

STRENGTHENING JUDICIAL REFORMS IN KENYA: ADMINISTRATIVE REFORMS

VOLUME X



THE KENYA SECTION OF THE
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Philip Kichana

Executive Director

EXECUTIVE SUMMARY

This is the tenth report in ‘*Strengthening Judicial Reforms*’ series of publications¹ and it addresses administrative reforms in the Judiciary. The report focuses on the offices of the Chief Justice and the Registrar as well as judicial policies which form the larger part of Judiciary’s internal environment that govern the day-to-day functions and operations of the Judiciary.

The report is based on the findings of both desk and field research carried out in January 2005 under the aegis of ICJ Kenya’s Judiciary Programme. This report forms part of ICJ Kenya’s objective of gathering and disseminating information on the Judiciary as an institution, and the administration of justice in general that would enable effective public interest in and demand for judicial reform.

Having addressed mostly the external environment within which the Judiciary operates, ICJ Kenya sought to analyse its internal governance of the judiciary to establish the extent to which the environment promotes or hinders the attainment of judicial reforms in Kenya, aimed at restoring the independence of the Judiciary, enhancing efficiency in service delivery

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- ¹ - Strengthening Judicial Reforms, Volume I – 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 Magistrate’s Court, 2003
 - Strengthening Judicial Reforms in Kenya, Volume VI: Public Perceptions of the Administrative Tribunals in Kenya, 2003
 - Strengthening Judicial Reforms in Kenya, Volume VII: Public Perceptions of Chapter Nine of the Draft Constitution of Kenya
 - Strengthening Judicial Reforms in Kenya, Volume VIII: Progress Assessment from 2000–2003
 - Strengthening Judicial Reforms in Kenya, Volume IX: The Anti-Corruption Court in Kenya

as well as fighting judicial corruption. This report is informed by both qualitative and quantitative survey that covered a wide range of respondents drawn from various sectors of the society.

It is my hope that the readers of this report will find it useful as we strive to open the Judiciary for public participation and scrutiny as a means of achieving all-inclusive, effective and sustainable judicial reforms in Kenya. It is with pleasure that I welcome feedback on any or all aspects of this report to enable us continuously improve this product.

Philip Kichana
Executive Director

INTRODUCTION

The existence of an independent Judiciary is at the heart of a judicial system that guarantees human rights in full conformity with international standards. It is the obligation of every State to ensure that the Judiciary is indeed an independent arm of the government².

Thus, the institution itself and the judges (Magistrates included) must be free to carry out their professional duties without interference from any quarters whether external or internal. This independence must be protected in law and in practice.

A trial can only be fair if the Judiciary itself, and the presiding judge and/or magistrate are independent.

The independence of the Judiciary can be compromised as a result of internal and external interference. Internal aspects such as selection, evaluation, promotion, discipline and case assignment process need a lot of transparency otherwise they constitute barriers to independence of the judiciary. It is out of this realization that ICJ Kenya sought to assess the internal environment of the Kenya Judiciary by addressing the issues hereafter and their impact on the independence of the Judiciary;-

- a) The office and the role of the Chief Justice in administration of justice in Kenya;
- b) The office and the role of the Registrar in administration of justice in Kenya;
- c) Judiciary's operation policies;

² The first principle under the UN *Basic Principles on the Independence of the Judiciary* states that, 'the independence of the Judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country....'

Research Objectives

The broad objective of this study was to examine the administrative structure of the Judiciary with a view of assessing the extent to which it hinders or promotes judicial reforms with specific emphasis on the personal independence of judicial officers, efficiency and the institutional accountability.

The specific objective of this survey is to create awareness on the powers and duties of the Chief Justice, the Registrar and the general operations of the Judiciary.

As has been the case in the past, ICJ Kenya noted with concern that there is very little, if any, information on the administrative powers of the Chief Justice, the Registrar and judicial policies available in the public domain. This lack of information makes it very difficult for the public to scrutinise and hold judicial administrators accountable and/or participate in judicial reforms.

Even more worrying is the fact that very little is known about policies that govern the operations of the Judiciary, from whether there are indeed any policies, to whether they are documented and adhered to. Lack of information on the policies is not only evident among ordinary members of the public, but also to judicial officers, for whom the policies are developed. This has greatly affected the internal governance of the Judiciary.

This report seeks critically examine the administrative structure of the Judiciary and the impact this has on the independence of the Judiciary.

Data Sources

- a) Literature review
- b) The Constitution of Kenya
- c) Statute books

- d) Judicial officers (serving and retired)
- e) Legal practitioners
- f) Members of the public

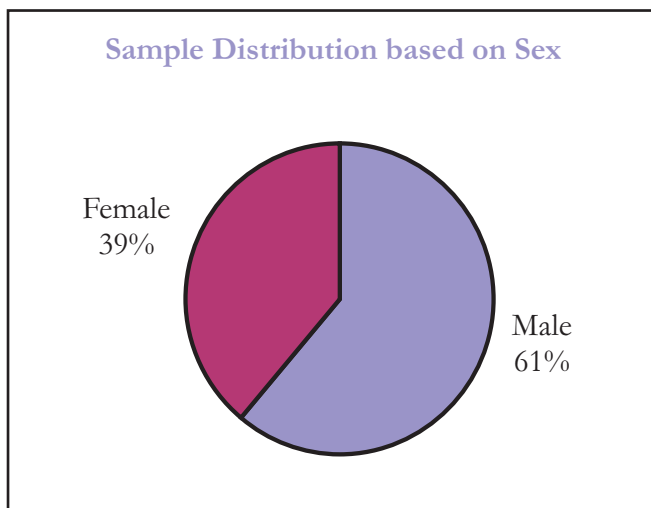
Coverage

The quantitative survey was carried out in Nairobi only, with a total of 365 interviewees participating in the survey³. However, the qualitative survey which targeted mainly judicial officers both serving and retired and practising legal practitioners was conducted in Nairobi, Meru, Nakuru, Machakos and Thika as well as online correspondence from other parts of the country and overseas.

³ They included judicial officers, legal practitioners, academia, Civil Society representatives, the media practitioners and members of the public.

RESEARCH FINDINGS AND ANALYSIS

Sample Distribution based on Sex



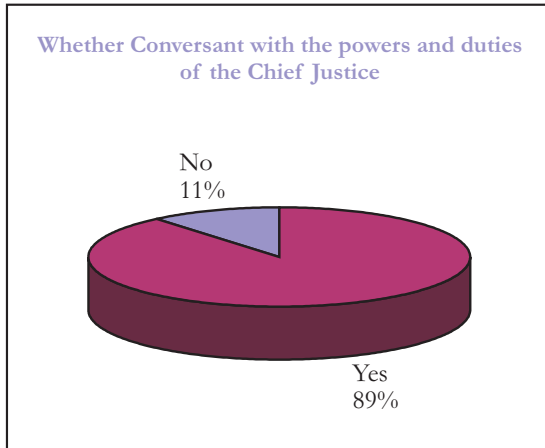
Majority of the respondents were male.

Out of the total sample, 42% were practising lawyers; 19% judicial officers (10 % currently serving and 9% retired officers); and 39% members of the public drawn from various sectors.

I. THE OFFICE OF THE CHIEF JUSTICE

1.1 Powers and Duties of the Chief Justice

89% of the respondents stated that they were conversant with the powers and duties of the Chief Justice.



In Kenya, the Chief Justice enjoys a very peculiar Constitutional position. He is both an administrator and judge of both the High Court⁴ and the Court of Appeal⁵ as well as the overall head of the Judiciary. He is also the link between the Judiciary and the other two arms of government. This duality has very significant bearing on his powers as the administrator of the court.

Administratively, among other duties⁶, the Chief Justice chairs the Judicial Service Commission, a body that is in charge of the core personnel issues including appointments, promotions, transfers, discipline and removal of judicial officers (except judges) among others. The Chief Justice who is not a trained manager enjoys

⁴ Section 60(2) of the Constitution

⁵ Section 64(2) of the Constitution

⁶ It should however be noted that these powers are not stipulated anywhere in the Constitution

enormous administrative powers, which unfortunately are not codified into a set of rules or guidelines or legislation. Most of his powers are discretionary.

Judicially, the Chief Justice makes rules of court for regulating the practice and procedure of the High Court and where applicable and subject to any other written law, those of subordinate courts too⁷. The Chief Justice also has the power to decide who hears particular cases by constituting benches.

1.1.1 The Chief Justice as the Head of the Judiciary

When asked whether the Chief Justice should remain the head of the Judiciary, 86% of the respondents said ‘yes’. They stated that by virtue of being the head of one of the three arms of government, the Chief Justice should be in-charge of the Judiciary just like his counterparts in the Executive⁸ and the Legislature⁹.



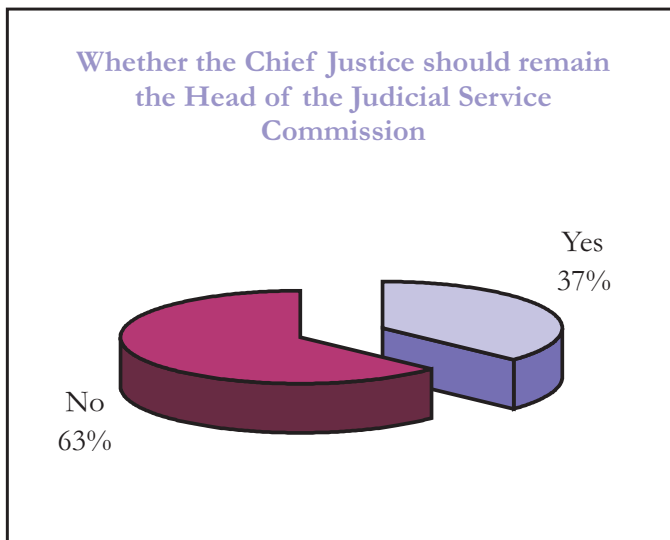
⁷ Section 10 of the Judicature Act, Cap 8.

⁸ President

⁹ Speaker

1.1.2 The Chief Justice as the Head of the Judicial Service Commission

63% of the respondents said that the Chief Justice should not head the Judicial Service Commission, while 37% supported the current position.



The following reasons were given as to why the Chief Justice should not head the Judicial Service Commission; -

- His domination in the Commission compromises its independence and objectivity, which ultimately undermines the independence of the Judiciary as an institution. By virtue of being the head of the Judiciary, he is the one who recommends appointments, disciplining and removal of judicial officers and cannot therefore be objective in such matters when he is the one chairing such meetings.

Further, such domination promotes patronage which is a major catalyst for corruption, inefficiency, ineptness and nepotism that have bedevilled the Judiciary for a long time.

- His dominion undermines the internal checks and balances. Ideally, the Chief Justice by virtue of being a judicial officer should be subject to the scrutiny of the Commission. This compromises accountability and transparency in the Judiciary.
- This impedes his ability to offer judicial leadership thereby affecting the administration of justice which is the core function of the Judiciary.

At the time of doing this report, the Chief Justice had discriminatorily¹⁰ and relying on reports from the press interdicted several magistrates who had participated in a strike clamouring for a salary increase. It will be interesting to see the outcome of their cases in view of the fact that the Chief Justice is the ‘complainant’ and the ‘judge’ in these cases¹¹.

However, 37% believe that the Chief Justice should remain the chair of the Commission based on the following reasons; -

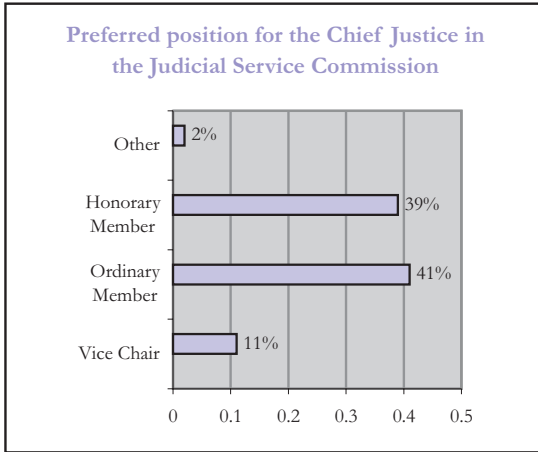
- As the head of an arm of government, the Chief Justice cannot be subject to the Commission. He is the one who should be in charge. It is up to the Legislature and the Executive to check his excesses.
- It befits the Chief Justice to have a greater role in the appointment of judicial officers for easier control¹² and management of Judiciary affairs. This will ensure commonality of interest and vision for the good of the administration of justice in the country.

¹⁰ Not all magistrates who participated in the strike were interdicted. Mombasa and Machakos were the most affected stations.

¹¹ The Chief Justice himself signed the dismissal letters meaning the Judicial Service Commission never met to deliberate on the matter as required

¹² This argument and use of the word ‘control’ raises a lot of questions because this can be interpreted to mean ‘lord over and/or manipulate’ his juniors which in itself compromises the independence of the judicial officers and the Judiciary as a whole (internal interference).

When asked about the suitable position for the Chief Justice in the Commission if he **must** be a member, 41% stated that he should serve an ordinary member; 39% voted for honorary membership while 11% voted for Vice-Chairmanship.



1.1.3 The Chief Justice and the Independence of the Judiciary

43% of the respondents stated that the current powers of the Chief Justice severely undermine the independence of the Judiciary¹³, while 44% did not think so.

Our research findings showed that the Office of the Chief Justice undermines personal independence of most judicial officers by curtailing their exercise and enjoyment of their fundamental rights and freedoms. For instance, judicial staff are forbidden from talking to the press without prior consent from the Chief Justice, even on very mundane issues. This curtails judicial officer's freedom of expression.

¹³ As a matter of practice the Chief Justice allocates all constitutional cases, decides how certain matters should be handled including selecting benches and asking judicial officers to disqualify themselves from certain matters. This undermines personal independence of judicial officers whose cumulative effect is a compromised Judiciary.

As guarantors of the rule of law and an integral part of the legal community, judicial officers must necessarily participate in national debate on key issues such as judicial reforms¹⁴.

Besides, one would want to question whether judicial officers right to associate is operational in Kenya. The current Chief Justice is on record threatening to disband the Kenya Magistrates and Judges Association. Despite eminent intimidation such a threat poses, it also deprives judicial officers of their freedom of association. Judicial officers' associations play an essential role in ensuring that the independence of the Judiciary and the rule of law are respected. Such associations allow judicial officers to organise themselves in order to defend their interests and those of the entire judicial and legal profession¹⁵.

Other reasons given in support of the claim that the powers of the Chief Justice undermine the independence of the Judiciary were; -

- By virtue of being a direct appointee of the President, the office of the Chief Justice has more often than not acted as subordinate to the President and the Executive. In effect the Chief Justice is answerable to the President. This effect has trickled through the entire judicial structure which has in numerous cases acted in accordance with the wishes and interests of the Executive, thereby compromising its independence. The current mode of appointment and removal of the Chief Justice and the judges as

¹⁴ Principle 4.6 of the *Bangalore Principles* states that, 'A judge, like any other citizen, is entitled to freedom of expression... but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the Judiciary.'

¹⁵ Article 12 of the *Universal Charter of the Judge* provides that, 'the right of a judge to belong to professional association must be recognized in order to permit the judges to be consulted, especially concerning the application of their statutes, ethical and otherwise, and the means of justice, and in order to permit them to defend their legitimate interests.'

Guideline VII.3 of the *Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence* states that, 'an independent, organized legal profession is an essential component in the protection of the rule of law.'

a whole¹⁶, breeds ground for manipulation and seriously undermines the principle of security of tenure and in essence the independence of the judiciary.

- His immense powers have made the office dictatorial towards judicial officers. For example, the Chief Justice decides when and which judicial officer should travel to attend a certain seminar or conference; who should go for training; who should be transferred among others, without giving any (or valid) reasons. This compromises personal independence of the officers.
- The Chief Justice can easily influence the outcome of cases through unfettered Bench selection in crucial matters such as constitutional adjudication; recalling of files from the lower courts; asking officers to disqualify themselves from certain matters and transfer of judicial officers.
- He exercises his powers exclusively with very minimal or no consultations and involvement of key players, often leading to manipulation and intimidation.

Those who argued that the powers of the Chief Justice do not in themselves undermine the independence of the Judiciary did so based on the following reasons;-

- The Chief Justice is the symbol of the Judiciary and as such, cannot undermine the same.
- There are adequate checks on his excesses since the President can remove him from office¹⁷.

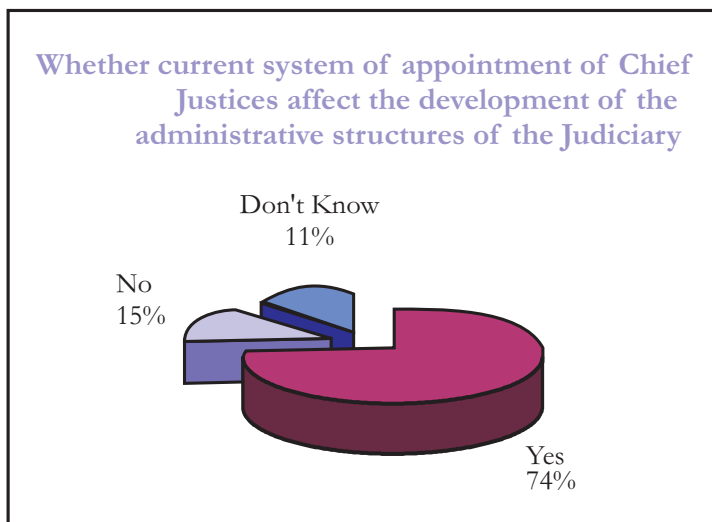
¹⁶ The process of appointment allows for political manipulations as the president is not bound by the advice of the Judicial Service Commission in appointing. As regards the removal particularly of the Chief Justice the process as to who should initiate the complaints is not clear.

¹⁷ The President is unlikely to remove any Chief Justice who is serving his interests; hence, this argument cannot hold. The current and past political situation attests to this.

- Judges have security of tenure hence are protected from the Chief Justice's influence.
- The powers *per se* don't undermine the independence of the Judiciary; it all depends on the performance of individual occupant of the office. A competent, credible Chief Justice of high moral character is unlikely to be compromised and will thus not compromise the independence of the Judiciary.

1.2 Appointment and independence of the Chief Justice in Kenya

74% of the respondents thought that the current system of appointing Chief Justices had affected the administrative structure of the Judiciary.



Currently, the Chief Justice is appointed by the President under section 61(1) of the Constitution of Kenya¹⁸.

¹⁸ S. 61(1) of the Constitution states that, *the Chief Justice shall be appointed by the President.*

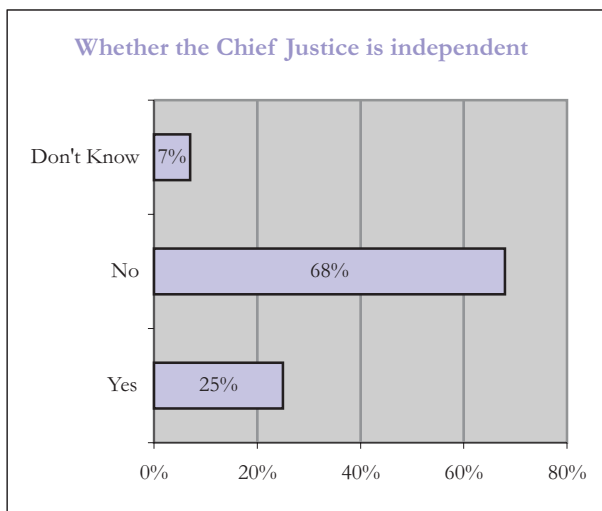
These unfettered powers have resulted into the office of the Chief Justice being a political office whose appointment is dependent on the interests of the incumbent Head of State. Over the years, political nepotism and regional factors¹⁹ have become key factors for consideration when appointing Chief Justices. Many commentators perceive this to be the genesis of the problems affecting the Judiciary today, for it is at this point that the independence of the Judiciary is severely compromised. The end result of this has been wide spread corruption, inefficiency, inaccessibility and basically a malfunctioning Judiciary. Unless the mode of appointment of judges is addressed and made more transparent Judgeship in Kenya will continue being perceived as a political office established to further the interests of the appointing authority (the Executive). This negates the international standards²⁰.

It was proposed that clear standards must be set for the appointment of a Chief Justice. A suggestion was that he/she should be appointed from the judges on the basis of seniority. He could also be appointed from the senior counsels.

68% of the respondents believed that the current Chief Justice is not independent.

¹⁹ For instance the late Chief Justice Z. Chesoni was appointed even though he had been declared bankrupt. Further, former Chief Justice Bernard Chunga was appointed even though he did not possess the minimum academic qualifications to even merit his appointment as an ordinary judge.

²⁰ Principle 10 of the *UN Basic Principles on the Independence of the Judiciary* provides that, 'persons selected for judicial office shall be individuals of integrity with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives....' See also, principle A paragraphs 4(i) and (k) of the *Principles and Guidelines on the Right to a fair Trial and Legal Assistance in Africa*.

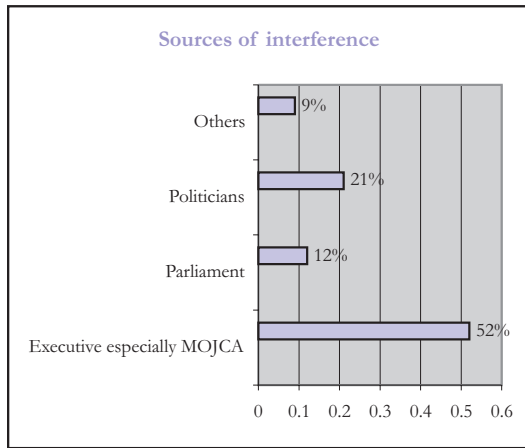


Main sources of interference were identified as follows; -

- Executive especially Ministry of Justice and Constitutional Affairs and the President
- Parliament
- Politicians through both passive and active lobbying.

The ministry of Justice and constitutional Affairs was viewed to have unduly interfered in the removal of judges in the purge conducted in 2003 making the judiciary appear like just a department of the Ministry²¹.

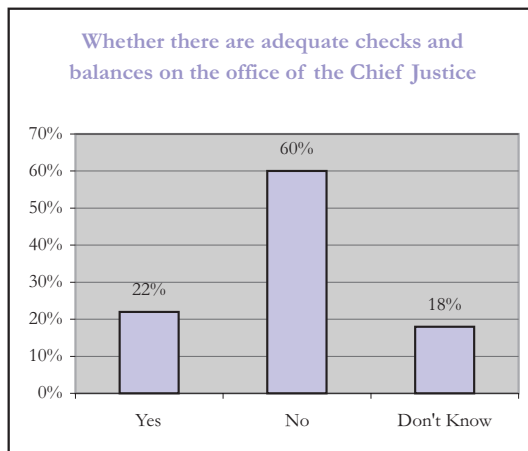
²¹ The purge popularly known as the 'radical surgery' was initiated by the ministry of Justice and Constitutional affairs who promised Kenyans a surgery.



1.3 Accountability of the office of the Chief Justice in Kenya

Due to this susceptibility for abuse of the Chief Justice the question arises as to what mechanisms of control and accountability exists. One question that begs our minds in addressing these roles is whether there is an appellate system against the powers of the Chief Justice. Of course there are none since the Chief Justice is the head of the judiciary.

60% of the respondents thought that there are no adequate checks and balances on the office of the Chief Justice.



In order to hold the Chief Justice accountable and promote transparency, the following were proposed,

- The Judicial Service Commission should be independent, empowered, strengthened and restructured so as to effectively regulate the operations of the Judiciary as an institution.
- Establish the office of an ombudsman or a Complaints Unit to deal with complaints against judicial officers.
- Develop clear and transparent appointment criteria for both the Chief Justice and other judges.
- Reduce the discretionary powers of the Chief Justice and set out clearly the limits of the exercise of powers by the Chief Justice.
- The Chief Justice to remain the head of the Judiciary whose main focus should be giving judicial leadership²² while leaving the administrative powers to the Registrar, the Judicial Service Commission and/or a distinct Administrative department within the Judiciary. Further, the Chief Justice should serve for a fixed term²³, and should continue serving as a judge (unless otherwise) once he leaves office as is the case in Canada.
- There is an absolute need for the formulation of rules clearly setting out the duties and obligations of a Chief Justice not only as a judge, but also as an administrator.
- Develop a functional code of conduct and Ethics for all judicial officers.
- Develop a monitoring, performance and evaluation system.

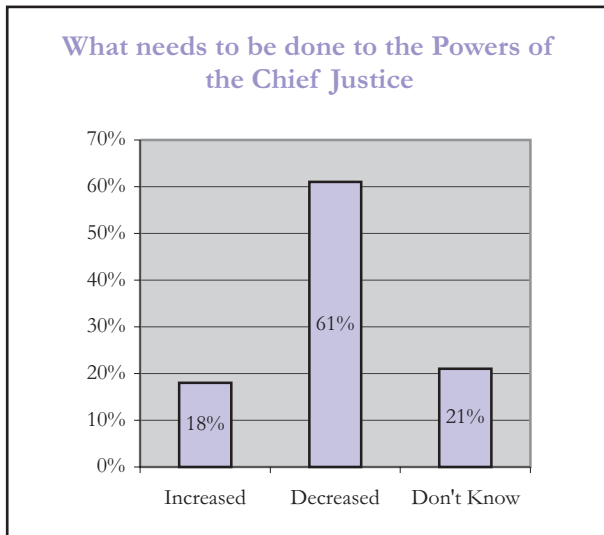
²² He should offer leadership in the development of the law and jurisprudence in Kenya.

²³ Ideally, a maximum of 2 terms comprising of 5 years each.

- There should be wide consultation among key stakeholders before key decisions are made. This will enhance participation and objectivity in decision-making processes.

In this regard, 61% of the respondents called for the reduction of the powers and influence of the Chief Justice in the following areas,

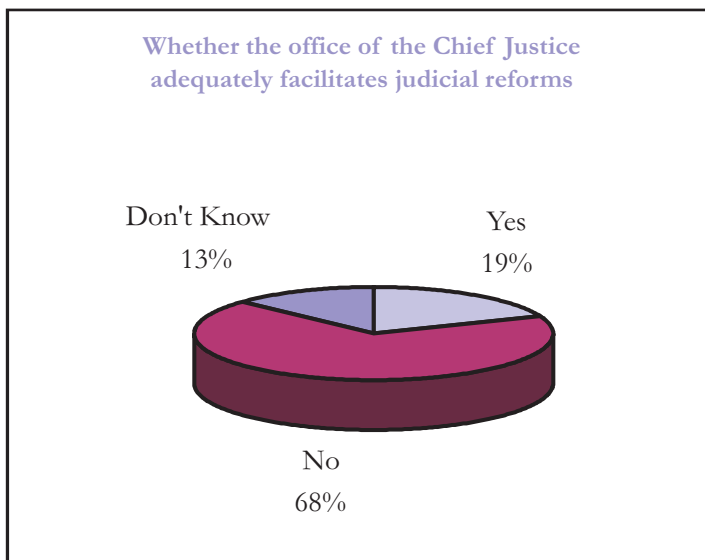
- Promotion and transfer of judicial officers.
- Control of the Judicial Service Commission.
- Dispensation of cases.



Appointment of judges and direct control of Judiciary's resources (financial) were areas that some of the respondents proposed Chief Justice's powers to be increased to guarantee the independence of the Judiciary. Further, they proposed that the Chief Justice being the head of one of the arms of government should be equally powerful as his counterparts in the Executive and the Legislature.

1.4 The Chief Justice and Judicial Reforms in Kenya

68% of the respondents thought the office of the Chief Justice does not adequately facilitate judicial reforms in Kenya.



The Chief Justice's inability to facilitate these reforms was attributed on following; -

- Lack of independence and constant interference from external forces particularly, the Executive arm and the political class.
- A relatively weak office compared to the other arms of government.
- Its detachment from other key stakeholders and excessive arbitrary powers.

- Its slowness or incapacity to implement and build on the recommendations of various committees such as the Kwach²⁴, Akiwumi²⁵ and partly Ringera's²⁶ committees.
- Its failure to provide leadership in the national reform agenda.
- Slow constitutional reform process.
- Weak structural and policy framework.
- Its inability to tame rampant judicial corruption.

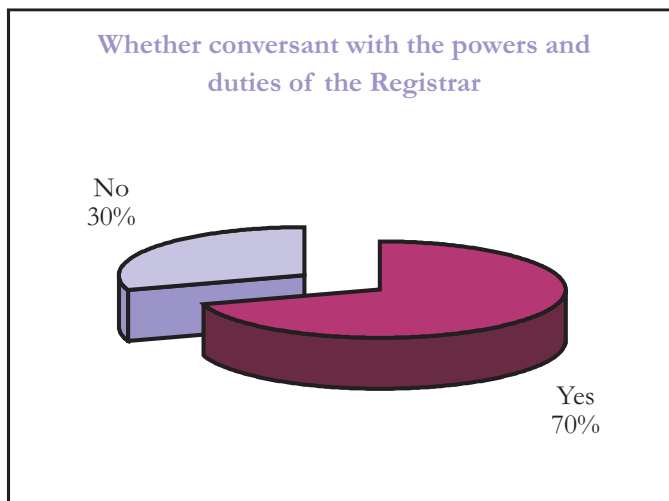
²⁴ Committee on the Administration of Justice

²⁵ Committee on the de-linking of the Judiciary from the Civil Service.

²⁶ Committee on Judicial Corruption and Integrity

2. THE OFFICE OF THE REGISTRAR

70% of the respondents said they were conversant with the duties of the Registrar.



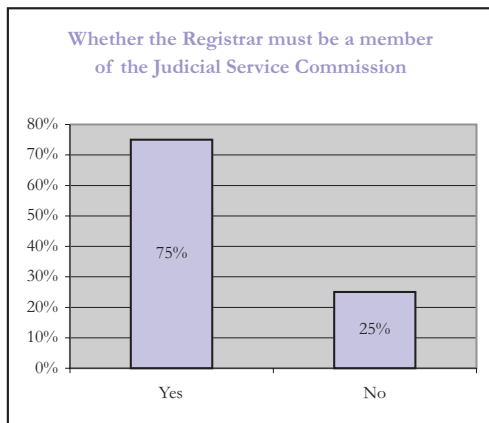
It was observed that the office of the Registrar is equally powerful as that of the Chief Justice. Ordinarily, the Registrar handles all matters relating to the Magistrates. For all intents and purposes, the Registrar is equivalent to a Permanent Secretary. He is also the chief accounting officer in the Judiciary.

Thus, key functions of the Registrar include;-

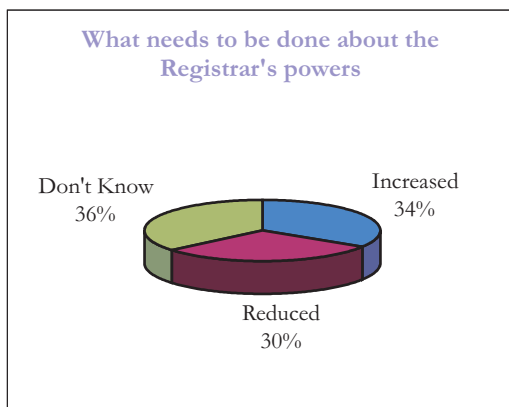
- Acting as the Chief Accounting Officer of the Judiciary.
- In charge of the day-to-day running of the Judiciary, including the operations of the registries.
- Acting as the Secretary of the Judicial Service Commission.

Owing to the central administrative role that the office of the Registrar plays, 56% of the respondents thought that it could operate better if managed by a qualified and skilled Manager who ideally should be a qualified Lawyer with specialised managerial skills.

Further, 75% of the respondents stated that the Registrar must be a member of the Judicial Service Commission because of his central administrative role. Majority among them wanted him to sit in the Commission as an ordinary member.



In order to enhance efficiency, 34% of the respondents suggested that the powers of the Registrar should be increased, while 30% called for a reduction.



The following were identified as areas that the Registrar's powers should be enhanced; -

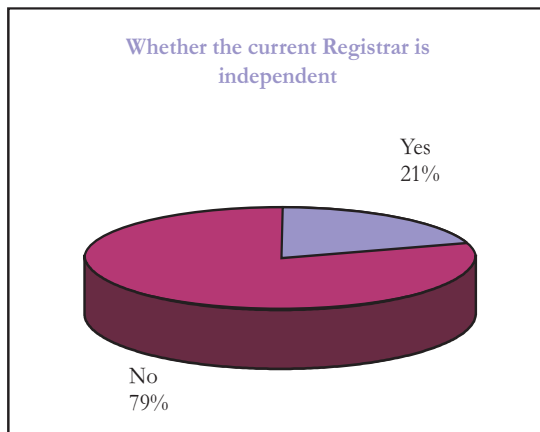
- Influence in the Judicial Service Commission
- As the custodian of the Roll of Advocates the disciplining aspect within the legal sector as a whole should be within his jurisdiction. Thus, he should be empowered to investigate, discipline and enforce punishment.
- Be in-charge of budgetary allocation and control of the Judiciary's finances. Further, he should be able to access the Consolidated Funds directly.

Conversely, the following areas were identified as those that need minimal involvement of the Registrar;

- Promotion and transfer of judicial officers especially Magistrates. It was proposed that this task be left entirely in the hands of the Judicial Service Commission.

The independence of the Registrar

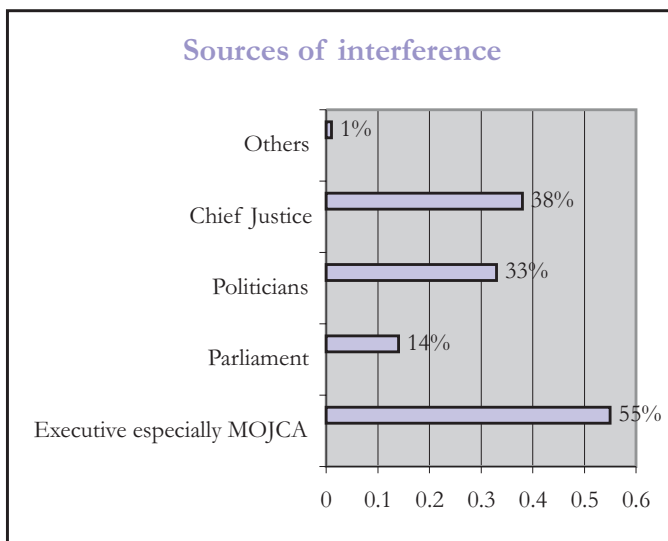
Majority of the respondents (79%) believed that the current Registrar is not independent²⁷ which undermines his performance.



²⁷ The current Registrar was named in the Ringera report and he must have been retained because of intervention from some powerful sources hence compromising his independence.

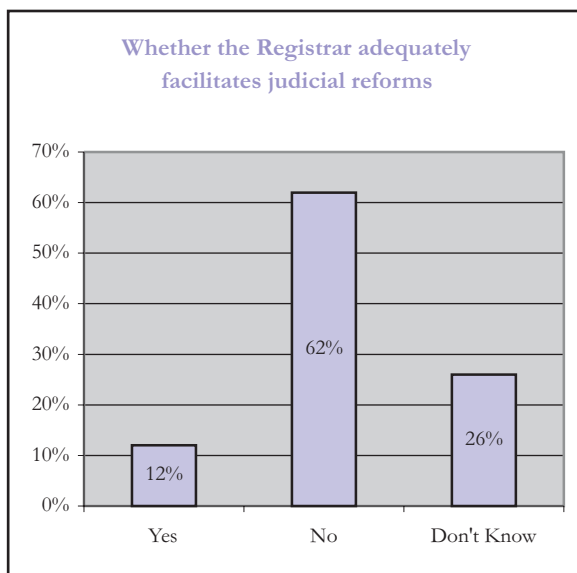
Main sources of interference were identified as the following:-

- Executive especially Ministry of Justice and Constitutional Affairs
- Chief Justice
- Politicians
- Parliament
- Influential and wealthy members of the public



The Registrar and Judicial Reforms in Kenya

62% of the respondents said the Registrar does not adequately facilitate judicial reforms in Kenya.

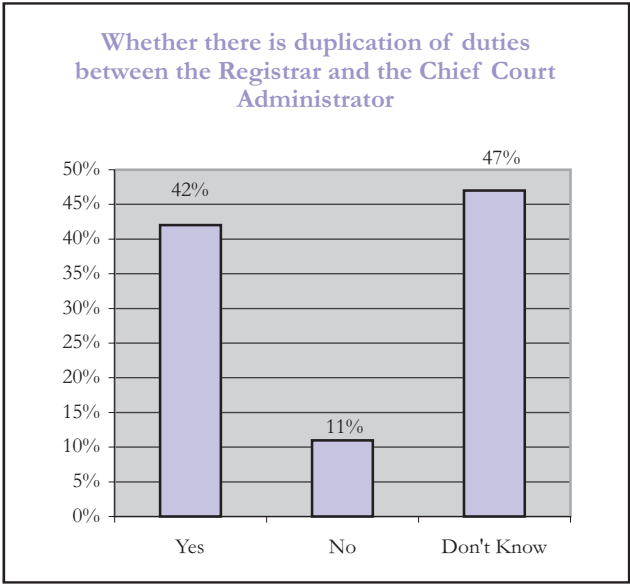


This was attributed to the following factors;-

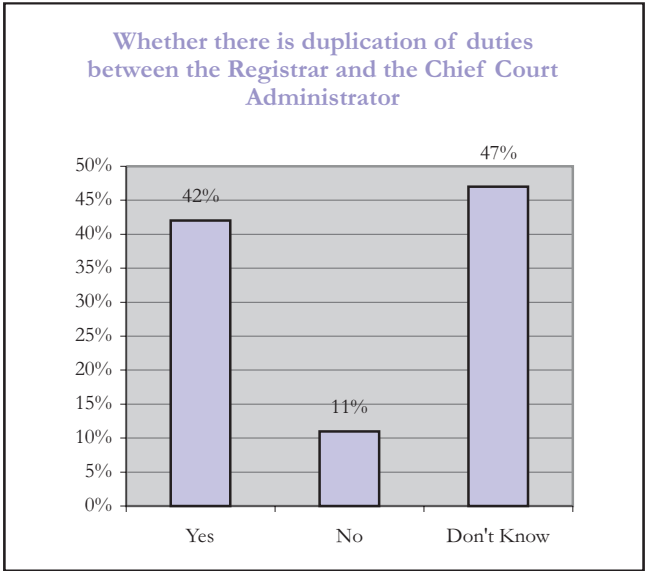
- His lack of independence and constitutional backing.
- His main role is administrative and the Chief Justice is well placed to address most of the judicial reform issues than the Registrar.
- Lack of clear, transparent and adequate legal and policy framework.

The Office of the Registrar and the Chief Court Administrator

In 2000 the office of the Chief Court Administrator was established to assist the Registrar. However, the operations and the role of this office are not well known a fact that was proved in this survey. 63% of the respondents stated that they did not know anything about the role of this office.

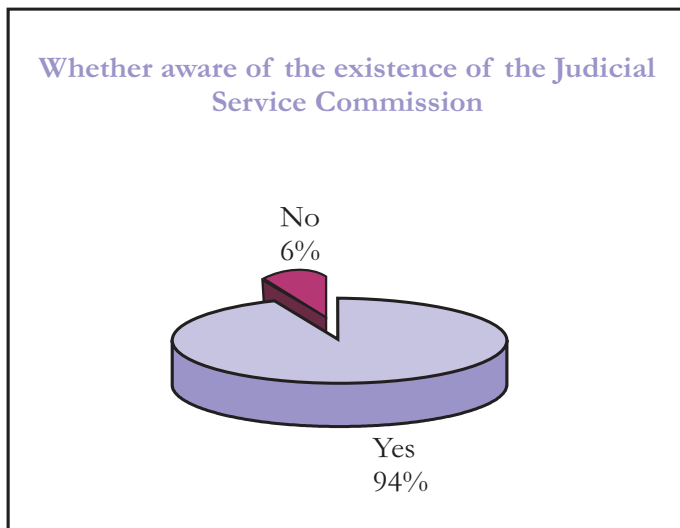


42% of the respondents thought the office was merely a duplicate of the Registrar’s office and must therefore be streamlined with distinct roles or be abolished altogether.



3. THE JUDICIAL SERVICE COMMISSION

An impressive 94% of the respondents stated that they were aware of the existence of the Judicial Service Commission.

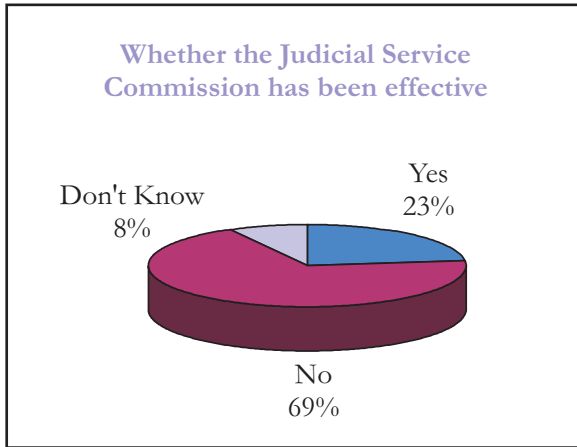


The Judicial Service Commission is established under section 68(1) of the Constitution of Kenya. It consists of

- The Chief Justice as Chairman
- The Attorney-General
- Two persons who are designated by the President from among puisne judges of the High Court and the judges of the Court of Appeal
- The chairman of the Public Service Commission.

69% of the respondents stated that the Judicial Service Commission had failed miserably in the dispensation of its duties. Under section

69(1) of the Constitution, the Judicial Service Commission plays a key role in the appointment, disciplining and removal of judicial officers.²⁸



The following were proposed as remedial measures aimed at improving the performance of the Judicial Service Commission,

- Review the Commission’s composition
- Train the Commission’s members on their roles.
- Enhance the Commission’s powers in so far as running the affairs of the Judiciary is concerned. This includes, appointments, promotions, disciplining, removal, transfer and remuneration of all judicial officers.
- The Commission should have a permanent Secretary with a fully-fledged secretariat and a Chairman who will serve for a fixed term.

²⁸ 69(1) The power to appoint persons to hold or act in an office to which this section applies (including the power to confirm appointment), the power to exercise disciplinary control over persons holding or acting in those offices and the power to remove those persons from office shall vest in the Judicial Service Commission.

- The Commission should be de-linked from the office of the Chief Justice ²⁹and run its affairs autonomously.
- Create mini-Committees within the Commission to address certain thematic areas e.g. capacity building, terms and conditions of service etc.
- Regularise the Commission's meetings. Copies of the minutes should be accessible to public on demand.
- Empower the Commission to determine the size and structure of the Judiciary and the number of judges and magistrates³⁰.

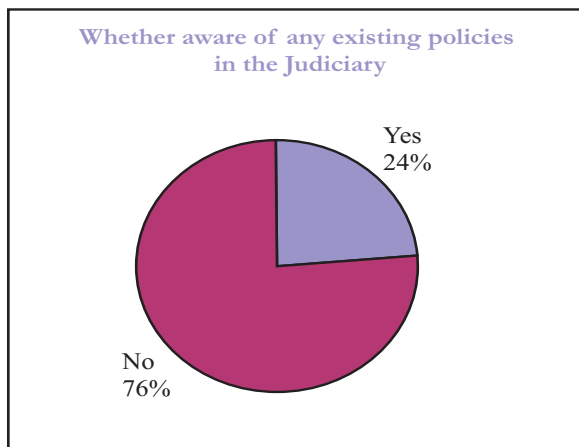
An independent Judicial Service Commission plays an important role in the protection and promotion of the institutional independence of the Judiciary through recruitment and disciplining processes, determining terms and conditions of service, determining and controlling judicial resources among others.

²⁹ Even though section 68(2) of the Constitution states

³⁰ Section 60(2) of the Constitution sets the minimum number of High Court judges as eleven, while section 7(1) and (2) of the Judicature Act, Cap 8 sets the maximum number of judges as fifty (50) and eleven (11) for the High Court and Court of Appeal respectively.

4. JUDICIAL POLICIES

76% of the respondents stated that they were not aware of any existing policies in the Judiciary. Even our interviews with former and current judicial officers revealed that they were not aware of any policies in the Judiciary.



Even those who said that they knew of such policies could not cite specific examples, therefore confirming the fact that there are no policies that govern the operations of the Judiciary or if in existence, they are not accessible.

Because of lack of information, this section was sparsely answered by majority of the respondents.

The need for clear and transparent policies in any established institution whether public or private cannot be gainsaid. Policies and regulations determine the manner in which institutions function in pursuant of its vision, mission and objectives. It is therefore disheartening to note that the Judiciary does not have such policies.

As a way forward, the respondents cited the following areas as being in dire need of clear and transparent policies,

- Transfer³¹
- Appointments and
- Promotion³²
- Discipline and removal³³
- Judicial corruption³⁴

³¹ Most judicial officers interviewed perceived transfers as one of the punitive measures used by the Chief Justice to harass and intimidate judicial officers hence promoting nepotism and patronage at the expense of smooth administration of the justice and development of the law. One retired judge of the High Court of Kenya recalled that his personal differences with the Chief Justice led to his transfer to an upcountry station (Meru) infamously known as ‘Siberia’ within the court circles thereby affirming the fact that transfers are used as punitive measures for ‘rebel’ judicial officers.

Another former judicial officer at the rank of a magistrate revealed that he had been transferred three (3) times within two and half years he had served in the Judiciary. This certainly disrupts smooth administration of justice.

Currently, there is unwritten rule that once officers have been transferred, they must move with immediate effect and not later than 14 days irrespective of the status of the cases such an officer was handling. Worse still, such officers are not allowed to go back to their former stations to clear their partly heard matters. Some judicial officers felt that this practice was meant to save on costs however it does a lot of injustice to consumers of justice.

³² There is need for clear and transparent appointment criteria with clear employment policy that addresses among others, induction and promotion needs. Our interview with judicial officers revealed discomfort among magistrates stating that appointing people directly as Senior Resident Magistrates as has been the case post the 2003 purge has devastating effect on the Resident Magistrates’ Courts downwards thus demoralizing those who have been serving for a long time. Further it was felt that the standards being used to appoint magistrates had gone down thus the standards of dispensation of justice were suffering.

³³ Immense powers that the Chief Justice enjoys especially over the magistrates necessitate a clear policy on the discipline and removal of officers, if the developments subsequent to the Ringera report are the precedents to go by.

³⁴ The Judiciary ought to develop its own benchmarks and indicators on judicial corruption and how it should be addressed.

- Judicial reform³⁵
- Training³⁶
- Remuneration³⁷
- Leave³⁸
- Housing and Security³⁹
- Transport⁴⁰
- Accessibility to and dissemination of judicial Information⁴¹

³⁵ The Judiciary must develop its own vision and mission and work towards achieving the targets and objectives therein outlined. It is worth noting that at the time of compiling this report, the Judiciary had for the first time in its history unveiled its Strategic Plan. However, there is greater need for it to take lead in the push for a better Judiciary in the new constitutional dispensation.

³⁶ Lack of training policy has hampered personal development of judicial officers. The current Chief Justice has been viewed as a major stumbling block as far as training of judicial officers is concerned unlike his predecessor. It was revealed that currently, a judicial officer who wishes to undertake further training and education especially, Masters degree has to choose between going for such studies and resigning. Further, his unwillingness to facilitate reimbursement for those who have undertaken such studies at their own cost illustrates the unimportance he attaches to training. The Training Committee established by the Judiciary was termed as 'ineffective'. The training policy must incorporate both short-term and long-term studies as well as Continuous Legal Education (CLE).

³⁷ The policy will help in harmonizing salaries and other financial allowances of all judicial officers.

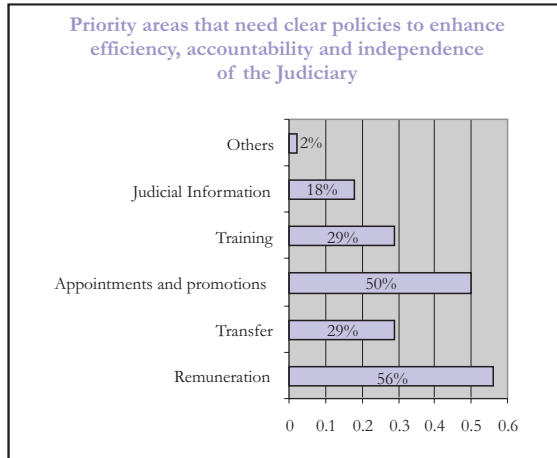
³⁸ Like is the case with training and transfers, the leave policy is not harmonized and its approval or disapproval is based on the kind of relation a particular judicial officer enjoys with the administrators.

³⁹ Currently, Judicial officers housing and security requirements are at the mercy of the Registrar's discretion with wide disparities. Further, whereas judges are provided with security, most of the magistrates do not have any special security detail yet some of them handle very dangerous criminals.

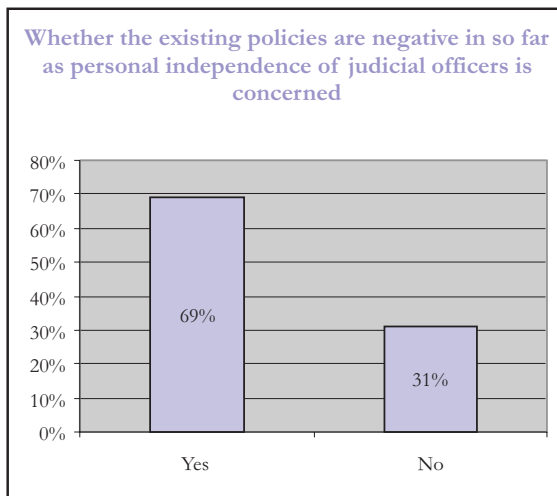
⁴⁰ Like housing, transport arrangements are done discretionarily by the Registrar. Further, magistrates are not assigned any car like judges.

⁴¹ This will help in disseminating information to the public and improve both internal and external communication.

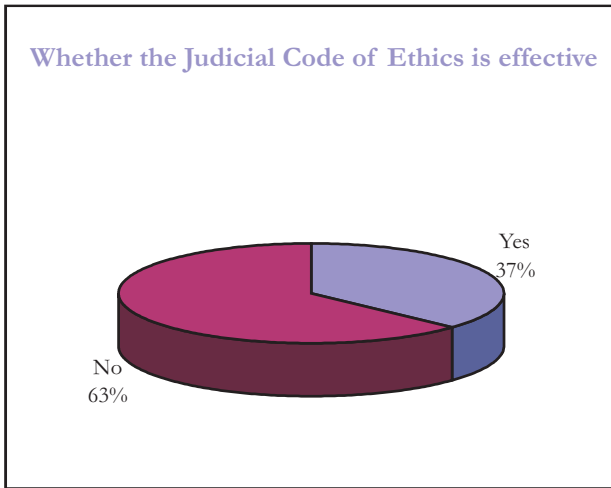
Majority of the respondents believed that if at all there are any existing policies, then they are not shielded from any potential manipulation both internal and external. This is based on the perception that the independence of the Judiciary as an institution is questionable.



Lack of clear policies on key administrative issues has resulted into wide spread corruption, manipulation, malpractices and chronic backlog of cases that have had a negative impact on the access to justice and the administration of justice generally.



69% of the respondents thought that the current policies and practices are oppressive to judicial officers especially the Magistrates.



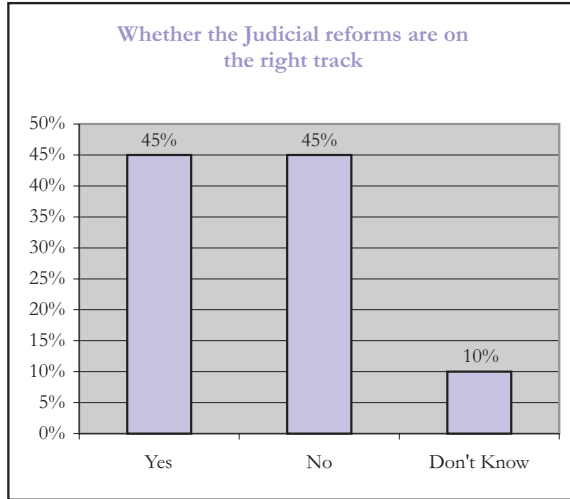
63% of the respondents thought the Judicial Code of Conduct and Ethics was ineffective citing rampant corruption as the key indicator.

To make the Code more effective, the following proposals were made:-

- i. It should be made public to enable the public to hold the judicial officers accountable based on known standards.
- ii. A comprehensive Code should be developed based on wider consultations with other key stakeholders and should be updated regularly so as to keep up with the dynamism in the legal and judicial systems.
- iii. Establish an effective Disciplinary and Complaints Unit to enforce the Code.

RECOMMENDATIONS

When asked whether the judicial reforms were on the right track, 45% said 'yes' while 45% said 'no'.



The following areas were seen as priority reform areas if smooth administration of justice, accessibility to judicial services, efficiency, accountability and the independence of the Judiciary are to be guaranteed,

- Judicial information should be made available to the public to enhance its participation in judicial reforms.
- Enhance and harmonise remuneration levels of all judicial officers.
- The need for coordinated and systematic training policy to address both Continuous Legal Education and other training needs.
- The need for the development of policies on various administrative issues in order to shield the Judiciary from individual influence especially from the offices of the Chief Justice and the Registrar.
- Embrace ICT throughout the court system and restructure all Registries.

- Establish an effective legal aid scheme to help those who cannot afford legal services.
- Establish Small Claims Courts.
- Reduce the powers of the Chief Justice. For instance, it was proposed that there should be a constitutional amendment to create way for rotational occupancy of the Chief Justice’s office by the Court of Appeal judges for a fixed term of between 3 – 5 years. In addition, the office of a Deputy Chief Justice should be established, as is the case in Uganda. Further, offices of Principal Judges for each tier of the Judiciary should be established. These officers will be administrative heads of their respective courts.
- Restructure and strengthen the Judicial Service Commission. The Commission should among other things elect its own Chairman and have a permanent secretariat.
- Seek total autonomy for the Judiciary⁴².
- The Law Society of Kenya should subject members of the Bar to strict code of ethics.
- Restructure and reform other key institutions such as the prisons, the police and prosecution units. For example replace the police prosecutors with lawyers and improve their terms of service; and embrace community service sentences.
- Create Supreme Court⁴³
- Increase physical facilities for the judicial officers⁴⁴.

⁴² Other than personal and institutional independence, the Judiciary needs fiscal autonomy for it to operate smoothly. This entails developing its own budgetary requirements, receiving adequate resources from the State and allocating such resources, as it may deem fit and necessary for smooth and effective administration of justice. Inadequate resources render the Judiciary vulnerable to corruption hence compromising its independence and impartiality.

⁴³ It has been proposed both in the Draft Constitution and Judiciary’s own Strategic Plan.

⁴⁴ This includes, courtrooms, chambers, libraries, computers, and stationery among others.

- Establish a monitoring, evaluation and appraisal system
- Embrace Alternative Dispute Resolution (ADR)
- Establish mobile courts in rural areas
- Introduce stenographers and allocate research assistants to judicial officers.
- Establish clear appointment, promotion, discipline and removal criteria⁴⁵.
- There is need for proper vetting process for all judicial appointments including the Chief Justice. Reputable professionals should be involved in the vetting process. Further, appointment of magistrates straight from Law School should be discouraged owing to the critical nature of their work that requires not only legal knowledge but also professionalism and maturity.⁴⁶
- There is need for clear and known separation of duties and job description for the Registrar and the Court Administrator to ensure efficiency.
- Judges should only be entitled to an annual leave to be taken at the most convenient time and the current practice of going on three vacation breaks annually should be abolished as one way of dealing the chronic case backlogs.

⁴⁵ In general terms, it is preferable for judges to be elected by their peers or by a body independent from the Executive and the Legislature. For instance, under paragraph 1.3 of the *European Charter on the Statute for Judges*, it provides that, 'In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the Executive and the Legislature powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the Judiciary.'

⁴⁶ There is need for strict selection criteria which should be transparent. Unless judicial officers are appointed and promoted on the basis of their legal skills, the Judiciary runs the risk of not complying with its core function, i.e. imparting justice independently and impartially.

CONCLUSION

Sustainable judicial reform is a process not an event. Lasting and effective solutions to the problems, which have plagued the legal system, depend on an accurate assessment of the root causes. Examination of the requisites of an effective judicial system must be undertaken. We need to identify aspects of judicial reforms that will assist in restoring the status of our Judiciary to the glory that used to be its hallmark.

A favourable attitude towards reform is an important variable if the reforms are to be effective.

Efforts must be made at promoting judicial independence. Judicial officers should be allowed to decide matters before them without any restrictions, improper influences, pressures, threats or interference, direct or indirect from any quarter.

Another issue is continuing professional development for judicial officers and practitioners alike. This helps in reform and development of the law. This is an occasion for sharing information not learning *per se*. Continuing professional development may also be achieved through colloquia and consultations on thematic areas not just formal and periodic education.

At the time of compiling this report, the Kenya Judiciary, for the first time in its history had launched its three-year Strategic Plan which we hope shall be implemented to the fullest and shall assist in addressing some of the key concerns affecting its internal environment.

EXCERPT

Frustrations by judicial officers especially at the Magistracy level are well captured in the sentiments expressed in this excerpt by a former magistrate currently studying abroad. The magistrate was forced to resign after she was denied leave of absence to pursue further studies.

More should be done in our criminal justice system. The outcome of the Waki Tribunal is an indication that the Kenya Judiciary needs a total overhaul. If senior members of the Judiciary could allow a judge to be suspended on trumped up charges, what of the many innocent people who are languishing in our prisons on trumped up charges, what of the many magistrates who were not given a fair hearing before they were shamed in the press and then retired in the “public interest”.

Think of the many accused persons in remands whose cases were pending judgment in the High Court when the judges were suspended. The Ringera Commission on Corruption in the Judiciary needs to be re-examined critically. WHY are judicial officers not allowed to further their education, and are forced to resign or stay on the job and kill their ambitions of progressing intellectually, and yet from the Law Society of Kenya to the Eminent Commonwealth Judicial Experts, ICJ Kenya and Kenyans at large, the Judiciary is accused of incompetence?

If the above sentiments reflect the mood and the working condition of the Kenya’s judicial officers, then undoubtedly, justice is the last thing that can be guaranteed from the corridors of justice in Kenya.

An angry and frustrated judicial officer cannot be impartial, independent and objective in his or her work. The end product is nothing but “injustice”.

