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# **Problem-Driven Political Economy Analysis of Judiciary's Resource Allocations**

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# **Problem-Driven Political Economy Analysis of Judiciary's Resource Allocations**

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# Abbreviation

BAC	Budget and Appropriations Committee
CRJ	Chief Registrar of the Judiciary
CUC's	Court User Committees
CS	Cabinet Secretary
CSO's	Civil Society Organizations
DPP	Director of Public Prosecution
EACC	Ethics and Anti-Corruption Commission
GJLO's	Governance, Justice, Law and Order Sector
IFMIS	Integrated Financial Management Information System
JLAC	Justice, and Legal Affairs Committee
JSC	Judicial Service Commission
KMJA	Kenya Magistrates Judges Association
LSK	Law Society of Kenya
MTEF	Medium Term Expenditure Framework
NGO's	Non-Governmental Organizations
NCAJ	National Council for Administration of Justice
NPS	National Police Service
PFM	Public Finance Management
PS	Principle Secretary
SOJAR	State of the Judiciary and Administration of Justice Report
SAGA's	Semi-Autonomous Government Agencies
SWG's	Sector Working Group's

# 1.0 Introduction and Policy Concerns

The promulgation of the 2010 Constitution introduced the separation of powers and explicitly set out functions for the Executive, Parliament, Judiciary and Constitutional organs. Parliament appropriates funds for expenditure by the National Government and other state organs and exercises oversight over national revenue and its expenditure<sup>1</sup>. The judiciary must be able to impartially adjudicate matters involving government or citizens, it must be independent of both<sup>2</sup>. Therefore, through the powers given by the Constitution, Parliament is a dominant player in the politics of resource allocation in Kenya.

Between the 2012/2013 financial year and the 2018/2019 financial, allocations by the Judiciary expanded by 38% while allocations to Parliament expanded by 153%. While Parliament which has the Constitutional powers of being the Purse holder almost tripled its allocations within the period surveyed, Judiciary only got an additional Ksh 4.8 billion. This confirms the powerful position that Parliament plays in resource allocation. Between the 2018/2019 and 2020/2021 financial years, Judiciary's allocation increased by 1%, while Parliament increased by 11%.

**Table 1: Allocations to Judiciary and Parliament**

Entity	2012/2013	2018/19	2020/2021
Judiciary (Ksh Bn)	12.5	17.3	17.42
Parliament (Ksh Bn)	13.9	35.14	39.15
Growth in Judiciary (%)		38%	1%
Growth in Parliament (%)		153%	11%

Source: IEA Budget Guide (Various issues)<sup>3</sup>

The Constitution of Kenya provides a straightforward process for how resources are allocated to arms of government. Article 221 (1) At least two months before the end of each financial year, the Cabinet Secretary responsible for finance shall submit to the National Assembly estimates of the revenue and expenditure of the national government for the next financial year to be tabled in the National Assembly. Article 221(2) specifies these estimates referred to in clause (1) must include estimates for

<sup>1</sup>National Assembly. "Factsheet No 28: How Parliament Works." The National Assembly of Kenya, 2018.

<sup>2</sup>Jackson, Jeffrey. "Adequate Court Funding, and Inherent Judicial Powers, 52 Md." L. Rev 217, no. 1 (1993). <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2859&context=mlr>.

<sup>3</sup>IEA Budget Guides for various years can be accessed over various years here

expenditure from the Equalization Fund; and should be in the form, and according to the procedure, prescribed by an Act of Parliament. To ringfence resource allocations to legislature and Judiciary, the Constitution under Article 173(3) that each financial year, the Chief Registrar shall prepare estimates of expenditure for the following year, and submit them to the National Assembly for approval.

Article 173(1) establishes a fund to be known as the Judiciary Fund which shall be administered by the Chief Registrar of the Judiciary. Article 173 (2) specifies that the Fund shall be used for administrative expenses of the Judiciary and such other purposes as may be necessary for the discharge of the functions of the Judiciary. Article 173(4) says that upon approval by the National Assembly, the expenditure of the Judiciary shall be a charge on the Consolidated Fund and the funds shall be paid directly into the Judiciary Fund. A charge on the consolidated fund implies that the expenditure for the Judiciary is the first charge just like public debt, pension, and salaries for constitutional officeholders.

The Constitution ringfences the allocations to Judiciary from interference. Once the Appropriation Act is passed “the Cabinet Secretary for Finance(National Treasury) has no control over the Parliamentary or Judiciary Budget. However, he has, with the approval of the National Assembly, limited control over the National Government’s budget Under Article 225 of the Constitution”<sup>4</sup>. The Budget and Appropriations Committee Report on the Estimates of Revenue and Expenditure for Financial Year 2021/2022 notes that the failure to operationalize the Judiciary Fund has compelled the Judiciary to surrender funds collected every year in terms of court fees and fines to the National Treasury (Page 9)<sup>5</sup>.

The Chief Justice warned that resource allocation for the Judiciary has a ripple effect on all services that are offered by this organ of government and particularly its ability to discharge its core function of adjudication of disputes as required by Article 159 of the Constitution<sup>6</sup>. The National Treasury at that time was undertaking fiscal consolidation which affected Judiciary’s budget. Circuit courts of appeal in Nairobi, Mombasa, Nakuru, Eldoret and Nyeri had been suspended and 53 mobile courts working in remote areas had also stopped working owing to a lack of money for vehicles and fuel<sup>7</sup>.

There is a recurring issue of Inadequate funding for the Judiciary. This had been widely documented in Judiciary’s institutional documents and other literature. Chief Justice Willy Mutunga for a lack of resources compounded organizational problems<sup>8</sup>. Maraga said funding challenges have continued to impede Judiciary’s quest for modernization in a bid to enhance efficiency and reduce case backlogs<sup>9</sup>.

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<sup>4</sup>The Judiciary. “Statement By Hon. David K. Maraga, Chief Justice And President of The Supreme Court of Kenya, on The Judiciary Budget Cuts. November 4, 2019.”

<sup>5</sup>Budget and Appropriations Committee Report on the Estimates of Revenue and Expenditure for Financial Year 2021-2022

<sup>6</sup>The National Assembly. “National Assembly, Judiciary Hold Consultative Forum, Agree to Ringfence the JSC Budget.” March 10, 2022. <http://www.parliament.go.ke/national-assembly-judiciary-hold-consultative-forum-agree-ringfence-jsc-budget>.

<sup>7</sup>Miriri, Duncan, and Humphrey Malalo. “Kenya Starving Judiciary of Funds, Chief Justice Says.” Reuters, November 4, 2019, sec. Top News. <https://www.reuters.com/article/ozatp-uk-kenya-politics-idAFKBN1XE1OY-OZATP>.

<sup>8</sup>Gainer, Maya. “Transforming the Courts: Judicial Sector Reforms in Kenya, 2011–2015.” November 2015. [https://successfultsocieties.princeton.edu/sites/successfultsocieties/files/MG\\_OGP\\_Kenya.pdf](https://successfultsocieties.princeton.edu/sites/successfultsocieties/files/MG_OGP_Kenya.pdf).

<sup>9</sup>Tanui, Carolyne. “Kenya: CJ Maraga Says E-Filing System Risks Collapse over Funding Gap.” allAfrica.com, August 6, 2020. <https://allafrica.com/stories/202008060771.html>.

The main objective of this political economy study is to analyse the policy actions of different players to establish incentives and institutional constraints that explain the resource allocation to the Judiciary.

## Policy Problems

The political economy analysis seeks to address the following key fundamental questions. They are as follows;

1. What explains the political economy constraints in the resource allocations to the Judiciary?
2. Has the question of adequate funding for the Judiciary been appropriately defined and addressed?
3. What are the structural factors that explains the priorities and prioritization process of the proposed allocations to the Judiciary by the National Assembly?
4. What explains the decisions and logic of behaviours of different stakeholders (i.e. National Assembly, National Treasury) involved in resource allocations towards Judicial functions?

## Methodology

The framework adopted has three different phases which are interrelated which include identification of the problem, diagnosis of the problem and consideration of possible change processes. We rely on different methodologies which include Fritz, Levy and Ort (2013)<sup>10</sup>, Harris (2013)<sup>11</sup>, and Whaites (2017)<sup>12</sup>.

In Fritz, Levy and Ort (2014) the problem-driven approach broadly comprises three steps which are problem identification, and analysis.

- The first step is to identify a specific policy problem like in this case, often one where technical analysis and engagement on their own have failed to gain operational traction. The challenge could be narrowly focused: for example, on what to do about continued low judiciary allocations. It could also be framed more broadly, such as how best to pursue further an efficient justice sector system to resolve conflicts, promote rule of law, democracy and how promote a more level playing field for persons, businesses, levels of government or how to help a country deal with fundamental structural conflicts such as those relating to public safety.
- The second step as per Fritz, Levy and Ort should consist of analysing why the observed, dysfunctional patterns are present, that is, the political economy drivers. This step should cover three dimensions:
  - o Relevant structural factors that influence stakeholder positions

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<sup>10</sup>Fritz, Verena, Brian Levy, and Rachel Ort. "Problem-Driven Political Economy Analysis the World Bank's Experience Public Sector Governance," 2014. <https://openknowledge.worldbank.org/bitstream/handle/10986/16389/9781464801211.pdf>.

<sup>11</sup>Harris, Daniel. "Applied Political Economy Analysis : A Problem-Driven Framework (Methods and Resources)." ODI, March 2013.

<sup>12</sup>Alan Whaites, "The Beginner's Guide to Political Economy Analysis (PEA)," July 2017.

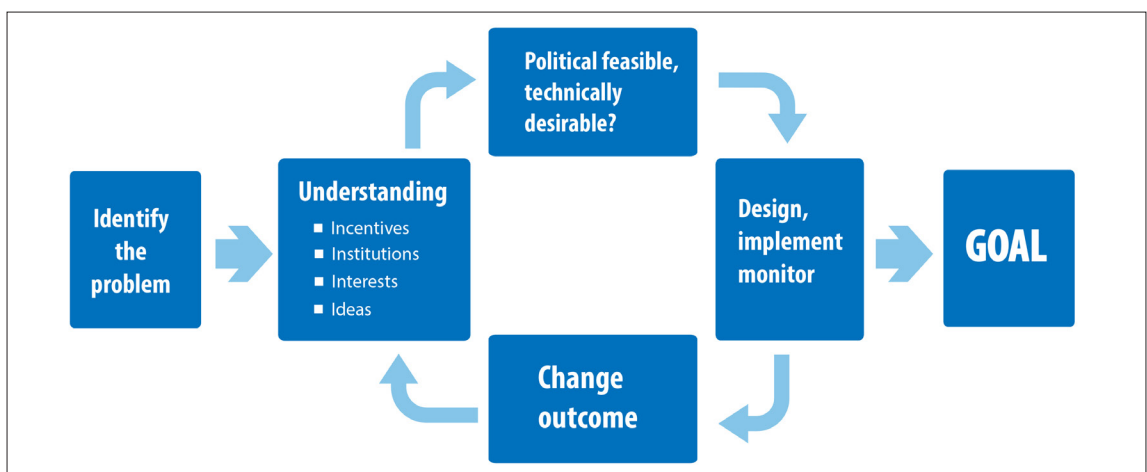


- o existing institutions, including institutional dysfunctions that channel behaviour, as well as ongoing institutional change
- o stakeholder interests and constellations. Structural factors influence stakeholder incentives and opportunities. Relevant structural factors fiscal policy priorities of the leading regime that is crowding out funding to other institutions. These factors may also include elements that may be subject to change but that are outside the control of stakeholders.
- The third and final step is to identify ways forward, including how to initiate change. These are analytical recommendations intended to offer a road map for operational engagement for potential entry points and ways to engage. As will be discussed further in the fourth section, such recommendations must be clear about risks (including unintended consequences of first-best policy reforms) and offer options and positive ways of engaging with political economy drivers. These options may include how identifying the areas with the greatest potential overlap between political incentives and policies that foster development progress.

Harris (2013) puts forward three steps which include problem identification, structural diagnosis and agency diagnosis, and prescription of what needs to be done. Problem identification involves the identification of the specific problem and whether that problem can be distinguished as a process problem or systems problem. The structural diagnosis includes identifying systemic features that are relevant to the problem. The agency diagnosis includes an analysis of power, incentives and behaviour. Of importance, is the type of relationships and balance of power between those actors involved in the resource allocation to the Judiciary. In undertaking agency diagnosis, it will include an analysis of credible commitment problems, collective action problems, information asymmetries, and principal-agent relationships with the view of providing a potential change process.

In Whaites (2017), the emphasis is on the Teskey programme model which involves identification of the problem, and understanding incentives, institutions, interests and ideas.

**Chart 1: Teskey Programme Model**



Source: Whaites (2017)

Thereafter, the insights drawn from the second step are used in designing politically feasible and technical desirable policy recommendations. The last stage is implementation and monitoring, and changes where necessary until the goal is achieved.

## The Political Economy issues of Judiciary's Resource Requirements and Allocation

The biggest political economy problem is that Judiciary's problem is that allocations to the Judiciary have never gone close to the requested resource requirements. At any time that the Chief Registrar of the Judiciary has transmitted the resource requirement to Parliament, Parliament has always allocated fewer resources at any time. The resource gaps between Judiciary's resource requirement requests and parliamentary allocation have ranged from 19% in some years to 53% in other years. Kagume and Kemboi (2021) note the recurring issue of inadequate funding for the Judiciary after comparing the resource requirements requested by Judiciary and what was allocated by Parliament after the appropriations bill has been passed<sup>13</sup>.

**Table 2: Judiciary's Resource Requirement vis-à-vis Allocation**

Fiscal Year	Resource Requirement (Ksh Bn)	Allocation (Ksh Bn)	The gap between Judiciary request and parliamentary allocation
2017/18	35.95	17.56	51%
2018/19	31.17	17.30	44%
2019/20	23.29	18.86	19%
2020/21	37.42	17.42	53%

Source: "The Judiciary Budget Public Hearing for The FY 2021/22-2023/24 Medium Term Budget"<sup>14</sup>

The implication is that the Judiciary's delivery of Justice might not be met in a financial year due to the failure of parliament to allocate sufficient resources. The resource question is an important policy question because it can hamper the independence of the Judiciary. The resource questions also hamper the efficiency in discharging the efficient delivery of justice as required by Article 159 of the Constitution of Kenya.

<sup>13</sup>Kagume, Jackline, and Leo Kemboi. "Comments on the Judiciary Medium-Term Expenditure Framework (MTEF) Financial Year 2022/2023-2024/2025." Institute of Economic Affairs Kenya, November 2021.

<sup>14</sup>The Judiciary. "The Judiciary Budget Public Hearing for The FY 2021/22 2023/24 Medium Term Budget," 2020.

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Maraga(2020) advanced that financial autonomy is a critical aspect of judicial independence and for it to effectively discharge its mandate, the Judiciary requires not just adequate financial allocation but also real financial autonomy”<sup>15</sup>.

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Most of the policy conversations around the sufficiency of the Judiciary tend to address the failure of parliament to allocate sufficient resources to the Judiciary by claiming that funding to the Judiciary is adequate. The literature defines adequate funding in different ways, but they are almost similar.

The Principles on the Funding and Resourcing of the Judiciary in the Commonwealth recognise that funding of the Judiciary reaches adequacy if it provides facilities and equipment to the courts to enable its operational functions as per the international standards.

Commonwealth (Latimer House) Principles on the Three Branches of Government define adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought<sup>16</sup>. This can be taken to mean funding of constitutional functions of the Judiciary. The Principles on the Funding and Resourcing of the Judiciary in the Commonwealth recognise that funding of the Judiciary reaches adequacy if it provides facilities and equipment to the courts to enable its operational functions as per the international standards<sup>17</sup>.

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<sup>15</sup>Owino, Winfrey. “Koome on a Low Start Treasury Slashes Judiciary Budget Again.” The Standard, June 10, 2021. <https://www.standardmedia.co.ke/national/article/2001415336/koome-on-a-low-start-as-treasury-slashes-judiciary-budget-again>.

<sup>16</sup>“Commonwealth (Latimer House) Principles on the Three Branches of Government,” November 2003. <https://www.cpahq.org/media/dhfajkpg/commonwealth-latimer-principles-web-version.pdf>.

<sup>17</sup>ICJ. “Communique on Judiciary Funding in Kenya and the Region,” 2021. <https://icj-kenya.org/wp-content/uploads/2021/10/Communique-Judiciary-Funding-in-Kenya-and-the-Region-1.pdf>.

# Understanding the Political Economy of Budget Allocations

The constitution gives the Parliament (and specifically the National Assembly relating to allocations to the arms of government including the Judiciary the powers of a purse holder. As for the Judiciary, they have no role other than the Chief Registrar of the Judiciary transmitting the budget estimates, they have no direct role in a decision relating to what is allocated to them. The National Treasury, on the other hand, has the consolidation role of the budget which gives the National Treasury more impetus in determining budgetary allocation decisions.

They are demand and supply-side players that participate in the process of Judiciary allocations. The behaviours of the demand side and supply which are shaped by incentives influences the direction of revenue collection.

## 1. Supply-Side Players

### a. National Assembly (whole House)

Article 94(4) gives the National Assembly constitutional power to determine allocations of national revenue between the levels of government, appropriating funds for expenditure by the national government and other national state organs and exercising national revenue and expenditure. The National Assembly considers the reports and motions of the Budget and Appropriations for approval with or without amendments.

### b. Budget and Appropriations Committee (BAC)

The Budget and Appropriations Committee has a major role in providing general direction on budgetary matters, discussing and reviewing the Budget Policy Statement, and the budget estimates with the view of making recommendations to the National Assembly.

The committee is tasked to monitor all budgetary matters falling within the competence of the National Assembly under this Act and report on those matters to the National Assembly, monitor adherence by Parliament, the Judiciary and the national government and its entities to the principles of public finance and others set out in the Constitution, and to the fiscal responsibility principles of this Act. The committee through its chair introduces the Appropriations Bill in the National Assembly.

### c. National Treasury

The National Treasury is the institution charged with general economic policymaking and is established under section 11 of the Public Finance Management (PFM) Act. The National Treasury is constituted of the Cabinet Secretary, Principal Secretary, and departments and offices of the National Treasury charged with economic and financial matters.

The Public Finance Management Act has been given the National Treasury the wide impetus role to formulate, implement and monitor macro-economic policies involving expenditure and revenue; and ensure proper management and control of, and accounting for the finances of the national government and its entities to promote the efficient and effective use of budgetary resources at the national level.

The National Treasury is also required to prepare and submit the Budget Policy Statement to Cabinet for approval. The Budget Policy Statement prescribes the ceilings for all organs of government including the Judiciary. The proposed expenditure limits for the national government, including those of Parliament and the Judiciary and indicative transfers to county governments<sup>18</sup>.

One of the outstanding issues is that the National Treasury prescribed the sector working groups (SWGs) as one of the key steps in determining the budget allocation.

Amadi (2020) notes that the Judiciary budget proposal has been submitted as part of the Governance, Justice, Law and Order Sector (GJLOS), which is one of the ten MTEF budget sectors created by the Government for efficiency in planning. GJLOS brings together 19 Semi-Autonomous Government Agencies (SAGAs) and about 20 Tribunals, with different functions and mandates, grouped into 14 sub-sectors. Through the years the judiciary as an arm of government has had to compete for funds with all these agencies, a hugely disadvantageous process for the Judiciary<sup>19</sup>. This is being done despite the fact the Constitutional path for allocations relating to the Judiciary doesn't have an administrative process spearheaded by the members of the Executive branch of government.

National Treasury reinforces the idea that Sector working groups are the only recognized avenues of resource bidding<sup>20</sup>.

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<sup>18</sup>Section 24(4)

<sup>19</sup>Hon. Anne Amadi. 2020. "Participatory Budgeting Key to Judicial Accountability. The Judiciary of Kenya." December 7, 2020. <https://www.judiciary.go.ke/participatory-budgeting-key-to-judicial-accountability-by-hon-anne-amadi/>.

<sup>20</sup>Slide 7- Director of Budget/National Treasury. 2021. "Budget Process for the FY 2022/23 and the Medium Term." Presentation during the Launch of the FY 2022/23 and the Medium Term Budget Process. National Treasury. 2021. <https://www.treasury.go.ke/wp-content/uploads/2021/08/Budget-Process-for-the-FY-2022-23-and-The-Medium-Term.pdf>.

#### **d. Cabinet Secretary- National Treasury**

Section 11 of the Public Finance Management act puts the Cabinet Secretary as the head of the National Treasury. Section 36(1) of the act denotes that the Cabinet Secretary shall manage the budget process at the national level. Additionally, section 36(5) of the Act requires the Cabinet Secretary to specify through regulations, and procedures how, when and where members of the public shall participate in the budget process at the national level.

The Public Finance Management system as constructed gives the Cabinet Secretary in charge of the National Treasury an elevated role in setting the spending priorities making the Institution a powerful political player in resource allocation.

#### **e. Justice and Legal Affairs Committee (JLAC)**

The Justice and Legal Affairs committee reviews the annual performance of the Judicial Service Commission and the Judiciary. The State of Judiciary's Annual Report (SOJAR) is a creation of section 38 of the Judicial Service Act with information relating to the performance of the Judiciary and attendant challenges analysis of the financial statements of the Judicial Service Commission and the Judiciary. The SOJAR is the main accountability tool for the Judiciary.

- In the 2016/2017 financial year, the JLAC noted a drop in resource allocation for the year under review which negatively affected operations. The MPs also noted that government funding to the Judiciary was unstable with variances between what was approved and what was allocated and delays in release. The Members of Parliament also noted the problems of inadequate funding converging with exchequer releases, court cases and lack of title documents as the major cause of delayed implementation of projects<sup>21</sup>.
- The Justice and Legal Affairs recommended in the report of deliberation of 2017/2018 State of Judiciary and Administration of Justice Report that the National Assembly allocates more resources to the Judiciary to address financial issues. The committee also noted delayed exchequer issues<sup>22</sup>.

Kemboi (2021) notes that in probing the issue of case backlogs, the Justice and Legal Affairs Committee of the National Assembly noted that inadequate judicial officers and lack of adequate resources are major impediments to case resolution (National Assembly, 2019)<sup>23</sup>. The justice and legal affairs committee has studied and reviewed the performance of the Judiciary over years of scrutinizing the SOJAR and should have defined the issue of adequate allocation and reviewed resource needs from the performance of the Judiciary at present.

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<sup>21</sup>Justice and Legal Affairs. "Report on the Consideration of 2016/2017 State of Judiciary and Administration of Justice Report." Parliament.go.ke, May 2019. <http://www.parliament.go.ke/sites/default/files/2019-06/JLAC%20State%20of%20Judiciary%20rpt%202016-2017.pdf>.

<sup>22</sup>Justice and Legal Affairs Committee. "Report on the Consideration of 2017/2018 State of the Judiciary and the Administration of Justice Report," May 2019. <http://www.parliament.go.ke/sites/default/files/2019-07/JLAC%20State%20of%20Judiciary%20rpt%202017-2018.pdf>.

<sup>23</sup>Kemboi, Leo Kipkogei. "The Case Backlog Problem in Kenya's Judiciary and the Solutions." Institute of Economic Affairs Kenya, March 2021.

## **2. Demand-Side Players**

### **i. JSC Commissioners**

The Judicial Service Act requires that the Judiciary take administrative manifestations of the Judiciary's autonomy and inherent power to protect and regulate its process, achieving these objects through the application of principles set out in the Constitution and other laws.

Section 29(1) of the Judicial Service Act requires that the Chief Registrar of the Judiciary prepare estimates of expenditure and forward them to the Judicial Service Commission for review. The commission is required to review estimates and make adjustments where necessary and forward them to National Assembly for approval. This section of the law provides powers and functions to JSC Commissioners an impetus over the Judiciary's estimates of expenditure. The JSC Commissioners can seek to play an important role in building the argument for increased resources for the Judiciary.

### **ii. Chief Registrar of the Judiciary (CRJ)**

The Chief Registrar of the Judiciary is tasked with the Constitutional role of preparing and submission of budgets for the Judiciary and the Judicial Service Commission. Article 173(3) states that each financial year, the Chief Registrar shall prepare expenditure estimates for the following year and submit them to the National Assembly for approval..

### **iii. Court Leaders**

The court leaders are defined as the leaders of the various levels of courts including the Chief Justice as the overall leader, the Court of Appeal President, the Principal Judge of the High court and the head of the stations for all court levels.

### **iv. National Council for the Administration of Justice (NCAJ)**

Section 34 of the Judicial Service Act establishes the National Council on Administration of Justice (NCAJ). The members of the NCAJ include the Chief Justice as the Chairperson, the members of the Executive branch (including Cabinet Secretaries, Commissioner of Prisons, Principal Secretaries), Attorney General, Director of Public Prosecutions (DPP), National Police Service (NPS), Law Society of Kenya (LSK), representative of private sectors, and representatives of Non-Governmental Organizations (NGO's).

The NCAJ is tasked primarily with four functions related to the formulation of policy, monitoring, evaluation of strategies, facilitating the establishment of court users' committees at the county level, and mobilising resources for the efficient administration of justice. Section 35(2) d is the functional part of the law that speaks specifically about the resource mobilization along the Justice chain (the entire criminal justice sector).

The NCAJ is expected to build political arguments on the sufficiency of resources in the criminal justice system. this includes investigation, prosecutions, and court levels.



# Factors and Actions that have influenced the suboptimal allocations to the Judiciary

## 1. Bypassing Constitution in Running of Kenya's Public Finance Management

The Constitution of Kenya 2010 put in place key public finance management structures in the Constitution which brought in the doctrine of separation of powers. The constitution took the majority of powers that the executive branch enjoyed in determining the budget's form, content, and timing and bestowed Parliament those powers.

### i. National Treasury Reinforcing Norms of the Previous PFM Arrangement.

One of the earlier observed risks was the National Treasury using administrative functions such as the sector working groups to reinforce the public finance management norms of the previous constitution. The Constitution required the three arms of government to submit budget estimates directly to the National Assembly. However, the National Treasury brought forward the sector working group which is an administrative process where different Ministries Departments and Agencies including the Judiciary undertake resource bidding despite Article 173 of the Constitution requiring the Chief Registrar of Judiciary to send budget estimates directly to Parliament. In essence, the National Treasury assumed the National Assembly's role of determining political economy discussions around the resource allocations to various arms of the government.

### ii. Judiciary Fund

Kagume and Kemboi (2021) assert that under Article 173(1) of the Constitution of Kenya, the Judiciary Fund was considered established when the Constitution came into force. Article 173(1) provides that "There is established a fund to be known as the Judiciary Fund, which shall be administered by the Chief Registrar of the Judiciary". This negates any requirement for another law to re-establish the Fund. The requirement for Parliament per Article 173(5) of the Constitution was only to provide for the Regulation of the Fund. The Judiciary Fund should therefore be considered operational.

In its Budget Speech announcement for the fiscal year 2022/2023, the National Treasury finally committed to the Judiciary's Fund's operationalization<sup>24</sup>. The operationalization is being done 12 years later since the promulgation of the Kenyan Constitution. The extent of implementation of the Judiciary Fund is an area where it requires monitoring by Parliament and non-state actors. The fund's operationalization will alleviate the major problems that the Judiciary has with what Treasury releases via the Integrated Financial Management and Information System (IFMIS) system.

## **2. The overlooked role of the Judiciary in the Criminal Justice System**

Kenya's criminal justice system has different players who include the Presidency, Parliament, investigative agencies, Ministries in charge of interior and prisons, the office of the director of prosecutions, the Judiciary, and the prison systems.

The role of each player has been clearly outlined. The investigative agencies include the National Police Service including regular police and the Directorate of Criminal Investigation (DCI) and the Ethics and Anti-Corruption Commission (EACC) who forward their recommendations to the Director of Public Prosecutions (DPP) for action. The players in the executive branch of government set law enforcement objectives. Additionally, the president exercises the prerogative power and can pardon the convicted persons based on recommendations of the Power of Mercy Committee.

The Judiciary is required by the Constitution to punish convicted individuals to create deterrence. However, due to long-term resource issues that resulted in human resource shortages, few court levels, particularly at the Magistrates and High Court levels, where the majority of cases are filed, were affected.

## **3. National Treasury's upper hand in setting the Spending Priorities (Budget Circular and the Budget Policy Statement)**

Given the uniqueness of the National Treasury as an institution given powers by law to formulate general economic policy and the budget consolidation roles provided under the Public Finance Management, it makes it an institution that has an upper hand in the budget preparation process.

The Public Finance Management Act has given the National Treasury the wide impetus role to formulate, implement and monitor macro-economic policies involving expenditure and revenue; and ensure proper management and control of, and accounting for the finances of the national government and its entities to promote the efficient and effective use of budgetary resources at the

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<sup>24</sup>National Treasury. "Paragraph 78 (Page 44) of the Budget Statement FY 2022/2023," 2022. [https://www.treasury.go.ke/wp-content/uploads/2021/06/Budget-Statement-for-the-FY-2022-23\\_F.pdf](https://www.treasury.go.ke/wp-content/uploads/2021/06/Budget-Statement-for-the-FY-2022-23_F.pdf).

national level. All this is done through the Budget Policy statement. The National Treasury is also required to prepare and submit the Budget Policy Statement to Cabinet for approval. The Budget Policy Statement prescribes the ceilings for all organs of government including the Judiciary.

The allocations to the Judiciary mirror the estimate proposed by the National Treasury in the Budget Policy Statement.

**Chart 2: Judiciary Resource Requirements Versus Allocations (Ksh Bn)**



Source: Judiciary Medium Term Expenditure Frameworks and the Approved Budget Policy Statement (Various Issues)

The fact that the National Treasury’s resource ceilings for the Judiciary match those approved by Parliament proves that the National Treasury has considerable influence in determining the budget ceilings and subsequently what forms the budget estimates. The National Treasury also has an upper hand in the consolidation of budgets.

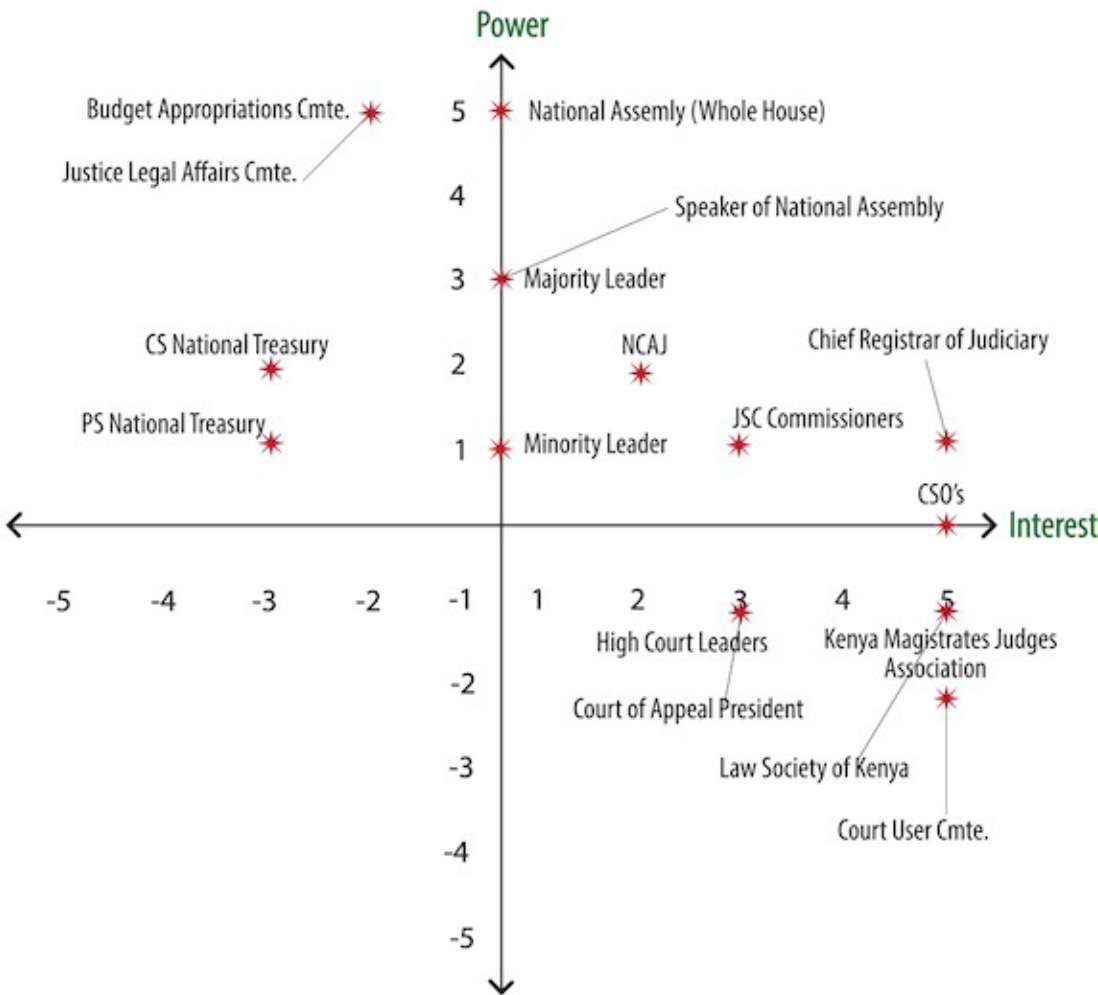
The National Treasury has used that elevated policy position in setting spending priorities to the detriment of the Judiciary. For example, when National Treasury effected budget cuts due to the

planned fiscal consolidation measures, the National Treasury slashed the judiciary’s budgets without authority<sup>25</sup>. Decisions of such nature can be made by Parliament and it’s an institutional weakness that Parliament allowed such decisions to pass<sup>26</sup>.

Power Map of Players Involved in Resource Allocation to Judiciary

The map below shows the different players who are involved in resource allocations to Judiciary

Chart 3: Stakeholder Map Analysis



<sup>25</sup>Mutai, Edwin. “Treasury in U-Turn over Sh3bn Court Budget Cuts.” Business Daily, November 15, 2019. <https://www.businessdailyafrica.com/bd/news/treasury-in-u-turn-over-sh3bn-court-budget-cuts-2270792>.

<sup>26</sup>Cece, Siago. “Moses Kuria Says MPs, Treasury Not to Blame for Judiciary Budget Cut.” Nation, July 30, 2018. <https://nation.africa/kenya/news/politics/moses-kuria-says-mps-treasury-not-to-blame-for-judiciary-budget-cut-72386>.

## Analysis and Interpretation of the Power Map of players involved in Resource Allocations to Judiciary

The defining interests and subsequent reform focus that institutions should adopt are provided in the following table. The recommendations to various agencies involved in formal and informal processes that have an impact on the allocation of resources to the judiciary are based on the reform focus.

**Table 2: Defining interests and Reform Focus**

Key Policy Player	Defining Interest	Reform Focus
National Assembly	The Constitution provides immense powers to the National Assembly to determine form, timing and the content of the budget.	Assure effective resource allocation to the judiciary's core duties, which leads to the effective delivery of justice as a public good. In order to give them more influence over the budget, they should allow the Chief Registrar of Justice to participate more actively in the process of creating the Budget Policy Statement.
Budget Appropriations Committee	The Budget and Appropriations Committee is the entity in charge of setting priorities and approving ceilings, examining budget estimates and having the final say on the budget appropriations before it is tabled in the whole house.	Provide a framework for costing of Judiciary functions in consultation with the Chief Registrar of the Judiciary and use that to ramp up resources provided to the Judiciary.
Court Leaders	The chief justice is referred to as the overall court leader, along with the president of the Court of Appeals, the principal judge of the High Court, and the head of the stations for all court levels.	The court leaders should take the lead by testifying before Parliament and advocating for the funding (especially the Chief Justice, Court of Appeal, and High Court leaders).
Justice and Legal Affairs Committee (JLAC)	The Justice, Legal Affairs Committee reviews the performance of the Judiciary and highly key performance questions that relate to resource allocation decisions.	Review the performance of the Judiciary as outlined in the and propose budget-based solutions to inadequacies identified as a result of suboptimal resource allocation.
Kenya Magistrates Judges Association (KMJA)	The KMJA is the association representing the interests of Magistrates and Judges which includes better working conditions. The working conditions include better courts, and equipment.	Given that resources are scarce, KMJA should use its voice to advocacy for urgent resources that improves the capability of Judicial officers which includes better courts and equipment, and not just the terms of service.

Key Policy Player	Defining Interest	Reform Focus
Law Society of Kenya (LSK)	The Law Society of Kenya represents the practitioners of law in Kenya, with the view of advocating for member interests and improving the conditions of Practise which requires quick and urgent resolution of cases.	The law society should engage predominantly in budget making process to build more consensus around increasing resources allocated to Judiciary. They engage the National Assembly's Justice and Legal Affairs committee's discussion of the State of Judiciary Annual Report (SOJAR). Through studies, track the financial independence of the Kenyan Judiciary
Chief Registrar of Judiciary (CRJ)	The Chief Registrar of Judiciary is the accounting officer tasked with preparing for estimates of expenditure for the following year, and submit them to the National Assembly for approval. The CRJ is tasked with ensuring smooth running of Judiciary.	The Chief Registrar should publish a detailed expenditure list (by court level) to promote transparency, engage the Budget Appropriations Committee at the Budget Policy Statement stage where ceilings are being set and would definitely form the appropriations at the end. Additionally, the Chief Registrar of Judiciary should publish the rubric of how resource planning is prioritized at the court level.
Court User Committees	The Court User Committees (CUCs) are critical forums to help address challenges to the efficient and effective delivery of services at the individual Court level. They are 127 CUCs in Kenya <sup>27</sup> .	The Court users' committees understand the challenges that face different courts and can become the first point for providing alternative budget ideas to Court stations as they prepare the estimates of expenditure for every financial year.
JSC Commissioners	The Judicial Service Commissioners are required to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice as per Article 173(1). The Commissioners are required under section 29(2) of the Judicial Service Act to review the estimates making them a principal player in setting spending priorities of the Judiciary.	The JSC Commissioners given their role and standing in Kenya's public sector should play a direct role in building the political and economic arguments on why the Judiciary deserves additional resources, and how the provision of this public good will be beneficial to the republic.

<sup>27</sup>Judiciary. "The Critical Role of Court Users Committees – the Judiciary of Kenya," October 13, 2021. <https://www.judiciary.go.ke/the-critical-role-of-court-users-committees/>.

Key Policy Player	Defining Interest	Reform Focus
The Speaker of National Assembly	The Speaker of National Assembly presides over debates in Parliament, and also doubles as the Chair of Parliamentary Service Commission.	The speaker serves in an unofficial capacity because, despite not having direct control over allocations, he or she chairs the PSC, which has benefited from favourable allocations over the past ten years. The speaker should ask lawmakers to treat all institutions (Judiciary included) fairly.
National Council for Administration of Justice	The National Council for Administration of Justice is responsible for policy formulation and increasing the efficiency in delivery of Justice along the criminal justice chain.	It is essential that the criminal justice system adopts a stance that empowers all agencies, including the judiciary, given that the chain of criminal justice requires courts to function effectively and that they have not been receiving sufficient resources while other agencies in the sector have seen resource increases.
Civil Society Organizations	The Civil Society Organizations act as watchdogs and reinforce the need to abide by the Constitution and the rule of law.	The Civil society organizations should continue playing the watchdog role and improve accountability of each player that has influence over Judiciary's resource allocation.

## Conclusions

This Political Economy analysis identifies major political economy considerations that have affected resource allocations to the Judiciary.

They include the fact that the National Treasury set spending priorities to the detriment of the judiciary using that powerful position in the policy. Such decisions can be made by Parliament, and it is an institutional weakness that Parliament allowed such decisions to pass. For instance, when National Treasury implemented budget cuts due to the planned fiscal consolidation measures, the National Treasury cut the judiciary's budgets without authority.

Due to its special status as an institution with legal authority to create general economic policy and the budget consolidation responsibilities granted by the Public Finance Management, the National Treasury has an advantage over other institutions when it comes to creating budgets. The National Treasury has been given a broad mandate by the Public Finance Management Act to develop, implement, and track macroeconomic policies involving spending and revenue as well as to ensure proper management, control, and accounting for the national government and its entities' finances in order to support the efficient and effective use of financial resources at the national level.

The National Treasury has significant influence over deciding the budget ceilings, which in turn determines what constitutes the budget estimates, as evidenced by the fact that its resource ceilings for the judiciary coincide with those approved by Parliament. The National Treasury also has the advantage when it comes to budget consolidation. The justice and legal affairs committee has spent years examining the SOJAR and studying the performance of the judiciary. It should have defined the issue of adequate allocation and examined resource requirements based on the judiciary's current performance.

Parliament is the only institution that can level up the powers of different institutions.









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