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## **MEMORANDUM TO THE JUSTICE AND LEGAL AFFAIRS COMMITTEE OF THE NATIONAL ASSEMBLY TO INCREASE FUNDING FOR THE FULL IMPLEMENTATION THE ALTERNATIVE JUSTICE SYSTEMS POLICY AND THE LEGAL AID ACT**

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This submission has been prepared by justice sector actors<sup>1</sup> who co- created Kenya's justice commitment in the 4th Open Government Partnership National Action plan (2020-2022)<sup>2</sup>.

### **Executive Summary**

Access to Justice is a critical human right that is protected under Article 48 of the Constitution of Kenya, 2010. This right has particularly been impacted by the Covid-19 pandemic and continues to be threatened. Some courts shut down while others downscaled when the pandemic first hit the Country. Kenyans were also introduced to the digital systems when some of the courts adopted the virtual court sessions and filing of court documents digitized. This locked out many self representing litigants who do not have access to affordable legal aid services and in most cases do not have access to the necessary equipment to access the judicial systems or the technical knowhow. This has pushed a lot of those with disputes to rely on community based justice systems which, for many, maintains status quo between the parties in disputes and is fast and less costly. We as access to Justice stakeholders consisting of state and non-state actors wish to present this Petition/Memorandum to the House for consideration during the supplementary budget cycle and particularly on the need for increased budgetary allocations to the implementation of the Alternative Justice System Policy and the operationalization of the Legal Aid Fund.

Kenya has been a member of the Open Government Partnership (OGP) platform since 2011. The Partnership provides an opportunity for government and civil society reformers to make government more transparent, participatory, and accountable. Working together, government and civil society co-create two-year action plans with concrete commitments across a broad range of

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<sup>1</sup> Kituo cha Sheria, Mzalendo, Haki Yetu, Katiba Institute, Coast Interfaith Council of Clerics, Strathmore Law School, University of Nairobi Law Clinic and The Judiciary of Kenya

<sup>2</sup> [Kenya Action Plan 2020-2022](#)

issues that are then monitored by Open Government Partnership's Independent Reporting Mechanism (IRM).

Kenya has since developed and submitted three action plans in 2014, 2016 and 2018 with ambitious commitments ranging from electoral openness, judicial openness, access to information, records management, legislative openness, open budgets, climate change, anti – corruption, beneficial ownership and transparency in public procurement.

The fourth national action plan (2020-2022) now includes an access to justice commitment with milestones that focus on the implementation of the Alternative Justice Systems and the Legal Aid Act; both of which are imperative as they set in place legal and policy frameworks for the promotion of access to justice in Kenya.

To track implementation of the justice commitment, a justice cluster composed of various state and non-state stakeholders has been established. The members are Judiciary (Government co-lead), Kituo Cha Sheria (Civil society co-lead), National Legal Aid Service, Katiba Institute, Namati-Kenya, Mzalendo, the Coast Interfaith Council of Clerics, Haki Yetu Organization, National Council for Administration of Justice, County Government of Mombasa's Legal Aid Unit, University of Nairobi-School of Law and Strathmore Law School.

To fulfill the justice commitment, the cluster is currently working on implementing the following milestones:

1. Adequate funding for the implementation of the AJS policy and establishment of the Legal Aid Fund
2. Setting up of 1 virtual court centre in collaboration with Kituo's ICT centre and National Legal Aid Services to build the capacity of indigent self representing clients to use technology in accessing the Employment and Labour Relations Court in Milimani, Nairobi.
3. Enhance co-referencing of cases between the Mombasa Legal Aid Unit and AJS Mechanisms

The State Law Office and the Judiciary have been tasked with access to justice despite the continued trend of inadequate budgetary allocations by the State as has been the trend for the past 5 financial years which negatively impacts their ability to carry out their mandate. In FY 2021/2022, the Judiciary was allocated 36.3% less of its budgetary estimate. Trends from the past 5 years have shown that during the supplementary budget process, allocations made to the judiciary are revised downwards and further that what is actually available and disbursed is way lower than the amount it is allocated. We are concerned that this will be the trend in FY 2021/2022 and FY 2022/2023.

We encourage that there is a shift from the current trend in the two departments so that there is increased financing of the government led legal aid services, the operationalization of the Legal

Aid Act and allocations for funding for Judiciary to fully implement the Alternative Justice Policy,2020.

## **Background**

A majority of Kenyans, due to an array of reasons, including socio-economic, legal and political factors, are unable to access justice. A Kenyan need at least KES 8000 to access justice<sup>3</sup>. This is a modest cost considering that court fees are assessed on a case to case basis and dependent on the nature and value of the claim. Before the pandemic, a third of Kenyans lived below the poverty line<sup>4</sup> and 53% of the population were multidimensionally poor.<sup>5</sup> As a result of the pandemic, an additional 2 million Kenyans have become poor in 2021 because of the serious impacts on livelihoods, sharp decreases in incomes and employment. <sup>6</sup> The cost of accessing justice was unattainable before the pandemic and has gravely worsened because COVID 19.

Injustice is the norm for most Kenyans. Justice problems are fuelling conflict, damaging livelihoods, and undermining the sacred compact between the government and the citizens. Women seeking recourse for sexual and gender-based violence are turned away by the justice institutions meant to serve them. Illiterate farmers are putting their thumbprints on decades-long lease agreements, surrendering their land to multinational companies with no understanding of the terms.

Indigent patients in need of emergency treatment are losing access to life-saving treatments when they are detained by some hospitals for their inability to meet medical bills. This is the case for a patient who needed to access specialised intensive emergency treatment following a road accident. Kenyatta National Hospital detained the patient over an accumulated bill of Kshs. 1.4 million. With the intervention of legal aid advocates, the court directed the hospital to release the patient to seek treatment elsewhere<sup>7</sup>.

Efforts to expand opportunity and reduce poverty cannot succeed without a legally empowered citizenry. Enhancing access to justice for communities is associated with higher incomes, greater financial security for women, and better enforcement of labour and environmental standards. All of these are critical to fair and sustainable development outcomes.

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<sup>3</sup> [Justice Needs and Satisfaction in Kenya 2017 \[7 MB\]](#)

<sup>4</sup> An adult earning less than KES 3,252 in rural areas and KES 5,995 monthly in urban areas according to 2020 Comprehensive Poverty Report by the Kenya National Bureau of Statistics (KNBS)

<sup>5</sup> An individual is considered multi-dimensionally poor if he or she is deprived of at least three basic needs, services or rights according to 2020 Comprehensive Poverty Report by the Kenya National Bureau of Statistics (KNBS)

<sup>6</sup> <https://www.ohchr.org/Documents/Countries/KE/Human%20Rights-Based-Analysis-Kenya-Budget-2021-2022.pdf>

<sup>7</sup> See the case of Nathan Muthangani Shimwenyi V Attorney General & 2 Others (2012) [Petition 282 of 2012](#)

Most access to justice work is led by community based paralegals who work directly with communities. They raise awareness of rights, laws, and policies; help clients to navigate legal and administrative processes in the pursuit of remedies; and support citizen engagement in law and policy reform. In Kenya, it has been estimated that the ratio of advocates to the general population is approximately one advocate for every 3,500 people.<sup>8</sup> In addition, a majority of lawyers are too expensive, too specialised, or too far away to serve the millions in need of assistance. A partnership between community based paralegals and advocates helps to resolve the imbalance between the supply of, and demand for, legal services.

The establishment of the Small Claims Courts is expected to speed up the wheels of justice particularly in trade disputes with the jurisdiction of the court capped at Kshs. 1, 000, 000. The Small Claims Courts provide an inexpensive, informal and expeditious forum for access to justice to the masses. The major success registered by this court is that within 100 days of its establishment 1621 cases were registered and of these 713 cases were heard and determined.<sup>9</sup>

Evidence shows that when people are able to access justice, they can thrive, seek peaceful solutions, protect the lands and resources they depend on, and contribute to improvements in governance.

### **What the evidence says:**

1. **Access to justice improves livelihoods:** The impacts of accessing justice on people's ability to secure their basic needs are well-documented and diverse. In Nairobi, residents of Muthurwa were legally assisted to secure their land interests through a court case<sup>10</sup>. As a result, there is legislation in place giving directions on how to carry out lawful evictions in Kenya and the outcome of this particular case has been used by other litigants in protecting their livelihood rights.
2. **Access to justice strengthens the delivery of essential services:** When people are able to monitor, report on, and influence public service delivery, they help governments to enhance the availability and quality of these services. Between 2009 and 2010, some counties in the Rift Valley Region had experienced a severe shortage of water so bad that it almost started clashes. Community leaders worked together with a paralegal to secure the construction of a 700 metre deep borehole that saw affected communities access water<sup>11</sup>.
3. **Accessing justice can address the root cause of conflict:** In Kisumu, Trans Nzoia and Eldoret, communities affected by the 2007/2008 post election violence, seeking a broad based approach to justice, were supported by grassroots justice defenders to use alternative justice mechanisms<sup>12</sup>. This platform brought together conflicting parties, restored broken relationships, enabled the return and compensation of stolen property, offered a safe space

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<sup>8</sup> <https://lsc.or.ke/about-lsk/> About 17, 000 advocates against a population of 55 million Kenyans.

<sup>9</sup> [100 days since the establishment of Small Claims Court Milimani – The Judiciary of Kenya](#).

<sup>10</sup> Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others. [Petition 65 of 2010](#)

<sup>11</sup> [Kenya's Community-Based Paralegals \(Chapter 5\) - Community Paralegals and the Pursuit of Justice](#)- Case 2

<sup>12</sup> <http://kituochasheria.or.ke/media/videos/>

for truth telling and, in some cases, closure. This has restored peace and harmony in communities divided by the post election conflict.

4. **Accessing justice reduces inequality:** In many parts of Kenya, despite facing intense gender discrimination, dispossessed widows or divorced women with access to a community paralegal asserted their land claim<sup>13</sup>. Where cases stalled at the community level, paralegals were able to bring them to formal court, where decisions are more often in a woman's favour.
5. **Accessing justice combats environmental destruction:** In Mutomo District, Kitui County, community paralegals in partnership with advocates supported residents to successfully challenge mining activities on community land that has brought about environmental degradation<sup>14</sup>.
6. **Accessing justice promotes citizen engagement:** In 2013, the Court held that prisoners have a right to vote<sup>15</sup>. This has since ensured that there is improved citizen engagement and participation in matters touching on governance in Kenya. In Laikipia and Kajiado paralegal-led community land protection efforts strengthened the rules and structures for governing community lands<sup>16</sup>. This resulted in more inclusive local governing bodies, enhancing in particular the voices of women and youth in decision making around land and natural resources. On the other hand, failure to accord citizens participation in the entrenchment of a digitized judicial system by the judiciary has led to a feeling of exclusion by many indigent ordinary Kenyans who cannot access justice. This is what led to the filing of a case against the Chief Justice seeking for implementation of initiatives and programmes aimed at ensuring that ordinary Kenyans access court services.<sup>17</sup>

The promise of one being able to access justice is compelling, yet one main challenge hinders this important work: financing.

This memorandum calls for increased and sustained financing of key government institutions which are charged with the core responsibility of implementing the Legal Aid Act 2016 and the Alternative Justice Systems Policy. Both the Legal Aid Act and Alternative Justice Systems Policy are imperative as they set in place legal and policy frameworks for the promotion of access to justice in Kenya.

Increased financing for justice is particularly important now as Kenya seeks to recover and build back better from the COVID 19 pandemic. Kenyans have and continue to experience several repercussions of the COVID 19 measures. Most notably police brutality<sup>18</sup>, extortion and bribery<sup>19</sup>,

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<sup>13</sup> [KITUO RESCUES 91 YEARS OLD GRANNY FROM LAND GRABBERS](#)

<sup>14</sup> ELC Petition No 20 of 2019 Solomon and 9 others versus Athi River Mining and 11 others

<sup>15</sup> KITUO CHA SHERIA v INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & another [2013] eKLR

<sup>16</sup> [Musul – The second community in Kenya to secure their land rights, the first to do so using legal empowerment](#)

<sup>17</sup> Kituo Cha Sheria & Others V Chief Justice & Others E 392 of 2020. Judgment in the case on the 14th October 2021.

<sup>18</sup> In 2021 alone, police have been linked to 25 extra judicial executions and 43 cases of torture while enforcing COVID 19 containment measures- Police Reforms Working Group, Daily Nation, 20th August, 2021

<sup>19</sup> <https://community.namati.org/t/webinar-legal-aid-approaches-for-marginalized-and-indigent-persons-in-the-wake-of-the-covid-19-pandemic/73653?u=aimeongeso>

increase in SGBV cases<sup>20</sup>, evictions<sup>21</sup>, loss of jobs, <sup>22</sup>- almost one-third of household run businesses are not currently operating and the informal sector workers are particularly at risk—a group in which women make up the majority<sup>23</sup>, the inability to access justice exacerbated by some courts closing, reducing or adjusting their operations.

The entrenching of the electronic system in the judicial system through virtual court hearings and electronic filing have subjected many Kenyans to in- access to justice. While we appreciate the positive impact the digitization of the judiciary has brought such as fast retrieval of filed court documents and communication on when filed matters are coming before court, we note that this has locked out many indigent clients, especially those who represent themselves. Some of the challenges they face are lack of infrastructure as most of them do not own gadgets that are able to connect them to the virtual court sessions or gadgets they can use to file court documents in the e-portal. There also exists the challenge of limited internet connectivity, which in most areas is not strong and is expensive for the indigent clients.

Furthermore, there is also the challenge in the limited technical know-how on how to access these online platforms. Most indigent clients especially the elderly are unable to access the digital platforms. The digital system also faces downtime and this causes delay in filing cases especially those that are urgent, negatively impacting those that need to file time bound court documents.

Apart from in- access to justice that has been caused by the digitized judicial system is a feeling of exclusion where indigent litigants feel that justice is only accessible to the rich. The failure to accord members of the public participation before entrenching the digitized judicial system made many ordinary Kenyans feel excluded and discriminated against on the basis of their economic status.

**To adequately meet its needs and serve the Kenyan people, the Judiciary would have required 31.2 billion. However, the current approved budget is 11.5 billion which translates to only 36.9 percent of their request. We hence acknowledge that enhancement of access to justice for indigent Kenyans may be difficult to achieve.** We maintain that increased allocations will enable our courts to host more indigent clients who seek to access the courts and even train the public on how to use the digital court filing system in place to ensure access to justice for all.

Left unaddressed, the repercussions will endure far beyond the current COVID 19 crisis. Ensuring an inclusive response and recovery to the pandemic is crucial. The State must increase financing to address the socio-economic impact of the pandemic.

At a global and regional level, Kenya has shown its commitment to promoting access to justice. Globally, Kenya has developed and submitted its 4th Open Government Partnership (OGP) Action

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<sup>20</sup> Ibid

<sup>21</sup> <https://www.nation.co.ke/counties/nairobi/Families-in-the-cold-after-Kariobangi-demolitions/1954174-5542602-ysq7ct/index.html>

<sup>22</sup> <https://www.standardmedia.co.ke/article/2001369841/uhuru-half-a-million-to-lose-jobs-due-to-coronavirus>

<sup>23</sup> <https://www.ohchr.org/Documents/Countries/KE/Human%20Rights-Based-Analysis-Kenya-Budget-2021-2022.pdf>

Plan<sup>24</sup> which includes a justice commitment focused on the implementation of the Legal Aid Act and the Alternative Justice Systems Policy. Consequently, Kenya is now a member of the OGP Coalition on Justice<sup>25</sup>. Nationally, Kenya has domesticated and integrated the SDG's, which includes a goal on justice, in its Vision 2030 Third Mid Term Plan (2018-2022)- MTP III<sup>26</sup>. In addition, MTP III policies, programmes and projects are also aligned with the aspirations of Africa's Agenda 2063 which also includes an aspiration on promoting justice.

### **What is at stake if access to justice remains underfunded?**

**Millions of Kenyans will be left behind.** Disadvantaged groups face relatively more legal, social, and economic problems than others, yet are less likely to be able to access justice. To break the cycle of exclusion—and achieve the SDGs' vision to leave no one behind—all Kenyans must be able to access justice.

**We destabilise our society.** Being able to access justice works to make institutions more equitable and responsive. When people feel that institutions are broken and unfixable, trust in government erodes. The resulting sense of powerlessness brews anger and alienation.

**Development will be hindered.** Efforts to expand opportunity and reduce poverty cannot succeed if Kenyans are unable to access justice. Enhancing access to justice for communities is associated with higher incomes, greater financial security for women, and better enforcement of labour and environmental standards. All of these are critical to fair and sustainable development outcomes.

### **Alternative Justice System Policy**

Kenya is one of 3 countries in the world that has formalised its traditional and other informal mechanisms used in accessing justice. One consequence of access to justice problems in the formal legal system is that many Kenyans resort to alternative systems of justice, such as mediation processes facilitated by paralegals and community-based traditional justice systems.

Only 10% of Kenyans use the formal justice system to resolve their disputes<sup>27</sup>. Alternative justice processes not only enhance access to justice and support expeditious delivery of justice, they also help to reduce the burden on courts and are meant to strengthen the links between formal and informal justice systems. In some areas, such as Northern Kenya, informal justice systems have almost replaced the formal justice system, also in dealing with criminal offences. However, there is an amount of interplay between the formal and informal justice systems, evident for example from the fact that community leaders who serve in informal justice systems can refer serious crimes cases to the ordinary courts. The courts have also embraced the interplay with the informal justice system through court led mediation such as that which exists in Isiolo court where the court keeps

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<sup>24</sup> [Kenya Action Plan 2020-2022](#)

<sup>25</sup> [OGP Coalition on Justice](#)

<sup>26</sup> [THIRD MEDIUM TERM PLAN 2018 – 2022](#)

<sup>27</sup> [Justice Needs and Satisfaction in Kenya 2017 \[7 MB\]](#)

a roster of council of elders. The court refers cases to the elders for determination and later recording of judgments and this is bearing fruit thus enhancing and expanding access to justice at the community level.

Kenya’s Alternative Justice System (AJS) Policy<sup>28</sup> proposes a legal framework that systematizes the use of various AJS models whilst linking the informal and formal justice systems. During the pandemic the inaccessibility of justice for indigent litigants has been exacerbated by the use of technology in court processes. AJS presents an accessible platform for indigent clients to access remedies for their disputes within an informal space recognised by law.

The Judiciary’s priority area for funding in the financial year 2021/22 identified among many other areas, the entrenchment of various alternative justice systems models and improving access to justice as key priority areas<sup>29</sup>. In the FY 2021/2022, the Judiciary had requested Sh31.2 billion, but Parliament allocated it Sh14.5 billion. Treasury further slashed the amount to Sh11.5 billion<sup>30</sup>. Due to inadequate funding, key programmes such as AJS have been scaled down.<sup>31</sup>

For the FY 2021/2022 Judiciary received only 0.6% share of the National Budget, while Parliament was allocated 1.3% and the Executive the largest, 62.8% share. It is clear that the Judiciary’s approved budget has remained the lowest in comparison to the other arms of government. The principle of equitable sharing of available resources amongst arms of government remains a serious policy concern.

 **Judiciary Budget Allocation for the Last Ten Years** 

Percentage allocation (Amounts in Million Kes.)			
FINANCIAL YEAR	TOTAL APPROVED NATIONAL BUDGET	JUDICIARY ALLOCATION	JUDICIARY AS %AGE OF THE NATIONAL BUDGET
2010/2011	999,277.40	3,912.30	0.39%
2011/2012	1,203,425.40	7,990.00	0.66%
2012/2013	1,459,855.90	15,360.00	1.05%
2013/2014	1,641,474.80	17,827.00	1.09%
2014/2015	1,530,280.20	17,492.00	1.14%
2015/2016	1,947,029.80	16,688.00	0.86%
2016/2017	2,204,993.60	17,308.00	0.78%
2017/2018	2,131,952.10	14,651.90	0.69%
2018/2019	2,456,771.90	16,289.00	0.66%
2019/2020	2,734,600.10	16,964.00	0.62%

 

Yet, the Judiciary is tasked with more functions and runs its courts across the country. Additionally, the budget is inclusive of other institutions and agencies under the Judiciary such as the Judicial Service Commission, tribunals, National Council on the Administration of Justice, and

<sup>28</sup> [Alternative Justice Systems Baseline Policy and Policy Framework – The Judiciary of Kenya](#)

<sup>29</sup> Judiciary MTEF Report FY 2012/2022-2023/2024

<sup>30</sup> [Budget cuts: Treasury slashed Judiciary’s budget by Sh3 billion](#)

<sup>31</sup> Judiciary MTEF Report FY 2012/2022 - 2023/2024

<sup>32</sup> Source: Budget Policy Statement, 2021 at page 52

the Judiciary Training Institute. In contrast, Parliament is centralized with additional funds from the NGCDF kit.

It is also concerning the ministries, departments and agencies under the Executive receive more allocation than the Judiciary as illustrated in the highlights below<sup>33</sup>:

Institution	Allocation	
National security	294.5 billion	42.5 billion - National Intelligence Service
		119.8 billion - Defence
		110.6 billion - Policing and prisons service
		10.7 billion - Leasing police motor vehicles
		1 billion - Police modernization program
		1.5 billion - Communication & surveillance system
		335 million - National Forensic Lab
		4.8 billion - Medical insurance for the police & prisons
		2.3 billion - Group personal insurance for NPSP
1 billion - NIMS		
Criminal Investigations Services	7.6 billion	
Ministry of Health	121.1 billion	
Ministry of Education	202.8 billion	
Ministry of Transport	182.5 billion	
Agriculture	60 billion	
National Metropolitan Services	48.3 billion	27.2 billion from national government 21.1 billion from Nairobi County government
<b>Commissions &amp; Independent Offices</b>		
Ethics and Anti- Corruption Commission	3.3 billion	
Office of the Director of Public Prosecutions	3.2 billion	
Office of the Auditor General	5.9 billion	
Teachers Service Commission	281.7 billion	
KNCHR	?	
CAJ	?	

Besides getting the lowest allocation of the budget among the arms of government, the allocation to the Judiciary relative to the National Budget has been declining. This is despite the increasing functions of the Judiciary and the huge unmet justice needs in Kenya. Yet, the national budget has

<sup>33</sup> Source: 2021/22 Budget Policy Statement

been increasing with every year. In any case, the allocations are not in tandem with the ever increasing functions of enabling access to justice across the country. **The trends hereunder depict the decline in allocation to the Judiciary in the FY 2021/2022. While an increment of 6.1% of the Judiciary budget has been projected for the FY 2022/2023, we are of the considered view that the increase is still way below the proposed budget estimates.**

**Table 3.1: Summary of Allocations for the FY 2021/22 -2023/24(Kshs.Million)**

S/NO.	Details	Financial Years			
		Approved Original Budget	BPS Projection		
			2020/21	2021/22	2022/23
1.0	National Government	1,871,648.0	1,950,377.7	2,047,387.2	2,171,405.9
	Executive	1,816,342.2	1,894,576.8	1,989,844.9	2,112,557.9
	Parliament	37,306.0	37,882.7	38,535.7	39,207.6
	Judiciary	17,999.8	17,918.3	19,006.7	19,640.5
2.0	Consolidated Fund Services	586,468.6	697,623.5	796,892.9	863,577.0
3.0	County Government	316,500.0	370,000.0	370,000.0	375,000.0
	<b>Total.....Kshs.</b>	<b>2,774,616.6</b>	<b>3,018,001.3</b>	<b>3,214,280.1</b>	<b>3,409,982.9</b>
<b>% Share in the Total Allocation</b>					
1.0	National Government	67.5	64.6	63.7	63.7
	Executive	65.5	62.8	61.9	62.0
	Parliament	1.3	1.3	1.2	1.1
	Judiciary	0.6	0.6	0.6	0.6
2.0	Consolidated Fund Services	21.1	23.1	24.8	25.3
3.0	County Government	11.4	12.3	11.5	11.0
<b>Notes**</b>					
<b>* Consolidated Fund Services(CFS)is composed of domestic interest, foreign interest and pension</b>					
<b>**County Government allocation is composed of sharable allocation</b>					
<b>*** The Net provision for Nairobi Metropolitan is assumed in the figures for the County Sharable</b>					

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In Uganda, the National budget for the financial year 2021-2022 allocation to the Judiciary was substantially enhanced from Ugandan Shs 199.1billion to Shs.376.9 billion.<sup>35</sup> This translates to 3.6% of the national budget allocated to the judiciary. The Ugandan judiciary has also invested in Alternative Dispute Resolution (ADR) which has seen a reduction of cases that are over 2 years old from 24% in 2017 to 17.5% in 2021 as a result of the implementation of the case backlog reduction strategy and the use of ADR alongside conventional court proceedings to improve access to justice.

The revenue generated by the Judiciary can barely meet its needs.

<sup>34</sup> The Judiciary Budget Public Hearing for the FY 2021/2022- 2023/2024 Medium Term Budget

<sup>35</sup> <https://www.finance.go.ug/sites/default/files/Publications/The%20Budget%20Speech%20for%20FY%202021-2022.pdf>



All revenue collected by the Judiciary shall be surrendered to the National Exchequer Account.

Vote : 1261	2017/18	2018/19	2019/20
	Kshs.	Kshs.	Kshs.
Fines	954,904,031	1,639,108,517	1,263,812,977
Fees	1,123,835,935	1,056,183,336	1,007,391,340
<b>Total Revenue</b>	<b>2,078,739,966</b>	<b>2,695,291,853</b>	<b>2,271,204,317</b>



National budgets are an indicator of a country's priority. Given the allocations in the past, Kenya has demonstrably shown that justice is not a national priority. The trend is that what is allocated to the Judiciary, which is lower than what the Judiciary estimated would meet their needs, is further revised downwards during the supplementary budget cycle and that not the entire amount is allocated during the Financial year. In FY 2019-2020 under the Development Expenditure, The Judiciary was allocated Kshs.4,390,400,000 which was later revised down to Kshs.3,166,400,000 and what was actually available and disbursed to the Judiciary was Kshs.1,389,419,253.<sup>36</sup> In FY 2020-2021 under the Development Expenditure, The Judiciary was allocated Kshs.14,722,436,279 which was later revised down to Kshs.14,693,278,582 and what is actually available to be disbursed to the Judiciary is Kshs.1,389,419,253.<sup>37</sup> The fear is that during the supplementary budget, the amount that is allocated for the Judiciary to carry out its mandate will be further revised down and that the Judiciary may not have access to the amount that will be disbursed as has been the trend for the past financial years.

### Legal Aid Act

The Legal Aid Act was enacted in 2016. It establishes a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable among others. However, Kenya is yet to achieve the benefits of the provisions in the Act, specifically access to justice for poor and deserving Kenyans. Some provisions of the Legal Aid Act that remain unrealized 5 years later include: the operationalization of the Legal Aid Fund for financing and expansion of the legal aid scheme nationwide.

The Legal Aid Fund supports the expansion of the legal aid scheme by remunerating legal aid providers, paying expenses incurred by represented persons and financing general operations and

<sup>36</sup>August 2020, National Government Budget Implementation Review Report For the FY 2019/2020

<sup>37</sup> May 2021, National Government Budget Implementation Review Report: First Nine Months FY 2020/21

development activities to promote legal aid. Without a Legal Aid Fund, there is limited state funded legal aid which does little to bridge the expanding justice gap. The payment of pauper briefs<sup>38</sup> are currently being borne by the Judiciary which is already severely underfunded. This payment should be borne by the National Legal Aid service.

From the table below<sup>39</sup>, State Law Office and Department of Justice has had a steady increase of budgetary allocation. Within the broader programme of Governance, Legal Training and Constitutional Affairs, the Sub Programme of Governance Reforms receives the least amount of budgetary allocation as indicated in the table below. This limited allocation, which averages about 6.7% of the total budget allocated to State Law Office and Department of Justice, is shared among Kenya National Anti-Corruption Steering Committee, Directorate of Legal Affairs, Victims Compensation Fund, Victims Protection Board and the Programme for Legal Empowerment & Aid Delivery in Kenya (PLEAD)- which oversees the implementation of the Legal Aid Act. Consequently, there is hardly enough funding to roll out the national legal aid scheme.

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<sup>38</sup> Clients unable to afford legal counsel

<sup>39</sup> [https://www.treasury.go.ke/wp-content/uploads/2021/07/PBB\\_July2021\\_Approved.pdf](https://www.treasury.go.ke/wp-content/uploads/2021/07/PBB_July2021_Approved.pdf)

PART F: Summary of Expenditure by Programmes, 2021/2022 - 2023/2024

Programme	Baseline	Estimates	Projected Estimates	
	2020/2021	2021/2022	2022/2023	2023/2024
	KShs.	KShs.	KShs.	KShs.
0606010 Civil litigation and Promotion of legal ethical standards	1,012,653,072	1,064,747,364	1,099,193,034	1,124,967,440
0606020 Legislations, Treaties and Advisory Services	375,413,703	266,252,804	282,004,659	287,560,927
0606030 Public Trusts and Estates management	272,527,335	309,484,457	321,524,309	329,101,570
0606040 Registration Services	485,834,646	618,875,331	600,850,685	620,240,058
0606050 Copyrights Protection	127,000,000	135,820,000	140,060,000	145,460,000
<b>0606000 Legal Services</b>	<b>2,273,428,756</b>	<b>2,395,179,956</b>	<b>2,443,632,687</b>	<b>2,507,329,995</b>
0607010 Governance Reforms	330,286,061	348,300,000	342,357,311	355,729,997
0607020 Constitutional and Legal Reforms	631,180,264	648,440,000	627,410,000	651,590,000
0607030 Legal Education Training and Policy	931,019,711	969,960,000	945,100,000	981,480,000
<b>0607000 Governance, Legal Training and Constitutional Affairs</b>	<b>1,892,486,036</b>	<b>1,966,700,000</b>	<b>1,914,867,311</b>	<b>1,988,799,997</b>
0609010 Transformation of Public legal services	101,602,166	129,840,000	133,900,000	139,100,000
0609020 Administrative services	623,689,889	667,931,380	733,171,338	745,671,344
<b>0609000 General Administration, Planning and Support Services</b>	<b>725,292,055</b>	<b>797,771,380</b>	<b>867,071,338</b>	<b>884,771,344</b>
<b>Total Expenditure for Vote 1252 State Law Office and Department of Justice</b>	<b>4,891,206,847</b>	<b>5,159,651,336</b>	<b>5,225,571,336</b>	<b>5,380,901,336</b>

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## Recommendations

- 1. Increase budgetary allocation to the Judiciary:** For the FY 2022/2023 - 2023/2024 the Judiciary requires KES 36. 44 billion so as to effectively address the question of access to justice. The Sub-program on Access to Justice which carries the core mandate of the Judiciary receives the largest share of the allocated budget. In the FY 2017/18, Access to Justice received 70% of the Judiciary's budget , in FY 2018/2019, Access to Justice received 76% of the budget<sup>41</sup>. With an increase in allocation, the Judiciary will allocate

<sup>40</sup> [https://www.treasury.go.ke/wp-content/uploads/2021/07/PBB\\_July2021\\_Approved.pdf](https://www.treasury.go.ke/wp-content/uploads/2021/07/PBB_July2021_Approved.pdf)

<sup>41</sup> Judiciary MTEF Report FY 2021/2022- 2023/2024

more funding towards implementation of the AJS policy and promote inclusiveness for indigent clients affected by the digital divide.

**Table 2.04: Analysis of Programme Expenditure (Amount in Kshs Million)**

	Approved Budget			Actual Expenditure		
	2017/18	2018/19	2019/20	2017/18	2018/19	2019/20
Programme 1: Dispensation of Justice						
Sub-Prog. 1: Access to Justice	10,256	12,363	12,825	9,652	11,503	12,080
Sub-Prog. 2: Administration and Support Services	4,396	3,926	4,139	4,136	3,853	4,078
<b>Total Programme</b>	<b>14,652</b>	<b>16,289</b>	<b>16,964</b>	<b>13,788</b>	<b>15,356</b>	<b>16,158</b>

2. **Legal Aid:** In light of the increased financing to the State Law Office and Department of Justice as highlighted in the memorandum, we recommend the immediate establishment and operationalization of the Legal Aid Fund as provided under section 29 of the Legal Aid Act.