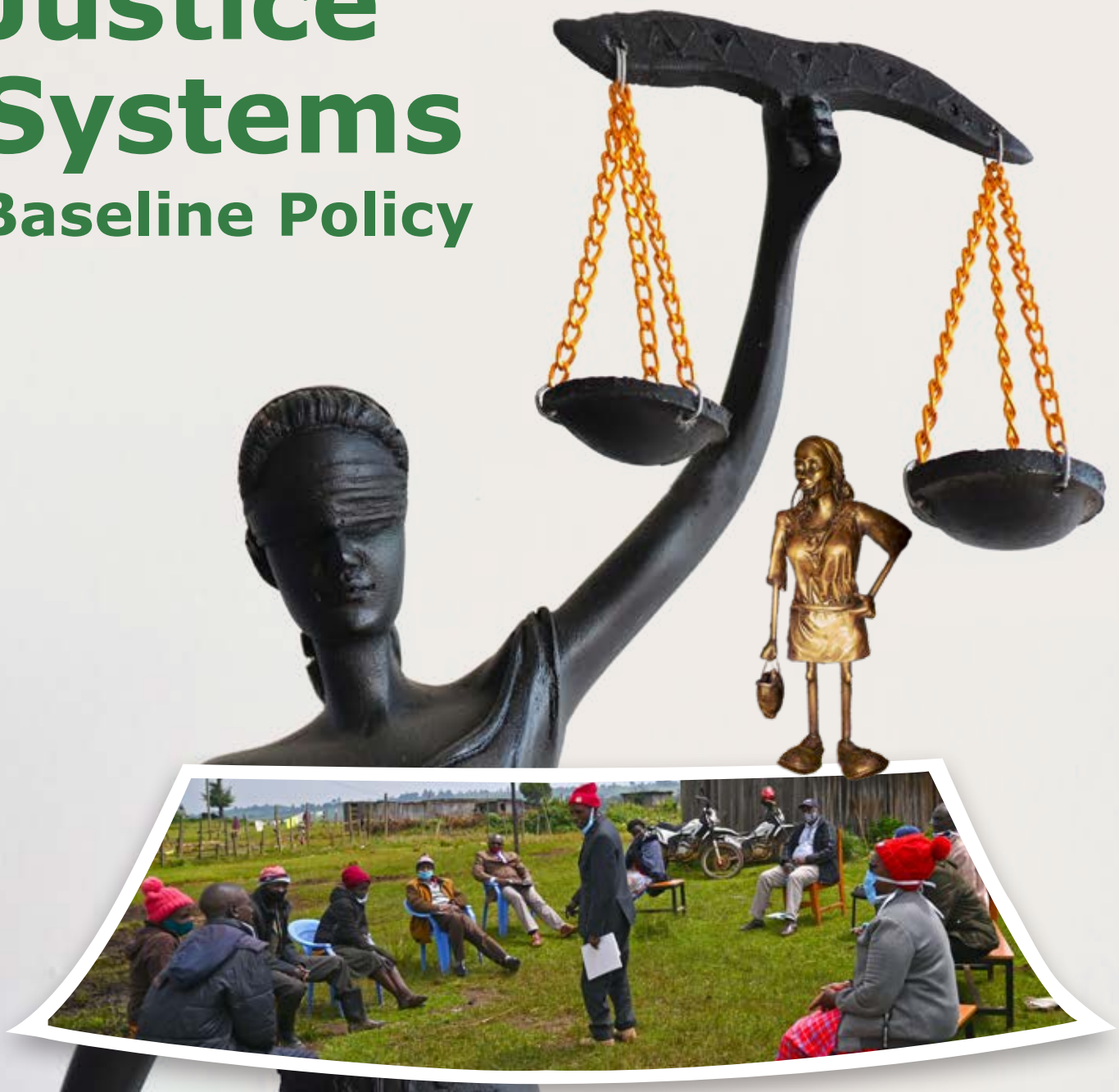
Alternative Justice Systems

Baseline Policy



TRADITIONAL, INFORMAL AND OTHER MECHANISMS USED TO ACCESS JUSTICE IN KENYA (ALTERNATIVE JUSTICE SYSTEMS)

AUGUST 2020

Published by
The Judiciary of Kenya
P.O. Box 30041 - 00100, Nairobi
Tel. +254 20 2221221

Cover photo: Allan Gichigi/UNODC
Design and layout: Amina Darani/UNODC

Funded by the European Union

UNODC
United Nations Office on Drugs and Crime

Food and Agriculture Organization of the United Nations

This publication was produced with technical assistance from the United Nations Office on Drugs and Crime (UNODC) and with the financial support of the European Union through the Programme for Legal Empowerment and Aid Delivery in Kenya (PLEAD). Its contents are the sole responsibility of the Judiciary of Kenya and do not necessarily reflect the views of the European Union or UNODC.

JUSTICE AS FREEDOM[1]: TRADITIONAL, INFORMAL AND OTHER MECHANISMS FOR DISPUTE RESOLUTION IN KENYA

AUGUST 2020

Alternative Justice Systems Baseline Policy

[1] This phrase is borrowed from Amartya Sen, *Development as Freedom* (Oxford University Press: Oxford, 1999). According to Sen (at page 3), development should not be gauged solely from an economic perspective or opportunities that any project is likely to create. Rather, we need to take a transformative approach. This perspective entails reviewing also rights that any initiative promotes or curtails.

Aligning AJS Mechanisms and Judiciary to the Constitution of Kenya (2010) and
The Judiciary's Blueprint for Sustaining Judicial Transformation

Letter of transmittal

Date: Friday, 17th August, 2020

Hon. Justice David Maraga
Chief Justice and President
The Supreme Court of Kenya
NAIROBI.

Your Lordship,

RE: REPORT OF THE TASKFORCE ON THE TRADITIONAL, INFORMAL AND OTHER MECHANISMS FOR DISPUTE RESOLUTION IN KENYA:

In line with the directive Your Lordship gave *vide The Kenya Gazette* (Special Issue) Gazette Notice. Vol. CXVIII-No.21, 4TH March 2016, P. 838.

The Taskforce was required to examine the legal, policy and institutional framework for the furtherance of the endeavour by the Judiciary to exercise its constitutional mandate under Article 159(2)(c) and its plans to develop a policy to mainstream Alternative Justice Systems (AJS) with a view to enhancing access to and expeditious delivery of Justice as espoused in both the Judiciary Transformation Framework and Sustaining Judiciary Transformation (SJT), the blueprints for Transformation in the Judiciary. The Taskforce undertook its assignment diligently from April, 2016.

We now have the great pleasure and honour to submit our Report to Your Lordship and to thank you for the opportunity to make our humble contribution towards defining the pathway for promoting AJS in Kenya.

Accept, Sir, the assurances of our highest regard.

Yours faithfully,

.....

Justice (Prof.) Joel Ngugi
(Presiding Judge, Nakuru High Court)
Chairperson

Dr. Steve Ouma Akoth
(Executive Director, Pamoja Trust)
Vice- Chairperson

Hon. Clara Otieno-Omondi,
(Magistrate)
Member

Hon. Florence Macharia
(Magistrate)
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Jedidiah Wakonyo
(Commissioner, Kenya National Commission on Human Rights)
Member

Hon. Joan Irura
(Magistrate)
Member

Hon. Justice Joseph Sergon
(High Court Judge)
Member

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Member

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National Cohesion and Integration Commission (NCIC)
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(Representative, Law Society of Kenya)
Member

Hon. Peter Mulwa
(Judiciary/RMC)
Member

Chief Inspector Peter Thuku,
(Kenya Police Service)
Member

Samuel Nderitu
(Chartered Institute of Arbitrators- Kenya Chapter)
Member

Sheikh Ahmed Set
(National Council of Elders)
Member

Dr. Steve Ouma
(Deputy Director, Judiciary Training Institute)
Member

Timothy Mwichigi
(Legal Resources Foundation)
Member

Tom Chavangi
(National Land Commission)
Member

Vincent Monda
(Representative, Office of the Director of Public Prosecutions)
Member

Acknowledgments

During the final stages of developing this policy document, a colleague wondered why it should take so many years to develop a policy document. Well, we had no response. However, when the same colleague reviewed the draft that has been presented by the Taskforce, she concluded that, indeed, development of the policy document was an endeavour that explored many areas of uncertainty, which necessarily required the indulgence and involvement of diverse actors. The Taskforce had its humble beginnings as a forum of dialogue between the then Chief Justice, Dr. Willy Mutunga and diverse Councils of Elders from all over the country. Shortly after that, the Judiciary incorporated the Alternative Justice Systems (AJS) as a central strategy for responding to the internal crisis of backlog within the Judiciary as well as an avenue for realizing the transformative intent of the Constitution of Kenya, 2010. We thus thank Hon. Dr. Mutunga for initiating this process and for his leadership in defining the path of the AJS Taskforce.

Yet, the Taskforce would have realized but little had it not been for Chief Justice David Maraga who, upon taking office, extended the tenure of the Taskforce. Justice Maraga further ensured that the AJS were formally captured and in the Judiciary's Strategic Plan (2017—2021) on *Sustaining Judiciary Transformation*. In this plan, AJS has been situated as a principal pillar and strategy for realizing the vision of Judiciary Transformation and access to Justice in Kenya. We are delighted the Taskforce completed its work and submitted this Final Report during the tenure of Justice Maraga as Chief Justice.

When we set out to undertake this work, the Taskforce had no resources, yet the task at hand was both enormous and momentous. It is the Judiciary Training Institute (JTI) that almost single-handedly took up the enormous financial, administrative and convening obligations of the Taskforce. We were privileged to enjoy support from Retired Justice Paul Kihara (currently the Attorney-General) who was then Director at the JTI at the time of conceptualizing the AJS question and the mandate of the Taskforce. Later, after my tenure at the JTI, my predecessor the Late Justice Prof. Odek and the current Director, Justice Kathurima M'Inoti, continued to ensure that JTI remained the natural home of the Taskforce.

The pedagogy of this Taskforce was that of learning and shaping our mandate to suit the path that has long been defined by the AJS actors all over the country. We have worked with members of Court User Committees, Judicial Officers and Councils of Elders from all parts of the country. To ensure a far-reaching learning and public engagement space, we made an invitation for memorandums from various interested parties. The response was overwhelming, with about 230 submissions received. We thank Kenyans from all walks of life who are justice seekers and providers for the privilege of learning from them and for their critical contribution in shaping this policy.

The funding of this initiative brought together various actors who supported us at various stages and sometimes as a basket fund. In that way, they have made an investment that we do hope shall have far-reaching consequences in fostering effective access to justice in our society. At the nascent funding stage, the Taskforce received enormous support from civil society organizations working on social justice, human and legal rights. Amongst those who offered this support were the International Commission of Jurists-Kenya (ICJ-K), the Federation of Women Lawyers of Kenya (FIDA-K), the Legal Resources Foundation (LRF), the Pamoja Trust, Kituo

Cha Sheria, Usalama Forum, The Legal Resources Foundation, and the Public International Law and Policy Group, the GIZ and the Korogocho Social Justice Centre. We also wish to thank the World Bank for enormously supporting the Taskforce's work through the Judiciary Performance Improvement Project (JPIP). Similarly, the Ford Foundation, the International Development Law Organization (IDLO), and the United Nations Food and Agriculture Organization (FAO) have given the Taskforce enormous financial support.

Throughout the process, however, our core development partner has been the United Nations Office on Drug and Crime (UNODC) through the European Union-funded PLEAD project. We cannot thank UNODC and the European Union enough for both the technical and financial support accorded to the Taskforce throughout the process of the generation of this Policy.

In the preparation of this report, we have been very ably helped in different ways by Yvonne Oyieke, Dr. Linda Musumba, Dr. Edwin Abuya, and indeed all the Taskforce members. We deeply appreciate the earnest and scholarly efforts of Dr Steve Ouma Akoth, whose deep insights into the core issues of this field were most instructive. Amos B. Omollo, who did the final editing of the Policy Report, also deserves mention. Finally, while this final Report has been signed by the current members of the Taskforce, past members who were seconded to the Taskforce by their various institutions deserve special mention. Many of them remained ex-officio members of the Taskforce when their tenure at their organizations ended. They include: Anita Nyanjong and Teresa Mutua both formerly of ICJ-Kenya; Jemimah Aluda formerly of the ODPP; Barbara Kawira-Japan formerly of FIDA-Kenya; Justice Christine Ochieng' formerly of FIDA-Kenya and Sylvester Adwoli formerly of the Kenya Police. Special thanks also go to Jane Murungi of the University of Nairobi – Kisumu Campus School of Law. Though not an official member of the Taskforce, Ms. Murungi volunteered as an *ex-officio* member of the Taskforce generously offering her expertise and time.

Finally, I would be remiss if I did not acknowledge the truly amazing rapporteuring work done on a voluntary basis by the Strathmore Dispute Resolution Center (SDRC). Headed by the ever-efficient and indefatigable Ms. Balla Galma, SDRC was always on hand to offer services as the official rapporteur to the Taskforce. SDRC also served as the archivist to the Taskforce helping to systemize the truly overwhelming documents and data the Taskforce needed to sift through. We thank the many volunteers at SDRC who offered their time and expertise.

To all those who we could not mention by name, accept our acknowledgement of your role and contribution.

Let justice be our shield and defender!

Justice (Prof.) Joel Ngugi
(Presiding Judge, Nakuru High Court)
Chairperson

Nairobi, Kenya
August, 2020

Foreword

One of the core principles laid down in the Constitution to guide the administration of justice and the exercise of judicial authority, is the requirement to embrace alternative forms of dispute resolution, including traditional dispute resolution mechanisms. This requirement is a fundamental shift from the approach to the idea and concept of justice, especially to our Kenyan context. Kenya's communities have, for generations, developed their own justice systems that have and continue to hold societies together. While justice dispensed by the Courts has occupied the centre-stage in the administration of justice, the reality is that the vast majority of disputes (the Policy estimates around 90 percent) among Kenyans are resolved through justice systems that are outside the formal Court process. Therefore, the constitutional guidance to embrace and recognize Alternative Justice Systems is located within a wider frame of response that addresses, holistically, the concept of justice in the Kenyan context.

It is in the above context that my predecessor, Retired Chief Justice Dr. Willy Mutunga appointed the Taskforce on the traditional, informal, and other mechanisms for dispute resolution in Kenya. The team was required to examine the constitutional, legal, and policy options available to fulfil the requirement under Article 159 (2) of the Constitution. More importantly, the Judiciary has, through its key blueprints (Judiciary Transformation Framework (2011-2016) and Sustaining Judiciary Transformation 2017-2021) laid down the strategies, plans, and institutional policies to accommodate and recognize alternative systems of justice. The Policy is, thus, a critical output for the future of administration of justice, and specifically, the manner in which judicial services can be offered while taking cognizance of the wider justice processes in the country.

There is no doubt that Alternative Justice Systems hold great promise in enhanced access to justice, in a holistic sense of the concept. The Policy makes clear recommendations and viable options on how the judicial system and Alternative Justice Systems can interact in a manner that is mutually reinforcing and focused on an effective system of justice. The Policy has also identified useful and immediate steps to be taken in order to animate this important aspect of the administration of justice. These steps include: identification of matters to be brought under AJS, regulation of practitioners of AJS, appropriate procedures and processes in AJS, appropriate interventions, and resource allocation to support the process.

More importantly, however, it is critical that the Policy is seen as a momentous step towards fulfilling the Transformational agenda of the Constitution of Kenya, 2010. Through both unleashing the transformative potential of Alternative Justice Systems and embracing sociological and situated jurisprudence required by the Constitution, the Policy offers a dialogic space for both the Judiciary and Alternative Justice Systems to deliver on the transformative vision of the Constitution of Kenya: reversal of structures that lead to gender oppression; social injustice and stigma; cultural domination; distributive and social injustice and other forms of oppression.

The Policy is an important guide on the operationalization of Alternative Justice Systems, not only to the Judiciary, but to all institutions in the justice sector. I thank the entire team, under the leadership of Hon. Justice (Prof.) Joel Ngugi, for this important work that will help define an important part in the administration of justice in the country.

Hon. Justice David K. Maraga, EGH
Chief Justice of the Republic of Kenya &
President of the Supreme Court.

Nairobi
27th August 2020

Contents

Letter of transmittal	**iv**
Acknowledgments	**vii**
Foreword	**ix**
List of acronymns and abbreviations	**xiii**
Executive summary	**xiv**
AJS in historical perspective	xiv
The imperatives of engaging with AJS	xiv
The four models of AJS practice	xvi
Overall recommendations	xvii
Table of cases and legislation	**xix**
1. Introduction: Alternative Justice Systems and the need for an AJS policy in context	**1**
1.1. AJS in historical perspective	1
1.2. A note about terminology	5
1.3. The inquiry and policy development process	6
2. Conceptual framework and imperatives for Alternative Justice Systems	**9**
2.1. The imperatives of engaging with AJS	9
2.1.1. Access to Justice in Kenya: The Reality	9
2.1.2. The “River of Justice”	10
2.1.3. Justice Needs Survey Results	11
2.1.4. Situational Analysis from Field Studies	12
2.2. AJS expands human rights and human autonomy	17
2.2.1. Engaging with the Repugnancy Clause	19
2.3. Agency theory of jurisdiction of AJS	22
2.3.1. Fairness	24
2.3.2. Dignity	24
2.4. AJS enables social re-engagement with (and re-legitimizes) the State	25
2.5. AJS as a site for stimulating the growth of culture and customary norms	26
2.6. Resituating the Restatement project	26
2.7. Resituating rationality: the traditional as rational	29
2.8. AJS advances justice differently and more effectively	31
2.9. Return to restorative justice	31
2.10. AJS ensures more social inclusion	31
2.11. More affordable justice	32
2.12. Minimal formalities and more expeditious justice	32
2.13. Less adversarial and creative solutions	33
2.14. AJS affirms people’s sovereign power	33
2.15. AJS as an everyday way of living	35

2.16. Moving away from the disputational mode of resolving disputes 35
2.17. Other advantages of AJS 36
2.18. Decongestion of Courts and reduction of backlog 37
2.19. Reduction in reliance on incarceration 37
2.20. Diversion from criminal prosecution 38
2.21. AJS promotes common civilization as envisaged in the Constitution 38
2.22. AJS and the constitutional standpoint 38
2.23. Conclusion: The imperative of engaging with AJS in Kenya's justice discourse 40

3. Challenges and responses on Alternative Justice Systems 41
3.1. Concerns, challenges and vulnerabilities 41
3.1.1. The Challenge of Gender Justice 41
3.1.2. The Challenge of Inclusion of Marginalized and Vulnerable Groups 42
3.1.3. The Challenge of Procedural Fairness and Undermining Constitutional Values 43
3.1.4. The Concern About Traditional Practises inconsistent with the Constitution of Kenya (Article 159 3(c)) 44
3.1.5. The Challenge of Affirming Public Values through Litigation and Adjudication 45
3.1.6. Challenge of AJS for Minorities in Mixed Communities 45
3.1.7. Other Practical Concerns about AJS 46
3.2. Response to the challenges in AJS 48
3.2.1. The Need to Decolonize Human Rights Discourse 48
3.2.2. The Need to Recalibrate our Understanding of AJS and "Customs" 49
3.2.3. A Didactic Pedagogy of Engagement with AJS 49
3.2.4. Empowerment of Justice Seekers and Listening to Marginalized Voices 49
3.2.5. Embracing an Obligations Framework (see Chapter 6 of this Policy) 50
3.2.6. Training and Skills-building for AJS Justice Providers 50
3.2.7. Responding to Concerns about the Constitutional Role of the DPP in Criminal Cases 50

4. How is AJS practiced? Existing models of AJS 51
4.1. The four existing models of AJS practice 51
4.1.1. Autonomous AJS Institutions 51
4.1.2. Third Party Institution-Annexed AJS Institutions 51
4.1.3. Court-Annexed AJS Institutions 52
4.1.4. Regulated AJS Institutions 53
4.2. AJS and lessons from comparative jurisdictions 53
4.3. Task force synthesis and recommendations on form of AJS institutional practice 54

5. Operational doctrines of interaction between Courts and matters determined by or before AJS institutions 55
5.1. The need for an appropriate doctrine of interaction 55
5.2. The appropriate matrix for balancing autonomy and constitutional values 55
5.3. Six standards of review/interaction between the Courts and matters determined by or before AJS institutions 57
5.4. Synthesis, conclusions and recommendations 58

6. The obligations framework 59

6.1. Why a rights approach? 59

6.2. The obligations approach explained: three pillars of the AJS guiding principles—Respect, Protect and Transform 60

6.2.1. Duty to Respect 60

6.2.2. Duty to Protect 61

6.2.3. Duty to Transform 62

6.3. Capacity building of the AJS framework 64

7. Key areas of intervention and implementation 65

7.1. Strategic Objective 1: To formally recognize and identify the nature of cases AJS can hear 65

7.2. Strategic Objective 2: Strengthening the processes for selection, election, appointment and removal of AJS practitioners 68

7.3. Strategic Objective 3: Develop procedures and AJS jurisprudence 72

7.4. Strategic Objective 4: Facilitate effective intermediary interventions 75

7.5. Strategic Objective 5: Strengthened and sustainable resource allocation and mobilization 78

8. Operationalizing the AJS policy—the roles of different actors 81

9. Operationalizing the AJS policy: The implementation matrix 84

10. Moving forward and conclusion 91

List of references 93

Annex i: Comparative analysis of AJS in select jurisdictions 98

List of acronymns and abbreviations

ADR	Alternative Dispute Resolution
AJS	Alternative Justice Systems
AG	Attorney General
CBOs	Community Based Organizations
CRT	Critical Race Theory
CSOs	Civil Society Organizations
CUC	Court Users Committee
FGM	Female Genital Mutilation
FIDA	Federation of Women Lawyers
HRBA	Human Rights Based Approach
JTI	Judiciary Training Institute
LC1	Local Area One
LLC	Local Council Court
LRF	Legal Resources Foundation
ODPP	Office of the Director of Public Prosecutions
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime
USAID	United States Agency for International Development

Executive summary

In line with a directive from his Lordship the Chief Justice, Hon. (Dr.) Willy Mutunga, *vide The Kenya Gazette* (Special Issue) *Gazette Notice. Vol. CXVIII-No.21*, 4th March 2016, the Taskforce on Alternative Justice Systems was appointed to look at the various *Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems).* The tenure of the Taskforce was subsequently extended by Chief Justice Hon. David Maraga to April, 2010. The Taskforce was required to examine the legal, policy and institutional framework for the furtherance of the endeavour by the Judiciary to exercise its constitutional mandate under Article 159 (2) and its plans to develop a policy to mainstream Alternative Justice System (AJS) with a view to enhancing access to and expeditious delivery of justice as espoused at Pillar One of the *Judiciary Transformation Framework*, which was the blueprint which undergirded transformation in the Judiciary in the period 2012-2016. This objective was later included in the *Sustaining Judiciary Transformation* Blueprint. Under the able leadership of Justice (Prof.) Joel Ngugi (Presiding Judge, Nakuru High Court; Chairperson) and Dr. Steve Ouma Akoth (Executive Director, Pamoja Trust; Vice Chairperson), the Taskforce undertook its assignment diligently from then until the completion of this Policy.

AJS in historical perspective

Human society has had justice systems for as long as it has existed. In Kenya, the different communities that existed before colonial occupation and rule had their own systems and mechanisms of justice. These systems are referred to as Customary or Traditional systems, although they have undeniably been altered through the encounter with the colonial and post-colonial legal systems. The colonial administration in Kenya pursued a dual track approach to justice and dispute resolution, comprising: Native Tribunals, and later Native Courts, which applied "customary law" to the locals, and; the Colonial State Courts, which applied to the settlers and for matters whose jurisdiction was excluded from the Native Courts. This dual Court system attempted to be both stabilizing and transformative. It provided new opportunities and altered the distribution of power in the communities. In addition to Customary Law, Islamic Law was practiced in certain parts of the country. The coming of the White colonialists simply opened another centre of justice, albeit one that sought to subjugate all others. This position persisted through 2010 when the Constitution of Kenya revived the prominent place of African Customary Law as well as "Traditional" systems and mechanisms in the legal order.

The imperatives of engaging with AJS

Situational Analysis from Field Studies conducted by the Taskforce indicate that Kenyan communities have made efforts to protect, preserve, and promote their cultures, while affirming that these have, indeed, been deployed in Kenya for long. This has included dispute resolution systems. Further, the frameworks are present in both urban and non-urban settings. The Report documents field case studies from, among others, Kericho, Othaya, Garissa, Isiolo, Marsabit, Kuria, Nairobi City County, and Narok.

The AJS Taskforce has identified the following as the key advantages of AJS:

a. ***AJS reflects the lived realities of Kenyans and is an effective mechanism for increasing access to justice for many Kenyans***: The Justice Needs and Satisfaction in Kenya ('Justice Needs Survey') generally suggests that approximately, only four to five per cent of the population ever submit legal disputes to the law courts. Most disputes, approximately 95%, are resolved through informal and non-State-based means outside the confines of Courts. These informal means include a myriad of dispute resolution processes of which AJS is just one. This captures the multi-polarity of justice dispensation in Kenya. The movement is towards multiple justice systems.

b. ***AJS as a Framework for Expanding Human Rights and Human Autonomy***: Correctly conceived, AJS is an important tool for the vindication and expansion of human rights and human autonomy. It is not, as is often portrayed, an avenue for the diminution or abuse of human rights.

c. ***AJS as a Mode of Doing Justice Differently and More Effectively*:** AJS is seen as a different and better mode of doing justice in at least four ways:

i. It is a form of restorative justice – unlike the adversarial system which prevails in Court;
ii. It ensures more social inclusion since it is participatory in nature;
iii. It is more affordable;
iv. It has minimum formalities and technicalities; and focuses on substantive justice;
v. It is more expeditious;
vi. It is less adversarial and more creative in terms of remedies.

d. ***AJS is an Effective Mechanism for the Reduction of Case Backlog and Decongestion of Courts:*** By dealing with appropriate disputes and actively preventing others from becoming active disputes, AJS reduces congestion of cases in Courts.

e. ***AJS is a Mechanism for Social Re-engagement with (and Re-legitimizing) the State***: One of the transformative objectives of the Constitution is to re-legitimise the State by bringing Government closer to the people. One way of meeting this objective is through public participation–a key pillar of the Constitution.[2] Informal justice systems enhance public participation in the justice system.

f. ***AJS is a Mechanism for Reconstituting the State and the Citizen as Part of the Constitutional Project to Remake the Kenyan State***: AJS seeks to enhance the role of the State and the citizen as direct actors making contributions towards their civic autonomy. The State is reconstituted by accommodating the lived realities of Kenyans, and by allowing them to make direct contributions towards governance. Citizens are no longer subjects of the State. Rather, they are partners in the running of the Country. Like devolution,[3] AJS brings the government closer to the mwananchi. Additionally, since AJS expands civic autonomy, it also reconstitutes the citizen and the exercise of citizenship rights.

2 See, for instance, the following articles in the Constitution: 196(1)(b) (requiring County Assemblies to 'facilitate public participation and involvement in the legislative and other business of the assembly and its committees'); 201 (calling for 'public participation in financial matters'); 69 (encouraging public participation in environmental management and conservation); 118 (requiring Parliament to facilitate public participation in passage of laws and running of parliamentary affairs).

3 See chapter 11 of the Constitution.

g. ***AJS as a Site for Reclaiming Ossified Customary Norms and as a Project to Resituate the Traditional as Rational***: AJS mechanism is a site for preserving and promoting cultures and preventing them from "ossifying" or becoming "stale". The practice of AJS also belies the false logic of modernity that all that is "traditional" and "African" is irrational and unfit for contemporary life.

The four models of AJS practice

AJS is anchored on Article 1(1) and 1(2) of the Constitution. This framework of dispute resolution is a direct exercise of political sovereignty. The practice, regulation and legal application of AJS in different jurisdictions could be categorized into four main models, namely:

1. ***Autonomous AJS Institutions***: These are processes and mechanisms run entirely by the community. The community selects and approves the third parties involved in resolving disputes as well as the processes, procedures and applicable substantive norms, without any interventions or regulations from the State. The third parties selected resolve these disputes in accordance with the laws, rules and practices that govern that particular community. These AJS institutions mostly work relatively independently of any form of State regulatory mechanisms.

2. ***Third-Party Institution-Annexed AJS Institutions*:** These can be State-sanctioned institutions such as chiefs, the police, probation officers, child welfare officers, village elders under the County government, and the chair of *Nyumba Kumi* groupings, among others. They can also be non-State or related institutions such as church leaders, Imams and Sheikhs among Muslims, as well as other religious leaders and functionaries of social groups such as Chamas, NGOs and CSOs. The main characteristic in this model is that the State and non-State third parties are not part of any State judicial or quasi-judicial mechanisms.

3. ***Court-Annexed AJS Institutions*:** These refer to AJS processes that are used to resolve disputes outside the Court, although under its guidance and partial involvement. They work closely with the Court and Court officers in the resolution of disputes through a standard referral system between the Court, Court Users Committees (CUCs), the AJS processes, and other stakeholders such as the ODPP, Probation Office, and Children's Office. This dispute resolution model fuses the community-based mechanisms and the formal justice system.

4. ***Regulated AJS Institutions*:** These are AJS mechanisms created, regulated, and practiced either entirely or partially by State-based law or statute. These models include States that incorporate AJS mechanisms like traditional Courts and/or local government structures in their Court systems as part of their judicial mechanism. Examples of these practices of AJS can be found in South Sudan, South Africa and, to some extent, Botswana and Uganda. Kenya also briefly experimented with this model in the form of Land Disputes Tribunals.[4]

4 The Land Disputes Tribunal Act, 1990 (Chapter 303 of the Laws of Kenya). Section 4 of the Act sets up a Land Disputes Tribunal for every registration district. The Tribunal consists of the District Commissioner as Chair and two or four elders appointed by the District Commissioner from a list appointed by the Minister in charge of lands.

Overall recommendations

Based on collected data, discussions by the Taskforce, the lived realities and practices of Kenyans, and the opinions of experts on AJS, the recommendations of the Taskforce are that:

1. ***Models of AJS Institutions***: Kenya should only apply the three models currently encountered in practice. These are the *Autonomous AJS Institutions*; the *Third Party-Annexed AJS Institutions*; and the *Court-Annexed AJS Institutions*. These models should be maintained, respected, protected, and transformed in practice.
   The fourth model – the *Regulated AJS Institutions* – should not be introduced in Kenya. This model will likely unduly distort AJS practices in Kenya; is too readily amenable to appropriation; and may undermine rather than promote AJS practices overall. Kenya's failed experiment with the Land Disputes' Tribunals in the 1990s provides a necessary cautionary tale in this regard.

2. ***Human Rights-Based Obligations Framework:*** The Policy recommends a rights-based obligations framework anchored on three Pillars or Guiding Principles—namely the duty to 'Respect, Protect and Transform.' The Policy has adopted the human rights language which has emerged globally and nationally as a useful moral and governance discourse. This Policy has adopted the human rights language in the context of Kenya for a number of reasons including:

   a. First, the instructive statement in Article 159(2)(c) of the Constitution of Kenya, explicitly requires that AJS ought to be promoted as a principle and practice. The notion of 'promote' is a positive obligatory mandate of the Judiciary and it is best to conceptualize it in the human rights context and language in view of Kenya's Bill of Rights.

   b. Second, human rights provide an appropriate language and context for rebalancing the society. In the context of moral, political, economic and social inequalities in Kenya, the rights language is perhaps the most appropriate to advance AJS.

   c. Third, human rights as an ongoing societal construct enables interchange between law, politics and culture. This is one of the primary objective of AJS.

   d. Fourth, the Constitution of Kenya inscribes a strong logic and ethic of human rights as the controlling narrative and thread gluing together the Kenyan society and its ambitions for an inclusive prosperous and just society.

   e. Fifth, the Constitution envisages that the human rights language is an important and able discourse for shaping and influencing the growth of AJS as a sustainable and pragmatic system of justice.

3. ***Agency Theory of Jurisdiction of AJS:*** This Policy also proposes an Agency Theory of AJS in delimiting the jurisdiction of AJS institutions and mechanisms. The theory does not distinguish civil from criminal law. Instead, it asks if it can be objectively determined that the parties to a given dispute have consensually and voluntarily submitted themselves to the AJS mode of dispute resolution; and whether the consent of the parties can be objectively and credibly be determined to be informed, mutual, free and revocable. If the answer is in the affirmative and if there is no specific legislation or public policy ousting the jurisdiction of AJS mode of dispute resolution, then the dispute is amenable to the AJS mode of dispute resolution – whether the dispute is formally determined to be "civil" or "criminal."

4. ***Operational Doctrines of Interactions Between the AJS and Courts:*** The Policy has also made recommendations and provided guidelines of how Judges and Judicial Officers should deal with questions related to AJS when they encounter them in the course of determining controversies filed in Court. The Policy terms the different approaches to this question as "Operational Doctrines" and identifies six such doctrines as follows:

    i. *Avoidance*: The Court could simply ignore previous AJS proceedings and awards.

    ii. *Monism*: The Court could treat previous AJS proceedings or awards as a tribunal of "first instance" from which a dissatisfied party is permitted to appeal to the Court. In this mode, the Court conducts a *de novo* review of both facts and law.

    iii. *Deference*: The Court reviews previous AJS proceedings and awards for procedural propriety and proportionality only. This is the most appropriate interaction between the Courts and AJS.

    iv. *Convergence*: The Court defers to the AJS process only when both parties agree. In this mode, either party has a veto to choose whether previous, concurrent or intended AJS proceedings should be taken into account by the Court.

    v. *Recognition and Enforcement in the Mode of Arbitral Awards*: Here, the Court has a duty to recognize and enforce an award by an AJS mechanism as it would its own decree subject only to the right of one party to set aside the award for an extremely narrow set of reasons: where the award is unconscionable or offends public policy or where the adjudicators/members of the panel were corrupted or otherwise unduly influenced.

    vi. *Facilitative Interaction*: In this mode, the Court accepts the AJS proceedings or awards as evidence for the parties in the Court process. While the Court, therefore, does not accept and enforce the AJS award or verdict as given in the AJS proceedings, the award or proceedings serve as one of the pieces of evidence the Court uses to reach its own verdict. The probative value the Court assigns to this evidence will vary depending on the nature of the AJS proceedings.

The Policy encourages Judges and Judicial Officers to deploy either the Deference or Recognition and Enforcement Operational Doctrines when they encounter these questions in practice. There may be instances where a prior agreement of the parties or the specific circumstances of the case make the Monist or Facilitative Doctrines appropriate. However, the Policy reaches the conclusion that Avoidance and Convergence doctrines are inappropriate in our constitutional context in view of Articles 159, 11 and 44 of the Constitution. Courts should not, therefore, resort to these two doctrines when they encounter questions related to AJS.

5. ***Key Areas of Intervention:*** Finally, the Policy has identified the following five key areas of intervention and implementation:
    a. Strategic Objective 1: To recognize and identify the nature of cases AJS mechanisms can hear.
    b. Strategic Objective 2: Strengthening the processes for selection, election, appointment and removal of AJS practitioners.
    c. Strategic Objective 3: Develop Procedures and Customary Law jurisprudence.
    d. Strategic Objective 4: Facilitate Effective intermediary interventions.
    e. Strategic Objective 5: Strengthened and Sustainable Resource Allocation and Mobilization.

This Policy document is complemented by, and should be read in conjunction with, the Alternative Justice Systems Framework Policy.

Table of cases and legislation

Cases

Kenya:

1. Josiah Njoroge Njuguna v Ingobor Farm Co. (Registered Trustees) and 3 Others (2018) eKLR
2. Owners of Motor Vessel "Lilian S" v Caltex Oil (K) Ltd (1989) KLR 1
3. Rex v Amkeyo (1917) 7 EALR 14.
4. Wanjiru Gikonyo &2 others v National Assembly of Kenya & 4 others [2016] eKLR Petition No 453 of 2015

Common Law:

1. R v Sussex Justices, Ex Parte McCarthy (1924) 1 KB 256.
2. O'Reilly v Mackman (1982) 2 AC 237

South Africa:

1. *S v Makwanyane* (1995) 3 SA 391.

Other jurisdictions:

1. *Walker v Husssmann Australia Pty Ltd* (1991) 24 NSWLR
2. *Bush v. Gore* 531 U.S. 98, 128

Legislation

Kenya:

1. Constitution of Kenya (2010)
2. Judicial Service Act (Act No. 1 of 2011, Act No. 25 of 2015)
3. Advocates (Remuneration) (Amendment) Order (Legal Notice No. 35, 2014)
4. County Governments Act (Act No. 17 of 2012)
5. Judiciary Fund Act (Act No. 16 of 2016)

Other jurisdictions:

1. Interim Constitution of South Africa (1993)

1.

Introduction: Alternative Justice Systems and the need for an AJS policy in context

1.1. AJS in historical perspective

1. Human society has had justice systems for as long as it has existed. In Kenya, the different communities that existed before colonial occupation and rule had their own systems and mechanisms of justice. These systems are at times still referred to Customary or Traditional systems. As they exist in contemporary times, these systems and mechanisms have been altered through the encounter with the colonial and post-colonial legal systems.

2. It is no simplification to say that each society in pre-colonial Kenya had a legal system, while some ethnic groups actually had multiple systems operating side by side. Many anthropologists and legal historians have concluded that these legal systems had certain common features. In the main, they were: informal, flexible, unwritten and un-codified procedures; relied on community participation; characterized by a primary focus on reconciliation and reparation.[5] However, the actual procedures and substantive law applied differed from community to community, but all were greatly influenced by the prevailing moral and spiritual codes and beliefs. Each society also had its own religious beliefs and practices, and the spiritual heads played a central part in the resolution of disputes as well as maintenance of law and order within the community.

3. At the outset of colonialism, the Colonial State faced a dual problem: One problem was how to establish centralized control over the business of conquest and administration; another was how to govern with meagre resources and little knowledge of the indigenous populations and their ways of being.[6] As Brett Shadle has persuasively argued, the colonial State responded to this dual challenge by intervening in the law, justice and order sector by, among other measures, establishing Native Courts. The justification, Brett Shadle argues, quoting Fredrick Lugard, was:

5 See, for instance, Sarah Kinyanjui, 'Restorative Justice in Traditional Pre-Colonial "Criminal Justice Systems" in Kenya', *Tribe Law Journal*; Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010', (2015) *Strathmore LJ*; Jomo Kenyatta, *Facing Mount Kenya* (East African Educational Publishers: Nairobi, 1938).

6 Richard Waller, *Legal History and Historiography in Colonial Sub-Saharan Africa* (Oxford University Press, USA, 2019).

[O]nly from native Courts employing customary law was it possible to create rudiments of law and order, to inculcate a sense of responsibility, and evolve among a primitive community some sense of discipline and respect for authority. Britain had not the manpower, the money nor the mettle to rule by force of arms alone. Essentially, in order to make colonial rule work with only a 'thin white line' of European administrators, African ideas of custom and of law had to be incorporated into the new State systems. In a very real way, customary law and African Courts provided the ideological and financial underpinnings for European colonial rule.[7]

4. This approach to colonial administration led, in Kenya, to the establishment of Native Tribunals, and later Native Courts (with limited subject matter and personal jurisdiction–mainly family law, land tenure and succession) which applied "customary law" to the Natives. This operated alongside the Colonial State Courts, which applied to the settlers and for matters whose jurisdiction was excluded from the Native Courts. Later on, in the 1930s and 1940s, initial efforts were made to codify the various African Customary laws based on the argument that that would make them more predictable. These efforts were resisted by some Africans and many Colonial Administrators who favoured more fluid customs and feared that "reducing African customs to written law and placing it in a code would 'crystallize' it, altering its fundamentally fluid or evolutionary nature" hence making it harder for the colonizers to use the law to shape society by reducing their latitude in pursuit of the goals of the colonial enterprise.[8]

5. This dual Court system attempted to be both stabilizing and transformative. It provided new opportunities and altered the distribution of power in the communities.[9] Perhaps more importantly, while it altered the administration of customary law in cases under whose gaze it was brought, there continued to exist the pre-colonial legal systems which were unrecognized by the Colonial State and largely operated outside the colonial legal order. However, even these unrecognized systems that continued to operate side by side with the Native Courts were at least obliquely altered and transformed by their interactions with the Native and Settler Courts. This happened primarily through borrowing and transplantation of doctrines and procedures. The main doctrine used to transform African customary laws in the image of the English colonizer, though, was the repugnancy doctrine: African customs could only be enforced if they were not "repugnant" to justice and morality.[10] As conceptualized and applied, "justice" and "morality" was interpreted from the perspective of English Common Law and English people. Among others, the objective of this clause was to fortify hierarchies, with English Law being at the apex.

6. Still many features of the pre-colonial legal systems endured through the colonial legal interventions. Many Africans continued to use these systems because they were more accessible to them and more trusted. While the Native Courts and their administration of customary laws benefited some Africans, some Africans avoided them as much as possible.

7 Brett Shadle, *Changing Traditions to Meet Current Altering Conditions: Customary Law, African Courts and the Rejection of Codification in Kenya, 1930-60'*, (1999), *Journal of African History*.

8 *Ibid*.

9 Richard Waller, *supra* note 6.

10 Article 52, 1897 Order in Council.

7. One of the main aims of colonization was the "civilizing mission." Civilization in this case meant the advancement of the concept of rule of law from the colonial perspective. This was to be deployed via the colonial Courts.[11] According to Mamdani, these Courts were intended to be shining beacons of Western civilization.[12] However, it is important to remember that the British applied in-direct rule in East Africa.[13] Under this regime, it was impossible to achieve the civilizing objective, and the idea was quietly dropped. Owing to increased law and order concerns, attention shifted from the civilizing mission to one of maintenance of law-and-order.[14]

8. This subtle shift marked the beginning of the semi-institutionalization of the legal pluralism that the colonial administration introduced. The dual system of justice was such that, at one end of the spectrum, we find the 'native Courts' administered by Chiefs and Headmen, and which operated as the first port-of-call for local disputes. As one would expect, they applied Customary Law (read: Customs of the area of the Court's jurisdiction) to resolve disputes.[15] Mamdani makes this point thus:

> To the Africans of the time, living for the most part in what was still a traditional society, the native Courts were their own Courts administering their own unwritten customary law and it is not surprising that it was to these Courts, rather than to the magistrates' Courts, that they chose to bring the vast bulk of their litigation.[16]

9. On the other end of the spectrum were formal Courts. These were designed for non-natives.[17] Consequently, they applied Common Law. In the middle of this spectrum were tribunals staffed by white officials–Commissioners who, interestingly, heard and determined appeals from the native Courts.[18] This is the legacy of the colonial judicial heritage: two separate justice systems ran by the colonial administration. This system interfered a great deal with existing local dispute resolution regimes. The appeals system, for instance, was clearly problematic.

10. In addition to Customary Law, Islamic Law was practiced in certain parts of the continent. The coming of the white colonialists simply opened another centre of justice, albeit one that sought to subjugate all others. This regime reigned supreme. Customary Law in particular had to pass the repugnancy test in order for it to apply; otherwise it was summarily declared unlawful. Based on this provision, therefore, one would argue that colonialism constrained Alternative Justice Systems (AJS). Yet, it was not only in the dispute resolution arena that formal law reigned supreme. In all other spheres of life—including music, leadership, sports, art, language, innovation and education—native practices were deemed inferior.

11 Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press, 1986) 109.

12 *Ibid*.

13 Under this system 'rural Africans were subjected to European law in all matters relating to the public sphere, and to the economy in particular, but in personal matters they were bound by the customary laws as enforced by the designated African authority'. See David Johnson, Steve Pete and Max du Plessis, *Jurisprudence: A South African Perspective* (Butterworths: Durban, 2001) at 211.

14 *Ibid*.

15 H.F. Morris, *Some Perspectives of East African Legal History* (The Scandinavian Institute of African Studies: Uppsala, 1970).

16 Mamdani, *supra*, note 24 at 15.

17 *Ibid* at 109.

18 *Ibid*.

11. The colonial hierarchies were further entrenched in the late 1950s, when the colonial administration interacted with the first stirrings of the Law and Development Discourse. Yet, the colonialist view of Africans as a backward race persisted. Thus, any development projects could only be initiated by Europeans. Africans, by contrast, were unable to bring on board any meaningful progress. For any African society to make any strides, it was taken for granted that they had to tap into the knowledge and skills of Europeans, otherwise they would remain backward and undeveloped—suppliers of unskilled labour at best.

12. The explicit theorization about the role of law in economic development in the Post-World War II period heralded the role of the post-colonial State. The law was comprehended in instrumental terms: the laws would be used to fashion a developmental State by harnessing and redistributing resources towards modernization. There was, therefore, emphasis on the State-backed legal systems: the Settler and Native Courts as the instruments of modernization and purveyors of the norms necessary for the State accumulation deemed necessary for industrialization and economic take-off.

13. In the immediate period after independence, the dual Court system was officially abolished. A unitary Court system in Kenya was established in 1967.[19] African customary law would still continue to be applied in the unitary Courts for certain kinds of civil claims, provided they passed the test under the repugnancy doctrine. Hence, the repugnancy doctrine continued to act as a superintending doctrine over the evolution of African Customary Law.

14. Away from the State Courts, many Africans continued seeking justice and resolution of their cases through their own justice systems and mechanisms. The traditional systems and mechanisms often proved more accessible and trusted to them than the State Courts. However, these systems and mechanisms remained largely unrecognized in the legal order. Issues of African Customary Law were only litigated in the few cases where claims were actually made with African Customary Laws used as founding a cause of action (for example, in land tenure cases where the Courts used the concept of "African Trust"[20]), or as defences in certain civil and criminal cases. Doctrinally, the *Judicature Act* placed African Customary Law hierarchically as the lowest source of law after the Constitution, Kenyan Statutes, English Statutes of General Application, and Common Law. That said, there was significant interaction between the formal and informal systems. Considering Africans used both regimes, it would be unreasonable to expect the two systems to operate in isolation. They were bound to and indeed influenced each other both in terms of process and outcomes.

15. This position persisted through 2010 when the Constitution of Kenya revived the prominent place of African Customary Law as well as "Traditional" systems and mechanisms in the legal order.[21] While the repugnancy doctrine has been retained, as this Policy explains in Part 1.3.2.3, it must now be understood within the structure of the Constitution where the Applicability of African Customary Dispute Resolution Mechanisms or African Customary Law is only constrained by the outer limits of the Bill of Rights and Fundamental Freedoms. As such, the repugnancy doctrine is no longer a policing doctrine to superintend over the evolution of the traditions, customs and norms of Kenyan communities.

19 Magistrates Court Act, Cap 10, Laws of Kenya (1967).

20 See, for example, *Esiroyo v Esiroyo and Another* (1973).

21 Article 159 of the Constitution.

16. As flagged in section 1.3.1 of this Policy, the prevalence and use of mechanisms of dispute resolution that can be termed "traditional", "customary" or "alternative" ("Alternative Justice Systems") to the State-led Court system have continued to endure. Indeed, some studies show that as many as 90% of all cases are resolved away from the State-backed Court system.[22] It is important to point out that while the prevalence of the use of AJS is probably higher in rural areas that are geographically remote from Courts, there is ample evidence to show that AJS is utilized by many in the urban and peri-urban areas where the formal Courts are easily accessible. As demonstrated later in this Chapter, this demonstrates that there are many imperatives for AJS beyond lack of physical access to State-backed Courts.

17. The developments in Kenya in the Post-2010 period have matched a renewed interest in AJS in the Global (development) discourse. In the immediate preceding period, there was emphasis on the Rule of Law as an enabler of economic development, and reform efforts were concentrated on the role of the law and Courts in creating enabling conditions for the market to operate efficiently. Similarly, in the first decade of this millennium, Rule of Law reforms focused on the independence of the Judiciary as an institution as the best bet for unleashing economic development. After 2010, however, focus has shifted to the needs of the individual justice seeker as the pivot of economic development. Hence, rather than begin with the abstraction of Rule of Law and the independence of the Courts as the instruments of the Rule of Law, the new discourse on economic development treats access to justice in whatever effective format or forum as a fundamental right which is necessary for sustainable development. This is because it is only by guaranteeing access to justice that democratic participation and mechanisms for accountability can be ensured.

18. At the global level, the global community, in Sustainable Development Goal 16, agreed to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels." The plain recognition that a great majority of people in the Global South access justice through AJS has returned focus on these mechanisms. The obsession with formal State institutions only (Courts and Tribunals) as the instruments of access to justice has now given way to all mechanisms that guarantee access to justice. In Kenya, this global renewal of interest in AJS coincided with the promulgation of the Constitution of Kenya in 2010, which, among other things, places a categorical obligation on the Judiciary (as a State organ) to promote AJS. It is in obedience of this constitutional commandment that the Judiciary established the *Taskforce on Traditional, Informal and Other Mechanisms for Dispute Resolution in Kenya (Alternative Justice Systems*) to develop a National Policy on AJS. The next section will define some of the terms used in this Policy.

1.2. A note about terminology

19. The Taskforce has advanced its work on the basis the transformative nature of the Constitution. It has been the understanding of the Taskforce that the agenda of transformation in the context of the Constitution of Kenya is largely about creating jurisprudence that contributes towards an inclusive society where individuals and communities live in dignity. This is why at its inaugural convening and during the

22 Hague Institute for Innovation of Law, Justice Needs and Satisfaction in Kenya, 2017: Legal Problems in Daily Life (on file with the author) at 68.

subsequent sessions, the taskforce adopted and has endeavored to expand the meanings of various terms in use in quest for access to justice by the justice seekers and providers alike. The terms that we explore here are inextricably linked to the notion of justice.

20. The first amongst these terms was the meaning of "Access Justice." With this background, "Access to justice" would then have meaning from an outcome perspective as well as operation perspective. As a question of outcome, the taskforce understand access to justice as realization and preservation of human dignity as expressed in Article 28(2) of CoK Constitution. In other words, justice is said to have done when dignity is realized, advanced and preserved. As a process, access to justice ought to encompass how people navigate and are treated in the many relations and transactions (with dignity and legal consequences) that comprise everyday life.

21. Because Article 48 of Constitution rightfully positions the State as the central actor in these maneuvers, our analysis of access to justice do emphatically focus on those avenues or forums that are administered or involve government agencies including the Courts of Law. However we have received evidence that access to justice is not just about access to Courts and tribunals and is much more than the resolution of disputes. This is why we talk about Alternative Justice Systems rather than the "miniature Courts" of Alternative Dispute Resolution (ADR). This Policy, therefore, refers to Alternative Justice Systems (AJS), not as extraneous dispute resolutions mechanisms comprehended from the Judiciary perspective but as an expression of the plural legal systems which exist in Kenya.

22. Consequently, the Policy has also taken into account the various uses and applications of the term "Community." In most common law traditions, "Community" is defined in its anthropological sense of individuals who share common ancestry, tradition and lineage. The Taskforce agrees with that meaning but considered it inadequate. It has come to our attention that the notion and practice of community to make sense in our times, it must be understood to transcend the category of culture, ethnicity and place. Rather while not negating the anthropological meaning, community in the context of AJS also includes, persons who collectivize around common interest, ecological zones, socio-economic characteristics and other ideas of common purpose. This meaning of community is not different from the one envisaged under Article 60 of the Constitution when it makes reference to Community Land.

1.3. The inquiry and policy development process

23. This Policy has been developed through a creative process of social inquiry. Its approach by itself may well constitute a veritable policy exemplar for developing public policy for a complex and far-reaching subject such as the AJS. The Policy started off as a robust practical and intellectual discussion mainly between Justice Joel Ngugi, Dr. Steve Ouma Akoth and Justice Paul Kihara Kariuki. The three were in agreement that the intention of the Constitution in Article 159 (2c) was something beyond the quasi-judicial Alternative Dispute Resolution (ADR) mechanism that is a mere alternative to the formal legal system, and which is often underscored in the context of the shortcomings of the formal legal system. We strongly felt that the vistas envisaged in Article 159 (2c) incorporates and transcends the ADR since it not only makes up for the limitations of the formal Courts, but also encompasses its own unique world view. In reality, AJS is not a mere response to the inadequacies and excesses of the State and its formal systems.

In actual sense, AJS harks back to the inalienable and sovereign authority of the people and asserts their identity and autonomy as direct actors in their situation and destiny.

24. At any rate, the Constitution explicitly and continuously declares the centrality of 'the people' in its design and philosophy. Largely, the people are the *hoi polloi*—poor and marginalized communities that are most often disempowered and vulnerable. Yet, when it comes to access to justice, the 'people' are far beyond the *hoi polloi.* Indeed, the 'people' are the many justice seekers who are frustrated, misunderstood, un-reached or else ill-served by the formal judicial systems. The method of this work commenced from this inquiry of appropriate naming and conscience that AJS, by its very nature, is a forum for public participation in performance of the judicial function.

25. The Taskforce explored and expanded this clarity using two key strategies. First was the convening of various councils of elders to hold dialogue with the then Chief Justice, Dr. Willy Mutunga, to advance his clarion call of 'Equitable Access to and Expeditious Delivery of Justice'. During these conversations, the elders (as contested as that category can be) elaborated their *modus operandi*—including its spiritual, moral and cultural underpinnings; their mandate and, most importantly, how they enforce their determinations. These conversations also questioned the very notion of 'alternative': as the elders eloquently argued, the Courts are much more the 'alternative' to their work and not vice-versa. We were quite challenged by this juxtaposition of world views and what it means in practice, for naming (or 'labelling') is one of the last bastions of hegemony. Alongside this discourse with the elders were the convening of colloquia of academics and civil society luminaries under the auspices of the Judiciary Training Institute (JTI). These conversations expanded the inquiry by broadly identifying and clarifying models of AJS in Kenya. The ultimate question of these series of round-table conversations was very much practical: How do we expand access to justice for Kenyans?

26. After these conceptual debates, interaction with Chief Justice Dr Willy Mutunga, elders and roundtable conversations, the Taskforce commenced a series of learning sessions. These sessions were mainly convened in Othaya, Nyeri, Isiolo, and Kericho. The selection of these areas was deliberate. For Othaya and Kericho, the Taskforce purposed to learn from the creative interventions that had already been deployed by the judicial officers in those locations. As the Taskforce members learnt how these officers nurtured working relationships with village and clan elders to enhance access to justice. These acted as live case studies, replete with successes as well as limitations of their interventions. It is through these conversations that the Taskforce developed a series of questions that it would later use to guide its wider public inquiry. Later in 2017, the Taskforce members were invited to observe how community justice groups, councils of elders and Court-annexed systems made use of Article 159 of the Constitution of Kenya to realize the objective of Article 48 of "access to justice for all persons".

27. In the year 2016 and 2017, the Taskforce convened a series of town-hall conversations that were named "Community empowerment workshops on AJS". The Taskforce used the various curriculum questions that it had developed over time to understand the pertinent issues that promote or hinder the practice of AJS as a legitimate pathway to justice in Kenya. Ultimately, it is these workshops that served as the key source of information for the Taskforce. In the spirit of live inquiry, the Taskforce members improvised all through the way, modifying the questions in the light of lessons learnt and also to suit the various contexts. These included two key retreats (Sunset Hotel, Kisumu—3 to 6 March 2016, and Thayu Farm, Limuru—1 to 4 September); meetings with sectoral stakeholders (Magistrates–9 March 2013; Isiolo Court User's

Committee—24-26 June 2013; Academia—4 October 2013) and various field visits and exposures to further study the matters that pertain to Alternative Justice Systems (AJS) courtesy of the council of elders and the Court-annexed AJS models.

28. To complement these public engagements, the Taskforce commissioned in-house research on various subject areas. These in-house and desk research initiatives focused on concerns such as: How does AJS, and its engagements with social realities and people, allow us to understand and theorize the interrelatedness, precariousness, and uncertainty that characterize so distinctively our contemporary Kenya? How can AJS address issues of race, gender, class, social justice and reciprocity today? What are the challenges and potentialities of practicing AJS in the African continent today? How can we constantly refashion and reinvent AJS in theory and practice? What are the horizons and the contours of AJS today? How can AJS illuminate the political, economic and social realities in a situated manner and become the very instrument for political and social critique? And how have new technologies, urbanization and youth culture interfaced with AJS?

29. Finally, the Taskforce convened dedicated sessions with various actors in the justice chain. We met with representatives from various institutions that are charged with the duty to provide or promote access to justice in Kenya. These include government institutions, civil society groups, intermediary institutions such as office of the Ombudsman and the Kenya National Commission on Human Rights (KNCHR), as well as the alternative social networks and arrangements to which those who are excluded tend to turn. Our convening looked at the role of these actors in the chain of justice and their performance. We then sought to know why, on their own admission, many of them fail to achieve their aims or fulfill their responsibility to provide services more so to the hoi polloi.

30. This Policy is thus the result of a multi-sectoral and multi-pronged approach that sought to break new ground in the pursuit of universal access to justice for all people in Kenya.

2.

Conceptual framework and imperatives for Alternative Justice Systems

2.1. The imperatives of engaging with AJS

2.1.1. Access to Justice in Kenya: The Reality

31. A number of surveys have been carried out on perceptions of Kenyans on the Justice system. In 2007 Governance, Justice, Law, and Order Sector ('GJLOS') Programme conducted a survey on government agencies in Kenya.[23] This study reported that citizens' confidence on key State institutions, including the judiciary, remained 'low'.[24] Ten years later, in 2017, the Hague Institute for Innovation of Law in co-operation with the Kenyan Judiciary conducted yet another survey entitled, *Justice Needs and Satisfaction in Kenya*[25] ('Justice Needs Survey'). The study reported that about two thirds (63%) of the citizenry had experienced a situation that called for resolution through a judicial process.[26] Further, most (80%) of those who experienced legal problems took active steps to resolve them.[27] According to this research, ten percent (10%) resolved their disputes through the formal Court system.[28] Just under one half (40%) used the local administration and the police to resolve their disputes.[29] The lived-realities of justice seekers in Kenya affirm this. Most disputes are resolved through informal and non-State-based means outside the confines of the Courts.[30] These informal means include a myriad of dispute resolution processes and the multiple modalities for access to justice in Kenya. The AJS mechanisms include mechanisms that deal both with resolving legal disputes as well as those seeking everyday justice. The expansion moves beyond the narrow conception of Alternative Dispute Resolution ('ADR') that only captures modes addressing resolution of disputes.

32. Several local organizations have conducted surveys on AJS. While some of the studies are theoretically grounded,[31] others draw on fieldwork. Indeed, both kinds of

23 The report is available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.608.9919&rep=rep1&type=pdf.(visited: 6 August 2019).

24 *Ibid* at para 365.

25 Supra, note 19.

26 *Ibid* at 5.

27 *Ibid* at 6.

28 *Ibid* at 68.

29 *Ibid* at 69 to 70.

30 *Ibid* at 70.

31 See, for instance, Celestine Nyamu-Musembi, 'Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa' (2003) (on file with the author).

studies contribute to our understanding of matters relating to the AJS regime. That said, works that draw on experiences on the ground contribute a great deal to our understanding of events on the ground. Generally speaking, these studies have focused on the justice question. The running theme has been the extent to which these frameworks promote or limit realization of justice by those who invoke these regimes. Focus has been on the communities that deploy these dispute resolution mechanisms. Some studies have focused on the procedures that are deployed to resolve disputes via this model.

33. The evolution of Kenya's legal system is a well-researched subject. History helps us to understand where we are coming from. This record enables us to avoid some of the mistakes that may have been made in the past. Francis Kariuki's[32] work reviews the jurisprudence that Kenyan Courts have developed on matters touching on customary law. The author looks at the impact of these decisions on traditional justice systems. While tracing the development of Kenya's legal regime, Kariuki underlines the value traditional systems played in the lives of the local communities. He goes ahead to point out the limitations of the formal justice system, and why locals preferred traditional systems. The author concludes by reiterating the need for Kenyans to embrace the traditional dispute systems. Indeed, this research is vital to the discussion of AJS. Even so, it would have benefitted by drawing on practical experiences. Further, works from other jurisdictions would have enriched the analysis as well as the conclusions arrived at.

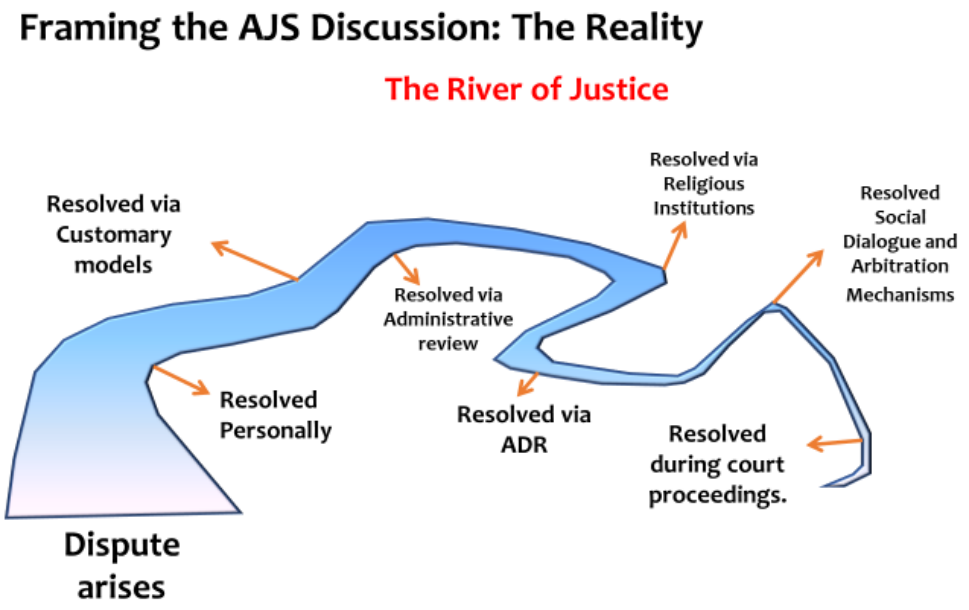
34. The understanding of justice in the AJS paradigm is broad and multi-faceted. It is that justice is both a process and an outcome: it is conceptualized not as a route and destination, but as a bundle and a continuum. It encompasses principles of recognition and protection of the holistic personhood and the vindication, restoration, and restitution of harmonious social ties. The result of this is a rich space for the development and interplay of multiple justice systems. These cover the entire breadth of avenues that Kenyans use to seek justice—including the family, chiefs, community elders, police officers and probation officers.

2.1.2. The "River of Justice"

35. The lived realities described above are captured under the "River of Justice." The depiction of this river shows the path disputes in Kenya take. It is based on the width of a river. From the illustration below one notices that the width of the river gets narrower as one sails from the source of the river to its mouth. There are seven stages under this model. Each stage represents a mode of access to justice, which addresses the lived realities of Kenyans.

36. The first stage of the river is the point where the dispute arises. Here most disputes are resolved either personally or via family and/or kinship ties. This is the widest point of the river meaning that this is where most disputes are resolved. It is also at this level that many cases can be prevented. The second stage is narrower than the first, but still significantly wide. Here disputes are resolved using customary-based models. These are methods found in the communities' systems of dispute resolution that have been practiced among these communities for generations. These methods are practiced based on the different customary laws of these communities. These systems would normally resolve a lot of disputes in the community.

32 Francis Kariuki, Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems' (on file with the author).



37. The third stage is that of administrative review. It involves the many State established institutions that provide goods and services to citizens.[33] These entities are required to comply with due process requirements. The Constitution mandates them to establish expeditious, efficient, lawful, reasonable, and procedurally fair adjudication.[34] The fourth stage involves religious institutions, while the fifth relates to formal ADR mechanisms—meditation, arbitration and conciliation. The fifth involves disputes resolved through social dialogue. Disputes resolved in the formal Courts are the final and narrowest part of the river. In a nutshell, this pictorial affirms the proposition that very few cases end up in Court.

2.1.3. Justice Needs Survey Results

38. Most disputes are an intrinsic part of daily life. The Justice Needs Survey established that two out of three Kenyans (68%) have encountered at least one dispute during the last four years. Of these, 81% sought resolution of their dispute. Models of dispute resolution range from non-institutional methods (personally resolved, customs and traditions, religious institutions) to institutional neutral third parties (police, chiefs, mediation). Out of the 81% of Kenyans who sought resolution, only 21% sought resolution in the Courts. The remaining 68% sought to resolve their dispute through 'non-judiciary-based' forms of dispute resolution.

39. This research also established that lower-income people are significantly less likely to engage an institutional dispute resolution provider compared to those who are in the higher-income bracket. Citizens with low incomes tend to approach third-parties outside of the judiciary—mainly the chiefs, the police and/or faith-based organizations. In other words, they were dependent on dispute resolution processes that are closer to them. This survey found that trust is higher in non-public justice institutions than in public justice institutions. This finding affirmed the position that justice is found both in the formal and informal justice systems. Arguably, therefore, most Kenyans invoke AJS to resolve their disputes.

33 Migai Akech, *Administrative Law* (Strathmore University Press, 2016) 117.

34 Constitution of Kenya, Article 47.

2.1.4. Situational Analysis from Field Studies

40. The following section presents the findings from the Taskforce's site visits. The situational-specific analysis of AJS suggests that Kenyans engage with AJS as an important means of access to justice and as a vital avenue of fulfilling their justice needs. While not generic, these pilot field studies showcase the important societal and cultural values surrounding AJS in Kenya. In addition to the daily practicing of AJS, it is apparent that these communities have made efforts to protect, preserve, and promote their cultures. These examples also affirm the thesis that AJS is alive and well in Kenya. They also confirm further that this mode of dispute resolution has been deployed in Kenya for long. Moreover, they demonstrate that AJS is indeed an avenue Kenyans around the country invoke when they have disputes. This stems from the several advantages these fora offer, compared to formal Courts. The fact that the examples are drawn from across the country affirms that this form of dispute resolution is widespread. In other words, it is not limited to specific parts of the country. Further, the frameworks are present in both urban and non-urban settings. Consequently, it is in the interest of the justice regime to take steps that would promote, not curtail this framework. The remainder of this section reviews the pilot studies.

41. **Kericho**

In Kericho, the Kipkelion AJS project was initiated in 2008 following the 2007/2008 post-election violence (PEV). Following the PEV, there was a complete break-down of law and order in parts of the country, including Kericho. While one would have expected the law enforcement officials to restore order, this was hardly the case. They were overwhelmed by the incidents of crime and violence that erupted following the disputed elections. The authority of formal justice systems were tested to the limit. By contrast, elders and chiefs maintained a strong sense of authority.

In Kericho in particular, the fact that subsequent reconciliation efforts bore fruit can arguably be attributed to the strong elders and chiefs in the area. It is upon this background that the Legal Resources Foundation (LRF) set up a project in 2008, through which it has continued to offer legal assistance to the community in Kipkelion. Part of its work has included training of elders as paralegals. The project has two main objectives: firstly, to contribute to peace-building and maintenance initiatives and resolve conflicts and, secondly, since Kipkelion was adversely affected by the 2007/08 post-election violence and is far-removed from the Courts in Kericho, the project aims at bringing justice closer to the people. The community paralegals and elders undergo training on various aspects, such as land issues, succession and aspects of civil and criminal matters. Additionally, soft skills such as recording of proceedings and decisions are also taught.

Complaints from the community are submitted to the community paralegals, whom as we have seen are elders from the community. The paralegals record these cases in standardized forms. Usually the following data are collected: date of complaint, names of the parties, age of the complainant, the service that the complainant has received at the point of filing the complaint and the date that the matter would be heard. The elders record the proceedings in writing. The chief in this process wears two hats—an elder in the process and an administrative officer. When the chief serves as an elder, he/she serves as the chair of the dispute resolution panel. Other elders can also serve as chair. When chiefs wear their administrative hat, they are involved in enforcement of the decisions by the panel. In terms of disputes, the elders handle civil and petty criminal

matters. Serious criminal offences, mainly felonies, are not handled by the panel but are referred directly to the police.

Members of the community usually select elders to the panels. In Liloch Location, for example, each of the fifteen villages in the location selected three elders to hear and determine disputes. While there are no specific age limits, one's wisdom is of utmost importance. Several factors are considered, including whether one has educated their children, their relationship with other members of society, and the level of contribution one makes in community meetings.

Moreover, the Kericho Magistrates Court have co-opted one of the elders as a member of the CUC. The AJS project in Kericho is, however, not linked with the Court through any referral system. This may be problematic. The Othaya example (discussed below) highlights some of the benefits of a Court-annexed AJS system.

42. Othaya

The Othaya AJS project began in 2013. Hon. Florence Macharia, a member of the Taskforce together with Hon. Justice Joseph Sergon (also a member) and other senior judicial officers, provincial administrative officers, and representatives from the Office of the Attorney General in Central Province came together to determine how the Courts could utilize Traditional Dispute Resolution Mechanisms (TDRMs). In Othaya, the CUC realized that most of the cases are petty and repetitive cases between members of the same family. These cases, they realized, could well be settled outside formal justice systems ('FJS'). It was apparent that individuals took advantage of the formal justice system as a mechanism for revenge. These individuals were less interested in resolving these disputes amicably. However, once complaints were lodged and charges preferred, the Courts had no choice but deal with them as framed. Issues surrounding their nature, history, motivation and recurrence were hardly taken on board.

The Court in Othaya and the CUC recognized that the Constitution provides for the use and promotion of AJS but does not dictate how exactly these means should be promoted. Against this background, the Othaya CUC established a framework and structure of the mechanism of working with elders to resolve matters in the interest of the community. The CUC observed that the authority of the members of the existing councils of elders was not recognized within the community because they were partial and easily corruptible. Hence, the CUC has now co-opted administration officers, including chiefs and probation officers, the latter of whom are trained mediators.

Additionally, the CUC handles referrals to and from the AJS framework. The concern is whether the Courts should refer the cases or the police. The CUC agreed to do referrals to AJS at both levels. In criminal cases where an accused person and complainant agree to refer the matter to AJS before plea-taking, the police refer the cases to AJS. In other instances, matters are referred by the Courts. The parties do not directly refer the matter to AJS. This referral by the Courts has strengthened the power and authority of elders. In certain instances, the Courts guide elders in order to enhance their capacity and skill set. The CUC also defers to use the services of probation officers who are trained mediators to aid in dispute resolution.

In the period January 2015 and February 2016, 17 cases had been referred for resolution through the AJS framework. Seven had been settled through AJS, seven are yet to be concluded, while three have been referred to Court. This is an example of a successful Court-annexed AJS regime, which is situationally established without any direct policy

direction from the Judiciary. Indeed, it is a reminder of how effective justice can be accessed through the AJS/local route.

43. Garissa

The AJS mechanism used in Garissa is called *Maslah*. This is a hybrid dispute resolution system that relies on Somali customs and traditions. The system is used to resolve disputes within the Somali community, which is pre-dominantly Muslim. Islamic religious teachings, through *Sharia*, bear a strong influence in dispute resolution among the Somali. Elders resolve civil and criminal cases such as inter-clan conflicts, domestic violence and business-related disputes. They draw on strong binding norms among clans, which have developed over several decades. Apart from Kenya, the system is also popular among the Somalis living in Somalia and Ethiopia.

In terms of membership, elders are selected or appointed by the community or the Sultan, who is the individual in charge of the clan. They are selected or appointed based on their experience, age and role in the community from within clans and sub-clans. Elders involved in the process possess a wealth of knowledge in dispute resolution. Although not recorded, elders make use of precedents recorded through narration from one generation to the next. They can fix punishment, usually in the form of payment of fines payable by way of livestock. Additionally, elders maintain strong relationships with the national government administration in issues of conflict prevention and resolution.

44. Isiolo

In Isiolo, like in Othaya, the AJS mechanism is Court-annexed under the supervision of the CuC. The AJS mechanism comprises of the council of elders from different communities (Somali, Samburu, Turkana, Borana, and Meru) and an additional inter-community council established for inter-community disputes. These AJS mechanisms resolve civil matters and criminal misdemeanours.

There is an established procedure for referring matters to the system. Referrals are done by the police upon arrest of a suspect or by the Court upon arraignment of a suspect. The officer, however, makes it clear that AJS is not a compulsory mechanism. An individual is thus at liberty to select either the formal justice system or AJS. Where the Court has referred a matter, elders file a report with the Court after resolution. Matters are referred to elders by the Court through a Court form in stipulated format. The findings of the elders usually stipulate whether the matter has been successfully resolved or not. In criminal matters, where the matter has been successfully resolved by the elders, the prosecutor applies for discharge or acquittal of the accused person in line with section 87 and 204 of the Criminal Procedure Code (CPC). Unresolved matters are referred back to Court for hearing and determination. In civil matters, where the matter has been successfully resolved by the elders, the case is marked as closed.

45. Marsabit

In Marsabit County, different communities—Borana, Rendille, Gabra and the Burji—have their own dispute resolution mechanisms. Among the Burji, disputes involving members of the same *manyatta* are heard and determined within the *manyatta*. Disputes involving people from different *manyattas* are heard and determined by the village elder. Where the village elder is unable to determine it, the matter is taken to the *Jasrera*—an elderly chairperson of the village elders. He sits with the village elders and together they determine the dispute.

Where a dispute cannot be resolved by the *Jasrera* and village elders, it is referred to the *Iditing' Olcho*. About 8 elders sit in this panel. They listen and determine disputes. In terms of nature of disputes, they handle both civil and criminal matters–family disputes, land disputes, clan disputes, theft, early and forced marriages, rape, defilement, and inheritance. The dispute resolution process involves interrogation to get information on the occurrence of events, as well as dialogue and negotiations between the parties in the presence of the elders. The elders then retire to determine the matter. Common remedies include penalties and warnings. One may also be forgiven, if they ask for pardon.

There are nine clans among the Rendille community. Each clan has its own council of elders referred to as *Naabo*. The appointment of elders is dependent on certain factors such as trust, wealth, experience and family history. One's family history may determine appointment as an elder. It is assumed that those from families that have a history of leadership in the community make good elders. In terms of jurisdiction, *Naabo* handles both civil and criminal cases–domestic problems, theft, clan disputes, assault, early marriages and defilement. Cases are brought to the council of elders by the victims, the victim's family, the community or the clan. Determination of a dispute involves hearing both sides–the complainant and the accused person. Oral testimony of witnesses is also relied on. So, too, is any evidence the parties may have submitted. *Naabo* will then weigh the evidence presented and render its decision. The remedies handed down include guidance and counselling, asking for forgiveness, fines in the form of material goods (such as livestock) and remarks from the elders, either congratulatory or in rebuke.

Among the Gabra, one becomes automatically qualified to hear disputes when he is an elder and is married. Village elders can also hear and determine disputes. The cases elders hear are of any magnitude. There is no limitation. Due process is accorded in the sense that each side of the dispute is given a chance to tell their side of the story. Parties are also at liberty to call witnesses. All those who have an interest in the matter are allowed to sit and follow proceedings. The elders then convene on their own to consider an appropriate relief. These range from fines, warnings and reconciliation of the parties.

Among the Borana, disputes are heard by a council, which comprises a president, chairman, a custodian of the law and a Judge. Disputes can be brought by a victim or a complainant. Matters are reported usually to the elder closest to the victim or complainant. He then brings the matter before the council. The latter then hears the case at the village level. Dissatisfied parties can appeal their cases to the *Jazula Abaula*. Further appeals lie on the *Jalab*. If one is still dissatisfied they can approach the *Kael*. The *Sera* is the final port-of-call. The common remedies in this system are fines (in the form of goats and cows), asking for forgiveness and sanctions against an individual.

46. Kuria in Migori County

Among the Kuria, the AJS mechanism functions through a council of elders–the *Ebharasa*. This body oversees hearing and resolving disputes between individuals in the community. Elders usually sit under trees. The parties appear before the council of elders and present their claims.

Community members usually sit and follow proceedings. Common cases heard by the *Ebharasa* are those that involve marital issues, debts, trespass by livestock and boundary disputes. The council of elders meets once a week to hear disputes. In some cases, it may charge a small fee that ranges between Kshs.350 to Kshs. 1,000. However, in most

instances a fee is not levied. Before a dispute is determined the *Ebharasa* will ensure parties have submitted sufficient evidence to enable it determine a claim. Additionally, the *Ebharasa* works closely with the chief's office for enforcement of its decisions.

47. Nairobi City County

The Taskforce established that there are different AJS mechanisms in Nairobi County. In Huruma, there is an organization under a network known as *Muungano wa Wanavijiji* (a residents union), which hear and determine disputes concerning housing and financial issues. In terms of process, a letter of complaint is first written and forwarded to other Civil Society Organizations ('CSOs') such as Pamoja Trust and Kituo cha Sheria. The meetings are convened on Wednesdays where disputes are heard and settled.

In Kibra, the AJS is divided into three sectors: markets, village and transport. Under the markets framework, a committee has been instituted that resolves disputes. If the dispute is not resolved by the committee, it is referred to the chief's office and, eventually, the county government. The disputes that are determined mainly concern rent or assets. In the village sector, the Kibera Legal Centre resolves disputes using the following means:

i. use of a demand letter;
ii. Referral to the local administration and /or community based organizations; or
iii. referral to pro-bono lawyers to take cases to Court

In some disputes, a grievance committee can be constituted. This then becomes the panel that listens to the dispute. Dissatisfied parties can approach the chief's office for further hearing and determination.

In the Westlands area of Nairobi, there is a District Peace Committee, which hears and determines disputes. Prior to 2006, this agency did not exist: instead gangs resolved disputes. Presently, however, there is also a group called the Westlands Informal Settlement Residents which also hears and determines disputes. Complaints involving gender-based violence and sexual offences are beyond the jurisdiction of these committees. These are referred usually to Court.

In Lang'ata, the Lang'ata Legal Aid Centre (LLAC) provides platforms where disputes can be resolved out of Court. It also informs residents of various legal procedures. The centre works closely with the local administration, NGOs and CSOs. Usually, these agencies refer cases, such as those involving sexual and gender-based violence, to the LLAC.

The AJS mechanism in Korogocho is mainly run by paralegals from the community. Parties are summoned via demand letters. A date is then set when the team of paralegals will hear and determines disputes. If an agreement is not reached, the dispute is referred to other institutions such as Kituo Cha Sheria.

In Mathare AJS, there are multiple dispute resolution centres. One can approach the village elders, the chief's office or the police post (for disputes that are criminal in nature).

AJS is facilitated in Kamukunji through village elders called *Maslah* and *Mangutha*. As the situation in Garissa, *Maslah* primarily deploys *Sharia* law to hear and determine

disputes. Most of these disputes lack documentation. There is also a justice centre called the Kamukunji Justice Centre, which is run by paralegals from the community. Again, parties are summoned through a demand letter, and a date is set for hearing. The dispute is then heard and determined. If no agreement is reached, the matter is referred to other institutions. Other matters which are referred to other institutions include urban refugee cases, disputes concerning children, disputes relating to land and those relating to gender-based violence.

48. **Narok**

In Narok County, there is an AJS mechanism in Olpusimoru commonly referred to as *Landesa*. It is named after Landesa, a non-profit rural development institute that offered training to the residents of Olpusimoru on dispute resolution. The *Landesa* program was established in the Olpusimoru community in 2011. It was a program that aimed to sensitize the community on the Constitution. During the training, community members visited Courts to observe how cases were determined. After the training, the community developed a *baraza* that was integrated with the previous dispute resolution system in the community. The *baraza* was introduced to hear and determine disputes in the community. As part of the process, it ensured constitutional principles were observed. Women, youth and other marginalized groups in the community were included in the process. In terms of jurisdiction, the Narok *baraza* determines disputes involving land ownership, title deeds for women, and school drop-out cases among girls, early marriages and female genital mutilation (FGM).

2.2. AJS expands human rights and human autonomy

49. AJS is an important tool for the vindication and expansion of human rights and human autonomy. Its mechanisms are based on three human rights-based avenues. Firstly, the human rights imperative under article 48 of the Constitution. This provision mandates the State to ensure access to justice for all persons. Engaging AJS mechanisms has the direct consequence of fulfilling, respecting, and protecting this important fundamental human right since it has been demonstrated above that majority of Kenyans access justice through AJS Mechanisms. The second avenue is the human rights-based constitutional principles under Article 10 as read together with Article 28 of the Constitution. Article 10 provides for the national values and principles of governance, namely, rule of law, citizen participation, human dignity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalized. These principles, read together with Article 28 (right to dignity), provide the principles for vindicating and expanding the AJS framework in Kenya. Finally, AJS acts as a strong framework for anchoring human rights. Article 44 (on everyone's right to use the language and to participate in the cultural life of their choice) anchors this position. This is bolstered by the Constitution's recognition of culture as the foundation of the nation and the cumulative civilization of the Kenyan people and nation (Article 11).

50. One may therefore argue that promotion of AJS contributes to the expansion of the fundamental human rights mandated and anchored in the Constitution. Indeed, AJS provides space for the expansion of human autonomy. The perspective is grounded on everyone's right to voluntarily choose the systems of culture, religion, and moral practices that would apply to them. AJS provides a mechanism for the individual to invoke their culture, language, and moral scripts of personhood without State interference. This autonomy is part of enhancing the general freedom required in the right to

access to justice, which the Constitution affirms.[35] The vindication of this autonomy is important since the colonial and the post-colonial States in Kenya destroyed this sovereignty.[36]

51. The two main proselytizing religions, Islam and Christianity, had already taken a strong foothold in most of Africa playing important roles in the shaping of socio-economic and political structures. Therefore, Africa in the pre-colonial century (before the European scramble, partition, and the establishment of colonial rule) had its main linguistic and cultural populations established.[37] While expanding communal and human autonomy, the AJS framework enhances the idea of Africa as a ground of great historical encounters. Expanding human autonomy is meant to re-humanize the African as civilized, political, and dignified. Thus African systems of knowledge, governance, or social order should no longer be subordinated to formal systems.

52. One of the predominant narratives of AJS is based on casting these processes and methods as spaces for human rights abuses. This theory is mainly based on a distortion of the context and application of AJS practices. It comes out of a long history of subordination, distortion, and repudiation of African cultural practices by colonial powers. This unsupported thesis demonstrates the level of arrogance and presumptuousness with which the colonialists viewed Africa and its people. Unsurprisingly, Africa was referred to as the "dark continent" by Henry Stanley, one of the early explorers.[38] This superiority complex ignores the reality in the West. As a matter of fact, examples of human rights abuses have been noted in Westernised legal systems as well.[39] Sections 2.1 and 2.2 of this policy flesh out these criticisms and engage with them, respectively.

53. Consequently, it is a misconception and an error of acontextual reading to identify, reify and essentialize AJS Mechanisms as spaces for human rights violations. While it is true that some processes and substantive outcomes of AJS Mechanisms may run afoul of the Constitution in the same way some Court and Tribunal procedures and outcomes may be violative of the Constitution, characterizing AJS spaces as cesspools of human rights violations is empirically and epistemologically false. Instead, properly conceived, AJS Mechanisms are an important site for guaranteeing human rights by providing an easier, more affordable, more approachable and more culturally and socially appropriate forums for individuals to access justice. Where the AJS Mechanisms fail to adhere to the minimum human rights standards in terms of their obligations of process as well as obligations of results, it is incumbent upon the Judiciary, through its mandate under Article 159(2)(c) to engage with and appropriately intervene by deploying the Human Rights Framework proposed by this Policy in order to respect and protect the other rights which might potentially be violated by the AJS Mechanisms while simultaneously transforming the AJS Mechanism to be respectful of the human rights.

35 See article 48.

36 See Ngugi Wa Thiong'o, *Something Torn and New: An African Renaissance* (*Basic* C*ivitas* Books, 2009).

37 Jacob Festus Adeniyi Ajayi, 'Africa at the Beginning of the Nineteenth Century: Issues and Prospects' in Jacob Festus Adeniyi Ajayi (ed.), General History of Africa VI: Africa in the Nineteenth Century until the 1880s (Heinemann & UNESCO 1989), 30.

38 Henry Morton Stanley, *Through the Dark Continent* (London: 1878).

39 See, for instance, *R v Wager* (where the Canadian Federal Court Judge Robin Camp repeatedly asked the ccomplainant, a 19-year old female victim, why she 'didn't ... just sink [her] bottom down into the basin so [she] couldn't [be] penetrate[d]') .... .

2.2.1. Engaging with the Repugnancy Clause

54. In pre-colonial Africa, communities had their own authentic, autonomous, and self-regulated methods of governance and justice systems.[40] The colonial-based common law was introduced as the highest law regulated by the State. This State sought to accumulate all incidences of State power that included judicial power and administration. The indirect-rule system of governance fashioned by the British colonialists, however, meant that the colonial power had to introduce a legal-plural system on administration of justice. This was mainly because the two systems (one religious-based and the other culture-based) they found on the continent were non-compatible with the Western-styled systems of justice. The legal pluralism that was introduced by the colonial system of administration in Africa was therefore meant to create a system of tolerance and multicultural diversity. In reality, however, the system was enforced more as a display of power relations by the colonial powers. The imperial dominance of English common law over customary law was introduced in Kenya by the enactment of an *East Africa Order in Council* in 1897, which proclaimed the application of English law in Kenya. The central colonial State intended the merger of the colonial legal system with the customary system, but set limits on the application of customary law via the 'repugnancy clause.' The formulation of the repugnancy clause was that customary law be applicable provided it was 'not repugnant to justice and morality'.[41]

55. The repugnancy clause was based on several assumptions. All these drew on the "Dark Continent" thesis that Stanley advanced. These claims were anchored on the 'civilizing mission' of the Europeans. In the first place, the colonialists viewed the customary system as irrational and barbarous. They claimed that the system was uncivilized. Hence, it required close supervision by the formal law (read: European) system. Its jurisdiction also had to be checked closely. This system was deemed to be unfit for the civilized. To put it in another way, it was a backward regime. To be rescued from this "dark hole", it had to be compliant with the formal legal system. Hence, to pass the legal test, a custom had to surmount the repugnancy test.[42]

56. Consequently, the repugnancy clause was used by the colonial powers and the post-colonial Courts to 'strike out whatever rules of customary law they did not like or to declare custom that which was unknown to African culture'.[43] One of the classical examples of this subordination can be found in Hamilton C.J ruling in *R v Amkeyo*.[44] The issue was whether a woman married under African Customary Law could testify against her husband. The common law rule then was that a spouse could not testify against the other. Interestingly, the Court (Hamilton C.J) in this instance declared that a marriage celebrated under African Customary Law was not a proper marriage in law. The Judge critiqued the African practice of payment of dowry. To the Judge such unions were simply 'wife purchase'. They could not be termed to be a marriage. The Judge declared them repugnant to justice and morality. Listen to the words of Judge Hamilton:

40 John Ambani and Ochieng Ahaya, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era,' (2015) *Strathmore Law Journal* 43.

41 Article 52 of the 1897 Order-In-Council.

42 See E.A. Taiwo, 'Repugnancy Clause and its Impact on Customary Law: Comparing South African and Nigerian Positions–Some Lessons for Nigeria', (2009) 34 *Journal of Juridical Science* 89 for an excellent discussion of this principle.

43 H.W.O Okoth-Ogendo, 'The Tragic African Commons'. Available at http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/8098/The%20Tragic%20African%20Commons.pdf?sequence=1 (accessed on March 7, 2018).

44 *R v Amkeyo* [1917] 7 EALR 14.

In my opinion, the use of the word 'marriage' to describe the relationship entered into by an African native with a woman of his tribe according to tribal custom is a misnomer which has led in the past to considerable confusion of ideas. I know of no word that correctly describes it; 'wife-purchase' is not altogether satisfactory, but it comes much nearer to the idea than that of 'marriage' as generally understood among civilized peoples.

57. Additionally, 'colonial law reports are full of incidences in which common property concepts were declared 'repugnant' to colonial notions of property, or where doctrines unknown to common law property systems were declared as part of the common law system'.[45] Furthermore, woman-woman marriages and liability of the family for wrongs committed by one of its members were also branded 'repugnant'. This application of African customary law to the repugnancy threshold had a number of consequences. First, it placed customary law inferior to the common law. Further, the standard by which the validity of the African customary law was determined was that set by English ideas of legal norms, justice, and morality.[46] The colonial powers intended the repugnancy clause as a tool for stifling an African culture that was 'appalling, ridiculous, or simply unhelpful to the inculcation of Christian ideals'.[47] The repugnancy clause was only viewed with the moral lenses of the colonizer. Lastly, this clause seriously undermined the autonomy and extent of the customary law systems. Ahmednasir Abdullahi argues persuasively that the repugnancy clause was:

[U]sed by the colonial authorities to seriously restrict the application of African customary norms, displacing them in the process, and creating room for a more preferred law to resolve the dispute.[48]

58. African Customary Law was formally recognized in most post-colonial African states, including Kenya via the 1963 Constitution. However, it applied only to the extent that it was not 'repugnant to any written law' (see section 208 (11). While case law and commentators have discussed these words in detail, what is important to note is that the starting point for the analysis for repugnancy is the 'written law'. This is the lens through which one reviewed the issue. Three central assumptions were made. In the first place, it was assumed that the written law was spotless or perfect. It was also assumed that customary law, by contrast, was soiled. Further, and based on this reasoning, one may also assume that customary law and its procedures were inferior to the written law. Consequently, it was only once customary law had proven itself useful/adequate that it could be embraced. Failure to do this would make the custom in question and its accompanying procedures to be labelled 'repugnant'. The burden of proof was on the moving party to demonstrate that customary law was indeed not gross or, in other words, that this corpus of law was relevant enough to be applied to a particular set of circumstances. Subsequent Constitutions, including the 1969 Constitution of Kenya contained similar provisions.

45 See H.W.O Okoth-Ogendo, 'The Tragic African Commons'. Available at http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/8098/The%20Tragic%20African%20Commons.pdf?sequence=1 (accessed on March 7, 2018).

46 Muna Ndulo, 'African Customary Law, Customs, and Women's Rights' (2011) 18:1 *Indiana Journal of Global Legal Studies, 95*.

47 Mudibo Ocran, 'The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa' (2015) *Akron Law Review* 470.

48 Ahmednasir Abdullahi, *Burial Disputes in Modern Kenya: Customary Law in a Judicial Conundrum* (Faculty of Law, University of Nairobi: Nairobi, 1999)

59. The promulgation of the Constitution in 2010 was expected to transform the nation in many ways. It is arguable whether the Constitution and attendant legislation change the dubious heritage of the repugnancy clause. Two important points need to be underscored here. First, is the current structure of the repugnancy clause. Under Kenya's legal framework, the repugnancy clause is found in Article 159(3) of the Constitution and Section 3(2) of the *Judicature Act*.[49] Section 3(2) of the *Judicature Act* reads thus:

> The Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and all subordinate Courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

60. Article 159(3)(b) of the Constitution retains the repugnancy doctrine. It limits the application of traditional dispute resolution methods to those systems that are not repugnant to justice and morality or do not result in outcomes that are repugnant to justice or morality. Read together with the Article 2(4) of the Constitution, which provides that any law, including customary law that is inconsistent with the Constitution is void, it is apparent that the limitation placed on the application of customary law to civil matters under the *Judicature Act* cannot be permissible under the Constitution. This is the progressive lens through which the doctrine of repugnancy should be viewed. The progressive character of the Kenyan Constitution requires Courts to give new meaning to Article 159 of the Constitution. Compliance with the call of Article 259 of the Constitution will be critical in meeting this goal.[50] The repugnancy clause should neither be seen as a stumbling block, nor be allowed to constitute a supervising doctrine for customary law. The "civilization mission" approach must be rejected by litigants and our Courts. Rather, we need to view this doctrine as a building block towards access to justice and promotion of the rights set out in the Bill of Rights. This is the lens via which Courts should view the repugnancy clause. Furthermore, the repugnancy limit in the Constitution can also be said to be redundant as Article 153(3) of the Constitution subjects the use of traditional dispute resolution to the Bill of Rights, the Constitution and any other written law. The redundancy here is based on the breadth and coverage of constitutional rights in the bill of rights. It is difficult to see why a repugnancy clause based on justice and morality is still present yet the Kenyan Constitution prides itself in having a robust Bill of Rights.

61. Furthermore, we need to recognize that under the previous legal framework the point of reference was the 'written law'—a well-known standard. The net effect of the current state of affairs is to render it easy for any party challenging the decision of an AJS forum to allege that the process does not comply to 'justice and morality' or it 'results in outcomes that are repugnant to justice or morality'.[51] Several questions

49 Chapter 8 of the Laws of Kenya.

50 This article requires the Constitution to be interpreted in a manner that—
(*a*) promotes its purposes, values and principles;
(*b*) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
(*c*) permits the development of the law; and
(*d*) contributes to good governance.

51 Article 159(3)(b) of the Constitution.

come to mind: Whose morality are we going to base our analysis on?[52] What is the applicable standard? Which test(s) should we draw on? What amounts to justice? These are some of the questions that will need to be fleshed out, at the outset. Otherwise the bar for challenging an AJS decision appears quite low, as of now. The net effect will be counterproductive–the Court process could be clogged with challenges from AJS decisions; an unintended consequence. Moreover, we need to realize that customary law is dynamic, not static. It is simplistic to assume that these laws are the way they were when the colonialists first came to Africa. Courts must come to grips with this reality. Judges and Magistrates must adopt a view that is consistent with the modern times. This dynamic approach will ensure customary law endures.

62. An additional comment needs to be made— the repugnancy clause is itself arguably redundant. This position stems from reading the Constitution as one document. The fundamental goal of the Bill of Rights serves to protect every person in the country. Via this protection regime, a decision maker can grant a range of legal remedies to a victim. They can also compel a perpetrator to undertake measures to rectify any wrong they may have committed. The Bill of Rights can thus be deployed to check the AJS processes. An interpretive approach, which brings this clause in line with the Bill of Rights, is the route to be taken. Through this path it is possible to create a robust Kenyan Customary Law. Focus, however, should be placed on due process guarantees.

2.3. Agency theory of jurisdiction of AJS

63. The Constitution gives the Judiciary the mandate to promote traditional methods of dispute resolution in Article 159(2)(c). However, the jurisdiction of these mechanisms is not specified. In all judicial based processes, the question of jurisdiction is central. It applies to the dispute, the persons involved in the dispute resolution process and the geographical scope of the decision-makers. The nature of judicial power is strongly tied to a model of the modern nation-State that is ideally characterized by separation of powers between the Executive, Parliament and the Judiciary. The delineation of jurisdiction on the Judiciary is, therefore, based on this model of centralized State power exercised as delegated authority on behalf of its citizens.

64. Nwabueze argues that centralized judicial power includes the following attributes: (i) the existence of a dispute between two or more parties about some existing legal right; (ii) a compulsory jurisdiction at the insistence of one party to inquire into the dispute; (iii) a power to determine authoritatively the facts of the dispute; (iv) a decision arrived at by the application of the relevant law to the facts, and which, by declaring the rights in question, finally disposes of the whole dispute; (vii) a power to enforce compliance with or obedience to the decision.[53] In his analysis, Nwabueze reflects on the central attributes of AJS Consequently, the appropriate theoretical framework for understanding jurisdiction in AJS should also be unique.

65. This Policy proposes an Agency Theory of Jurisdiction as the constitutionally permissible modality to determine the acceptability and propriety of a particular dispute, controversy or issue to be before an AJS Mechanism. On the first attribute mentioned by Nwabueze – the existence of disputes between parties–the Agency Theory

52 For a deeper engagement of this theme, see Roscoe Pound, 'Law and Morals-Jurisprudence and Ethics', (1945) 23(3) *North Carolina Law Review* .

53 Ben O. Nwabueze, *Judicialism in Commonwealth Africa* (C. Hurst & Company, 1977) .

does not require a dispute or controversy as a prerequisite for jurisdiction. Additionally, the theory does not classify disputes based on whether they are criminal or civil. Furthermore, the Agency Theory does not distinguish jurisdictional reach based on the gravity of the offence in criminal matters. The important question is whether the concerned parties have consensually and voluntarily submitted themselves to this mode of dispute resolution. The foundational question is thus whether there is a dispute that is ripe for resolution. Whether the third-parties involved have power to resolve the dispute is irrelevant. What needs to be determined is whether the consent of the parties is informed, mutual, free and revocable. These are the fundamental prerequisites of this theory.

66. Differently stated, therefore, the Agency theory does not distinguish civil from criminal law in determining the appropriate province or jurisdiction of AJS mechanisms. Instead, the Agency Theory asks if it can be objectively determined that the parties to a given dispute have consensually and voluntarily submitted themselves to the AJS mode of dispute resolution; and whether the consent of the parties can be objectively and credibly be determined to be informed, mutual, free and revocable. If the answer is in the affirmative and if there is no specific legislation or public policy ousting the jurisdiction of AJS mode of dispute resolution, then the dispute is amenable to the AJS mode of dispute resolution – whether the dispute is formally determined to be "civil" or "criminal."

67. The Agency Theory explains the endorsement of the High Court decision in *Republic v Mohamed Abdow Mohamed*[54] as constitutional and lawful. Mohamed Abdow had been charged with the murder of Osman Ali Abdi. However, the matter did not go to full trial. The office of the Director of Public Prosecutions (ODPP) requested the Court to mark the case as settled for two reasons. First the complainant was satisfied with the compensation that the accused had offered—camels, goats, and other traditional ornaments as well as the payment for the blood of the deceased to his family through Islamic law and customs. Further, the prosecution had faced great difficulties in securing witnesses. They were no longer interested coming to Court to adduce evidence. Rather, they were eager to see the matter marked resolved. Thus, the Court allowed the ODPP's application. It consequently discharged the accused in keeping with the agency theory, since the Court established that there was consent in the withdrawal of the matter. Further, it was mutual in the sense that both parties had agreed to the withdrawal of the matter. Moreover, the consent was given freely; no party was coerced into it. This case demonstrates how citizens retain power even where this has been delegated to another arm of government.

68. Some have criticised *Abdow* on grounds that the Court allowed the discharge of a capital criminal offence yet trial had not been conducted and concluded.[55] One of the concerns in the case was whether customary law and Islamic law would under the Constitution be applied in murder cases specifically and felonies generally. The answer to this jurisdictional concern is that, depending on the free, mutual, informed and revocable consent of the parties and all involved stakeholders, such cases can be resolved using AJS. You will recall earlier we flagged that the fundamental question is whether the parties, victims or stakeholders involved in the dispute have consensually and voluntarily submitted to the AJS process. The direct consequence of this yardstick

54 *Republic v Mohamed Abdow Mohamed* [2013] eKLR (This line of jurisprudence has advanced in subsequent cases. See, for instance, *Republic v Musili Ivia & another* [2017] eKLR).

55 See, for instance, Pravin Bowry, 'High Court opens Pandora's Box on criminality' available at https://www.standardmedia.co.ke/article/2000085732/high-Court-opens-pandora-s-box-on-criminality (accessed on 8 March 2019).

is that cases involving vulnerable individuals such as children, persons with disabilities, marginalized groups and elderly persons can be problematic. The possibility of confirming free, mutual, informed and irrevocable consent is highly reduced. In many instances these factors may be absent. The fear of opening a 'Pandora's box', as Pravin Bowry contends, for the application of AJS in sensitive cases such as defilement is, thus, addressed sufficiently by the Agency Theory. This theory also challenges us to go beyond the narrow view in criminal law of taking these cases as disputes between the State and the individual, and not between two individuals. Indeed, this theory addresses this concern as well. Further, it recognizes the involvement of the ODPP as the representative of the State-based interests in criminal cases. In instances where the ODPP has consented in a free, informed, and mutual manner with the victim and other stakeholders, it is reasonable and lawful to contend that AJS mechanisms can be deployed in the criminal justice system.

69. Finally, the Agency Theory is an antidote to the formal challenges presented by the wide and multifaceted concerns that jurisdictional issues created in the formal justice systems. It affirms the aims of justice as fairness and as dignity, a subject covered below.

2.3.1. Fairness

70. The AJS regime is consistent with the fundamental principles of justice. From the preceding analysis, it is apparent that it meets the basic goals of the idea of justice. First, it seeks to assign basic rights and duties to members of one the various possible and/or practiced community configurations. Secondly, it determines the division of social benefits in society in an equitable manner. In this case, it neither imposes nor condones a veil of ignorance on the disputing parties, but operates on a lived-reality framework that is justice-oriented and human dignity-focused. This is a close amalgamation of the essence of justice as having to do with the maintenance and restoration of equilibrium in the most equitable manner possible. As we have seen, the same cannot be said of the legal realities that Kenyans face in the formal justice system, characterized as it is by, among other serious shortfalls, serious backlogs, few Courts and high litigation costs, ultimately making justice not only delayed, but often denied as well.

71. Consequently, and in keeping with every-day reality, Kenyans have come to accept a plural justice system and yearn for its effective reign. Within these frameworks, there are multiple-avenues of justice. These multiplicities increase the avenues of participatory democracy and enhance human dignity. Necessarily, therefore, the processes and outcomes of justice are not singular: Rather, they are multiple and dynamic. Their global aim is to uphold fundamental rights that are due to every human being—including human dignity, equity, social justice, inclusiveness, equality, and non-discrimination.

2.3.2. Dignity

72. Article 10 of the Constitution outlines Kenya's national values and principles of governance. These include patriotism, human dignity, equality, social justice, inclusiveness, human rights, non-discrimination, and protection of the marginalized and public participation. These principles form part of the blueprint that lies at the core of the transformational framework of obligations developed by the Taskforce. AJS is one of the mechanisms of the people in maintaining and upholding human dignity and social justice. These two principles form the backbone of the transformational AJS. As a matter of fact, the AJS systems and processes are based on the idea of dignity.

73. Importantly, AJS processes are focused at affirming human dignity as explicitly enshrined in the Constitution (Article 28). Every person has inherent dignity and the right to have their dignity respected and protected. The State, through promoting people-centred modes of justice dispensation, is strongly affirming the inherent dignity of its citizens. As the Taskforce established during the field visits, Kenyans expect their justice outcomes to be fair and to uphold the value of human dignity. The valuing of human dignity as the centre of justice outcomes is tied to viewing justice-dispensing institutions as avenues of vindicating the inherent dignity of humanity. Simply put, Kenyans expect that everyone will be treated by the justice system as of respect and value for the main reason that they are a member of this community.

74. Affirming human dignity is a running theme in all AJS processes. This strong traditional dignity-based heritage should inform the 'Respect, Protect, and Transform' obligations framework discussed in Chapter Five of this Policy. This tradition should always be guaranteed. Home- grown versions of human dignity should serve to enrich international discourses of this entitlement. Through this route, therefore, the AJS project will contribute to debates on realization and preservation of human dignity at the international level.

2.4. AJS enables social re-engagement with (and re-legitimizes) the State

75. Recognition and promotion of AJS is one way of re-engaging and re-legitimizing the State. Prior to the constitutional mandate in 2010, the State had consistently alienated itself from and, was, hence, unapproachable by its people. Exercise of State power was viewed as a preserve of a few. Most Kenyans held the belief that governmental power was placed far from them both substantively and geographically. The State was far removed from its people, and in many ways remained clueless on the needs and abilities of its own populace.

76. One of the transformative objectives of the Constitution of Kenya, 2010, is to re-legitimize the State by bringing Government closer to the people. One way of meeting this objective is through public participation, which forms a key pillar of the Constitution.[56] Alternative justice systems enhance public participation in the justice system. It is important to determine how to best enhance these mechanisms that are already vastly employed by the people of Kenya. In addition, there is need to develop basic principles which can be adhered to by all AJS actors, irrespective of the AJS model. In order to enhance this re-engagement with the State, AJS seeks to interweave its practices with the everyday lives and social practices of the people.[57] 65. The exercise of judicial power is compulsory, not necessarily because it is the best or most efficacious, but because it is State-sanctioned, backed as it is by the full authority and coercive instruments of the State. This attribute distinguishes judicial power from other analogous structures and systems. It also places the Judiciary and State-sanctioned law on a higher pedestal than other avenues of justice dispensation.

56 See, for instance, the following articles in the Constitution: 196(1)(b) (requiring County Assemblies to 'facilitate public participation and involvement in the legislative and other business of the Assembly and its committees'); 201 (calling for 'public participation in financial matters'); 69 (encouraging public participation in environmental management and conservation); 118 (requiring Parliament to facilitate public participation in passage of laws and running of parliamentary affairs).

57 Abdullahi An-Nai'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Harvard University Press, 2008).

77. By recognizing and promoting AJS this hegemonic view of State law is greatly diluted. This is a critical point, since most of the authority of AJS institutions is not derived from the powers delegated to the State by the people of Kenya. Rather, it is derived directly from popular sovereignty.

78. Thus, AJS seeks to enhance the role of the State and the citizen as direct actors making contributions towards their civic autonomy. The State is reconstituted by accommodating the lived realities of Kenyans, and by allowing them to make direct contributions towards governance. Citizens are no longer subjects of the State: Rather, they are partners in the running of the country (*Wenyenchi*, not *Wananchi*). Like devolution,[58] AJS expands civic autonomy and returns the power to govern to the *Wenyenchi*.

79. One of the main objectives of the Constitution is to reorganize the governance systems in the country. Under the terms of the new order, the citizen is placed at the centre of activities. The Constitution is emphatic that citizens have to play a central, not peripheral, role in running the Government. Consequently, the spaces citizens can engage towards running of Government have been expanded. In that regard, the current legal framework recognizes an array of dispute resolution fora that one can invoke in pursuit of justice.

2.5. AJS as a site for stimulating the growth of culture and customary norms

80. AJS is a site for reclaiming indigenous customary norms. While some deem these as fixed, the reality on the ground is that they are dynamic. Indeed, AJS stimulates the growth of customary norms.

2.6. Resituating the *Restatement* Project

81. As already mentioned, a dual justice system was maintained in post-independent Kenya. The outcome was a customary law system based on ethnic identity. This was an unintended consequence, however. Since different communities that formed Kenya had their unique customs, practices and traditions, it would be unrealistic to expect the country to have a unified customary law regime. There were and still are different customary laws.[59] To understand the problem of such formulation, one must understand that the designations of 'native' and the 'tribal' were introduced as pejorative conceptual categories by the colonial powers. The idea of nativity was a theoretical-creation of the imperial powers to ensure the sustainability of the colonial project.[60] It is through this project that African communities were divided into 'enthnicized' and 'tribal' categories.

58 See Chapter 11 of the Constitution.

59 See also Lynn Berat, 'Customary Law in a New South Africa: A Proposal', (1991) 15 Fordham International Law Journal 92, drawing a similar conclusion.

60 See Mahmood Mamdani, Define and Rule: Native as Political Identity, (Harvard University Press, 2012).

These initiatives led to some dubious projects such as the so-called 'Restatement of African customary law' of Eugene Cotran.[61]

82. This project made a number of assumptions. First, customary law and practices that are outlined were settled. In other words, it was assumed that there was no dispute regarding the practices and customs, as presented in the text. The reality paints a different picture. It was apparent that there were several contestations on the practices and customs as captured by Cotran's project. Further, the word "restatement" seems to suggest that Cotran's work was clarifying on a position earlier advanced or stated by an author , and that his project was a review of earlier works with the aim of offering a critique or stating the correct or alternative position. Cotran mentions that this term was influenced by 'Re-statements of American Common Law' by the American Law Institute in the United States of America. In reality, however, what he was engaging in was a project that attempted to "create" and "freeze" in place the position of customary law in Kenya.

83. AJS is also a manifestation of racism, European superiority and male dominance.[62] Curiously, Cotran had to rely on local chiefs and elders to help him collect data for the project. It is not clear why the funders did not contract locals directly to undertake this exercise. Chances are high they would have obtained deeper and more solid information. By the time Cotran was conducting his research, there were learned individuals in Kenya. The claim, therefore, that there was a deficit in expertise in Kenya is weak and cannot be allowed to stand. So, too, is the view that the traditional was irrational.

84. An additional underlying assumption lies on the capacity to conduct a project of this nature. For the research to capture the correct information on the ground and present it in a logical manner, a male white British had to be contracted to collect and present the data. It was too risky to place a project of this magnitude in the hands of a "native". Again, one cannot help but notice the arrogance, superiority complex and male chauvinism that this approach presents. Cotran's terms of reference were to arrange the customs and practices of Kenyans 'in a simplified and improved form'.[63] It appears Africans could not be trusted to accomplish these basic tasks. Was it because they neither grasped the concepts of data collection and processing nor conceptualized these aspects, as Jack Donnelly claims?[64] As experience shows, these assumptions were misplaced. Critics such as Ngugi wa Thiong'o have rejected such notions. In his well known text, *The River Between,* Ngugi wa Thiong'o poses the following question: 'do you think the education of our tribe, the education and wisdom which you received, is in any way below that of the White man'?[65]

61 See the following works by Eugene Cotran: Report on Customary Criminal Offences in Kenya (Government Printer: Nairobi, 1963); Restatement of African Law: Volume 1-The Law of Marriage and Divorce (Sweet and Maxwell: London, 1968); Restatement of African Law: Volume 2-The Law of Succession (Sweet and Maxwell: London, 1969). This was a project developed as part of a grant from Nuffield Foundation. Its objective was to finance a comprehensive plan for the systematic recording and restatement of African customary law. See also Allot A.N (eds), Judicial and Legal Systems of Africa (Butterworths: London, 1962).

62 This position is consistent with the Critical Race Theory. There are a number of critics in this school of thought. See, for example, Ngugi wa Thiong'o, The Black Hermit (Heinemann: Oxford, 1968); Richard Delgado, The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?, (1987) Harvard Civil Rights-Civil Liberties Law Review .

63 Ibid, Volume 2 at viii.

64 Jack Donnelly, 'Human Rights and Human Dignity: An Analytical Critique of Non-Western Conceptions of Human Rights', (1982) American Political Science Review 303 at 303.

65 Ngugi wa Thiong'o, The River Between (Heinemann: Nairobi, 1983) at 68.

85. For the AJS Policy, assumptions such as the one flagged in the preceding paragraph are reminders of the value of getting local personnel to implement the frameworks. Indeed, this would contribute a great deal towards protection of our culture. We must reject what Richard Delgado, a well-known Critical Race Theory proponent, describes as '"Euromyths"'.[66] There are several advantages in taking this route. In the first place, the local people tend to have a good understanding of the different facets of life within the community in which they live. Edward Said underlines the undeniable fact that knowledge production is deeply rooted in the materiality of history, circumstance and location.[67] As protectors and 'repositories of knowledge of the local customary law',[68] the people are best placed to offer insights into the cultural practices of their society. In the *The Black Hermit,* Ngugi wa Thiong'o describes the following conversation between Remi (a local male) and Jane (A European female):

> You are different from me, from us, from the tribe. You cannot know what I know. You have not experienced what I have experienced. Your background is a world from mine. How can we be the same? How can the call of the tribe be your call?[69]

86. Against this background, could it be said that Cotran and others in this league[70] heard the 'call of the tribe' when they engaged in these kinds of projects? Did they really appreciate the position on the ground? The responses to these questions must be in the negative.

87. Moreover, these African customs are dynamic,[71] not static or unchanging, as Cotran assumed. Indeed, he fails to prove the hypothesis that they are still the way they were in the past. Furthermore, locals have an interest in keeping the community together, and, thereby, protect their customs. The question of promoting social inclusion is central to the AJS regime. Several authors have affirmed this position.[72] Hence, any outcome that is finally arrived at in the quest for justice is designed to maintain peace and good order in society. Outcomes that seek to punish an individual or group must be a last resort, or at least form part of a package whose first and final aim is to restore and maintain social harmony. The Taskforce findings established this during the field visits.

88. Arguably Cotran's work was keen to silence or isolate African voices in his writing. Language is a critical element in communication. The language one deploys in their writing can either promote or curtail understanding of the subject matter by their audience. For instance, several authors have levelled criticism on use of English, arguing that this forces one's *audience* to view text through this lens. Rather than follow through the text, there is a high chance of a reader getting lost. Said, who was taught by a foreigner, shares his experience thus: 'although [we] are learning, [we] could never be part of the English language and culture.'[73]

66 Richard Delgado, 'The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?', (1987) Harvard Civil Rights-Civil Liberties Law Review 301 at 303.

67 Edward Said, Power, Politics and Culture (London: Bloomsbury, 2005) at 263.

68 E.A. Keay and S.S. Richardson, The Native and Customary Courts of Nigeria (London: Sweet and Maxwell, 1966) at 196. See also Peter Onyango, African Customary Law System: An Introduction (LawAfrica: Nairobi, 2013) drawing a similar conclusion.

69 Ngugi wa Thiong'o, The Black Hermit (Heinemann: Oxford, 1968) at 47.

70 See, for instance, D.J. Penwill, *Kamba Customary Law* (Kenya Literature Bureau: Nairobi, 1951); G.S. Snell, *Nandi Customary Law* (Macmillan: London, 1954).

71 This point was underlined by participants who attended a session of the Taskforce organized in Kisumu.

72 See, for instance, Kinyanjui, *supra* note 31 at 3.

73 Edward Said, *Power, Politics and Culture* (London: Bloomsbury, 2005) at 263.

89. The final criticism lies on the intellectual property question. As a general rule, the intellectual property of any work lies with the author. In his research, Cotran relied a great deal on locals. It is through them that he was able to get information for his research. Absent guidance and input by locals, it is highly unlikely that Cotran's mission would have met its terms of reference. Despite this reality, it is unfortunate that he alone could claim intellectual property rights over the texts produced from this research study. All the locals who helped in his research cannot stake a claim. AJS seeks to reverse this trend. In the quest to protect African cultures and practices, AJS also guarantees that any accruing intellectual property rights remain in the community, first, and country, second. It is for this reason that the Constitution in Article 11(2)(c) seeks to promote and protect the intellectual property rights 'of the people of Kenya'. Few would deny that this is the preferred position. In many ways this route ensures African voices are put forward and protected at all times.

90. The AJS Policy aims to dismantle the colonial legacy. Such a process must involve the de-tribalization and de-ethnicization of customary law and customary systems. However, that does not mean that Africans deny their cultural identity and diversity. By contrast, the point is that this is a process of freeing the cultural identities of Kenyan communities from the shackles of a falsified history. The idea is to create local and plural justice narratives. These accounts should stem from locals.

2.7. Resituating rationality: the traditional as rational

91. It is often thought that everything modern is good, while everything that is traditional is backward, and, hence, should be descried or at least improved upon.[74] To put it in another way, the theory here is that traditions, unlike modern practices, are backward or irrational and thus in dire need of improvement in order to bring it to terms with modern trends. This notion could be traced back to colonialism. During this period, Africans were encouraged to adopt the colonial lifestyle and practices. Those who failed to do so were considered barbaric. In the justice system, this manifested in the sense that Africans were allowed to practice their justice system only to the extent that it did not offend British values, cultures and practices. This is the genesis of the repugnancy clause, which stipulated that traditional dispute resolution systems were acceptable only so long as they were not repugnant to (British) justice or morality. To put it in another way, all the rules, cultures and practices the British introduced were assumed to be perfect. African customs and practices, by contrast, were deemed irrational in the first instance. They were only good and applicable if they demonstrated that they did not contradict British laws, norms and values. This line of thinking casts a disparaging look at traditional customs.

92. The theoretical underpinning of this debate vested in the benighted assumption that Africans did not understand the concept of "human being". Another assumption was that the human rights discourse did not originate from Africa: that it was a Western concept developed after the Second World War. Donnelly makes the following claim:

74 There is a fair amount of literature on this theme. See, for instance, Thomas Sankara, *Thomas Sankara Speaks* (Kwela Books: Cape Town, 1998), Sarah LeFanu, *S is for Samora: A Lexicon Biography of Samora Machel and the Mozambican Dream* (University of Kwazulu-Natal Press: Scottsville, 2012) and Colin Legum, '*Zambia: Independence and Beyond-The Speeches of Kenneth Kaunda* (Thomas Nelson and Sons: London, 1966).

[M]ost non-Western cultural and political traditions lack not only the practice of human rights but the very concept. As a matter of historical fact, the concept of human rights is an artefact of modern Western civilization.[75]

Against this hypothesis, how would Africans be expected to engage with human rights concepts? Would they understand the inner meanings of these rights?

93. Upon independence, the traditional justice system continued to run parallel to the formal justice system introduced by the British. Curiously, the repugnancy clause was retained in the post-independence era. This clause can be critiqued through the concept of universality of human rights lens.[76] Comparative experiences can also come in handy. Under the universality school of thought, the concept of human rights is one that is found in all places. Several authors have affirmed this thesis. Dominique Uwizeyimana contends that 'there is no separate African democracy in terms of a democracy of a special kind'.[77] Human rights are guaranteed to all individuals. Proponents of this school also assert that the rights notion of humanness (or *utu* in Swahili) is found everywhere and its contents are the same. The idea that human rights are a Western concept must thus be rejected. As Surya Subedi affirms, this line of thinking 'ignores the practices of other great civilizations of the world'.[78] Cultures will definitely differ from one society to another. To use Western cultures and practices as a yardstick is misplaced. Simon Tay contends that one's culture should not be privileged 'over a system of universal human rights'.[79] The Constitution of Kenya, 2010 sharply rebukes this untested notion of irrationality of the traditional cultures of Kenyans. Articles 11 and 44 recognize the right to culture. Promoting AJS is one way of challenging and restoring this rationality.

94. The Constitution seeks to re-situate rationality. One way of doing so is through the recognition and promotion of AJS. Right at the outset of the Constitution (Preambular paragraph three), the people of Kenya are reminded to be proud of their ethnic, cultural and religious diversity. This is an indication that ethnicity, culture and religion are values that Kenyans should be proud of. They should not despise them.[80] Article 11 further recognizes culture as the foundation of the nation. It also cements culture as the cumulative civilization of the Kenyan people and nation. Towards this end, Government is required to promote all forms of national and cultural expression. Article 44 also recognizes that a person has the right to participate in the cultural life of the person's choice. The requirement to promote AJS under Article 159 (2)(c) is a further rebuke on this rationality as it recognizes AJS as a mode of dispute resolution in Kenya.

95. An additional point needs to be made. AJS seeks to dismantle the colonial through de-ethnicization of customary systems. It is not the aim of this regime to take us back to the traditional ways of life. Rather, its goal is to implement and achieve the

75 Donnelly, *supra*, note 53 at 303.

76 See, for instance, Karin Mickelson, 'How Universal is the Universal Declaration?', (1998) *University of Brunswick Law Journal*; Dominique Uwizeyimana, 'Democracy and Pretend Democracies in Africa: Myths of African Democracies', (2012) 16 *Law, Democracy and Development*.

77 Uwizeyimana, *ibid* at 139.

78 Surya Subedi, 'Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claim of the "Asian" Concept of Human Rights from the Perspectives of Hinduism', (1999-2000) 30 *California Western International Law Journal* 45 at 49.

79 Simon Tay, 'Human Rights, Culture and the Singapore Example', (1995-1996) 41 *McGill Law Journal*.

80 See also Nancy Baraza, 'The Institution of Woman-to-Woman Marriage in Kenya: Navigating between Culture and Human Rights', (2018) 6 *African Nazarene University Law Journal* (advocating for observance of customary laws and norms) .

constitutional project. Through this route, therefore, we stand on the cusp of the dawn of a truly Kenyan Customary Law.

2.8. AJS advances justice differently and more effectively

96. As already discussed, the idea of justice for Kenyans is closely tied to the lived realities they experience. Like in any society, the experiences of Kenyans are tied with a myriad of contestations. These are conflicting. They stem from everyday life experiences in families, communities, and institutions. Kenyans view justice as both a process and outcome that should promote social cohesion and harmonious living. This conception of justice is tied more to restorative and rehabilitative forms of justice approaches, than on the restitutive forms. From responses and inputs received during the Taskforce's field visits, one could infer that Kenyans strongly feel that any justice-dispensing institutions should be centred within close social proximity of the community. This perspective is tied to modes and processes that are accessible to the rural and urban poor and illiterate people. The ideal here is one of a voluntary, harmonious, restorative and autonomous form of justice.

2.9. Return to restorative justice

97. Restorative justice is anchored on the need for maintaining the notion of collectivity or communality in the society. This notion of justice promotes the rights and dignity of an individual as a member of a larger society. As the Taskforce established in the field, the focus of restorative justice systems such as AJS is on rehabilitating offenders through conciliation with victims and the community at large. Additionally, restorative justice enhances group solidarity. The fundamental idea here is that, for justice to be served in a community, it must aid the members of society to rely on each other for skills, survival, advice and experiences.

98. The overall objective of AJS is preservation of peace and harmony in the community. It also seeks to preserve and protect culture. In her research in Kenya, Kinyanjui established that 'restorative values' existed in traditional communities.[81] Unlike formal Courts, the traditional concepts of justice do not support the 'winner-takes-it-all' approach' that is to the hallmark of restitutive forms of justice. On the contrary, restorative systems of justice seek to balance the interest of all sides. Its emphasis, as *Abdow* demonstrates, is on getting the best outcome possible for all interested parties, each of which need to come out of the process contented, restored, and possibly empowered. Further, in the AJS model of restorative justice, the community is crucially involved in the dispute resolution process.

2.10. AJS ensures more social inclusion

99. AJS is a means through which the needs of society are addressed. Via this dispute settlement mode, one can assess the extent to which this method meets the needs of the Kenyan people. Considering the ever-changing nature of society, it is imperative

81 *Supra* note 31 at 2.

for AJS to evolve in order to keep pace with these changes in order to meet the needs of society.[82] Unlike the formal Court system, which is based on the winner-take-all notion, AJS focuses on maintaining social inclusion, and, thereby, cohesion.[83] The individual's welfare is not an end (or at least not as the only end); it is upheld only to the extent that it aids in securing the optimal welfare of society. The use of AJS to resolve disputes facilitates social inclusion. This theme, which the Taskforce established during its field visits, is flagged in detail in the preceding sections.

2.11. More affordable justice

100. Formal justice systems are quite expensive when compared to informal justice systems. Since most AJS processes are closely tied to the communities and are mostly non-institutionalized, these processes are cheap and more affordable as compared to formal systems. Parties do not need to pay filing or advocate's fees for representation purposes. This means that the inordinate cost associated with the formal justice system is alleviated. The State does not have to pay most of the AJS practitioners as these individuals play their role as part of their organic and time-honoured communal-based role-sets. Whereas Courts in different places might require litigants to travel long distances, this is not the case with AJS mechanisms. The latter tends to be locally-based.

2.12. Minimal formalities and more expeditious justice

101. The non-involvement of lawyers or Court-based fees and practices means that many of the AJS mechanism are not riddled with the maze of formalities experienced in the formal systems. In its 2011 survey, the Danish Institute for Human Rights found that laws 'are drafted in a way that make them too complicated for ordinary people to understand and it is often impossible to obtain copies of legislative acts'.[84] AJS mechanisms, by contrast, have very few formalities. Communications gaps are one of the huge impediments to accessing justice in Kenya. As experience demonstrates, local languages are usually used in the AJS processes, thereby enhancing effective communication. These processes are also quite flexible. Since they are local, members of the community are able to identify with the rules and decision-makers. Court procedures, by contrast, are complex. They also tend to be rigid. Specific timelines, which parties must comply with to remain on the system are also prescribed by statute. Failure to comply with these basic requirements is often fatal to the interests of the affected party.

82 See also James Gardner, 'The Sociological Jurisprudence of Roscoe Pound (Part I)', (1961) 7 *Villanova Law Review* 1 at 2 (arguing 'law should be brought into harmony with changing social conditions'); Roscoe Pound, 'The Scope and Purpose of Sociological Jurisprudence. [Concluded.] III. Sociological Jurisprudence', (1912) *Harvard Law Review* ('law in its evolution, in its successive changes, [should] relate these changes to the changes [society] undergo[es]').

83 See also *R v Juliana Mwikali Kitembe,* Criminal Case No. 10 of 2015 (Garissa), where Judge Dulu allowed a criminal matter to be withdrawn. The Court invoked Article 159(2) of the Constitution. Among other reasons, the Court argued that this would promote 'reconciliation' as envisaged by the Constitution.

84 Danish Institute for Human Rights, 'Access to Justice and Legal Aid in East Africa: A Comparison of the Legal Aid Schemes Used in the Region and the Level of Co-operation and Co-ordination Between the Various Actors', available at https://www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_africa_dec_2011_dihr_study_final.pdf (accessed 11 January 2019) at 29.

102. AJS mechanisms are more localized. This makes them readily available to the communities in which they are used. As flagged above, the mechanisms are not riddled by the many formalities and processes required in the formal systems. These factors render such systems more expeditious, compared to formal systems. This explains why these processes are widely used in the country.

2.13. Less adversarial and creative solutions

103. The restorative justice-based nature of AJS mechanisms means that they are far less adversarial. The parties are not involved in a legal contest but are part of system of harmonious social living. Chinua Achebe's quote on the mode of dispute resolution among the Igbo captures this view:

> When the Igbo encounter human conflict, their first impulse is not to determine who is right but quickly to restore harmony. In my hometown, Ogidi, we have a saying, *Ikpe Ogidiadi*-amaofuonye: 'The judgement of Ogidi does not go against one side'. We are social managers rather than legal draftsmen. Our workplace is not a neat tabletop but a messy workshop. In a great compound, there are wise people as well as foolish ones, and nobody is scandalized by that.[85]

104. The decisions that are mutually arrived at by AJS forums also tend to be creative and customized. Unlike the formal Courts, which have to issue decisions prescribed by legislation,[86] the AJS mechanisms allow ample room for and even require the crafting of innovative decisions. The central idea AJS is to come up with outcomes that are realistic or fit for purpose. The net effect of this creativity is to create a system that is likely to deliver substantive and sustainable justice.

2.14. AJS affirms people's sovereign power

105. Article 1(1) of the Constitution declares that all sovereign power belongs to the people of Kenya. Citizens are required to exercise this power in accordance with the Constitution. AJS can be anchored upon the pre-delegation of sovereign power. This sovereign power may be exercised by the people directly or through their democratically elected representatives. AJS, whose application is grounded on Article 159 of the Constitution, pivots on this Article. Indeed, it is a means by which the people directly exercise their sovereign power. For this objective to be achieved, the people must have power. It is through this power that they exercise AJS.

106. The social contract theory developed by John Locke supports this argument. According to Locke:

85 Chinua Achebe, The Education of a British-Protected Child (Penguin Books, 2009) at 6.

86 See Article 23(3) of the Constitution, setting out reliefs a Court can issue.

Man lived in a state of nature in which man had complete liberty to conduct one's life as one best sees fit. This state of nature was, however, limited by natural law. This state of nature was pre-political but not pre-moral. Man entered into a social contract as his property was not safe. Under this contract, man did not surrender all their rights to one single individual. They surrendered only the right to preserve or maintain order and enforce the law of nature. The individual retained with them the other rights such as the right to life, liberty and estate because these rights were considered natural and inalienable rights of men.[87]

107. This means that, while human beings delegated some rights, they retained others. Having created a political society and government through their consent, human beings then gained three things, which they lacked in the state of nature: laws, judges to adjudicate laws, and the executive power necessary to enforce these laws. According to Locke, the purpose of government and law is to uphold and protect the natural rights of men. When the government fulfils this purpose, the laws given by it are valid and binding. However, when government ceases to fulfil this objective, then the laws would have no validity. Government, he asserts, can be removed from power. In Locke's view, unlimited sovereignty is contrary to natural law.

108. The social contract theory developed by Locke argues that the social contract brings together the citizens to delegate the enforcement of the natural law to the state for the sake of convenience. This means that where it is no longer convenient, the citizens can themselves exercise the powers that they had delegated. In many ways, this theory draws on fundamental principles of AJS. There are some instances in which it is more convenient for the people themselves to exercise the power of dispute resolution. They arrive at this decision based on their lived experience of the formal Court processes and outcomes viewed against the circumstances and nature of the case at hand. The matter of *Abdow* (discussed above) is a reflection of this state of affairs.

109. AJS is also anchored upon the post-delegation of sovereign power. Sovereign power, identified under Article 1(1) of the Constitution, may then be delegated to State organs such as the Judiciary. In this regard, we find the principal-agent relationship. The people are the principals, while the State is the agent. The people then delegate some of their power to the Judiciary, which acts as their agent. Article 159(1) of the Constitution recognizes this relationship. This key provision is an indication that sovereign power has been delegated by the people to Judges and Magistrates.

110. Article 1(2) of the Constitution recognizes that sovereign power may be exercised by the people directly or through their democratically-elected representatives. This is an indication that sovereign power, including the power to resolve disputes through AJS, has been delegated to the Judiciary. This is actualized through AJS mechanisms that work with the Judiciary such as Court-annexed AJS projects. In these systems, the people delegate their sovereign power to the Judiciary through democratically elected representatives who form the elders of the Court-annexed projects and the CUCs. This exercise of power is a means of enforcing the State's obligation in Article 48 (on access to justice)—a power delegated to the State by the people, through democratically elected representatives.

87 John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press (2003).

2.15. AJS as an everyday way of living

111. There are many forms of contestations/disputes that communities experience in Kenya. It is through these experiences that the communities view justice. Justice is, therefore, a way of life that these communities come to know and understand through experience. Justice as contestation is, therefore, linked to the elaborate relationships that these communities experience. In some communities, disagreements are presented and resolved within the family. Other disputes would be presented and resolved by a group of elders or representatives chosen either by the State or the community itself. These mechanisms and processes apply to many facets of the community–from birth, initiation, marriage and death. At all stages, it is the community itself that sets the procedures and processes to be followed. Justice in this framework is a continuum, not a product that is available in one location or as a last resort.

2.16. Moving away from the disputational mode of resolving disputes

112. The principle of 'justiciability' is a key principle in the exercise of judicial authority under the formal justice system. This principle limits Courts to decide only matters that require to be decided. A Court is, thus, prevented from determining an issue when it is too early or simply out of immediate apprehension.[88] This principle is connected to the principle of ripeness: For a matter to be heard and determined, it must be "ripe" for trial. It must have gone through preliminary pre-trial motions.[89] Courts cannot determine issues which are not yet ready for determination or engage in premature adjudication of matters.[90] Usually, these are referred to as academic exercises. This characterizes formal justice as a disputational mode. Under this dispute resolution method, one can only bring a claim before a Court once two conditions are satisfied: First, a dispute must have already occurred, and; secondly, the disagreement should be ready for resolution. If not, the matter will be considered frivolous, vexatious and an abuse of the Court process.

113. AJS attempts to move away from this notion of justice as a disputational mode. According to AJS, the conception of justice is wider as it is both a process and an outcome. In AJS, the concept of justice is palliative. Consistent with the principle of harmonious being or *utu*, it aims to mend relationships in society and bring parties back to good standing with each other. *This, therefore, makes it possible for AJS to deal with disputes pre-emptively*. Here, a potential dispute can be resolved way before it can be considered "ripe". AJS aims to resolve the underlying causes of disputes within the community. This is a key plank in the quest to ensure peace is maintained in society at all times. Among the Kuria, for example, AJS is considered as a healing process whose main aim is to restore the relationship between the parties to a dispute. The following sentiments from a participant affirms this position:

88 *Wanjiru Gikonyo &2 others v National Assembly of Kenya & 4 others* [2016] eKLR Petition no 453 of 2015.

89 *Ibid.*

90 *Ibid.*

We thank the *Ebharasa* for the work it is doing. It ensures people become friends. The good thing about it is that it handles disputes directly, without complicating issues. I had a dispute with a friend of mine concerning a plot. We took the matter to the *Ebharasa*. On that day, my friend was angry and our case could not be heard. In the second meeting, we were able to talk. The secretary helped us to come up with a solution to our dispute. We are now friends again. He has even invited me to his house after this workshop because there is a function there.

114. Similarly, in *Abdow,* the parties decided to settle the matter out of Court, rather than proceed to full trial. The measure of success of AJS will be evident when we see fewer disputes occurring. While we cannot avoid conflicts from happening, there is need to have strong preventive measures. This is a prerequisite which AJS must embrace.

115. Additionally, the notion of justice as palliative and focuses on indigenous justice as stemming from the way of life of the communities. The lived experiences of Kenyans with AJS as well as their idea of justice both affirm this line of thinking. These views are consistent with the Sociological school of thought, which underlines a bottom-approach of justice.

2.17. Other advantages of AJS

116. AJS mechanisms have other positive effects on the dispensation of justice in Kenya. These can be seen more as unintended consequences. However, in reality these positives deal with the injustices found in the formal justice systems. Sometimes people become involved in disputes which, although very important and worrying to those concerned, are better resolved outside the comparatively expensive Court system. *Some disputes do not have a legal solution, while others may be made worse by Court action*. If we choose to use AJS, the following three benefits will accrue. In many ways these benefits also underscore the problems in the formal Court system.

a. *Finality of Awards*. Unlike Court decisions, which can generally be contested through one or more rounds of appeal, AJS awards would usually not be contested on appeal. This arises from the frameworks through which these decisions are arrived at.

b. *Neutrality*. AJS can be neutral to the law, language and institutional culture of the parties. These factors curb any 'home court advantage' that one of the parties may enjoy in Court-based litigation, where familiarity with the applicable law and local processes can offer significant strategic advantages.

c. *Cost savings*. Parties may choose the applicable law, place and language of the proceedings. Increased party autonomy can also result in a faster process, as they are free to devise the most efficient procedures for their dispute. These can result in material cost savings.

2.18. Decongestion of Courts and reduction of backlog

117. Kenyan Courts cannot hear and determine all the cases filed before them every year. Even if the number of judges and magistrates were increased, the Courts would still not be able to clear the backlog they currently experience. This stems from the fact that new cases are being filed daily in all levels of the Court system. Data from the Judiciary affirms this position: As of the beginning of 2019, the number of cases classified as backlog stood at just over 300,000.[91] Of these, fifty five percent (55%) were between one and three years, 23% between three and five years and 22% over five years.[92] This data from the Judiciary shows that, with its current capacity, it would take four years to determine the matters currently filed.[93] This conclusion assumes that no new cases are filed, which is far from reality. The position on the ground is that some 400,000 new cases were filed in 2018 alone in all the Courts.[94]

118. Reducing backlog in the Courts is one of the primary goals of the Judiciary, or what it calls one of the 'key focal areas'.[95] If this objective is met, it will definitely enhance access to justice within the institution. As underlined earlier, 80% of cases are resolved out of the formal Court structure. Hence, AJS is an avenue for reducing case backlog, while at the same time enabling citizens to access justice—a fundamental constitutional entitlement.

119. If parties choose to invoke the AJS regime, there is a high chance that the backlog currently experienced will be reduced tremendously. In the first place, some cases that would ordinarily have been filed in Court would be heard and determined in these fora. Secondly, those are already in the pipeline can be deflected, and, consequently, finalized in an AJS forum. Barring any procedural impropriety or substantive flaws, these, too, can be settled within the AJS frameworks and affirmed by Courts, where necessary. This measure, too, would contribute immensely towards cutting down the number of cases in Court. It would also ensure that justice is not only done, but is seen to be done. And expeditiously at that.

2.19. Reduction in reliance on incarceration

120. As of September 2018, Kenya's Prison population total (including pre-trial detainees / remand prisoners) 51 130 spread across some 108 establishments / institutions, while the official capacity of the prison system was 26, 837. That translates to an occupancy level (based on official capacity) 190.5% –almost double the prison capacity.[96]

121. The Kenyan Prisons lack the capacity to handle inmates and detainees in their facilities and the need to decongest the prison system is imminent.

91 Judiciary, 'State of the Judiciary and the Administration of Justice: Annual Report, 2017-2018', available at https://www.judiciary.go.ke/wp-content/uploads/sojar20172018.pdf at 22 (accessed 23 May 2019).

92 *Ibid*.

93 Judiciary, 'Sustaining Judiciary Transformation: A Service Delivery Agenda, 2017 – 2021', available at file:///C:/Users/Edwin/Downloads/STRATEGIC%20BLUEPRINT.pdf (accessed 13 January 2019).

94 *Supra*, note 15 at 20.

95 *Supra*, note 15 at 23.

96 Data available at www.prisonsstudies.org/countries/Kenya.

122. The consequences of overcrowding in the prisons are tragic.[97] The general incarceration rates in Kenya for petty offences have sky-rocketed in recent years. The use of AJS mechanisms would reduce the rate of incarceration for offences that can be resolved by via this stream. At the same time, alternative sanctions such as restitution, fines, warning and reprimands would need to be embraced for this objective to be met.

2.20. Diversion from criminal prosecution

123. Diversion offers an alternative to criminal prosecution. As a concept, diversion was introduced in 2015 by the National Prosecution Policy.[98] Diversion will enable the perpetrators of crime to be dealt with by non-judicial bodies. This system has several benefits. In the first place, a perpetrator will not be convicted. Secondly, they will not have a criminal record. Further, when implemented, diversion reduces backlog of cases in Court. This process also enhances restitution and restorative justice rather than retributive justice. The perpetrator is given a second chance and participates in community development. Moreover, diversion enhances interpersonal relationships.

124. Finally, this process gives disputants an opportunity to invoke AJS as a mode of dispute resolution. Under this regime, parties are required to report back to the Court, through the ODPP, on the progress of the process and outcome arrived at. In this regard, the cases that are resolved are marked as settled. Subsequently these are withdrawn from the Court process, if at all they were registered already in Court.

2.21. AJS promotes common civilization as envisaged in the Constitution

125. Article 11 of the Constitution affirms our right to culture. While these cultures are different, the Constitution is emphatic that culture is the 'foundation of [our] nation'. It is also the 'cumulative civilization' of the Kenyan people. Towards this end, State and non-State actors are required to promote and protect the rights of individuals to culture and cultural expressions. Despite the fact that we have diverse cultures, this Article 11 challenges us to strive towards building a common civilization. AJS lies at the heart of this project. The application of customary norms in this dispute resolution mechanism in various parts of the country is a path through which the objective of building a 'cumulative civilization' for Kenya can be energized and met.

2.22. AJS and the constitutional standpoint

126. Several articles of the Constitution recognize the value of AJS. In addition to the formal recognition, the Constitution goes further to lay down a framework for protecting this dispute resolution regime. Article 1(1) of the Constitution states that 'All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.' Article 1(2) provides that 'The people may exercise their

97 See Edwin Abuya and Grace Mburu, 'Prisoners in Kenya–*Katika Tundu la Simba*', (2018) 11 *Journal of Comparative Law* 1 at 4-12.

98 Office of the Director of Public Prosecutions- Kenya (2015) the National Prosecution Policy.

sovereign power either directly or through their democratically elected representatives.' Exercising sovereign power is, in part, through establishing and implementing community-based justice systems. According to Article 1(3), sovereign power is delegated to State organs including the Judiciary and independent tribunals. Article 159(1) of the Constitution further provides that judicial authority is derived from the people and vests in, and shall be exercised by the Courts and tribunals. Article 1(3) requires these State organs to exercise sovereign power in accordance with the Constitution.

127. Article 159(2) of the Constitution provides the principles that should govern the exercise of judicial authority. These are:

a. Justice shall be done to all, irrespective of status;
b. Justice shall not be delayed;
c. Alternative forms of dispute resolution including reconciliation, mediation, arbitration and *traditional dispute resolution mechanisms* shall be promoted.

This Article then obliges the Courts and tribunals to be guided, in exercising their judicial authority, by certain important principles. One of these principles is alternative forms of dispute resolution, including traditional dispute resolution mechanisms. The Judiciary is mandated to promote this principle as long as they are not used in a manner that does not contravene the Bill of Rights, is not repugnant to justice and morality, and is not inconsistent with the Constitution. Article 159 (2)(c) places a categorical obligation on the Judiciary to promote alternative forms of dispute resolution, including traditional forms of dispute resolution. [99]

128. Among the recognized human rights is a right to culture. Article 11 of the Constitution guarantees this entitlement. Culture is an important part of the lives and livelihoods of Kenyans. The AJS mechanisms are embedded in the cultural practices of our people. Article 11 of the Constitution recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. Additionally, Article 44 grants to the people the right to use the language and to participate in the cultural life of their choice. This right entails the right, with other members of that community, to enjoy the person's culture and use the person's language or to form, join and maintain cultural and linguistic associations and other organs of civil society.

129. The Constitution also sets out, under Article 10, the national values and principles of governance. These include patriotism, human dignity, equality, social justice, inclusiveness, equality, human rights, non-discrimination, protection of the marginalized and public participation. These principles form part of the blueprint that forms the core of the transformational framework of obligations developed by the Taskforce. AJS is one of the mechanisms of the people maintaining and upholding human dignity and social justice. These two principles form the backbone of the transformational AJS.

130. Consequently, Article 48 obliges the State to ensure access to justice for all persons. If any fee is required, it shall be reasonable and shall not impede access to justice. AJS is a mechanism that, if allowed to flourish, will complement the Courts in ensuring the realization of this right. Finally, the right to culture is also recognized under International Human Rights Law. Articles 15 and 17(2) of the *African (Banjul) Charter*

99 See article 159(3).

on Human and Peoples' Rights[100] ('Banjul Charter') and the *International Covenant on Economic, Social and Cultural Rights*[101] ('ICESCR'), respectively, provide for the right of everyone to take part in the cultural life of their community. Due process principles are also found in many international human rights treaties.[102] These well-known rights are fundamental to the AJS framework.

131. The Constitution of Kenya is transformative in nature. It envisions a more participative approach with people at the heart of the affairs of the State. Article 10 provides for the participation of the people as one of the national values and principles of governance. Public participation, then, recurs in the Constitution as one of the major themes. Indeed, the ability of people to control their affairs in ensuring justice allows them to play, so to say, a role in Government. AJS is a manifestation of this entitlement.

132. Dignity is another right that is critical to the AJS framework. It is a running theme in all AJS processes. As the discussion in the preceding sections demonstrates, this right is well-known in most Kenyan communities. This strong traditional heritage should inform the 'Respect, Protect, and Transform' obligations framework–discussed in Chapter Two. This tradition should be guaranteed at all times.

2.23. Conclusion: The imperative of engaging with AJS in Kenya's justice discourse

133. The analysis in this Chapter demonstrates that AJS expands human rights. Contrary to what some may argue, it does not limit the enjoyment of fundamental rights and freedoms. That said, a number of concerns have been raised as regards this system. The next chapter addresses with these assertions. It also engages with these claims.

100 Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force 21 October 1986).

101 Adopted by UN General Assembly resolution 2200A (XXI) of 16 December 1966) (entered into force 3 January 1976).

102 For these standards, see *International Covenant on Civil and Political Rights*, GA Res 2200(XXI) UN GAOR, 21st Sess, Supp No 16 at 52, UN Doc A/6316 (1966), 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'), part III; Universal Declaration of Human Rights, UNGA Res 217 A, GAOR, 3d Sess, 183 plen Mtg at 22, UN Doc A/810 (1948) ('UDHR'), articles 7, 8, 10 and 11.

3.

Challenges and responses on Alternative Justice Systems

3.1. Concerns, challenges and vulnerabilities

134. The practice of AJS in Kenya has encountered a number of challenges. This Chapter focuses first on these. The remainder of the Chapter reviews counter-arguments that can be advanced in response to these criticisms. Chapter Six carries this theme further by addressing key areas of intervention.

3.1.1. The Challenge of Gender Justice

135. Every individual, irrespective of gender, is entitled to enjoy fundamental rights and freedoms. It is for this reason that all forms of discrimination are outlawed by international treaties as well as domestic laws. Gender justice, a fundamental right, seeks to achieve this objective. Its underlying mission is creation and sustenance of an environment where women and men as well as boys and girls enjoy the same rights, freedoms and obligations in all spheres of life. To put it in another way, all persons have equal opportunities to participate in the society.[103]

136. Traditions have been identified as one of the causes of gender injustice. One of the concerns that have been levelled against the AJS is the claim that this regime is bad for women and girls: That, contrary to the requirement that all should be treated equally, it disfavours them and fails to accord them the rights due to them as women and girls. The assertion that AJS is less ideal for women draws on the fact that most of these systems are male-dominated. While in some instances one finds female decision-makers, this is not very common. In most settings it is men who sit on the decision-making panels. Consequently, and considering the patriarchal nature of the African society, it is claimed that it is unlikely that they will assure objective decisions, especially in gender-related cases such as those involving rape (of women or young girls), early marriages and/or domestic violence. Chances of them recognizing the basic right of both genders to inherit are also seen as being slim, despite the due process, equality and anti-discrimination provisions in the Constitution[104] and the *Law of Succession Act*.[105]

103 Several authors have discussed this right. See, for instance, Maria Nzomo, 'The Gender Dimension of Democratization in Kenya: Some International Linkages', (1993) 18 *Alternatives* 61; Patricia Stamp, 'Burying Otieno: The Politics of Gender and Ethnicity in Kenya', (1991) 4 *Signs: Journal of Women in Culture and Society* 808; Chamma Kaunda, 'Ndebu Cultural Liminality, Terrains of Gender Contestation: Re-conceptualising Zambian Pentecostalism as Limited Spaces', (2017) 73 *Theological Studies* 1.

104 See Articles 27 and 10(2).

105 See Section 4 of this statute.

137. Based on the social context of the African society, women are disadvantaged and unequal to men even before they come into the process of accessing justice.[106] In some cultures, women cannot even represent themselves in these fora. To ventilate or defend themselves in such contexts, a man must accompany them. Hence, and contrary to due process requirements that require one to be represented by a person of their choice,[107] it is less likely that they will find justice in these forums, since a good deal of the customary dispute resolution mechanisms and procedures are gender-biased. Eventually, many are forced to accept outcomes that ordinarily they would not. The following narrative illustrates:

> In Borana [culture], since cases start at individual level, irrespective of whether woman, child, you are perceived as coming from a family, and close nuclear family. There is a clan that is very well structured. If a widow is affected, the brother or cousin brother is assigned to speak. As much as she explains, she has a spokesperson in that family. This is done right through the levels. However, there is no specific clause that a woman can stand for herself. She must always be represented by a male.[108]

138. It has also been claimed that, owing to their overwhelmingly male composition, disputes that affect women or girls are unlikely to be handled fairly in most traditional AJS. In other words, the men who sit in these tribunals are insensitive to the needs of women folk, and it would thus be unrealistic to expect them to adjudicate such claims objectively. The basic assumption of this claim is that, in order to resolve some of these cases, one needs to be empathetic; otherwise an umpire cannot and will not be neutral when hearing and determining a claim. Examples of such cases include rape as well as claims to inheritance by women or those involving cultural practices in conflict with the provisions and spirit of the Constitution of Kenya, 2010. Eventually, women, as some argue, are excluded from policy and decision-making.[109]

3.1.2. The Challenge of Inclusion of Marginalized and Vulnerable Groups

139. The autonomous AJS regime has also been criticized for excluding marginalized groups[110] and vulnerable individuals in its decision-making and thereby being blind to their concerns and interests in its outcomes. Those who fall in these categories include persons with disabilities, women, and older members of society as well as minorities or marginalized community members, children and youth.[111] Considering they are also part of society, it has been argued that these categories of persons, too, need to be allowed access to these forums. Like any other individual, and in keeping with access to justice and anti-discrimination provisions within the Constitution, members of these groups ought to be fully integrated into the AJS mechanism, be enabled to be active participants and influence the decisions of claims via this dispute resolution framework.

106 See also F Heidensohn, 'Models of Justice-Portia or Persephone?-Some Thoughts on Equality, Fairness and Gender in the Field of Criminal Justice', (1986) 14 *International Journal of the Sociology of Law* 287.

107 Article 50 of the Constitution.

108 Task Force Field Visit.

109 See Kirema Mburugu and David Macharia, 'Resolving Conflicts Using Indigenous Institutions: A Case Study of Njuri-Ncheke of Ameru, Kenya', (2016) 1 *International Journal of Science Arts and Commerce* 18 at 28.

110 See article 250 of the Constitution for a definition of this term.

111 See article 21(3) of the Constitution.

3.1.3. The Challenge of Procedural Fairness and Undermining Constitutional Values

140. Criticisms have also been levelled on the extent to which AJS Mechanisms are compliant with due process standards[112] as set out in the Constitution[113] and other laws.[114] The concerns under this head are usually on the extent to which these regimes are procedurally fair. As is well known, there is a strong relationship between the procedures that a system adopts and the outcomes that it delivers. Parties and observers assess the legitimacy of a dispute resolution system based on the processes that have been deployed. If the procedures are in compliance with due process standards (i.e. fair), there is a high chance that even losing parties will accept the outcomes thereof. The converse is also true. Those systems that fail to comply with these basic standards are very likely to suffer a crisis of legitimacy. Further, the decisions they hand down risk being ignored by those against whom adverse orders have been made. These sentiments were echoed by respondents in the field study that the Taskforce undertook in various parts of Kenya.

141. Critics have based their assertions for procedural infirmities in AJS systems on a number of grounds. Firstly, it has been claimed that these systems are unable to treat all individuals fairly owing to their composition. As flagged above, most are peopled by men. Because of this setup, vulnerable individuals, generally speaking, are less likely to be treated fairly by the system. The Courts have also been used as a gauge to critique AJS regimes. Compared to formal Courts, some of the salient features, which promote the right to a fair hearing, may not be apparent in the AJS framework. Commentators such as Rebecca Holland-Blumoff outline some of these salient factors:

> In the courtroom, understanding what kind of process is fair is facilitated by a set of clear norms and rules that govern behaviour. Judges oversee a formalized process, parties sit in designated spaces, and the courtroom itself offers cues about the role of the rule of law.[115]

142. We need to note, however, that there were two categories of elders. In the first category are those elected and recognized by the communities they live in. The second category is one that emerged during political times to give political backing to certain individuals. This second category is temporary. These elders are not elected by the community. This distinction is important as it helps us understand the nature of these categories and the extent to which they can be influenced. In terms of overall categories, at least three are identifiable: elders by virtue of age, community council of elders and village elders.

112 See, for instance, KI Vibhute, 'Right to Access to Justice in Ethiopia: An Illusory Fundamental Right?', (2012) 54(1) *Journal of the Indian Law Institute* 67. See also Adenike Aiyedun and Ada Ordor, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa', (2016) 20 *Law, Democracy and Development* 1.

113 See articles 47, 49, 50 and 54.

114 See generally the *Civil Procedure Act* and the *Evidence Act*.

115 Rebecca Holland-Blumoff, 'Fairness Beyond the Adversary System: Procedural Justice Norms for Legal Negotiation', (2017) 85 *Fordham Law Review* 2081 at 2083.

143. Corruption has also permeated AJS systems.[116] Hence, the extent to which these systems can deliver procedural justice remains questionable.[117] Some have also argued that, owing to power imbalance in the process, 'there is little opportunity for people from disadvantaged groups to appeal against decisions'[118] that the elders have arrived at.

3.1.4. The Concern About Traditional Practises inconsistent with the Constitution of Kenya (Article 159 3(c))

144. As noted above, cultural practices in conflict with the provisions and spirit of the Constitution, including FGM and early childhood marriages, are a major concern in the country. Despite a statutory ban,[119] practices such as FGM are still prevalent.[120] The criminalization of FGM by itself has not worked. Its ban and criminalization in 2011 simply forced practitioners of FGM to go underground. Most now conduct their operations secretly in homes.

145. For cultural practices in conflict with the provisions and spirit of the Constitution to be eradicated, there is need for all players to be involved. The AJS framework is one of the key sites where these ills can be combated. Via this framework, the issue and way forward can be explored. As underlined earlier, AJS regimes are located usually within the society. One would have expected the elders who oversee these systems to contribute robustly in the fight against such harmful cultural practices. Experience shows that they have not always taken such steps.[121] Rather, harmful cultural practices continue to be practiced in parts of the country. This is the first criticism that can be levelled against AJS, namely, that some of its decision-makers condone these cultural practices. Rather than report such incidents to the authorities, they choose to look the other way.

146. In the context of FGM in particular, it is notable that some perpetrators are eventually arrested and brought before the AJS regime. Herein lies the second criticism of AJS. Rather than take them to Court for prosecution (and possible conviction), some perpetrators are dealt with via the AJS route. As noted above, AJS systems suffer from gender justice, inclusion and procedural fairness deficits. It will be recalled that one of the fundamental objectives of AJS is community cohesion. While this is a noble objective, it is also problematic. It could be used to force a victim or her family to accept a form of compensation, which ordinarily they would not. The perpetrator could be ordered to compensate the victim through payment in the form of fine (cattle, crops or

116 See generally, UN Office on Drugs and Crime, 'Assessment of Justice System Integrity and Capacity in Three Nigerian States', (2004) available at https://www.unodc.org/pdf/crime/corruption/corruption_nigeria_justice_sector_assessment_2004-05.pdf (visited: 20 June, 2019'. See also article 10 of the Kenyan Constitution outlining the national values that persons of authority need to comply with these standards.

117 See, for instance, *Erastus Gitonga Mutuma v Mutia Kanuno and 3 Others* 2012 eKLR (where the Applicant gave evidence that the *Njuri Njeke* had requested him to pay Kenya Shillings Twenty Five Thousand (KShs. 25,000/=) 'for hearing and oath taking but [he] declined'.

118 See Mumbi Mwihurih, 'Analysing the Effectiveness of Informal Access to Justice in Kajiado North and Kajiado West Constituencies', University of Nairobi, LLM Thesis, 2015 at 47.

119 See the *Female Genital Mutilation Act* (2011).

120 See, for instance, Everline Bosibori Moranga, 'Factors Influencing the Practice of Female Genital Mutilation in Kenya: A Case Study of Gachuba Division, Nyamira County', UoN MA Dissertation (2014).

121 For a wider discussion of this theme, see Maresha Y. Andarge, The Difficulties of Ending Female Genital Mutilation: A Case of Afar Pastoralist Communities in Ethiopia', (2014) Available at https://www.ohchr.org/Documents/Issues/Women/WRGS/FGM/NGOs/ActionForIntegratedSustainableDevelopmentAssociation.pdf (visited 20 June 2019).

money) or be requested to issue an apology. The practice among the Borana community requiring a child who has been defiled to be married by the defiler is quite disturbing. In addition to human rights concerns, the long term effect of such a practice on the life of the victim is a cause for serious concern. The assertion that such girls may not find partners to marry them in future is seriously flawed. Among others, it assumes that girls from such communities will only be married by men from the same community. Experience shows that this is not always the case, as instances of intermarriage are quite common in Kenya today.

147. The Taskforce came across instances of cultural practices in conflict with the provisions and spirit of the Constitution, although not in the context of FGM. Being criminal in nature, the argument is that the perpetrators of such offences ought to be taken through the criminal justice system, with anyone found to be culpable facing a jail term. These penalties could also deter others who engage in such practices. Handling such offences through the AJS system effectively removes them from the ambit of the criminal justice system. Indeed, these results affirm arguments by some that 'preservation of 'harmony' can take preference over the protection of individual rights'.[122]

3.1.5. The Challenge of Affirming Public Values through Litigation and Adjudication

148. Some contend that the Courts have a role in affirming public values through adjudication. It is asserted that AJS trivializes the remedial role of lawsuits and privatizes disputes at the cost of public justice. According to this school of thought, justice for the public, especially in public interest legal challenges, is achievable via the lawsuit route. To this end, the judiciary usually affirms public values. Consequently, use of AJS may undermine this fundamental objective of the justice system. For instance, in claim of maintenance for a wife or child(ren), one would have to file a civil suit in order to compel their spouse to meet this obligation. If the matter was resolved via the AJS route, that would undermine the Court system. Therein reposes one of the criticisms of AJS. Coupled with the claim that such spaces promote gender injustice, the solution, it seems, is to invoke the Court process.

It also been asserted that litigation underscores the rule of law. The public spectacle of civil and criminal litigation gives life to the rule of law. Use of AJS, thus, eliminates the social function of lawsuits. While peace between the parties might be achieved, society is left without a remedy. The chances of public interest litigation outcomes setting ground-breaking precedents are also diminished when matters are settled via AJS.

3.1.6. Challenge of AJS for Minorities in Mixed Communities

149. AJS has also been criticized on the ground that it is unsuitable for minorities in mixed communities (i.e. those with members who speak different languages or practice different cultures). In such situations some of the questions that arise include: who should sit in the adjudication panel and why? Which customs and practices will be applied and why? Which language(s) will be used and why? Similar questions do not arise in State-backed Courts because one set of rules and procedures is deployed across the board. A similar argument would be used in uniform communities, although their

122 Ewa Wojkowska, 'Doing Justice: How Informal Justice Systems Can Contribute' available at the http://www.albacharia.ma/xmlui/bitstream/handle/123456789/30535/0280Doing_Justice__How_informal_justice_systems_can_contribute_(2007)7.pdf?sequence=1 (accessed 10 March 2019) 21.

application is limited to the geographical location of the community. In mixed/border communities the question of the applicable culture is quite important. If culture 'A' was used, would that imply that culture 'B' is subservient to it? One would have expected all cultures to be at the same level. In mixed communities the idea of equality of cultures is somewhat distorted. Consequently, the argument is that in such instances the rules that may be applied can favour members of a certain community. This in turn leads to outcomes that could be deemed to be discriminatory. Minorities would also feel excluded, especially if their views are ignored during any proceeding.

150. Use of one culture over the other has exposed the AJS framework to additional criticism. This state of affairs has led some to assert that AJS can be a form of cultural imperialism. While the system speaks in the language of harmony and peaceful resolution of cases, it may, in fact, comprise a form of "coercive harmony" that discourages newcomers to dispute resolution fora.

3.1.7. Other Practical Concerns about AJS

151. It has also been argued that AJS ignores root causes of conflicts. By facilitating settlement and creating a dialogue between parties instead of addressing legal rights, AJS fails to confront the social realities and root causes of ethnicity, race, class and gender. AJS has also been criticized on grounds that it excludes legitimate players, like lawyers, from the process. This is a major concern that this cohort has raised. According to this view, if the disputes were litigated Court, there is a high chance they would be instructed to represent one of the parties to the dispute. From this interaction, they would earn a legal fee. The AJS framework excludes them totally from the dispute resolution arena. Consequently, they are rendered unable to earn a living, contrary to Articles 41 (on labour rights) and 43 (on economic and social rights) of the Constitution.

3.1.7.1. The Challenge of Undermining the Constitutional Role of the DPP in Criminal Cases

152. In criminal cases, the DPP is the State organ mandated by the Constitution to commence and prosecute alleged offences, which victims have reported to the law enforcement agencies.[123] If the prosecution establishes its case, the Court has a number of options, which it can take to punish the offender. Part of this process is also to warn would-be-offenders of the consequences of similar actions. The reverse is true—unproven claims will lead to the discharge of an individual.

153. In this regard, the criticism against AJS is three-fold. In the first place, it is contended that the AJS framework is problematic in the sense that it removes the State from the process. To put it in another way, the AJS framework undermines the role of the DPP in criminal trials. This criticism stems from the fact that this is the office mandated by the Constitution to prosecute alleged criminal offences; hence it should be given room to do its job. Secondly, and from a public value perspective, AJS is amenable to be critiqued on ground that it compromises the operation of the criminal justice system, which is deemed to be a "public good". In additional to constitutional reasons, the office of the DPP is run by public resources. Criminal offences, too, are deemed to be infractions against the public, not an individual. Hence, anyone who is alleged to have committed a criminal offence should be prosecuted under its framework, not any

123 See Article 157 of the Constitution.

other forum. Finally, it is contended that prosecution in Court helps in maintenance of law and order in the country. It also promotes the national values and principles of governance set out by Article 10 of the Constitution.

154. As flagged earlier, via the AJS framework the victim and the accused person can consent to withdraw a case from Court, irrespective of the nature of the offence. For instance, in *Abdow,* the accused had been charged with the offence of murder. In the course of trial, the victim's family and that of the accused decided to settle the matter out of Court. The matter was subsequently withdrawn. Cases such as these and the criticisms levelled above are used in demonstrating the unsuitability of the AJS framework when considered against the role of the DPP in prosecuting criminal offences. That said, we need to pay great attention to the agency principle.

3.1.7.2. The "Substantive" Law to be Used

155. Under the Court-backed system, the substantive rules to be applied at every stage are known. These are found in the Constitution and other laws. This legal framework applies to the whole country. Compared to the Court-backed system, critics have asked several questions: is there any law applied in the AJS framework? If yes, which law(s)? What is the substantive law that is applicable in this regime? Which rules and procedures guide the process? These questions stem from the narrow view that deems laws as those that have been written in statutes. It is for this reason that Cotran embarked on the Restatement Project. In the absence of formal codification, how will parties know that there is any law? Further, how will they determine the laws applicable to a particular fact or pattern? This brings us to the third question: How can African States figure out the rights available and their contents in the absence of codification?

156. The customary law system, unlike its formal counterpart, is unique. The law itself and accompanying rules on substance lie with the people. Few would deny that they are present and have been with the people since time immemorial. It is the people who nurture and protect the customs, which in turn nourish them and help them prosper. Granted, their reach is limited in the sense that they apply, unlike the formal laws, to the local communities. However, that is not to mean that this body of law and its substantive rules are non-compliant. The nature of AJS itself implies that it needs must be a community-based justice system. These systems then merge to create the 'cumulative civilization' that Article 11 of the Constitution underpins. As the Taskforce established during its field visits, there are indeed both anecdotal and substantive rules within each system. While each system is unique, across the board substantive rules were not only present, but were applied as well. Deeper research by critics under this head would lead them to a similar conclusion.

3.1.7.3. The Concerns on Predictability over Courts Recognizing AJS Panel Decisions

157. Stemming from the analysis in section 2.1.8.2, it has also been asserted that the AJS system is unpredictable: That one cannot figure out how a panel will rule on a particular case that is before it. This claim is based on the fact that, unlike the Courts, AJS decisions are not formally reported. The fact that elders borrow from a number of sources exposes this framework to unpredictability. Concerns have also been levelled on the question of enforcement of awards issued by AJS frameworks. Compared to State-backed Courts, if one does not comply with an order of a Judge or Magistrate, there is a

formal enforcement mechanism that the winning party can follow to further ventilate their claim. Under the AJS regime, again, there is no predictability on the nature of award that will be issued.

158. As noted above, the AJS rules of operation and implementation lie with the people. They are the ones who apply them to solve their disputes. Against this background, can the claim that the system is unpredictable stand? Similar arguments could be made on the question of enforcement. The decision of the AJS panel is deemed to be that of the community. Hence, if there is any non-compliance, it is the community (via the AJS panel) that will again police the outcome. The overall objective is to ensure that the terms and conditions of an award are complied with.

3.2. Response to the challenges in AJS

159. In its many deliberations, the Taskforce considered these concerns about AJS Mechanisms. As discussed below, it is imperative that these concerns are seen in context and not set against an impossible unstated but brooding omnipresence of an ideal "universal standard" for evaluating legal systems. Yet, it is important to assess the validity of these concerns with a view to identifying the ways in which these concerns are, in the Let us now engage with some of the counter-arguments to the claims levelled above.

3.2.1. The Need to Decolonize Human Rights Discourse

160. Proponents of the universality school of thought argue that the concept of human rights is one that is found in all places. Several authors have affirmed this thesis. Dominique Uwizeyimana, for instance, contends that 'there is no separate African democracy in terms of a democracy of a special kind'.[124] Human rights are guaranteed to all individuals. Proponents of this school also assert that the rights notion of humanness (or *utu*) is the same everywhere. The idea that human rights are a Western concept must be rejected. As Surya Subedi affirms, this line of thinking 'ignores the practices of other great civilizations of the world'.[125] Cultures will definitely differ from one society to another. To use Western cultures and practices as a yardstick is misplaced. Simon Tay contends that one's culture should not be privileged 'over a system of universal human rights'.[126]

161. We also need to understand that human rights abuses do not occur only in AJS systems alone. Several instances have been noted in State-backed systems as well. But this is not to imply that AJS process should take comfort in this finding. Rather, they need to engage with the alleged violations. While at it, though, the discourse should be de-colonized. Local content is important, if these discussions are to bear real results.

124 Dominique Uwizeyimana, 'Democracy and Pretend Democracies in Africa: Myths of African Democracies', (2012) 16 *Law, Democracy and Development* 139 at 139.

125 Surya Subedi, 'Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claim of the "Asian" Concept of Human Rights from the Perspectives of Hinduism', (1999-2000) 30 *California Western International Law Journal* 45 at 49.

126 Simon Tay, 'Human Rights, Culture and the Singapore Example', (1995-1996) 41 *McGill Law Journal* 743 at 748.

3.2.2. The Need to Recalibrate our Understanding of AJS and "Customs"

162. Concerns about human rights abuses have been raised on the AJS frameworks. These have been flagged above. One cannot ignore these claims. They need to be addressed as and when they arise. The truth of the matter is that these systems cannot be done away with. What needs to be done is a deep engagement with the factors that do not meet the constitutional thresholds. This engagement, as flagged in Chapters Six and Seven, must involve multiple players.

163. There is also need to move away from the view that African cultures are static; that these practices are old and inflexible. This was the colonialist view, and which was subsequently translated to our laws via the repugnancy clause. In reality, practices in the African societies are fluid. It would be imprecise to allege that these customs and norms have remained static over time. As with any society, these customs have evolved to take into account the developments in each community. As mentioned earlier, customary law and norms lie with the people. Is it realistic to expect the people to change, but the customs to remain constant?

3.2.3. A Didactic Pedagogy of Engagement with AJS

164. A deeper inquiry into customary law will lead one to the conclusion that African cultures are after all not anti-human rights. The idea of human dignity lies at the heart of most cultures in Kenya. We thus need to establish and engage with abusive facets in our cultures, with the overall objective of ensuring compliance with the Constitution. If there are alternatives, these should be embraced. The constitutional idea of a Kenyan culture means that ideas and perspectives of other cultures must be taken on board in the search for solutions. In keeping with access to information rights,[127] these data should be available.

165. The human rights discourse should also be vernacularized. This project will facilitate robust engagement with the rights discourse. It is from these discussions that new ideas and perspectives on the same issue emanate. The engagement with authors such as Cotran is one such example. As the Taskforce noted while in the field, different communities have different names for the same entitlement. Language-based criticisms of AJS, such as those advanced by Donnelly, assume an anti-human rights culture. It is this trend that this Policy seeks to reverse.

3.2.4. Empowerment of Justice Seekers and Listening to Marginalized Voices

166. One of the fundamental rights within the AJS framework is dignity. As mentioned earlier, the Constitution emphasizes the observance of this right. Achieving this goal requires the system to build in structures that will enable all justice seekers to access the AJS forum. As mentioned earlier, one of the criticisms of the system is the fact that women and girls are not always permitted to present their cases in these forums in the absence of a male representative. Clearly, gender injustice is problematic. So, too, is the fact that some marginalized populations and minorities in mixed communities are excluded from the processes. While Chapter Seven carries this theme further, it is imperative that everyone, irrespective of age or status, be given a fair go. They must have

127 Simon Tay, 'Human Rights, Culture and the Singapore Example', (1995-1996) 41 *McGill Law Journal* 743 at 748.

a chance to access the justice forum and present their side of the story. Only then can one say that the system has met due process standards.

3.2.5. Embracing an Obligations Framework (see Chapter 6 of this Policy)

3.2.6. Training and Skills-building for AJS Justice Providers

167. Training and retraining on due process is a critical asset, if the AJS frameworks are to meet due process standards. This theme is further fleshed out in Chapters Six and Seven of this Policy. What is important to note here is that the training needs of the AJS decision makers must first be assessed. This exercise should involve the trainees themselves. A top-down approach must be avoided; otherwise the learning process will be ineffective. Qualified personnel must be hired to run sessions. All categories must be represented in these forums. As much as possible, the sessions should tap into the local personnel. Experiences from other forums would also come in handy. Consequently, these, too, must be brought on board.

168. It needs to be understood that the training process is not one way. AJS providers have a lot to offer to the State-backed Courts. Thus, sessions involving these two players could also be arranged, for instance, during CUC meetings. This initiative will dispel the assumption that traditional perspectives are backward or irrational. By contrast, one is likely to find a lot of rational material from this interaction.

3.2.7. Responding to Concerns about the Constitutional Role of the DPP in Criminal Cases

169. Part 2.1.8.1 responded to some of the criticisms levelled on the AJS system in the context of its relationship with the DPP. From the field study, it was apparent that the office of the DPP understands the concept of AJS, its content and value. In fact, the DPP was represented in the Taskforce. The DPP is a key stakeholder in the execution of the AJS project. Court experience shows that prosecutors have a role to play when parties to a criminal matter decide to take it to an AJS forum and when they report back the results of this engagement to Court. In other words, because a matter has been taken to an AJS forum does not mean that the State has no role to play in it. If there is no settlement from the AJS process, the trial process will continue. As a State agent, the DPP ensures that the interests of society are safeguarded in the trial process, from start to finish. At the same time the doctrine of civic autonomy remains key to the AJS dispute resolution regime.

4.

How is AJS practiced? Existing models of AJS

4.1. The four existing models of AJS practice

170. AJS is anchored on Article 1(1) and 1(2) of the Constitution. This framework of dispute resolution is a direct exercise of political sovereignty. The practice, regulation and legal application of AJS in different jurisdictions could be categorized into four main models, namely:

i. Autonomous AJS Institutions
ii. Third-Party Institution-Annexed AJS Institutions
iii. Court-Annexed AJS Institutions
iv. Regulated AJS Institutions

4.1.1. Autonomous AJS Institutions

171. Autonomous AJS refers to AJS processes and mechanisms run entirely by the community. The community selects and approves the third parties involved in resolving the disputes without any interventions or regulations from the State. The third parties selected resolve these disputes in accordance with the laws, rules and practices that govern that particular community. This body of laws, rules and practices constitute the substance of customary law applied by the community. These AJS institutions do not have any involvement with the State. They mostly work relatively independently of any form of State regulatory mechanisms.

172. Examples of Autonomous AJS systems in Kenya include the dispute resolution systems found within the Rendille Community. Here, dispute resolution is a function of the council of elders of each clan. The disputes are presented by the victims involved, a family, clan, or the community. The elders hear and determine the dispute. They then hand down binding decisions. Another example of this system that the Taskforce interacted with is the *Ebharasa* among the Kuria. The *Ebharasa* is the council of elders, which resolves disputes that arise within the Kuria community. Sessions are usually held under a tree, with members of the community allowed to sit in during hearings. Once a dispute has been heard by these elders, they also issue binding decisions.

4.1.2. Third Party Institution-Annexed AJS Institutions

173. Third-party institution-annexed AJS are processes that involve third-parties who are not necessarily members of the community. These third-parties can be State-sanctioned institutions such as chiefs, the police, probation officers, child welfare officers, village elders under the County government, and the chair of *Nyumba Kumi* groupings, among others. They can also be non-State or related institutions such as

church leaders, *Imams* and *Sheikhs* among Muslims, as well as other religious leaders and functionaries of social groups such as *Chamas*, NGOs and CSOs. The main characteristic in this model is that the State and non-State third parties are not part of any State judicial or quasi-judicial mechanisms.

174. Under this model, numerous examples exist. These include the Kibera Legal Centre. Some of these forums usually refer matters to the local administration and CSOs for resolution. The Lang'ata Legal Aid Centre is another example. This forum is involved in dispute resolution at the community level. The dispute resolution is conducted by paralegals from the community who have undergone training by various institutions including the Legal Resources Foundation (LRF). CSOs such as the LRF offer capacity assistance to the Centre to assist in the resolution of disputes. In many informal settlements in urban areas and in rural areas, chiefs are involved in dispute resolution. Disputes are brought before chiefs who hear cases and act as important third-parties for their resolution. There are also CSOs that offer dispute resolution services such as Kituo Cha Sheria and FIDA. These also handle and determine disputes within communities.

4.1.3. Court-Annexed AJS Institutions

175. Court-Annexed AJS refers to AJS processes that are used to resolve disputes outside the Court, although under its guidance and partial involvement. Like Court-Annexed Mediation, Court-Annexed AJS works closely with the Court and Court officers in the resolution of disputes. This is done through a standard referral system between the Court, Court Users Committees (CuCs), the AJS processes, and other stakeholders such as the ODPP, Probation Office, and Children's Office. This dispute resolution model mergers the community-based mechanisms and the formal justice system. The Court can refer matters to the AJS mechanism and the AJS mechanism can refer the matter to the Courts based on a mutual referral system.

176. Examples of this model include the Isiolo Court-annexed AJS mechanism. The Isiolo Court-annexed AJS involves the council of elders of different clans in the resolution of disputes. The council of elders resolve disputes within the community. They also work closely with the Court officers such as probation officers and children's officers

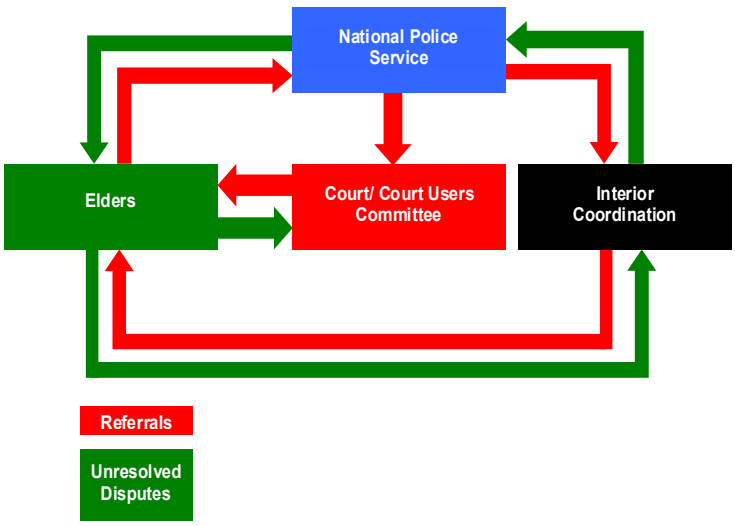


Fig. 3.0 Court-Annexed AJS Model from Kangema, Nyeri County

who may give direction on the requirement of the law when handling certain cases. The Court may refer disputes to the elders where parties have agreed to the process or where it is determined that the elders are best placed to resolve the dispute. Similarly, elders refer disputes to the Court. An example of this system, which the Taskforce studied, is the Othaya Court-annexed AJS mechanism. This model is illustrated below.

4.1.4. Regulated AJS Institutions

177. These kinds of AJS involves practices where AJS mechanisms are created, regulated, and practiced either entirely or partially by State-based law or statute. These models include States that incorporate AJS mechanisms like traditional Courts and/or local government structures in their Court systems as part of their judicial mechanism. The creation and regulation through statute means that these AJS institutions are part of the State-based dispute resolution systems and the third-parties involved are in certain instances remunerated by the State.

178. Examples of these practices of AJS can be found in South Sudan, South Africa, and to some extent Botswana as presented in Annex I.

4.2. AJS and lessons from comparative jurisdictions

179. A review of the African dispute resolution landscape suggests a number of issues.[128] In the first place, this record affirms that AJS is practiced and widely deployed across the continent. AJS has been recognized across the continent owing to the benefits that accrue from this system. In terms of model preference, Autonomous, Third Party and Regulated are the common models used across the continent. In most countries, the system is backed by legislation. While in some the Constitution is the governing template, in other countries specific legislation has been passed to regulate the AJS structures. As for the case with Kenya, elders are chosen to decide cases that parties file. It is apparent from this record that these panels are located at the local levels. Unlike Courts, this is advantageous in the sense that is facilitates access to justice by victims or their guardians. It also saves on costs that would otherwise accrue if one invoked the Court processes.

180. In all instances, the AJS laws applicable are those of the local communities. Usually these are traditional customs and norms, which have been developed over time. It is reasonable to assume that local languages are used during these proceedings since most of these systems are locally based and use of non-local languages would definitely curtain effective communication. Due process considerations appear to have been built into these systems. Individuals are allowed to present their cases as they deem fit. Upon completion, the panels retire to deliberate on the evidence that was presented. Independence from interference by State organs is a key factor in these systems. While some have received donor support (such as in Rwanda), most systems rely on local resources to run. Again, this is a huge advantage in the sense that it insulates these systems from external interference.

128 See Annex I for the tabular representation of the countries sampled.

181. Record keeping is also a key facet of any proceeding. Overall, it is unclear if records are kept by all panels. However, in Ghana the proceedings are video-taped and later transcribed. Several advantages accrue from this. First, it creates a permanent record. This in turn makes it possible for parties and the panel to revert to the proceedings in case any arises. It also promotes consistency in the process as parties are able to refer back to the past decisions. Researchers can also benefit a great deal from these data. In most of the systems, there is an appeal process, an ingredient in the assessment of whether or not a procedure is fair. Appeals are usually handled by a different agency to that which handled the claim at first instance. For this second panel, the record of the first panel is key. The appellate body would require this record in order to assess whether or not the appellant has made out its case. Lastly, a permanent record is likely to enhance confidence in the system. That said, the information that is lacking is the steps taken to secure the data once it is collected. A strong security system is crucial, if the records are to be stored for a significant amount of time. A proper cataloguing method would also ease retrieval of the records.

182. In terms of jurisdiction, the record demonstrates that all matters can be heard and determined by elders. There is no limit on the nature of matters that they can hear. The appeals system curbs any infraction on the part of the elders. While these systems are not perfect, they reinforce a point made earlier—AJS promotes the development of customary law and its norms.

4.3. Task force synthesis and recommendations on form of AJS institutional practice

183. The Constitution and other statutes encourage the use of traditional dispute resolution mechanisms. The State has also recognized the National Council of Elders. Based on the field work conducted by the Taskforce as well as the current formal and informal practice of AJS in Kenya, Kenyan communities, select Courts, and third-party institutions apply three (3) models of AJS:

i. Autonomous AJS Institutions
ii. Third-Party Institution-Annexed AJS Institutions
iii. Court-Annexed AJS Institutions

184. Consequently, and based on collected data, discussions by the Taskforce, the lived realities and practices of Kenyans, and the opinions of experts on AJS, the recommendations of the Taskforce are that:

i. Kenya should only apply the three models currently encountered in practice. These models should be maintained, respected, protected, and transformed in practice.
ii. The fourth model–Regulated AJS Institutions–should not be introduced in Kenya.

5.

Operational doctrines of interaction between Courts and matters determined by or before AJS institutions

5.1. The need for an appropriate doctrine of interaction

185. The three models of AJS recommended in this policy will inevitably have some interactions with the established Courts. The formal judicial system has been on a different track from AJS for decades. These two justice dispensation tracks have been isolated from each other without any linkages for the benefit of access to justice for Kenyans. Providing this linkage would be the fulfilment of Article 48 of the Constitution, which guarantees access to justice for everyone. Moreover, such linkage would also enhance fulfilment of Article 50 of the Constitution, which guarantees the right to a fair trial. Read together, these two provisions constitutionally mandate the Judiciary to develop appropriate parameters and standards of interaction. Additionally, the freedom of personal liberty and the concept of civic autonomy permit and mandate individuals to pursue all available avenues of dispute resolution provided by the law. This means therefore that the AJS adopted in Kenya will inevitably interact with the Courts, and therefore an appropriate balance between civic autonomy and constitutional values should be developed.

5.2. The appropriate matrix for balancing autonomy and constitutional values

186. Civic autonomy implies that individuals should not be constrained by the State in their pursuit or application of civic, political, and personal autonomy. With a human rights obligations approach, the State should respect the person as well as the civic and socio-political space of the individual. This is mainly a negative human rights/constitutional obligation on the part of the State. This civic autonomy is, however, not absolute. It is tempered by the mandate of the State to uphold, respect, protect, promote, and observe constitutional values and fundamental human rights. The calibration or balancing of fundamental human rights and civic autonomy is well regulated under Article 24 of the Constitution on limitation of rights and fundamental freedoms. The balance between civic autonomy and constitutional values such as human dignity, equity, social justice, and equality is, however, not constitutionally calibrated.

187. Consequently, an appropriate matrix of such calibration is important not just for AJS purposes but also for the interaction between constitutional and common law on one hand and customary law, on the other. From the theory of Agency developed

in this Policy, an appropriate matrix can be developed. The agency of the individual is the centre upon which all the intervening issues revolve. For an appropriate calibration, the agency of the individual should always be affirmed. Here the question is whether the individuals in an AJS-based dispute have voluntarily submitted themselves to the jurisdiction of the AJS institution or not. If the answer to this question is in the affirmative, then the Court interacting with AJS has to confirm that the process and outcome adheres to the following parameters:

i. The protection, respect and fulfilment of fundamental rights in the Bill of Rights;
ii. Commitment to and adherence to constitutional values under Article 10 of the Constitution;
iii. Promotion, protection, respecting, and transformation of AJS (hence the 'Respect, Protect and Transform' framework, and;
iv. "Applying the Reasonable and Justifiable Standard Test Contextually" or, in other words, "A Contextual Repugnancy Text".

These four parameters are illustrated in Fig. 5.1.

Fig. 5.1. Parameters for a good AJS model

188. Even with the view of this matrix, the Courts will still need guidance on how to interact with AJS disputes in a consistent, transparent, and transformational manner. This will promote the legitimacy of civic autonomy and constitutional values.

5.3. Six standards of review/interaction between the Courts and matters determined by or before AJS institutions

189. The Taskforce's learning in the course of developing the AJS Policy is that alternative justice intersects with the Courts at different levels. There are instances where parties resolve a dispute in an AJS forum and come to Court for the Court to adopt that decision as its own. In other instances, the matter can be referred to AJS when a dispute is pending in Court either on the Court's own motion or on the application of the parties.

190. The Constitution of Kenya imposes a positive duty upon the Courts in exercise of judicial authority to promote alternative forms of dispute resolution, including traditional forms of dispute resolution. Interaction of the Courts with AJS therefore is not only unavoidable, but Courts are duty-bound to ensure that the interaction is a reality. With this realization, it becomes important then to delineate the various forms of interaction, bearing in mind some minimum standard requirements of adherence to the Constitution and the Laws of Kenya by the AJS actors. To this end, fair hearing, procedural propriety, public interest and best interest of a minor in cases involving minors must undergird all AJS processes.

191. Below here are six standards of review or interaction between Courts and AJS processes.

i. **Avoidance:** This applies in instances where the Courts ignore previous AJS proceedings and awards. This is deemed contrary to Article 159 of the Constitution, which requires the Courts to promote traditional and other forms of dispute resolution.

ii. **Monism**: This is whereby awards from AJS mechanism are appealed to the Courts (*De novo* review of both facts and law). The Courts should respect the workings of AJS forums and realize that, more often than not, parties in an AJS forum come up with solutions to their dispute and Courts should only be concerned with procedural propriety and proportionality of the process without interfering with party autonomy.

iii. **Deference**: This is where the Courts review AJS cases for procedural propriety and proportionality only. This is the most appropriate interaction between the Courts and AJS.

iv. **Convergence**: In such instances, the Courts defer to the AJS process only when both parties agree. Parties have a right to have their dispute heard by a Court of law and only when they agree to have their dispute resolved in a separate forum should the Courts direct them to go there. However, this approach would fetter the Courts' duty to promote AJS. There is need to acknowledge that AJS is a dispute resolution forum just like the Courts: the end game is getting a dispute satisfactorily resolved. It would be necessary to give judicial officers the freehand in assessing matters in the docket and encourage parties to give AJS a chance in appropriate cases even where one party is not agreeable.

v. **Recognition and enforcement in the mode of arbitral awards**: In such cases, the award made by an arbitrator is final and binding on the parties to it and either party can file the award in Court for the Court to

recognize and enforce the award as it would its own decree. In that sense, the Court only ensures that the award conforms to the requirements of a valid and enforceable award and does not delve into the facts and finding of the arbitrator unless the award is totally unconscionable or offends public policy. If Court declines recognition for any reason, it does not substitute the decision of the arbitrator with its own decision but instead refers the award back to the arbitrator to do the correct thing and issue an award that conforms to legal requirement. This is a quite appropriate interaction between Courts and AJS decisions received from autonomous AJS forums.

vi. **Facilitative interaction**: In this mode, AJS awards/processes are taken as providing evidence for the parties in the Court process. The parties could have attended an AJS forum, e.g. a clan's dispute resolution meeting where a decision is made by the elders. That decision then comes to Court, not as an award by the elders for enforcement, but as evidence in support of resolution of a dispute pending before Court in consonance with the recommendations contained in the minutes of the clan elders. In such an instance, the Court will still have to play its role in determining the weight and relevance of such evidence before making its own decision. This is a common interaction between Courts and AJS and where such reports or minutes are presented, Court should admit the same after confirming procedural propriety was adhered to during the local meeting.

5.4. Synthesis, conclusions and recommendations

192. The six standards above have different levels of impact and influence on the Courts-AJS interaction matrix. As a rule, the most compatible standard with the AJS interaction matrix should be preferred over the less compatible. Via this route, the interaction of the Courts with AJS processes will enhance their autonomy and promote the observance of human rights as well as compliance with the Constitution. From this analysis, the compatibility levels with the AJS interaction matrix can be presented as follows:

i. **Standards of review/interaction modes compatible with AJS**

   a. Deference: Courts review for procedural propriety and proportionality only.
   b. Recognition and enforcement in the mode of arbitral awards.
   c. Facilitative Interaction: AJS awards/process as providing evidence for the parties in the Court process.
   d. Convergence: The Courts defer to the AJS process only when both parties agree.

ii. **Standards of review/interaction modes incompatible with AJS**

   a. Monism: Awards from AJS mechanisms are appealed to the Courts (*De novo* review of both facts and law).
   b. Avoidance: Courts ignore previous AJS proceedings and settlement.

6.

The obligations framework

6.1. Why a rights approach?

193. The human rights language has emerged as a useful moral and governance discourse. This policy has adopted it in the context of Kenya for a number of reasons:

i. First is the instructive statement in Article 159(2)(c) of the Constitution of Kenya, which explicitly requires that AJS ought to be promoted as a principle and practice. The notion of 'promote' is a positive obligatory mandate of the Judiciary.
ii. Second, human rights provide an appropriate language and context for rebalancing the society. In the context of moral, political, economic and social inequalities in Kenya, the rights language is perhaps the most appropriate to advance AJS,
iii. Third, human rights as an ongoing societal construct enables interchange between law, politics and culture. This is the objective of AJS.
iv. Fourth, in the context of a modern Bill of Rights, human rights stands out as perhaps the most transformative language for our society and Judiciary in their quest to advance access to justice.
v. Fifth, the idea of culture in Article 11 suggests that scripts of personhood that embody values such as dignity, equity, respect, protection, equality and public service have always been part and parcel of our common civilization as reflected in our diverse ethnic and cultural practices.
vi. Finally, the call of the Constitution in Article 28 to advance human dignity for individuals and communities is consistent with the cultural claim for inter-joined humanity expressed in notions such as *utu* and *undugu*.

194. To advance this choice, this policy is centred on the Human Rights Based Approach (HRBA). This means that there is a claim holder (AJS user) and a duty bearer (AJS officers, Judiciary, ODPP, etc) each of whose roles are key in the dispensation of justice, social order and development. The HRBA practical involves: Participation of all; Accountability of the AJS personnel and framework; Non-discrimination of all AJS users, Transparency of the AJS framework; Human dignity, which must be respected and protected at all times, Empowering of all AJS users and officers equally and equitably based on their vulnerability and capacities, and in compliance with the Rule of law, which is critical to the continued success of the AJS framework in all communities, counties and nationally (the P.A.N.T.H.E.R.). This will enhance access to and the administration of justice.

195. The AJS obligations framework is contained in Article 159(2) of the Constitution. This provision obliges the Courts and tribunals to be guided, in exercising their judicial authority, by certain important principles. These principles include the use of alternative forms of dispute resolution, including traditional dispute resolution

mechanisms, so that justice is done irrespective of status. The Judiciary is mandated to promote this principle as long as they are used in a manner that does not contravene the Bill of Rights or is inconsistent with the Constitution. Article 19 provides that the Bill of Rights is an integral part of Kenya's democracy and national framework of social, economic and cultural policies. Further, in protecting human rights, the dignity of the individuals and communities is preserved, social justice is promoted and the people realize their potential.[129]

6.2. The obligations approach explained: three pillars of the AJS guiding principles—Respect, Protect and Transform

6.2.1. Duty to Respect

196. AJS mechanisms are as old as the people and their civilization. AJS is also a way of life for many communities in Kenya. The duty to respect requires non-interference by the State in the enjoyment of rights and freedoms. In the context of AJS, this requires the Judiciary and other State organs to ensure that the AJS mechanism can function without unjustified interference. This is not to imply that AJS processes and mechanisms are immune from scrutiny. One example where such processes can be checked by the Judiciary and other State agencies is where violations of human rights have been alleged. In these instances, there is a duty to scrutinize AJS processes. However, such scrutiny must be in compliance with the Constitution and other relevant laws. This duty entails, among other processes, monitoring AJS processes and mechanisms, conducting impact assessments or audits and removing any structural obstacles. The State is also duty-bound to share useful data and knowledge with the AJS entities and processes in Kenya. Further, this duty obligates the Judiciary to put in place personnel, resources and facilities that will enable the AJS systems and processes to develop.

197. In Autonomous AJS, the duty to respect requires the Judiciary to ensure that there is no interference in the AJS processes, from start to finish. Once a complaint is lodged, the process should proceed uninterrupted. Further, at regular intervals the Judiciary is obligated to audit this province with the view of ensuring that due process standards are kept. If it finds any incident of non-compliance, it must advise key personnel in this province on steps that should be taken to rectify them.

198. In Third-party Institution AJS, the Judiciary has a duty to ensure that interference with the AJS process is limited to capacity building, where necessary. The dispute resolution process should, however, be conducted without interference from the Judiciary or other State organs. Capacity building may involve training of adjudicators and provision of materials to be used in the dispute resolution process, including relevant documentation.

199. Under the Court-annexed AJS province, the duty to respect requires Government to undertake measures to curb any measure that will prevent AJS processes in this province from meeting their mandate. Significant attention needs to be paid to those officers in charge of executing the mandate bestowed by the Constitution. In the discharge of their duties, officials should consider basic principles of respecting and protecting human dignity. These are found in all African communities.

129 Article 19(2) of the Constitution.

6.2.2. Duty to Protect

200. The starting point for any legal analysis is the law. As mentioned in the preceding Chapter, the AJS process is grounded in the Constitution. As one would expect, this is the document to turn to in order to gauge the obligations due to users of this system. Article 3 of the Constitution places an obligation on 'every person' 'to respect, uphold and defend' the Constitution. Protection of the Constitution is a fundamental duty of every individual. The AJS regime must thus comply with this call in the execution of all its activities.[130] This obligation can be broken down into two parts—a positive and a negative obligation. Under the terms of the positive obligation, those who undertake the AJS process are required to promote the realization of all the entitlements granted by the Constitution to users of this system. To meet this objective, they are expected to undertake appropriate legal and administrative measures, which will secure the rights set out in the Constitution. Further, when violations occur, they are expected to prosecute accused persons. Moreover, the State is expected to invest sufficient resources that will facilitate one's access to the protection framework. The negative obligation, on the other hand, requires Government to refrain from taking any step that will erode enjoyment of these entitlements and hold accountable the violators.

201. Article 21 puts a fundamental duty on the State, State organs and public officers to observe, respect, protect, promote and fulfil rights while addressing the needs of the vulnerable including women, persons with disabilities, children, older members of society, etc. The duty to protect, therefore, places an active obligation on the State to guard the AJS and its mechanisms against any and all third party interference—be they individuals, State agencies, the police, lawyers, Court officials or any other. If left unchecked, these third parties can impede access by rights-holders to justice-seeking processes. Consequently, this requires the State to reinforce current legislation and develop laws, polices and regulations that will safeguard AJS mechanisms. The recognition of AJS under Article 159(2)(c) of the Constitution is one way of realizing this objective. Towards this end, the State is mandated to protect the rights of individuals seeking justice under AJS mechanisms. In order to prevent violations of rights by AJS entities and processes, the State may be required to develop laws, policies and regulations which set benchmarks for operation. These can contribute a great deal towards successful implementation of the AJS project. This duty to protect the rights of justice-seekers also requires an examination or investigation of the circumstances of all violations or alleged violations of rights protected under the Constitution. There should also be remedies where there have been violations of human rights in the AJS processes. Government must also prosecute perpetrators of human rights violations in the context of AJS mechanisms. Steps also need to be taken to guarantee protection of our cultures.

202. Under the autonomous province of AJS, the duty to protect entails developing laws, policies and regulations for AJS and its mechanisms that guard against human rights violations, and provide remedies where these processes have resulted in human rights violations. It also requires guidelines on the involvement of third-parties, where applicable, in the AJS process.

203. Consistent with the sociological school of thought, third-party Institution AJS processes similarly require the generation of laws, policies and regulations for AJS and its mechanisms. So, too, is protection of cultural practices and norms. These should be geared towards guarding against human rights violations. When violations do occur or

130 Article 260 of the Constitution defines "person" to include a company, association or other body of persons whether incorporated or unincorporated.

are imminent, these processes must provide remedies to aggrieved individuals. In order to ensure that there is no interference with these AJS mechanisms by third parties, there is need to develop guidelines on which parties may be involved in these processes and their terms of reference, as defined by the community. Such clarity is necessary. In many ways, that would help insulate the process from interference by external players.

204. In Court-annexed AJS mechanisms, the duty to protect requires the generation of laws, policies and regulations for AJS and its mechanisms that guard against human rights violations, and provide remedies where these processes have resulted in human rights violations. Court-annexed AJS mechanisms are a creation of the Court. They aim to bring together the Court and community-based dispute resolution mechanisms. In a bid to guard against interference of third parties, the Court is required to develop a guide on the actors of the Court-annexed AJS process. This gives clarity on which Court officers should be involved and their place(s) of involvement. Preservation of culture is also a key obligation for this framework.

6.2.3. Duty to Transform

205. The Kenyan Constitution is a transformative Constitution. Judge Pius Langa, the former Chief Justice of South Africa, argues, 'there is no single accepted and stable definition for transformative constitutionalism because the word transformation by itself has changeable features'.[131] Even so, as the term suggests, a transformative Constitution is one that ensures that the State fulfils its obligations by introducing far-reaching changes. Transformative Constitutions go beyond the fulfilling objective: They are much more radical in the sense that they facilitate creation of a new order. From the South African experience, one sees that the Constitution was transformative in the sense that it sought to tackle head-on the system of apartheid, which had been practiced in the country for several decades. While recognizing past injustices on the basis of colour or race, one of the objectives of the 1996 South African Constitution was to create an equal society[132] governed by the rule of law. Socio-economic rights were also introduced by the Constitution, as a way of improving the lives and livelihoods of those who were disadvantaged by the previous regime.[133]

206. Like the position in South Africa, the Kenyan Constitution is also transformative. While apartheid was not a policy practiced in the county, the social inequalities were huge. The huge gap between the rich and the poor called for significant changes in the new legal order. Urgent and bold legal measures had to be taken. The barriers to social equality had to be removed and replaced with a system that facilitated social justice. Starting with the preamble to the Constitution, which recognized the value of creating a society based on values of human rights, equality, social justice and the rule of law, subsequent provisions of the Constitution carried these themes further. In addition, as was the case with the South African Constitution, its Kenyan counterpart embraced socio-economic rights.[134] Provisions relating to access to information and, the respect and protection human dignity were also brought on board.[135] The full bench of the

131 Pius Langa, 'Transformative Constitutionalism', 2006 (17) (3) *Stellenbosch Law Review* 351 at 351.

132 See section 9.

133 See sections 26 and 27.

134 See article 43.

135 See articles 35 and 28, respectively.

Supreme Court affirmed this in its *Advisory Opinion Reference No.2 of 2013,*[136] which underlined the transformative character of the Kenyan Constitution:

> [51] Kenya's Constitution of 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades, which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute *social change* and *reform*, through values such as *social justice, equality, devolution, human rights, rule of law, freedom and democracy.* ...
>
> [52] The transformative concept, in operational terms, *reconfigures the interplays between the States majoritarian and non-majoritarian institutions*, to the intent that the desirable goals of governance, consistent with dominant perceptions of *legitimacy*, be achieved.

207. Another transformative inclusion was Article 11, which recognizes culture as the foundation of the nation and the cumulative civilization of the people of Kenya and the nation. Therefore, for the AJS regime, the task ahead is to maintain the transformative spirit of the Constitution. Thus, the first duty of the Judiciary will be ensuring that the transformative character is established and sustained in all AJS provinces at all times. Those who implement the regime will have to demonstrate that their minds are geared towards meeting this transformative agenda. Where the same is absent, a capacity building programme through agencies, including the Judiciary Training Institute (JTI) and Prosecutors Training Institute (PTI), should be developed and rolled out in all Court stations. Secondly, the decision-makers in this system will need to hand down decisions geared towards strengthening its transformative practice. This is not to imply that they should walk outside of the legal framework. On the contrary, they must stay within the borders of the rule of law. While protecting cultural practices that are consistent with the Bill of Rights, they must push the boundaries in order to ensure that their outcomes reflect the transformative character of the Constitution. Simply put, subject to the limitation clause of the Constitution,[137] they must endeavour to deliver decisions that reflect achievement of substantive equality and socio-economic transformation.[138]

208. This also requires the judicial and AJS justice mechanisms to be developed and reinforced in keeping with human rights standards—a key feature of the human rights school of thought. The aim of this initiative is to improve the observance of human rights always and in all spaces. This requires all justice systems, including AJS

136 Delivered 1 November 2013.

137 According to this article, 'A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including––

(*a*) the nature of the right or fundamental freedom;

(*b*) the importance of the purpose of the limitation;

(*c*) the nature and extent of the limitation;

(*d*) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(*e*) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

138 See also Article 20(4):

In interpreting the Bill of Rights, a Court, tribunal or other authority shall promote––

(*a*) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(*b*) the spirit, purport and objects of the Bill of Rights.

mechanisms, to be aligned to human rights and constitutional values. Under this duty, the State is required to facilitate right-holders' access to and utilization of AJS. In order to ensure alignment to the Constitution, the duty to transform requires the State to establish the minimum core content. In an effort to promote AJS, there is a duty to remedy the gaps that exist within the AJS entities and processes in order to ensure efficiency and effectiveness. This is tied to the duty to conduct exhaustive research. The duty to transform further requires the development of a plan of action for furtherance of AJS mechanisms and processes. Its implementation should be monitored at all times.

209. The duty to transform under the Autonomous AJS province requires the Judiciary to establish minimum core standards that can be adhered to by all State actors to ensure conformity with constitutional values. In Third-party Institution AJS, this duty requires the Judiciary to remedy the gaps that exist within the practice of this province. Lastly, Court-annexed AJS requires the Judiciary to develop a Plan of Action for the furtherance of Court-annexed AJS mechanisms and process in all the jurisdictions of all CUCs. It also requires the implementation of this plan of action in good faith.

6.3. Capacity building of the AJS framework

210. As mentioned earlier, there is need to ensure all justice seekers are able to bring their claims in an AJS forum. It is also important that an opportunity is granted to all parties to ventilate their claims. To get to this level, capacity building efforts must be undertaken by both duty bearers (the State and civilians) and claim holders. Otherwise, some claim holders especially will be excluded from the process yet the Constitution provides for access to justice by all. In order to create a sustainable process, it is important for all justice seekers to have the skills, information and knowledge, which will enable them run their cases before AJS panels.

211. This means also that AJS personnel in all the models need to be trained in the principles and standards found in the Constitution and human rights practices. A special focus should also be put in building skills in writing, documentation, filing, record keeping and case management. This also means that a special coding on disaggregated data, special support services and monitoring must be built into the case management system. This will ensure capacities are built at all levels. In a nutshell, every AJS panel must embrace the rule of law principles. Further, special measures to facilitate access by marginalized groups must also be undertaken. Like any other person, they should be able to participate in the AJS process as litigants or to defend themselves. They should also be in a position to hold the process accountable for any infraction of the law or social justice. Their dignity must be respected at all times in the process. No one should be left behind. In short, every AJS panel must embrace the rule of law principles.

212. Moreover, the Judiciary has an obligation and role through the JTI and PTI to develop a curriculum for the training of all AJS personnel to ensure compliance with the Constitution, minimum practice standards, appropriate record keeping and the development of AJS jurisprudence in the administration of and access to justice. Further, the Council for Law Reporting should develop the law reporting systems to facilitate the reporting of AJS case law. As noted earlier, there are immense benefits to be realized from these initiatives.

7.

Key areas of intervention and implementation

213. In this Chapter, this Policy document focuses on specific areas for intervention. These are main sites where strategic measures have to be taken in order to ensure the system delivers. Fieldwork identified these factors as crucial for effective delivery of the AJS project. The overall objective is to create a framework that is compliant with the Constitution, and which accords all users dignity. Stakeholders must therefore pay great attention to these aspects. Implementing law will also need to embrace the following strategic objectives.

7.1. Strategic Objective 1: To formally recognize and identify the nature of cases AJS can hear

214. The question of jurisdiction (i.e. matters that an AJS panel can hear and determine) lies at the heart of the dispute resolution regime. The key concern is usually whether elders should hear all disputes or whether a limitation should be placed on the matters that are referred to these fora. Experience shows that, in practice, elders hear and determine all disputes without any distinction between civil and criminal claims, as found in the formal Courts. These systems, as noted earlier, have been in existence for a long time. It would thus be impractical to try and limit the reach of the AJS regimes. Considering the limited reach of Courts in Kenya, such an action would seriously curtail access to justice for many citizens.

215. Against this background, this strategic objective focuses on the matters that are handled by the AJS framework. Focus is placed on enhancing the reach of this regime as well as making it efficient and effective. At the field, study views were sought from participants on issues relating to jurisdiction of the AJS framework. In particular they were asked five questions on this theme:

i. What they considered appropriate jurisdiction for AJS institutions.
ii. Whether the jurisdiction should be provided by law or left unregulated.
iii. The rules that should be used to refer matters to the AJS arena.
iv. Whether or not the AJS system should be used to determine cases involving individuals coming from different communities.
v. Whether or not the AJS framework should be used to adjudicate matters involving those who had "defected" from their communities.

216. The three models of AJS practice–the autonomous (unregulated) system, the third party institution annexed (or semi-autonomous system) and the Court annexed (regulated) system–were flagged above. The first type relates to those AJS mechanisms that are autonomous. Third party institution annexed, as discussed above, are those that reside within specific institutions such as the Police Service and Probation Department and the Local Administration. These are independent institutions. They have been unregulated over time. Over the years they have demonstrated their jurisdiction. Matters

that are within or outside their purview are well known to the members and communities that these systems have been working in. Feedback received from the field study in Meru, Nairobi and Marsabit affirmed that, overall, these systems have been delivering the "goods". It would, therefore, be imprudent and impractical to interfere with their mandate. Indeed, these systems must be allowed to operate within the frameworks that they have established. To use a well-known saying: "If it is not broken, don't fix it".

217. Participants had varying views on the field study questions flagged above. This is not strange considering the differences in views and opinions that exist within any political economy. Indeed, there was consensus on the fact that the Court-annexed AJS regime should handle claims. Where there was disagreement was on the extent of claims that this regime should handle. Should it handle all or some claims? This was the central question.

218. Whereas some were of the view that the jurisdiction of the Court-annexed AJS regime should be broad to cover all cases, others thought that some matters, particularly grave offences, such as robbery with violence and sex offences, should be excluded from this reach. To them these were serious crimes that, if left at the hands of this framework, justice would not be delivered to the victims and their families. While drawing on their experiences, some participants felt that victims were not treated with dignity in the proceedings. Others asserted that the some AJS practitioners are corrupt. Hence, there is a high chance that criminals would use the AJS framework to avoid serving jail terms, if convicted. Proponents of the opposing school of thought felt that the AJS arena should be allowed to handle all claims, including serious offences. What needs to be done in order to address the concerns raised is to introduce checks and balances in the system. A monitoring system, they claimed, would go a long way towards delivering justice. Lessons from the human rights approach that this Policy has embraced as well as the African spirit of humanity are handy towards this end. These proposals go a long way towards ensuring the systems meet due process considerations and are sound. Consequently, they should be embraced. Aside from matters that statutes excluded expressly, the AJS framework should hear and determine all matters that come before it.

219. There appeared to be consensus that rules of reference should be introduced to regulate the Court-annexed AJS province in particular. Strategic Objective number two fleshes this theme out further. That said, there was also agreement that the Court-annexed system should be permitted to handle disputes involving members from different communities or cultures as well as those who had since "defected". As most participants suggested, these frameworks have a lot to offer to the AJS framework. Field work affirmed that the two other AJS provinces have unique rules of operation and already have experience in handling cross-cultural/community disputes. With objective rules in place, it is reasonable to assume that the AJS regime will be able to meet its constitutional mandate. As required by the human rights approach, specific needs of vulnerable individuals must also be taken on board.

220. That the jurisdiction of the AJS provinces must be determined cannot be gainsaid. While the views captured above on jurisdiction both have advantages, they also suffer from certain limitations. AJS practitioners must operate within the law. The overall goal should be creation of a fair system, with particular attention to the prerequisites set out by Article 159(3) of the Constitution.

221. The expected outcomes of this strategic objective are:

i. Enhanced non-distinction between civil and criminal matters within AJS.
ii. Enhanced stakeholder and peoples' involvement in cases of public interest and concerns of the aggrieved party.
iii. Enhanced efficiency and effectiveness of the justice system.

The table below (Table 7.1) below captures the areas that we need to focus on. It also proposes policy actions that should be taken to safeguard and promote these.

Table 7.1: Interventions and outcomes for successful AJS

Outcomes	Immediate results	Activities
Formal recognition of AJS as an access to justice tool and ensure that there are safeguards that will respect the human rights of individuals who seek redress through AJS	Development of guidelines that recognize and adopt the three models of AJS which are compatible with the Constitution.	• Design and operationalise a framework that promotes appropriate interactions between the Judiciary and the various models of AJS to give effect to the constitutional mandate. • Outline and gazette guidelines that recognize and adopt the three AJS Models namely: i. Autonomous AJS Institutions ii. Third-Party Annexed AJS Institutions iii. Court Annexed AJS Institutions • Promote AJS as a forum of first instance for appropriate cases. • Produce and disseminate information on AJS mandate. • Sensitize all Court Users Committees on AJS and
Enhanced non-distinction between civil and criminal matters within AJS.	Development of draft User Guidelines.	• Consolidate emerging consensus on various aspects of AJS outlined in the Policy with a view to determining if a statute is recommended as the best way to guide the protection, respect and transformation of AJS in the country and if so develop such statute. • Formulate a system to facilitate appropriate cooperation between the Courts and AJS Mechanisms to enable co-references of cases between them. • Train Judicial Officers on appropriate applications of the agency principle on jurisdiction of AJS Mechanisms and the operational doctrines of interaction. • Train Practitioners of AJS and the public on the appropriate jurisdiction for AJS Mechanisms. • Audit and suggest possible review of existing legislations and judiciary guidelines to ensure coherent implementation of the AJS policy. • Develop and adopt AJS User guidelines for all stakeholders • Develop a manual and bench book for decision-makers. • Formulate the referral system to AJS institutions. • Promote robust cooperation and harmony between AJS and the Court system. • Support communication policies and initiatives in both State and non-State actors for the dissemination of AJS information. • Facilitate judicial colloquia on AJS

Outcomes	Immediate results	Activities
Enhanced stakeholder and peoples' involvement in cases of public interest and concerns of the aggrieved party.	Creation of a database of stakeholders. Production of manuals on AJS. Sending out a call for internship opportunities.	• Map and engage robustly all the players in the AJS regime for meaningful engagement with the process. • Work with CUCs on a work plan for operationalization of the AJS project. • Adopt structural interventions to address barriers to accessing the AJS framework. • Form and reinforce AJS and community linkages. • Produce and disseminate information on benefits of the AJS to other stakeholders. • Create and explore internship opportunities in the AJS regime in order to gain traction in these frameworks. • Develop protocol for reporting cases.
Enhanced efficiency and effectiveness of the justice system.	Creation of a communication guide.	• Progress efforts to ensure the AJS process and the Court system are fully harmonized and working together. • Support communication policies and initiatives in Government for dissemination of AJS information. • Use technology for appointment reminders (e.g. SMS/ WhatsApp) for all models. • Develop a template for reporting referrals for all AJS actors.
Research and publication of results in high quality outlets.	Crafting of a moot Court problem. Making contact with universities on the moot Court.	• Scale up engagement with academia and professional bodies. • Organize moot Court and other competitions around the three AJS provinces. • Support internal and external research initiatives.

7.2. Strategic Objective 2: Strengthening the processes for selection, election, appointment and removal of AJS practitioners

222. Justice, as one legal maxim reminds us, must not only be done, but must also be seen to be done. For the AJS framework to achieve this aim, it must build-in an objective system of appointing and dismissing practitioners. This strategy aims to build a robust and sustainable hiring and dismissal process to enable effectiveness and efficiency in processing claims within AJS processes. This section also flags the requisite skill-set that is required to enhance service delivery within this plan. Significant attention should be paid on these prerequisites. They have a high impact on the extent to which the system delivers justice. They also go a long way towards ensuring complaints and accused persons are treated with dignity. Through these broad initiatives an environment of trust and legitimacy of the AJS process is likely to be created and sustained.

223. How officials are brought on board on any system, disciplined and removed to a large extent determines how users perceive the system.[139] If the selection process is not above-board, there is a high chance of non-acceptance. This in turn has an impact on delivery by the system.[140] Further, there is need for an all-inclusive membership.

139 See Edwin Abuya, 'Can African States Conduct Free and Fair Elections?', (2010) 8 *Northwestern Journal of International Human Rights* 122 at 163 ('the selection process should be transparent, and interviews should be open to the public').

140 See also *Bush v. Gore* U.S. 98, 128 (2000) (Stevens, J., dissenting) ("It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.").

Consistent with the Constitution,[141] women, older persons, youth and persons with disabilities as well as member of minority or marginalized groups must be represented. Systems that are dominated by one gender or age group are less likely to be trusted.[142]

224. But it is insufficient to have an inclusive panel that is appointed though a fair system. These are not the only determinants of effective delivery. In addition to these criteria, practitioners must possess certain baseline competencies. Considering they will be discharging tasks similar to those of Courts, a similar skill set (aside from legal qualifications) should be required of these officials.[143]

225. The *Judicial Service Act* sets out general criteria for evaluating applications for positions within the Judiciary.[144] Applicants are required to demonstrate the following skills and competencies:

i. Professional competence;
ii. Written and oral communication skills;
iii. Integrity;
iv. Fairness;
v. Good judgment;
vi. Life experience; and
vii. Commitment to public and community service.

226. These are central criteria. Indeed, AJS practitioners should be required to possess a similar skill set. They should also demonstrate compliance with the National Values and Principles set out in Article 10 of the Constitution. Additionally, they should be required to demonstrate that they will promote and protect acceptable African cultures in their work. To safeguard the process, they need to take an oath administered by the relevant official(s) in the Judiciary. Demonstration of knowledge of the local language(s) and customs is an additional requirement; so, too, is a deep understanding of the community(ies) they will be working in. In Meru County, for instance, respondents suggested strongly that AJS practitioners should be 'conversant with the dynamics of the community'. Authors, such as Moore, support this point.[145]

227. Grounds and procedures for disciplining errant practitioners should also be spelt out. Again, these should be similar to those of judges and magistrates.[146] For any system to be successful, it must be approved by its users. Duty-bearers must also give their nod. In the absence of these buy-ins, there is a high chance this AJS regime would suffer from a reputation crisis.[147]

228. Consistent with these minimum standards, participants at the research workshops were asked the following questions:

141 Article 21.

142 For a deeper analysis of this theme, see Fernando Filgueiras, 'Perceptions of Justice, the Judiciary and Democracy', (2013) *Brazilian Political Science Review* .

143 For qualifications of judges and magistrates, see article 166 of the *Constitution* and section 32 of the *Judicial Service Act*, respectively.

144 See part V of the second schedule to the *Judicial Service Act*.

145 *Supra*, note 13 at 11.

146 For grounds and process for removal of judges and magistrates see article 168 of the Constitution and section 32 of the *Judicial Service Act*, respectively.

147 Data from Israel supports this thesis. See Theodore Eisenberg, Talia Fisher and Issi Rosen-Zvi, 'Actual Versus Perceived Performance of Judges', (2012) *Seattle University Law Review*.

i. Who should select or elect the "elders"/providers/practitioners, and what should be the appointment criterion?
ii. How do we ensure the inclusion of women and other marginalized groups and how do we address the interests of women, children, and the vulnerable and marginalized groups in AJS processes?
iii. What is the appropriate role of National Administration/Interior/County administration (Police; Chiefs; Ward Administrators)?

229. While responses were varied, most respondents supported an all-inclusive selection panel for AJS practitioners. In keeping with human rights standards, almost all respondents affirmed the need for an objective selection process. In addition to rendering the recruitment process transparent, a fair selection framework would ensure qualified applicants are appointed. Further, it would bring on board previously marginalized constituencies. It is of upmost importance to ensure only those with the requisite competencies are shortlisted and, subsequently, hired. The process for removal must also comply with due process standards. Collectively, these measures would safeguard the integrity of AJS. In many ways, they would also guarantee fairness in the conduct of proceedings. Furthermore, these initiatives would contribute towards victims and perpetrators being treated with dignity.

230. Views on the appointing authority and role of National Administration were also varied. Various proposals were floated. The underlying goal is to have a system that delivers substantive justice. Overall national administration is a necessary cog in the justice delivery wheel. Vital lessons can be learnt from the current systems. Chiefs already handle a huge number of disputes in their localities, exercising skills and garnering vital experiences that cannot be overlooked. These experiences can be shared with other regimes as a way towards improving service delivery. Lessons from comparative experiences must be "bent" to suit local circumstances. The local administration would also play a vital role in informing the local population about the AJS framework. However, some respondents expressed reservations. They underlined the need to insulate the system from influence by local administration. Considering the power these officials wield, a lot of caution has to be exercised. Corruption is also an ill that will have to be fought full force, if the system is to be embraced broadly.

231. Training is also an important element in ensuring delivery of excellent service. The Judiciary, under auspices of the JTI and PTI, can, in the first place, develop and support training programs for AJS. Focus should be on specific limitations, which a baseline study should have pre-identified. The Judiciary could also take a lead role in offering material support to these processes. Collectively, the two institutions can also come up with a set of guidelines on standards and procedures that these processes should follow. The overall objective should be compliance with due process standards. The transformative theme as well as accountability should be at the centre of these training tools. So, too, are issues touching on the value of these systems in protecting and preserving cultural practices that comply with well-known human rights standards. Further, the systems can also develop a rubric on skills decision makers should possess. Tips on how to improve the current procedures can also be shared. Moreover, the Judiciary, in consultation with Kenya Law Reports (eKLR) and other justice defenders, can facilitate publication of decisions stemming from these processes in publicly available outlets. Several advantages can stem from initiatives such as these. We need to remember that this engagement should not be a one way street. Rather, this interaction should benefit both sides. Immense expertise and knowledge resides in either side. It is in the interest of the other side to tap into this reservoir.

232. The following are the expected outcomes of this initiative:

i. Enhanced selection, election, appointment and removal procedures for competent and capable AJS practitioners
ii. Enhanced outcomes by AJS practitioners that comply with the rule of law and human rights principles
iii. Enhanced environment of trust and legitimacy of the practice of AJS.

Table 7.2 below points out the focus areas and initiatives that should be taken to protect the desired outcomes.

Table 7.2: Strengthening the processes for selection, election, appointment and removal of AJS practitioners

Outcomes	Activities
Enhanced selection, election, appointment and removal procedures for competent and capable AJS practitioners	• Establish objective systems which guarantee all-inclusive AJS panels. • Design appropriate application processes and eligibility standards to ensure the inclusion of women, youth and persons with disabilities as AJS practitioners. • Conduct capacity assessment to determine current skills and competencies. • Develop and deploy an objective hiring, promotion and firing process. • Recruit and motivate AJS practitioners. • Develop objective procedures for staff *modus operandi*.
Enhanced outcomes by AJS practitioners that comply with the rule of law and human rights principles	• Build the capacity and empower AJS practitioners and Judicial Officers in functionality and basic fundamental principles touching on cross-cutting issues. • Develop procedures and guidelines on the principles of the Constitution and standards for human rights for AJS Practitioners. • Develop practical training manuals and standard operating procedures on key matters relating to justice delivery through AJS Mechanisms. • Establish a quality assurance framework and a regulator for AJS practitioners. • Train and strengthen the capacity of support staff based on results of the capacity assessment. • Mainstream due process values in all policies and strategies. • Develop a mentorship and skills transfer program. • Formulate a data-base with details on personnel, competencies and training attended. • Develop manuals and bench books (covering both substance and process). • Foster a culture of continuous improvement. • Define and implement indicators for service delivery and interventions. • Develop feedback and accountability mechanisms. • Schedule events for professional development of staff.
Enhanced environment of trust and legitimacy of the practice of AJS. .	• Develop a complaints and feedback process. • Implement effective and sustained interventions targeting vulnerable and disabled individuals. • Sensitize all stakeholders on the AJS framework. • Educate stakeholders on dispute prevention strategies. • Strengthen community and all AJS linkages. • Institute early warning conflict detection mechanisms to defuse volatile situations before they explode into conflict. • Eliminate all forms of barriers of service delivery by the AJS framework. • Promote expeditious resolution and enforcement of claims. • Take cognizance of and protect needs of special and/or vulnerable individuals.

7.3. Strategic Objective 3: Develop procedures and AJS jurisprudence

233. This Strategic Objective is aimed at ensuring that AJS Mechanisms and the Judiciary to cooperate to deliver substantial and procedural justice through the application of organic customary law in compliance with the Constitution and human rights principles. Some of the key questions it seeks to respond to are the following:

i. Should there be minimum procedural requirements for AJS sessions? Should these standards be provided for in the law?
ii. How do we ensure constitutional values are adhered to and "harmful" traditional practices eliminated?
iii. How do you keep African Customary Law evolving, living and relevant rather than ossifying it?

234. Above are the questions participants are asked in the context of procedures that Court- annexed AJS processes should adopt. Procedure, as is well-known, is the handmaiden of substance or justice.[148] The process that is used should be one that delivers procedural and substantive justice. For the AJS framework, Article 159(3) of the Constitution has set conditions for AJS practitioners to comply. They must also ensure they work within legal boundaries. In a nutshell, the procedures that are adopted by the Court-annexed AJS province must be fair. They must meet due process considerations. Almost all respondents agreed with this position.

235. A fair process is one that is accessible to any individual. Two, each party must be given a reasonable opportunity to present its case. Further, the proceedings must be conducted in a language the parties understand. Any communication gap is likely to affect one's ability to follow proceedings. The outcome that is handed down should be in writing. In order to ensure that all the parties follow the decision of the AJS practitioner, technical language should be avoided. Rather, they should use language that is simple and easy to understand. Special arrangements should be made where one of the parties is disabled[149] or of advanced age.[150] All parties must be treated with dignity. Moreover, dissatisfied parties must be given an opportunity to appeal their cases. In sum, compliance with procedural and substantive requirements is of utmost importance.[151] These are fundamental procedural requirements, which the Court-annexed AJS process must take on board. In the preceding objective, the policy flagged key competencies that AJS practitioners should possess. If professionally deployed, one would expect the system to deliver.

236. Due process standards are well established in law. The three AJS models recommended by this Policy must, thus, comply with these basic rules. Towards this end, the Judiciary must impress upon AJS practitioners to embrace them in their operations. The implementing legislation should refer to them. During fieldwork conducted in Narok, for instance, participants stressed the need for these standards to be infused in the process. Such clarity is necessary for avoidance of any doubt.

148 This is a well-known legal proposition recently reiterated by Justice Ohungo in *Josiah Njoroge Njuguna v Ingobor Farm Co. (Registered Trustees)and 3 Others* (2018) eKLR at para 17.

149 Article 54 of the Constitution calls on AJS practitioners to observe this basic rule.

150 *Ibid,* Article 57.

151 Early Constitutional Law authors in Africa recognized this fundamental rule. See, for instance, B.O. Nwabueze, *Constitutionalism in the Emergent States* (C. Hurst & Co. (Publishers) Ltd: London, 1973) at 10 to 11.

237. The question of ensuring laws and customs of a particular community are observed at all times by all AJS provinces is crucial. This position is consistent with the central theme of the sociological school of thought. All respondents agreed that we should maintain our customs. These have to be at the forefront when deciding AJS-related matters. In Swahili they say: *mwacha asili ni mtumwa* (translation: One who leaves his/her own ancestry is a slave). All defenders of the Constitution must guard against this unfortunate outcome. It is for this reason that this Policy document requires AJS practitioners to demonstrate competency in this area. For those working in border areas, a sound understanding of customs and practices in the both communities is crucial. Failure to observe and implement customary law has serious consequences. Key among these is the risk of customary law wearing away—an unintended consequence that we all must guard against. Training and retraining on this aspect is another way of guarding against erosion or dilution of customary laws and practices. So, too, is capturing in a more permanent form decisions handed down by the autonomous and semi-autonomous provinces. Earlier on, the Policy demonstrated the consequences of the repugnancy clause. One of these was dilution of African Customary Law. To guard against this, decision makers will need to develop innovative ways of dealing with this colonial principle. As argued before, they must surmount it. Otherwise, rather than remaining alive, there is a high risk that our cultures will continue to die.

238. This strategy emphasizes the value of incorporating due process standards within the AJS process of all provinces. A number of issues are cross-cutting with Strategic Objective number 3 above. These have been captured below. Via the justice lens, the discussion in this section underlines key measures that should be taken to guarantee fairness in the process. The aim is to build objective AJS provinces. Further, this strategy aims at ensuring that customary law is kept. Consistent with the mission of the Judiciary, it also ensures that 'local jurisprudence' flourishes.

239. Moreover, the Policy in this section makes proposals to combat cultural practices in conflict with the provisions and spirit of the Constitution. Fieldwork identified this as a major concern in the sites that were visited. On this issue, respondents were clear that these practices must be dealt with head-on. They called on law enforcement agencies and the local administration to take stern measures to eliminate them. It was also suggested that such matters could be dealt with via the AJS provinces. Raising awareness on the harmful effects of these practices was another proposal respondents put forward. In Kitui County, participants suggested that this function be carried out by the elders. In addition to these stakeholders, this Policy proposes that other interested parties pull together to eradicate HCP.

240. Below are the expected outcomes of this Strategic Objective:

i. Enhanced access to justice.
ii. Enhanced compliance with the Constitution and human rights principles.
iii. Enhanced application of customary law and practice.

Table 7.3 below captures the spaces interventions should focus and strategies that should be taken to protect these.

Table 7.3: Developing Procedures and Customary Law jurisprudence

Outcomes	Activities
Enhanced compliance with the Constitution and human rights principles	• Identify cultural and social practices in conflict with the Constitution and human rights standards and engage AJS Mechanism to transform them. • Formulate standard operating procedures which encourage and promote due process standards. • Mainstream due process values in all training manuals and strategies. • Using comparative jurisprudence, develop measures to engage with the repugnancy clause to give it meaning which is compatible with the spirit of the Constitution. • Sensitize all users on their rights and entitlements. • Foster a culture of continuous improvement. • Train and support the capacity of paralegals to cascade information on AJS. • Promote expeditious resolution and enforcement of claims in the Court-annexed AJS process. • Promote expeditious resolution and enforcement of claims in the Court-annexed AJS process.
Enhanced application of (organic) customary law and practice.	• Address cultural practices including dispute resolution practices in conflict with the provisions and spirit of the Constitution through didactic engagement. • Facilitate the adoption of the following Operational Doctrines of interaction between Courts and AJS processes: Deference, Recognition and Enforcement, Facilitative Interaction, and Monism • Provide age-appropriate information on effects of harmful practices using different audio-visual and digital platforms to AJS. • Leverage on multi-sectoral stakeholders initiatives to promote cultural practices and norms. • Engage with regional players for comparative lessons. • Enforce customary laws and guidelines. • Organize home visits and follow-ups for victims or survivors of cultural practices in conflict with the provisions and spirit of the Constitution. • Scale up sensitization of law enforcement agencies on the necessary interventions to curb cultural practices in conflict with the provisions and spirit of the Constitution. • Train and encourage paralegals to address cultural practices in conflict with the provisions and spirit of the Constitution occurring in their communities. • Report all cases that come from AJS. • Translate relevant material into local languages and vice versa. • Support reporting initiatives. • Develop innovative approaches to dealing with cultural practices in conflict with the provisions and spirit of the Constitution.
Enhanced access to justice infrastructure.	• Implement a client satisfaction framework on AJS processes through, among other methods, surveys and suggestion boxes. • Take cognizance of and protect needs of special and/or vulnerable individuals in the Court-annexed AJS process.

7.4. Strategic Objective 4: Facilitate effective intermediary interventions

241. The right to representation is considered fundamental to the justice delivery framework.[152] When we talk about representation, it is usually with reference to advocates coming on board a legal process to represent clients. As mentioned earlier, the litigation process is quite complex.[153] In order to navigate successfully this maze, a complainant or accused person will need services of representation.[154]

242. But legal services are expensive. Usually advocates fees often run to hundreds of thousands of shillings.[155] The reality is that many Kenyans cannot afford to these fees.[156] High legal fees that Advocates charge end up becoming a huge stumbling block for those seeking justice in Court. Rather than go through the process, some claimants choose to drop active cases or not lodge complaints at all. The issue of legal fees is relevant for those in the Court-annexed AJS province. During fieldwork in Kericho and Nairobi Counties, we confirmed that lawyers were hardly present in the AJS processes. These frameworks must deal with the undesirable consequences of the Court system, including discouraging claimants from filing or pursing cases. For the regime to be embraced, active steps must be taken to encourage complainants to file their claims. As the Constitution guarantees in Article 48, everyone should be able to access justice. Any impediment towards this end should be removed.

243. "Should lawyers and paralegals participate in AJS processes"? This is one of the questions respondents were asked. A vast majority answered "no". Apart from increasing adjudication costs, many participants argued that lawyers would complicate proceedings. They would raise unnecessary objections. Respondents in Migori, for instance, considered lawyers would cause confusion in the proceedings or complicate the process via use of technical language. Commentators have expressed similar sentiments:

> It is clearly desirable that Courts presided over by lay[persons] and basically administering the customary law should not be overawed by the presence of professional pleaders who are trained in another system of law and may well be ignorant of the customary law to an extent that they will attempt to persuade the Court to accept entirely foreign concepts in arriving at a judgment. Justice in the customary Courts is ... relatively cheap because parties are not burdened with the cost of professional assistance.[157]

244. Having lawyers on board the process would be counterproductive in the sense that they would prolong the road to justice. It would also not accord particular groups the special treatment they require in order to follow proceedings. A minority, however,

152 See article 49(1)(c) of the Constitution.

153 See The Judiciary, *State of the Judiciary and the Administration of Justice: 2012-2013*, available at http://www.kenyalaw.org/kl/fileadmin/SoJA_2012-2013.pdf (accessed 25 January 2019 (identifying 'complex procedures' as one of the challenges facing litigants) at 127.

154 See also Mitchelle White, 'Legal Complexity and Lawyers Benefit From Litigation', (1992) *International Review of Law and Economics* ([L]awyers representing both plaintiffs and defendants prefer an intermediate level of legal complexity in a wide range of circumstances) at 381.

155 For these fees see the *Advocates (Remuneration) (Amendment) Order*, 2014, Legal Notice No. 35.

156 See also Office of the Attorney General and Department of Justice, 'National Action Plan: Legal Aid 2017-2022 Kenya–Towards Access to Justice for All, available at: http://www.statelaw.go.ke/wp-content/uploads/2017/12/NAP-Legal-Aid-2017-2022.pdf (date of access: 24 January 2019) ('Widespread poverty translates into an increase in the number of people unable to access justice ....') at 3.

157 See Keay and Richardson, *supra*, note 57 at 364.

felt lawyers would be useful to the process, as they would spot legal issues as well as standards of proof. Unlike lawyers, most respondents answered affirmatively the question on whether or not paralegals or intermediaries should participate in the process. This position is consistent with Article 49 of the Constitution, which allows a person to be represented by, among others, any person 'whose assistance is necessary'. Considering they came from the local communities, respondents felt they were able to identify with intermediaries. This fact alone made them more acceptable. The fact that they spoke local languages was a huge advantage. In Narok, some asserted that, unlike lawyers who tell 'lies', paralegals would represent the correct position. To put it in another way, because they were local folk, paralegals were more likely to tell the truth.

245. Like any legal process, AJS procedures must rely on certain set of rules. Unlike the formal legal system that draws on statutes and precedents, most of the rules invoked by the AJS regime are with the people. These are the roots of justice. It is from the branches of these trees that justice is nurtured and created. Among other roles, lawyers could play an advisory function on procedures and processes that are used in the AJS regime. They could highlight the norms that need to be adhered to in order for the systems to comply with the Constitution. In Narok, for instance, some respondents opined that lawyers would sensitize and teach AJS practitioners salient issues relating to due process. As stakeholders, they would apply also to sit on selection panels of AJS practitioners. They would also serve as a link between AJS and the legal professions. These roles are vital in ensuring the system complies with requirements of the Constitution, while at the same time creating harmony within the general dispute resolution framework

246. Paralegals would also play a central role towards this end. In many ways, this initiative will contribute a great deal towards meeting the 'people-focused delivery of justice' goal of the Judiciary. The role of paralegals, however, should be limited to offering basic legal information to any individual. It should not extend to representation at the forum.

247. An additional comment needs to be made. The trial process, generally speaking, is not straight forward. Parties must invest considerable amounts of time to prepare and prosecute their cases. Patience is a central virtue, which all parties must invest in. They must also have a level of understanding that will enable them follow proceedings. These are necessary tools, which AJS practitioners must ensure are present always. Meeting due process standards requires procedures to be simplified. As the Judiciary noted in its 2012-2013 Annual Report, simplified procedures 'enable the public to understand proceedings.[158] Decisions that are handed down particularly must also be crafted in a language that is easy to understand. Technical terms or phrases, as the respondents in Narok remind us, must be avoided at all times. If this model fails to comply with these basic rules, chances are high claimants will be lost in the procedures. This is a consequence that must be avoided. All key stakeholders must guard against this outcome.

248. There are several other challenges that the justice system in Kenya faces. In the first place, there is limited access to legal aid.[159] Further, the system is fraught with serious delays. At the 2018 annual Judges Colloquium, the Chief Justice, Hon. David K. Maraga, observed that, as of June 2018, there were just over 110,000 unresolved cases.[160]

158 See *supra* note 149 at 124.

159 See Office of the Attorney General and Department of Justice, 'National Action Plan: Legal Aid 2017-2022 Kenya-Towards Access to Justice for All, available at: http://www.statelaw.go.ke/wp-content/uploads/2017/12/NAP-Legal-Aid-2017-2022.pdf (accessed 25 January 2019) (Citing barriers to justice at 2).

160 This speech is available off the website of the Supreme Court of Kenya (www.judicirary.go.ke).

According to the Chief Justice, these cases were more than five years old. Corruption is also a huge problem that the current regime faces.[161] The perception of political interference with the justice system is also a challenge.[162] Moreover, the fact that proceedings are conducted largely in English or Swahili is quite problematic.[163] These are critical issues. It is in the interest of the AJS processes to tackle them head-on. They must surmount these barriers. If they fail, it is likely they will record very low acceptance rates. The reverse is true—dealing robustly with these limitations will immensely improve their rating.

249. This strategy emphasizes the value of having a simplified process. Complicated procedures, as experience shows, tend to be user unfriendly and do little to promote justice. For the AJS regime to make a real impact in the country it has to be accessible by all. Steps should be taken to ensure those claimants who invoke the system are able to ventilate or defend their claims with relative ease. The discussion in this section reviews central initiatives that could be taken to develop a robust system, which all can access. The overall objective is to ensure compliance with the rule of law. All voices must be heard.

250. Expected Outcomes from this Objective include:

i. Enhanced awareness of the role and place of intermediaries in the administration of justice.
ii. Developed infrastructure to encourage use of intermediaries.
iii. Enhanced promotion and protection of the rights and voices of the vulnerable and marginalized.

Table 7.4 below captures the outcomes and activities that should be deployed to safeguard these initiatives.

161 See The Ethics and Anti-Corruption Commission, 'Corruption and Ethics Survey Report, 2014 at 9, available at: http://www.eacc.go.ke/wp-content/uploads/2018/09/Corruption-Ethics-Survey.pdf (accessed 24 January 2019) (Citing 'corruption' as one of the challenges facing operations within the Judiciary).

162 Ibid.

163 See The Judiciary, *State of the Judiciary and the Administration of Justice: 2016-2017*, available at file:///C:/Users/Edwin/Downloads/STATE%20OF%20THE%20JUDICIARY%20AND%20THE%20ADMINISTRATION%20OF%20JUSTICE%20ANNUAL%20REPORT%20.pdf (accessed 25 January 2019) at 251 and 281 (citing language issues as a barrier for access to justice).

Table 7.4: Facilitating effective intermediary interventions

Outcomes	Activities
Enhanced awareness of the role and place of intermediaries in the administration of justice.	• Develop and adopt guidelines for intermediaries. • With stakeholders, design and disseminate a Procedures Toolkit. • Develop a Code of Conduct and ensure that all accredited practitioners in the country have the skills required to provide such services ethically. • Translate the Procedures Toolkit into local languages and other formats. • Sensitize decision-makers and users as well as other stake-holders in the AJS process of intermediaries. • Develop and disseminate widely a directory of paralegals.
Enhanced promotion and protection of the rights and voices of the vulnerable and marginalized.	• Create an enabling environment for observing and respecting rights of all litigants and that allows them to ventilate their cases individually or through their representatives, while allowing them to claim their rights in AJS. • Develop and implement a feedback mechanism. • Promote respect for and the protection of rights of litigants in the AJS. • Have frequent open days. • Focus on infrastructural needs of lay and disadvantaged individuals. • Conduct an assessment on capacity gaps, limitations and future needs (legal and procedural) of claim holders/beneficiaries.
Developed infrastructure to encourage use of intermediaries.	• Commission and adopt recommendations from surveys on use and satisfaction of the procedural framework. • Build on comparative pros and cons of formal and traditional adjudication. • Promote new litigation methodologies. • Support law reform and other initiatives geared towards enabling lay representatives and disadvantaged individuals understand and pursue their claims within the AJS framework. • Develop and deploy a Code of Conduct for Intermediaries. • With stakeholders, formulate less rigid and economical legal procedures for all users in the AJS framework. • Create dispute resolution centres.

7.5. Strategic Objective 5: Strengthened and sustainable resource allocation and mobilization

251. Availability of adequate resources is one of the key pillars of the Judiciary in Kenya. This criterion draws on the fact that for any system to deliver, it must be effectively resourced. Sufficient resources must be deployed. If a system is under-funded and under-resourced, it will face huge challenges meeting its long- and short-term objectives. Definitely, a budget, with details of income and expenditure will have to be drawn at the preliminary stage. Salaries and other benefits due to office holders must be captured in this record. The issue of resources is central, particularly to the Court-annexed regime.

252. At the field visits, participants were asked two questions. First, whether AJS practitioners in the Court-annexed system should be 'paid'. If yes, 'how [much] and by who'? On the first question, there was a unanimous response—adjudicators should be paid. Most saw this as a placement within Government/Judiciary. That said, they expected payment for the services rendered. There was variation, though, on the amount of payment that should be payable. It was also not clear whether they understood the

position to be permanent or temporary. In Kuria, for instance, while some participants contended that AJS practitioners should be paid a sitting allowance (i.e. temporary position), others vouched for a monthly salary (i.e. permanent position). On the latte, participants in Kuria proposed a salary range of Kenya Shillings 10,000 tod 15,000/=. Apart from salaries, there are many other activities in the AJS framework that would need funding. Table 7.5 captures these. In his text entitled, *Scholars in the Market Place,* Mahmood Mamdani warns us of the dangers of commercializing public functions.[164] He argues persuasively that this can lead to fall in standards, as a result of people applying to be part of the process for other considerations other than public service. This warning needs to be taken seriously. Service delivery lies at the core of the general mandate of the Judiciary. Hence, any threats to this mission should be taken seriously and addressed.

253. While there were attempts to convince those who attended sessions to deem adjudication as a volunteer service, participants were not persuaded. A vast majority were adamant—they expected payment in return for services rendered.[165] In the absence of compensation, they would be reluctant to play any role. This brings us to the second question: who should underwrite costs of operating the AJS frameworks?

254. Considering that this is a constitutional obligation, the central Government will have to fund the entire operation.[166] It will need to include activities of AJS frameworks it its annual budget. Like Courts and other tribunals, this system must be insulated from interference by other arms of Government. Political intrusion, which was flagged earlier, is one of the ills the system must guard against. Financial manipulation is one of the channels other arms of Government use to influence the Judiciary. Adequate funds must, therefore, be allocated by Government. To ensure sustainability of the project, these resources must be protected. Resources must also be promptly disbursed to avoid creating gridlock.

255. But we should also be cognizant of the fact that resources are finite. Secondly, the Judiciary is seriously underfunded. In his foreword to the 2016-2017 Annual Report, the Chief Justice expressed the following sentiments:

> The level of funding for the Judiciary and other players in the Justice system remains a matter of considerable concern. While our recurrent budget is largely covered from Government of Kenya funds, only 30 per cent of the development budget comes from the Treasury. The rest is derived from donor funding, particularly the World Bank's Judicial Performance Improvement Program (JPIP). This programme comes to an end in December 2018, meaning that alternative funding must be found in order not to slow down the progress we have made so far.[167]

256. Alternative and sustainable sources of funding, as the Chief Justice points out, would contribute a great deal towards financing programs that funding from central Government will not cover. Resource mobilization is key in ensuring sustainability of the Court annexed AJS project. All actors must be involved in ensuring this system is sufficiently funded at all times. Strong accountability measures must be put in place. Otherwise potential funders will be reluctant to fund the AJS project.

164 Mahmood Mandani, *Scholars in the Market Place: The Dilemmas of Neo-Liberal Reform at Makerere University 1989-2005* (Fountain Publishes Ltd, 2007) at chapter 3.

165 In any event, under the County Government structure, elders are paid allowances. See section 53(3) of the *County Governments Act*.

166 See article 173 of the Constitution (establishing the Judiciary Fund). See also the *Judiciary Fund Act*, which operationalizes the fund.

167 See *supra* note 159 at iv. See also page 161 for data on allocation of funds.

257. In the first instance the Budget Committee of the Judiciary needs to develop a robust budget, with proposed activities. This will then need to be shared with stakeholders in order for them to assess the potential area(s) of investment. An annual audit must be conducted at the close of the financial year to ascertain the resources that were allocated versus those that were used to implement activities under each strategic objective. These need to be reviewed as implementation plans are made for the following year.

258. As highlighted above, the tenure and terms of office for AJS practitioner must also be guaranteed and protected at all times. It is important to maintain the independence of this office. The English system in the 17th century where judges held office 'at the King's pleasure' cannot be allowed to take root. In order to promote independence, tenure and terms of office must be protected by statute. They should not be 'dismissible at the whim of the 'Government'.[168] Rather, there should be specific grounds for their removal. Due process must also be followed before an individual is removed. Collectively, these measures will go a long way towards promoting sustainability of the implementation framework.

259. The following are the expected outcomes of taking this strategy:

i. Strengthened capacity of communities to manage their own affairs in the administration of justice.
ii. Targeted allocation of resources for the promotion of AJS.
iii. Optimal utilization, flexibility and accountability in the use of public resources for AJS.

Table 7.5 below identifies the area that we need to place focus. It also outlines actions that should be taken in order to guarantee the central theme of this initiative.

Table 7.5: Sustainable resource allocation and mobilization for AJS

Outcomes	Activities
Strengthened capacity of communities to manage their own affairs in the administration of justice.	• Promote a philosophy of self-sustenance by the AJS Mechanisms. • Develop a targeted budget for AJS Mechanisms in line with this Policy. • Conduct a resource gaps analysis to identify resource needs at each level of the process. • Establish effective and sustained mechanisms for resource mobilization, including non-State funders/agencies. • Conduct regular forums on AJS (JTI and other Rights Organizations to lead this process).
Targeted allocation of resources for the promotion of AJS.	• Co-ordinate and harmonize non-State allocations. • Prioritize areas for funding and engage Government, national and county, to allocate resources. • Provide an evidence-based resource allocation program.
Optimal utilization, flexibility and accountability in the use of public resources for AJS.	• Develop mechanisms for monitoring utilization of funds allocated. • Enhance efficiency and accountability in resource allocation and use.

168 Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights* (OUP, 2006) 63.

8.

Operationalizing the AJS policy—the roles of different actors

260. In this section, the Policy looks at different institutions and their role in promoting the AJS project. Table 8.1 below outlines the relevant institutions, their legal grounding and role(s).

Table 8.1: The Proposed institutional framework for implementing the Policy

Institution	Legal grounding	Role(s)
Judiciary and CUC Judicial Officers Administrative office-office of chief justice, etc. CUC as a vehicle for implementation	Chapter 10 of the Constitution CUC Guidelines Judicial Service Act Judicature Act. Kadhi's Courts Act. Magistrate's Court Act High Court (Organization and Administration) Act. Court of Appeal (Organization and Administration) Act.	• CUCs can facilitate establishment of Court-annexed AJS • CUCs can identify capacity gaps for AJS practitioners • CUCs facilitate coordination of justice system actors to promote AJS • Train practitioners and users on AJS. • CUCs to report to NCAJ on implementation of AJS • Continuously train judicial officers on promotion of AJS and ensure continuous interaction between its officers and AJS mechanisms • Urge Parliament to pass relevant laws, policies and guidelines. • Refer cases in their dockets to the AJS framework. • Oversight the AJS regime (oversight over integrity/ adherence to process and outcomes, not merits. Oversight does not, however, envisage appeals and reviews). • Create awareness among members of the public on the AJS framework. • Advise on jurisdiction of the AJS arena. • Enforce orders in Court-annexed AJS or upon agreement by parties in an autonomous AJS • Facilitate exchange of knowledge between AJS mechanisms. • Document, archive and make available knowledge from experiences of AJS mechanisms • Adopt measures to monitor and assess the implementation of AJS. • Hold regular dialogues with stakeholders on challenges and opportunities available to the AJS framework.
Office of the Director of Public Prosecutions	Article 157 of the Constitution. Office of the Director of Public Prosecutions Act.	• Continuously train ODPP officials on AJS. • Review its own legal framework to accommodate and promote AJS • Continuously find and promote areas of synergy and complementarity between AJS process and the Criminal Justice System • Refer cases in their dockets to the AJS framework. • Inform the public of the AJS framework.

Institution	Legal grounding	Role(s)
Article 15 Institutions: i. Kenya National Human Rights and Equality Commission; ii. National Land Commission; iii. Independent Electoral and Boundaries Commission; iv. Parliamentary Service Commission; v. Judicial Service Commission; vi. Commission on Revenue Allocation; vii. Public Service Commission; viii. Salaries and Remuneration Commission; and ix. National Police Service Commission.	Chapter 15 of the Constitution; Kenya National Human Rights Commission Act. National Land Commission Act. Parliamentary Service Commission Act. Judicial Service Act. Public Service Commission Act. Salaries and Commissions Act. National Police Service Commission Act.	• Continuously train their staff on AJS promotion. • Provide for the establishment of AJS mechanisms within their institutional policies in appropriate circumstances. • Prioritize resolution of cases using institutional AJS mechanisms • Inform the public on AJS mechanisms. • Refer cases to the AJS regime for resolution. • Offer technical assistance to AJS mechanisms when called upon to do so. • Document and keep records of experience of AJS in settlement of disputes. • Refer cases to AJS. • Offer opportunities for knowledge and experience sharing among AJS mechanisms. • Advocate for the formulation, review and implementation of laws and policies with a view to promote AJS.
Council of Elders and community justice institutions i. As AJS mechanisms. ii. As decision makers but not resolvers of disputes.	County Governments Act. Societies Act.	• Sharing knowledge and experiences on AJS. • Documenting and keeping records of AJS/ encourage documentation and keeping of records for AJS. • Enforcement of decisions out of AJS processes. • Participate as members of AJS panels. • Participate in the selection of candidates for consideration to AJS panels. • Inform the public on the AJS framework. • In consultation with their communities or CUC, facilitate the establishment of AJS mechanisms
Civil Society Organizations	Non-Governmental Organizations Co-ordination Act. Public Benefits Organizations Act. Societies Act. Companies Act. Trustees and Perpetual Succession Act.	• Share knowledge and experiences on AJS among themselves and with other AJS actors. • Inform the framework of NGOs working in specific parts of the country. • Offer technical and financial support for AJS activities. • Scrutinize the AJS framework. • Publicize AJS within their networks and among the public • Explore possibility of providing internship opportunities. • Participate in the selection process of AJS officers. • Carry out continuous research to inform AJS processes. • Promote accountability for AJS mechanisms for adherence to human rights. • Facilitate annual stakeholders' forum. • Disseminate AJS related laws, policies and guidelines. • Monitor implementation of the AJS system. • Establish AJS mechanisms within their organizations

Institution	Legal grounding	Role(s)
• The legal fraternity i. Lawyers ii. Council of Legal Education iii. Law Society of Kenya iv. Kenya School of Law v. Attorney General	Advocates Act. Law Society of Kenya Act Legal Aid Act. Kenya School of Law Act. Legal Education Act.	• Ensure training of the legal practitioners on AJS. • Partner with the Judiciary in promoting the practice of AJS. • Offer technical expertise to AJS forums when called upon. • Advocate for and promote the autonomy of the AJS. • Encourage use of AJS by their membership. • Create awareness on AJS to the public. • Facilitate avenues for knowledge and experience sharing among its members and with other AJS actors. • Continuously monitor the implementation of the AJS process.
Paralegals	Legal Aid Act	• Document, keep record and make available AJS processes, experiences and best practices. • Offer legal and other advice to AJS mechanisms and users. • Monitor adherence to AJS principles and progress of implementation of AJS Policy. • Establish AJS forums in consultation with the community and CUCs. • Create awareness on AJS to the public. • Encourage the public to utilize AJS mechanisms in dispute resolution.
Academia i. Students ii. Lecturers/ staff iii. Institution	Universities Act.	• Engage in high level research to inform and expand the philosophy and practice of AJS. • Organize and run moot Court and other competitions. • Provide platforms for exchange of knowledge and experiences on AJS among student but also with other actors of AJS. • Inculcate in their curriculum training on AJS. • Monitor the implementation of the system. • Develop research protocols. • Document best practices of the implementation process. • Explore internship opportunities for students in the AJS system. • Offer technical expertise to AJS mechanisms when called upon to do so. • Organize annual sensitization forum/conference. • Develop AJS repository centres, with requisite material for research, publication and dissemination. • Collaborate with other researchers working in the area of AJS.

9.

Operationalizing the AJS policy: The implementation matrix

261. In this section, we look at the implementation framework of the AJS policy. This section draws on the strategic interventions and the actors as identified in the preceding sections. These are depicted in Table 9.1.

Table 9.1: Policy implementation matrix

Strategic Objective 1: To recognize and identify the nature of cases AJS can hear				
Outcome(s)	**Policy action / activities**	**Intermediate results**	**Verifiable Indicators**	**Actors**
1. Formal recognition of AJS as an access to justice tool and ensure that there are safeguards that will respect the human rights of individuals who seek redress through AJS	• Design and operationalise a framework that promotes appropriate interactions between the Judiciary and the various models of AJS to give effect to the constitutional mandate. • Outline and gazette guidelines that recognize and adopt the three AJS Models namely: • Autonomous AJS Institutions • Third-Party Annexed AJS Institutions • Court Annexed AJS Institutions • Promote AJS as a forum of first instance for appropriate cases. • Produce and disseminate information on AJS mandate. • Sensitize all Court Users Committees on AJS	• Development of AJS Guidelines for Judicial Officers. • Development of AJS Guidelines for CUCs • Development of AJS Guidelines for AJS Practitioners.	• Guidelines developed. • Number of decisions properly recognizing the place of AJS	• Judiciary • AJS Mechanisms • JTI • CUCs

Strategic Objective 1: To recognize and identify the nature of cases AJS can hear				
Outcome(s)	**Policy action / activities**	**Intermediate results**	**Verifiable Indicators**	**Actors**
2. Enhanced non-distinction between civil and criminal matters in AJS.	• Consolidate emerging consensus on various aspects of AJS outlined in the Policy with a view to determining if a statute is recommended as the best way to guide the protection, respect and transformation of AJS in the country and if so develop such statute. • Formulate a system to facilitate appropriate cooperation between the Courts and AJS Mechanisms to enable co-references of cases between them. • Train Judicial Officers on appropriate applications of the agency principle on jurisdiction of AJS Mechanisms and the operational doctrines of interaction. • Train Practitioners of AJS and the public on the appropriate jurisdiction for AJS Mechanisms.. • Promote robust cooperation and harmony between AJS and the Court system. • Support communication policies and initiatives in both State and non-State for the dissemination of AJS information. • Facilitate Judicial colloquia on AJS.	• Constitution of a Standing Committee on AJS to shepherd the process of harnessing consensus on the need for a statute. • Increased number of cases documented • Increased public awareness	• Standing Committee on AJS Constituted • State and non-State actors reports • Legal framework including Policy, Law, regulations' and Amendment acts, administration tools and documents. • Gazette Notice(s). • CUC Minutes and NCAJ reports. • Baseline survey report • Information Education and Communication/ Behaviour Change Communication materials • Radio, TV and social media channel talk shows and infomercials	• Judiciary • JTI • JSC • CUCs • CSOs • ODPP • County Administration • National administration • Community justice institutions • Media • Parliament • Lawyers • Paralegals • Probation and aftercare • Academia • Professional bodies • Office of the Attorney General • Kenya Prisons Service • National Police Service
3. Enhanced stakeholder and peoples' involvement in cases of public interest and concerns of aggrieved parties	• Create and explore internship, attachment and learning opportunities. • Work with CUCs on work plan for operationalization of AJS.	• Increased number of academic institutions and professional bodies engaging, mooting and writing on AJS • Increased involvement of AJS actors in CUCs		

Strategic Objective 1: To recognize and identify the nature of cases AJS can hear				
Outcome(s)	**Policy action / activities**	**Intermediate results**	**Verifiable Indicators**	**Actors**
4. Enhanced efficiency and effectiveness of the justice system	• Formulate and publicize an integrated referral mechanism (tools and protocols). • Promote the use of technology in case management and AJS. • Promote transitional and restorative justice. • Promote the documentation of best AJS practices and case catalogue.	• Increased use and publicization of tools created for use in AJS • Bi-annual colloquia and trainings for AJS practitioners • Publication of AJS case digest • Use and development of apps for AJS • Reduced number of complaints of officers on the basis of inefficiency and/or incompetence by decision makers.	• Standing Committee on AJS Constituted • State and non-State actors reports • Legal framework including Policy, Law, regulations' and Amendment acts, administration tools and documents. • Gazette Notice(s). • CUC Minutes and NCAJ reports. • Baseline survey report • Information Education and Communication/ Behaviour Change Communication materials • Radio, TV and social media channel talk shows and infomercials	• Judiciary • JTI • JSC • CUCs • CSOs • ODPP • County Administration • National administration • Community justice institutions • Media • Parliament • Lawyers • Paralegals • Probation and aftercare • Academia • Professional bodies • Office of the Attorney General • Kenya Prisons Service • National Police Service
5. To promote use of Court-annexed AJS systems to resolve disputes. To strengthen autonomous and third party institution.	• Strengthened capacity of Court annexed AJS to deliver justice. • Deepened knowledge or understanding on AJS practices. • Increased appreciation of role of autonomous and third party institution annexed AJS systems in dispute prevention and resolution		• AJS public information materials; Gazette notices, posters etc.	• Academia • Kenya Law Reports • JTI • Judiciary

Strategic Objective 2: Strengthening the Processes for selection, election, appointment and removal of AJS practitioner				
Outcome	**Policy actions/Activities**	**Intermediate results**	**Verifiable indicators**	**Actors**
1. Enhanced selection, election, appointment and removal procedures for competent and capable AJS practitioners	• Deploy a recruitment, retention and training and continuous practitioner development manuals and guidelines • Provide a competitive motivation and remuneration package. • Develop appropriate procedures, policies and strategies for AJS practitioners	• Competent, capable and inclusive AJS practitioner • Inclusion of women, youth and PWD as AJS practitioners	• Manual, guidelines, policies, • Casebook(s), • Database • Media reports • State and State actors reports	• Judiciary • JTI • JSC • CUCs • CSOs • ODPP • County Administration • National administration • Community justice institutions • National Council of Elders • Media • Lawyers • Paralegals • Probation and aftercare • Academia • National Council for Law Reporting • Constitutional Commission and other independent offices • Professional bodies • Office of the Attorney General • Ministry of culture, sports and art • Ministry of gender
2. Enhanced outcomes by AJS practitioners that comply with the rule of law and human rights principles	• Undertake capacity assessment and develop a database of existing AJS practitioners (personnel, competencies, training) • Develop a mentorship and skills transfer program • Develop substantive and procedural manuals and bench books • Develop effective and continuous interventions to include vulnerable and marginalised individuals • Develop intermediary practice guide	• Reduced number of cases, reviewed, appealed or overturned by the High Court or the Court of Appeal • Increased satisfaction rates by users of all AJS processes.		
3. Enhanced environment of trust and legitimacy of the practice of AJS.	• Define and implement indicators for quality service delivery • Develop complaints, feedback and accountability mechanisms • Sensitize and educate stakeholders and users on AJS dispute prevention strategy • Develop early warning conflict detection mechanisms and strengthen community and AJS linkages			

Strategic Objective 3: Develop procedures and customary law jurisprudence				
Outcomes	**Policy actions/activities**	**Intermediate results**	**Verifiable indicators**	**Actors**
1. Enhanced access to and administration of justice infrastructure	• Conduct research and document AJS best practices and cases • Adopt structural interventions to address barriers in accessing justice • Formulate standard operating procedures that encourage and promote due process • Promote expeditious resolution and enforcement of AJS outcomes • Translate procedures and practice toolkits into local languages and useable formats	• Improved use of AJS as a means to access justice.	• Research reports • Cases • Case digests • Operating procedures • Policies • Articles and journals on jurisprudence	• Academia • Kenya Law Reports • Judiciary • CSOs • Lawyers • ODPP • Parliament • County assemblies • Paralegals • Attorney General ('AG') • Local Administration • CUCs • Council of Elders • Ministry of culture, sports and art • Ministry of gender
2. Enhanced compliance with the Constitution and human rights principles	• Develop a human rights based approach manual for AJS practitioners • Periodic audit of AJS decisions and practices • Identify, document and respond to harmful traditional practices. • Develop and disseminate information on harmful traditional practices. • Promote dialogue, debate and negotiation to eliminate harmful social and cultural practices. • Train human rights defenders and paralegals to address harmful cultural practices. • Develop innovate approaches and interventions for HCP survivors e.g. safe houses	• Increased knowledge and application of equality norms and principles.	• Manuals • Audit reports • IEC and BCC materials	
3. Enhanced application of customary law and practice	• Map and engage with stakeholders to document customary law and practice • Integrate the use of customary law in law reform and policy development • Use comparative customary law jurisprudence to develop measures that address the repugnancy clause • Develop a systematic reporting structure with the National Council of Kenya Law and Court registries.	• Increased confidence in AJS processes • Positive attitude by users and non-users of AJS • Increased use of customary law jurisprudence	• Customary law and AJS Cases digest • Customary law and AJS database • Laws and policies	

Strategic objective 4: Facilitate effective intermediary interventions

Outcomes	Policy actions/activities	Intermediate results	Verifiable indicators	Actors
1. Enhanced awareness of the role and place of intermediaries in the administration of justice.	• Identify and create a database of intermediaries. • Promote open days and AJS service weeks.	• Increased use of intermediaries. • Increased recognition of intermediaries by justice actors.	• Database • Training manuals and curriculums • Reports by State and non-State actors • Guidelines and regulations • Media reports	• Academia • Kenya Law Reports • Judiciary • Judiciary Training Institute • CSOs; FIDA, Cradle, CREAW, COVAW, LRF, Kituo Cha Sheria, Katiba Institute. • NLAS • ODPP • Parliament • County assemblies • Paralegals • Attorney General ('AG') • Local Administration • CUCs • Council of Elders • Ministry of Education • Kenya School of Government • Ministry of Public Service, Youth and Gender Affairs • Professional bodies • Constitutional commissioners and other independent commissions
2. Developed infrastructure to encourage use of intermediaries.	• Develop rules and regulations that support intermediary participation in AJS. • Develop a self-representation curriculum and manual. • Conduct a capacity assessment of intermediary skills and competencies. • Develop a code of conduct for intermediaries. • Develop practice guidelines/toolkits for intermediaries. • Facilitate training and learning exchange for intermediaries. • Develop and implement feedback/public satisfaction M&E mechanisms.	• Adoption and review of training manuals and curriculums. • Robust community of competent intermediaries. • Increased knowledge on roles and practices of intermediaries by AJS users.		
3. Enhanced promotion and protection of the rights and voices of the vulnerable and marginalized.	• Identify and develop appropriate responses to the infrastructural needs of lay and disadvantaged individuals. • Identify and designate State and non-State organs as a friend of AJS in the interest of justice.	• Increased satisfaction rates by AJS users. • Increased number of vulnerable protected and voices heard. • Increased number of cases supported by intermediaries.		

Strategic Objective 5: Strengthened and sustainable resource allocation and mobilization				
Outcomes	**Policy actions/activities**	**Intermediate results**	**Verifiable indicators**	**Actors**
1. Strengthened capacity of communities to manage their own affairs in the administration of justice	• Identify and document community resources. • Quantify community resources and cultural artefacts.	• Recognition of cultural contribution.	• Reports • Budgets • Database of cultural artefacts • Work plans • Recognition awards	• Academia • Judiciary • CSOs • NLAS • ODPP • Parliament • County Assemblies • Paralegals • Attorney General (AG) • Local Administration • CUCs • Council of Elders • Ministry of Culture, Sports & Art • Ministry of Public Service, Youth and Gender Affairs • Professional bodies • Constitutional commissioners and other independent commissions • Auditor General • Controller of Budget
2. Targeted allocation of resources for the promotion of AJS	• Conduct a resource gap analysis to identify the needs of AJS. • Prioritize areas of funding for resource allocation. • Identify resource mobilization opportunities, both State and non-State • Design an evidence based resource allocation programme	• Increasingly stable and predictable allocation of resources. • Visible and capacitated AJS mechanisms.		
3. Optimal utilization, flexibility and accountability in the use of public resources for AJS.	• Develop mechanisms for resource accountability and monitoring of utilization.	• Increased accountability in use of public resources. • Financial prudence for the administration of justice	• Auditor General's report • Controller of Budget's reports	

10.

Moving forward and conclusion

262. The formal recognition of AJS is only a first step in animating them. The task ahead is to implement this Policy. This role cannot be left entirely to the AJS frameworks. Both the State Agencies identified in this Policy – including the Judiciary as the primary duty bearer – as well as all other defenders of human rights must play their rightful roles. It is important to ensure that this Policy keeps track of current events. It needs to be updated on a regular basis to ensure its enduring relevance. A review every two years would ensure compliance with this basic requirement.

263. For optimal and targeted implementation of the Policy, the Taskforce recommends that the task of shepherding and monitoring the implementation of the Policy, the Judiciary forms and appoints a Standing Committee on Alternative Justice System. It is envisaged that the main mandate of the Standing Committee in the first four years will be the following:

i. First, to undertake the primary task of leading the didactic human rights engagement envisaged in this Policy as a mode of transforming Alternative Justice Systems in Kenya by capacitating the different actors – primarily the AJS Mechanisms – on the Human Rights Framework and minimum constitutional requirements as well as foster conversations between Judicial Officers and their interlocutors on the dialogic and social jurisprudence needed to fulfil the Judiciary's mandate under the Human Rights Obligation presented in this Policy as a means to protect and advance the transformative vision of the Constitution of Kenya of freedom, inclusive equality, democracy, distributive justice and access to justice, and practices that reverse social structures which perpetuate oppression, discrimination and stigma;

ii. Second, to consolidate emerging consensus on various aspects of AJS outlined in this Policy with a view to determining if a statute is recommended as the best way to guide the protection, respect and transformation of AJS in the country;

iii. Third, to lead, shape, and frame conversations on AJS in Kenya and to monitor and map progress and retrogressions (if any) and where appropriate act as a resource in the field as well as assist various actors in implementing this Policy in meeting their obligations to protect, respect and transform AJS; and

iv. Fourth, to mobilize and rationalize resources to do the three tasks above.

264. Due to the nature of the tasks that need to be prioritized, the Taskforce recommends that the Standing Committee be technically housed at the Judiciary Training Institute (JTI) given its triple mandate of transforming the Judiciary through training, constructive engagement (with other actors in the justice sector) and policy development. It is further recommended that the Standing Committee to have a formal reporting requirement to the Honourable Chief Justice twice a year. Finally, it is

recommended that given the stakeholders involved in the venture to animate AJS in the vision of the Constitution, that the Honourable Chief Justice formally tables the reports of the Standing Committee before the National Council for the Administration of Justice (NCAJ) for discussion and possible appropriate action.

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A.

Annex I: Comparative analysis of AJS in select jurisdictions

Country		Mode of AJS Practise		AJS Model Applied
• Uganda	• *Local Council Courts Act*, 2006	• Different tribes have a system of regulation of community rules led by a council of elders. For example the *Akiriket* (in Karamoja), and the *Arriget* (among the Iteso). The Iteso also have a cultural leader, clan leaders, chiefs, clans and sub clans who deal with offenses domestically and communally.	• Local Council Courts ('LCC') were initially set up where official judicial institutions were absent. They are now officially incorporated into the lower Court system with a right to appeal to a Magistrate's Court. • They also carry out local government functions. The Ministry of Justice and the Ministry of Local Government jointly supervise the LCC.	• 3 Models Applied: • Autonomous AJS, • Third-Party, and • Regulated AJS.
• Rwanda	• During the genocide, Rwanda incorporated an informal justice system through the *Gacaca* Courts and *Komitez'Abunzi* (mediation committees). • They were fully recognized under the law—see for instance, Organic Law modifying and complementing Organic Law nº 16/2004 of 19/06/2004 establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994. • The *Abunzi* system's restorative approach in conflict resolution helps people address their conflicts without resorting to litigation and other retributive approaches.	• *Gacaca* traditionally processed reconciliation and the restoration of communal harmony. They operated to varying degrees from 1997 until 2012. • They were fully recognized under the law. • The *Gacaca* Courts were vested with jurisdiction over crimes related to the 1994 genocide. They also dealt with assault and battery; land issues (boundary demarcation and encroachment); inheritance; civil responsibility; debt repayment; contracts; theft; and family disputes. • *Abunzi* presided over cases such as land disputes, civil disputes and, in some instances, criminal cases. • These committees have received extensive donor support for informal justice related initiatives.	• The government of Rwanda has adapted the traditional dispute resolution mechanism, to process the backlog of genocide related cases. • The State is not the only actor but is one of a number of socio-political orders that provide governance and regulate processes of conflict management.	• 3 Models Applied: • Autonomous AJS, • Third-Party, and • Regulated AJS.

Country	Mode of AJS Practise			AJS Model Applied
• Ghana	• The role of chiefs is well recognized. • Constitution authorizes formal Courts to apply both statutory and customary law in resolving disputes. • The Kumasi Traditional Council also has statutory authority. • The *Courts Act* of 1993, provided that customary law can be applied by State Courts as long as the rules meet the requirements of "equity and good conscience" and they are not incompatible with any existing statutory law. • The *Alternative Dispute Resolution Act* (2010) also contains provisions for resolution of customary arbitration.	• Highest traditional Courts for the Ashanti are the Asanteman Council and the Kumasi Traditional Council, both of which are presided over by the King of the Ashanti. • Matters that frequently come before local traditional authorities and Chiefs address issues considered as matters of private law, such as land disputes, conflicts affecting chieftaincy, and family law matters, such as marriage and its dissolution, succession issues and custody matters. • The Asanteman Council hears cases related to matters governed by customary law and has jurisdiction over all Ashanti. • The Kumasi Traditional Council has jurisdiction to hear and determine all matters affecting chieftaincy in the Kumasi Metropolitan Area as well as portions of the Ashanti and Brong Ahafo Regions. • The Asanteheman Court hears cases of social and personal conflict involving women, such as matters of curses, insults, accusations of witchcraft or disputes over land use or labour contribution.	• The proceedings of these tribunals are videotaped and some are later transcribed. • The informal system has been of significant interest to donors. United States Agency for International Aid (USAID) is seeking to eliminate "harmful traditional practices," that are frequently manifested in the informal legal system. It sponsors research and seeks to partner with relevant State institutions to try and eliminate harmful practices in Ghana.	• 3 Models Applied: • Autonomous AJS, • Third-Party, and • Regulated AJS.

Country	Mode of AJS Practise			AJS Model Applied
• South Sudan	• The *South Sudanese Local Government Act* of 2009 provides a detailed prescription on customary Court organization.	• Most disputes are addressed locally or within extended family units, when it fails next step for the disputants is to go to Court headed by an officially recognized member of the traditional leadership. • There are customary Courts divided into A, B, and C Courts with varying levels of formality. • Customary law Courts require that individuals present their arguments without the specialized assistance of trained advocates. • An example is the *Agrima* or *Majlis* headed by religious leaders where most important issues, particularly conflicts, are discussed and resolved both between clans within the same tribe and/or between two or more different tribes.	• Legally, all customary Courts have limited jurisdiction and are subject to review by State Courts. • The informal justice sector has been of significant donor interest. The United Nations Development Programme (UNDP) has been supporting a number of transitional justice dialogues of the informal justice system, but there is little prospect of UNDP or other donors dramatically scaling up work in this area since conflicts are so active.	• 3 Models Applied: • Autonomous AJS, • Third-Party, and • Regulated AJS.
• Botswana	• *Customary Law Act* governs application of customary law in actions before Court.	• The customary Court system in Botswana is significantly more independent from the State than many incorporated informal justice systems in other States.	• Wide latitude has been given to Courts in Botswana to make decisions. • There are also strong provisions for protection of customary law.	• 3 Models Applied: • Autonomous AJS, • Third-Party, and • Regulated AJS.
• South Africa	• In coming up with new the Constitution of South Africa, the provisions of section 166(e) and section 16(1) of Schedule Six of the Constitution to find that section 16(1) included traditional Courts by recognizes. • The *Traditional Courts Bill* extends jurisdiction to traditional Courts in both civil and criminal cases. • *Black Administration Act* regulated how customary Courts functioned.	• The Courts were divided into Courts of chiefs and Courts of headmen. • The kings, queens, principal traditional leaders, senior traditional leaders, headmen and headwomen were recognized.	• When properly deployed, sound jurisprudence can develop from this regime.	• 3 Models Applied: • Autonomous AJS, • Third-Party, and • Regulated AJS.

ALTERNATIVE JUSTICE SYSTEMS POLICY FRAMEWORK

- i. Jurisdiction and Vulnerabilities
- ii. Relationship with Courts and Procedure of Appointment for AJS Agents
- iii. "Conflict" in Culture and Procedures
- iv. Representation and Enforcement
- v. Finance and separation of Power
- vi. Sustainability

Justice Related Human

Justice Deficit Puzzle

Environing Factors

Alternative Justice System (AJS)

- I. **SOCIAL** Social attitudes, behaviours and trends that may have an impact on AJS
- II. **POLITICAL** Refers to political or politically motivated factors
- III. **ENVIRONMENTAL** Refers to environmental forces
- IV. **ECONOMIC** Refers to economic forces that may impact AJS
- V. **LEGAL** Refers to legal and regulatory factors
- VI. **TECHNOLOGICAL** Technological factors that can affect the AJS process

Imperatives

01 **ACCESS TO JUSTICE**
AJS is a system of justice that is compatible with the everyday existence of the people

02 **EFFECTIVENESS AND EFFICIENCY**
Only 21% went to Court to resolve the dispute in 2018;

03 **THE CONSTITUTIONAL OBLIGATION**
Article 159(2)(c) as the self-executing En- forcement of the Right to Culture (Arts. 11 and 44)

04 **SOCIAL ENGAGEMENT**
Trust is higher in non-public justice institutions than in public justice institutions

05 **COMPETENCE**
The courts lack technical competence to ascertain certain aspects of customary law

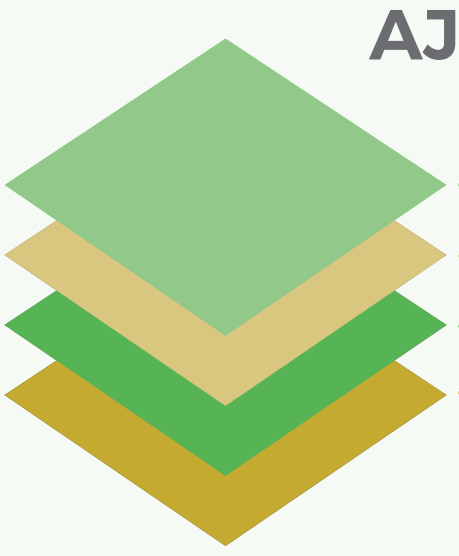
06 **NEED FOR A DIFFERENT KIND OF JUSTICE**
Restorative justice as an alternative to formal courts methods of justice

07 **CIVIC AUTONOMY**
The Traditional as rational and judicial authority is derived from the people

AJS Human Rights Framework

- **RESPECT**
- **PROTECT**
- **TRANSFORM**

AJS Typologies



- 04 REGULATED AJS INSTITUTIONS
- 03 AUTONOMOUS AJS INSTITUTIONS
- 02 THIRD-PARTY INSTITUTION ANNEXED
- 01 COURT-ANNEXED AJS INSTITUTIONS

Models of judiciary interaction

- DEFERENCE
- RECOGNITION AND ENFORCEMENT
- FACILITATIVE INTERACTION
- CONVERGENCE
- MONISM
- AVOIDANCE

STRATEGIC ACTION

SO1
TO RECOGNIZE AND IDENTIFY THE NATURE OF CASES AJS CAN ADJUDICATE

i. Describe the different mechanisms of accessing justice.

ii. What kind and type of cases should be heard through AJS?
   a. Agency theory
   b. Voluntariness as a factor

iii. The special problem of criminal cases and the role of the DPP

iv. How do you ensure that constitutional values are adhered to? How to protect vulnerable groups including women, children, PWDs?

v. How do you identify and respond to "harmful" traditional/ cultural practices?

SO2
STRENGTHENING THE PROCESSES FOR SELECTION

i. Who should select or elect the "elders"/providers/practitioners, and what should be the appointment criterion?

ii. How do we ensure the inclusion of women and other marginalized groups and how do we address the interests of women, children, and the vulnera- ble and marginalized groups in AJS processes?

iii. What is the appropriate role of National Administration/ Interior/ County administration (Police; Chiefs; Ward Administration)

SO3
DEVELOP PROCEDURES AND CUSTOMARY LAW

i. Should there be minimum procedural requirements for AJS sessions? Should these standards be provided for in the law?

ii. How do we ensure constitutional values are adhered to and "harmful" traditional practices eliminated?

iii. How do you keep African Customary Law evolving, living and relevant rather than ossifying it?

SO4
FACILITATE EFFECTIVE INTERMEDIARY INTERVENTION

i. Should lawyers and paralegals participate in sessions?

ii. How does the team ensure Enforcement of its AJS decisions?

SO5
STRENGTHENED AND SUSTAINABLE RESOURCE ALLOCATION AND MOBILIZATION

i. Who and how shall be AJS be facilitated financially and logistically?

ii. What shall be the role of the ministry for interior and Internal coordination (Police; Chiefs, etc)?

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