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REPORT OF THE ADVISORY PANEL OF EMINENT
COMMONWEALTH JUDICIAL EXPERTS
NAIROBI, KENYA
MAY 17, 2002

Chair

The Hon. Justice Dr. George W. Kanyeihamba
Supreme Court of Uganda

Members

The Hon. Mr. Justice Damian Z. Lubuva
Court of Appeal, Tanzania

The Hon. Justice Yvonne Mokgoro
Constitutional Court of South Africa

The Hon. Justice Robert J. Sharpe
Court of Appeal for Ontario, Canada

Professor Ed Ratushny, Q.C.
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Table of Contents

| | |
|---|----|
| 1. Mandate of the Advisory Panel | 3 |
| 2. Credentials of the Advisory Panel | 4 |
| 3. Programme of Consultation | 7 |
| 4. The Need for Reform | 9 |
| 5. Specific Recommendations | 21 |
| I. <i>Vesting Judicial Power and the Principle of Judicial Independence in the Constitution</i> | 21 |
| II. <i>A Supreme Court</i> | 25 |
| III. <i>Appointment of Judges</i> | 27 |
| IV. <i>Terms of Office, Conduct and Removal</i> | 30 |
| V. <i>Judicial Service Commission</i> | 34 |
| VI. <i>Access to Justice and Efficiency</i> | 38 |
| VII. <i>Kadhis' Courts</i> | 40 |
| VIII. <i>Attorney General and the Director of Public Prosecutions</i> | 41 |
| IX. <i>Structure and Jurisdiction of Magistrates Courts</i> | 43 |
| X. <i>Election Petition Appeals</i> | 45 |
| XI. <i>Interim Measures</i> | 46 |
| 6. Summary of Recommendations | 52 |
| 7. Appendices | |

1. Mandate of the Advisory Panel

The Advisory Panel was established by the Constitution of Kenya Review Commission "CKRC" to advise it on constitutional reforms regarding the Kenya Judiciary. With the support of the Chief Justice, the CKRC contracted the International Commission of Jurists (Kenya Section) "ICJ (K)" to coordinate this project.

In the letters of invitation the Panel Members received, the Advisory Panel was asked to:

- a. Advise the CKRC on what reform proposals to make regarding the Kenyan Judiciary in a new constitutional framework;
- b. Advise the CKRC on what corollary proposals and recommendations of a legislative, policy or administrative nature to make for further efficacious working of the Judiciary in a post-Constitutional making dispensation;
- c. Advise the CKRC on what to do to "transit" from the current to a post-constitution making dispensation.

The specific Terms of Reference for the Advisory Panel are as follows:

- Examine and make recommendations on the financial and administrative autonomy of the Judiciary. In so doing examine and make recommendations on the physical facilities of the Judiciary.
- Examine and make recommendations on the constitutional jurisdiction of the courts and whether a separate Constitutional Court should be established.
- Examine and make recommendations on the structure of the courts and whether a separate Supreme Court should be established.

- Examine and make recommendations on the electoral appellate jurisdiction of the Courts.
- Examine and make recommendations on the jurisdiction of the Kadhis' Courts and appeals therefrom.
- Examine the procedure for the appointment, discipline and dismissal of judges as well as magistrates and make recommendations for strengthening the independence and competence of the Judiciary.
- Examine the backlog of cases and recommend methods to speed up the management of cases.
- Examine other improvements to the procedures and facilities of courts, including case management, 'fast tracks', alternative dispute resolution, computerization, etc.
- Examine and recommend any other aspect of the Judiciary, which will strengthen the general independence, efficiency and accountability of the Judiciary.
- Examine and make recommendations on the appointment, tenure and functions of the Attorney General.
- Examine and recommend on the powers of prosecution.

2. Credentials of the Advisory Panel

Chair

The Hon. Justice Dr. George W. Kanyeihamba

Current Positions:

- Justice of the Supreme Court of Uganda
- Chairman, Judiciary Committee on Judges' Terms and Conditions of Service
- Chairman, Judiciary Committee on the Constitutional Review
- Co-ordinator, Africa, International Association of Refugee Law Judges

Previous Positions:

- Minister of Justice and Attorney General of Uganda

- Minister of Commerce of Uganda
- Member of Parliament of Uganda
- Senior Advisor to the President of Uganda
- Chairman, Legal and Drafting Committee, Constituent Assembly of Uganda
- Constitutional Advisor on the pre-independence constitutional arrangements for Namibia
- Professor of Law, Universities of Makerere, Wales at Cardiff and Warwick

Members

The Hon. Mr. Justice Damain Z. Lubuva

Current Position:

- Justice of the Court of Appeal of Tanzania

Previous Positions:

- State Attorney in the Office of the Attorney General
- Legal Secretary to the Permanent Secretary to the Commission of Enquiry (Ombudsman) of Tanzania
- Attorney General of Zanzibar
- Judge of the High Court of Tanzania
- Chief Corporate Counsel, Tanzania Legal Corporation
- Chairman of the Tanzania Law Reform Commission
- Attorney General and Minister of Justice for Tanzania

The Hon. Justice Yvonne Mokgoro

Current Position:

- Justice of the Constitutional Court of South Africa
- Chairperson of the South Africa Law (Reform) Commission
- President of Africa Legal Aid Board of Governors
- Board of Governors of the Centre for Human Rights (University of Pretoria)
- Board of Governors of the Child Law Centre (University of Pretoria)
- Committee of the South African-Canadian Linkage Project on Judicial Transformation in South Africa

Previous Positions:

- Minister of Commerce of Uganda
- Member of Parliament of Uganda
- Senior Advisor to the President of Uganda
- Chairman, Legal and Drafting Committee, Constituent Assembly of Uganda
- Constitutional Advisor on the pre-independence constitutional arrangements for Namibia
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- Board of Governors of the Centre for Human Rights (University of Pretoria)
- Board of Governors of the Child Law Centre (University of Pretoria)
- Committee of the South African-Canadian Linkage Project on Judicial Transformation in South Africa

Previous Positions:

- Associate Professor of Law, Universities of North-West, Western Cape and Pretoria
- Specialist Researcher Centre for Constitutional Analysis, Human Sciences Research Council of South Africa

The Hon. Justice Robert Sharpe

Current Positions:

- Judge of the Court of Appeal for Ontario, Canada
- Board of Governors, National Judicial Institute

Previous Positions:

- Judge of the Superior Court of Justice, Ontario, Canada
- Professor and Dean, Faculty of Law, University of Toronto
- Executive Legal Officer, Supreme Court of Canada
- Member of the Law Society of Upper Canada and Associate, MacKinnon McTaggart, Barristers and Solicitors, Toronto Canada

Professor Ed Ratushny, Q.C.

Current Positions:

- Professor, Faculty of Law, University of Ottawa, Canada
- President of the International Commission of Jurists, Canadian Branch

Previous Positions:

- Special Advisor on Judicial Affairs to the Minister of Justice of Canada
- Counsel to the Canadian Judicial Council on matters related to judicial misconduct
- Guest of the Irish Judiciary in relation to the development of a process to deal with allegations of judicial misconduct
- Special Envoy of the Minister of Foreign Affairs of Canada
- Commissioner, Royal Commission on Racism in the Criminal Justice System of Ontario

3. Programme of Consultation

The Advisory Panel followed a programme of consultation established by the ICJ (K) in cooperation with the CRKC, the Chief Justice and key stakeholders. A detailed outline of our programme is attached as Appendix 1. During our visit to Kenya, we met with the Chief Justice and senior members of the Kenya Judiciary. We also met the Attorney General with whom we had a full and frank discussion. The Panel received the full cooperation and enthusiastic support of Prof. Ghai, Chairperson of the CRKC. We received written and oral submissions from key stakeholders, including the Law Society of Kenya and the ICJ (K), with whom we had most fruitful discussions. We made site visits to various courts and we had useful discussions with several magistrates and court officers. We met the Chief Kadhi and Muslim advocates with whom we discussed the Kadhis Courts. The Panel also had the pleasure of meeting many Kenyan judges, magistrates, lawyers and court officers in various less formal settings during our time here.

We are most grateful for the warm Kenyan hospitality we have received during our stay. We are grateful to all those who took the time to meet with us and to give us the benefit of their views on the current state of the Kenya Judiciary and their suggestions for its place in a new constitutional order.

We make our report on the basis of this programme of consultation and on the basis of our own experience as judges of sister Commonwealth countries. Two of us are neighbours from Uganda and Tanzania, countries with close and historic legal, social, economic and political ties to Kenya. Uganda has recently

experienced a fundamental political change and adopted a new constitution. One of us comes from South Africa, a nation with a different history that has recently experienced a fundamental change to its constitutional and political order. Two of us come from Canada, a distant land that enjoys very different economic and social conditions, but which shares with East Africa a common legal tradition. All of us come from countries that have recently experienced constitutional renewal. For ease of reference, we attach as Appendix 2 relevant provisions of the Constitutions of South Africa, Tanzania and Uganda.

It has become apparent to us that there is a common bond that transcends any differences between Kenyans, Ugandans, Tanzanians, South Africans and Canadians. That common bond is a passion for equal justice, respect for fundamental human rights and a firm commitment to the rule of law. As human beings we must accept our shortcomings. Our human institutions are bound to fail us at times. Our ideals and principles do not suffer the same weakness. We share with many Kenyans we have met the belief that if we are true to our principles and willing to engage in the struggle, we can achieve justice despite our human frailties.

We are convinced that the Kenyan people aspire to and deserve a just society governed by the rule of law. The people of Kenya through Parliament have established the CRKC to achieve that goal. An independent and accountable Judiciary will be essential in the new constitutional order. We are deeply honoured by the invitation extended to us by the CRKC and the ICJ (K), in

cooperation with the Chief Justice, to assist Kenya in this mission. As visitors to this country, we offer our suggestions for reform humbly but with the sincere hope that they may help Kenya in its current process of constitutional renewal and in its quest for democratic governance under the rule of law.

4. The Need for Reform

The Advisory Panel has drawn two general conclusions as a result of its Programme of Consultation. Regrettably, the first is negative. We have concluded that as presently constituted, the Kenyan judicial system suffers from a serious lack of public confidence and is generally perceived as being in need of fundamental structural reform. It is our considered view that strong measures are necessary for Kenya to achieve an independent and accountable Judiciary, capable of serving the needs of the people of Kenya by securing equal justice and the maintenance of the rule of law under a new constitutional order.

Some members of the Kenya Judiciary have recognized the need for change. The Kwach Committee on the Administration of Justice was appointed in 1998 by the then Chief Justice to recommend measures "in regard to maintenance of Judicial Rectitude of Judicial Officers in the discharge of their judicial functions" as well as other matters in relation to organization and efficiency of the courts. However, many of the fundamental recommendations of the Kwach Committee have not been implemented. We are disappointed to report that the Kenya Judiciary has failed to come to grips with the crisis confronting it. We

regret to report that the group of judges delegated by the Chief Justice to meet with us did not come prepared to discuss the issues identified in our Terms of Reference.

Our second general conclusion is positive. We have found that there is a commitment on the part of key members of the Kenya legal community to undertake those reforms. The people of Kenya through Parliament have expressed the wish for constitutional renewal by establishing the CRKC. *The Constitution of Kenya Review Act*, s. 17 (v) gives the CRKC the specific mandate "to examine and make recommendations on the judiciary generally and in particular, the establishment and jurisdiction of the courts, aiming at measures necessary to ensure the competence, accountability, efficiency, discipline and independence of the judiciary." The Attorney General told us of his wish for judicial reform. The Law Society of Kenya and the ICJ (K) are prepared to take a leading role.

The Panel was concerned about the many allegations it heard about misconduct on the part of members of the bar. However, we have had the benefit of excellent submissions from many groups and individuals. Many of those who came before us are talented young lawyers, full of energy, ideas, integrity and the willingness to work for a reformed Judiciary. In stark contrast to our negative assessment of the current state of the Kenya Judiciary, the Panel was impressed by the dedicated lawyers and members of civil society with whom it met. These dedicated men and women eagerly await a reformed judicial structure. Kenya is privileged to have this strong group of lawyers and jurists who exhibit superb legal

skills, knowledge and vision. They are men and women of the highest integrity, well educated, articulate, and determined to achieve a just society. We have been deeply moved by their passionate belief in the rule of law and their commitment to the highest ideals of justice. We were also deeply moved by their courage in speaking so frankly to us and in confronting the serious problems that bedevil the judicial system in which they work.

We are confident that these bright, capable and dedicated jurists reflect the capacity of the Kenya legal community to find its way on the path to justice. They are the future and that future is bright. We sincerely hope that the establishment of proper structures and mechanisms will give this new generation of jurists the tools necessary to restore public confidence in the Kenya judicial system and to allow the courts of Kenya to play their vital role in a new constitutional order.

We adopt a useful statement of the goal to be reached from the submission of the ICJ (K):

The objective is to come up with a judiciary that is independent, efficient and accountable. *Independent* in terms of institutional and financial autonomy; freedom from undue executive, parliamentary or private sector interference; independence in administrative operations; and also the independence of individual judges and magistrates, and freedom from executive, judicial or other patronage structures that influence their work. *Efficient* in terms of delivery of consistent, fair and timely justice; thus laying a constitutional basis for legislative or other follow-up on matters such as case management, procedural reforms, guaranteed law reporting etc. *Accountable* in terms of accessibility by all consumers of justice to the court, its structures and its outputs; transparency and consistency in its operations and outputs; integrity, appointment criteria and procedures, and non-corruption.

Crisis of Confidence

Our Terms of Reference do not give us a mandate to investigate specific complaints or allegations. We are in Kenya for a short period of time and we have had a limited opportunity to observe Kenya's judicial system. We are not fact finders. However, as judges we report without the slightest hesitation that we have been persuaded that there is a serious and urgent need for significant reform of Kenya's judicial system.

We heard consistent complaints about the integrity and the competence of the Kenya Judiciary. We have been told by senior members of the legal community and by representatives of civil society that corruption is widespread. Corruption takes various forms. Bribery is the most obvious. It hardly needs to be stated that offering or accepting bribes in relation to judges, magistrates or court officials is completely inconsistent with the law and represents an assault on the integrity of the judicial system. Another form of corruption is the exertion of political pressure or influence on a judge or a magistrate to decide a case other than in accordance with the law and the evidence before the court. Regrettably, we must report that we have been told by virtually everyone to whom we have spoken that both forms of corruption are common in the courts of Kenya.

The Panel was shocked and dismayed by the widespread allegations of corruption in the Kenya Judiciary. While many of Kenya's judges continue to

fulfil their judicial office faithfully to their judicial oath, public confidence in the independence and impartiality of the Judiciary has virtually collapsed.

This in turn threatens the principle of the Rule of Law, the very foundation of all modern democracies. The Judiciary must be the one bastion where the citizen may go to challenge the arbitrary or oppressive actions of the state. It must be the safe haven where the most impoverished or abused citizen may find support for his or her legal rights when they conflict with those of the rich and powerful in society. A court of law is the forum where corrupt police officers and government officials may be brought in order to condemn their misconduct and impose punishment for their abuse of public trust. Where justice is not dispensed with impartiality, there is no hope for citizens to be treated with objectivity, fairness and honesty by other institutions.

The maintenance of judicial independence and impartiality is the very reason why judges are given such a privileged position in society. It is why they have security of tenure in office. It is why they are given guarantees of financial independence. It is why they are treated with deference and respect in their courtrooms. As the High Court has stated in the *Gachiengo* case:

A judge occupies an enviable position in society. He is enveloped by an aura of dignity. He is always on a pedestal. That position has to be jealously guarded.

Where corruption occurs in the Judiciary, it is the worst form of abuse of public trust since honesty, integrity and fairness are the features that entice citizens to such recourse in the courts, only to be ambushed.

In the short time available to the Panel, we have not been able to document the full extent of this problem. However, the allegations we have heard have come from highly credible sources. These sources are diverse and the allegations are both persistent and consistent.

The Panel is aware that great caution must be exercised in accepting allegations of judicial corruption. In almost every case that is tried, one of the parties will lose and may be devastated. Where a losing party has gone to court with complete confidence in the justice of his or her cause, he or she may rationalize that the only explanation for the result must be that the judge acted with impropriety. We also fully realize that judges can be wrong. Errors in decision-making do not, in themselves, constitute corruption, or even misconduct. It is expected that judges will err, from time to time, and that is why appellate courts exist.

The air is full of allegations of corruption, incompetence and inefficiency. If the Judiciary is to carry out its vital function in an acceptable manner, the air must be cleared.

This conclusion should come as no surprise. In recent times, the Kenya Judiciary has been openly criticized for its alleged shortcomings in the daily press and in Parliament. While we were here, an editorial in the *Daily Nation* congratulated the Chief Justice for certain anti-corruption initiatives, but also urged further action, stating: "The perception that the Judiciary is corrupt is

becoming widespread. A general lack of confidence in it contributes greatly to a creeping erosion of social mores."

The Kenya Judiciary itself has recognized that there is a problem. When appointing the Kwach Committee, the then Chief Justice "stressed the need for the Judiciary to inspire confidence in the Kenyan public, who have perceived it with fear and suspicion; that the necessary steps need to be taken to improve the image and the performance of the Judiciary in the administration of justice." The Kwach Committee Report stated:

The Kenyan Judiciary has experienced, in the recent past, lengthy case delays and backlog, limited access by the population, laxity in security, lack of adequate accommodation, allegations of corrupt practices, cumbersome laws and procedures, questionable recruitment and promotional procedures and general lack of training, weak or non-existence of sanctions for unethical behaviour and inequitable budget.

The Kwach Committee Report specifically stated that the Commission had received allegations of "actual payment of money to judges and magistrates to influence their decisions." The Committee reported that while most were unwilling to name judicial officers who are guilty of corrupt practices, "the Commission was given several names in confidence of those known to be corrupt."

The ICJ (K)'s published report under the title *Strengthening Judicial Reforms. Performance Indicators: Public Perceptions of the Kenya Judiciary* contains disturbing evidence of bribery, corruption and lack of public confidence. Similarly, Transparency International's survey entitled *The Kenya Urban Bribery*

Index places the Judiciary high on the list of public institutions reported by citizens as places where bribery is encountered.

The evil of corruption confronts Kenyan society on many fronts. In the recent past, various steps have been taken by the state to combat corruption. The Judiciary itself has taken certain steps. A Judicial Code of Conduct has been developed. We are told that some magistrates and court officials have been prosecuted and convicted. Special anti-corruption courts have been established. We applaud these steps. However, it is our view that they are plainly inadequate to combat the present crisis. Fundamental changes are required and we respectfully recommend that a number of specific steps be taken immediately to combat corruption in the Judiciary.

We have also heard consistent complaints regarding the level of competence of the Judiciary. As experienced judges, we know that disappointed litigants will often attribute a loss in court to imagined shortcomings of the judge. We have all been subjected to these complaints and we recognize that they must be expected and tolerated in an open and democratic society. Regrettably, we must report that the complaints we have heard far exceed the level that can be expected or tolerated. While there can be no doubt that many of Kenya's judges exhibit the requisite knowledge, skill, and judgment necessary to carry out their judicial functions, some judges are widely perceived to lack those qualities. We have heard consistent complaints that judgments are made without proper regard to the evidence or to the law. Highly credible and reputable members of the legal

profession have told us repeatedly that in a disturbing number of instances, the courts have rendered inconsistent judgments without regard to precedent. There has been deplorable failure to ensure the dissemination of judicial decisions to the legal community and the public for proper scrutiny. We have also been told *repeatedly that many judges bring to their work an unacceptably rigid and technical approach, refusing to consider legal arguments and legal principles in the manner that is required for the attainment of justice.* This, we are told, has been especially prevalent in constitutional cases dealing with the fundamental rights of the citizens of Kenya and in connection with the investigation and prosecution of corruption cases.

As judges, we are naturally reluctant to repeat such serious allegations regarding the shortcomings of the integrity and competence of the Kenya Judiciary without the opportunity to consider the evidence in detail and without the benefit of a full and fair hearing. We repeat that we are not in a position to make specific findings of wrongdoing. However, we must report that we view the nature and extent of the allegations made against the integrity and competence of the Kenya Judiciary to be extremely alarming. No person and no institution should be condemned on the basis of allegations and perceptions. Unfortunately, the committee of judges appointed by the Chief Justice to work with us was not prepared to discuss these issues. Justice cannot be provided under a cloud of suspicion and distrust. At a certain point, perceptions become a reality that must be dealt with. We are convinced that that point has been reached in Kenya.

Public trust and confidence in the Judiciary is vital. Without it, the Judiciary cannot do its important work. If public trust and confidence are lost for whatever reason, immediate steps must be taken to restore them lest the judicial structure collapse under the weight of suspicion and distrust.

We are mindful of the hurt that sweeping and general allegations must cause conscientious, hardworking and dedicated judges and magistrates. To them we simply say it is time to clear the air. They deserve to have the cloud of suspicion lifted so that they can perform their judicial functions with pride and confidence that they work in a judicial system that aspires to the highest ideals.

It is the considered view of the Advisory Panel that the Kenya Judiciary is confronting a crisis of confidence. It is also our opinion that immediate and urgent action should be taken to restore public confidence in the Kenya Judiciary as an institution capable of delivering justice in accordance with the rule of law. In the words of the presentation of the Law Society of Kenya, the Judiciary of this country is at the cross-roads. The Advisory Panel agrees with the Law Society that a fundamental change in the architecture of the administration of justice is required. We also agree that there must be a fundamental reconstruction of the Judiciary through the process of constitutional reform.

The Advisory Panel's most significant recommendations for constitutional reform are premised on two fundamental principles. The first is judicial independence. The *U.N. Basic Principles of the Independence of the Judiciary*

(1985), article 1 requires states to guarantee judicial independence "in the Constitution or the law of the country."

Judicial independence shields the Judiciary from the threat of corruption. The *U.N. Basic Principles of the Independence of the Judiciary* (1985), article 2 provides:

The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

We recommend the entrenchment of the terms of office for judges to ensure that as individuals, they enjoy the necessary protections to allow them to decide cases without fear or favour, affection or ill-will, in an open and public manner and in accordance with the law.

The Advisory Panel was urged by some credible and reputable members of the legal community to take the drastic step of recommending that all current judges be asked to submit their resignations and reapply for appointment to the bench under a reformed appointments process. We do not agree with this suggestion. In our view, such action would represent an insult to those conscientious members of the Judiciary who carry out their duties with integrity. It would also represent an unacceptable infringement of the security of tenure of office enjoyed by individual judges. However, in view of the crisis the Judiciary faces, it is imperative that immediate action be taken to ensure that complaints of

misconduct are properly investigated and that, where necessary, appropriate action is taken for the removal of any judges found guilty of misconduct. The Advisory Panel recommends that an effective interim mechanism be adopted to inquire into allegations of judicial misconduct pending completion of the Constitutional Review process.

The second vital principle that motivates our recommendations is accountability. Public office is founded upon public trust. Judges, magistrates and judicial officers must be accountable to the public for their conduct and actions. Judicial accountability goes hand in hand with judicial independence. It is our view that the twin goals of accountability and independence can best be achieved by exposing the judicial structure to public view. At present, there are crucial aspects of the Kenyan judicial structure that are hidden from public view. Secrecy breeds suspicion and distrust. It is the Advisory Panel's view that several reforms are required to make the institution of the Judiciary more accountable to the public. We have concluded that more transparent processes are called for and we make several recommendations in that regard in relation to appeals, the appointment of judges, the conduct and removal of judges and the Judicial Service Commission.

5. Specific Recommendations

I. Vesting Judicial Power and the Principles of Judicial Independence in the Constitution

There is need for express declaration of judicial independence in the Constitution. This is a foundational constitutional principle. It has several aspects.

Vesting Judicial Power

Although section 23(1) of the Constitution expressly vests executive power in the President as head of the Executive and section 30 vests legislative power in Parliament, there is no similar entrenchment of judicial authority in the Judiciary. This immediately creates a perception of a weak foundation of judicial authority and an imbalance of power between the Judiciary on the one hand, and the other two arms of government on the other. The Judiciary is the body that, in any credible democracy, must have the final authority to protect the fundamental rights of the people and to decide whether impugned legislative enactments or decrees, or actions of the executive have transgressed the Constitution.

The courts should be independent and not subject to control or direction of any person or authority in the exercise of their functions. Organs of state shall, through legislative and other measures as may be required, assist and protect the courts, to ensure their effectiveness and independence. A restructured independent

Judicial Service Commission will also serve to ensure the institutional independence of the courts.

The Judiciary may be required to act at crucial times and in crucial areas that may determine the destiny of the nation. It is therefore important that the foundation of judicial power is guaranteed to be unshakable. This also protects the Judiciary against undue interference and influence.

It is therefore necessary that the Constitution explicitly vest judicial power or authority in the Judiciary. In this way, the boundaries of public power and authority will be clearly drawn. This, however, does not preclude the need to design mechanisms that create a balance of power between the Judiciary and the other arms of government. This usually augers well for the operation of the doctrine of separation of powers.

In order to reinforce the authority of the Judiciary and cultivate respect for its orders and decisions, it may also be necessary that the Constitution explicitly provide that court orders and decisions shall be binding on all persons, entities, organs and institutions of state to whom and to which they apply.

We recommend vesting judicial authority in the Judiciary alongside the Executive and Parliament to ensure recognition of and respect for the distinctive role of the courts in the governance of the Republic of Kenya.

We are of the opinion the organization of the Judiciary should avoid undue concentration of authority in a single judicial officer. Consideration

should be given the role of the Chief Justice in the administration of the courts. The Chief Justice shall have over-all responsibility for the Judiciary. However, he or she will only have direct administrative responsibility for the Supreme Court and only general supervisory jurisdiction for the Judiciary as a whole. Along the same lines, the Court of Appeal and the High Court should each have its own President with direct administrative responsibility for the administration of those courts.

We are of the view that the general principle of local administrative responsibility within each court should also apply to the Magistrates' Courts and we return to this topic under Part IX.

We recommend that the Chief Justice shall be head of the Judiciary and shall provide judicial leadership at all times. The Chief Justice shall preside over and have direct administrative responsibility for the Supreme Court. There shall be a President of the Court of Appeal and President of the High Court to preside over and have direct responsibility for the administration of those courts.

Principles of Judicial Independence

We recommend that the following principles be enshrined in the Constitution in relation to the terms and conditions of judicial office:

- Judges shall be persons of integrity and ability with appropriate training and qualifications in law.
- Judges shall exercise judicial power impartially and in accordance with the law and authority without fear, favour or ill-will.
- The tenure of Judges shall be guaranteed and adequately secured by the Constitution.
- The Constitution shall provide that the remuneration and other terms and conditions of service of Judges shall be adequately secured by law and shall not be reduced or altered to their disadvantage.
- Judges shall not be liable to any action or suit for any act or omission in the exercise of their judicial powers or functions.
- Judges shall be free to form associations that represent their interests, to promote their professional training and to protect their judicial independence.
- Judges are entitled to freedom of expression, belief, association and assembly on condition that they shall always conduct themselves in a manner that preserves the dignity of their office, their impartiality and the independence of the Judiciary.

- Judges must always strive to uphold their integrity and independence by refraining from impropriety or any appearance of impropriety.
- Judges shall devote their full time and attention to their judicial duties and shall not engage in any business, trade, profession or other activity inconsistent with the judicial function.

Financial Independence

We recommend that the financial independence of the Judiciary be entrenched in the Constitution. The Judiciary should enjoy financial budgetary autonomy, draw up its own budget and deal directly with the relevant state finance authority. The state shall be obliged to provide adequate financial resources to enable the Judiciary to perform its functions effectively.

II. A Supreme Court

An effective appeals process is one important means to ensure the accountability of judges in their day to day legal work. Judges are required to explain their decisions and if the explanation given reveals error, the decision may be reversed on appeal. The appellate process imposes quality control upon judicial decision making.

The Advisory Panel agrees with those who advocate a further level of appeal to a court of last resort. It has been our experience that such a court significantly strengthens the quality of decision-making in the lower courts. Supreme Court judges have the aptitude and the time necessary to give mature reflection to the most difficult legal issues confronting the country. Their judgments provide necessary guidance for the lower courts and serve to ensure that the law, especially the Constitution, evolves in the manner necessary to address the changing needs of society.

We recommend the establishment of a Supreme Court comprised of a small number of select jurists of unquestionable skill, judgment and integrity.

Some representations urged us to recommend the creation of a Constitutional Court. While a specialized Constitutional Court was admirably suited to meet the particular needs of the new constitutional order of South Africa, we are not persuaded that it represents the best solution for Kenya. Both Uganda and Canada have had positive experience with a Supreme Court with general appellate jurisdiction. A Supreme Court has the advantage of allowing courts of first instance to address constitutional issues, while avoiding the obvious limitation of having such issues decided once and for all, without appeal, by one court. Important constitutional issues find their way to the Supreme Court to be finally resolved by jurists of high repute. In practice, if not in law, a Supreme Court becomes a specialized constitutional court. At the same time, this select

body of jurists is available to resolve difficult issues of law that fall outside the realm of constitutional law, providing more general judicial leadership to the lower courts. Moreover, given Kenya's size, adding both a Supreme Court and a Constitutional Court would be difficult to justify.

We recommend that in addition to the existing courts of judicature of Kenya, namely the High Court and the Court of Appeal, there be established the Supreme Court of Kenya to consist of:

- **The Chief Justice and**
- **Such number of justices of the Supreme Court not being less than six, as Parliament may by law establish.**

The Supreme Court shall exercise general appellate jurisdiction.

It shall be the final court of appeal in all matters.

III. Appointment of Judges

Current practice relating to the appointment of judges is a matter of grave concern. We are informed that judicial appointments have regularly been made without public exposure and consultation. Vacancies are not advertised and criteria for appointment appear to be uncertain. Lawyers with disciplinary proceedings pending before the Law Society have been appointed to high judicial office. This is obviously unacceptable and bound to undermine public confidence

in the Judiciary. Judges should not be appointed for political, tribal or sectarian reasons.

We are persuaded that a lack of transparency in the manner in which judges are appointed has undermined public confidence in the quality of those named to judicial office. We have heard the consistent plea that a more transparent appointment process is required to ensure that those appointed as judges have the required standing in the community as jurists of integrity, learning and wisdom. We agree with Mr. Justice Kwach who wrote (*The Lawyer*, December 1998): "The procedure for the appointment of Judges including the Chief Justice is faulty and in dire need of change." We also note that the Kwach Committee identified the shortcomings of the present appointments system and we also agree with the Committee's conclusion that:

...rigorous vetting is necessary before appointment of judicial officers. The appointments process must be transparent and tailored to identify individuals of the highest integrity for recruitment. There must be a transparent and merit-based judicial appointment system.

We recommend the adoption of a clearly established transparent appointment process with clearly stated criteria under the authority of a restructured Judicial Service Commission.

We received representations that Parliament's approval of judicial appointments ought to be required to ensure transparency. We do not agree with the suggestion that nominations to the bench ought to be subjected to full-scale debate and majority vote by Parliament. In our view, that process carries an undue

risk that the appointment of judges will be politicized. In our view, transparency can be assured through the crucial role we have recommended for the restructured Judicial Services Commission and by requiring the President when making judicial appointments to consult formally the Parliamentary Committee responsible for judicial affairs. We recommend that such a Committee be established.

We recommend that the appointment of all judges, including the Chief Justice, be made by the President in accordance with the written recommendation of the Judicial Service Commission and after the President has duly and formally consulted the Parliamentary Committee responsible for judicial affairs, which we propose be established.

We recommend that only distinguished judges and jurists of proven integrity and impeccable character as determined by the Judicial Service Commission be appointed as Chief Justice and as judges of the High Court, Court of Appeal and Supreme Court.

- **The minimum constitutional qualification for appointment as Chief Justice or as a judge of the Supreme Court shall be a total of fifteen years experience:**
 - **as a judge of the High Court or Court of Appeal,**
 - **practising as an advocate, or**

- full-time law teaching in a recognized University.
- The minimum constitutional qualification for appointment as a judge of the Court of Appeal shall be a total of ten years experience:
 - as a judge of the High Court
 - practicing as an advocate, or
 - full-time law teaching in a recognized University.
- The minimum constitutional qualification for appointment as a judge of the High Court shall be a total of ten years experience:
 - as a magistrate, or
 - practicing as an advocate.

IV. Terms of Office, Conduct and Removal

Under s. 62 (3) of the present Constitution, a judge may be removed from office "only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour". There is a widely held belief among Kenyans that complaints regarding sufficiently serious judicial misconduct to warrant thorough investigation have not been pursued. Such complaints have become publicly known through press reports and Parliamentary debate. There is a widely and strongly held perception

that allegations of judicial misconduct are not taken seriously by those who have the constitutional duty to act. This amounts to an abdication of constitutional responsibility and represents a serious stain on the Judiciary. If there is nothing to an allegation of judicial misconduct, the judge concerned deserves to have his or her name cleared. If judicial misconduct is proved, the Constitution and the public interest require that the judge be removed from office. Failure to address openly and publicly serious allegations of judicial misconduct saps public confidence in the Judiciary. We have concluded that there is an urgent need for the establishment of a more transparent complaints and removal process.

In some cases, the Judicial Service Commission may find that the judge's behaviour is inappropriate, but not so serious as to warrant removal. In such cases, the judge should be informed of the Commission's assessment. This is not a formal sanction. It is also important that the complainant be advised of the Commission's conclusion. Experience in other jurisdictions is that a judge may acknowledge the inappropriateness of the conduct in question and, possibly, express regret. A situation such as this may prove to be "remedial". The judge has recognized that there are consequences for inappropriate behaviour and will improve in future. The complainant is satisfied that his or her complaint was taken seriously by the judges as well as by the Commission. The independence and credibility of the Judiciary will be enhanced rather than diminished where there is institutional acknowledgement and redress for judicial misconduct even where it falls short of warranting removal from office.

We recommend a transparent complaint and removal process, to be established through a restructured Judicial Service Commission in the following terms:

- A judge may be removed from office only for
 - inability to perform the functions of his or her office arising from infirmity of body or mind, or
 - misbehaviour, misconduct or incompetence of such a nature as to make the judge unfit for judicial office.
- A judge may only be removed from office in accordance with the procedure prescribed by the Constitution.
- The Constitution shall provide that any individual or institution, society or group of individuals may lodge a complaint against any judge to the Judicial Service Commission.
- The Judicial Services Commission shall investigate and if it is satisfied that consideration should be given to the removal of the judge from office, it shall request the President to appoint a Judicial Tribunal of eminent judges to conduct a hearing into the allegation.
- If the Judicial Service Commission finds the judge's behaviour to be inappropriate but is not satisfied that

consideration should be given to the removal of the judge from office, it may inform the judge of its assessment of the judge's conduct.

- The Judicial Tribunal shall report its findings and recommendation to the President who shall act in accordance with that recommendation.
- Where a judge is under investigation by a Judicial Tribunal, the Judicial Service Commission may recommend to the President that the judge be suspended without loss of remuneration or benefits pending the Judicial Tribunal's hearing of the complaint and the President shall act in accordance with the recommendation of the Judicial Service Commission.

We also recommend that a comprehensive Code of Conduct for judges, magistrates and judicial officers be formally adopted and that it should impose two important obligations. First, all judges, magistrates and judicial officers should be required to file with the Judicial Service Commission upon appointment and annually thereafter a financial disclosure statement clearly disclosing all assets, property or investments owned and all sources of income. Failure to make full and accurate financial disclosure may constitute judicial misconduct. Second, all judges, magistrates

and judicial officers should be under a legal obligation to disclose to the Judicial Service Commission any instance known to them of bribery or corruption in the administration of justice. Failure to report may constitute judicial misconduct.

V. Judicial Service Commission

It is our opinion that a restructured Judicial Service Commission will both protect judicial independence and to enhance judicial accountability. Our proposed reforms to the appointment and removal process require the creation of an independent body comprised of members of proven integrity who reflect the interests of the public at large as well as the interests of the Judiciary.

The Advisory Panel recommends that a restructured Judicial Service Commission be entrenched in the Constitution.

The Judicial Service Commission will recommend appropriate terms and conditions of service for judges and magistrates, a function now left to the vagaries of the political process. In the exercise of its appointment and removal functions, the Judicial Service Commission will also ensure that these important decisions are protected from political influence. Because its membership is broad-based and not within the control of any single constituency, the Judicial Service Commission will also bring transparency to these matters and thereby enhance accountability. Finally, we believe that a restructured Judicial Service Commission will have the capacity to improve the administration of justice by

providing education and training for judges and advising on the administration of justice, including efficiency and measures designed to ensure access to justice.

From the various presentations made to the Panel, it was persistently emphasized that the Judicial Service Commission as presently constituted is not effective in relation to judicial appointments. As a result, it was urged that a number of the appointments are based not on merit but on other considerations. Appointments are made in a manner that is not transparent. It is therefore imperative that an effective, efficient and transparent procedure of appointing judges and other judicial officers is put in place.

The Panel recommends that the Judicial Service Commission as presently constituted should be restructured in order to ensure that it is independent and effective and not subject to the direction and control of any other person or authority in the exercise of its functions. Its membership should be broad-based, consisting of members drawn from various sections of the society and stakeholders. In this regard, while the Panel is aware of the stature and position of the Chief Justice as head of the Judiciary, it is concerned that the inclusion of the Chief Justice as chairman of the Judicial Service Commission may inhibit it from properly exercising its functions. Given his position, the Chief Justice is directly affected by and interested in the Judicial Service Commission's recommendations relating to both the appointment and removal of judges. His direct involvement in the functions of the Judicial Service Commission risks putting him or her in the unenviable role of a judge in his or her own cause. For these reasons, it is

recommended that the Chief Justice should not be a member of the Judicial Service Commission. However, it is recommended that the Chief Justice shall appoint one member to represent his office on the Commission.

Composition of the Judicial Services Commission

We recommend that in its restructured form, the Judicial Service Commission shall comprise the following members who shall be persons of high moral character and proven integrity:

- **A full-time chairperson whose qualifications shall be comparable to those of a Supreme Court Judge.**
- **One member appointed by the Chief Justice.**
- **Two lay members of the public appointed by the President in consultation with the proposed Parliamentary judicial affairs committee.**
- **Two members nominated by the Law Society of Kenya.**
- **Two members elected by the faculties or schools of law of the universities Kenya.**
- **Three judges elected by the Supreme Court, Court of Appeal and the High Court respectively.**
- **Two members elected from the subordinate courts.**

- One member representing the Public Service Commission nominated by the Public Service Commission.
- The Attorney General as an ex-officio member.

Functions of the Judicial Service Commission

We recommend that the Judicial Service Commission shall have the following functions:

- To recommend to the President persons for appointment as judges, including the Chief Justice.
- To review and make recommendations on terms and conditions of service of judges, magistrates and other judicial officers.
- To appoint, discipline and remove registrars, magistrates and other judicial officers including paralegal staff in accordance with the law as prescribed by Parliament.
- To receive and investigate complaints against judges in accordance with the Constitution.

- To prepare and implement programmes for the education and training of judges, magistrates and paralegal staff.
- To advise the government on improving the efficiency in the administration of justice and access to justice including legal aid.
- To encourage gender equity in the administration of justice in Kenya.
- Any other function as may be prescribed by the Constitution or any other legislation enacted by Parliament.

VI. Access to Justice and Efficiency

Our terms of reference include issues related to access to justice and the efficient operation of the courts. In the time available to us, we have chosen to focus our efforts on structural and constitutional issues and we have not had adequate opportunity to give to these issues the attention they deserve. Our inability to do so, however, should not be taken to minimize the importance of these issues. As was so forcefully put by FIDA's submission to us, the courts will fail to serve the public interest if their doors are effectively closed to the poor and disadvantaged.

We recommend that the restructured Judicial Service Commission be specifically mandated by the terms of the Constitution to advise the government on improving access to justice. It is our hope that this would focus attention on this vital issue and achieve the necessary reforms.

We have heard many suggestions for reform that deserve serious consideration. Several representations urged the establishment of a Small Claims Court with user-friendly simplified rules of procedure and evidence. Small Claims Courts should be accessible without the assistance of a lawyer. Similarly, consideration should be given to the development of alternative methods of dispute resolution, possibly by building on traditional local tribunals or customs, as a means of enhancing access to justice.

We recommend that serious consideration be given to enhancing the availability of legal aid. We find particularly disturbing the present failure to ensure full legal representation for all proceedings involving persons accused of capital offences.

We have also heard many complaints that there is lack of adequate resources to ensure the efficient operation of the courts. On our site visits, we saw some evidence of this. Proper court records must be maintained and case management systems are required to ensure the proper and timely disposal of all matters. Justice cannot be done if court files are lost because of inadequate storage or retrieval systems.

We recommend that the restructured Judicial Service Commission be specifically mandated to advise the government on improving efficiency in the administration of justice.

VIII. Kadhis' Courts

The Kadhis' Courts are constitutionally recognized as subordinate courts which only deal with matters of Muslim personal laws and are presided over by Kadhis. Appeals from Kadhis' Courts lie to the High Court.

Removal of the Kadhis' Courts from the formal judicial structure was not strongly advocated. On the other hand, submission was made to abolish appeals from Kadhis' Courts to the High Court. A separate system of Kadhis' Courts, including an appellate Kadhis' Court, would be created. These Courts would exercise jurisdiction in all matters where Muslim personal law is applicable. Presiding officers would profess the Muslim faith and be proficient in Muslim law.

We are of the view that it is undesirable to have in one jurisdiction, a parallel court system without any supervision by the ordinary courts. This is particularly so in a legal system where the Constitution is the supreme law.

We recommend no change to the current constitutional provisions regarding the Kadhis' Courts. We recommend, however, that consideration be given to the appointment of judges to the High Court who are proficient in Muslim Law.

VIII. Attorney General and the Director of Public Prosecutions

The Constitution does not establish the office of the Director of Public Prosecutions, yet that office is central to the administration of criminal justice in jurisdictions with similar legal systems to that obtaining in Kenya. Some members of the Panel come from countries with similar legal systems. The powers normally vested in the Director of Public Prosecutions in other jurisdictions are vested in Kenya in the Attorney General by section 26 of the Constitution.

The Panel recommends the establishment of an office of the Director of Public Prosecutions, vested with the powers that are now vested in the Attorney General under section 26(3), (4) and (8) of the Constitution together with any other appropriate powers for this office and these should be clearly set out in legislation. The Director of Public Prosecutions shall exercise these functions independently without interference, control or direction of any other person or authority.

We further recommend that the Director of Public Prosecutions should be appointed by the President in accordance with the recommendation of the Public Service Commission after consultation with the Parliamentary committee responsible for legal and Constitutional affairs. The Director of Public

Prosecutions should be appointed from among persons of proven integrity and moral character qualified to be appointed a Judge of the High Court. The Public Service Commission shall consult with the Judicial Service Commission prior to making its recommendation.

With the creation of the office of Director of Public Prosecutions, the Attorney General would retain the conventional functions set out under section 26 (2) of the Constitution. He would act as the principal legal advisor to the government of Kenya.

By section 36 of the Constitution, the Attorney General is an ex-officio member of the National Assembly. Although he is not entitled to vote in the National Assembly, he is presently entitled to participate in debate. In our view, the Constitution ought to reflect the independence of the Attorney General from the government of the day. That independence is inhibited by the present arrangement whereby the Attorney General effectively acts in the National Assembly as the Minister of Justice.

We recommend that the Attorney General no longer be a member of the National Assembly and that there be a Minister of Justice to attend to all political issues, including responsibility for legal, judicial and constitutional issues in Parliament.

We recommend that the Attorney General be appointed by the President with the approval of the Parliamentary committee

responsible for legal and Constitutional affairs from among persons of proven integrity, moral character who are qualified to practise as advocates and who have not less than 10 years experience.

IX. Structure and Jurisdiction of Magistrates' Courts

Section 7 (1) of the *Magistrates' Courts Act, 1985* establishes District Courts but there is no clear distinction made between the geographical areas and the judicial offices. Courts are therefore designated either as Chief, Principal, or District Magistrates' Courts depending on the grade of the magistrate posted at the station. This is unsatisfactory.

We recommend:

- That the *Magistrates' Courts Act* be reviewed in order to realign the Courts established under section 7 (1) with their respective grades in every District throughout Kenya.
- Each Magisterial area should be designated to its grade and jurisdiction to which a magistrate of a specified grade would be posted. Magistrates of lower grade posted to the courts of higher grades or designation may only do so in an acting capacity.

- Magistrates assigned to the courts of specified grade shall exercise such jurisdiction as may be determined by Parliament from time to time.
- A hierarchical system of appeal in all matters from the lowest to the highest Magistrates' court and thereafter to the High Court, Court of Appeal and the Supreme Court should be established by Parliament.
- The Judicial Service Commission shall be responsible for making recommendations on the remuneration, terms and conditions of service for Magistrates' and other subordinate courts.

During our visits to the Magistrates' Courts and from other representations we received, it became apparent that the efficient administration of these courts and the treatment of individual Magistrates has been adversely affected by the concentration of administrative responsibility for this court in the office of the Chief Justice. The administration of justice would benefit from greater devolution of administrative responsibility for this court.

Direct administrative responsibility would permit greater focus on the special needs of magistrates in various regions of the country. For example, we heard of the absence of toilet facilities in some rural court houses and inadequate transportation for a Magistrate who was responsible for providing judicial service to court houses in two different locations. There is a clear need for greater

efficiency in the deployment of resources to provide better service to the public. A comprehensive and uniform system for filing and better communication facilities should be established. Greater initiatives should be encouraged in relation to training, including emphasis on ethical conduct. The Magistrates should be given greater resources to assist them in carrying out their professional responsibilities to the people of Kenya

We recommend that there should be a judicial officer designated to have primary responsibility for the administration of all Magistrates' Courts throughout Kenya.

X. Election Petition Appeals

Section 44 of the Constitution vests jurisdiction in the High Court to hear and determine issues pertaining to the validity of the election of a member of the National Assembly. With the enactment of the 1997 amendment appeals lie to the Court of Appeal by parties who are dissatisfied with the decision of the High Court. Consequent upon the recommendation to establish the Supreme Court, it is the Panel's view that it should be open for the parties to appeal to the Supreme Court if they so wish. However, in view of the fact that election petitions are by their nature of great public interest, speedy disposal of these cases is needed.

We recommend that appeals in election petitions should lie from the Court of Appeal to the Supreme Court on a point of law only.

XI. Interim Measures

It is not clear when changes to the Constitution of Kenya will be adopted to provide a new process for dealing with complaints about judicial conduct. Even after the Constitution is amended, legislation will have to be passed, appointments to the new positions will have to be made and administrative machinery put into place. The Panel strongly believes that corruption in the Judiciary of Kenya is such a serious problem that a strong and immediate response is required. It is therefore necessary to take appropriate action within the framework of the existing Constitution.

The Panel recommends that necessary measures be taken immediately under the present constitutional arrangements.

Section 62(4) of the Constitution of Kenya currently provides:

A judge of the High Court shall be removed from office by the President if the question of his removal has been referred to a tribunal appointed under subsection (5) and the tribunal has recommended to the President that the judge ought to be removed from office for inability as aforesaid or for misbehaviour.

Subsection 5 provides that the President shall appoint such a tribunal:

If the Chief Justice represents to the President that the question of removing a puisne judge under this section ought to be investigated....

The limitation of these provisions is that they do not prescribe the means to receive complaints about the conduct of judges, assess those complaints and establish whether they are serious enough to warrant a formal investigation by a

tribunal. The Judicial Service Commission that we have recommended will eventually fill this need. But currently, there is no institution to receive and assess complaints against judges and assist the Chief Justice in the discharge of his constitutional obligation to decide whether a complaint "ought to be investigated" by a tribunal appointed by the President.

The appointment of a tribunal is a serious matter and is not to be undertaken lightly. However, we understand that such a tribunal has never been established in Kenya in spite of widespread allegations of judicial corruption including specific allegations against specific judges. Quite frankly, it is clear that the Chief Justice cannot be relied upon to fulfil this constitutional responsibility on his own initiative. As a result, there is need for a mechanism to assist the Chief Justice in the discharge of his constitutional obligation to decide whether a complaint ought to be investigated by a tribunal appointed by the President.

The Panel recommends that as an interim measure there be a Committee to receive complaints about the conduct of any judge in Kenya in order to assist the Chief Justice in the discharge of his constitutional obligation to decide whether a complaint ought to be investigated by a tribunal appointed by the President under s. 62(5).

This would establish a preliminary stage to provide information to assist the Chief Justice to carry out his constitutional responsibility under section 62(5) of the Constitution. The Committee would not make a finding or recommendation as

The Committee shall be responsible for selecting a Chairperson from among its members. It is crucial that the members of this Committee be persons of unquestionable integrity, competence and resolve. The Committee must be provided with adequate resources to fulfil its role, including office space, staff and equipment.

We recommend that the mandate for the Committee be as follows:

- To receive complaints about the conduct of any judge in Kenya from any source.
- To assess the merits of such complaints and to refer to the Chief Justice any complaints that he should consider for investigation by a tribunal pursuant to section 62 (5) of the Constitution of Kenya.

The Committee must be "user-friendly" when receiving complaints. Publicity should be given to its role and it must be provided with adequate resources to fulfill its functions. It will be necessary to have a screening process to filter out complaints without merit. It will have to be made clear to the public that the Committee has no authority to deal with judicial decisions that the complainant considers to be erroneous. Something more than mere error is necessary to constitute misconduct. It is important that the Committee act only on specific

complaints and not initiate investigations into the conduct of a judge. The process must not be allowed to become or be perceived as a "witch hunt".

After preliminary examination, where it appears that a complaint may be well founded, the judge in question should be provided with a copy and invited to provide a reply in writing. Where the judge's response does not resolve the matter, the Committee will gather further information by interviewing the complainant and any others who may have relevant information. This will be done informally since the Committee will not have the authority to summon witnesses or compel production of documents.

Upon completion of its fact-finding, where the complaint appears to be serious enough to warrant referral to the Chief Justice, fairness must be extended to the judge involved. Complete disclosure should be provided to the judge who should be given the opportunity to respond in writing and his or her response must be included in the report of the Committee, if it decides to refer the matter to the Chief Justice. Where a complaint is referred to the Chief Justice, the Committee may make its report public. Experience in other jurisdictions has demonstrated that where a judge has engaged in serious misconduct, and is presented with the evidence that his or her misconduct has been exposed, the judge will resign rather than face the embarrassment of a formal inquiry and the inevitable result of removal.

The process followed by the Committee must reflect:

- Sensitivity to the complainant

- Fairness to the judge and respect for judicial independence
- Credibility in the eyes of the public.

Corruption by a judge must be exposed and condemned simply because it is evil. Such judges must also be removed from the Judiciary so they are no longer able to prey upon the public. They also tarnish the image of other judges who carry out their judicial role with integrity. These judges are entitled to have the cloud of suspicion lifted. Moreover, the very creation of such a Committee will have an immediate chilling effect on judges who engage or are tempted to engage in improper behaviour.

Conclusion

The Panel was saddened by the reports of corruption which appear to be endemic in Kenya's public institutions and have found their way into the Judiciary as well. We believe a short, sharp, shock is necessary to detour this path towards a culture of corruption. We hope, for the sake of this great country, that the proposed Committee will prevent the Judiciary from being a complicit partner in public corruption, rather than its greatest enemy.

SUMMARY OF RECOMMENDATIONS

I. Vesting Judicial Power and the Principles of Judicial Independence in the Constitution

1. We recommend the entrenchment of the terms of office for judges to ensure that as individuals, they enjoy the necessary protections to allow them to decide cases without fear or favour, affection or ill-will, in an open and public manner and in accordance with the law.
2. We recommend vesting judicial authority in the Judiciary along side the Executive and Parliament to ensure recognition of and respect for the distinctive role of the courts in the governance of the Republic of Kenya.
3. We recommend that the Chief Justice shall be head of the Judiciary and shall provide judicial leadership at all times. The Chief Justice shall preside over and have direct administrative responsibility for the Supreme Court. There shall be a President of the Court of Appeal and President of the High Court to preside over and have direct responsibility for the administration of those courts.
4. We recommend that the following principles be enshrined in the Constitution in relation to the terms and conditions of judicial office:
 - a) Judges shall be persons of integrity and ability with appropriate training and qualifications in law.
 - b) Judges shall exercise judicial power impartially and in accordance with the law and authority without fear, favour or ill-will.

c) The tenure of Judges shall be guaranteed and adequately secured by the Constitution.

d) The Constitution shall provide that the remuneration and other terms and conditions of service of Judges shall be adequately secured by law and shall not be reduced or altered to their disadvantage.

e) Judges shall not be liable to any action or suit for any act or omission in the exercise of their judicial powers or functions.

f) Judges shall be free to form associations that represent their interests, to promote their professional training and to protect their judicial independence.

g) Judges are entitled to freedom of expression, belief, association and assembly on condition that they shall always conduct themselves in a manner that preserves the dignity of their office, their impartiality and the independence of the Judiciary.

h) Judges must always strive to uphold their integrity and independence by refraining from impropriety or any appearance of impropriety.

i) Judges shall devote their full time and attention to their judicial duties and shall not engage in any business, trade, profession or other activity inconsistent with the judicial function.

5. We recommend that the financial independence of the Judiciary be entrenched in the Constitution. The Judiciary should enjoy financial budgetary autonomy, draw up its own budget and deal directly with the relevant state finance

authority, The state shall be obliged to provide adequate financial resources to enable the Judiciary to perform its functions effectively.

II. A Supreme Court

6. We recommend the establishment of a Supreme Court comprised of a small number of select jurists of unquestionable skill, judgment and integrity.
7. We recommend that in addition to the existing courts of judicature of Kenya, namely the High Court and the Court of Appeal, there be established the Supreme Court of Kenya to consist of:
 - a) The Chief Justice and
 - b) Such number of justices of the Supreme Court not being less than six, as Parliament may by law establish.

The Supreme Court shall exercise general appellate jurisdiction. It shall be the final court of appeal in all matters.

III. Appointment of Judges

8. We recommend the adoption of a clearly established transparent appointment process with clearly stated criteria under the authority of a restructured Judicial Service Commission.
9. We recommend that the appointment of all judges, including the Chief Justice, be made by the President in accordance with the written recommendation of the Judicial Service Commission and after the President has duly and formally

consulted the Parliamentary Committee responsible for judicial affairs, which we propose be established.

10. We recommend that only distinguished judges and jurists of proven integrity and impeccable character as determined by the Judicial Service Commission be appointed as Chief Justice and as judges of the High Court, Court of Appeal and Supreme Court.

a) The minimum constitutional qualification for appointment as Chief Justice or as a judge of the Supreme Court shall be a total of fifteen years experience:

- i) as a judge of the High Court or Court of Appeal,
- ii) practising as an advocate, or
- iii) full-time law teaching in a recognized University.

b) The minimum constitutional qualification for appointment as a judge of the Court of Appeal shall be a total of ten years experience:

- i) as a judge of the High Court,
- ii) practicing as an advocate, or
- iii) full-time law teaching in a recognized University.

c) The minimum constitutional qualification for appointment as a judge of the High Court shall be a total of ten years experience:

- i) as a magistrate, or
- ii) practicing as an advocate.

IV. Terms of Office, Conduct and Removal

12 We recommend a transparent complaint and removal process, to be established through a restructured Judicial Service Commission in the following terms.

a) A judge may be removed from office only for

i) inability to perform the functions of his or her office arising from infirmity of body or mind, or

i) misbehaviour, misconduct or incompetence of such a nature as to make the judge unfit for judicial office.

b) A judge may only be removed from office in accordance with the procedure prescribed by the Constitution.

i) The Constitution shall provide that any individual or institution, society or group of individuals may lodge a complaint against any judge to the Judicial Service Commission.

ii) The Judicial Services Commission shall investigate and if it is satisfied that consideration should be given to the removal of the judge from office, it shall request the President to appoint a Judicial Tribunal of eminent judges to conduct a hearing into the allegation.

iii) If the Judicial Service Commission finds the judge's behaviour to be inappropriate but is not satisfied that consideration should be given to the removal of the judge from office, it may inform the judge of its assessment of the judge's conduct.

iv) The Judicial Tribunal shall report its findings and recommendation to the President who shall act in accordance with that recommendation.

v) Where a judge is under investigation by a Judicial Tribunal, the Judicial Service Commission may recommend to the President that the judge be suspended without loss of remuneration or benefits pending the Judicial Tribunal's hearing of the complaint and the President shall act in accordance with the recommendation of the Judicial Service Commission.

11. We also recommend that a comprehensive Code of Conduct for judges, magistrates and judicial officers be formally adopted and that it should impose two important obligations. First, all judges, magistrates and judicial officers should be required to file with the Judicial Service Commission upon appointment and annually thereafter a financial disclosure statement clearly disclosing all assets, property or investments owned and all sources of income. Failure to make full and accurate financial disclosure may constitute judicial misconduct. Second, all judges, magistrates and judicial officers should be under a legal obligation to disclose to the Judicial Service Commission any instance known to them of bribery or corruption in the administration of justice. Failure to report may constitute judicial misconduct.

V. Judicial Service Commission

12. The Advisory Panel recommends that a restructured Judicial Service Commission be entrenched in the Constitution.

13. We recommend that in its restructured form, the Judicial Service Commission shall comprise the following members who shall be persons of high moral character and proven integrity:

- a) full-time chairperson whose qualifications shall be comparable to those of a Supreme Court Judge.
- b) One member appointed by the Chief Justice.
- c) Two lay members of the public appointed by the President in consultation with the proposed Parliamentary judicial affairs committee.
- d) Two members nominated by the Law Society of Kenya.
- e) Two members elected by the faculties or schools of law of the universities Kenya.
- f) Three judges elected by the Supreme Court, Court of Appeal and the High Court respectively.
- g) Two members elected from the subordinate courts.
- h) One member representing the Public Service Commission nominated by the Public Service Commission.
- i) The Attorney General as an ex-officio member.

14. We recommend that the Judicial Service Commission shall have the following functions:

iv) The Judicial Tribunal shall report its findings and recommendation to the President who shall act in accordance with that recommendation.

v) Where a judge is under investigation by a Judicial Tribunal, the Judicial Service Commission may recommend to the President that the judge be suspended without loss of remuneration or benefits pending the Judicial Tribunal's hearing of the complaint and the President shall act in accordance with the recommendation of the Judicial Service Commission.

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- a) To recommend to the President persons for appointment as judges, including the Chief Justice.
- b) To review and make recommendations on terms and conditions of service of judges, magistrates and other judicial officers.
- c) To appoint, discipline and remove registrars, magistrates and other judicial officers including paralegal staff in accordance with the law as prescribed by Parliament.
- d) To receive 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 in the administration of justice and access to justice including legal aid.
- g) To encourage gender equity in the administration of justice in Kenya.
- h) Any other function as may be prescribed by the Constitution or any other legislation enacted by Parliament.

VI. Access to Justice and Efficiency

15. We recommend that the restructured Judicial Service Commission be specifically mandated by the terms of the Constitution to advise the government on improving access to justice. It is our hope that this would focus attention on this vital issue and achieve the necessary reforms.

20. We further recommend that the Director of Public Prosecutions should be appointed by the President in accordance with the recommendation of the Public Service Commission after consultation with the Parliamentary committee responsible for legal and Constitutional affairs. The Director of Public Prosecutions should be appointed from among persons of proven integrity and moral character qualified to be appointed a Judge of the High Court. The Public Service Commission shall consult with the Judicial Service Commission prior to making its recommendation.

21. We recommend that the Attorney General no longer be a member of the National Assembly and that there be a Minister of Justice to attend to all political issues, including responsibility for legal, judicial and constitutional issues in Parliament.

22. We recommend that the Attorney General be appointed by the President with the approval of the Parliamentary committee responsible for legal and Constitutional affairs from among persons of proven integrity, moral character who are qualified to practise as advocates and who have not less than 10 years experience.

23. We recommend:

- a) That the *Magistrates' Courts Act* be reviewed in order to realign the Courts established under section 7 (1) with their respective grades in every District throughout Kenya.

**APPENDIX 2 – EXTRACTS FROM THE CONSTITUTIONS OF TANZANIA,
UGANDA AND SOUTH AFRICA**

**A: THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA,
1977**

PREAMBLE

FOUNDATIONS OF THE CONSTITUTION

WHEREAS WE, the people of the United Republic of Tanzania, have firmly and solemnly resolved to build in our country a society founded on the principles of freedom, justice, fraternity and concord:

AND WHEREAS those principles can only be realized in a democratic society in which the Executive is accountable to a Legislature composed of elected members and representative of the people, and also a Judiciary which is independent and dispenses justice without fear or favour, thereby ensuring that all human rights are preserved and protected and that the duties of every person are faithfully discharged:

NOW, THEREFORE, THIS CONSTITUTION IS ENACTED BY THE CONSTITUENT ASSEMBLY OF THE UNITED REPUBLIC OF TANZANIA, on behalf of the People, for the purpose of building such a society and ensuring that Tanzania is governed by a Government that adheres to the principles of democracy and socialism.

ADMINISTRATION OF JUSTICE IN THE UNITED REPUBLIC OF TANZANIA

107 A – (1). As the authority and responsibility to administer justice is vested in the Judiciary of the United Republic of Tanzania and the Judiciary for Zanzibar no other organ of government including Parliament shall have final authority on matters pertaining to the administration of justice.

(2). In adjudicating cases of both a civil and criminal nature, the court shall subject to the law, apply the following principles –

- (a) justice shall be done to all irrespective of their social or economic status
- (b) justice shall not be delayed
- (c) adequate compensation shall be awarded to victims of wrongs caused by other people and in accordance with the law may be enacted by Parliament

(d) reconciliation between parties shall be promoted.

107 B - In discharging the responsibility of administering justice, the courts shall freely adjudicate cases guided by the provisions of the Constitution and the laws of the State.

B: CONSTITUTION OF THE REPUBLIC OF UGANDA, 1995**CHAPTER EIGHT****THE JUDICIARY****Administration of Justice**

126. (1) Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people.

(2) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principal-

- (a) justice shall be done to all irrespective of their social or economic status;
- (b) justice shall not be delayed;
- (c) adequate compensation shall be awarded to victims of wrongs;
- (d) reconciliation between parties shall be promoted; and
- (e) substantive justice shall be administered without undue regard to technicalities.

127. parliament shall make law providing for participation of the people in the administration of justice by the courts.

128. (1) In the exercise of judicial power, the courts shall be independent and shall not be subject to the control or direction of any person or authority.

(2) No person or authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.

(3) All organs and agencies of the State shall accord to the courts such assistance as may be required to ensure the effectiveness of the courts.

(4) A person exercising judicial power shall not be liable to any action or suit for any act or omission by that person in the exercise of judicial power.

(5) The administrative expenses of the Judiciary including all salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the Judiciary, shall be charged on the Consolidated Fund.

(6) The Judiciary shall be self-accounting and may deal directly with the Ministry responsible for finance in relation to its finances.

(7) The salary, allowances, privileges and retirement benefits and other conditions of service of a judicial officer or other person exercising judicial power, shall not be varied to his or her disadvantage.

(8) The office of the Chief Justice, Deputy Chief Justice, Principal Judge, a Justice of the Supreme Court, a Justice of Appeal or a judge of the High Court shall not be abolished when there is a substantive holder of that office.

129. (1) The judicial power of Uganda shall be exercised by the Courts of Judicature which shall consist of-

- (a) the Supreme Court of Uganda;
- (b) the Court of Appeal of Uganda;
- (c) the High Court of Uganda; and
- (d) such subordinate courts as Parliament may by law establish, including Qadhis' courts for marriage, divorce, inheritance of property and guardianship, as may be prescribed by Parliament.

(2) The Supreme Court, the Court of Appeal and the High Court of Uganda shall be superior courts of record and shall each have all the powers of such a court.

(3) Subject to the provisions of this Constitution, parliament may make provision for the jurisdiction and procedure of the courts.

The Supreme Court of Uganda

130. The Supreme Court shall consist of=

- (a) the Chief Justice; and
- (b) such number of Justices of the Supreme Court not being less than six, as Parliament may by law prescribe.

131. (1) The Supreme Court shall be duly constituted at any sitting if it consists of an uneven number not being less than five members of the Court.

(2) When hearing appeals from decisions of the Court of Appeal sitting as a Constitutional Court, the Supreme Court shall consist of a full bench of all members of the Supreme Court; and where any of them is not able to attend, the President shall, for that purpose, appoint an Acting Justice under clause (2) of article 142 of this Constitution.

(3) The Chief Justice shall preside at each sitting of the Supreme Court and in the absence of the Chief Justice, the most senior member of the Court as constituted shall preside.

132. (1) The Supreme Court shall be the final court of appeal.

(2) An appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law.

(3) Any party aggrieved by a decision of the Court of Appeal sitting as a Constitutional Court is entitled to appeal to the Supreme Court against the decision; and accordingly, an appeal shall lie to the Supreme Court under clause (2) of this article.

(4) The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law.

133. (1) The Chief Justice

(a) shall be the head of the Judiciary and shall be responsible for the administration and supervision of all courts in Uganda; and

(b) may issue orders and directions to the courts necessary for the proper and efficient administration of justice.

(2) Where the office of the Chief justice is vacant or where the Chief Justice is for any reason unable to perform the functions of his or her office, then until a person has been appointed to and has assumed the functions of that office or until the Chief Justice has resumed the performance of those functions, those functions shall be performed by the Deputy Chief Justice.

The Court of Appeal of Uganda.

134. (1) The Court of Appeal of Uganda shall consist of-

(a) the Deputy Chief Justice; and

(b) such number of Justices of Appeal not being less than seven as Parliament may by law prescribe .

(2) An appeal shall lie to the Court of Appeal from such decisions of the High Court as may be prescribed by law.

135. (1) The Court of Appeal shall be duly constituted at any sitting if it consists of an uneven number not being less than three members of the Court.

(2) The Deputy Chief Justice shall preside at each sitting of the court and in the absence of the Deputy Chief Justice, the most senior member of the Court as constituted shall preside.

(3) The Chief Justice, in Consultation with the Deputy Chief Justice, may create divisions of the Court of Appeal as the Chief Justice may consider necessary-

- (a) consisting of such numbers of justices of Appeal as may be assigned to them by the Chief Justice;
- (b) sitting at such places in Uganda as the Chief Justice may, after consultation with the Attorney-General, by statutory order, determine.

136. (1) Subject to the provisions of article 133 of this Constitution, the Deputy Chief Justice shall-

- (a) deputise for the chief Justice as and when the need arises;
- (b) be the head of the Court of Appeal and in that capacity assist the chief Justice in the administration of that Court; and
- (c) perform such other functions as may be delegated or assigned to him or her by the Chief Justice.

(2) Where-

- (a) the office of the Deputy Chief Justice is vacant; or
- (b) the Deputy Chief Justice is acting as Chief Justice; or
- (c) the deputy Chief Justice is for any reason unable to perform the functions of his or her office;

then, until a person has been appointed to and has assumed the functions of the office Deputy Chief Justice, those functions shall be performed by a Justice of the Supreme Court or a Justice of Appeal designated by the President, after consultation with the Chief Justice, or the acting Chief Justice, as the case may be.

137. (1) any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.

(2) When sitting as a Constitutional Court, the Court of Appeal shall consist of a bench of five members of that Court.

(3) A person who alleges that-

- (a) an Act of Parliament or any other law or anything in or done under the authority of any law; or
- (c) any act or omission by any person or authority,

is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.

(4) Where upon determination of the petition under clause (3) of this article the Constitutional Court considers that there is need for redress in addition to the declaration sought, the Constitutional court may-

- (a) grant an order of redress; or

(b) refer the matter to the High Court to investigate and determine the appropriate redress.

(5) Where any question as to the interpretation of this Constitution arises in any proceedings in a court of law other than field Court Martial, the Court-

(a) may, if it is of the opinion that the question involves a substantial question of law; and

(b) shall, if any party to the proceedings requests it to do so, refer the question to the Constitutional Court for decision in accordance with clause(1) of this article.

(6) Where any question is referred to the Constitutional Court under clause (5) of this article, the Constitutional Court shall give its decision on the question and the court in which the question arises shall dispose of the case in accordance with that decision.

(7) Upon a petition being made or a question being referred under this article, the court of Appeal shall proceed to hear and determine the petition as soon as possible and may, for that purpose, suspend any other matter pending before it.

138. (1) The High Court of Uganda shall consist of-

(a) the Principal Judge; and

(b) such member of judges of the High Court as may be prescribed by Parliament.

(2) The High Court shall sit in such places as the Chief Justice may, in consultation with the principal judge, appoint; and in so doing, the Chief Justice shall, as far as practicable, ensure that the High Court is accessible to all the people.

139. (1) The High Court shall, subject to the provisions of this constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law.

(2) Subject to the provisions of this Constitution and any other law, the decisions of any court lower than the High Court shall be appealable to the High Court.

140. (1) Where any question is before the High Court for determination under clause (1) of article 86 of this Constitution, the High Court shall proceed to hear and determine the question expeditiously and may, for that purpose, suspend any other matter pending before it.

(2) This article shall apply in a similar manner to the Court of Appeal and the Supreme Court when hearing and determining appeals on questions referred to in clause (1) of this article.

141. (1) Subject to the provisions of article 133 of this Constitution, the Principal Judge shall –

- (a) be head of the High Court, and shall, in that capacity, assist the Chief Justice in the administration of the High Court and subordinate courts; and
- (b) perform such other functions as may be delegated or assigned to him or her by the Chief Justice.

(2) Where –

- (a) the office of Principal Judge is vacant; or
- (b) the Principal Judge is for any reason unable to perform the functions of his or her office,

then, until a person has been appointed to and has assumed the functions of that office, or until the Principal Judge has resumed those functions, those functions shall be performed by a judge of the High Court designated by the President after consultation with the Chief Justice.

Appointments, Qualifications and Tenure of Office of Judicial Officers

142. (1) The Chief Justice, the Deputy Chief Justice, the Principal Judge, a Justice of the Supreme Court, a Justice of Appeal and a Judge of the High Court shall appointed by the President acting on the advise of the Judicial Service Commission and with the approval of Parliament.

(2) Where –

- (a) the office of a Justice of the Supreme Court or a Justice of Appeal or a Judge of the High Court is vacant; or
- (b) a justice of the Supreme Court or a Justice of Appeal or a Judge of the High Court is for any reason unable to perform the functions of his or her office; or
- (c) the Chief Justice advises the Judicial Service Commission that the state of business in the Supreme Court, Court of Appeal or the High Court so requires,

the President may, acting on the advise of the Judicial Service Commission, appoint a person qualified for appointment as a Justice of the Supreme Court or a Justice of Appeal or a Judge of the High Court to act as such a Justice or Judge even though that person has attained the age prescribed for retirement in respect of that office.

(3) A person appointed under clause (2) of this article to act as a Justice of the Supreme Court, a Justice of Appeal or a Judge of the High Court shall continue to act for the

period of the appointment or, if no period is specified, until the appointment is revoked by the President acting on the advice of the Judicial Service Commission, whichever is the earlier.

143. (1) A person shall be qualified for appointment as –

- (a) Chief Justice, if he or she has served as a Justice of the Supreme Court of Uganda or of a court having similar jurisdiction or has as an advocate for a period not less than twenty years before a court having unlimited jurisdiction in civil and criminal matters;
- (b) Deputy Chief Justice or Principal Judge, if he or she has served as a Justice of the Supreme Court or as a Justice of Appeal or as a Judge of the High Court or a court of similar jurisdiction to such a court or has practiced as an advocate for a period not less than fifteen years before a court having unlimited jurisdiction in civil and criminal matters;
- (c) A Justice of Appeal, if he or she has served as a Judge of the High Court or a court having similar or higher jurisdiction or has practiced as an advocate for a period not less than fifteen years before a court having unlimited jurisdiction in civil and criminal matters;
- (d) A Justice of Appeal, if he or she has served as a Judge of the High Court or a court having similar or higher jurisdiction or has practiced as an advocate for a period not less than ten years before a court having unlimited jurisdiction in civil and criminal matters or is distinguished jurist and an advocate of not less than ten years standing;
- (e) A Judge of the High Court, if he or she is or has been a Judge of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from any such court or has practiced as an advocate for a period not less than ten years before a court having unlimited jurisdiction in civil and criminal matters.

(2) Any period during which a person has practiced as a public officer holding an office for which qualifications as an advocate is required, shall be counted in the calculation of any period or practice required under clause (1) of this article even though that person does not have a practicing certificate.

144. (1) A judicial officer may retire at any time after attaining the age of sixty years, and shall vacate his or her office-

- (a) in the case of the Chief Justice, the Deputy Chief Justice, a Justice of the Supreme Court and a Justice of Appeal, on attaining the age of seventy years; and
- (b) in the case of the Principal Judge and a Judge of the High Court, on attaining the age of sixty five years; or
- (c) in each case, subject to clause (7) of article 128 of this Constitution, on attaining such other age as may be prescribed by Parliament by law;

but a judicial officer may continue in office after attaining the age at which he or she is required by this clause to vacate office, for a period not exceeding three months necessary to enable him or her to complete any work pending before him or her.

- (2) A judicial officer may be removed from office only for-
- (a) inability to perform the functions of his or her office arising from infirmity of body or mind;
 - (b) misbehaviour or misconduct; or
 - (c) incompetence;

but only in accordance with the provisions of this article.

(3) The President shall remove a judicial officer if the question of his or her removal has been referred to a tribunal appointed under clause (4) of this article and the tribunal has recommended to the President that he or she ought to be removed from office on any ground described in clause (2) of this article.

(4) The question whether the removal of a judicial officer should be investigated shall be referred to the President by either the Judicial Service Commission or the Cabinet with advise that the President should appoint a tribunal; and the President shall then appoint a tribunal consisting of-

- (a) in the case of the Chief Justice, the Deputy Chief Justice or the Principal Judge, five persons who are or have been Justices of the Supreme Court or are or have been judges of a court having similar jurisdiction or who are advocates of at least twenty years standing; or
- (b) in the case of a Justice of the Supreme Court or a Justice of Appeal, three persons who are or have been Justices of the Supreme Court or who are or have been judges of a court of similar jurisdiction or who are advocates of at least fifteen years standing; or
- (c) in the case of a Judge of the High Court, three persons who are or have held office as Judges of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from such a court or who are advocates of at least ten years standing.

(5) If the question of removing a judicial officer is referred to a tribunal under this article, the President shall suspend the judicial officer from performing the functions of his or her office.

(6) A supervision under clause (5) of this article shall cease to have effect if the tribunal advises the President that the judicial officer suspended should not be removed.

(7) For the purposes of this article, "judicial officer" means the Chief Justice, the Deputy Chief Justice, the Principal Judge, a Justice of the Supreme Court, a Justice of Appeal or a judge of the High Court.

145. (1) There shall be in the Judiciary the office of Chief Registrar and such number of Registrars as Parliament may by law prescribe.

(2) The Chief Registrar and a Registrar shall be appointed by the President on the advice of the Judicial Service Commission.

Judicial Service Commission

146. (1) There shall be a Judicial Service Commission.

(2) The Judicial Service Commission shall, subject to clause (3) of this article, consist of the following persons who shall be appointed by the President with the approval of Parliament-

- (a) a Chairperson and a Deputy Chairperson who shall be persons qualified to be appointed as Justices of the Supreme Court, other than the Chief Justice, the Deputy Chief Justice and the Principal Judge;
- (b) one person nominated by the Public Service Commission;
- (c) two advocates of not less than fifteen years' standing nominated by the Uganda Law Society;
- (d) one Judge of the Supreme Court nominated by the President in consultation with the Judges of the Supreme Court, the Justices of Appeal and Judges of the High Court; and
- (e) two members of the public, who shall not be lawyers, nominated by the President.

(3) The Attorney General shall be ex-officio member of the Commission.

(4) The Chief Justice, the Deputy Chief Justice and Principal Judge shall not be appointed to be Chairperson, Deputy Chairperson or member of the Judicial Service Commission.

(5) A person is not qualified to be appointed a member of the Judicial Service Commission unless the person is of high moral character and proven integrity.

(6) The office of Chairperson shall be full-time and a person shall not engage in private legal practice while holding that office.

(7) Subject to the provisions of this article, a member of the Judicial Service Commission shall vacate his or her office-

- (a) at the expiration of four years from the date of his or her appointment but is eligible for reappointment for one more term; or
- (b) if he or she is elected or appointed to any office determined by Parliament to be likely to compromise the independence of the Judicial Service Commission; or
- (c) on being removed by the President; but the President may only remove a member for inability to perform the functions of his or her office arising from infirmity of body or mind or for misbehaviour, misconduct or incompetence.

(8) There shall be a Secretary to the Judicial Service Commission who shall be appointed by the President on the advice of the Public Service Commission.

147. (1) The functions of the Judicial Service Commission are –

- (a) to advise the President in the exercise of the President's power to appoint persons to hold or act in any office specified in clause (3) of this article, which included power to confirm appointments, to exercise disciplinary control over such persons and to remove them from office;
- (b) subject to the provisions of this Constitution, to review and make recommendations on the terms and conditions or service of Judges and other judicial officers;
- (c) to prepare and implement programmes for the education of, and for the dissemination of information to judicial officers and the public about law and the administration of justice;
- (d) to receive and process people's recommendations and complaints concerning the Judiciary and the administration of justice and generally, to act as a link between the people and the Judiciary;
- (e) to advise the Government on improving the administration of justice; and
- (f) any other function prescribed by this Constitution or by Parliament.

(2) In the performance of its functions, the Judicial Service Commission shall be independent and shall not be subject to the direction or control of any person or authority.

(3) The offices referred to in paragraph (a) of clause (1) of this article are-

- (a) the office of the Chief Justice, the Deputy Chief Justice, the Principal Judge, a Justice of the Supreme Court, a Justice of Appeal and a Judge of the High Court; and
- (b) the office of Chief Registrar and Registrar.

148. Subject to the provisions of this Constitution, the Judicial Service Commission may appoint persons to hold or act in any judicial office other than the offices specified in clause (3) of article 147 of this Constitution and confirm appointments in and exercise disciplinary control over persons holding or acting in such offices and remove such persons from office.

149. Every judicial officer shall, before assuming the duties of his or her office, take and subscribe the oath of allegiance and the Judicial Oath specified in the Fourth Schedule to this Constitution.

150. (1) Subject to the provisions of this Constitution, Parliament may make laws providing for the structures, procedures and functions of the Judiciary.

(2) Without prejudice to clause (1) of this article, Parliament may make laws for regulating and facilitating the discharge by the President and the Judicial Service Commission of their functions under this Chapter.

151. In this Chapter, unless the context otherwise requires-

“ Judicial officer” means –

- (a) a Judge or any person who presides over a court or tribunal howsoever described;
- (b) the Chief Registrar or a Registrar of a court;
- (c) such other person holding any office connected with a court as may be prescribed by law.

C: CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1994

Courts and Administration of Justice

Judicial authority

165. (1) The judicial authority of the Republic is vested in the courts.
 (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
 (3) No person or organ of state may interfere with the functioning of the courts.
 (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
 (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

Judicial system

166. The courts are ­
 a. the Constitutional Court;
 b. the Supreme Court of Appeal;
 c. the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
 d. the Magistrates' Courts; and
 e. any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.

Constitutional Court

167. (1) The Constitutional Court consists of a President, a Deputy President and nine other judges.
 (2) A matter before the Constitutional Court must be heard by at least eight judges.
 (3) The Constitutional Court ­
 a. is the highest court in all constitutional matters;
 b. may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
 c. makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.
 (4) Only the Constitutional Court may ­
 a. decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
 b. decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;

- c. decide applications envisaged in section 80 or 122;
 - d. decide on the constitutionality of any amendment to the Constitution;
 - e. decide that Parliament or the President has failed to fulfil a constitutional obligation; or
 - f. certify a provincial constitution in terms of section 144.
- (5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.
- (6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court ­
- a. to bring a matter directly to the Constitutional Court; or
 - b. to appeal directly to the Constitutional Court from any other court.
- (7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.

Supreme Court of Appeal

168. (1) The Supreme Court of Appeal consists of a Chief Justice, a Deputy Chief Justice and the number of judges of appeal determined by an Act of Parliament.
- (2) A matter before the Supreme Court of Appeal must be decided by the number of judges determined by an Act of Parliament.
- (3) The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only ­
- a. appeals;
 - b. issues connected with appeals; and
 - c. any other matter that may be referred to it in circumstances defined by an Act of Parliament.

High Courts

169. A High Court may decide ­
- a. any constitutional matter except a matter that ­
 - i. only the Constitutional Court may decide; or
 - ii. is assigned by an Act of Parliament to another court of a status similar to a High Court; and
 - b. any other matter not assigned to another court by an Act of Parliament.

Magistrates' Courts and other courts

170. Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

Court procedures

171. All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation.

Powers of courts in constitutional matters

172. (1) When deciding a constitutional matter within its power, a court & shy;
- a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - b. may make any order that is just and equitable, including & shy;
 - i. an order limiting the retrospective effect of the declaration of invalidity; and
 - ii. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
- (2)
- a. The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
 - b. A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
 - c. National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
 - d. Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

Inherent power

173. The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

Appointment of judicial officers

174. (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
- (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.
- (3) The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the

President and Deputy President of the Constitutional Court and, after consulting the Judicial Service Commission, appoints the Chief Justice and Deputy Chief Justice.

(4) The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the President of the Constitutional Court and the leaders of parties represented in the National Assembly, in accordance with the following procedure:

- a. The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
- b. The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
- c. The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.

(5) At all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.

(6) The President must appoint the judges of all other courts on the advice of the Judicial Service Commission.

(7) Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.

(8) Before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.

Acting judges

175. (1) The President may appoint a woman or a man to be an acting judge of the Constitutional Court if there is a vacancy or if a judge is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the President of the Constitutional Court and the Chief Justice.

(2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.

Terms of office and remuneration

176. (1) A Constitutional Court judge is appointed for a non-renewable term of 12 years, but must retire at the age of 70.

(2) Other judges hold office until they are discharged from active service in terms of an Act of Parliament.

(3) The salaries, allowances and benefits of judges may not be reduced.

Removal

177. (1) A judge may be removed from office only if ­
- a. the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
 - b. the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.
- (2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.
- (3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1).

Judicial Service Commission

178. (1) There is a Judicial Service Commission consisting of ­
- a. the Chief Justice, who presides at meetings of the Commission;
 - b. the President of the Constitutional Court;
 - c. one Judge President designated by the Judges President;
 - d. the Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member;
 - e. two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;
 - f. two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;
 - g. one teacher of law designated by teachers of law at South African universities;
 - h. six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly;
 - i. four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces;
 - j. four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and
 - k. when considering matters specifically relating to a provincial or local division of the High Court, the Judge President of that division and the Premier, or an alternate designated by the Premier, of the province concerned.
- (2) If the number of persons nominated from within the advocates' or attorneys' profession in terms of subsection (1)(e) or (f) equals the number of vacancies to be filled, the President must appoint them. If the number of persons nominated exceeds the number of vacancies to be filled, the President, after consulting the relevant profession, must appoint sufficient of the nominees to fill the vacancies, taking into account the need to ensure that those appointed represent the profession as a whole.
- (3) Members of the Commission designated by the National Council of Provinces serve until they are replaced together, or until any vacancy occurs in their number. Other members who were designated or nominated to the Commission serve until they are replaced by those who designated or nominated them.

- (4) The Judicial Service Commission has the powers and functions assigned to it in the Constitution and national legislation.
- (5) The Judicial Service Commission may advise the national government on any matter relating to the judiciary or the administration of justice, but when it considers any matter except the appointment of a judge, it must sit without the members designated in terms of subsection (1) (h) and (i).
- (6) The Judicial Service Commission may determine its own procedure, but decisions of the Commission must be supported by a majority of its members.

Prosecuting authority

- 179. (1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of ­
 - a. a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
 - b. Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.
- (2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.
- (3) National legislation must ensure that the Directors of Public Prosecutions ­
 - a. are appropriately qualified; and
 - b. are responsible for prosecutions in specific jurisdictions, subject to subsection (5).
- (4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.
- (5) The National Director of Public Prosecutions ­
 - a. must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;
 - b. must issue policy directives which must be observed in the prosecution process;
 - c. may intervene in the prosecution process when policy directives are not complied with; and
 - d. may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:
 - i. The accused person.
 - ii. The complainant.
 - iii. Any other person or party whom the National Director considers to be relevant.
- (6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.
- (7) All other matters concerning the prosecuting authority must be determined by national legislation.

Other matters concerning administration of justice

180. National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including ­

- a. training programmes for judicial officers;
- b. procedures for dealing with complaints about judicial officers; and
- c. the participation of people other than judicial officers in court decisions.

APPENDIX 3 – LIST OF PERSONS MET

A. Dignitaries Visited

1. The Hon. The Chief Justice, Bernard Chunga, MBS, EBS, EGH
2. The Hon. Attorney General, S. Amos Wako

B. Members of the Judiciary

(i) The Official Judiciary Team to assigned to interact with the Panel¹

3. The Hon. Mr. Justice Tom Mbaluto, Judge of the High Court of Kenya²
4. The Hon. Mr. Justice Samuel Oguk, Judge of the High Court of Kenya³
5. The Hon. Lady Justice Kalpana Rawal, Judge of the High Court of Kenya
6. The Hon. Mr. William Ouko, Acting High Court Registrar⁴
7. The Hon. Ms. Jane Ondieki, Senior Principal Magistrate

(ii) At Dinner and Informally

8. The Hon. Mr. Justice Riaga S.C. Omolo, Judge of the Court of Appeal of Kenya
9. The Hon. Mr. Justice Msagha Mbogholi, Judge of the High Court of Kenya
10. The Hon. Ms. Jessie Lessit, Chief Magistrate
11. The Hon. Mr. Boaz Olao, Chief Magistrate
12. The Hon. Ms. Wanjiru Karanja, Senior Principal Magistrate
13. The Hon. Ms. Maureen Odera, Principal Magistrate
14. The Hon. Ms. Beatrice Thurania, Senior Resident Magistrate
15. Mr. Towett, Deputy Registrar (Protocol)

16. Mr. Vincent Kanyang'onda, Public Relations Manager, The Grand Regency Hotel⁵

¹ This team held a formal meeting with the Panel on Thursday 9 May 2002. A second meeting, fixed by mutual agreement for Monday 13 May 2002, aborted as the team did not show up.

² Also met at Dinner

³ Also met at Dinner

⁴ Also met at Dinner

⁵ Also attended the dinner hosted for the Judges.

(iii) At the Site Visits

17. The Hon. Mr. Joseph R. Karanja, Chief Magistrate (Machakos)
18. The Hon. Mr. Samuel Soita, Senior Resident Magistrate (Machakos)
19. Mr Sigu – Executive Officer (Machakos)
20. The Hon. Mr. C. O. Kanyangi, Chief Magistrate (Thika)
21. The Hon. Mrs Betty Rashid, Principal Magistrate (Thika)
22. District Magistrate II (Professional) (Thika)
23. District Magistrate II (Professional) (Thika)
24. *The Hon. Ms. Hannah Njeri Ndung'u, Senior Resident Magistrate (Kajiado)*
25. Executive Officer (Kajiado)

(iv) At Consultations

26. The Hon. Chief Kadhi, Sheikh Nasor Nahdy

C. THE ATTORNEY GENERAL'S OFFICE

27. The Hon. Director of Public Prosecutions, Uniter Pamela Kidulla

D. THE CONSTITUTION OF KENYA REVIEW COMMISSION

28. Prof. Yash Pal Ghai, Chairperson
29. Mr. P. L. O. Lumumba, Secretary
30. Ms. Sheila Karani, Legal Officer

E. THE LAW SOCIETY OF KENYA

(i) Members of the governing Council

31. Ms. Raychelle A. Omamo, Chairperson
32. Mr. Ahmednasir Abdullahi, Council Member
33. Mr. Patrick O. Kiage, Council Member
34. Mr. Harun M. M. Ndubi, Council Member⁶
35. Ms. Rose Waruinge, Council Member
36. Ms. Lucy Kambuni, Council Member

(ii) Senior Practising Advocates

37. Mr. Satish Gautama

⁶ Also the Executive Director of the Kituo cha Sheria (Legal Advice Centre), a leading Legal/ Human Rights NGO

- 38. Mr. Lee G. Muthoga⁷
- 39. Ms Lillian Mwaura⁸
- 40. Dr. Gibson Kamau Kuria⁹
- 41. Mr. Kathurima M'Inoti¹⁰

(iii) Younger Advocates

- 42. Mr. Amos W. Omolo
- 43. Mr. John Muu¹¹

F. THE INTERNATIONAL COMMISSION OF JURISTS KENYA SECTION

(i) Members of the governing Council

- 44. Mr. Mohammed Nyaoga, Chairperson
- 45. Ms. Mary Wangari, Vice-Chairperson¹²
- 46. Mr. Otiende Amollo, Secretary
- 47. Mr. Milton S. A. Makhandia, Treasurer
- 48. Mr. Swaleh Kanyeki, Council Member¹³
- 49. Mr. Wilfred Nderitu, Council Member

(ii) Members of the Secretariat

- 50. Ms. Kagwiria Mbogori, Executive Director¹⁴
- 51. Mr. Donald Deya, Deputy Executive Director
- 52. Mr. Peter Wendoh, Programme Assistant
- 53. Ms. Grace Wakesho Maingi, Programme Assistant
- 54. Mr. Jack Muriuki, Programme Officer
- 55. Mr. Samuel Mbithi, Programme Assistant
- 56. Ms. Norah M. Mutuku, Programme Intern

G. THE FEDERATION OF WOMEN LAWYERS – KENYA (FIDA)

- 57. Ms. Martha K. Koome, Chairperson
- 58. Ms. Nancy Kanyago, Programme Officer
- 59. Ms. Asha Hashmy, Programme Intern

⁷ A former Chair of LSK, ICJ(K), among many other posts

⁸ A former Chair of the National Council of Women of Kenya, among many other posts

⁹ Immediate former Chair of LSK, among other posts

¹⁰ Immediate former Chair of ICJ(K), among other posts

¹¹ Also submitted as a Muslim Legal Scholar

¹² Also a member of FIDA

¹³ Also submitted as a Muslim Legal Scholar

¹⁴ Also a member of FIDA

H. OTHER MEMBERS OF THE LEGAL/ HUMAN RIGHTS NGO NETWORK

- 60. Mr. Gichira Kibara, Executive Director, Centre for Governance and Development
- 61. Ms. Atieno Ndomo, Co-ordinator, The Basic Needs are Basic Rights Campaign
- 62. Mr. Harun Ndubi, Executive Director, Kituo cha Sheria (Legal Aid Centre)¹⁵
- 63. Mr. Mwalimu Mati, Programme Officer, Transparency International (Kenya Chapter)
- 64. Ms. Betty Maina, Executive Director, Institute of Economic Affairs
- 65. Mr. Okello Oketch, Acting Programmes Co-ordinator, Institute of Economic Affairs (IEA)

I. DONORS (At an informal round-table)

- 66. Mr. David Bell, Director, British Department for International Development – East Africa Office (DFIDEA)
- 67. Ms. Simone ellisOluoch-Olunya, British Department for International Development – East Africa Office (DFIDEA)
- 68. Mr. Francis Ang'ila, Human Rights, Democracy and Good Governance (HRDDGG) Advisor, Canadian International Development Agency (CIDA)
- 69. Ms. Elizabeth Odour-Noah, Assistant Country Representative, United Nations Development Programme (UNDP)
- 70. Mr. Thomas Ng'ang'a, Advisor, United States Agency for International Development (USAID)
- 71. Mr. Louis Aritho, German Development Co-operation (GTZ) – Nairobi Office

¹⁵ A veteran member of the governing Council of the Law Society of Kenya, who also acted as its Lead Counsel in the Commission of Inquiry into Tribal Clashes in Kenya (*The Akiwumi Commission*)