



Budget Brief

Analysis of Judiciary, Parliament, and Selected Constitutional Commissions and Independent Offices Funding for the Fiscal Year 2022/23

The Institute of Economic Affairs prepared this budget brief with the aim of providing a summary of the budgets of two branches of government—the Judiciary and Parliament—as well as a few constitutional commissions and independent offices. The main objectives of this analysis are to monitor judicial funding and identify issues that could enhance parliament’s allocations to the Judiciary and allow better service delivery for provision of the public good of justice administration. In order to provide this public good, the main priorities include quick resolution of cases and elimination of case backlogs. Regarding constitutional commissions and independent offices, they are small (in comparison to the three branches of government) and could easily be overlooked in the budget process, which is largely based on political bidding, given the oversight role that these institutions play in Kenya’s democratic framework.

A. Judiciary

The Kenyan Judiciary is one of the three branches of government established by Chapter 10, Article 159 of the Constitution. Its primary function¹ is to exercise the judicial authority granted by the people of Kenya and to serve as the independent custodian of justice. The Judiciary and its institutions² are tasked with the administration of justice, formulation and implementation of judicial policies and compilation of case law. The Judiciary comprises an elaborate system of courts, consisting of superior and subordinate courts operated by the respective judicial officers.

The Constitution of Kenya outlines a clear process for the allocation of resources to various branches of government. Article 221 (1) requires that at least two months before the end of each financial year, the Cabinet Secretary responsible for finance submits to the National Assembly estimates of the national government’s revenue and expenditure for the following financial year, to be tabled in the National Assembly. Article 221(2) states that the estimates referred to in clause (1) must include estimates for expenditure from the Equalization Fund and must be in the form and procedure prescribed by

¹The Judiciary. “The Judiciary Overview,” 2022. <https://www.judiciary.go.ke/about-us/overview/>.

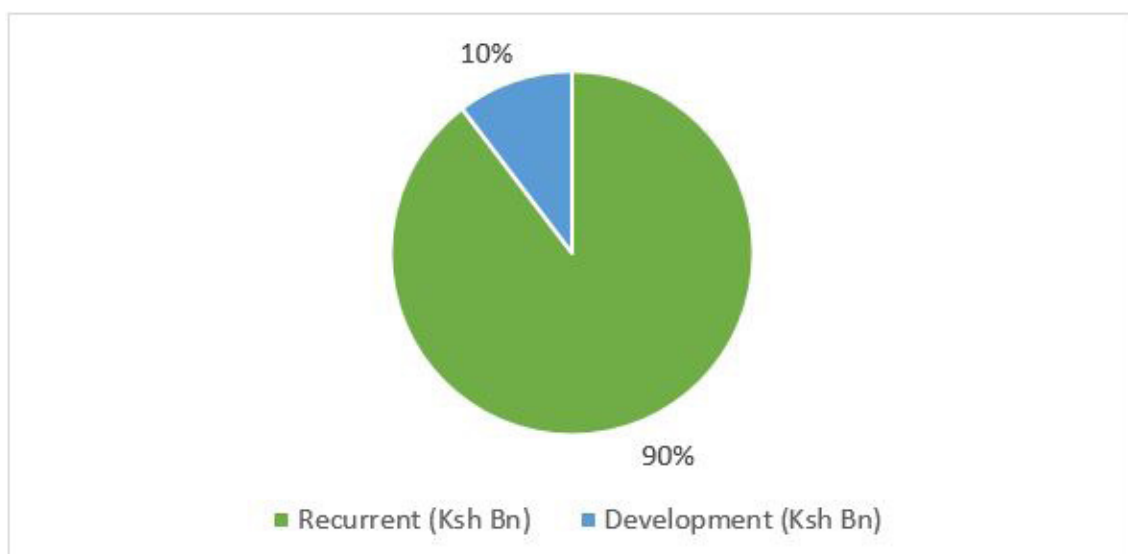
²Judicial Service Commission, Tribunals, Kenya Law and the Judiciary Training Institute

an Act of Parliament. To distinguish this from resource allocation to the Judiciary, the Constitution states in Article 173(3) that for each financial year, the Chief Registrar shall prepare estimates of expenditure for the following financial year and submit them to the National Assembly for debate and consequently approval with or without amendments.

1. Judiciary’s Budget 2022/2023

The Judiciary was allocated Ksh 18.30 billion in the financial year 2022/2023, an increase of Ksh 377 million from the previous year’s budget of Ksh 17.92 billion, equivalent to a 2% increase. Of that, almost 90% of the budget is recurrent while the rest is development expenditure. The total recurrent expenditure was Ksh 16.40 billion, while the development expenditure was Ksh 1.9 billion as shown in chart 1.

Chart 1: Judiciary’s Budget for the FY 2022/23



Source: Appropriations

A budget growth of 2% is less than the inflation rate, and given the two scenarios of 6% and 7% inflation rates, the budget would have increased to Ksh 18.99 and Ksh 19.20 billion, respectively, if it had been adjusted for inflation.

Table 1: Judiciary’s Budget if rising prices are factored

2005/06	Simulated Budget (Baseline= Ksh 17.92 bn)	Estimates 2022/2023 budget	What ought to have been added to Judiciary’s Budget (Ksh billion)
with 6% inflation	18.995	18.297	0.698
with 7% inflation	19.174	18.297	0.877

2. Allocations versus Resource Requirements

The IEA Kenya has consistently highlighted the perennial problem of inadequate Judiciary funding. This has also been documented widely in the Judiciary's institutional documents and other literature. Chief Justice Willy Mutunga noted that lack of resources compounded organizational problems³ within the Judiciary, exacerbating case backlog, inefficiencies and corruption. Chief Justice Maraga stated that funding challenges impeded the Judiciary's quest for modernization in a bid to enhance efficiency and reduce case backlogs⁴.

Some of the key findings on allocation versus resource requirement from the financial year 2022/2023 include;

- The Judiciary has a Kshs. 21.9 billion resource gap, which equates to 56% of the total resource requirement for FY 2022/23. The Recurrent Vote is underfunded by 52%, while the Development Vote is underfunded by 71%. The development vote is now solely funded by the Kenyan Government, as the World Bank project largely supported funding of capital projects in the judiciary (approximately 90% of development vote annually) from the fiscal year 2013/2014 ended in October 2021⁵.
- The resource gap for FY 2022/23, implies significant underfunding of key functions, which almost certainly means that the courts will continue to operate inefficiently.

Given that the budget for the financial year 2022/23 includes funding for the next general election, ensuring adequate funding to allow for timely resolution of electoral disputes, in addition to regular disputes, will be critical. Increased stakeholder engagement and advocacy with relevant institutions, such as Parliament's Budget and Appropriations Committee and the National Treasury, is required, with costs of efficiently resolving a dispute as well as the opportunity costs of underfunding demonstrated.

³Gainer, Maya. "Transforming the Courts: Judicial Sector Reforms in Kenya, 2011–2015." November 2015. https://successfultsocieties.princeton.edu/sites/successfultsocieties/files/MG_OGP_Kenya.pdf.

⁴Tanui, Carolyne. "Kenya: CJ Maraga Says E-Filing System Risks Collapse over Funding Gap." allAfrica.com, August 6, 2020. <https://allafrica.com/stories/202008060771.html>.

⁵Slide 31 of The Judiciary (2021). The Judiciary Budget for the FY 2022/23 And Medium Term. judiciary.go.ke.

3. The Budget Speech's promise to operationalize the Judiciary's fund

Since the adoption of the Constitution in 2010, the Judiciary Fund has not been operational. These are the two observations made by the IEA-Kenya on the Judiciary Fund;

- i. The Judiciary Fund was considered established when the Constitution entered into force under Article 173(1). According to Article 173(1), “a fund to be known as the Judiciary Fund is established, which shall be administered by the Chief Registrar of the Judiciary.” This eliminates the need for another law to re-establish the Fund. Article 173(5) of the Constitution only required Parliament to provide for the regulation of the Fund. As a result, the Judiciary Fund should be considered operational⁶.
- ii. According to the Budget and Appropriations Committee Report on Revenue and Expenditure Estimates for the Fiscal Year 2021/2022, the failure to operationalize the Judiciary Fund has forced the Judiciary to surrender funds collected each year in the form of court fees and fines to the National Treasury (Page 9)⁷. This report was published in June of 2021. The Committee points out that this is happening despite the Judiciary Fund Act of 2016, which allows the Judiciary to keep its appropriations, money from investments, fees, and levies.
- iii. The steps for the Judiciary Fund's operationalization have been completed, according to the Cabinet Secretary for National Treasury. These steps are: (1) enacting the Judiciary Fund Act and Regulations; (2) opening bank accounts at the Central Bank of Kenya for the Fund; (3) developing an appropriate budget for the Judiciary for the fiscal year 2022–2023; and, (4) improving IFMIS to support Judiciary Fund operations.

The Cabinet Secretary for National Treasury committed to the operationalization of the Judiciary Fund in the Budget Speech for the financial year 2022/2023 (paragraph 78), which will be administered by the Chief Registrar of the Judiciary, to meet the Judiciary's administrative expenses at the start of the fiscal year 2022/2023⁸. It remains to be seen whether the judicial operationalization will be fully implemented.

Conclusions

- The Judiciary should issue a post-budget analysis document that details the opportunity cost of the National Assembly allocating less than half of its resource requirements, along with clear illustrations of how it is slowing service delivery and efficiency in providing this public good. The document should explain how a lack of financial independence or adequate resources affects judicial independence.

⁶Kagume, Jackline, and Leo Kemboi. “Comments on the Judiciary Medium-Term Expenditure Framework (MTEF) Financial Year 2022/2023-2024/2025.” Institute of Economic Affairs Kenya, 2021.

⁷Budget and Appropriations Committee Report on the Estimates of Revenue and Expenditure for Financial Year 2021-2022

⁸CS National Treasury. “Budget Statement for FY 2022/2023,” April 2022. https://www.treasury.go.ke/wp-content/uploads/2021/06/Budget-Statement-for-the-FY-2022-23_F.pdf.

- To bolster its case, the Judiciary should rank its priorities so that they are consistent with those that will raise indicators of public service delivery. For example, increasing the number of judges and expanding access to courts in counties where none exist. This will increase public understanding of the judiciary's budget and political agreement on what should be Judiciary's budget.
- Parliament's top priority should be to clear the backlog of cases and strengthen the Judiciary's ability to provide this public good of dispute resolution. To meet filing demands at the Magistrates Court level, as well as special high courts such as the land and environment, and the Court of Appeal, the IEA proposes hiring more judicial officers and expanding court access.
 - Each magistrate annually resolved 827 cases, or 5 cases every two days, as shown by the IEA's study from the previous year. The Environment and Land Court solved 239 cases per judge, the Employment and Labour Relations Court solved 352 cases per judge, and the Court of Appeal solved 68 cases per judge⁹. Out of the 375,671 cases backlogged as of the end of the 2020/2021 financial year, the Magistrates' Courts had the highest percentage of cases at 73%, followed by the High Court at 18%. The Supreme Court and Small Claims Court both had the lowest case backlogs, at 0.012 and 0.003 percent, respectively. From this analysis, it is evident that Parliament's efforts should be to provide more judicial officers at magistrate's court and high court. As for the court of appeal, it should be to establish additional benches¹⁰.
 - Unless the number of judicial officers matches the number of cases, overall case resolution for filed and pending cases will remain suboptimal. Hiring additional judicial officers, particularly at Magistrates Courts and Court of Appeal Benches should be costed and prioritized in terms of resource requirements to Parliament.

B. Constitutional Commissions and Independent Offices

The Commissions and Independent Offices are established by Chapter 15 of Kenya's Constitution. Among these are the Judicial Service Commission, the National Police Service Commission, the Public Service Commission, and the Independent Policing Oversight Authority. The Independent Offices include the Controller of Budget and the Office of the Auditor-General. These offices play an important role in providing institutional oversight. The spending for constitutional commissions and independent offices has two distinct characteristics: it is typically smaller than that of state departments and the majority of it is recurrent. Any reduction in spending causes significant shocks and limits the ability of those institutions to carry out their constitutional functions.

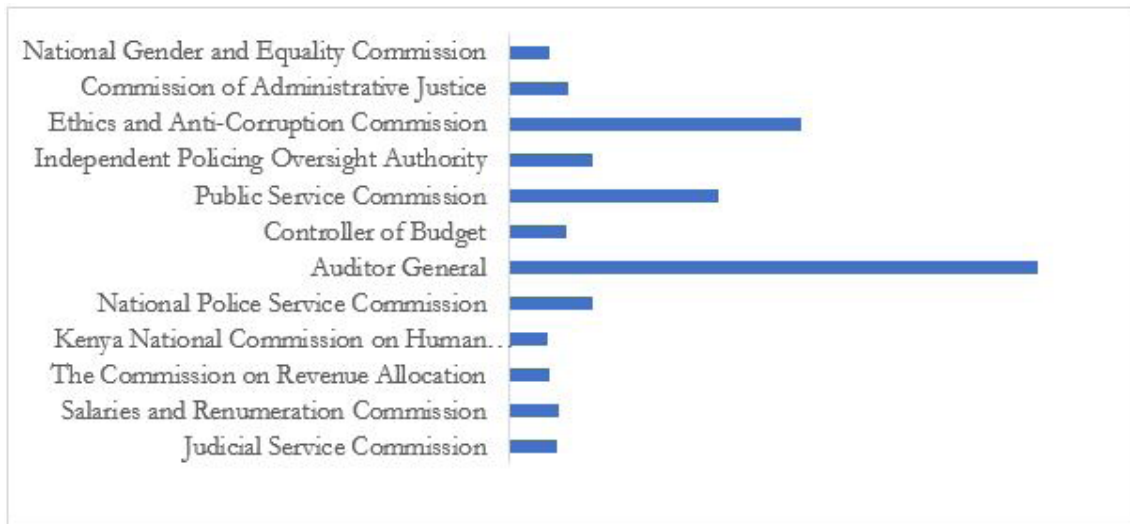
⁹Kemboi, Leo Kipkogei. "The Case Backlog Problem in Kenya's Judiciary and the Solutions." Institute of Economic Affairs, May 4, 2021. <https://ieakenya.or.ke/?wpdmdl=2138>.

¹⁰The Judiciary. "State of the Judiciary and the Administration of Justice Annual Report 2020/2021," 2021.

Given the political economy issues in Kenya concerning how these commissions shape the power and influence of the state’s mainstream organs such as the Executive and Parliament, these commissions sometimes face backlash from the institutions who hold the purse and control subsequent disbursements. For this reason, it is critical to track budget changes because some decisions may be informed by decisions made outside of fiscal policy space, by formal and informal power processes.

For the fiscal year 2022/2023, the Auditor-General was allocated Ksh 6.5 billion, the Ethics and Anti-Corruption Commission was allocated Ksh 3.58 billion, the Public Service Commission was allocated Ksh 2.58 billion, and the independent policing oversight authority was allocated Ksh 1.02 billion. These are considered some of the largest commissions given their fiscal positions (threshold of above Ksh 1 billion). Additionally, Ksh 724 million was allocated to the Commission on Administrative Justice, Ksh 702 million to the Controller of Budget, Ksh 464 million to the Kenya National Commission on Human Rights, and Ksh 587 million to the Judicial Service Commission, and Ksh 613 million to the Salaries and Remuneration Commission.

Chart 2: Constitutional Commissions and Independent Offices Budget 2022/2023 (Ksh Bn)



Source: Appropriations

Some Important Findings

1. An examination of 11 select commissions and independent offices reveals that they received an additional 1% budgetary allocation in the fiscal year 2022/2023 compared to the fiscal year 2021/2022 when allocations increased from Ksh 18.19 billion to Ksh 18.30 billion. The budgetary growth for the Commissions and Independent offices is lower than the 4% growth for the overall budget.

2. The Salaries and Remuneration Commission's budget was cut by nearly Ksh 7 million, which is equivalent to a 1% budget cut. At the moment, the SRC is at odds with Parliament over housing allowances and other critical income issues which are being contested in courts^{11,12}, and¹³.
3. The allocations to the Controller of Budget reduced from Ksh 2.28 billion in 2021/2022 to Ksh 702 million which is a 69% reduction.
4. The National Police Service Commission received the largest increase of 43%, from Ksh 720 million to Ksh 1.03 billion.
5. Given the meagre 1% increase in the overall budget of the select commissions, it is clear that new resources are not being added, but rather reallocated within the commissions and independent offices.

Table 2: Changes in allocations to Commissions and Independent Offices

No.		2021/2022 Budget (Ksh Bn)	2022/2023 Budget (Ksh Bn)	Changes
1	Judicial Service Commission	0.580	0.587	1%
2	Salaries and Renumeration Commission	0.620	0.613	-1%
3	Kenya National Commission on Human Rights	0.410	0.464	13%
4	National Police Service Commission	0.720	1.029	43%
5	Auditor General	5.860	6.508	11%
6	Controller of Budget	2.280	0.702	-69%
7	Public Service Commission	2.391	2.582	8%
8	Independent Policing Oversight Authority	0.950	1.025	8%
9	Ethics and Anti-Corruption Commission	3.326	3.579	8%
10	Commission of Administrative Justice	0.615	0.724	18%
11	National Gender and Equality Commission	0.437	0.483	11%
		18.189	18.297	1%

Source: Appropriations

¹¹Wangui, Joseph. "Kenya: MPs to Refund Sh2.7 billion Illegal House Allowances." allAfrica.com, December 7, 2021. <https://allafrica.com/stories/202112070063.html>.

¹²Mutua, John, and Edwin Mutai. "MPs' Pay up Sh40, 000 as Meeting, Travel Perks Cut." Business Daily, May 12, 2022. <https://www.businessdailyafrica.com/bd/economy/mps-pay-up-sh40-000-as-meeting-travel-perks-cut-3812458>.

¹³Kiplagat, Sam. "Supreme Court Declines to Stop SRC from Recovering Sh1.2bn Paid to MPs." Business Daily, March 1, 2022. <https://www.businessdailyafrica.com/bd/economy/supreme-court-declines-p-src-from-recovering-sh1-2bn-paid-to-mps-3733318>.

Conclusions and Key Takeaways

- Given the gravity of the corruption problem, the National Assembly should increase the resources available to the Office of the Auditor-General in order to broaden the scope of audits, broaden the type of audits to include more performance audits, and increase the frequency of special audits and forensic audits. The budget shortfall is a significant policy issue, affecting the Auditor General's constitutional mandate and making it difficult for Parliament and other oversight agencies to catch up with the typologies of various public sector crimes and corruptions.

Table 3: Office of the Auditor General's Resource Requirement and Allocation

Financial Year	Resource Requirement	Budget Allocation	Budget Shortfall (%)
2016/2017	8.253	4.428	-46%
2017/2018	8.722	5.296	-39%
2018/2019	9.206	5.968	-35%
2019/2020	8.88	5.505	-38%
2020/2021	8.9	5.525	-38%

Source: Office of the Auditor General (2022), Summary Report for the 2020/2021

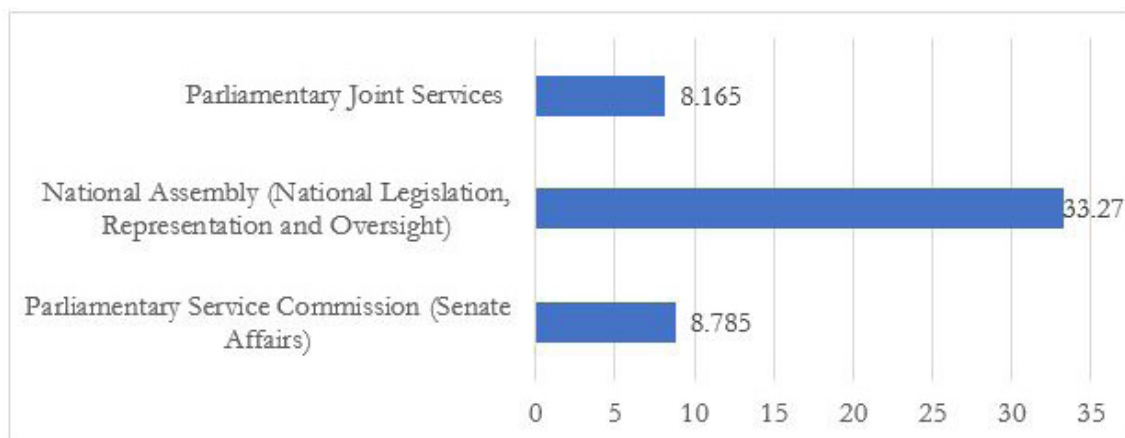
- As demonstrated by the allocations to the Salaries and Remuneration Commission, the role of commissions and independent offices explains the political economy considerations by the National Assembly in allocating resources. The advocacy by stakeholders should revolve around urging members of Parliament to be fair and just in their decisions and allow institutions that play an important role in managing public affairs to be just.
- Different stakeholders, including Civil Society organizations, the Parliamentary Budget Office, and the Budget Appropriations committee of Parliament, should estimate the costs associated with the consumer mandate of the constitutional commissions. These estimates should then be used as the basis for reaching an agreement and deciding how much funding should be given to each individual commission.

Conclusions and Key Takeaways

C. Parliament

In the financial year 2022/2023, Parliament has set aside Ksh 50.22 billion for its own use. About Ksh 8.165 billion has been allocated to Parliamentary Joint Services, Ksh 33.27 billion to National Assembly (National Legislation, Representation, and Oversight), and Ksh 8.785 billion to Parliamentary Service Commission (Senate Affairs) out of the overall budget of Ksh 50.22 billion.

Chart 3: Parliaments Budget 2022/2023 (Ksh Billion)



Source: Appropriations and PSC Budget Proposal¹⁴

In comparison to the previous financial year, the overall budget for Parliament has increased by 33 percent, or Ksh 12.34 billion. All three major votes, Parliamentary Service Commission (Senate Affairs), National Assembly (National Legislation, Representation, and Oversight), and Parliamentary Joint Services, have increased significantly, with 33%, 42%, and 5%, respectively. The budgetary increase for the Senate Affairs Program is due to expenses associated with the start of the 13th Parliament, which is scheduled to begin in the Financial Year 2022/2023.

Table 4: Changes to Parliaments Budget

	2021/2022 Budget	2022/2023 Budget	Changes (%)
Parliamentary Service Commission (Senate Affairs)	6.612	8.785	33%
National Assembly (National Legislation, Representation and Oversight)	23.502	33.27	42%
Parliamentary Joint Services	7.768	8.165	5%
Parliamentary Budget in Total	37.882	50.22	33%

The explanation for the significant increase in resources for Parliament also includes sendoff packages and other incentives for outgoing and incoming Members of Parliament. Among the incentives included in the budget are car grants for each MP, a send-off package for their aides, and additional funds for a subsidized mortgage and medical insurance payments. The sendoff packages and other incentives form 21.9% of the entire Parliamentary budget.

¹⁴Parliamentary Service Commission. “Estimates of Recurrent and Development Expenditure of the Parliamentary Service Commission for the Year Ended 30th June 2023,” 2022.

Conclusions

- The priority of resource allocations should go to parliament's ability to build capacity for oversight, provide checks and balances, and represent the people of Kenya.
- In comparison to other institutions outlined in the Constitution, such as the Judiciary and Constitutional Commissions, Parliament, as the purse holder, faces no resource constraints.
- The Legislature should justify its spending and priorities to prove that they are fair in decisions to allocate resources to the Judiciary, Constitutional Commissions, and the Executive.

NOTES

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The Institute of Economic Affairs is a public policy think tank which seeks to promote pluralism of ideas through open, active and informed debate on public policy issues by conducting policy research and analysis. IEA is independent of political parties, pressure groups and lobbies, or any other partisan interests.

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