender

- 210.** (1) There is established the office of the Public Defender as a constitutional office.
- (2) The Public Defender shall be appointed by the President on the recommendation of the Judicial Service Commission and with the approval of the National Council.
- (3) The qualifications for appointment as Public Defender are the same as for appointment to the High Court.
- (4) The Public Defender shall provide legal advice and representation to persons who are unable to afford legal services.
- (5) The Public Defender shall disseminate information on access to the law and legal institutions.

- (6) Parliament shall enact a law making provision for -
 - (a) the effective management of the public defender's office;
 - (b) the categories of persons who qualify for legal aid;
 - (c) the categories of cases that qualify for legal aid; and
 - (d) other limitations in accessing legal aid

Prerogative of mercy

- 211.** (1) The prerogative of mercy shall be exercised by the President in accordance with the advice of the Committee on the Prerogative of Mercy.
- (2) The Committee on the Prerogative of Mercy shall consist of the Attorney General as chairman and six prominent Kenyans appointed by the President.
- (3) A member of Parliament or a member of the District Council, or a judge or judicial officer is not qualified for appointment to the Committee on the Prerogative of Mercy.
- (4) The President may, on the advice of the Committee on the Prerogative of Mercy -
- (a) grant to any person convicted of an offence, a pardon either free or subject to lawful conditions;
 - (b) postpone, either for a specified period or indefinitely, the carrying out of punishment imposed on a person; and
 - (c) substitute a less severe form of punishment for a punishment imposed on a person for an offence.
- (5) When appropriate, the President shall consult the victims of the offence in respect of which he or she intends to exercise the prerogative of mercy.

PART III-LEGAL PROFESSION

The profession of law

212. (1) The privilege of practising law is a public trust. It is a fundamental duty of every legal practitioner to-

- (a) uphold the Constitution;
- (b) observe, respect, protect and promote the rights and freedoms set out in the Bill of Rights;
- (c) conduct the practice of law with integrity, and to be scrupulously honest in all dealings with clients, other legal practitioners, the courts, and any public office or officer;
- (d) advocate fearlessly before the court or any tribunals on behalf of, and in the interests of, the client;
- (e) assist the court in the development of the law by presenting well-reasoned, innovative and challenging arguments, such as will advance the objects and purpose of the Constitution and the rule of law; and
- (f) subject to the confidentiality of a client's business and communications, draw the attention of the appropriate authority, to any actual or apprehended violation of the Constitution or any law.