

**MAINSTREAMING ALTERNATIVE JUSTICE SYSTEMS FOR
IMPROVED ACCESS TO JUSTICE:
LESSONS FOR KENYA**

BY

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DECLARATION

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DEDICATION

To Mrs. V. M. R. Mwachanya-Okalo, whose dreams for me resulted in this achievement.

ACKNOWLEDGEMENTS

To God Almighty! Without His grace and blessings, this achievement would have been impossible.

This work would not have been presented as it is without the invaluable guidance and support from my supervisor, Mr. Kennedy Ogutu. I remain grateful for his assistance and the ideas he contributed to my quest for knowledge and the writing of this thesis.

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Mary Kinya Rukwaru v DPP & Anor [2016], eKLR

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R v Abdulahi Noor Mohammed (alias Arab) [2016], eKLR

R v Leeras Lenchura [2012], eKLR

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R v Musili Ivia & Anor, Garissa Criminal Case No. 2 of 2016, eKLR

LIST OF ABBREVIATIONS

ACCORD	African Centre for the Constructive Resolution of Disputes
ADR	Alternative Dispute Resolution
AJS	Alternative Justice Systems
CIDP	County Integrated Development Plan
CSO	Community Service Order
CUC	Court Users Committee
FIDA	Federation of Women Lawyers
HiL	Hague Institute for Innovation of Law
HRBA	Human Rights-Based Approach
ICJ	International Commission of Jurists
IDLO	International Development Law Organisation
IJS	Informal Justice Systems
JTF	Judiciary Transformation Framework
JLOS	Justice Law and Order Sector
JSC	Judicial Service Commission
KNHR	Kenya National Human Rights
KRA	Key Result Area
LAPSSSET	Lamu Port, South Sudan, Ethiopia Transport Corridor
LRA	Lord's Resistance Army
NCAJ	National Council for the Administration of Justice
NTJP	National Transitional Justice Policy
ODPP	Office of the Director of Public Prosecution
PEV	Post -Election Violence
PILPG	Public International Law and Policy Group
SJT	Sustaining Judiciary Transformation
TDRM	Traditional Dispute Resolution Mechanisms
TJS	Traditional Justice Systems

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List of Statutes (Kenya)

Civil Procedure Rules, 2010
Constitution of The Republic of Kenya, 2010
Criminal Procedure Code, CAP 75
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African Charter on Rights and Welfare of Child (ACRWC)
International Covenant on Civil & Political Rights (ICCPR)
International Covenant on Economic, Social & Cultural Rights (ICESCR)
The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa.
Universal Declaration on Human Rights (UDHR)
United Nations Convention on Rights of Child (UNCRC)

CHAPTER ONE

INTRODUCTION

1.1. Background

Kenya's retired Chief Justice Dr. Willy Mutunga shocked many in Kenya and abroad when he urged Kenyans to solve their disputes through witchdoctors rather than the courts.¹ Although the reference to witchdoctors must have been made in jest given that the practice of witchcraft is outlawed², the Chief Justice was emphatic that Kenyans needed to exhaust the numerous dispute resolution mechanisms that exist outside the courts before turning to the formal courts with their disputes.

Dr. Mutunga was speaking in early 2014 during a ceremony to unveil a new court building constructed in Kiambu County with funding from the World Bank whose support had enabled the Judiciary to expand its court network across the country. In the months and years following his retirement, his successor also unveiled more court buildings funded both by the World Bank and the Government of Kenya's own revenues in line with the Judiciary's ambitious plans of having at least one High Court in each of the 47 Counties.³

¹ 'Before You Go to Court, Ask the Witchdoctor, says Kenya's Top Judge' *Reuters* (London, 25 March, 2014) <www.reuters.com/article/us-kenya-judiciary/before-you-go-to-court-ask-the-witchdoctor-says-kenyas-top-judge-idUSBREA201IU20140325> Accessed 1 July, 2017, 'Witchdoctors Can Resolve Your Issues, CJ Willy Mutunga says' *Daily Nation*, (Nairobi, 26 March, 2014) <www.nation.co.ke/counties/kiambu/witchdoctors-Chief-Justice-Willy-Mutunga-/1183274-2258620-87x8bw/index.html> accessed 1 July, 2017.

² The practice of witchcraft is outlawed in Kenya under the Witchcraft Act, Cap 67 Laws of Kenya although the Kenya Law Reform Commission has recommended the review of the law, citing examples from Britain, Australia, Tanzania and South Africa. See KLRC, 'Justification for Review of Witchcraft Act, Cap 67' (KLRC, 23 January 2017) Available at <www.klrc.go.ke/index.php/klrc-blog/518-justification-for-review-of-witchcraft-act-cap-67%3E> accessed 8 March 2018.

³ 'The CJ Launches High Court Building in Kakamega' (The Judiciary, 14 February 2018) <www.judiciary.go.ke/the-chief-justice-launches-high-court-building-in-kakamega/> accessed 21 February 2018, 'Court construction by JPIP at different stages' (The Judiciary 17 May 2018) <www.judiciary.go.ke/court-construction-by-jpip-at-different-stages/> accessed 21 May 2018.

But even with the expanded court network, Kenya's Judiciary continues to struggle with a huge caseload resulting in part from over-reliance of Kenyans on the formal judicial system to solve all manner of cases, including those that are best handled out of court.

As such, Dr. Mutunga also urged Kenyans to approach their mosques, churches and elders to resolve their disputes.⁴

Four years after Dr. Mutunga's infamous remarks, Kenya's Cabinet Secretary for the Interior issued a stern warning to government administration officers who promoted the use of Islamic *Maslaha* Courts in the resolution of cases involving sexual offences such as rape in Wajir County.⁵ The Cabinet Secretary was speaking a few days after reports emerged that a 15-year-old girl had been gang raped in Habaswein settlement, Wajir County and that local government officials, community and religious elders reverted to *Maslaha* as a way to resolve the rape case.⁶

His remarks were echoed by a section of Wajir County Leaders, including the Governor and the leader of Majority in the National Assembly,⁷ as well as a nominated member of the Garissa County Assembly who indicated that she would table a motion that would ban the use of *Maslaha* to settle rape cases in the area.⁸

⁴ *Ibid*, n.1.

⁵ Wahome Gitonga, 'Matiang'i Warns Against Community Resolutions in Rape Cases' *Citizen* (Nairobi, 27 February 2018) < <https://citizentv.co.ke/news/matiangi-warns-against-community-resolutions-in-rape-cases-192128/>> accessed 8 March 2018.

⁶ Bruhan Makong 'Three Men Gang-rape 15-year-old Girl in Wajir' *Daily Nation*, (Nairobi, 23 February 2018) www.nation.co.ke/counties/wajir/Girl-gang-raped-by-three-men-in-Habaswein%20Wajir/34447904316922-4ialbc/index.html > accessed 8 March 2018.

⁷ Bruhan Makong 'Wajir Leaders Condemn Use of Maslaha to Resolve Rape Cases' *Daily Nation*, (Nairobi, 26 February 2018) <www.nation.co.ke/counties/wajir/Use-of-maslaha-to-resolve-rape-cases/3444790-4320604-dt3yxp/index.html> accessed 8 March 2018.

⁸ 'MCA Wants Use of Maslaha in Rape Cases Banned' *Citizen*, (Nairobi, 8 March 2018) Available at < <https://citizentv.co.ke/news/mca-wants-use-of-maslaha-in-rape-cases-banned-193132/>> accessed 8 March 2018.

The remarks from Dr. Mutunga on the one hand and those from Dr. Matiangi as echoed by the Wajir County leadership on the other hand illustrate the tense relationship between the state and non-state judicial systems in Kenya.

Dr. Mutunga's remarks echoed the provisions of the 2010 Constitution which places upon the Judiciary the responsibility to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.⁹

In line with this obligation, the Kenyan Judiciary has put in place several measures aimed at promoting the use of formal ADR mechanisms in the resolution of disputes, particularly through arbitration and mediation.

The Judiciary has also noticed the potential of AJS in improving access to justice for Kenyans and has rolled out an initiative aimed at increasing the uptake of these alternatives. Although these mechanisms are largely practiced in Kenya, they still operate in the periphery of formal systems. AJS is treated as 'alternative' to formal systems and it is for this that this paper seeks to suggest ways of improving and mainstreaming AJS.

Mainstreaming in this context means 'to integrate into/or work with the formal system'¹⁰ AJS should be incorporated or 'normalized' into with the legal system in order to promote access to justice.¹¹

Against this background, this paper examines the place of AJS in improving access to justice by drawing comparisons with other jurisdictions that have embraced AJS with a view to making recommendations on how Kenya can mainstream AJS in its judicial system for enhanced access to justice for all.

⁹ Constitution of Kenya 2010, Article 159(2) (c).

¹⁰ Paul coves, 'Alternative or Mainstream? It is Time to Take the 'A' out of ADR' (2015) Proctor, p.43.

¹¹ Joachim Zekoll, Moritz Balz, Iwo Amelung, Formalisation and Flexibilisation in Dispute Resolution (Leid Boston BRILL NIJHOFF 2014) p.136.

1.2. Statement of the Problem

The problem this paper sought to address was whether access to justice should only be limited to formal institutions. Access to justice in many countries has for a long time been limited to the formal courts and tribunals, also known as the state judicial system. As a result, the public perceives access to justice through AJS as an inconclusive and unsustainable method¹². However, the formal judicial system is fraught with challenges for many would-be litigants. Whereas some are not able to access the formal system altogether, many of those who interact with the formal system leave with unsatisfactory outcomes. Other challenges include, time constraints, lack of court filing fees, among other challenges.¹³ For these reasons, many have resorted to AJS, hence, this is an area that should be mainstreamed and accepted broadly rather than by small portions of the Kenyan and African population.

It is only recently that development partners have begun paying some attention to non-state justice systems.¹⁴ Additionally, non-state justice institutions have a great deal of attention in jurisprudence lately.¹⁵ This is despite the fact that many jurisdictions have a pluralist system where many legal systems exist side by side.¹⁶ The relationship between the formal state system and the non-state justice systems exists along a broad spectrum: one end of the spectrum the model of relationship involves the state outlawing and suppressing the non-state justice system, while at the other end the model involves

¹² ICJ Kenya and USAID, 'Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the New Constitution', 2002, vol III < https://pdf.usaid.gov/pdf_docs/pnacw006.pdf > accessed 19 November 2019.

¹³ *Ibid.*

¹⁴ Matthias Kötter, 'Non-State Justice Institutions: A Matter of Fact and a Matter of Legislation' (2015), In: Kötter M., Röder T.J., Schuppert G.F., Wolfrum R. (eds) *Non-State Justice Institutions and the Law. Governance and Limited Statehood*. Palgrave Macmillan, London.

¹⁵ Matthias Kötter, 'Non-State Justice Institutions: A Matter of Fact and a Matter of Legislation' (2012), SFB-Governance Working Paper Series, No. 43, Collaborative Research Center (SFB), 700.

¹⁶ Miranda Forsyth, 'A Typology of Relationships Between State and Non-State Justice Systems' *Journal of Legal Pluralism and Unofficial Law* (2007), vol. 56, p. 67 – 112.

the state incorporating the non-state justice system into the state legal system.¹⁷

The drafters of the Constitution of Kenya recognized the limitations of the formal system and imposed on the Judiciary the responsibility to promote AJS in the resolution of disputes. Despite this express mandate given by the Constitution, the Judiciary has not done much in promoting AJS. As such, existing initiatives are haphazard and uncoordinated with no mechanisms in place to replicate the successes of the few pilots that have shown promising results.

The Judiciary, has instead focused on building the capacity of the formal judicial system, a strategy that has been marked by the construction of new courts around the country over the past five years.¹⁸

The Judiciary's expansion strategy is problematic in two ways. One, it focuses largely on the formal judicial system which remains out of reach for a majority of Kenyans, as demonstrated by the HiiL report¹⁹ which revealed that only 11% of disputes are resolved through the courts.²⁰ In most parts of the country, court buildings are inaccessible to many due to the vast distances to the courts, particularly in Northern Kenya where poor road networks, inclement weather and poverty combine to ensure most residents cannot access the courts. In these parts, elders and other informal mechanisms are more accessible and should be supported as opposed to the formal judicial system.²¹

Secondly, the Judiciary's expansion strategy focuses on building more High Court stations so that there is one High Court in each of the 47 Counties despite the fact that the vast majority of disputes

¹⁷ *Ibid.*

¹⁸ 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 Corporation and Coordination between the Various Actors' (2011), p.29 < www.humanrights.dk/files/media/billeder/udgivelser/legal_aid_east_africa_dec_2011_dihl_study_final.pdf > accessed 18 November 2019.

¹⁹ HiiL Report, 'Justice Needs and Satisfaction in Kenya' (2018) < www.hiil.org/wp-content/uploads/2018/07/hiil-report_Kenya-JNS-web.pdf > accessed 18 November 2019.

²⁰ *Ibid.*, p.60.

²¹ *Ibid.*, n.18, p.30.

pending in the formal judicial system are before the lower level courts.²²

Even as the state shuns these informal institutions, they are perceived by local populations as legitimate institutions²³ whose decisions are as binding, if not more, than the state institutions. There is also need for the Judiciary to examine ways of mainstreaming AJS to increase its use and to enhance the quality of justice emanating from AJS. Without such interventions, AJS will remain on the periphery of the judicial system, a situation that is reminiscent of the colonial days when local customs, rules and institutions of governance were deemed as impervious to justice and morality.

1.3. Research Objectives

The main objective of the study is to examine the role of AJS in improving access to justice and to recommend ways in which Kenya can mainstream AJS within its broader legal and justice system.

More specifically, the study seeks to:

- i. Examine the extent to which AJS is important to access to justice vis a vis the formal justice system.
- ii. Examine the efficacy of existing legal, policy and institutional framework for AJS and access to justice.
- iii. Analyze the extent to which AJS is in practice in Kenya and compare the same with other jurisdictions.
- iv. Recommend strategies for mainstreaming AJS within the Kenyan justice system.

²² *Ibid*, n.17.

²³ Tilmann J. Röder, 'Informal Justice Systems: Challenges and Perspectives, in Innovations in Rule of Law': A Compilation of Concise Essays, Juan Carlos Botero et al., eds, (2012), *See* HiiL Report, *Ibid*, n.19.

1.4. Research Questions

In line with these objectives, this study seeks to answer the following questions:

- i. What has been the impact of AJS on access to justice?
- ii. What is the legal framework on AJS and access to justice?
- iii. To what extent is AJS practiced in Kenya and other countries?
- iv. What reforms are necessary to ensure that AJS adequately provide for access to justice?

1.5. Hypothesis

That Kenyan Constitution recognizes, alternative justice systems such as a TDRM.²⁴ This in essence connotes the fact that AJS plays a vital role in terms of promotion of access to justice. Despite this fact, AJS have been given little or no attention whilst on the other hand, the formal justice systems continue to bloom. In this case, the Judiciary has to an extent limited access to justice to the formal institutions, which also faces many inaccessibility challenges. These challenges hinder access to justice processes especially for the poor communities. There is therefore a need to be keen on AJS and change the public perception who have been brain washed to rely on courts for justice. There is need to broaden the perspective of AJS as an effective, feasible, accessible and sustainable means of justice.

Alternative Justice systems have a great impact on promoting access to justice both in Kenya and in other countries which shall be discussed in chapter 4 of this paper. Rwanda for example, has enacted various statutes that adequately provide for the use of AJS. Kenya is yet to enact or adopt regulations that mainstream use of AJS.

²⁴ Article 159(C).

1.6. Theoretical Framework

1.6.1. Legal Pluralism / Theory of the Living Law.

Legal pluralism is the existence of multiple legal systems within one geographical area.²⁵ In Kenya, legal pluralism can be demonstrated by the existence of legal systems such as customary law, sharia law, common law. This theory advocates for different forms of law be used to deal with different types of disputes.²⁶ For example, family disputes can be resolved using traditional/informal law whilst commercial disputes can resort to common law principles. These various forms of legal systems may have different procedures, guidelines, penalties, norms, styles and orientations which causes diversity in dispute resolution processes.²⁷

Recognition of various forms of legal systems improves access to justice.²⁸ Access to justice should be flexible and parties to a dispute should be at liberty to select a system/platform in which to solve their dispute. A state should not restrict access to justice to one system.

It should not be an essential element of the concept of law that it (law) be created by the state. Law is a question of social order found anywhere and therefore the state should not have monopoly over the law.²⁹ Different social fields and communities can formulate their own set of norms and sanctioning mechanisms.

1.6.2. Restorative Justice Theory

This theory considers crime or wrongdoing to be an offence against an individual or community and not to the state. For this reason, restorative justice theory advocates that for crimes to

²⁵ Margaret Davies, *The Oxford Handbook of Empirical Legal Research*, (Oxford Handbooks 2010), available at < www.oxfordhandbooks.com > accessed 10 April 2018.

²⁶ *Ibid.*

²⁷ Brian Tamanaha, 'Understanding Legal pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375.

²⁸ *Ibid.*, n.25, p.25.

²⁹ Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, (Walter Moll tr, Harvard University Press, 1936), 451.

be solved effectively, both the offender and the victim should take part in the resolution process.

AJS while settling disputes involve the families and the community as a whole, this offers a more reconciliatory approach. Through this method, the AJS hence addresses psychological and social needs of the society and not necessarily the injuries occasioned by the crime.

1.7. Literature Review

1.7.1. Non-State (informal) System vis a vis State (formal) System

Kotter and others examine more than two centuries of attempts to establish modern statehood and modern legal systems all over the world.³⁰ Kotter and others opine that different forms of non-state justice institutions have existed all along this time, others have emerged only during this period, partly in opposition of the newly created state institutions, partly with the approval of the official state judiciaries and administrations, and not seldom even initiated by the governments³¹. Tradition and traditional institutions as an intermediary between state and the society is an aspect present in both African countries, Latin America and South and Central Asia. Either way, non-state justice institutions are a phenomenon of modern statehood. Even the oldest institutions became “non-state” only when modern statehood came in and forced them to adapt to the institutional and normative impositions of modernity.³²

In a UN Study³³, the United Nations Development Programme (UNDP), the United Nations Children's Fund (UNICEF), and UN Women sought to ascertain how engagement with informal justice systems (IJS) can promote and protect human rights among communities that apply them.³⁴ The Study

³⁰ Matthias Kötter, Tilmann J. Röder, Gunnar Folke Schuppert, Rudiger Wolfrum (eds), ‘Non-State Justice Institutions and the Law; Decision Making at The Interface of Tradition, Religion and the State’, (2015) Palgrave Macmillan, London.

³¹ *Ibid*, p.9.

³² *Ibid*.

³³ UN Women, UNICEF, UNDP, ‘A Study of Informal Justice Systems: Access to Justice and Human Rights’(Informal Justice Systems, Charting a Course for Human Rights-Based Engagement) (2012) available at <www.unwomen.org/en/digital-library/publication.> accessed 3 August 2019.

³⁴ *Ibid*.

outlines and discusses various concerns that development partners should take heed when assessing whether or not to engage programs involving IJS³⁵. The first consideration is that engagement with IJS neither directly nor inadvertently reinforces existing societal or structural discrimination - a consideration that applies to working with formal justice systems as well. It is opined that, if IJS is conducted in ways that promote and protect human rights, IJS can enhance the fulfilment of human rights obligations by delivering accessible justice to individuals and communities where the formal justice system does not have the capacity or geographical reach.³⁶ However, this study only dwells with the HRBA access to justice and does not keenly address other areas where AJS, working together with state's formal systems, can enhance access to justice. The paper also extensively addresses women and children's rights issues whilst neglecting other areas such as the victims' rights.

The study found that despite the fact that IJS have general similarities, a major ingredient of IJS is their degree of adaptation to their socio-economic, political, and cultural contexts.³⁷ Programming for IJS needs to take its outset in the context in which they operate, including their co-existence with the formal systems. In addition, recognition of value of IJS to a society or a community and of their flexibility to individual circumstances can help avoid programming that would distort the positive elements of the IJS.³⁸

Many of the lessons learned about justice-sector programming can and should also be applied to IJS, including the need to holistically combine various forms of interventions and to coordinate the work of different actors and approaches.³⁹ In a similar way to planning for sector interventions generally, a thorough baseline analysis is a necessary starting point if wishing to work with IJS. While planning for support of justice sector institutions requires information on caseloads, resources, and

³⁵ *Ibid*, p.137.

³⁶ *Ibid*, p. 11.

³⁷ *Ibid*, p. 16.

³⁸ *Ibid*.

³⁹ *Ibid*, p. 17.

linkages, as well as needs, programming for informal justice demands greater understanding of people's legal preferences, needs, and choices, as well as the cultural, social, and economic realities that condition these needs.

The report unearths that women seek the use of IJS in resolution of disputes despite the fact that IJS do not fully respect and protect women's rights.⁴⁰ Women often face various challenges in accessing formal justice systems.⁴¹ Such challenges include societal pressure, economic and logistical difficulties. Engagement with IJS should be tied to raising awareness within IJS of women's rights and of the range of choices and access available to women to seek justice, remedy, and protection.⁴²

In a detailed review and comparison of different models and approaches of non-state and state justice systems in South Asia, Dr. Feroz Ali and others discuss the relationship between non-state justice actors and the state in a number of South Asian states. The scholars observe that non-state justice systems, such as *jirgas*, *shuras*, *shalish*, *panchayat* etc. have emerged as popular forms of dispute resolution as a result of the perceived failure or inaction by the state justice delivery system.⁴³

Miranda Forsyth discusses an extensive range along which the association between state and non-state justice systems can be tagged. At one end, the state outlaws and suppresses the non-state justice system while on the other end the state marries the non-state justice system into the state legal system.⁴⁴

After examining the destruction of the Afghan judicial system during the Afghan war and subsequent attempts at rebuilding the judicial system as a pillar of the rule of law, Ali Wardak argues

⁴⁰ *Ibid*, p. 121.

⁴¹ *Ibid*.

⁴² *Ibid*.

⁴³ Feroz Ali, Saji K Mathew, Arun Kumar Gopaldaswamy, and Suresh Babu, 'Systematic Review of Different Models and Approaches of Non-State Justice Systems in South Asia and its Complementarity with The State Justice Delivery Systems' (2017), London: EPPI-Centre, Social Science Research Unit, UCL Institute of Education, University College London, 6.

⁴⁵ *Ibid*.

that a post-Taliban justice system, built on a meaningful synergy between state and non-state justice institutions, has a very strong potential for providing accessible, effective, cost-effective and transparent justice to all sections of the Afghan society.⁴⁵ Although the post-election violence in Kenya is only a pale shadow of the Afghan conflict, the effects of the conflict on the judicial system are largely the same, and the Afghan model for building synergy between the formal and the informal justice system can be a good source of inspiration for Kenya.

Indigenous populations have little contact with the formal state hence AJS are the best and accessible means of dispute resolution. In this regard, the UN commissioned a study on restorative justice and indigenous juridical systems, particularly as they relate to achieving peace and reconciliation, including an examination of access to justice related to indigenous women, children and youth, and persons with disabilities. The study⁴⁶ notes that indigenous people utilize their local and traditional systems of justice and laws based on their conceptions of justice. The study fails to address other instances where the community has little contact with the formal state. In post-conflict settings for example, the community in most cases, loses trust in the formal system and does not resolve disputes in the formal systems.

Despite the fact that indigenous people rely wholly on their own traditional justice systems, the study unearths that these traditional justice systems have regrettably been ignored, suppressed or diminished by state policies and subordination to the formal justice systems.⁴⁷ This is the situation in Kenya where British colonialists replaced traditional laws and justice systems with their own formal judicial system which was given prominence over the customary laws. The study posits that law is a

⁴⁵ *Ibid.*

⁴⁶ UN Human Rights Council, 'Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples: Restorative Justice, Indigenous Juridical Systems and Access to Justice for Indigenous Women, Children and Youth, and Persons with Disabilities' (2014) available at <<https://digitallibrary.un.org/>> accessed 5 August 2019.

⁴⁷ *Ibid* p.3.

complex notion arising in explicit and implicit ideas and practices, and which is grounded in a people's worldview and the lands they inhabit, and is inextricably linked to culture and tradition.⁴⁸ As such, a narrow view of justice that excludes the traditions and customs of indigenous people violates the cultural base of all legal systems. Without the application and understanding of traditional indigenous conceptions of justice, a form of injustice emerges that creates inaccessibility and is based on unacceptable assumptions.⁴⁹

1.7.2. **Linking Informal Systems (AJS) with Formal System**

Kariuki Muigua, in his paper, undertakes an assessment of ADR mechanisms in Kenya in relation to Article 159 of the Constitution. The first part examines the ADR mechanisms and also discusses the legal framework governing ADR in Kenya. The second part discusses TDRM in view of Article 159 of the constitution; while the final chapter of the paper delves into dimensions of conflict and specifically discusses the social and cultural dimensions. It sets out to investigate the role, if any, that the cultures of different communities play in resolution of conflicts.⁵⁰

The paper makes the following findings; that Kenya faces a challenge in employing ADR in dispute resolution due to limited personnel who can handle disputes using ADR mechanisms. The second challenge as opined by Muigua is that, there is regrettably lack of understanding and grasp on the workings of ADR mechanisms such as mediation. There is also the risk of parties losing their autonomy when ADR is court-mandated.⁵¹

Muigua does not oppose regulation of ADR but makes a case for the need to strike a balance to ensure that the advantages of ADR are not lost. In his book⁵², the author also highlights reasons why

⁴⁸ *Ibid.*

⁴⁹ *Ibid*

⁵⁰ Kariuki Muigua. 'Alternative Dispute Resolution and Article 159 of the Constitution' (Legal Resource Foundation Trust, Program for Judges and Magistrates Training. Lake Baringo Soi Lodge, 2012).

⁵¹ *Ibid*, p.25.

⁵² Kariuki Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya* (Nairobi, Glenwood Publishers 2015).

ADR in Kenya should be regulated whilst being keen on sealing lacunas that might lead to injustice by ADR practitioners.

Caution should be taken in linking these mechanisms to the court system to ensure that they are not completely merged with the formal system as is the case with arbitration.⁵³ Arbitration process in Kenya has been choked by the legal procedural technicalities that it (arbitration) has lost its independence and autonomy. In arbitral hearings, proceedings are delayed and frustrated since lawyers employ court technicalities. Muigua posits that there is dire need to therefore create awareness among stakeholders on the effective and appropriate use of these mechanisms in order to promote access to justice.⁵⁴ The writer does not however suggest the best model(s) to apply in Kenya in terms of incorporating AJS in to the formal systems.

The paper also recommends that there is need to formulate a policy that provides for the mandatory exhaustion of traditional dispute resolution mechanisms before filing a case in court. This will notably ease backlogs in courts.⁵⁵

The policy and legal framework on the use of TDRM should also provide guidelines on a criterion for selecting elders, the types of disputes to be handled by the elders and areas of operation (jurisdiction) in a community.⁵⁶

The success of TDRM is tied to the fact that conflict is linked to the social setting and cultural aspects of a community and that in view of Article 11 of the Constitution such mechanisms should occupy their rightful place in enhancing access to justice and fostering peaceful coexistence among Kenyans.

⁵³ Kariuki Muigua (n 49) p. 36.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

In another paper, Muigua discusses how access to justice can be enhanced through ADR mechanisms and public participation. The author is keen to address areas that promote access to justice through ADR and public participation. Areas of reforms in this regard are also outlined.⁵⁷

Laws and regulations on the effective implementation of ADR and TDRM should be developed, designed and entrenched well to ensure public participation and enhance access to justice.⁵⁸ The paper advises that these laws and regulations should be well linked with formal systems (courts) to avoid conflicts. As such, mapping ADR mechanisms and all TDRM becomes inevitable. Mapping will help to determine the most applicable mechanisms in the circumstances.⁵⁹

The paper suggests that this could also include accreditation of ADR practitioners to ensure quality control, disciplinary mechanisms and the necessary accreditation of institutions thereof. In this regard, funding should also be directed towards creating public awareness on the ADR mechanisms and the opportunities they offer in enhancing access to justice and public participation.⁶⁰

In light of Article 159 (2) and in relevant cases the institution of council of elders should be used in resolving certain community disputes such as those involving use and access to natural resources among the pastoral communities in Kenya.

Using examples across the African continent, Francis Kariuki examines some of the successes and challenges faced by elders, and opportunities offered by the institution in enhancing access to justice amongst African communities.⁶¹ The negativity from “modernized” Africans is the first key challenge. Traditional practices such as rituals, cleansing, and trial by ordeals which are central in

⁵⁷Kariuki Muigua, ‘Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies’ (Conference at Strathmore School of Law, 2014).

⁵⁸ *Ibid*, p. 6.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

⁶¹ Francis Kariuki, ‘Conflict resolution by elders in Africa: successes, challenges and opportunities’ (Chartered Institute of Arbitrators Centenary Conference, ‘Learning from Africa’, Victoria Falls Convention Centre, Livingstone, Zambia, 15 July 2015).

resolving disputes have been declared illegal under most legal systems. Similarly, in most countries in Africa including Kenya, South Africa and Ethiopia, there are laws proscribing witchcraft and traditional African practices despite their complementary role in dispute resolution.

Compared to the formal justice systems, Kariuki opines that African justice systems are regarded as inferior. The inferiority is as a result of the subjugation of African customary law, which is the undergirding normative framework providing the norms, values, and beliefs that underlie traditional dispute resolution. The repugnancy clauses which aimed at limiting the application of African customary law remain in the statute books of most African countries even in the post-independence era.

Thirdly, modernity has had its fair share of negative impacts on African justice systems. In pre-colonial period, elders were the rich and wealthiest people as they held land and livestock. Their wealth and respect enabled them to be independent during dispute resolution processes. However, in modern societies, younger people have accumulated wealth and, in most cases, older people rely on the younger people. This has enabled dispute resolution by elders to be affected by bribery, corruption and favoritism. For instance, there are reports that the *Abba Gada* elders of the Borana-Oromo and the *Sefer chiefs* of the Nuer community have been corrupted by bribes therefore limiting people's faith in them.

Inadequate or unclear legal and policy framework on TDRM poses a major challenge to their application in contemporary African societies. Most African countries lack clear policies and laws on traditional dispute resolution mainly due to plurality of their legal systems.

Emphasis should be placed on traditional dispute resolution, as the first port of call where applicable and relevant, in resolving disputes. Parties in certain personal relations such as marriage, divorce, child custody, maintenance, succession and related matters should first opt to TDRM before approaching the formal legal system.

There is need for a framework for appealing the decision of elders in the TDRM. For instance, among the *Tswana*, the hierarchy of traditional dispute resolution mechanism begins at the household level, then goes to the extended family level, then to a formal customary court, and lastly to the customary court of appeal, with the status of the High court.

African traditions and customs should be co-opted into formal education system to enhance the respect for our cultures, especially after centuries of subjugation. Most African customs and practices are neither written nor codified since they are passed from generations to generations through word of mouth. They are at great risk of dying away and should therefore be taught not only for use in dispute resolution, but also for posterity and appreciation by present and future generations. Need for codification of key concepts, practices and norms of traditional dispute resolution to protect them. Further, such codification increases uniformity and consistency of application of traditional dispute resolution mechanisms by elders.

1.7.3. **Alternative Justice Systems in Kenya**

Kariuki Muigua, using the court decision in *Republic v Mohamed Abdow Mohamed*⁶² as a springboard, examines the applicability and/or appropriateness TDRM in settling criminal cases. The paper argues that the scope of Article 159 of the Constitution is wide enough to not only apply to civil matters but also to criminal matters. It also puts forth the argument that whereas court's aim is to punish the accused persons thus retributive in nature, traditional justice systems proffers restorative justice. Muigua posits that if restorative justice is encouraged in criminal matters, the use of AJS can promote social cohesiveness, peace, social justice and development. Challenges and prospects faced in the use of traditional dispute resolution mechanisms in Kenya are also discussed in the paper.

⁶² [2013], eKLR.

Francis Kariuki also explores customary law jurisprudence from Kenyan courts and its implications for traditional justice systems.⁶³ An examination of previous court decisions dealing with customary law is attempted to glean courts approach to customary law in the past and whether it can influence the application of traditional justice systems in enhancing access to justice. The paper posits that hinderance of application of traditional justice systems has over the years been occasioned by courts' interpretation of customary law. Courts should therefore develop jurisprudence that supports customary law and promotes traditional justice systems. The judiciary, judges, lawyers and the wider citizenry should develop a positive mindset towards traditional justice systems. A change of perception on these traditional mechanisms is paramount in order to enhance access to justice in Kenya.

Jurisprudence from the courts before 2010 show that they have treated African customary law as inferior to statutory laws in the juridical order of legal norms. The inferiority has emanated from colonial laws such as Section 3(2) of the Judicature Act and Section 2 of the Magistrate Courts Act that limits the list of claims under customary laws. The repugnancy clause has formed the basis for the disqualification and treatment of customary law as inferior. Additionally, the inferiority has been buttressed by the fact that customary law is an un-codified source of law and therefore must be proved in court. This jurisprudential history if unchecked may act as an impediment to the application of TDRM and Articles 159(2) (c) and (3) of the Constitution since TDRM and customary laws are closely interlinked and interconnected. There is therefore a need for a change of mindset and perceptions amongst judges, lawyers and the wider citizenry towards customary law if traditional justice systems are to contribute to enhanced access to justice for communities in Kenya. Courts must develop and generate appropriate and relevant customary law jurisprudence that will aid in the growth and

⁶³ Francis Kariuki, 'Customary law jurisprudence from Kenyan courts: implications for traditional justice systems' (2007) available at <https://scholar.google.com/citations?user=a_hut6cAAAAJ&hl=en> accessed 8 September 2019.

promotion of traditional justice systems.

In a study on the interface between formal and informal justice systems in Kenya,⁶⁴ the Kenya Chapter of the International Commission of Jurists (ICJ) makes a concise comparison between the formal and informal justice systems. Key lessons on how to integrate an efficient justice system are drawn from this comparison. The research also explores the efforts that exist in mainstreaming the use of IJS as an alternative to the court administered justice, the successes, challenges and way forward. The legal, legislative and policy framework on IJS is also discussed in this study, amendments on these are subsequently outlined.

Many of the TJS do not meet the threshold for fundamental freedoms and human rights as they do not adhere to basic principles such as due process, fair trial, equality and non-discrimination.⁶⁵ The study notes that actions that are considered by law to be violations are permissible under TJS. These include summary executions, infanticide, condemning people unheard, forced marriage and discrimination among others.

The major challenge noted however, is that information on many of these systems remain undocumented. While some practices are similar in communities in Kenya others are contradictory.

The report makes the following recommendations in regard to TJS. Awareness creation; TJS should be strengthened and streamlined by Institutionalization; a nexus should be created between TJS and the formal court processes to enhance access to justice. A referral system should be developed with the possibility that decisions of the TJS can be enforced by the formal courts. Also, a mechanism ought to be put in place to allow courts to refer cases to TJS for settlement where necessary. There is need to develop models for collaboration between the two systems to improve the delivery of justice, resolve disputes, and protect rights; TJS should be restructured to ensure inclusiveness and equal

⁶⁴ ICJ Kenya, Report on The Interface Between Formal and Informal Justice Systems in Kenya' (June 2011).

⁶⁵ *Ibid.*

participation by contending parties. The TJS should have representation from all community groups including youth, women, men, people with disability CBO representatives and different ethnic groups where applicable; There is also need to build the capacity of TJS and legitimize them so as to make them more user-friendly and more accessible for those matters that need not be adjudicated upon in the formal justice system; and There is need to do a nationwide in-depth survey to identify existing TJS.

1.7.4. **Challenges in Alternative Justice Systems**

Kinama on traditional justice systems as alternative dispute resolution under the Constitution of Kenya⁶⁶ concludes that there are various forms of justice, and that the concept of justice cannot be limited to legal justice. This paper explores the potential of traditional justice systems under the Constitution. It illustrates the need for a multidisciplinary approach in order to fully realize the right to access justice. Through a comparative analysis as well as case law, the paper demonstrates how alternative dispute resolution is not limited to civil cases, but can be applied to criminal proceedings. Challenges are pointed out and recommendations made on how to improve and effectively manage traditional justice system.

One of the challenges facing TJS is that the sentences imposed through TJS are sometimes contrary to human rights principles and the Constitution. These include beatings, banishment from communities, infliction of curses and mild punishments for serious human rights violations. However, some forms of punishment which may appear to be repugnant are actually more of a deterrent to commission of crimes. People who adhere to such customs generally fear imposition of curses and banishment as a form of punishment compared to imprisonment. To them their very being and sense

⁶⁶ Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya 2010' (June 2015) *Strathmore Law Journal*, 22-40.

of belonging is the community and if banished or cursed they cannot enjoy community life.

Celestine Nyamu-Musembi undertook a review of experiences in engaging with non-state justice systems in East Africa.⁶⁷ This was essential in providing an understanding of non-state justice systems in the East Africa region. This understanding would in turn be applied in developing guidelines on how to work with non-formal justice systems in order to achieve the objective of promoting access to justice to poor communities. The report is premised on a review of relevant experiences in Uganda, Kenya and Tanzania.

Reforming non-formal justice systems to improve access to justice for poor people and other vulnerable groups in the East Africa region is likely to face challenges. The report highlights the challenges as follows, assessing and building legitimacy and accountability, weak linkages to the judiciary and other relevant formal institutions, lack of inclusiveness, particularly on the basis of gender and, conflict with human rights principles.

In the paper on the Justice Sector and the Rule of Law in Kenya,⁶⁸ Patricia Kameri Mbote and Migai Akech identify the following challenges in dealing with traditional justice systems. First, some norms and traditions are discriminatory to certain groups (women and children), secondly, various TJS forums do not allow a representative of the party's choosing in all proceedings before the traditional court, thirdly some procedures do not provide for the right to appeal to a higher traditional court, administrative authority or a judicial tribunal, and lastly, there are no procedures for complaints against and discipline of members of traditional courts that are prescribed by law.

In Restorative Justice in Traditional Pre-Colonial "Criminal Justice Systems" in Kenya,⁶⁹ Dr.

⁶⁷ Celestine Nyamu-Musembi, 'Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa' (2003) Commissioned by Governance Division, DFID, Sussex University.

⁶⁸ Patricia K. Mbote & Migai Akech, *Kenya Justice Sector and the Rule of Law* (Johannesburg: Open. Society for East Africa 2011).

⁶⁹ Sarah Kinyanjui, 'Restorative Justice in Traditional Pre-colonial "Criminal Justice Systems" in Kenya' (2010) *Tribal Law Journal*, 10 *Tribal L.J.* 1.

Sarah Kinyanjui observes that traditional African communities are often said to have embraced restorative values in resolving conflicts and responding to wrongdoing. Through empirical research and analysis of secondary data on the pre-colonial traditional Kamba, Kikuyu and Meru communities in Kenya, this article illustrates how penal practices in these communities embraced restorative justice as understood today. This genealogy of restorative justice in these communities demonstrates the potential of restorative justice as an intervention in crime and its role in meeting overall community goals.

By doing so, the genealogy challenges the objectification of retributive justice in modern criminal justice systems, which renders retributive practices as an obvious or self-evident response to crime. The in-depth analysis of restorative justice in the three traditional communities further demonstrates how the penal practices resonated with the underlying cultural values hence effectively responding to crime before the inception of the formal criminal justice system in Kenya.

Within these traditional communities, restorative justice is seen as a strategy for governing the conduct of individuals. The involvement of the families of the wrongdoer and wronged party reaffirmed the communal ties. Having in mind that individual conduct had repercussions for one's kin, individuals bore the responsibility to act properly. Therefore, this social structure, which was based on communal living, facilitated the operation of restorative justice. As seen in the analysis of the three communities, the centrality of community unity was objectified as a truth. Together with other rationalities, this truth rendered restorative justice an acceptable practice that played a role in preserving community unity.

The Kenya Chapter of the Federation of Women Lawyers conducted a study of traditional justice systems in Kenya, focusing on communities in coast province, Kenya.⁷⁰ The main objective of

⁷⁰ FIDA Kenya, Report on traditional justice systems in Kenya: A study of communities in Coast Province, 2010.

the field research was to study traditional justice systems in the selected communities and come up with recommendations for legal reform that would result in the mainstreaming of traditional justice institutions into the Kenyan justice system, with a view to promoting access to justice by vulnerable groups, particularly women.

Some of the key findings are that traditional justice systems vary from community to community and have various names given to them. In most of the communities surveyed, there is a hierarchy of TJS from village, locational, divisional and district levels; Composition - In most TJS, the members are men only, although there are a few TJS made up of both men and women with men comprising the majority; Jurisdiction: the matters handled grow as you move up the structure; Enforcement: Remedies range from apology, fines and physical punishment depending on the type of conflict.

Tanja Chopra's book titled *Building Informal Justice in Northern Kenya*⁷¹ is based on qualitative field research in three arid lands districts. It is by no means a comprehensive study of the entire arid-lands region. However, in-depth research in selected areas revealed some of the mechanisms contributing to the success of the initiatives and identified some challenges, particularly at the community level. It seeks to present a unique form of peacebuilding to other practitioners, particularly those working in the legal sector. It also aims to support the peace activities and inform the government's national draft policy on peacebuilding and conflict management by presenting key trends at the local level.

The study was therefore designed to serve a more exploratory purpose by aiming to understand local conflict management processes in relation to socio-cultural systems, the official justice system and peace initiatives. The main theme that emerged from the first set of research data concerned the

⁷¹ Tanja Chopra, *Building Informal Justice in Northern Kenya*, (Legal Resources Foundation Trust 2008).

tensions between justice and peace that seemed to dominate the relation between local level dynamics and the work of judicial institutions. Following the post-electoral violence in January 2008, this theme has become the topic of national debates. While the results of this study do not respond to the post-electoral violence directly, they are intended to inform this debate by demonstrating how the question of justice versus peace can play out at the local level.

1.8. Research Methodology

This study relies on secondary sources and is basically for all intense and purposes, library oriented. Most of information in this study is sourced from academic books, journals, law reports and other materials from the University of Nairobi, Law library at the Parklands Campus. Concerted efforts have also been made to find relevant, cogent, reliable and authenticated information through the internet.

The study also utilizes the use of other secondary sources of information particularly from official documents and reports of the Kenyan Judiciary and other stakeholders of the government of Kenya, and other non-state actors. The data derived therefrom will analyzed descriptively using the content analysis.

1.9. Research Significance and Contribution to Knowledge

Close to a decade after the Constitution of Kenya recognized alternative justice systems, not much has been done by the Judiciary to promote these avenues for resolving disputes. The Judiciary's reform agenda over the past eight years has focused primarily on the formal justice system at the expense of AJS despite the potential that AJS has in enhancing access to, and the quality of justice, for Kenyans. This is despite the fact that the formal system remains out of reach for a majority of Kenyans due to the expenses involved, the distances to the courts, and the lack of familiarity with the formal

judicial system.

It is time for the Judiciary to heed the call of the Constitution by examining the place of AJS in access to justice so that it can develop an ideal legal and policy framework for mainstreaming AJS. This study will help by examining the options the Judiciary can employ to move AJS from the fringes of the judicial system to something that many people resort to when they have disputes.

Additionally, there is a dearth of literature that focuses on ways and means of mainstreaming AJS in Kenya. Although some studies have been done on AJS, they have focused mainly on such aspects as gender and human rights as opposed to strategies for adopting and incorporating AJS within the judicial system.

Against this backdrop, this study will help fill this gap in literature while helping to recommend ways for dealing with a real problem in our legal system.

Studying the complementarity between the systems is vital. It offers insights and suggestions on how the existing informal systems can be improved to be in line with the rule of law and international norms. It also offers insights into how the chronic problem of backlog of cases in the formal system can be dealt with.

1.10. Scope of the Study

The pertinent question in this study is the manner in which alternative justice systems that are prevalent all over Kenya can be mainstreamed within the justice system in the country. In order to answer this question, the study examines the place of alternative justice systems in improving access to justice, with a particular focus on marginalized communities and in communities seeking justice after conflict. As such, the paper examines alternative justice systems in Isiolo County and the mechanisms that have been set up in Uasin-Gishu and Kisumu Counties, then proceeds to the international arena to draw lessons from comparative jurisdictions.

1.11. Chapter Breakdown

The thesis consists of five chapters as follows:

Chapter 1: Introduction

This chapter shall be an introduction to the study particularly providing the general scope to the issues to be discussed in this study. The chapter begins by giving a brief background on matters pertaining access to justice; the constitutional provisions, formal access to justice vis a vis informal access to justice systems. It describes the problem which the study intends to deal with. It also provides justifications for the study, objectives of the study and frames hypothesis and research questions that will be tested in this research. It also provides the theoretical framework of the study. Further, it discusses the literature materials that inform the ideas and positions taken in this study.

Chapter 2: Alternative Justice Systems & Access to Justice

This chapter shall discuss the extent to which AJS is or has been important in the concept of access to justice. This discussion will center essentially on how AJS has impacted positively in access to justice in rural and marginalized areas that face challenges in accessing formal institutions of dispute resolution. It will demonstrate how AJS is vital in promoting justice and therefore the need for recognition by the formal system of justice.

Chapter 3: Alternative Justice Systems in Kenya

This chapter seeks to offer an in-depth analysis on the laws that have been enacted in Kenya to provide for AJS. Essentially, the aim here shall be to ascertain whether the provisions on AJS are efficient enough and if not, if there is need to mainstream the AJS sector. In this Chapter, the practice of AJS in Kenya is also discussed under the Isiolo Court Annexed AJS and the Eldoret Peace Commission.

Chapter 4: Case Study of Rwanda and Uganda

The fourth chapter will examine the different models of non-state justice systems in other jurisdictions so as to identify the different approaches for strengthening complementarity between the state and nonstate justice delivery systems.

Chapter 5: Conclusions and recommendations

This chapter aims to bring together the ideas, arguments and suggestions in the preceding chapters in a unified but coherent pattern and put forward cogent recommendations with the view of informing the formal system (Kenyan judiciary) the importance and need to mainstream AJS as an important component of availing access to justice to all.

CHAPTER TWO

ALTERNATIVE JUSTICE SYSTEMS AND ACCESS TO JUSTICE

2.1. Introduction

This chapter seeks to address the impact of alternative justice systems to access to justice. The chapter delves into two major areas where alternative justice systems can be used to resolve disputes; the marginalized areas and in post conflict settings. The marginalized areas face challenges such as accessibility to courts and insecurity while in post-conflict settings, effects of conflict result to destruction of judicial infrastructure, personnel and loss of trust in the judicial systems. The chapter concludes that AJS are the best conflict resolution mechanisms to be employed in such cases despite the various shortcomings that come with mainstreaming AJS.

2.2. Understanding Access to Justice

There is no universally accepted single definition for access to justice, but it is generally understood that access to justice requires the ability to seek and obtain remedies for wrongs through institutions of justice, formal or informal, in conformity with human rights standards, and that it is essential for the protection and promotion of all other human rights.

The Access to Justice Measurement Framework developed by Access to Justice British Columbia defines access to justice, as a concept, to “encompass all the elements needed to enable people to identify and manage their everyday legal needs and address their legal problems, seek redress for their grievances, and demand that their rights be upheld.”⁷² Such elements “include the existence of a legal framework granting comprehensive and equal rights to all citizens in accordance with international human rights standards; widespread legal awareness and literacy among the population;

⁷² Access to Justice BC, Access to Justice Measurement Framework (2016) Available at: <<https://acesstojusticebc.ca/wp-content/uploads/2017/08/A2JBC-Measurement-Framework.pdf>> accessed 21 February 2018.

availability of affordable and quality legal advice and representation; availability of dispute resolution mechanisms that are accessible, affordable, timely, effective, efficient, impartial, free of corruption, that are trusted by citizens and that apply rules and processes in line with international human rights standards; and the availability of efficient and impartial mechanisms for the enforcement of judicial decisions.”⁷³

Leading Kenyan constitutional law scholars Yash Ghai and Jill Cottrell Ghai define access to justice as follows:

*Access means approach, entry into; accessible includes the idea of being able to influence. So access to justice means more than being able to raise one’s case in a court or other relevant institution of justice.*⁷⁴

Justice as fairness, in the legal and political sphere, it usually means “exercise of authority in maintenance of rights”. Fairness in this context represents procedures, rules and authority of access.⁷⁵

UNDP⁷⁶ defines access to justice as a concept that is greater than mere improvement of an individual’s access to courts or guaranteeing legal representation. According to UNDP, access to justice must be defined in terms of judicial outcomes, that these outcomes must be “just and equitable”. Access to justice is therefore the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards.⁷⁷

UNDP therefore adopts a Human Rights Based Approach (HRBA) towards the resolution of disputes therefore any dispute mechanism which guarantees justice to an individual must pay due

⁷³ Teresa Marchiori, ‘A Framework for Measuring Access to Justice - Including Specific Challenges Facing Women’ (2015) Report commissioned by UN Women and The Council of Europe, New York.

⁷⁴ Yash Ghai, Jill Cottrell, ‘The Rule of Law and Access to Justice: Findings of an ABA Project on Access to Justice’ (2008) World Justice Forum, Pg.2, available at <www.lexisnexis.com/documents/pdf/20080924042712> accessed on 4 September 2019.

⁷⁵ *Ibid.*

⁷⁶ UNDP Access to Justice: Practice Note, 2004. available at <www.lexisnexis.com/documents/.../200809240434> Accessed on 3 February 2019.

⁷⁷ *Ibid.*

regard to the cardinal principles of human rights.⁷⁸

Connie Ngondi Houghton⁷⁹ on the other hand views Access to justice as a process which begins from inclusion within embodiment of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to ones rights; equal right to the protection of one's rights by the legal enforcement agencies; easy entry into the judicial justice system; easy availability of physical legal infrastructure; affordability of the adjudication engagement; cultural appropriateness and conducive environment within the judicial system; timely processing of claims; and timely enforcement of judicial decisions.⁸⁰

Access to justice was summed up by Lord Diplock in *Bremer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corp Ltd*⁸¹.

Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of Plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the Defendant.

Although Lord Diplock seems to equate access to justice to the formal courts of justice, it is worth noting that he calls for a means for the just and peaceful settlement of disputes, and these need not be the formal courts.

From the above definition, access to justice therefore means the ability to approach and

⁷⁸ *Ibid.*

⁷⁹ Connie Ngondi-Houghton, 'Access to Justice and the Rule of Law in Kenya' (2006) A paper Developed for the Commission for the Empowerment of the Poor.

⁸⁰ *Ibid.*, p.2.

⁸¹ [1981], AC, 909, [1981] 1 Lloyds Rep 253.

influence decisions of those organs which exercise the authority of the state to make laws and to adjudicate on rights and obligations.⁸² It is also evident that credence is given to the mechanisms of dispute resolutions which incorporate alternatives that give the poor and the disadvantaged an opportunity to resolve their disputes without them incurring extra costs in accessing justice. Further access to justice is not about physical entrance to court but a realization that not all disputes can be resolved through the law.⁸³

Further from the above definitions it can be extrapolated that there is no access to justice where citizens (especially marginalized groups) fear the system, see it as alien, and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system.⁸⁴

2.3. Alternative Justice Systems

Before delving into a discussion on alternative justice systems, it is important to be clear on what exactly the formal justice system entails. The state justice system generally refers to positive law that functions through legal codes and state institutions, such as the courts, prosecutors, police, the prison service, and the bar of law.⁸⁵ Thus, in the Kenyan context, key state justice and judicial institutions include the Judiciary which entails the Supreme Court, the Court of Appeal, the High Court, the Environment & Land Court, the Employment & Labour Relations Court, Magistrates Courts and Tribunals, the Attorney General's Office & Department of Justice, the Office of Director of Public

⁸² *Ibid.*

⁸³ Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory* (Chicago, University of Chicago Press Vol 7 No3 1982).

⁸⁴ UNDP, Access to Justice: Practice Note, *Supra* (n. 74), 5.

⁸⁵ Ali Wardak, 'State and Non-State Justice Systems in Afghanistan: The Need for Synergy' (2011), 32 U. Pa. J. Int'l L. 1305. Available at: <<https://scholarship.law.upenn.edu/jil/vol32/iss5/5>> accessed on 4 September 2019.

Prosecutions, the police, and the prison service.⁸⁶

The formal judicial system is also characterized by a large body of written laws modeled on the UK common law or civil law tradition. At the apex of this system is the Constitution of Kenya 2010 which is the supreme law of the land, complimented by a vast body of international treaties and conventions, international soft law,⁸⁷ national legislation enacted by Parliament and several regulations and by-laws made by other public bodies with the approval of parliament.

A key character of this system is the presence of both substantive and procedural laws which govern the conduct of cases before the judicial system, such as the Civil Procedure Rules and the Criminal Procedure Code in Kenya. Strict adherence to these procedural rules is often a mandatory requirement of the formal system, and cases are often struck out when a litigant skips one or more of the procedural hoops.⁸⁸

AJS on the other hand are informal and do not follow any predetermined procedures. Rather than a legal code, community norms and customary practices are applied in resolving disputes.⁸⁹ Forms of mediation and conciliation are commonly used to find a solution to the disputes. They are not a part of the state justice delivery mechanism and the formal courts do not exercise supervisory jurisdiction over these systems. They are “informal” in the sense that they only apply alternative/traditional methods and procedures in resolution of disputes. Nonetheless they may be obliged to adhere to state law, and they can even be formally incorporated into the state court system, such as the Gacaca courts in Rwanda. They are formal state organs that provide court-like decisions in recognition of the

⁸⁶ NCAJ, ‘Criminal Justice System in Kenya; Understanding Pre-Trial Detention in Respect to Case Flow Management and Conditions of Detention’ (2016), Legal Resources Foundations Trust. Available at < http://kenyalaw.org/kenyalawblog/wp-content/uploads/2017/01/Criminal_Justice_Report.pdf > Accessed 19 November 2019.

⁸⁷ Constitution of Kenya 2010, Articles 2(5) and 2(6).

⁸⁸ In Kenya, for instance, an election petition filed against President Daniel Arap Moi who was declared the winner of the 1997 presidential election was struck out when the Petitioner did not serve the Petition on the President in person. See *Mwai Kibaki v Daniel Toroitich Arap Moi*, Civil Appeal No. 172 of 1999, eKLR.

⁸⁹ Connie Ngondi-Houghton, *Supra* (n.77).

genocide that occurred in Rwanda.⁹⁰

The Constitution bestows upon the state the duty to ensure access to justice for all persons is achieved.⁹¹ Despite this constitutional provision, the state has over the time been concentrating on the formal justice system. Access to justice has been limited to formal courts and tribunals, most of which are inaccessible to communities in the rural areas. The Judiciary has endeavored to decentralize courts but such communities still face challenges accessing them. Some of the challenges faced include; complexity of the court procedures, use of legalese during court processes which creates language barrier, delay in expedition of matters due to backlog of cases, lack of finances to cater for court fees, and lack of awareness on AJS as a form of resolving disputes.⁹²

ADR mechanisms as provided by the Constitution include Traditional Dispute Resolution Mechanisms (TDRM).⁹³ Unfortunately, in Kenya, little has been done in this area as access to justice is perceived to be a preserve of the formal institutions.

TDRM predate in Africa as a whole, predate the advent of colonialism.⁹⁴ Conflicts in the communities were resolved locally through informal sittings in presence of village elders and other elders in the community. This system focused largely on reconciliation rather than punishment of the offenders hence social harmony was maintained amongst members of such community. Due to the reconciliatory approach achieved by AJS/TDRM, there was inclusion of family and the community as a whole. This was in the spirit of African context of togetherness and sensitivity to the community at

⁹⁰ Allison Corey & Sandra F Joireman, 'Retributive Justice: The Gacaca Courts in Rwanda' (2004), African Affairs 103:73-89.

⁹¹ Article 48.

⁹² ICJ Kenya and USAID, 'Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the New Constitution' (2002) vol III < http://pdf.usaid.gov/pdf_docs/pnacw006.pdf > Accessed 6 March 2018.

⁹³ Article 159(2) (c).

⁹⁴ Leah Wambura Kimathi, '*Non-State Institutions as A Basis of State Reconstruction: The Case of Justice Systems in Africa*' (CODESRIA's 11th General Assembly, Maputo, 6-10 December 2005) < www.codesria.org/IMG/pdf/kimathi > accessed 10 March 2018.

large and not necessarily focusing on punishing one individual.⁹⁵

However, in the colonial era, TDRM were treated as less superior to the formal methods of dispute resolution.⁹⁶ For this reason, TDRM were not recognized but remained resilient and are still practiced up to date.⁹⁷

Many African communities have been using informal systems to resolve disputes. In countries such as Botswana, Ghana and South Africa, the AJS have been recognized formally by the respective states. In Ethiopia, an informal system known as *Michu* is used to resolve land disputes.⁹⁸ Other TJS in Africa include *Gacaca* in Rwanda and *Lolwapa* in Botswana.

In Kenya, AJS is still treated as an alternative to the courts as opposed to being an addition to the formal courts system. Despite this, various communities use these AJS to solve disputes. Communities such as the Ameru use *Njuri Njeke* and the Giriama use *Kaya* or *Vaya*.⁹⁹ The formal systems as noted above, are expensive and inaccessible therefore the poor result to using informal sittings to solve disputes.¹⁰⁰ AJS therefore promote access to justice especially among the marginalized and poor communities.¹⁰¹

The Constitution also encourages communities to settle land disputes through “recognized local community initiatives consistent with the Constitution.”¹⁰² The National Land Commission is also constitutionally tasked with the responsibility to encourage application of TDRMs in solving land

⁹⁵ Emily Kinama, *Supra*, n.64.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Linda James Myers & David H Shinn, ‘Appreciating Traditional Forms of Healing Conflict and in Africa and the World’ *Black Diaspora Review* Vol. 2 No. 1, Fall 2010, p.7.

⁹⁹ Francis Kariuki, ‘African Traditional Justice Systems’ (2017), KMA, 156-175. Available at < https://scholar.google.com/citations?user=a_hut6cAAAAJ&hl=en> accessed 10 October 2019.

¹⁰⁰ *Ibid.*

¹⁰¹ E. Hunter, *Access to justice: to dream the impossible dream? ‘The Comparative and International Law Journal of Southern Africa*, (Vol. 44, No. 3 November, 2011), pp. 408-427.

¹⁰² Article 60 (1) (g).

conflicts.¹⁰³ The Marriage Act¹⁰⁴ also encourages parties who contracted a customary marriage to pursue customary mechanisms of resolving their dispute before determination of the petition for dissolution of marriage.

AJS therefore play a major role in promoting access to justice but have since not been incorporated into the formal system. For justice to be administered effectively, it is necessary to incorporate AJS into the formal justice system. When these alternative forms of dispute resolution are recognized and legitimized, access to justice will also greatly improve.

Indigenous juridical systems can play a crucial role in facilitating access to justice for indigenous people, particularly in contexts where access to the State's justice system is limited due to, among other factors, distance, language barriers and systematic discrimination. In such instances, informal justice institutions are the best resort since they require less need for travel as they are conducted among the communities. The informal justice systems are also cost effective, are less prone to external interference, bribery and discrimination since the proceedings are conducted by trusted elders and in the local language understood by all the members.¹⁰⁵ This is particularly true in contexts where State justice systems are plagued by inefficiency and corruption.

'Traditional' justice systems are found in many post-colonial countries where the legacies of small self-regulating 'stateless' societies have survived and adapted to the cumulative impacts of colonialism and modernization and, specifically, the establishment of the modern state and its national legal system.¹⁰⁶

These systems are prevalent in many post-colonial states in Africa and beyond, such as Malawi

¹⁰³ Article 67 (2) (f).

¹⁰⁴ Marriage Act 2014, Section 68(1).

¹⁰⁵ Tilmann, *Supra*.

¹⁰⁶ UNICEF, "Traditional" Justice Systems in the Pacific, Indonesia and Timor-Leste' (2009) Paper commissioned by UNICEF Papua New Guinea for the 2009 Justice for Children in the Pacific, Indonesia and Timor-Leste, EAPRO Sub-Regional Workshop.

where between 80 and 90% of all disputes are processed through traditional justice forums¹⁰⁷ and in Sierra Leone where approximately 85% of the population falls under the jurisdiction of customary law, defined under the Constitution as ‘the rules of law, which, by custom, are applicable to particular communities in Sierra Leone.’¹⁰⁸

This study uses the phrase AJS broadly to refer to systems that operate outside the formal state judicial system. These include traditional dispute resolution mechanisms, religion-based dispute resolution mechanisms as well as any such systems for the resolution of disputes outside state courts.

2.4. Alternative Justice Systems & Access to Justice in Marginalized Areas

At the moment, there are only 121 court stations in the country, manned by 600 judicial officers, placing the ratio of judicial officers to the population at a paltry 1:67,000.¹⁰⁹

The problem is acute in the marginalized areas of Kenya. For instance, with a total land surface area of 6273.1 km² composed of mainland, 65 Islands, 130 km coastline and water mass covering 308 km², Lamu County has just two courts, in Lamu Island and in Mpeketoni.¹¹⁰ The country’s second largest county – Wajir - has just one court in Wajir, covering an area of 56,685.9 Km². The largest County – Marsabit – with a total area of 70,961.2 sq km is covered by two courts situated in Marsabit and Moyale towns.¹¹¹

¹⁰⁷Wilfried Scharf, ‘Non-State Justice Systems in Sothorn Africa: How Should Governments Respond?’ University of Cape Town.

¹⁰⁸ Leila Chirayath, Caroline Sage, Michael Woolcock, ‘Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems’ (2005) Vol I, Washington DC available at <<http://documents.worldbank.org>> accessed on 12 September 2018.

¹⁰⁹ State of the Judiciary & Administration of Justice Report, 2018. Available at www.judiciary.go.ke/download/state-of-the-judiciary-the-administration-of-justice-annual-report-2017-2018-2/ accessed 12 September 2019.

¹¹⁰ County Government of Lamu, CIDP, 2013-2017, available at <<http://pshpkenya.org/wp-content/uploads/2016/04/Lamu-County-Integrated-Development-Plan.pdf>> accessed 4 July 2019.

¹¹¹County Government of Marsabit, CIDP, 2013-2017, available at <www.kpda.or.ke/documents/CIDP/Marsabit.pdf> accessed 4 July 2019.

To expand the limited reach of the formal justice system, the courts in these counties have been running mobile courts in select towns where they hold court on certain days to save litigants the agony of traveling for hundreds of kilometers to reach the court rooms in the major towns. However, mobile courts have their own challenges, including limited funding and the difficult terrain judicial officers and others working in the justice chain have to cover to reach the mobile court stations, not to mention the security risk in some of the marginalized counties.¹¹²

The circumstances obtaining in these counties offer fertile ground for AJS to thrive. Even with the current ambitious expansion strategy, it would be near impossible for the Judiciary to reach every inch of these expansive counties with permanent courts. This problem is compounded by the current budgetary cuts¹¹³ and funding challenges the Judiciary is facing.

As such, many of the communities living far away from the few court stations in these counties are forced to rely on AJS for resolving their disputes.¹¹⁴ These include such communities as the minority tribes living in the Boni forest in Lamu County and many others who live in places with limited presence of the formal government.

Aside from the lack of formal government institutions such as the Judiciary, communities in these marginalized areas are largely homogenous, making them fertile ground for alternative justice systems that thrive in communities with a common culture, language and religion.

2.5. Alternative Justice Systems & Restorative Justice in Post-Conflict Setting

Pro-longed conflict – such as civil war - is the most common cause for the collapse of rule of law institutions such as the Judiciary and its partners in the administration of justice. In some cases,

¹¹² Danish Institute For Human Rights (n 18) p.29.

¹¹³ Abiud Ochieng, 'Budget Cuts Hurt Judiciary Amid Talk of Falling Standards' *Daily Nation*, (Nairobi, July 17, 2019), Available at www.nation.co.ke/news/Budget-cuts-hurt-Judiciary-amid-talk-of-falling-standards/1056-5198768-ybps9oz/index.html accessed 24 July 2019.

¹¹⁴ Danish Institute For Human Rights (n 18) p.30.

rule of law institutions are sometimes the cause of such conflict.

In Kenya, for instance, the courts were blamed for the 2007/8 post-election violence when some political leaders refused to approach the courts to resolve their dispute. They blamed this decision on the systemic emasculation of the courts over the decades since independence.

In many situations, AJS often have to step up to fill the vacuum in the administration of justice that is left with the collapse of the formal judicial system or mistrust in the system. This was the case, for instance, in Kisumu and Uasin Gishu Counties where the Public International Law and Policy Group (PILPG) stepped up to establish councils of elders to handle cases that arose from the 2007/8 post-election violence.

Even though many post-conflict projects aiming at the reconstruction of justice assume that prolonged conflicts leave a ‘justice vacuum’ that now has to be filled, research by the Centre for Humanitarian Dialogue in Somalia demonstrates that no such vacuum exists, even when the state structures have collapsed completely.¹¹⁵ Despite conflict, people will always need ways of settling their disputes, and if there is no more formal way of doing so, they resort to other means.¹¹⁶ In Somalia, not only did the *xeer* system continue to exist up until and after the collapse, *sharia* courts as well as civil society initiatives and so-called warlord justice were also resorted to in this sense.¹¹⁷

In Afghanistan, long Afghan conflict resulted in an extensive destruction of Afghanistan’s state justice institutions that existed prior to the former Union of Soviet Socialist Republics invasion of the country in December 1979. Buildings and infrastructure, office furniture, official records, legal resources, and essential office equipment were destroyed. Not only was the infrastructure destroyed, but also judicial personnel and professionals fled the country and others perished during the war.

¹¹⁵ Kristina Thorne, ‘Rule of Law through imperfect bodies? The informal justice systems in Burundi and Somalia’ (2005) Geneva: Centre for Humanitarian Dialogue.

¹¹⁶ *Ibid.*

¹¹⁷ Andre Le Sage, ‘Stateless Justice in Somalia – Formal and Informal Rule of Law Initiatives’ (2005) Center for Humanitarian Dialogue.

Personnel such as qualified judges, prosecutors, police officers, and prison wardens were some of those affected. By the conflict.¹¹⁸

And in Burundi, while this country did not suffer from state collapse, the formal justice system is malfunctioning to the extent that the informal system has become the de facto court of first instance for the vast majority of the population.¹¹⁹

Similar challenges with post-conflict collapse of justice sector institutions were witnessed in Rwanda where local courts stepped in – with support from international donors – to dispense justice to victims of the 1994 genocide. Writing for the 60th Volume of the Harvard International Law Journal, Prof. Martha Minow discusses multiple arguments for and against the use of truth commissions and amnesties as complementarity alternatives to the International Criminal Court which only assumes jurisdiction where local mechanisms for justice have not been adequately initiated.¹²⁰ This was the situation in Kenya where the ICC assumed jurisdiction, but only after giving the government of Kenya opportunity to initiate local proceedings to bring the perpetrators of the 2007/8 post-election violence to justice.

The failure to initiate these proceedings gave the ICC the leeway to assume jurisdiction, but only for those suspected of bearing the greatest responsibility for the violence. Thousands of other perpetrators went unpunished, and this demonstrates the gap and utility of alternative justice systems in a post-conflict setting.

¹¹⁸ Ali Wardak, *Supra*.

¹¹⁹ Kristina Thorne, *Supra*.

¹²⁰ Martha Minow, 'Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law? Truth Commissions, Amnesties, and Complementarity at the International Criminal Court' (2019) Harvard International Law Journal Vol 60, No 1.

2.6. Common Dilemmas in Mainstreaming Alternative Justice Systems

There is no denying that AJS have the potential for improving access to justice while reducing both the prison population and the burden that formal courts have, and should thus be promoted – at least in principle. However, there are two main concerns that must be overcome in this debate: how to ensure AJS is not in conflict with the Constitution (Bill of Rights), and whether AJS can be deployed in all kinds of criminal cases.

UNDP cautions that informal and traditional mechanisms of justice are often more accessible to poor and disadvantaged people and may have the potential to provide speedy, affordable and meaningful remedies to the poor and disadvantaged. But they are not always effective and do not necessarily result in justice.¹²¹

UNDP also cautions that “there is a general tendency for access to justice reform (both multilateral and bilateral) to focus on programmes supporting formal mechanisms of justice, especially processes of adjudication through the judiciary. This is understandable from a governance perspective. However, from access to justice perspectives, it is essential that common parameters of assessment be applied to both formal and informal justice mechanisms. Hence, UNDP’s approach to justice sector reform focuses on strengthening the independence and integrity of both formal and informal justice systems, making both more responsive and more effective in meeting the needs of justice for all—especially the poor and marginalized.”¹²²

The most common criticism leveled against AJS is that it undermines gender equality since it operates under the same rules of the largely patriarchal African societies at a time the world is moving towards the equality of the sexes.¹²³

¹²¹ UNDP: Access to Justice Practice Note, 2004, *Supra* n.71.

¹²² *Ibid.*

¹²³ Lynne L. Manganaro & Amy L. Poland, 'For Better or Worse? Gender and Perceptions of Formal and Informal Justice Systems in Afghanistan, Women & Criminal Justice' (2012) National Criminal Justice Reference Service, p.2-9. Available at <<https://doi.org/10.1080/08974454.2012.636287>> accessed 29

Conversations with different people involved in traditional justice systems revealed, for instance, that women are not allowed to sit alongside male elders in panels that handle disputes, and as such, that decisions coming from these elders are not gender sensitive.¹²⁴ However, many African societies are quite protective of women and it is both incorrect and shortsighted to issue a blanket condemnation of AJS as being gender insensitive.¹²⁵

Even then, reports also indicated that compensation paid to female victims hardly reach them, particularly those who suffered sexual assault who may only receive a small portion of the compensation, with the bulk going to their families (father, brothers and other male relatives).

The second dilemma with AJS is whether it should be deployed in all types of criminal cases, especially murder and sexual offences. There is growing criticism against the use of AJS to resolve sexual offences especially in the aftermath of the Sexual Offences Act which imposes stiff penalties for deterrence. There has been outrage following reports that perpetrators of sexual assault have gotten away with fines (goats, camels, etc), while some have been ‘forced’ to marry their victims.

Due to this criticism, Chiefs, the police and other local government administrators in Kenya do discourage elders from handling sexual assault cases. Many elders have heeded this call, and do not solve sexual assault cases using their traditional justice systems.

On their part, the formal Courts are not united on whether AJS should be used to resolve serious criminal cases, especially murder. There are reported cases where the High Court has accepted the determination of community justice systems which imposed customary fines as punishment for murder, and marked the cases as resolved,¹²⁶ and there are other cases where courts declined such settlement citing the serious nature of the charges.¹²⁷

November 2019.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *R v Musili Ivia & Mutinda Muli*, Garissa Criminal Case No. 2 of 2016.

¹²⁷ *R v Abdulahi Noor Mohammed* (alias Arab) [2016], eKLR.

It is commonly said that he who pays the piper calls the tune.¹²⁸ Just like the formal courts which incur expenses when handling cases, elders who handle cases at the community level incur costs to handle matters, such as travel expenses. Unlike Courts which get support from the government and direct payment of fees to defray the costs, there is no budgetary allocation to the various councils of elders that are active around the country.

Whereas this was not a major concern in the past when custom determined what the elders were given, there is now a heightened need for facilitation for the councils of elders who run AJS forums around the country. In Isiolo, for instance, the elders are expected to submit a written report to the court detailing their proceedings and their determination for the consideration and possible adoption of the court, yet no facilities are provided for taking/typing proceedings or for printing the decision.

Because of the lack of financial and logistical support for elders from the Courts or other government agencies, they rely on litigants appearing before them for facilitation of the elders who attend to their cases. As such, the litigants are usually expected to give the elders ‘something small’¹²⁹ for their effort, and this is sometimes taken off whatever fines the elders impose on an offender which also doubles as the compensation for the victim.

In other instances, one of the parties to the dispute can offer something to the elders, and this breeds the perception that the elders may not be completely impartial when handling the case. In many cases this rises beyond mere perception to actual bias in favor of the person who facilitates the elders, particularly where one of the parties to the dispute is not well off.

¹²⁸ The idiom is traced to the classic legend, *The Pied Piper of Hamelin*, from the German town of Hamelin. The legend dates back to the middle ages, the earliest references describing a piper, dressed in multicolored ("pied") clothing, who was a rat-catcher hired by the town to lure rats away with his magic pipe. When the citizens refuse to pay for this service, he retaliates by using his instrument's magical power on their children, leading them away as he had the rats.

¹²⁹ Colloquial for a small fee or facilitation fee.

Moreover, AJS lack the substantive and procedural safeguards that the Constitution provides to those involved in the formal justice system, such the right to representation before an impartial tribunal, the right to call witnesses and the right to appeal.¹³⁰

Perhaps the biggest criticism leveled against IJS is the notion of justice that is administered in these forums. Many countries have come to accept western notions of justice as the ideal, and many of the processes and outcomes of AJS have come to be labeled as ‘repugnant to justice.’ Are there universal minimum standards of justice that all justice systems must ascribe to?

Ultimately these concerns bear on the discussion over whether AJS should be encouraged – or even permitted - and the ideal relationships between these systems and the formal state justice systems that apply codified rules, many of which are fashioned after western laws and international human rights standards.

2.7. Conclusion

It is clear from this discussion that certain questions remain with regard to the use of AJS to resolve disputes. These include questions over how to infuse constitutional values into customary law and AJS especially on gender and children’s issues, and whether AJS should be institutionalized.¹³¹

This is an important question given that some scholars have argued that the success of alternative justice systems is because of their separation from the formal justice system.¹³²

There is also some debate about the proper jurisdiction of the council of elders and other alternative forms of dispute resolution. As illustrated earlier, there are concerns that elders should not resolve murder and sexual assault cases.¹³³

¹³⁰ Constitution of Kenya 2010, Right to a fair hearing Article 50.

¹³¹ See discussion under topic 2.6 ‘Common Dilemmas in Mainstreaming Alternative Justice Systems’.

¹³² See Kariuki Muigua, *supra*, n.49 and n.51.

¹³³ *Ibid*, n.123.

Quality of justice is also another concern. There is no uniform decision of what amounts to quality justice and whether this can be dispensed outside the courtroom. For formal justice aficionados, quality justice is that which satisfies the written substantive and procedural law. A common phrase in this regard is procedures and outcomes that are “repugnant to justice and morality.”

Another important dilemma is how to apply customary law in modern times, particularly in mixed societies. As will be seen in the next chapter, alternative justice systems work better in homogenous societies where common customary or religious rules are applied to every member of that community. In urban centers, populations are mixed so it becomes difficult to apply customary or religious rules which often form the foundation for alternative justice systems.

One of the qualities of a good justice system is the predictability of decisions and outcomes of disputes. This is the purpose that judicial precedents serve – to assure a litigant that a court will reach a particular decision if the circumstances are similar.

With AJS, there is presently no way of predicting the outcome or applying precedents since decisions are not written.

Another dilemma arises from the fact that culture and traditions do evolve even within a homogenous community. While AJS is adopted into the judicial process, there is need to ensure culture and traditions continue to evolve instead of being codified. This is complicated further by the fact that culture and traditions keep changing.

In the next chapter, the study examines the legal and policy framework governing alternative justice systems in Kenya before proceeding to look at ongoing AJS mechanisms for purposes of comparative analysis with other jurisdictions so as to draw lessons that can be replicated in Kenya.

CHAPTER THREE

ALTERNATIVE JUSTICE SYSTEMS IN KENYA

3.1. Introduction

Alternative justice systems as a component of access to justice is provided for under various international and regional instruments and domestic legislations. The UDHR, ICCPR, ICESR, UNCRC and ACRWC are some of the international and regional instruments that recognize the right to access to justice.

The Constitution of Kenya 2010 also provides for alternative dispute resolution mechanisms to include traditional dispute resolution mechanisms. Article 159 2 (c) provides that judicial authority, the courts and tribunals shall promote ‘*alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.*’ This proviso does not specify cases in which these mechanisms should be employed; whether civil, criminal, matrimonial or others.

Despite this, courts in Kenya are divided in terms of the pace of AJS. Some Judges decline to discontinue cases resolved by AJS while others allow discontinuance of such cases. Given this divided position, the Judiciary constituted a Taskforce under CJ Maraga in order to offer recommendations on how to mainstream AJS. Policy interventions have also been put in place to promote alternative justice systems.

The Isiolo Court Annexed AJS was also introduced whereby elders in the marginalized area of Isiolo are working with the Judiciary to resolve cases using alternative justice systems. The Eldoret Peace Commission is also another instance discussed under this chapter where AJS has thrived in post conflict setting.

3.2. Normative Framework for Alternative Justice Systems in Kenya

The process that resulted in the Constitution of Kenya 2010 gave Kenyans the opportunity to

reflect upon the ideal judicial system that would handle disputes in a just and expeditious manner. This explains why reforms to the judicial system were at the center of the different attempts to rewrite the country's Constitution, beginning with the Bomas Constitutional Conference.

As part of the process to rewrite the new Constitution, Kenyans acknowledged the significance of AJS, and this explains the constitutional provisions that mandate the Judiciary to promote alternative justice systems.

This chapter fleshes out these constitutional provisions as well as other legal, policy and administrative arrangements that have been put in place in Kenya with a view to increasing the use and effectiveness of alternative justice systems within the broader dispute resolution framework. The chapter also discusses the prevalence of AJS in Kenya and focuses on two examples of alternative fora for dispute resolution. In the end, the chapter poses some questions regarding the relationship between the formal judicial system and these alternative systems for dispute resolution to lay the basis for the comparative study from which recommendations for mainstreaming these systems can be drawn.

3.2.1. International Norms

The right to access to justice is recognized under the major international human rights instruments including: the Charter of the United Nations, the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the United Nations Convention on the Rights of the Child (UNCRC). It is also recognized under regional human rights instruments such as the African Charter on the Rights and Welfare of the Child (ACRWC).¹³⁴

¹³⁴Jefferson R. Plantilla, Human Rights Based Approach Access to Justice, (2010, Vol.60, Asia Pacific Human Rights Information Centre) Available at < www.hurights.or.jp/archives/focus/section2/2010/06/human-rights-based-approach-to-access-to-justice.html > accessed 21 November 2019.

Both the Universal Declaration of Human Rights and the ICCPR provide that everyone has “*the right to effective remedy against violations of fundamental rights*”.

Under the Universal Declaration of Human Rights, “*everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law*”.¹³⁵

The ICCPR also requires each State Party to the Covenant to undertake “to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity,” “To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy,” and “To ensure that the competent authorities shall enforce such remedies when granted.”¹³⁶

Regionally, The African Charter on Human and Peoples Rights (ACHPR) acknowledges that every person has a right to have his case heard, right of appeal, and a right to defense including the right to be defended by counsel of their choice.¹³⁷

The ACRWC acknowledges the need for access to justice and states that state parties to the present charter shall in particular ensure that every child accused in infringing the penal law shall be afforded legal and other appropriate assistance in preparation and presentation of his or her defense.¹³⁸

The Lilongwe Declaration¹³⁹ highlights the importance of providing legal aid at all stages of the criminal justice process by stating that suspects, accused persons, and detainees should have access

¹³⁵ UDHR, Article 8.

¹³⁶ ICCPR, Article 2(3).

¹³⁷ Article 7.

¹³⁸ Article 2 (ii).

¹³⁹ The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, 2004, available at < <https://acjr.org.za/resource-centre> > accessed 30 October 2019.

to legal assistance immediately upon arrest and/or detention wherever such arrest and/or detention occurs. A person subject to criminal proceedings should never be prevented from securing legal aid and should always be granted the right to see and consult with a lawyer, accredited paralegal, or legal assistant.¹⁴⁰

The Constitution of Kenya 2010 also has recognized AJS mechanisms and lays out a framework for the alternative justice systems.

3.2.2. Constitution & Legal Framework

The need for the mainstreaming of AJS has a strong foundation in the 2010 Constitution which provides, right from the Preamble, that in giving themselves the Constitution, ‘the people of Kenya take great pride in their ethnic, cultural and religious diversity, and are committed to nurturing and protecting the well-being of the individual, the family, communities and the nation.’¹⁴¹

This explains why traditional justice mechanisms which are based on the culture and religious beliefs of the various communities should be protected and promoted.

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 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

¹⁴⁰ Article 3.

¹⁴¹ Constitution of Kenya, 2010, Preamble.

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 courts and tribunals. Article 1(3) requires these state organs to exercise sovereign power in accordance with the Constitution.

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 contravenes the Bill of Rights and is repugnant to justice and morality or results in outcomes repugnant to justice and morality or is 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.

The use of AJS is also protected as a human right. Among the recognized human rights is the right to culture. For many communities in Kenya, the justice systems in place are part and parcel of their cultural practices. In this regard, the Constitution recognizes in Article 11 that culture is both the foundation of the nation and the cumulative civilization of the Kenyan people and nation.¹⁴² Article 11 must be read jointly with Article 44 which safeguards the right of individuals to participate in the cultural life and practices of their communities. This 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.

¹⁴² Constitution of Kenya 2010, Article 11(a).

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. AJS is one of the mechanisms of the people in administration of maintaining and upholding human dignity and social justice.

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 on Human and Peoples' Rights ('Banjul Charter') and the International Covenant on Economic, Social and Cultural Rights¹⁴³ (ICESCR), respectively, provide for the right of everyone to take part in the cultural life of their community.

The Constitution of Kenya also envisions a more participative approach with people at the heart of the affairs of the state. In this regard, 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.

Aside from these constitutional provisions, there is no specific piece of legislation that is dedicated to the use of AJS in the resolution of disputes in Kenya. However, two of the most relevant provisions are in the Judicature Act and in the Criminal Procedure Code.

The Judicature Act outlines the sources of law in Kenya, with section 3(2) thereof making provision for the situations where customary law is to be applicable in Kenya. It states that:

¹⁴³ For these standards, *see*; International Covenant on Civil and Political Rights, part III; Universal Declaration of Human Rights, Articles 7, 8, 10 and 11.

'The High Court, the Court of Appeal 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.'

According to this section, African customary law is applicable only in civil cases, provided that the outcome is *not repugnant to justice*. The phrase 'repugnant to justice' carries with it vestiges of the colonial order which relegated African customary law to the bottom of the legal order, and hoisted western ideologies of justice above African notions of justice that had existed for millennia, and had resulted in peaceful co-existence within and between the different communities that resided in what is now Kenya.¹⁴⁴

There is section 176 of the Criminal Procedure Code which provides that:

'In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.'

This section permits reconciliation and out of court settlements, but only in minor offences such as common assault and other offences not amounting to felonies. As will be seen below, this section has been cited by many Judges to justify their rejection of applications to withdraw serious charges when the parties have reached out of court settlements through AJS.

¹⁴⁴ Hastings Okoth-Ogendo, *The Place of Customary Law in the Kenya Legal System: An Old Debate Revived*, in J.B. Ojwang, J.N. Mugambi and G.O. Aduwo (eds.), *The S.M. Otiemo Case: Death and Burial in Modern Kenya*, (University of Nairobi Press, Nairobi 1989), p.43.

The Judges who have placed reliance on these provisions of the Judicature Act and the Criminal Procedure Code have failed to acknowledge that the sections were enacted under the old constitutional order where there was no recognition of traditional justice mechanisms in the Constitution.

One of the newer statutes that should be given more emphasis is the Victim Protection Act.¹⁴⁵ One of the objectives of the Act is to protect the dignity of victims of crime through supporting reconciliation in appropriate cases by means of a restorative justice response.¹⁴⁶ Section 2 defines restorative justice to include:

“the promotion of reconciliation, restitution and responsibility through the involvement of the offender, the victim, their parents, if the victim and offender are children, and their communities; or a systematic legal response to victims or immediate community that emphasizes healing the injuries resulting from the offence.”

Before enactment of this Act, victims had no other role than to testify in court when called upon. Under the common law criminal justice system, accused persons had a plethora of rights, many of which were guaranteed by the repealed Constitution and have been expanded under the 2010 Constitution. The Victim Protection Act now moves victims of crime from the periphery of the criminal justice process where they stood as bystanders as all decisions on the trial were made by the Police, the prosecution and the court, all the time watching not to step on the toes of the accused person and his rights.¹⁴⁷ The only chance victims had was to retain a lawyer to watch brief during criminal proceedings, but even then, the terms of such engagement were not defined in law.

¹⁴⁵ No 17 of 2014.

¹⁴⁶ Victim Protection Act, Section 3(b)(iii).

¹⁴⁷ Pravin Bowry, ‘A New Era for Victims of Crime in Kenya’ *The Standard*, (Nairobi, October 22, 2014). Available at www.standardmedia.co.ke/article/2000139033/a-new-era-for-victims-of-crime-in-kenya Accessed 8 July 2018.

Even as the Victim Protection Act promotes reconciliation between offenders, their victims and the wider community, the Act does not make any distinctions between minor and serious offences. It is also to be noted that in calling the Judiciary to promote traditional justice systems, the Constitution does not make any distinctions between minor and serious offences.

Unfortunately, some courts have paid little regard to the Victim Protection Act, focusing instead on the Judicature Act and the Criminal Procedure Code that downplay the place of reconciliation in certain criminal matters.

3.2.3. Kenyan Courts and Alternative Justice Systems

The perception among judicial officers of AJS points to the need for this conversation on how to mainstream these justice systems. Different courts have sent mixed signals as is evident in a number of decisions in matters where alternative justice systems were at play.

In *Republic V Musili Ivia & Mutinda Muli*¹⁴⁸, the Court allowed the prosecution to discontinue a murder case after it was reported that the parties had reconciled. The court ruled that the termination of the case was not inconsistent with any written law. The accused persons both hailed from the *Mbaa Amutei* clan while the deceased was of the *Mbaa Katui* clan. A settlement agreement to pay 15 cows and a bull was reached after an inter-clan sitting. In reaching the decision to discontinue this case, court stated that the law did not have any provision against such discontinuance. In making this ruling, the court made clear reference to Article 159 (c) of the Constitution which advocates for use of traditional dispute resolution mechanisms as a form of alternative dispute resolution. The court held further that the agreement reached after reconciliation and the traditional dispute resolution forum used to settle the case did not contravene the provisions of Article 159 (3) of the Constitution.

¹⁴⁸ [2017], eKLR.

Not everyone has been happy with these cases. When the High Court marked the *Musili Ivia Case* as settled, there was hue and cry among many observers, including the then Chief Executive Officer of the Law Society of Kenya who penned an opinion piece condemning the court for accepting the out of court settlement.¹⁴⁹

In a slightly different twist in the case of *R v Leeras Lenchura*¹⁵⁰, an accused's charge of murder was reduced to manslaughter upon entering into a plea bargain agreement with the State. Emukule J fined the accused to pay one female camel to the family of the deceased, and to five years suspended sentence. In this case, the court itself imposed the fine of a camel and not the parties themselves.

The Court in *Republic v Abdulahi Noor Mohamed (alias Arab)*¹⁵¹ took a diametrically opposite view when an application to withdraw a murder case was made on the grounds that the families had reached a settlement. Lady Justice Jessie Lesiit declined an application to withdraw a charge facing one Abdullahi Noor Mohamed alias Arab who had been charged with murder contrary to section 203 as read with section 204 of the Penal Code. In making the application, the accused produced before court a copy of a reconciliation agreement that had been signed between him and the family of the deceased as part of an out of court settlement.

In this instance, the prosecution opposed the application, arguing that murder is such a serious charge that out of court settlements should not be permitted.

In declining the application, the Court cited section 3(2) of the Judicature Act which stipulates when the customary law is to be applicable. It states that:

'The High Court, the Court of Appeal 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

¹⁴⁹ Apollo Mboya, 'Principle in out of Court Settlements Abused' *The Standard*, (Nairobi, 31 October 2013, Available at <www.standardmedia.co.ke/article/2000096592/principle-in-out-of-court-settlements-abused> Accessed 2 July 2018.

¹⁵⁰ [2012], eKLR.

¹⁵¹ [2016], eKLR.

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.'

According to the court – and relying on this section - African customary law is applicable only in civil cases.

The Court also cited section 176 of the Criminal Procedure Code which provides that:

'In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.'

The Court cited this section in support of its position that reconciliation can only be permitted in minor offences, and certainly not in murder trials.

In taking this view, the court cited with approval the decision of Maraga J (as he then was) in *Juma Faraji Serenge alias Juma Hamisi v Republic*¹⁵² where he stated that:

'To the best of my knowledge, other than in cases of minor assault in which a court can promote reconciliation under section 176.... of the Criminal Procedure Code and such minor cases, a complainant is not allowed to withdraw a criminal case for whatsoever reason. In any case the real complainant in all criminal cases, and especially so felonies, is the state. The victims of such crimes are nominal complainants. And the state, as the complainant, cannot be allowed to withdraw any such case because the victim has forgiven the accused as happened in this case or any such other reason. The state can only be allowed to withdraw a criminal case

¹⁵² [2007], eKLR.

under section 87A of the Criminal procedure Code or enter a nolle prosequi when it has no evidence against the accused or on some ground of public interest. And even then, when it has convinced the court that the case should be so withdrawn”.

To allow withdrawals of criminal cases like this is tantamount to saying that relatives of murdered persons can be allowed to withdraw murder charges against accused persons whom they have forgiven. That cannot be allowed in our judicial system.’

In approving the decision above, the High Court failed to acknowledge the fact that the decision by Maraga J was rendered in January 2007, way before the 2010 Constitution came into effect. The court also stated specifically that it did not agree with the manner in which the application to withdraw charges in *Republic v Mohamed Abdow Mohamed*¹⁵³ was handled by the court of concurrent jurisdiction.

Although the High Court went ahead to cite ongoing attempts to reconcile traditional justice systems with the new Constitution, it concluded that:

“The Constitution and the written laws recognize alternative dispute resolution and traditional dispute resolution mechanisms as means of enhancing justice. The court does appreciate the good will of the accused family and that of the deceased in their quest to have the matter settled out of court. The charge against the accused is a felony and as such reconciliation as a form of settling the proceedings is prohibited.”

¹⁵³ HC Criminal Case No. 86 of 2011, [2013], eKLR. In this case, Abdow Mohammed was charged with the murder of Osman Ali Abdi. The prosecution sought dismissal of the case on grounds that the matter had been settled according to Islamic laws, that the accused’s family had paid camels, goats to the deceased’s family and also performed cultural rituals. In discontinuing this case, court relied on Articles 159 and 157 of the Constitution.

Even as it made this decision, the Court made some remarks which highlight the challenges with the usage of alternative justice systems in Kenya. It stated that:

“The constitutional recognition of alternative justice systems as one of the principles to guide courts in the exercise of judicial authority does not exclude criminal cases. This recognition restated the place of alternative justice systems in the administration of justice. Article 11 recognizes culture as ‘the foundation of the nation and as the cumulative civilization of the Kenyan people and nation’. There are however, no policy guidelines on how to incorporate the alternative justice systems in handling criminal matters.” It added that:

“Owing to the seriousness of some offences such as in the instant case, some direction is needed; more so, to ensure that there is consonance with the constitutional principles, and the requirements set out under Article 159(3) on the application of tradition dispute resolution. Some efforts are underway with the appointment of the Task Force on Traditional, Informal and Other Mechanisms used to Access Justice in Kenya (Alternative Justice Systems)¹⁵⁴ in line with the Judiciary’s plan to develop a policy to mainstream alternative justice system with a view to enhancing access to and expeditious delivery of justice.”

Similar sentiments were expressed by the High Court in *Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & another*¹⁵⁵ where an application was made to withdraw robbery with violence charges. After lengthy analysis of similar cases, the court rendered final orders from which can be gleaned certain guiding principles that are to be considered where an application to withdraw a case has been made. These include:¹⁵⁶

¹⁵⁴ See topic ‘Policy & Administrative Interventions’ for a detailed discussion.

¹⁵⁵ [2018], eKLR.

¹⁵⁶ See, *Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another* [2016] eKLR.

- a. The nature of the offence. A court dealing with a serious offence such as robbery with violence using firearms which is prevalent in its jurisdiction should conduct a full trial with conviction, if there is evidence to sustain the charge, and appropriate punishment for deterrence.
- b. Alternative Dispute Resolution mechanisms of Article 159 (2) (c) must be supportive and not destructive of the ability of the DPP to conduct his primary role as the executor of the State's powers of prosecution under Article 157 (6) of the Constitution.
- c. The approval of the DPP who has constitutional mandate and duty to consider under Article 157 (11) "*the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process*" has not been obtained.
- d. It is a public interest consideration within the meaning of Article 157 (11) of the Constitution that offenders in serious crimes should be suitably prosecuted and punished if found guilty.
- e. Improper termination of serious criminal charges will demoralize police and prosecutorial agencies to the detriment of the country's ability to combat and deter such crimes.

Although the above test was laid out in a case concerning robbery with violence, the principles emerging can be applied in other cases where similar applications are made.

The Courts in the above cases affirmed the central role of the DPP in criminal cases, holding that the concurrence of the DPP must be sought where applications to withdraw criminal charges are made.

Even then, we must be alive to the difficulties a prosecutor would face after a complainant has expressed the intention to withdraw a case. It would then become impossible to secure the attendance of such a witness to testify in court, and even when they come to court, the testimony they give will

likely be of very little evidentiary value. This is captured in the letter which was written to the court by the family of the deceased who indicated that “*it’s worth noting that it goes against our tradition to pursue the matter any further and/or testify against the accused person once we have received full compensation in the matter of which we already have.*” The letter goes on to state that “*it is our instruction that the matter and/or court case be withdrawn as our family wishes to put a stop to the matter.*”

The courts that declined the withdrawal of charges also elevated the state as the main complainant instead of acknowledging the role of the victim of the crime who may not wish to prosecute the case.

In civil cases, courts seem to be relying on the phrase ‘repugnant to justice and morality’ to decline applications to solve disputes by alternative justice systems. In *Erastus Gitonga Mutuma v Mutia Kamuno & 3 others*¹⁵⁷, an application for injunction to prevent the respondents from settling a land dispute by *Njuri Njeke* was allowed. Court relied on Articles 159 (3) (b), 29(d), 32 and 50 of the Constitution. Court opined that the *kithuri* curse and *nthenge* oath that were to be carried out by *Njuri Njeke* were painful and degrading to humans therefore repugnant to justice and morality.

In the absence of clear statutory or policy guidelines, courts have been left to determine each case on its unique circumstances, with the result that we now have conflicting decisions on the place of alternative justice systems in the justice system in Kenya. Coming from courts of concurrent jurisdiction, these decisions have left more questions than answers in Kenya’s quest to mainstream alternative justice systems, and this brings us to the policy and administrative interventions that have been put in place in recent years.

¹⁵⁷ [2011], eKLR

3.2.4. Policy & Administrative Interventions

Against this backdrop, the Judiciary sought to address these emerging concerns through policy interventions geared towards mainstreaming AJS in Kenya. Soon after becoming the Chief Justice, Dr Willy Mutunga formulated the Judiciary Transformation Framework (JTF)¹⁵⁸, a reform blue-print that captured his plan to transform the judiciary through far-reaching reforms in the period between 2012 and 2016.

The Framework was premised on four key pillars, which are (a) People focused delivery of service; (b) Transformative leadership, organization culture and professional, motivated staff; (c) Adequate financial resources and physical infrastructure; and (d) Harnessing Technology as an Enabler for Justice. These four pillars were intended to be driven and implemented towards the realization of a further ten Key Result Areas (KRA).¹⁵⁹

In acknowledgement of the Constitutional duty to promote access to justice, the Judiciary committed through the JTF to “improve access to justice through building more courts to reduce the distance to courts; increasing the number of mobile courts and developing a strategy to ensure that they work; establishing an effective system – including a litigant’s charter – to provide information on courts’ jurisdiction, fees, and calendar; reducing the costs of accessing judicial services; promoting and facilitating Alternative Dispute Resolution; establishing an office of Court Counsel in each court to assist litigants who are representing themselves to understand court procedures; simplifying court

¹⁵⁸ Judiciary Transformation Framework, 2012-2016, ‘Laying the Foundations for the Transformation of the Kenyan Judiciary’. Available at < www.judiciary.go.ke/download/judiciary-transformation-framework/> Accessed on 17 August 2019.

¹⁵⁹ The Key Result Areas under Pillar One (People-Focused Delivery of Justice) are: Access to and Expeditious Delivery of Justice, People-Centeredness and Public Engagement, and Stakeholder Engagement. The Key Result Areas under Pillar Two (Transformative Leadership, Organizational Culture, and Professional and Motivated Staff) are: Philosophy and Culture, Leadership and Management, Organizational Structure, and Growth of Jurisprudence and Judicial Practice. Key Result Areas under Pillar Three (Adequate Financial resources and Physical Infrastructure) are: Physical Infrastructure and Resourcing and Value for Money. Pillar Four has one Key Result Area: Harnessing Technology as an Enabler for Justice.

procedures; and making the courts non-intimidating places – including establishing a customer care desk at every court station.”¹⁶⁰ The Judiciary also committed to “set up special courts for children and other vulnerable groups, and to establish Small Claims Courts and Courts of Petty Offenders.”¹⁶¹

The task of coordinating the implementation of the Judiciary Transformation Framework fell on the shoulders of Justice Prof. Joel Ngugi, an educated legal scholar who taught law in the United States before returning to Kenya to join the High Court, and was appointed by the Chief Justice to head the Judiciary Transformation Secretariat.

The tenure of CJ Willy Mutunga also saw the Judiciary launch the Judiciary Strategic Plan 2014 – 2018 which is organized under 13 key result areas focusing on improving access to justice in Kenya. Under Key Result Area 1 on Improved access to and timely delivery of justice, the Judiciary committed to “improve physical access to courts by “Incorporating Alternative Forms of Dispute Resolution in the justice system.”¹⁶²

As acknowledged in the *Abdulahi Noor Mohamed Case*¹⁶³ the Judiciary has put in place a Taskforce that is charged with spearheading multi-stakeholder discussions on the use of AJS in Kenya with a view of coming up with the ideal framework for the use of these alternative justice systems.

The Task Force was constituted by CJ Willy Mutunga in February 2016 “to formulate an appropriate judicial policy on Alternative Justice Systems and to consider the methodology and viability of mainstreaming Alternative Justice Systems; and to suggest concrete ways of doing so.”¹⁶⁴

In line with this broad mandate, the specific terms of reference of the task force were to:

- i. Convene stakeholders and practitioners in Alternative Justice System in order to map out and understand the prevalence of use of Alternative Justice System, its intersection with the

¹⁶⁰ Judiciary Transformation Framework 2012 – 2016, p. 14.

¹⁶¹ *Ibid.*

¹⁶² The Judiciary, Republic of Kenya, Judiciary Strategic Plan 2014 – 2018 (2014), p. 19.

¹⁶³ *Supra.*

¹⁶⁴ Gazette Notice No. 1339, in Kenya Gazette Vol.CXVIII-No.21, 4th March 2016.

- Judicial System and the progress made in infusing it with national and constitutional values;
- ii. Undertake a situational analysis of any existing reports, manuals, guidelines, practice notes, legal provisions on mainstreaming Alternative Justice System;
 - iii. In conjunction with the Judiciary Training Institute to pilot and bench-mark existing models of Court-Annexed Alternative Justice System, to capacitate them, observing them and document their functioning to glean best practices to be used to develop potential national model
 - iv. Work with any seconded Consultants to synthesize secondary and primary data collected to address the objectives of the policy formulation exercise;
 - v. Consolidate best practices from selected traditional justice systems of selected communities;
 - vi. Highlight challenges and effects of inter-linkage between traditional justice systems and the formal justice system;
 - vii. Consult with key stakeholders and recommend a linkage between traditional and informal Justice Systems and the formal justice systems;
 - viii. Study best practices, formulate the policy on mainstreaming alternative techniques for reducing case backlog and produce a draft;
 - ix. Develop a strategic plan to implement the policy;
 - x. Present the draft documents to key stakeholders within the justice sector through meetings and workshops and incorporate comments as necessary; and
 - xi. Develop a National Model for Court-annexed traditional justice resolution mechanism for possible adoption.

The Task Force was also chaired by High Court Judge Justice Prof. Joel Ngugi, with membership drawn from various organizations involved in the administration of justice, including the Judiciary, the civil society,¹⁶⁵ the ODPP, the National Land Commission, the National Council of Elders, KNHR, the Police (Community Policing), the Law Society, and the academy.

As part of its mandate, the Task Force has undertaken field studies in various parts of the country to investigate the use and prevalence of AJS and any linkages with the formal judicial system, as well as a synthesis of published works on AJS.

Although the taskforce was to hand over its report by 30th September 2016, it has sought multiple extensions to its mandate owing to delays in the conclusion of its work. It is hoped that the report will come up with concrete measures for mainstreaming AJS within Kenya's justice system, including legal and policy interventions to anchor AJS firmly in Kenya's laws.

Following closely on the footprints of his predecessor, CJ David Maraga also came up with a blue-print that outlines his judicial reforms agenda. In order to improve access to justice, the Sustaining Judiciary Transformation (SJT)¹⁶⁶ promises to “buttress the JTF that focused on access to justice through the establishment of more High Court Stations and decentralization of the Court of Appeal, among other approaches.” Towards this end, the SJT promises to “focus on the demands in the ‘lower end of justice’ and invest in the establishment of more magistrates courts, especially in sub- counties that do not have them; rolling out of alternative justice systems programmes; expansion of Alternative Dispute Resolution mechanisms; promotion and deepening of the Court-Annexed Mediation processes; operationalization of the Small Claims Court; and full institutionalization of tribunals.”¹⁶⁷

¹⁶⁵ Civil Society organizations represented in the Task Force include Pamoja Trust, ICJ-Kenya, Legal Resources Foundation, and FIDA-Kenya.

¹⁶⁶ Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017-2021. Available at www.judiciary.go.ke/download/sustaining-judiciary-transformation-2017-2021/ accessed on 9 August 2019.

¹⁶⁷ *Ibid*, p. 5.

According to the SJT, focus during “the next phase of Judiciary’s Transformative Agenda will shift from institutional building and capacity enhancement to enhancing service delivery through improvement of work methods; operationalization of development systems; enhancing individual accountability; enhancing institutional accountability; entrenching performance measurement, monitoring and evaluation; and entrenching policies and manuals.”¹⁶⁸

With specific regard to AJS, the SJT promises to draw from the lessons of the AJS taskforce and establish an AJS policy, and to mainstream AJS including by sensitizing Judicial Officers and Stakeholders.¹⁶⁹

It is evident that both the JTF and the SJT paid a great deal of focus on improving physical infrastructure within the Judiciary and the use of formal alternative dispute resolution mechanisms such as Arbitration and Mediation. This is evidenced in the fact that the Judiciary has a number of committees working to mainstream formal ADR, and has worked with development partners such as IDLO and the Nairobi Center for International Arbitration to prepare a National ADR Policy that was presented to stakeholders in October 2019.¹⁷⁰

The focus on the brick and mortar dimension of access to justice is understandable with the JTF which was launched in 2012 when the Judiciary was only emerging from decades of neglect, with minimal funding and infrastructure. At the launch of the SJT, tremendous work had been done in infrastructure development, and this much is acknowledged in the strategic blueprint. As such, the SJT should have paid more attention to functional access to justice by focusing on AJS that should have been given equal prominence as the formal ADR mechanisms.

Central to Kenya’s Constitutional reforms was the clear mandate for judicial reform and the

¹⁶⁸ *Ibid.*, p. 13.

¹⁶⁹ *Ibid.*, p. 16.

¹⁷⁰ See Draft National ADR Policy, August 2019, Nairobi Centre For International Arbitration. Available at www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf accessed 2 November 2019.

significant premium on equitable access to justice in Kenya. The Constitution of Kenya 2010, has seen a significant improvement in the promotion and protection of human rights, gender equality and access to justice for majority of the country's population. However, much more remains to be done to address the challenges experienced by average citizens in accessing justice in Kenya.¹⁷¹

Access to justice, particularly for the most vulnerable groups, is hampered by lack of adequate institutional capacity of the Judiciary to effectively administer justice coupled with inadequate laws, policies, procedures rules and regulations that make it either substantively or technically difficult to access justice.¹⁷² This is further exacerbated by low levels of public confidence in the Judiciary. ADR mechanisms such as AJS should be at the Judiciary's top agenda in solving this problem.

In the next section, the paper discusses two examples of alternative justice systems that are in practice in Kenya, before delving into a comparative study from other jurisdictions.

3.3. The Practice of AJS In Kenya

What is now the Republic of Kenya is an amalgamation of 44¹⁷³ or so ethnic communities that were brought together through the Berlin Conference during which borders dividing the African continent into colonies – and subsequently countries - were drawn. In the period before colonialism, each community had its own mechanism for resolving disputes between individuals or between clans. With the advent of colonialism came the formal judicial system built on substantive and procedural laws borrowed from England, and these have dominated the administration of justice to date. Although these communities have embraced the formal judicial system that was set up by the British colonialists

¹⁷¹ IDLO, *Justice Sector Reforms to Enhance Access to Justice*, IDLO Quarterly Report, March 2017. Available at <www.idlo.int/resources/publications> accessed 2 November 2019.

¹⁷² *Ibid.*

¹⁷³ According to the 2009 population census, Kenya has 44 tribes though a number of groups have filed petitions urging the government to recognize them as distinct tribes. The results of the latest population census conducted in August 2019 is yet to be published.

and subsequently expanded in the post-independence era, a great number of disputes are still handled through various mechanisms that operate parallel to the formal judicial system. The adoption of the British legal system as the main judicial system in Kenya means that traditional justice systems that were mainstream for the communities are now referred only as alternative justice system.

Given the cultural differences among the many communities that make up Kenya, AJS take many different forms in Kenya and these depend on the demographics, culture and religious practices of the community concerned. Additionally, the growth of large urban centers across the country has resulted in hybrid systems that have evolved to incorporate various practices from the communities found in these cosmopolitan areas.

Given the diversity of the Kenyan population, it would be near impossible to study all forms of AJS at play across the country. Even then, this diversity is best captured in two examples of alternative justice systems that are discussed below. The Isiolo Court Annexed AJS has been discussed since Isiolo represents a marginalized area where AJS has thrived. The Eldoret Peace Commission is an example of how AJS has been employed in post-conflict setting.

3.3.1. Isiolo Court Annexed Alternate Justice Systems

Isiolo is one of the 47 Counties in Kenya and is located in the lower eastern region of Kenya. It borders Marsabit County to the North, Samburu and Laikipia Counties to the West, Garissa County to the South East, Wajir County to the North East, Tana River and Kitui Counties to the south and Meru and Tharaka Nithi Counties to the south West. The county covers an area of approximately 25,700 km².¹⁷⁴

¹⁷⁴ County Government of Isiolo CIDP, March 2018 available at <<https://isiolo.go.ke/wp-content/uploads/2018/12/CIDP-FINAL.pdf>> accessed 11 November 2019.

It is an arid¹⁷⁵ cosmopolitan County composed of 5 major ethnic communities; the Samburu, Turkana, Borana, Somali, and Meru who are drawn into Isiolo from the other counties it shares borders with. There is also a host of other communities that are smaller in population.

As a result of the arid nature of the region, most of the resident communities are nomadic pastoralists moving within and outside the county in search of water and pasture for their livestock. The scarcity of these resources has since time immemorial caused violent conflict between different communities.¹⁷⁶ These violent conflicts take the form of cattle rustling, inter-ethnic violence, and community displacements.

These man-made disasters are further compounded by environmental challenges including increased droughts, famines, and other natural catastrophes that are exacerbated by administrative and electoral boundaries disagreements.¹⁷⁷

Other factors¹⁷⁸ that contribute to recurrent violent conflicts and disputes within the county are the presence of small arms and light weapons, tensions with neighboring agricultural communities especially those living close to Isiolo County's boundary with Meru County¹⁷⁸ and human-wildlife conflicts that are intensified by competing uses of land for commercial ranching and wildlife conservation.

Isiolo is among the counties that have been categorized as marginalized but is now one of the counties earmarked for development under the Kenya Vision 2030 programme which aims to transform Kenya into a middle-income country by 2030, with plans to develop Isiolo town into a

¹⁷⁵ The county is classified into three ecological zones namely Semi-Arid, Arid and the very Arid.

¹⁷⁶ Roba Sharamo, 'The politics of pastoral violence: A case study of Isiolo County, Northern Kenya', (2014). Available at http://r4d.dfid.gov.uk/pdf/outputs/Futureagriculture/FAC_Working_Paper_095.pdf >accessed 12 August 2018.

¹⁷⁷ Saferworld Organisation Report, 'Isiolo County conflict analysis' June 19, 2015. Available at www.saferworld.org.uk/downloads/pubdocs/isiolo-conflict-analysis.pdf > accessed 12 August 2018.

¹⁷⁸ Bilali Salim, *The Nature of Conflicts between the Borana and Meru Communities in Isiolo County of Kenya* (MA Thesis, University of Nairobi, 2014).

‘resort city’ to boost tourism to the area.¹⁷⁹ There are planned massive capital investments under development of the LAPSET Corridor including International Airport and oil storage facilities that are expected to boost rapid population growth in the county.¹⁸⁰

Having been marginalized for a long time by the national government, the residents of Isiolo county have often times trusted and resolved their disputes using resolution mechanisms that are alternative to the formal justice systems, including traditional justice resolution mechanisms and inter-community negotiations led by community elders.

The preference for alternative mechanisms for resolving disputes is a consequence of the minimal presence of formal government institutions in the county. For instance, the entire county is served by one law court situated in Isiolo town. The poor road network makes this court extremely inaccessible for many residents, forcing them to seek solutions for their disputes at the community level.¹⁸¹

The preference for community justice mechanisms is also informed by the fact that each of these communities has its own dispute and conflict resolution mechanism that have roots in traditions and culture in which communities have complete confidence.¹⁸²

Additionally, the communities have different intra-community declarations that govern dispute and conflict resolution and are recognized by members of the community; for instance, the Madogashe and Maikona Declarations of the Borana community and the Laikipia Declaration.¹⁸³

The resident communities are also largely homogenous in terms of religious beliefs, and this

¹⁷⁹ *Ibid* p.137.

¹⁸⁰ *Ibid* Isiolo County CIDP.

¹⁸¹ *Ibid* County Government of Isiolo CIDP.

¹⁸² Tanja Chopra, ‘Justice Versus Peace in Northern Kenya’, (2009), The World Bank, J & D, Vol 2, Issue No. 1. Available at <<http://documents.worldbank.org/curated/en/239811468284359876/pdf/495810NWP0Box31f0version0with0cover.pdf>> accessed 20 November 2019.

¹⁸³ *Ibid* p.2.

contributes to the prevalence of religious elders as an avenue for dispute resolution.¹⁸⁴

For these reasons, these forms of AJS have been utilized in Isiolo with relative success.¹⁸⁵

In recognition of the commendable efforts of communities within Isiolo County to resolve disputes outside the formal justice system and in answer to the Constitutional mandate to promote ADR mechanisms, the Kenyan judiciary under the leadership of CJ Willy Mutunga envisioned a court-annexed AJS project in Isiolo County.¹⁸⁶

The project was planned to bring together the community based AJS mechanisms and the formal justice system composed of various players to ensure efficient access to justice for residents of Isiolo County. More specifically, the project was intended to ensure community participation in the justice process thereby strengthening the community's confidence in the justice sector and also improving the relationship between the formal and informal justice system.

Isiolo Court Annexed AJS is an example of Court Annexed AJS model which 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 officers, with Court's guidance and partial involvement.¹⁸⁷

To this end, the Chief Justice initiated discussions with elders from various communities. In November 2012, the Chief Justice, during an official tour of the Upper Eastern region, convened a

¹⁸⁴ *Ibid.*

¹⁸⁵ UNODC, Programme For Legal Empowerment and Legal Aid in Kenya; 'Strengthening the Administration of Justice and Operationalizing the Use of Alternatives to Imprisonment in Kenya', Baseline Study, October 2018, p.20.

¹⁸⁶ Julius Otieno, 'Mutunga Opens Elders Council Court in Isiolo' *The Star* (Nairobi, 30 September 2015) available at < www.the-star.co.ke/counties/north-eastern/2015-09-30-mutunga-opens-elders-council-court-in-isiolo/ > accessed 19 November 2019.

¹⁸⁷ Other examples of Court-Annexed AJS Mechanisms in existence include: Karatina Law Courts, Othaya Law Courts, Kangema Law Courts. See Judicial Service Commission, 'Memorandum of The Judicial Service Commission (JSC) To the Building Bridges to Unity Advisory Taskforce (BBI), (2019), p. 45. Available at <<https://s3-eu-west-1.amazonaws.com/s3.sourceafrica.net/documents/119368/Memorandum-of-the-Judicial-Service-Commission.pdf>> accessed 21 November 2019.

meeting with leaders of the five major communities in Isiolo and discussed with them the idea of establishing a court-annexed AJS project.

As a result of the nature and history of the resident communities, Isiolo provided an ideal forum for testing the viability of employing community focused AJS in the resolution of disputes. These AJS mechanisms were to be utilized in partnership with the formal justice system and a symbiotic relationship was to be created. This meant that the courts could refer matters that could be resolved by the elders to the relevant community's AJS mechanism.

Following this initiative by the Chief Justice and the elders of different communities, the Court Users Committee (CUC) and the Chief Magistrate of Isiolo invited chairpersons of the councils of elders of the five main communities to join the Isiolo Court User Committee (CUC). It is during CUC meetings attended by representatives of the communities that matters relating to the partnership between AJS and the formal justice system are discussed. These joint deliberations that took root from the Chief Justice's initiative are what led to the establishment of the AJS Pilot Project in Isiolo in 2013.

The Isiolo County AJS Pilot Project is largely involved in resolving criminal misdemeanors. The Isiolo CUC has established the procedure for referring these matters to the relevant Council of Elders for resolution. Referral could be by the police upon arresting the suspect or by the court once the suspect is arraigned in court.

When a criminal misdemeanor is before the court, the state counsel, upon the arraigned suspect taking plea, in consultation with the presiding judicial officer may seek to refer the matter for resolution to the council of elders. Such an application is guided by various factors including the willingness of the parties to subject themselves to the process, the nature and the circumstances of the offence and the viability of the process.

At this stage, the presiding judicial officer takes the liberty to explain to the complainant the constitutional provision on AJS and the court's mandate to promote this mechanism in constitutionally

suitable circumstances. The officer however makes it clear that AJS is not a compulsory mechanism and individuals are at liberty to select either the formal justice system or AJS.

The elders will then summon the parties to a community hearing where they are permitted to bring in witnesses and other evidence to support their case. At the conclusion of the hearings, the elders will make a determination, usually on the spot and impose such fines as are determined under community customs and other unwritten rules governing relations within the community.

The most common sanction, including in criminal cases, are fines that are paid in the form of livestock to the victim or his family.

After the hearing of the matter by the elders is concluded, the elders are required to file a report with the court. The report stipulates whether the matter has been successfully resolved or not. In instances where the matter has been successfully resolved by the elders, the accused person may apply for dismissal in line with Section 204 of the Criminal Procedure Code.¹⁸⁸

Should the matter have failed to be resolved the elders, it is referred back to court for formal determination. In this way, the formal justice system and the AJS procedure are able to play complimentary roles within the justice sector.

Since it was rolled out, the Isiolo Court-Annexed AJS has registered some success in helping the courts adjudicate over disputes.¹⁸⁹ For starters, matters brought before the elders are settled over a shorter span of time compared to the court system. With less formalities and procedural rules, the elders are able to conclude a case much faster than the formal courts which deal with thousands other cases that are often adjourned for a variety of reasons such as unavailability of witnesses.¹⁹⁰

¹⁸⁸ The section provides that “If a complainant, at any time before a final order is passed in a case under this Part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused.”

¹⁸⁹ Judicial Performance Improvement Project, January – May 2018 available at < www.judiciary.go.ke/wp-content/uploads/2018/07/Progress-Report-Jan-May-2017-18.doc.pdf > accessed 19 November 2019.

¹⁹⁰ *Ibid*, p.3.

In many instances, elders are able to conclude a case on the same day hearing started since the parties are asked to come with all witnesses to the same hearing. AJS has also helped reduce the backlog of cases before the courts in Isiolo by reducing the caseload.¹⁹¹

Furthermore, AJS has contributed to improved relations and promoted peaceful coexistence within communities because AJS mechanisms inherently seek to play a role of restorative justice. This has aided in reducing the recurrence of offences committed by individuals. Further, this mechanism has contributed to better relations between the communities and the police service as the two appreciate each other as equal stakeholders in the justice sector.¹⁹²

As a result of the increased use of AJS, communities increasingly continue to have confidence in the justice system as a result of their participation. Consequently, individuals are more satisfied by the settlement arrived at through the AJS mechanism.¹⁹³

Due to the involvement of the courts, AJS has aided in increasing cooperation between genders in dispute resolution. Previously, traditional justice systems excluded women and children from participating in dispute resolution. The partnership with the formal justice system has continuously called for participation of women in this justice mechanism.¹⁹⁴ The AJS, being a partnership between the two mechanisms therefore provided an opportunity for women to actively participate in dispute resolution within their communities.

Finally, the court-annexed AJS mechanism has aided in increasing the appreciation of the informal justice mechanisms by the formal justice sector. In the past, the judiciary treatment community justice mechanisms with contempt but they now work together as equals in the administration of justice.¹⁹⁵

¹⁹¹ *Ibid*, p.4.

¹⁹² *Ibid*.

¹⁹³ *Ibid*.

¹⁹⁴ *Ibid*.

¹⁹⁵ *Ibid*.

Despite its successes, the implementation of the partnership between the elders and the courts in Isiolo is not without its fair share of challenges.¹⁹⁶ For starters, the members of the communities are not easily accessible by the elders because they are dispersed across the county.¹⁹⁷

There are inadequate finances in implementing the pilot.¹⁹⁸ These finances are needed for, inter alia, facilitating the attendance of the AJS sessions by the parties and the elders. In some instances, elders have requested one or both of the parties to facilitate the sittings and this creates the impression that the one who sponsors the sittings more generously might get a favorable decision.

There is also lack of clarity on the application of laws in circumstances of inter-community disputes. It is not clear which customs and laws should be applied in instances where disputes are between individuals from different communities. Yet another challenge is the absence of proper documentation of AJS decisions and proceedings.¹⁹⁹

Inadequate buy-in and acknowledgement of AJS from the community as a result of lack of knowledge about the existence of this mechanism and further from individuals living in urban areas and young people who have embraced the formal justice system and question the legitimacy of the elders and the process. Additionally, complainants are not always altogether convinced that resolutions from the AJS are acceptable before the court.

The initiative is also facing other challenges such as inadequate comprehensive regulatory and coordination framework that guide the AJS mechanism.²⁰⁰ Moreover, there is lack of a proper enforcement mechanism of AJS decisions. This is compounded by the fact that the courts, which reinforce the decisions of the AJS, are physically inaccessible by the communities.

¹⁹⁶ UNODC, p.24.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid*, p.25

¹⁹⁹ UNODC, p.26.

²⁰⁰ *Ibid.*

The elders who handle cases lack a permanent location from which they can conduct proceedings. There are also some reports of political interferences in the process and lack of political goodwill for the process.

Other challenges include the lack of clarity on jurisdiction of matters that the elders can deal with and those that can only be settled through the formal justice system, as well as inadequate involvement of women in the dispute resolution process run by the community elders.²⁰¹

Even as they handle cases, there is inadequate capacity among the elders to deal with certain matters presented to them due to lack of proper understanding of constitutional and statutory requirements in resolution of specific disputes.

It was also reported that in certain instances where matters were referred for resolution to the elders voluntarily by the parties before submission to the police or the courts, the complainants refer the matter again to the formal justice system even after resolution by the elders. This has caused double jeopardy on accused persons on various occasions.

Whereas courts are hesitant to refer to the elder's cases involving murder or sexual assault, the elders handle many such cases in the communities without any reference from, or to the formal courts.

This is one of the areas of conflict between the informal and the formal justice system in Kenya. As has been indicated, government officials were irked when they learnt that community elders resolved a gang rape case without the involvement of the police and other law enforcement institutions.

In a bid to operationalize the Isiolo AJS project and further strengthen the collaboration between the formal justice system and AJS, the judiciary and other stakeholders within the justice sector have regularly conducted sensitization forums for individuals participating in the administration of the AJS project including the elders and the CUC.

²⁰¹ *Ibid.*

3.3.2. Eldoret Peace Commission

Most studies document AJS within rural and marginalized areas, with very few cases of AJS in urban centers. This is largely due to the fact that AJS systems work best in homogenous communities that are characteristic of rural areas. Urban areas present unique challenges to the use of AJS due to the cosmopolitan nature of the population and the absence of a uniform language, culture and religion. Urban areas are also defined by large presence of the formal law enforcement systems, with several police stations and local administrators within reach of a majority of the population. The formal courts are also present in nearly all major urban areas in Kenya. The larger Nairobi cosmopolitan area, for instance, is served by Magistrates' courts in Mavoko, JKIA, Makadara, Milimani, Kibera, Kiambu, Ngong and Kikuyu. This can be contrasted against Isiolo County which has one court station in Isiolo town.

This is not to say, however, that AJS cannot thrive in urban areas. In Uasin Gishu and Kisumu Counties, the Public International Law & Policy Group (PILPG) works with local partners on an alternative justice mechanism focusing on restorative justice for victims of the 2007/8 post-election violence.²⁰²

After plans to establish a local tribunal to try the perpetrators of the 2007/8 post-election violence failed,²⁰³ the government attempted to set up an International Crimes Division²⁰⁴ in the High

²⁰² Jennifer Tsai & Simon Robins, 'Strengthening Participation in Local-Level and National Transitional Justice Process' (2017) PILPG, Global Initiative for Justice, Truth and Reconciliation Consortium. *Also See*; < www.publicinternationallawandpolicygroup.org/democracy-and-governance > Accessed 19 November 2019.

²⁰³ Xan Rice, 'Kenyan Leaders Fail to Sanction Tribunal to Investigate Post-Election Violence' *The Guardian*, (Britain, November 5, 2009. Available at <www.theguardian.com/world/2009/nov/05/kenya-election-violence-tribunal> Accessed January 23, 2018. See Also, 'How Kenya Handled Local Tribunal Process' *Daily Nation*, (Nairobi, September 17, 2013. Available at <www.nation.co.ke/news/politics/How-Kenya-handled-local-tribunal-process--/1064-1997172-p5vb2y/index.html accessed January 23, 2018.

²⁰⁴ Judicial Service Commission, 'Report of the Committee of the Judicial Service Commission on the establishment of an International Crimes Division in the High Court of Kenya' (JSC Report), 30 October

Court but these plans also failed to take off, largely due to lack of political will.²⁰⁵ Rather than set up an International Crimes Division, the government attempted to steer the plans towards establishing a division to deal with international organized crime whose mandate would be markedly different as it would not cover the post-election violence.

As a fallback measure and to ensure some form of accountability for the post-election violence,²⁰⁶ PILPG was invited by the Judiciary to set up a pilot project that would ensure victims of the PEV get some form of justice under a system run at the community level.²⁰⁷

PILPG worked with Kituo Cha Sheria and the Kenya Chapter of the International Commission of Jurists to set up community-led justice initiatives in Eldoret (Uasin Gishu County) and Kisumu (Kisumu County), two of the leading hotspots of the PEV.²⁰⁸ This model is known as the Third Party Institution-Annexed AJS Institution where AJS processes involves a third party who does not necessarily have to be a community member.²⁰⁹

The major focus of this initiative was the restoration of property that was stolen or destroyed during the violence, or compensation where the property could not be restored to the owner or where the owner was unwilling to take back the property.²¹⁰

Since the communities in these counties are cosmopolitan, with victims and perpetrators from different ethnic backgrounds, PILPG worked with local partners to establish panels of elders drawn

2012; Betty Waitherero, 'Can the International Crimes Division Prosecute Kenya's PEV cases?', *Daily Nation*, (Nairobi, 8 February 2014. Available at <<https://mobile.nation.co.ke/blogs/International-Crimes-Division-bring-accountability/1949942-2197978-format-xhtml-ahiyvpz/index.html>> accessed January 23, 2018.

²⁰⁵ Stephen Brown, Chandra Lekha Sriram, 'The Big Fish Won't Fry Themselves: Criminal Accountability For Post-election Violence in Kenya' (2012) *African Affairs*, Volume 111, Issue 443, 244–260. Available at <<https://doi.org/10.1093/afraf/ads018>> accessed January 23, 2018.

²⁰⁶ Martha Minow, *Supra* n.115.

²⁰⁷ Public International Law and Policy Group (PILPG) Reports (2015-2016).

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid* Judicial Service Commission, p.44.

²¹⁰ PILPG Report, *Ibid.*

from all the major communities' resident in the counties.²¹¹ The panels are thus fairly representative of the communities that were perceived as perpetrators and those who suffered from the violence.

To ensure compliance with the Constitution, PILPG also insisted that the panel members had to be drawn from across different segments of the population, i.e. women, youth, PWDs and elders alike. However, it was reported that when PILPG invited the communities to submit names of persons to be included in the panels, it observed that lists sent from some communities had just men of a certain age (elderly).²¹²

As such, PILPG set up a modernized form of AJS that is a hybrid that infuses the purely traditional with constitutional principles such as fair representation of both genders and the representation of marginalized segments of the population. Even then, it had to deal with some of the common dilemmas AJS faces.

A major challenge facing the project was how to handle Sexual Offences that were committed during the PEV.²¹³ Whereas many of the victims of sexual assault have asked for a chance to face the perpetrators through these community justice systems, there is difference of opinion between PILPG and its local partners over whether they should pursue such cases. This is despite the fact that for many victims, this is the only hope of getting some form of justice, with many requesting simply for child support for the children they bore out of their assault as opposed to punishment for the perpetrators.

PILPG and its local partners are also attempting to work out an arrangement with the Courts so that the decisions of the elders are formalized by the courts. The High Court in Eldoret and Kisumu have expressed willingness to work with the project through a court-annexed AJS framework but the finer modalities of such an arrangement are yet to be worked out.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid* PILPG Report.

Both victims and perpetrators alike have welcomed this initiative, with PILPG reporting that some perpetrators would be happy to confess to their actions, followed by some form of cleansing since they feel that unexplained misfortune befell their families due to the roles they played in the PEV.

Even as the courts expressed their willingness to work with PILPG, it was reported that officials from ODPP were adamant that any perpetrator who came forth to confess to a crime committed during the PEV would be prosecuted like any other, thereby undermining any hope that perpetrators would come forth.

The AJS adjudication method does not take the form or structure of a court. Everyone is encouraged to feel free to talk, especially the parties, without fear of condemnation or fear of punishment. The AJS adjudication system aims to reconcile members of the community to each other and ensure that there is unity in the community.

The councils seek to ensure that both the complainant and the respondent can present their issues. It seeks to ensure that the parties can arrive at a mutually agreed-upon solution. This ensures that the parties can live harmoniously even after the dispute has been resolved.

The Council for Cohesion (*Baraza la Uwiano*) is divided into two groups, the commissioners and the adjudicators. The commissioners make arrangements for the sessions such as by notifying the parties of a hearing date, time and location. They also make arrangements for publicizing AJS within the community. The adjudicators determine how reconciliation will take place as they preside over the sessions.

The commissioners and the adjudicators have gone through training sessions on alternative dispute resolution methods including mediation, reconciliation and arbitration. They have also been trained to identify and assist persons needing psychosocial support. Certificates have been awarded to commissioners and adjudicators who have successfully undergone these trainings.

3.4. Conclusion

The examples discussed above show that Kenyans seem to recognize a role for both state and non-state actors in the maintenance of law and order, and communities often see no contradiction in seeking justice through both systems at the same time. The Isiolo example shows that there are instances where one system is approached and, if the response or outcome of the initial approach is considered unsatisfactory, then another will be approached. Kenyans therefore clearly display a concept of justice which involves a continuum encompassing both the informal and the formal legal system, in which generally a division between minor offenses, to be dealt with locally, and serious issues, to be forwarded to the formal system, applies.

A field study by IDLO²¹⁴ sought to analyze AJS situation and come up with recommendations for legal and policy reforms that would assist in incorporating AJS in the Kenyan justice system. The Kikuyu, Luhya, Kamba and Meru communities were selected in this study.

The study found that men and women generally consider ADR and AJS accessible, affordable and fair. However, as far as outcomes are concerned many women perceive some TDRM biased against women due to the negative perceptions of women as inferior to men in some respects.²¹⁵

It further revealed that the members of the community were well aware of that AJS and TDRM exist as means of ADR mechanisms. The communities also relied on other authorities such as chiefs, to solve their disputes.²¹⁶

From the case studies above, several questions remain with regard to the Judiciary's attempt to

²¹⁴ IDLO, Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes, July 2018. Available at <www.idlo.int/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya> accessed 6 August 2019.

²¹⁵ *Ibid.* Also see; Kariuki Muigua, 'Current Status of Alternative Dispute Resolution Justice Systems in Kenya' October 2018, p.18 available at <<http://kmco.co.ke/wp-content/uploads/2018/10/CURRENT-STATUS-OF-ADR-JUSTICE-SYSTEMS-IN-KENYA-Kariuki-Muigua-5TH-OCTOBER-2018-00000002.pdf>> accessed 21 November 2019.

²¹⁶ *Ibid.*

mainstream AJS. One of the main concerns is how to infuse constitutional values into customary law and AJS especially on gender and children's issues. The second question is whether AJS should be institutionalized, and how. Some scholars have argued that the success of AJS is because of their separation from the formal justice system.

Thirdly, what is the proper jurisdiction of the alternative justice system, particularly the council of elders? Should they handle any and all cases, particularly serious crimes like murder and robbery with violence, and sexual offences? Fourthly, how can customary law be applied in modern times in mixed societies? Fifthly, how can this mechanism deal with individuals who have wholly adopted the formal justice system and do not recognize AJS? Sixthly, how can the application of AJS be made predictable through the predictability of the decisions and use of precedents?

The seventh dilemma is how to ensure that even as AJS is adopted, there is room left for culture and traditions continue to evolve as they have done over millennia. The UNODC acknowledges that while some alternative justice systems are derived from traditional norms and structures, they are not static; they evolve and mutate as a result of social and political dynamics and in mutual interaction with formal systems.²¹⁷

One approach that has been pursued in many jurisdictions is to issue guidelines on the extent of the subject-matter jurisdiction of AJS forums. However, this has returned mixed results. In Liberia, for instance, during efforts to remove serious cases, such as murder, out of Chiefs' jurisdiction, Chiefs went "underground", continuing to hear serious cases to safeguard their legitimacy in the community.²¹⁸ The same outcome was seen in Sudan where the government issued similar jurisdictional guidelines. Instead, individual chiefs in urban areas adhere to formal regulations only

²¹⁷ UN Office on Drugs and Crime and US Institute of Peace. Criminal Justice Reform in Post-conflict States: A Guide for Practitioners (September 2011) United Nations.

²¹⁸ Deborah Isser, Stephen Lubkemann & Johnny Ndebe, 'Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options' (2009) United States Institute of Peace, Peaceworks Series, 4 available at <www.usip.org/publications/2009/11> accessed 2 November 2019.

when it suits them while in rural areas jurisdiction on all subjects remains squarely in the hands of the local chief even where the government has established jurisdictional guidelines.²¹⁹

The next chapter explores the use of alternative justice systems in selected jurisdictions with a view to drawing lessons that can be replicated in Kenya.

²¹⁹ UNFPA, *Adapting Restorative Justice Principles to Reform Customary Courts in Dealing with Gender-Based Violence in Southern Sudan* (2008), Final Report Compiled by DPK Consulting.

CHAPTER FOUR

CASE STUDY OF RWANDA AND UGANDA

4.1. Introduction & Justification

The opportunities presented by alternative justice systems are not unique to Kenya, and many jurisdictions with pluralist legal systems have grappled with the question of how to work with these alternative mechanisms. Just like Kenya, virtually all countries that make up Africa were fashioned by bringing together different ethnic communities that had their own ways of resolving disputes before the advent of colonialism. And like Kenya, the judicial system introduced by the colonial governments quickly rose to be the mainstream system for resolving disputes, and the other mechanisms that had existed were relegated to the periphery of the formal judicial system.

Over the years, different countries have attempted to breathe new life to these forums for dispute resolution, and this chapter looks at two examples of how this persistent question has been approached.

Having studied the mechanism set up by the Public International Law & Policy Group to bring justice for victims of the 2007/8 post-election violence in Eldoret and Kisumu in the preceding chapter, this chapter now examines the manner in which alternative justice systems were deployed in the aftermath of the 1994 Genocide in Rwanda for purposes of drawing lessons from this comparative experience. Rwanda makes for good comparison given its history of conflict and the manner in which alternative justice systems were used to restore community relations in the aftermath of the genocide.

The study also examines the use of alternative justice systems in Uganda which shares a colonial and legal history with Kenya.

4.2. Alternative Justice Systems in Rwanda

The essence of traditional justice resolution mechanisms in Rwanda is captured in the Kinyarwanda proverb '*Urujya kujya iBwami, rubanza mu Bagabo*' which translates to 'Before a case is brought to the King, it must first be heard by the wise men.'²²⁰

The existence of traditional conflict resolution mechanisms in Rwanda, goes back to the pre-colonial period before Rwanda was colonized. Disputes between neighbors or family members for instance, were resolved within the community by the '*Gacaca*', the literal meaning of which in Kinyarwanda is '*justice on the grass*'. Community members were chosen as mediators on the basis of their integrity and their wisdom (*Inyangamugayo*).

Gacaca justice was based on values such as respect, integrity and '*Ubupfura*' (nobility of heart). The objective of *Gacaca* was not to punish the offenders, but to offer compensation for the harm suffered and to subsequently restore community cohesion.²²¹ The compensation paid by the offender was also not intended to cause an economic loss to the offender, and to the community at large.

The *Abunzi* committee system, like the *Gacaca* Courts, was also part of a broader decentralization (of justice) process, launched by the Government of Rwanda in the post-2000 era, to make justice affordable and accessible. Literally translated, *abunzi* means 'those who reconcile'.

4.2.1. The *Gacaca* Court

The *Gacaca* court was set up in the wake of the 1994 Rwanda Genocide to fast track the prosecution of the more than 100,000 people accused of genocide, war crimes, and related crimes

²²⁰ Telesphore Ngarabe, *Practical Challenges in Customary Law Translation: The Case of Rwanda's Gacaca Law*, OSSREA 2015), p.22.

²²¹ Lauren Haberstock, 'An Analysis of the Effectiveness of the Gacaca Court System in Post-Genocide Rwanda' (2014) *Global Tides*, Vol. 8, Article 4, p.10. Available at <http://digitalcommons.pepperdine.edu/globaltides/vol8/iss1/4>> accessed 19 November 2019.

against humanity. The then justice system of Rwanda was coupled with challenges that would stall trial processes of such high number of accused persons.²²² The International Criminal Tribunal for Rwanda was hence created by the UN Security Council in 1994.

However, by June 2006, only 22 judgements, involving 28 accused persons had been passed, over a decade since inception of the Tribunal.²²³ At this snail's pace, it was estimated that it would take 200 years to prosecute all the accused persons, who were then crowded in prisons. Therefore, something had to be done to speed up these trials, putting into consideration factors such as humane detention and reconciliation.²²⁴

The *Gacaca* court was also another means adopted to deal with the staggering backlog of cases.²²⁵ The restorative conception and intentions of the *Gacaca* were specifically designed as an alternative justice system to state's model of retributive justice and formalities. This was in order to offer a more efficient, effective and long-term solution to the problems of national suffering and divisions.²²⁶

The term *Gacaca* Courts was deliberately chosen by the Rwandan government to highlight their differences from the traditional *Gacaca*; their powers were similar to those of a conventional court, and their proceedings were strictly regulated by law²²⁷. Based upon the traditional model, the

²²² The Rwandan judicial system itself had been almost entirely wiped out. The judicial infrastructure had been destroyed; the judges and trained court officials had, for the most part, been killed, or left the country. See Human Rights Watch, 'Justice Compromised, The Legacy of Rwanda's Community-Based Gacaca Courts, May 2011. Available at < www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts > accessed 19 November 2019.

²²³ Robert Gardner and Wayne Lavold, '*Exploring Globalization*' (2007), McGraw-Hill Ryerson, Toronto, 192.

²²⁴ *Ibid.*

²²⁵ Republic of Rwanda, Office of the President of the Republic, (1999), Report on the Reflection Meetings held in the Office of the President of the Republic from May 1998 to March 1999, Kigali, 49. See Charlotte Hulme, *The Truth Heals: Punishment and Reconciliation at Rwanda's Gacaca Courts*, Political Science Honours Thesis, Wellesley University, 2014 p.32. Available at < <https://repository.wellesley.edu/thesiscollection/212> > accessed 19 November 2019.

²²⁶ Charlotte Hulme, *Ibid.*

²²⁷ *Ibid.*, Teleshore Ngarambe, p.58.

Gacaca Courts were formally set up by the Organic Law of 2001²²⁸. The courts were established to achieve three specific objectives: to fill the gap left by the ordinary justice system; to eradicate the culture of impunity; and finally, to rebuild national unity and encourage reconciliation through a participatory justice system.²²⁹

The Organic Law governed their organization, competence and functioning while government agencies at the national and local levels supervised the law's enforcement.²³⁰ This was the National Service in charge of follow-up, supervision and coordination of the activities of the *Gacaca* Courts as well as leaders of administrative organs.²³¹

The *Gacaca* courts concluded the hearings of genocide cases in 2010.²³² In recognition by the Rwandan government that conflict is inevitable and a feature of social reality, the government sought long term solutions that would involve the public's participation in conflict resolution.²³³ Efforts to decentralize the reconciliation process among the Rwandan population led to the constitution of the *Abunzi* mediation system.²³⁴

²²⁸ Organic Law No. 40/2000 of 26/01/2001, setting up '*Gacaca* Jurisdictions' and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, and December 31, 1994.

²²⁹ *Ibid.*

²³⁰ Article 49, Organic Law No. 16/2004 of 19/6/2004 establishes the organization, 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 1st, 1990 and December 31, 1994. OGRR special issue of 19/06/2004.

²³¹ Ruben De Winnie, Anne-Ael Pohan, *Mediation in Rwanda: Conceptions and Realities of Abunzi Justice 2011-2014* (Vol.3, Bruxelles Belgique, RCN Justice & Democratie 2015).

²³² After the adoption of the 2001 Organic Law, a pilot phase began in 2002. Administrative reorganizations took place and in 2004, a new Organic Law replaced the 2001 legislation. It was only in 2005 that the first *Gacaca Court* trials were finally held. In 2010, the final closing ceremony was held for the closure of the sector level *Gacaca Courts*. At national level, the *Gacaca Courts* were officially closed in 2012. See Ruben De Winnie *Ibid.*

²³³ Martha Mutisi, 'The Abunzi Mediation in Rwanda, Opportunities for Engaging with Traditional Institutions of Conflict Resolution' (2011) ACCORD.

²³⁴ *Ibid.*

4.2.2. Abunzi Mediation System

The *Abunzi* are local mediators mandated by the state to use mediation as an approach to resolve disputes with the aim to find a mutually acceptable solution to both parties to the conflict.²³⁵ The *Abunzi* committees were set up in 2003 in the first Constitution of the post-genocide era²³⁶. This Constitution gives the *Abunzi* power to mediate between parties, certain disputes that involve matter determined by law prior to filing of a case in court of first instance.²³⁷

This Constitution entrusts the mediation committees with the task of mediating between parties to certain disputes involving matters determined by law, prior to the filing of a case with the court of first instance. These committees therefore offer a more approachable justice system, which facilitates access to justice while countering the limitations that come along with the formal court systems.

Currently, Article 141 of the revised Constitution²³⁸ provides for the *Abunzi* Committee. It provides that the Committee is responsible for conciliating parties in conflict with the aim of consolidating national unity and peaceful coexistence among Rwandans. The *Abunzi* Committee is comprised of persons of integrity who are recognized for their conciliation skills.

Carrying the agenda of local ownership of conflict resolution, the Rwandan government passed Organic Law No. 31/2004²³⁹ which recognizes the role of *Abunzi* in conflict resolution. The Organic Law of 2010 defines the *Abunzi* Mediation Committee as “an organ meant for providing a framework of obligatory mediation prior to submission of a case before the first-degree courts.”²⁴⁰ The Committee has jurisdiction to examine and handle both civil and criminal matters.²⁴¹

²³⁵ *Ibid.*

²³⁶ Constitution of the Republic of Rwanda of 04 June 2003, OGRR special issue of 04/06/2003.

²³⁷ Article 159.

²³⁸ The 2003 Constitution of Rwanda was revised in 2015.

²³⁹ Organic Law No. 17/2004 of 20/06/2004 was the first Organic law to be adopted. It was later replaced by Organic Law No. 31/2006 of 14/08/2006 and later the Organic Law No. 02/2010 of 09/06/2010.

²⁴⁰ Article 3, Organic Law No. 2/2010 of 09/06/2010.

²⁴¹ *Ibid.*, Articles 8 and 9.

The committee comprises of 12 elected members who are persons of integrity and are acknowledged for their mediating skills.²⁴² They are elected by the Cell Council by direct suffrage, whereby voters line behind candidates of their choice.²⁴³ The mediators have to be aged at least 25 years of age²⁴⁴. The committee members must also constitute 30% women.²⁴⁵

A party wishing their case examined by the Committee presents a request to the Committee either verbally or by writing to the Executive Secretary.²⁴⁶ On the hearing date, the parties choose 3 mediators whom they submit their case before.²⁴⁷ The mediation hearing is conducted publicly save for exceptional cases as requested by the parties. The parties to the claim are heard, and where available, witnesses present their evidence too.²⁴⁸ It is a requirement that the case must be settled within 30 days from when the case was entered in the cause list.

The Committee has power to make a decision (by consensus or absolute majority of votes) when conciliation fails, in accordance with the laws and customs applicable. Any party aggrieved by the decision is free to appeal to a competent court.²⁴⁹

4.2.3. Relationship between AJS & the Formal Justice System in Rwanda

Both the *Gacaca* and *Abunzi* were incorporated into the state's system in Rwanda. This is a regulated AJS institution where AJS mechanisms are created, regulated, and practiced either entirely or partially by the state and the various enacted statutes. Rwanda has incorporated AJS mechanisms in its court systems as part of its judicial mechanism and structures. The creation and regulation

²⁴² *Ibid*, Article 4.

²⁴³ Article 2, Presidential Order No. 43/01 of 16/08/2006 establishing regulations on electing mediation committee members. OGRR, special issue of 16/08/2008.

²⁴⁴ *Ibid*, Article 4.

²⁴⁵ *Ibid*, Article 3.

²⁴⁶ *Ibid*, Article 17, Organic Law of 2010.

²⁴⁷ *Ibid*, Article 18.

²⁴⁸ *Ibid*, Article 20.

²⁴⁹ *Ibid*, Article 25.

through statute means that these AJS institutions are part of the State.

In the post-independence regime, the *Gacaca* were under the local authorities. The councilors organized and presided over *Gacaca* hearings. After independence, the proceedings of the *gacaca* continued but under a streamlined way in form of a court, hence the name *gacaca* courts. The courts were all way to the national level. The National Service supervised and coordinated activities of these courts together with other administrative organs.²⁵⁰

The *Abunzi* committee was (by legislature) created as a local conflict resolution body. The Organic Law 02/2010 Of 09/06/2010 on Organization, Jurisdiction, Competence and Functioning of the Mediation Committee, outlines the organization, powers and functioning of the *Abunzi* committee. The Presidential Order No.43/01 of 16/08/2006 establishes regulations on election of the mediation committee members.

In 2013, a new revision of the legal framework for the mediation committees was undertaken by the Ministry of Justice. Several parliamentary sessions of Chamber of Deputies and Senate committees led to modifications in the draft law of April 2013²⁵¹. The final document has not yet been published.

4.3. Alternative Justice Systems in Uganda

Uganda and Kenya share a lot more than their common border, and these include a common colonial history that came with a common law foundation to their formal legal system. Like Kenya, the Judicature Act of Uganda allows the Ugandan courts to apply customary law in resolving disputes, but there is a proviso that relegates customary law to the bottom of the legal order. It provides that

²⁵⁰ Article 49, Organic Law No. 16/2004 of 19/6/2004 establishing the organization, 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 1st, 1990 and December 31, 1994. OGRR special issue of 19/06/2004.

²⁵¹This document is yet to be published but is available online at: www.parliament.gov.rw/uploads/tx_publications/DRAFT_ORGANIC_LAW_ON_ABUNZI_pdf169 accessed 29 October 2019.

“Nothing in this Act shall deprive the High Court of the right to observe or enforce the observance of, or shall deprive any person of the benefit of, any existing custom, which is not repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law.”²⁵²

Aside from the recognition of customary law in the Judicature Act, the Constitution of Uganda affords recognition and protection to traditional and cultural leaders, except that “a traditional leader or cultural leader shall not have or exercise any administrative, legislative or executive powers of Government or local government.”²⁵³

4.3.1. Alternative Justice System among the Baganda

The Baganda tribe of Uganda make up 16.9% of the population, being the largest ethnic group in the country. For this reason, the Baganda people as a group continue to be influential in affairs of state to the extent that conflicts which occur in their region also affect the rest of the country.²⁵⁴

The Baganda kinship system (*Ekika*) is a group system that is designed to address and solve social, political and other problems in the Baganda community. The *Ekika* system is run entirely by the Buganda community; an Autonomous AJS model. The community solely undertakes resolution of disputes without involvement from the state.

The community is made up of various kinship groups (*ekika*), each led by a *Mutaka*. The group represents an extended family consisting of; *Ssiga* (a family grouping of paternal lineages), *Lunyiriri* (paternal lineage), *Mutuba* (bigger group of related homesteads), *Luggya* (homestead headed by

²⁵² Judicature Act (Uganda), Section 15.

²⁵³ Constitution of Uganda, 1995, Article 246(3)(f).

²⁵⁴ Ashad Sentongo & Andrea Bartoli, eds, ‘Conflict Resolution Under the *Ekika* System of the Baganda in Uganda’ Africa Dialogue, Monograph Series N0. 2/2012, ‘Integrating Traditional & Modern Conflict Resolution: Experiences from selected Cases in Eastern & the Horn of Africa’, (2012), ACCORD.

paternal grandfather including his immediate family), and *Nnyumba* (home of birth headed by father, including his immediate family). Conflicts involving marriage, inheritance, adultery, fornication, theft, burglary, false accusations, and other grievances involving social inequality are handled through these social structures. There are no general rules that govern the *ekika* system of conflict resolution. This mode is anchored on the need for harmony and continuity of the kingdom.²⁵⁵

The Baganda people are known for the unity and group harmony hence the suffix “*ganda*” which means “bundle”. They therefore put emphasis on total resolution of conflicts in order to “keep the bundles together”.²⁵⁶

Each *ekika* is driven by the need to keep together and defend the Buganda kingdom. *Ekika* emphasizes on peace and harmony in the Buganda kingdom, as opposed to retribution and punishment approaches of the modern state.²⁵⁷ The fact that the *ekika* is driven by common goals and interests, conflicts are minimal and if they arise, the people are driven to pursue conciliation. They are driven by the fact that disgrace of one member affects the entire *ekika* hence, the need to solve conflicts in amicable ways.²⁵⁸

Group members are obliged to participate in celebrating success and enforcing the judgement or punishment issued by elders. This is regardless of one’s status in the community. Individuals are encouraged to own property, pursue success at all levels and have respectful careers because it contributes to the shared status of the kinship group.

Under the system, *Kisaakaate* (enclosure), *Kutawulula* (disentangle) and *Kwanjula* (introduction) are some of the traditional practices through which conflicts are mitigated and resolved.

The Baganda’s practice of *Kwanjula*, which means “to introduce” is a ceremony conducted by

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid*, p.14.

²⁵⁸ *Ibid.*

a bride to be, to introduce her would be husband to the family. In this function, it is a requirement that the partners recite their kinship lineage (*Ssiga, Lunyiriri, Mutuba, Luggya, Nnyumba, Mutaka*). This practice among the Baganda is for the purpose of fostering long term relationships between the in-laws and the extended families. According to them, this helps prevent conflicts between the two families and if any conflicts arise, will be managed effectively.²⁵⁹ Here, the *ekika* system focuses on the kinship relationship as a tool of social cohesion, as opposed to the nuclear relationship.

The kinship reciting by the parties also helps to prevent marriage between members of the same group as it is a taboo in the Baganda culture. This promotes the Baganda culture and assures the members of a peaceful co-existence between the families and the *ekika* at large. Unifying relationships are created during Kwanjula therefore possibilities of future conflicts are minimal, hence the community proceeds in unity and togetherness.²⁶⁰

The Baganda also handle matters locally at the *Kisaakaate* (enclosure), an enclosed place within a village managed by the *Omutaka* or *Omutongole* (village chief). These enclosures were used as venues where the Baganda would learn about the Baganda culture and norms. This helped to maintain conflict-free relationships among themselves and with other tribes. Abilities demonstrated during training determined the role a participant would play in society upon completion.²⁶¹ Any participant who demonstrated excellent abilities in the handling of public affairs was recommended by the *Omutongole* or *Omutaka* to the *Kabaka* for appointment to a position of responsibility. The prospect of recognition and appointment to serve the *Kabaka* based on one's ability regardless of kinship group, religion or status was a strong incentive that 'promoted moderation and cooperation' among participants. These were considered strong and necessary qualities for leaders to have and to

²⁵⁹ Pearl Dykstra, *Family Relationships: The ties that bind, A Sociological and Demographic Research Program 2000-2006* (The Hague, Netherlands Interdisciplinary Demographic Institute), 26.

²⁶⁰ Pearl Dykstra, p.18.

²⁶¹ *Ibid*, p 21.

be able to keep the ‘bundles’ together.

In the pre-colonial and colonial periods, the *Kisaakaate* served as a means of conflict resolution where members of captured communities attended *Kisaakaate* to learn the Buganda language and traditions. This helped to minimize tension and resulted to integration into the Buganda community.

The *kisaakaate* system was revived by Kabaka Mutebi in 2008.²⁶² It is currently in practice and the Baganda communities are taught about their culture and history, and to discuss ways to solve social, political and economic problems affecting Buganda.

The Baganda also have, the *Kutawulula* (disentanglement), a practice conducted in a *Kitawuluzi* (physical or symbolic space) where issues causing conflict are analyzed and parties to a dispute reconciled. Parties to the dispute attend *kitawuluzi* sessions and discussions are held until an amicable settlement is reached.²⁶³

In Buganda, each *Muluka* (parish) in all eighteen *Masaza* (counties) of the Buganda Kingdom had a *Kitawuluzi*, presided over by *Owomuluka* (chief). The sessions are conducted publicly, with each party given a chance to air out their case, and witnesses also give clarifications and testimonies. The parties are obliged to declare their commitment to forgiveness and to the outcome of the case. AJS mechanisms are employed to solve such local disputes.²⁶⁴

4.3.2. Post-Conflict Alternative Justice in Uganda

Uganda has been at the center of what is now Africa’s longest-running conflict, the Lord’s Resistance Army conflict. Led by the reclusive Joseph Kony, the Lord's Resistance Army brutal insurgency displaced nearly two million people in large areas of northern Uganda. To date, the conflict

²⁶² *Ibid*, p.32.

²⁶³ *Ibid*.

²⁶⁴ *Ibid*.

has seen more than 10,000 people killed in massacres, while twice that number of children have been abducted by the LRA and forced to work as soldiers, porters and sex slaves.²⁶⁵

Uganda's criminal justice system has not responded adequately to the LRA conflict, and the rebel leaders and others responsible have not had their day in court. This prompted the ICC to intervene, and the warrants issued in 2005 for the arrest of Joseph Kony and other rebel leaders were the first ever since the ICC was established.²⁶⁶

The ICC was not the only institution that moved in to address these gaps in the criminal justice system in Uganda. Traditional justice mechanisms have also been used in Uganda particularly to restore relations within communities affected by the decades-long Lord's Resistance Army conflict.²⁶⁷ These mechanisms have proved particularly useful for child soldiers,²⁶⁸ borrowing on lessons from the use of Gacaca courts in Rwanda.

4.3.3. Relationship between the AJS & the Formal Justice System in Uganda

It is to be noted that all these mechanisms for dispute resolution exist autonomously outside the formal justice system and no attempts have been made to formalize or legislate over these practices. The first time they received formal recognition is in the National Transitional Justice Policy that was adopted by the Cabinet of the Government of Uganda in June 2019. A statement issued by the government on the adoption of the policy indicated that the "objective is to address the gaps in the

²⁶⁵ Xan Rice, 'Background: The Lord's Resistance Army' *The Guardian*, (London, October 20, 2007) Available at < www.theguardian.com/katine/2007/oct/20/about.uganda > Accessed on 2 November 2019.

²⁶⁶ Tim Allen, 'The International Criminal Court and the invention of traditional justice in Northern Uganda', (2007), *Dans Politique Africaine*, No. 107, pages 147-166.

²⁶⁷ Sharon Esther Nakandha and Kendra Alexia Hefti-Rossier, 'Towards a Comprehensive & Holistic Transitional Justice Policy for Uganda: Exploring linkages between transitional justice mechanisms' (2013) *Avocats Sans Frontières*.

²⁶⁸ Hope Among, 'The application of Traditional justice mechanisms to The Atrocities Committed by Child Soldiers in Uganda: A Practical Restorative Justice Approach' (2013), Chapter 8, Vol 2, AHRLJ 19. < www.saflii.org/za/journals/AHRLJ/2013/19.html > Accessed on 5 October 2019.

formal justice system for post conflict situations, and that it is also aimed at formalizing the use of the traditional justice mechanism in post conflict situations and to also addressing gaps in the current amnesty process.”²⁶⁹

One of the guiding principles in the National Transitional Justice Policy is complementarity, through which “[the] policy recognizes that the solution to national reconciliation and justice lies in the multiple systems of justice functioning simultaneously and effectively complimenting each other,” and “that that different actors have different roles to play for the common good.”

The Policy states that “As much as the formal justice system in Uganda has well laid out institutions and processes that have been used in the administration of justice, there are gaps in terms of transitional justice.” The most pertinent gaps that the policy seeks to address are in relation to the protection of witnesses, participation of victims in proceedings, and access to justice by the vulnerable especially children and women in post conflict situations. As such, the Policy calls on the government to “ensure witnesses are protected and victims participate in proceedings and to the extent possible, remove barriers for access to justice by victims especially the vulnerable.”

The Policy also acknowledges that “although Traditional Justice Mechanisms (TJMs) are widely applied in Uganda due to advantages such as speed, accessibility and cost effectiveness among others, these mechanisms are still faced with challenges, with the major ones being the lack of formal recognition and lack of regulation.”

To address these challenges, the policy requires the Government to recognize traditional justice mechanisms as a tool for conflict resolution through the development of legislation and the empowerment and capacity building of traditional leaders and traditional institutions in functionality

²⁶⁹ See, JLOS at www.jlos.go.ug/index.php/com-rsform-manage-directory-submissions/services-and-information/press-and-media/latest-news/item/69 cabinet-approves-national-transitional-justice-policy Accessed 5 October 2019.

and basic fundamental principles touching on cross cutting issues. The anticipated legislation will provide “guiding principles and jurisdiction of TJMs, checks and balances in the implementation of TJMs, sensitization on the roles of TJMs in the community, and the use of TJMs as the point of first contact for particular concerns.”

4.4. Conclusion

Just like Kenya, alternative justice resolution mechanisms have existed in Uganda and Rwanda for decades, and these forums predate independence and the formal judicial system to which they are now subservient. In the period after independence, these mechanisms existed parallel to the formal judicial system without any recognition from the state, but the governments in Rwanda and Uganda have acknowledged the inadequacies of the formal justice system to deal with all disputes, particularly those arising from conflict, and the tremendous potential for alternative justice systems.

In Rwanda, this acknowledgement was followed by legislation that gave formal recognition to Gacaca courts which were the primary forum through which trials for perpetrators of the genocide were conducted at the national level, away from the International Tribunal where those who bear the greatest responsibility were tried. In Uganda, traditional justice mechanisms have existed without formal recognition, until 2019 when the Cabinet approved the National Transitional Justice Policy that now calls for legislation on traditional justice mechanisms which have stepped up to offer justice to victims of the LRA conflict.

Both countries provide useful lessons for Kenya, and these are distilled in the next and final chapter of this study.

CHAPTER FIVE

CONCLUSIONS & RECOMMENDATIONS

5.1. Introduction

This study set out to investigate the impact of AJS on access to justice, the legal framework on AJS in Kenya, as well as the practice of AJS in Kenya and in comparable jurisdictions with a view to making recommendations for mainstreaming AJS in Kenya.

Alternative justice systems are a reality in many jurisdictions and Kenya is no exception. This study has revealed that these systems exist both in urban and in rural areas, but are particularly prominent in marginalized areas where state justice institutions have little or no presence.

The study has noted numerous advantages that AJS presents towards improving access to justice. To start with, AJS enables persons who are otherwise not reached by the formal justice system to get an opportunity at justice without having to travel long distances to access the formal judicial system. In doing this, AJS mechanisms also help lessen the load on the formal justice system. In deed, many studies suggest that as much as 80% of disputes are resolved out of court through various models of AJS. This is particularly significant for a country like Kenya whose formal courts are struggling under the weight of case backlog.

Where they exist, AJS serve to enhance reconciliation between individual parties to a dispute and the wider community as opposed to the formal justice system where the parties are regarded as adversaries. In AJS, parties are not adversaries and the elders go to the root of the problem, which promotes reconciliation. In this manner, AJS helps maintain existing relations between individuals and communities.

Additionally, the nature of decisions made in AJS take into account very many circumstances because the adjudicators understand the parties and the cases better.

High costs are often cited as an impediment to access to formal justice institutions. On the contrary, poor people are able to access justice because AJS is significantly cheaper than AJS. Additionally, individuals are able to best represent themselves because there are no procedural restrictions as in the formal justice systems. Lack of strict procedural hoops also mean alternative justice mechanisms are time saving, and cases can be concluded within a matter of days, or even hours.

The participation of the entire community in the process, including in the payment of fines results in ownership of the process and outcome by the community, and in improved compliance.

Although AJS have traditionally sidelined women, modern iterations of AJS, especially in cosmopolitan areas, have given women a more prominent role, as seen in Uasin Gishu County where women are selected to sit among adjudicators handling cases that arose from the 2007/8 post-election violence.

Regarding popular attitudes towards the interaction of the two systems, this study has showed that Kenyans seem to recognize a role for both state and non-state actors in the maintenance of law and order, and communities often see no contradiction in seeking justice through both systems at the same time. Sometimes one system is approached and, if the response or outcome of the initial approach is considered unsatisfactory, then another will be approached. Kenyans therefore clearly display a concept of justice which involves a continuum encompassing both the informal and the formal legal system, in which generally a division between “minor” offenses, to be dealt with locally, and “serious” issues, to be forwarded to the formal system, applies.

In the absence of clear statutory or policy guidelines, courts have been left to determine each case on its unique circumstances, with the result that we now have conflicting decisions on the place of alternative justice systems in the justice system in Kenya. Coming from courts of concurrent jurisdiction, these decisions have left more questions than answers in Kenya’s quest to mainstream alternative justice systems, and this brings us to the policy and administrative interventions that have

been put in place in recent years.

Despite clear provisions in the Victims Protection Act that call for restorative justice without regard to the crime, some courts have resorted to the older laws that limit the application of reconciliation to minor offences only, and of African customary law to civil cases.

While most of the literature points out that local justice at times runs counter to ideas of equality and international human rights standards, less attention is given to the fact that local law and its focus on collective rights, rather than individual rights, serves a crucial social function: maintaining peace and social order within small, close-knit communities.²⁷⁰

Building the capacity of the formal system is a long-term process. Considering their integral role in local culture, local informal systems will remain a central feature of conflict resolution regardless of the completion of this process, providing Kenyans with a culturally accessible alternative to the formal justice system. Being tied up in a set of spiritual beliefs and social norms, local justice systems are fulfilling a purpose the formal system cannot simply replace. It is therefore of crucial importance to engage with these systems and understand the cultural values underpinning various practices and beliefs.²⁷¹

5.2. Mainstreaming AJS for Improved Access to Justice – Which way for Kenya?

The examples of AJS discussed above and literature review from other areas revealed that 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.

²⁷⁰ UNDP Report, ‘Approaches to Domestic Violence against Women in Timor-Leste: A Review and Critique’ Available <www.undp.org/content/dam/timorleste/docs/JSP%20docs/TL_JSP_LitReview%20DV_CL_FIN_ALJan2011.pdf> accessed 2 July 2018.

²⁷¹ *Ibid.*

The first category - 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, which govern the community. These 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.²⁷²

The second category consist of Third-Party Institution - Annexed AJS Institutions. These are AJS processes that involve third-parties who are not necessarily members of the community. They are the ones who hear and resolve such disputes. These third-parties can be State sanctioned institutions like chiefs, the police, probation officers, child welfare officers, village elders under the County government, the Chair of *Nyumba Kumi*, among others. They can also be non-state related institutions like churches, *Imams* and *Sheikhs* among Muslims, other religious leaders, 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.²⁷³

In many informal settlements in urban areas and in rural areas chiefs are involved in dispute resolution. Disputes are brought before Chiefs who hear and act as important third parties for their resolution. There are also CSOs who offer dispute resolution services such as Kituo Cha Sheria and FIDA. These also handle and determine disputes within communities.

The third category are Court-Annexed AJS which refers to AJS processes that are used to resolve disputes outside the court, although under its guidance and partial involvement. Like Court-

²⁷² Judicial Service Commission, ‘Memorandum of The Judicial Service Commission (JSC) To The Building Bridges to Unity Advisory Taskforce (BBI), (2019), p.44. Available at < <https://s3-eu-west-1.amazonaws.com/s3.sourceafrica.net/documents/119368/Memorandum-of-the-Judicial-Service-Commission.pdf> > access ed 21 November 2019.

²⁷³ *Ibid*, p.45.

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 (CuC), the AJS processes, and other stakeholders such as the ODPP, Probation Office, and Children's Office. The AJS mechanisms are linked to the courts through the CuC and receive the guidance of the court and its officers such as ODPP, probation officers and children officers in the resolution of disputes. This dispute resolution model merges 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 on a referral system.²⁷⁴

In the final category are Regulated AJS Institutions. 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 in their court systems as part of their judicial mechanism or local government structures. 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.²⁷⁵

These modalities point to three levels of engagement with the state justice systems – abolition, limited incorporation, and complete incorporation.²⁷⁶ There are countries where informal justice systems are completely abolished in favor of the formal justice system. In others, there is limited incorporation where the formal and alternative justice systems coexist within the same state system and retain their distinct jurisdictions, with admittedly some form of supervision by the state system over the alternative justice system. Where there is complete incorporation, the alternative justice system is fully incorporated or given a formal role within the state justice system. The formal state

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid*, p.47.

²⁷⁶ Wojkowska, Ewa, 'Doing Justice: How Informal Justice Systems Can Contribute' (2006) Oslo: UNDP Oslo Governance Centre, December 2006.

system may codify or incorporate as common law the informal or customary rules or norms of decision into its decision-making process. The informal structures may also comprise one section of the lowest tier of courts within the entire formal state structure. Specialized formal courts may be established to hear only disputes arising under customary law.²⁷⁷

The benefits of full incorporation are that it provides for judicial supervision over informal courts, facilitates linkages between customary and statutory law, and may help to clarify jurisdiction over different types of disputes. But there are a number of problems associated with full incorporation. Codification is often seen as a problematic and potentially harmful endeavor because by "freezing" customary practices into law, it deprives customary practices of fluidity and the potential to change over time, a key feature and advantage. The top-down imposition of informal systems may likewise erode another central feature of these systems: their reliance on voluntary community participation and on social sanction as the principal means of enforcement.

Limited incorporation/coexistence is seen as the most beneficial model of complementarity, for it can potentially promote and strengthen human rights standards in the informal/traditional system, clarify the jurisdictional division of labor between the formal and informal systems, and at the same time rely on key advantages of informal systems: self-regulation and community-driven demand for and supply of justice. But this model is also not without its shortcomings. As with the full incorporation model, state regulation may impinge on and thus erode the popular and voluntary nature of informal/traditional justice systems. Also, the promotion of informal/traditional alternatives may reduce the pressures or incentives for reforming the formal justice system.

In short, there are both advantages and disadvantages to these linkages between the formal and informal/traditional justice systems. The exception is the abolition model, which is seen as entirely

²⁷⁷ *Ibid.*

disadvantageous because it essentially means that modes of dispute settlement that are widely accepted and resorted to by many people, especially in rural areas, falls outside the law as recognized by the state. It is also worth noting that these models are "ideal" types, and there may be an array of formal-informal linkages falling between them. Ultimately, what matters is not the value of models, but rather specific ways that complementarity is actually carried out on the ground.

5.3. Recommendations

The fact that AJS has the potential to improve access to justice cannot be gainsaid. What remains is to fashion an ideal relationship between the formal and the informal, so that AJS is pulled from the periphery to the center of the judicial system where it belongs. Even as this is done, care must be taken so that AJS does not lose that which makes it appealing to its users in the first place. If not done properly, we may end up with a parallel and ineffective structured/formal system that does not serve any purpose.

One of the most glaring consequences of the lack of a relationship is the absence of witnesses which happens after elders have intervened in a case without the knowledge of the formal justice actors. Once a determination is reached by the elders, any individual who was to attend court as a witness is dissuaded or threatened from attending court, forcing the prosecution to withdraw a case after many adjournments due to lack of witnesses. Because of the ordinary challenges that witnesses face even when they are willing to attend court, the prosecutor and magistrate would not know whether the witnesses are unavailable due to the ordinary challenges or unwillingness to pursue the case through the court.

More importantly, how do we fashion a working relationship between the courts and the alternative justice systems in use around the country? Is this even necessary? Is it practical in all areas, or will it impose a heavy burden on the players? Is there a need to formalize a decision made by the

elders in Boni Forest who must travel to the Court in Mpeketoni or Lamu Island to register their decision? Should this be done with ALL disputes they resolve, or only with those that went first to court before referral to the elders?

It is highly unlikely that the formal justice system will expand to all corners of the country, and this means that millions of Kenyans will continue to rely on alternative justice systems to resolve their disputes. Even where formal justice systems have a presence, many Kenyans alternate between the two systems in the resolution of their disputes.

But even as these benefits are exalted, there is need to ensure that AJS is aligned with the Constitution which is the supreme law of the land, given by all Kenyans unto themselves. This is particularly so given that Customary law cannot contradict the constitution.²⁷⁸ We should also be cognizant of the national values that are binding to all Kenyans, and which provide that any person taking administrative or adjudicative action must promote values that underlie an open and democratic society.

Furthermore, the need to ensure that the Bill of Rights is respected cannot be gainsaid.²⁷⁹ Furthermore, the Constitution demands that traditional justice mechanisms should not be repugnant to justice or morality.²⁸⁰

The Constitution also demands equality before the Law.²⁸¹ This calls for non- sexism, getting rid of systematic and unfair discrimination and ensures that women are afforded full and equal participation in proceedings. Additionally, the cases must be determined and the outcome must take into account the respect that ought to be accorded to individuals in respect of human dignity.²⁸²

Due regard must also be paid to Article 53(e) that provides for the protection of children from

²⁷⁸ Article 2(4) and 159(3)(c).

²⁷⁹ Art. 159 (3)(a).

²⁸⁰ Article 159 (3)(b).

²⁸¹ Article 27.

²⁸² Article 28.

abuse, neglect and harmful traditional practices etc. The Constitution provides for equal responsibility for both parents whether they are married or not, and AJS practices should take cognizance of this.

Alternative justice systems must also promote access to justice as called for under Article 48 of the Constitution, both by the processes followed, and the substantive law that is applied. Towards this end, the processes should observe the rules of natural justice that is mandatory in any adjudicative process.

Vulnerable persons should be treated in a manner that takes into account their vulnerability. The prohibition against inhuman, cruel or degrading treatment must be observed.

Given the advantages that alternative justice systems present in enhancing access to justice in Kenya, the study recommends the following steps towards mainstreaming these alternatives to the formal judicial system.

5.3.1. Long Term Recommendations

In response to the constitutional imperative under Article 159 of the Constitution, the Judiciary should engage with existing AJS Institutions in a manner that will mitigate the potential possibilities of abuse and human rights violations.

Given the numerous benefits of AJS, the study recommends that Kenya continues to promote three of the four models of Alternative Justice Systems, i.e. Autonomous AJS Institutions, Third-Party Institution-Annexed AJS Institutions, and Court-Annexed AJS Institutions while avoiding the temptation to create Regulated AJS Institutions. This will mean that the existing models continue as they are. The only change will be the introduction of minimum standards and procedural safeguards which all AJS practitioners must follow. This will be in a statute whose aim would be *facilitate* rather than *regulate* AJS.

The Judiciary should work with other stakeholders to develop an appropriate judicial

operational doctrine of interaction between Courts and matters determined by or before AJS Institutions. The three models of AJS recommended above will inevitably have some interactions with the established courts under the Constitution. Article 48 of the Constitution guarantees access to justice to everyone and Article 50 of the Constitution guarantees the right to a fair trial (under Article 25 this right can be categorized as non-derogable). Read together, these two provisions mean that inevitably informal means of dispute resolution would inevitably be subjected to the rigors of the Bill of Rights.

Additionally, the freedom to personal liberty and the concept of civic autonomy permit and mandate individuals to pursue all available avenues of dispute resolution provided by the State. This means therefore that the AJS models presented above will inevitably interact with the courts. An appropriate doctrine of this interaction should thus be developed and operationalized. Such a doctrine must carefully calibrate civic autonomy and constitutional values.

The Judiciary should also establish Court-Annexed AJS in all Court Stations. Court User Committees that already exist in all stations countrywide should consider establishing Court-annexed AJS mechanisms in line with the practices, customs, and norms of their localities. This recommendation acknowledges the fact that AJS mechanisms are unique in each community, and there can be no one-size fits all formula that can be applied across the country.

5.3.2. Short Term Recommendations

All the above recommendations can be implemented through the enactment (by Parliament) of an AJS Statute which will serve to facilitate AJS mechanisms countrywide. The Statute should be facilitative rather than regulative. However, it will provide for certain minimum requirements and procedural safeguards for AJS Institutions, standards and guidelines for operations and the operational doctrines for interactions with Courts.

Finally, the study recommends comprehensive training on AJS for all actors in the

administration of justice, including Judicial Officers, prosecutors, local government administrators. Given the key importance of AJS in the constitutional set up, it is imperative that all involved in the administration of justice be sensitized on AJS. The stakeholders can work together under the auspices of the National Council for the Administration of Justice (NCAJ) an appropriate curriculum.

5.3.3. Medium Term Recommendations

It goes without saying that some of these initiatives will call for additional funding for the Judiciary, either from internal government sources or from development partners. Donors supporting access to justice in Kenya should turn some of their attention and funding to the alternative justice systems in play across the country. It would not be the first time donors are doing this. Evidence shows that in some cases, especially in Rwanda, Burundi, and Timor-Leste, there has been considerable donor involvement in revitalizing traditional justice mechanisms meant to address post-conflict justice issues.²⁸³ For example, in the case of the *Gacaca* courts in post-genocide Rwanda, "virtually all major donors supported the *Gacaca* one way or the other: they financed the training of the 250,000 *inyangamugayo* ('persons of integrity') who would serve as judges, funded the wooden benches on which these judges (nineteen per community) would sit, the red motorcycles on which the government monitors would go from one meeting to the other and the general, complicated logistics of holding trials in 11,000 jurisdictions."²⁸⁴

The role of international donors is particularly crucial in Kenya given recent reports that the budget of the Judiciary has been reduced significantly in the financial year 2019/2020, forcing some

²⁸³ International Association for Humanitarian Policy and Conflict Research, 'Traditional & Informal Justice Systems: Actors & Activities', (2009), Peace Building Initiative, Available at www.peacebuildinginitiative.org/index4472.html?pageId=1877, accessed July 12, 2019.

²⁸⁴ Barbara Oomen, 'Donor-Driven Justice and its Discontents: The Case of Rwanda, Development and Change' (2005) Vol 36, Issue No. 5, Institute of Social Studies, The Hague, 902-903.

courts and tribunals to cancel scheduled sittings.²⁸⁵ It is highly unlikely that the Judiciary will find government funding for alternative justice systems when funding for the formal courts have been slashed. Whereas the recent budget cuts are unfortunate, they point to the need for the Judiciary to mainstream alternative justice systems that do not rely primarily on state funding so that the justice system does not grind to a complete halt when the government slashes the Judiciary's budget.

Ultimately, the implementation of any recommendations on mainstreaming alternative justice systems will require the goodwill and support of the Chief Justice who heads both the Judiciary and the National Council for the Administration of Justice. Retired CJ Willy Mutunga was a great champion of alternative justice systems, and is on record urging Kenyans to solve their cases out of court. On the contrary, his successor CJ David Maraga has not made any similar public pronouncements on alternative justice systems even though he is the one who is likely to receive the report of the AJS Task Force. Kenyans will have to wait to see how he will respond once the report is out. In the meantime, it can only be hoped that he has since softened his stance given the hardline position he took in *Juma Faraji Serenge alias Juma Hamisi v Republic*.²⁸⁶

²⁸⁵ George Kegoro, 'Budget Cut Hurts the Judiciary, Many Citizens who Need Justice' *The Standard* (Nairobi, November 3, 2019) Available at <www.standardmedia.co.ke/article/2001347841/budget-cut-hurts-the-judiciary-many-citizens-who-need-justice,> accessed November 3, 2019. *See, also*, Stephen Rutto, 'Man Wants Court to Declare New County Budget Unlawful' *The Standard* (Nairobi, August 22, 2019). Available at <www.standardmedia.co.ke/business/article/2001339021/man-wants-court-to-declare-new-county-budget-unlawful> accessed October 1, 2019, and Maureen Kaka & Joseph Wangui, 'High Court Stops Further Reduction of Judiciary Budget' *Daily Nation* (Nairobi, October 13, 2019) Available at <www.nation.co.ke/news/Court-stops-Treasury-from-more-Judiciary-budget-cuts/1056-5329014-h949xg/index.html> accessed November 3, 2019.

²⁸⁶ *Supra*, n.150.

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