



Institute of
Economic Affairs

Costing the Consumer Mandate of the Judiciary in Kenya



Costing the Consumer Mandate of the Judiciary in Kenya

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Table of Contents

Acronyms and Abbreviations	5
1.0 Introduction and Policy Issues	6
2.0 Methodology	9
3.0 Justifications for the Study	10
4.0 The fundamental duties of the judiciary and their implications for fiscal policy	12
5.0 Breaking down Judiciary Budgets	14
6.0 What areas are the Judiciary's Resource Requirements Going?	16
i. Judiciary's resource requirement versus allocation	16
ii. What areas are these Judiciary Requests going to?	17
7.0 Costing the Consumer Mandate of the Judiciary	19
a. Simulation on one-time fixed costs	20
b. Simulation on Labour costs	21
c. Simulation on O&M Costs	22
d. Aggregate costs of the Consumer Mandate of the Judiciary	22
i. Scenario 1: Costing the Consumer Mandate of the Judiciary	22
ii. Scenario 2: Allocating to the judiciary a budget equal to 2% of the total budget	23
8.0 Case Studies	25
Findings and conclusions	27
References	28

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Acronyms and Abbreviations

List of Tables

Table 1	Judiciary's functions and fiscal implications
Table 2	Main Spending Areas in the Judiciary
Table 3	Judiciary's Resource Requirement and Allocation
Table 4	Main Spending Areas and Resource Requirements
Table 5	Simulation of Infrastructure costs
Table 6	Indicative Budget Costs for the Judiciary
Table 7	Budget Simulation for the Judiciary (Assuming the 2 percent Rule)

List of Charts

Chart 1	Budget allocation for operations and maintenance by court level for the fiscal year 2020–21
Chart 2	Select Case Studies

1

Introduction and Policy Issues

When parliament decides how much money should be given to the Kenyan judiciary each fiscal year, there is debate over what amount is appropriate. The Kenyan Parliament has the sole authority to decide how much money should be given to various government agencies, commissions, and levels of government.

The first point to be made is that the judiciary is able to provide efficient case resolution for the common good of all Kenyans equally when resources are allocated to it optimally. Article 159 of the Kenyan Constitution stipulates that the efficient delivery of justice must be carried out. The Judiciary uses it as a tool to achieve operational and financial independence. This highlights how important it is to give the judiciary sufficient resources.

The second issue is now to define what is considered adequate/sufficient/optimum resources. Chief Justice David 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”¹. The majority of policy discussions regarding the judiciary’s sufficiency focus on the fact that parliament has not provided enough funding for it by asserting that funding is sufficient.

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 sought². This can be taken to mean funding of constitutional functions of the Judiciary. The Principles

¹Owino, 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>.

²“Commonwealth (Latimer House) Principles on the Three Branches of Government,” November 2003. <https://www.cpahq.org/media/dhfajkpg/commonwealth-latimer-principles-web-version.pdf>.

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 standards³.

Regarding the best method and threshold for allocating resources to the Kenyan judiciary, there are various schools of thought. The allocation should account for at least 2 percent of budget, according to the first school of thought, which has been promoted by the present and past Chief Justices.

Chief Justice David Maraga stated that the Judiciary has recommended that Parliament have a minimum of 2.5% of the national budget to function optimally in his call for the Judiciary to operate effectively and have financial autonomy⁴. In a meeting with members of the national assembly, Chief Justice Martha Koome emphasized a similar stance, saying that the budget for the judiciary and judicial service commission should be ring-fenced to at least 2 percent of the overall budget. She also pointed out that the judiciary in Kenya has typically received allocations that are much lower than 1 percent⁵. This is the latest policy position to have been fronted in the bid to have the Judiciary get the required resources to resolve all case backlogs and operate efficiently.

Even though the allocation of 2 percent of GDP to the judiciary, in this case, is arbitrary, its defence is based on the fact that the allocation to the judiciary is already ringfenced by the constitution once it has been approved by Parliament. They could create a sort of “endowment fund” if the judiciary received the annual 2 percent of GDP! The Constitution requires that upon approval of the Judiciary’s allocation by the National Assembly, Article 173(6) directs the National Treasury (equivalent to the Ministry of Finance) to deposit the Judiciary appropriations in the Judiciary Fund. Reading the whole constitution, the Judiciary is the only arm of government that has been given such discretion with the budget.

The second school of thought is the approach that the judiciary is currently using. To determine how much it will cost to operate the judiciary in the upcoming fiscal year, the expected costs for each station’s expected functions are totalled at the national level. Additional development issues that are already part of the Judiciary’s strategic plan such as building new counties in counties where the judiciary is not present and aspirations such as buying vehicles for staff and judicial officers, and mobile courts amongst other issues are costed and added to aggregated to form what is called the resource requirement. The resource requirement ends being transmitted by the Chief Registrar of Judiciary as required under Article 173(3) of the Constitution of Kenya.

³ICJ. “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>.

⁴Chief Justice David Maraga. “Statement by Chief Justice David Maraga on Judiciary Budget Cuts.” The Judiciary of Kenya, November 4, 2019. <https://www.judiciary.go.ke/statement-by-chief-justice-david-maraga-on-judiciary-budget-cuts/>.

⁵National 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>.

Neither of these two widely used approaches has been able to win the broad political support necessary to give the judiciary the resources it needs to function at its best. As a result, it is necessary to consider the best method that the Judiciary can optimum resources that guarantee operational and financial independence of the Judiciary.

2

Methodology

The IEA will opt for a mixed-methods analysis that combines qualitative and quantitative techniques.

1. To enable the costing of similar functions and their aggregation, the IEA will separate the core functions of the judiciary in a data frame.
2. On the quantitative side, the IEA will compile and analyse three years' worth of approved judiciary appropriations by line and resource needs as compiled by the Chief Registrar of Judiciary to identify the kind of framework that is necessary for allocating resources to the judiciary.
3. The IEA will also gather information on case backlogs at the court level and determine the effects of these case backlogs on fiscal policy over the short and long term.
4. The IEA will also use case studies to examine the appropriate procedures for allocating resources to the judiciary in other pertinent jurisdictions.
5. Create a new framework for resource allocation and provide a cost indicative of the Consumer mandate for the Judiciary for the 2023–2024 fiscal year using the core functions of the Judiciary, insights from the IEA's fiscal policy analysis, case backlogs analysis, and case studies.

The IEA will consider the part of the budget that is fixed costs and what is considered variable costs. The fixed costs here imply those are the costs that Judiciary must have for it to operate at an optimum level at all time through all financial years. The variable costs vary from time to time depending on circumstances.

The entire Judiciary Budget would be calculated as follows

$$\text{Fixed Costs} + \text{Variable Costs} = \text{Judiciary's Budget}$$

3

Justifications for the Study

The following list outlines the study's justifications. They range from the fact that the provision of justice is a public good, so there is a constitutional obligation to provide for a financially independent judiciary, to the imperative to have an efficient judiciary that clears backlogs and reduces unintended consequences of case backlogs to society and the economy.

1. Case Resolution and Interpretation of laws provided by the Judiciary is a public good

Only the judiciary, as required by the Constitution, can resolve cases more efficiently and effectively than any other party, which is why it is important. Whether or not they are parties to cases, public and private institutions gain a great deal when the judiciary interprets the law which in legal terms would be referred to as jurisprudence.

2. The backlog of cases has several negative effects on the economy and the delivery of justice.

Conflicts that haven't been resolved yet keep people from moving on to engage in economic activity. For instance, a pending dispute over land would prevent construction from starting, a pending dispute over pensions would prevent retirees from accessing their savings, and a pending dispute over a pending government bill would prevent a company from appropriating financial and economic benefits for services provided. The aforementioned illustration shows that actual economic benefits are forfeited whenever a case is delayed.

3. Unintended effects of slow case resolutions on society and public policy processes

The failure by parliament to adequately provide resources to Judiciary creates both intended and unintended effects. The unintended effects are of concern due to their negative externalities. The administration of justice is slowed down and the entire justice system is crippled by a large case backlog. There are actual economic repercussions when justice is delayed. According to general equilibrium analysis, a system with a high case backlog produces a situation in which disputes are never resolved promptly or where cases are never resolved at all.

For instance, if a person who poses a threat to public safety is not apprehended and justice is delivered, law enforcement officials may be unable to handle the crime appropriately because the case cannot be advanced since the courts lack the necessary resources.

4. Democracy suffers when the judiciary lacks both financial and operational independence.

Any institution that does not protect its operational and financial independence is vulnerable to entrapment by parties both inside and outside the judiciary. The courts play an important role in deciding conflicts between private citizens and the government of Kenya on issues relating to extensive bills of rights in the constitution. The Magistrates Court, which acts as a court of the first instance, would be rendered ineffective if sufficient manpower was available in strategic areas of the nation. This would create a disincentive for people to bring cases before courts for resolution, and they might instead turn to incorrect methods that might encourage lawlessness.

4

The Fundamental Duties of the Judiciary and their Implications for Fiscal Policy

The Judiciary's functions are outlined in Chapter 10 of the Constitution and other relevant chapters of the Constitution and the law. The stated obligations require the state to spend resources to assist the Judiciary in carrying out that specific role. Parliament, specifically the National Assembly and the specific committees, are the purse holders who hold the resources mandated by the Constitution and are required to make appropriations to the Judiciary and ensure that it functions efficiently.

The Judiciary's function is to resolve cases, interpret the law and the constitution, and provide advice to government agencies and other individuals. Ensuring that justice is served promptly will necessitate the establishment of a court and all necessary amenities such as furniture, stationery, and appropriate technology, among other things. It will also require the Judiciary to hire and compensate judicial officers in accordance with applicable law.

Furthermore, the judiciary will establish committees to periodically review rules and performance and deal with other emerging issues.

Table 1: Judiciary's functions and fiscal implications

Functions of the Judiciary	Fiscal Implication
<ul style="list-style-type: none">The authority of the courts and tribunals established by or pursuant to the Constitution is used to resolve cases.	<ul style="list-style-type: none">Establish a court and all of its amenities, including furniture.
<ul style="list-style-type: none">Interpret the law and constitution	<ul style="list-style-type: none">Hire judicial officials and pay them in accordance with the applicable law
<ul style="list-style-type: none">Provides advisory opinions to agencies of government at request.	<ul style="list-style-type: none">Automated court filing and payment procedures
<ul style="list-style-type: none">Make sure that everyone receives justice, regardless of status	<ul style="list-style-type: none">Automate court recordings
<ul style="list-style-type: none">Make sure that justice is served promptly.	<ul style="list-style-type: none">Ensure that judges and other members of the judiciary have mobility
<ul style="list-style-type: none">Ensure that traditional dispute resolution methods as well as alternative dispute resolution methods like arbitration, reconciliation, and mediation are encouraged	<ul style="list-style-type: none">Provide stationary and other material such as constitution et al

Functions of the Judiciary	Fiscal Implication
<ul style="list-style-type: none"> • Make sure the proper process is followed when administering justice. 	<ul style="list-style-type: none"> • Provide necessary support to Judiciary
<ul style="list-style-type: none"> • Make sure the constitution's goals and tenets are upheld and promoted. 	<ul style="list-style-type: none"> • Create committees within the judiciary to handle matters of policy and management.

5

Breaking Down Judiciary Budgets

Using the approved budget for 2021/2022, we identify the major areas of spending by the Judiciary.

- Employee compensation totals Ksh 9.88 billion, with salaries for Judicial Officers and other Judiciary staff accounting for 57% of total spending.
- The second largest spending category for recurrent expenditure is the use of goods and services, which accounts for 24 percent of total spending and amounts to Ksh 4.18 billion.
- Capital expenditures account for 13% of the total budget for the Judiciary. Non-financial assets, use of goods and services, and financial assets account for 9 percent, less than 1 percent, and 4 percent, respectively. In the fiscal year 2021/2022, the use of goods and services for capital expenditures was allocated Ksh 75 million, non-financial assets for capital expenditures were allocated Ksh 1.52 billion, and financial assets for capital expenditures were allocated Ksh 738 million.
- In conclusion, employee compensation is the single largest expenditure item, and this is not by chance because the Judiciary provides services that require Judicial officers. Because the justice system is a service industry, more judicial officers may be required rather than more capital expenditures.

Table 2: Main Spending Areas in the Judiciary

	Approved Budget 2021/22 (Ksh Mn)	Share of the total Budget
Compensation of Employees	9,881	57%
Use of Goods and Services- Recurrent	4,177	24%
Social Benefits	20	0%
Other Expense	566	3%
Non-Financial Assets -Recurrent	189	1%
Financial Assets- Recurrent	170	1%
Use of Goods and Services – Capital	75	0%
Non-Financial Assets- Capital	1,521	9%
Financial Assets- Capital	738	4%
	17,337	100%

Source: The Judiciary Budget for the Financial Year 2022/23 and Medium Term

The purpose of identifying the major Judiciary spending areas is to provide a picture of the major policy priorities. As previously stated, the Judiciary's top policy priority is to hire and retain judicial staff.

6

What are the Judiciary's Requirements Going

Before the National Assembly decides how much money to allocate to the Judiciary, the Judiciary sends its resource requirements to Parliament via the Chief Registrar of the Judiciary. We recognise that this is a wish list compiled by the judiciary and should be treated with caution. Regardless, it must be clear that the resource requirement is useful because it has been prepared from court stations across the country, has achieved some broad consensus, and may reflect the true wishes of the Judiciary and its organs as a whole.

As a result, comprehending the framework used to allocate resources to the judiciary necessitates comprehending the basis for those requests as well as where the majority of those resources are allocated. Understanding the framework used to develop the resource requirements would confirm the importance of some of the budgeted lines.

The first step is to compare the judiciary's resource requirements to what Parliament has allocated to them. This is the first macro argument, and it indicates whether the allocation-resource gap is widening or narrowing. The second step is to conduct a more detailed analysis to determine where the additional resources requested in the resource requirement are being allocated. It would be simple to determine whether the resource request requests to Parliament are consistent with the Judiciary's stated priorities of increasing efficiency, which include hiring more judicial officers to resolve cases more quickly and eliminate case backlogs.

i. Judiciary's resource requirement versus allocation

The judicial resource gap has ranged from 19 percent to 53 percent within the period surveyed. In the 2022/2023 financial year the Judiciary requested Ksh 39.56 billion but only received a meagre Ksh 17.60 billion. The trend noticeable from the data is that the gap between the resource requirement and allocations is widening. The Institute of Economic Affairs' political economy analysis reveals that, interestingly, Parliament has not been forthcoming in increasing resource allocations to the judiciary when factors such as inflation and accounting for the increasing size of National Government expenditure are taken into account.

The economics of public finance teaches us that the guiding principle in adding more resources to the judiciary should be a cost-benefit analysis, utility and whether the institution can absorb all of the resources efficiently, and the value for money principle emphasized in the Constitution of Kenya, 2010.

Table 3: Judiciary’s Resource Requirement and 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%
2021/22	35	17.34	51%
2022/23	39.56	17.60	56 %

Source: Kagume & Kemboi (2022)⁶

ii What areas are these Judiciary Requests going to?

The examination of the Judiciary’s resource requirements reveals important insights into the Judiciary’s policy priorities. To establish these key policy priorities, we use the resource requirements for the fiscal year 2022/2023 and compare them to the approved budget for the fiscal year 2021/2022. The following are highlights from the table below:

- In terms of employee compensation, the Judiciary requested an additional Ksh 6.56 billion, which is 66.40 percent more than the allocation it received for the same function in the fiscal year 2021/2022.
- The Judiciary requested Ksh 8.99 billion in the fiscal year 2022/2023, which is Ksh 13.17 billion more than the Ksh 4.18 billion approved in the fiscal year 2021/2022 for goods and services considered recurrent expenditures.
- Compensation of Employees and use of goods and services for recurrent expenditure makes up 70% of all resource requests in the 2022/2023 financial year.
- The remaining resource requirements made by the Judiciary are detailed by non-financial assets, use of goods and services, and financial assets.
- Overall, the Judiciary requested Ksh 22.22 billion more in the 2022/2023 fiscal year than it was allocated in the 2021/2022 fiscal year, bringing the Judiciary’s overall resource requirement to Ksh 39.56 billion.
- The resource requirement plan proposes doubling of resources allocated to Judiciary at present.

⁶Kagume, Jackline, and Leo Kipkogei Kemboi. “Problem-Driven Political Economy Analysis of Judiciary’s Resource Allocations.” Institute of Economic Affairs Kenya, 2022.

Table 4: Main Spending Areas and Resource Requirements

	Approved Budget 2021/22	2022/23 Resource Requirement	Additional Resources Requested	Additional Resources Requested 2022/23 /Approved Budget 2021/22
Compensation of Employees	9,881	16,443	6,562	38%
Use of Goods and Services- Recurrent	4,177	13,172	8,995	52%
Social Benefits	20	62	42	0%
Other Expense	566	1,784	1,218	7%
Non-Financial Assets -Recurrent	189	597	408	2%
Financial Assets	170	536	366	2%
Use of Goods and Services- Capital	75	222	147	1%
Non-Financial Assets- Capital	1,521	4,536	3,015	17%
Financial Assets	738	2,203	1,465	8%
Total	17,337	39,555	22,218	128%

Source: The Judiciary Budget for the Financial Year 2022/23 and Medium Term

We derive the following insights from the approved budgets and resource requirements table above:

- According to the data, the key policy priorities for the fiscal year 2022/2023 are employee compensation and the use of goods and services for recurrent expenditures. The additional resources requested account for 90% of all resource requests for the fiscal year 2022/2023.
- The judiciary’s budgeting stance, in this case, is consistent with the prioritisation of hiring new judicial officers, according to our prior budget analysis. The expansion of court access at the Magistrates Court level and the hiring of more judicial officers are two recommendations made by Kagume and Kemboi (2021). Overall case resolution for the filed and pending cases will continue to be below optimal unless the number of judicial officers matches the case supply. The cost of an emphasis on the need for additional judicial officers, specifically at the Magistrates Courts, should be included in the MTEF’s resource requirement. It should be stated as a strategic goal as well. This knowledge would be essential for successful resource advocacy⁷.

⁷Kagume, Jackline, and Leo Kipkogei Kemboi. “Comments on the Judiciary Medium-Term Expenditure Framework (MTEF) Financial Year 2022/2023-2024/2025.” Institute of Economic Affairs Kenya, November 18, 2021. <https://ieakenya.or.ke/?wpdmdl=2351>.

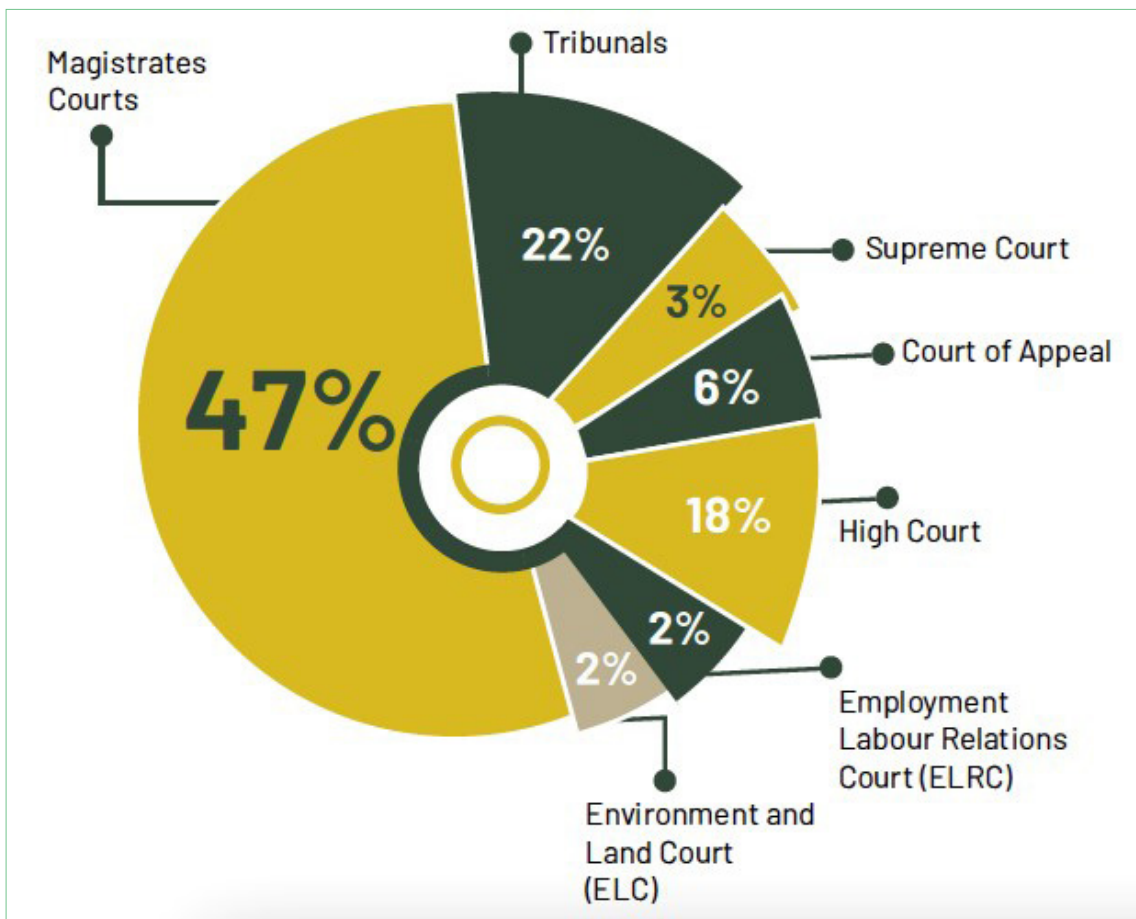
7

Costing the Consumer Mandate of the Judiciary

In order to be able to cost the consumer mandate of the Judiciary, it is important to distinguish the kind of expected expenditures at the Judiciary. The taxpayer is required to cover yearly fixed costs for the judiciary as well as intermittent costs brought on by technological advancements and one-time costs that are not fixed.

- Salaries for judicial officers and other staff members, stationery costs, expenses for court-related events, and each judge's research costs are all included in the fixed costs. Non-discretionary budget items, like personnel emoluments (PE) and contractual obligations, like security and cleaning services, leased printers, internet services, medical coverage, insurance, and utilities, among others, have always been given priority and ring-fenced. For as long as the judiciary as an institution exists, these costs must be covered. The Constitution ringfences judges' salaries because they hold constitutional offices. These expenses are generated as a result of the current contracts and obligatory rules outlined in the Constitution and the law.
- The judiciary occasionally incurs intermittent costs, which include replacing judges' and other staff members' computers and upgrading technology infrastructure. They form part of the Operations and Maintenance (O & M) expenditure. As outlined in the State of Judiciary and Administration of Justice report, three criteria have been used at the court level to share resources: 50% of the weight was given to caseload, 30% to the number of judicial officers, and 20% to the number of judicial staff. This kind of division makes sense to case demand and economic reasoning. Using the 2020/2021 financial year data, the division of operations and maintenance expenditure is as follows.
- One-time expenses are those that are incurred only once and cannot be recovered repeatedly. Typically, these are significant capital investments like building courts. An example could be the construction of High courts at every sub-county level.

Chart 1: Budget allocation for operations and maintenance by court level for the fiscal year 2020–21



Source: State of Judiciary and Administration of Justice report 2020/2021

a. Simulation on one-time fixed costs

To simulate the fixed construction costs, we use the previously indicated costs on the record by the Judiciary. Chief Justice Willy Mutunga indicates the cost of eight working stations to be Ksh 1.5 billion which is around Ksh 188 million per court station⁸. This cost today would be equivalent to Ksh 200 million in today’s prices, adjusted for inflation.

The leadership of the national assembly and the judiciary, both past and present, have made a commitment to build a courthouse in every sub-county of Kenya. In Kenya, there are 295 sub-counties. The target to build new sub-counties is to get an additional 70% infrastructure in Kenyan Counties, but given that there is already court infrastructure in almost one-third of all sub-counties in Kenya. As a result, there would be about 236 targeted sub-counties. The following is a simulation of the one-time costs associated with building court facilities.

⁸Chief Justice Willy Mutunga. “Fulfilling the Promise of the Constitution.” kenyalaw, October 19, 2012. <http://kenyalaw.org/kenyalawblog/fulfilling-the-promise-of-the-constitution/>.

Table 5: Simulation of Infrastructure costs

Cost of Constructing a court station (Ksh Million)	200
Number of subcounties targeted	236
Estimated Cost of constructing a court station (Ksh Billion)	47.20
Annual costs for Budget if it follows a 10 year trend (Ksh Bn)	4.72
Annual costs for Budget if it follows a 5 year trend (Ksh Bn)	7.87

Source: Author's own calculations

By multiplying the price of building a court station by the anticipated number of sub-counties, we can calculate the cost of having the ideal number of court facilities for the nation, which comes to Ksh 47.20 billion. Spread out over ten fiscal years, that expense would come out to Ksh 4.72 billion per fiscal year. However, if it were spread out over six fiscal years, the price per fiscal year would be Ksh 7.87 billion.

The creation of various court levels in sub-counties is now a matter of case demand management, which the Judiciary's management may occasionally implement. Lower courts or courts of first instance should be given priority in the establishment in different parts of the country because there are more cases filed, and they should follow the fair considerations outlined in the Constitution, such as population and reducing the effects of marginalisation, among other issues.

b. Simulation on Labour costs

Given that the judiciary is a service sector where the primary service provided entails a judge hearing and deciding cases, the cost of labour plays a significant role in the budget and the priorities of fiscal policy. In the present financial year 2022/2023, the Judiciary has proposed a resource requirement of Ksh 16.44 billion which is Ksh 6.56 billion higher than the approved budget in the financial year 2021/2022.

It is crucial to note that any increased labour costs should be used to raise the case resolution rate at the magistrates' courts, high court level, and court of appeal. Here, the Judicial Service Commission's top priority should be to increase the number of judicial officers assigned to the case in order to increase the likelihood that it will be resolved favourably for each court. The lower courts should take precedence because they are the courts of the first instance and where the filing is made.

We observe that the labour costs for each and every judicial officer can be calculated on a macro level. Costs here include the cost of hiring any additional support judiciary staff who might not be a judicial officers such as research officers, ICT officers, clerks etc.

The Judiciary anticipated spending Ksh 9.88 billion on employee compensation in the 2021–2022 fiscal year. According to information from the State of the Judiciary and Administration of Justice Report, there are an estimated 807 judges, including Supreme Court justices, judges on the Court of Appeals, judges on the High Court, judges on the Employment Labour Relations Court, judges on the Employment Land Court, and magistrates. In order to calculate the cost of labour per judge, we take the overall spending and divide it by the number of Judicial Officers and get the cost per judicial officer as Ksh 12.25 million annually. Looking at public sector numbers in Kenya, these costs are affordable and within range. Here, we are holding other factors constant.

In conclusion, if the Judiciary's request for resources in 2022/203 financial had been granted, there would be 535 more judicial officers. It would have significantly improved the case resolution rate and increased the number of judicial officers by at least 66 percent.

c. Simulation on O&M Costs

These expenses are always categorised as operations and maintenance costs. These expenses represented an estimated 10% of the total budget for the judiciary in the 2020–2021 fiscal year. Due to the caseload, the number of judicial officers, and the size of the judicial staff, the Magistrates court, tribunals, and the high court received the majority of the Ksh 1.568 billion allocation. Here, setting it at 15% of the entire Judiciary budget is a straightforward solution. Here, we also aggregate the intermittent costs together with the use of goods and services.

d. Aggregate costs of the Consumer Mandate of the Judiciary

The judiciary wants to increase the number of judicial officers and employees to enable it to function at its best. This implies that it will be able to finish cases that have already been filed and catch up with cases that have never been able to be resolved.

i. Scenario 1: Costing the Consumer Mandate of the Judiciary

- **Compensation of Employees:** Here, we make use of the judiciary's resource needs in an effort to significantly increase the number of judicial officers. This number is based on justifications put forth to them by the Justice Legal Affairs Committees when they were debating different SOJAR reports because it will enable them to both clear the backlog of cases and resolve cases as they are filed. Additionally, this fits with the evidence generated by the Institute of Economic Affairs in the past. The cost of Ksh 16.4 billion would increase the judiciary's capacity by at least 66%.
- **Use of Goods and Services:** This budget line is elevated as a result of the fact that as the number of employees rises, so do the necessary utilities and other contractual obligations owed to employees as a result of their employment.

- **Court and facilities:** This would allow Kenya to take Justice to all counties in Kenya. Here we used the existing costs of a court station and multiplied it by the number of court stations that should be constructed. Given the scarcity of resources and the IEA's understanding of the Kenya public finance management system, we spread the costs over six financial years.
- **Intermittent costs:** The O&M costs would double and this is necessary given that the size of the Judiciary staff and the Judicial Staff would have increased substantially.

Based on our reasoning and simulation, an aggregated cost analysis reveals that the total budget is Ksh 40 billion, with recurrent expenses accounting for 80% of the total budget. 20% of the total budget is allocated to infrastructure costs, which include building courts and other facilities.

Table 6: Indicative Budget Costs for the Judiciary

	Amount (Ksh Bn)	Share of the total Budget
Fixed Costs		
Compensation of Employees	16.4	41%
Use of Goods and Services	12.0	30%
One time Infrastructure costs		
Courts and other facilities	7.9	20%
O&M Costs		
O&M costs	3.6	9%
	40.0	

Source: Authors Own Calculations

ii. Scenario 2: Allocating to the judiciary a budget equal to 2% of the total budget

The current and former Chief Justices, who oversaw the judiciary and the judicial service commission for the entirety of their terms, have advocated for the allocation to represent at least 2 percent of the budget. In his call for the Judiciary to function efficiently and have financial autonomy, the retired Chief Justice David Maraga stated that the Judiciary has recommended that Parliament have a minimum of 2.5 percent of the national budget⁹.

Chief Justice Martha Koome stressed a similar position in a meeting with members of the national assembly, saying that the budget for the judiciary and judicial service commission should be ring-fenced to at least 2% of the total budget. She added that the judiciary in Kenya typically only receives allocations of much less than 1%¹⁰. This is the most recent policy position put forth in an effort to secure the funding the judiciary requires to eliminate all case backlogs and operate efficiently.

⁹Chief Justice David Maraga. "Statement by Chief Justice David Maraga on Judiciary Budget Cuts." The Judiciary of Kenya, November 4, 2019. <https://www.judiciary.go.ke/statement-by-chief-justice-david-maraga-on-judiciary-budget-cuts/>.

¹⁰National 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>.

Using this method would almost quadruple the resources available to the judiciary. The only downside is that this is an arbitrary target. The judiciary’s budget would be Ksh 55 billion, Ksh 64.3 billion, and Ksh 66.86 billion, respectively, if a simulation was done using the current budget for the last three financial years 2020/2021, 2021/2022, and 2022/2023.

Table 7: Budget Simulation for the Judiciary (Assuming the 2 percent Rule)

	2020/21	2021/22	2022/23
Total National Budget (Ksh Bn)	2,750	3,215	3,343
Judiciary's Budget when its 2% of the Budget (Ksh Bn)	55	64.3	66.86

Source: IEA’s Budget Guide 2022/2023, Authors Own calculations.

8

Case Studies

Financial independence is one of the most crucial factors considered when assessing the independence of the judiciary. On three key fronts, the literature appears to point to some significant findings. The taxpayer is required to pay for the judiciary's annual fixed costs, as well as any intermittent costs brought on by technological advancements and any one-time, non-fixed costs.

The fact that salaries and wages are ring fenced is one of the budgets for the judiciary's most notable features. According to the respective Constitutions and subsequent statutes, judicial officers' terms of service cannot be changed during their tenure in Canada, Italy, or the United States to their detriment. Such a constitutional ruling has implications for fiscal policy in that it makes employee compensation a fixed expense in the budget. This choice is crucial because the judiciary is a service industry and needs manpower from time to time to operate at an optimal capacity.

Chart 2: Select Case Studies

United States

The United States Constitution, for example, states that federal judges' salaries cannot be reduced during their tenure. In recent years, some Member States have adopted more flexible solutions to avoid negotiations between judges and the government, as well as to ensure that the government does not manipulate or appear to manipulate the judiciary by establishing terms of remuneration and other employment benefits for judges.

Italy

In Italy, a law enacted in 1984 provides an automatic mechanism for increasing the salaries and pensions of judges every three years in such a way that their remuneration remains significantly higher than that of other state employees.

Canada

In Canada, judicial salary commissions or tribunals have been established by constitutional fiat for both federal and provincial judges since 1997. Their job is to review the financial terms of judicial service (salaries, pensions, per diems, etc.) on a regular basis, taking into account various statutory parameters such as the cost of living.

Such “arbitration” commissions are made up of representatives from both the judiciary and the government and are usually chaired by a professionally qualified person chosen by the two parties and appointed by the Minister of Justice. In most jurisdictions, the recommendations of these commissions are advisory in nature and addressed to the executive. In some cases, the recommendations are legally binding on the executive (for example, in Nova Scotia). When the recommendations are advisory, the reviewing court can only refer the case back to the government or the commission, indicating what the court has determined to be untenable.

Findings and Conclusions

Some conclusions are drawn from an analysis of the literature and the cost indicatives computed in this paper include;

- The judiciary's top priorities continue to be the availability of a sufficient number of judicial officers and staff, the availability of facilities that can accommodate them, and the cost of the necessary goods and services. Those resources need to be ring-fenced to allow Judiciary to operate at an optimum level by resolving cases quickly and dealing with the case backlogs.
- The fundamental principle in budgeting that needs to be followed is that court access and judicial staffing levels should increase across all of Kenya's counties.
- Arbitrary allocation targets as a share of the budget are not advisable due to the nature of service that the Judiciary offers and might not be justifiable in the long run.
- To provide every county with the desired level of court access, the estimated cost of the court infrastructure is Ksh 47.20 billion.
- The computed cost for the judiciary in the 2022–2023 fiscal year should be Ksh 40 billion. These will make it possible for the judiciary to function as a whole at its optimum.

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