

# Multiple Doors to Justice in Kenya

## ENGAGING ALTERNATIVE JUSTICE SYSTEMS



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## About the Author

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## About Pathfinders Grand Challenge on Justice

5.1 billion people—two thirds of the world's population—lack meaningful access to justice. To achieve SDG16+ and deliver equal access to justice for all by 2030, we need to put people at the center of justice systems and move from words and planning to action and implementation.

The Pathfinders' Grand Challenge on Justice acts as an impact hub, convening countries, civil society, and multilateral and regional organizations to close the justice gap by accelerating action on people-centered justice. The Grand Challenge provides a platform to exchange innovative practices on data collection, evidence-based policy making, and effective use of resources to bridge silos and transform justice systems in preventing and resolving people's common justice problems.

The Grand Challenge is an initiative of the Pathfinders for Peaceful, Just and Inclusive Societies, a cross-regional impact hub of 46 member states, as well as partners across international organizations, civil society, and the private sector committed to advancing the Sustainable Development Goal targets for peace, justice, inclusion, and equality (SDG16+). The Pathfinders is hosted at New York University's Center on International Cooperation.

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# Acronyms

<b>AJS</b>	Alternative Justice Systems
<b>CAM</b>	Court Annexed Mediation
<b>CIJ</b>	Customary and Informal Justice
<b>CUC</b>	Court Users Committees
<b>FGM</b>	Female Genital Mutilation
<b>ICC</b>	International Criminal Court
<b>NaSCI-AJS</b>	National Steering Committee on Implementation of Alternative Justice Systems Policy
<b>NCAJ</b>	National Council on the Administration of Justice
<b>ODPP</b>	Office of the Director of Public Prosecutions
<b>SCC</b>	Small Claims Court
<b>SDG</b>	Sustainable Development Goal
<b>UNDP</b>	United Nations Development Programme
<b>UNODC</b>	United Nations Office on Drugs and Crime
<b>UN OHCHR</b>	United Nations Office of the High Commissioner for Human Rights
<b>USAID</b>	United States Agency for International Development

# Executive Summary

The global justice gap impacts approximately 5.1 billion individuals worldwide. 4.5 billion people are excluded from social, economic, and political opportunities provided by law, and 1.5 billion individuals face unresolved criminal, civil, or administrative justice issues. At least 253 million people live in extreme conditions of injustice, devoid of any meaningful legal protections.<sup>1</sup>

The movement toward people-centered justice recognizes that what we are doing is not enough to close the global justice gap.<sup>2</sup> Efforts to improve justice systems worldwide have long focused on institution-building approaches without fully considering the needs of the people they are meant to serve.<sup>3</sup> Taking a people-centered approach to improving equal access to justice means identifying and understanding what people need and want, and transforming justice institutions and services to more effectively meet those needs.

People-centered justice means putting people and their justice needs at the center of justice systems and services. This entails broadening the pathways through which justice problems may be solved, improving the quality of peoples' justice journeys, and investing in justice to prevent as well as resolve justice problems.<sup>4</sup> Designing people-centered justice journeys also requires us to empower people and communities to act to prevent and address injustices while ensuring access to services by simplifying processes, supporting alternative pathways, and tailoring services to needs.<sup>5</sup>

Global evidence shows that customary and informal justice systems (CIJ) are the most-utilized justice providers, often the only providers available, and disproportionately used by women, the poor, and other marginalized groups.<sup>6</sup> As per Denney and Domingo, there is growing recognition that CIJ systems “are often more grounded in the communities they serve, more accessible, affordable, and proximate than formal systems” and “tend to emphasize restorative justice, flexible rules and procedures, and consent based negotiated solutions that are culturally resonant”. Accordingly, more governments and development partners are exploring the positive role that customary and informal justice mechanisms can play in the achievement of equal access to justice for all.<sup>7</sup>

It is important to recognize state-operated court systems and CIJ systems as complementary, albeit each with advantages that meet the particular needs of the people served.<sup>8</sup> Improving the formal system does not automatically result in the elimination or reduction of the role CIJ systems play. Even where formal courts are functioning well, communities may still prefer CIJ mechanisms for a variety of reasons. “Legal pluralism, where formal and traditional justice systems complement each other, may be the best option for many states. Each system can fulfil needs that the other cannot, or at least not easily.”<sup>9</sup> In many places, exploring the engagement of multiple pathways to justice may be the only way to effectively close the justice gap and reach those most likely to be left behind.

The Pathfinders for Justice program's key priority is to promote and support governmental action to accelerate implementation of the UN's SDG 16.3 and the provision of equal access to justice for all. It also works to build increasingly integrated and comprehensive international support to people-centered justice, create campaigns to provide justice to groups at risk of being left behind, and build an effective and empowered movement for justice.

To that end, this paper profiles the development and implementation of Kenya's Alternative Justice Systems (AJS) Policy<sup>10</sup> to capture and share good practices from this people-centered approach. Through a review of relevant literature and interviews with key stakeholders from government, civil society, and development partners, this paper briefly covers the historical and sociopolitical context from which the Policy arose; details the Policy framework; examines impacts and challenges in the early stages of policy implementation; and highlights key takeaways for other countries and stakeholders interested in engaging CIJ systems. It further explores Kenya's experiences to provide governments, judiciaries, development partners, and civil society stakeholders ideas for integrating people-centered justice approaches in their own contexts.

## Methodology

This paper relies on desk research, key informant interviews, and a focus group discussion with village elders. Desk research included review of constitutional and legal frameworks; AJS Policy and documentation relating to its implementation; reports and policies of the Judiciary and government agencies; research on the evolution of justice systems in Kenya as well as contemporary practices of traditional justice among diverse Kenyan communities; research on Kenyans' experiences and perceptions of justice; and reports on outcomes of access to justice programming conducted by civil society organizations. Review of international and regional research and policy papers on opportunities and challenges for state engagement with customary and informal systems was aimed at situating the analysis in the broader context of international discourse.

Sixteen interviews were conducted with key stakeholders currently serving in the Judiciary, government departments, civil society organizations, academia, elders, and international development partners. A focus group discussion was held with village elders in Western Kenya. The respondents reflect a range of experience and knowledge, including taskforce members responsible for the development of the policy, steering committee members responsible for policy implementation, and civil society organizations implementing independent community dispute resolution programming. Respondent elders represent four different communities including some that are not yet engaging with courts through the AJS Policy. In an abundance of caution, opinions of respondents have been anonymized.

Due to constraints of time and logistics, users of AJS were not interviewed. The paper recommends further research targeting AJS users to understand how AJS engagement changes peoples' experience of justice.

## Access to justice in Kenya

Kenya's colonial history left a lasting legacy on its justice ecosystem. The courts established by British rule created a plural legal system in which the state courts, customary law, and traditional justice systems coexisted and interacted to varying degrees for the better part of two centuries. Despite efforts to harmonize and unify systems of justice and law since independence, practitioners within each system have often regarded the other with skepticism and distrust.

Kenyan citizens have had good reason to distrust the justice systems available to them: written law and governance systems were instrumentalized throughout colonial occupation to disadvantage Africans in favor of European settlers. Though founded in law and practice meant to protect substantive and procedural rights, Kenya's Judiciary has at times been criticized for inefficiency, corruption, and a lack of independence.<sup>11</sup> Traditional justice systems were physically and culturally closer to the diverse ethnic and religious communities of Kenya, but often reflected patriarchal values and discriminated against women, children, and other marginalized groups. Weaknesses in these plural systems have historically violated rights and entrenched inequality.

Recent national surveys reveal a startling justice gap in Kenya, with as few as 3 percent of Kenyans seeking justice in the courts<sup>12</sup> and 20 percent choosing not to seek justice at all.<sup>13</sup> Ordinary Kenyans overwhelmingly utilize other strategies and pathways to resolve their legal problems, including self-help by engaging with the other party directly or through a friend or family member. Among the other third parties used to resolve disputes, the most significant involves chiefs and other community-based authorities such as elders and religious leaders through traditional dispute resolution mechanisms. People prefer not to utilize courts due to the high cost, lengthy delays, geographic and cultural remoteness, fear of further aggravating relationships through litigation, and perceived corruption. Patriarchal attitudes and structural biases serve as a significant barrier for women whether seeking justice through courts or CIJ systems. But for most women and marginalized people, CIJ systems are the only practical dispute resolution mechanism available to them.

## Terminology

A variety of terms have been used to capture the wide range of dispute resolution mechanisms. These mechanisms have diverse normative foundations, varying degrees of recognition by the state, and evolve over time. Terms such as customary, traditional, community-based, informal, indigenous, non-state, and others<sup>14</sup> are inadequate in capturing the diversity of mechanisms, while some terms are burdened with historical uses intended to emphasize the inferiority of such systems to courts of law established by colonizing powers.<sup>15</sup>

This paper adopts the use of customary and informal justice (CIJ) when referring broadly to the variety of ways in which people seek and resolve disputes outside of Kenyan courts of law,<sup>16</sup> such as through community paralegals, local authorities, or traditional elders. Traditional dispute resolution mechanisms (or traditional justice systems) are used to describe the dispute resolution practices of indigenous communities, as this is the terminology used in the Kenyan Constitution. In the Kenyan context, traditional justice relies to a large degree on community elders. Additionally, this paper adopts the use of alternative justice systems (AJS) when discussing specific CIJ mechanisms—including but not limited to traditional—with which the Judiciary is now engaging through implementation of the AJS Policy.

The adoption of the 2010 Constitution<sup>17</sup> ushered in a new era of justice sector reform in Kenya, restructuring the Judiciary and making possible successive leadership at the Supreme Court dedicated to the transformation of justice administration and delivery. Since 2012, the Judiciary has worked to increase public outreach and engagement, simplify procedures, strengthen accountability through performance management and public complaints mechanisms, expand the availability of courts, improve the quality of service provided, and enable justice seekers greater choice in how they resolve disputes.

The 2010 Constitution also reconceived access to justice as more than merely access to courts or tribunals or the resolution of disputes, but rather “as realization and preservation of human dignity.”<sup>18</sup> The Constitution restored customary law and culture to a place of prominence, mandating the courts to promote “alternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms.”<sup>19</sup> In this environment of transformation and reform, the Judiciary sought to tackle the reality that the courts were a forum for justice for very few Kenyans. In order to truly reach the people and improve their experiences in seeking justice in line with the Constitution, the Judiciary needed to answer the question of how to engage with and promote traditional dispute resolution mechanisms.

## Developing an AJS Policy

Embracing the reality that most Kenyans do not seek justice in the courts, in 2016, the Judiciary established the Taskforce on Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya. Its mandate was to examine existing practices of dispute resolution taking place outside of the courts and to formulate an appropriate judicial policy in response.

The Taskforce recognized that in centering people, they must also center their diverse cultures and traditions. Rather than starting with the question of how the judicial system might be improved, which risked that “the voice of ordinary people [might be] lost, banished, and dehumanized,”<sup>20</sup> the Taskforce undertook a deep study of CIJ systems. They hoped to better understand why ordinary justice seekers prefer the benefits of these systems, how these benefits could complement and enhance justice delivered through courts, and how they could design an approach to engaging CIJ systems so that people could access justice processes and outcomes that protect human dignity and human rights.

The Taskforce made the following key findings on AJS in the Kenyan context, which form the basis of the Policy:<sup>21</sup>

- AJS reflects the lived realities of Kenyans and is an effective mechanism for increasing access to justice for many Kenyans;
- AJS can be a framework for expanding human rights and human autonomy;
- AJS is a mode of doing justice differently and more effectively, particularly through its valuable characteristics of being restorative, participatory, affordable, minimally technical and flexible, more expeditious, less adversarial, and creative in terms of remedies;
- AJS is an effective mechanism for the reduction of case backlog and decongestion of courts;
- AJS is a mechanism for social reengagement with and improvement of state legitimacy;
- AJS is a mechanism for reconstituting the state and the citizen as part of the constitutional project to remake the Kenyan state; and
- AJS is a site for reclaiming ossified customary norms and as a project to resituate the traditional as rational.

The resulting AJS Policy plots an ambitious path toward transforming access to justice in Kenya. The Policy aims to engage with traditional justice mechanisms in order to advance practices in the protection of human rights and human dignity. The Policy envisions this effort along multiple streams: sensitization of AJS practitioners to Constitutional rights and potential points of conflict with customary values or practices; empowerment of marginalized and vulnerable groups to meaningfully participate in AJS mechanisms; and a broad engagement, both philosophical and practical, with the meaning of human rights in plural cultural and legal traditions. Guidelines relating to the selection of AJS practitioner and practice help to ensure adequate procedural protections, while the Director of Public Prosecution maintains a key role in determining which criminal matters must be prosecuted by the state.

Crucially, the Policy rejects the creation of an AJS model regulated and operated partially or entirely by the state (i.e., Regulated AJS model) in favor of court engagement with AJS models operating at varying degrees of independence. The Taskforce deemed a Regulated AJS model as a departure from the self-agency of AJS practitioners affirmed by the Constitution, likely to unduly distort AJS's valuable practices, too amenable to appropriation by political or state interests, and prone to undermining rather than promoting AJS. The engagement between courts and AJS mechanisms under the Policy is deliberately arms-length to preserve the beneficial characteristics of AJS.

Additionally, the Policy applies an Agency Theory of Jurisdiction to determine which matters AJS mechanisms may hear. Rather than distinguishing civil from criminal matters, the important question is whether the parties have consensually and voluntarily submitted themselves to AJS resolution, and whether that consent is informed, mutual, free, and revocable. Where such consent can be objectively determined, and if there is no specific legislation or public policy circumscribing the jurisdiction of AJS, then the dispute is deemed amenable to the AJS mode of dispute resolution.

In practice, AJS engagement relies on AJS practitioners, whether traditional elders, local administrators, paralegals, or other respected community members. These practitioners receive basic training on the Policy, legal protections, and dispute resolution skills such as mediation, arbitration and negotiation. Matters may reach practitioners independently of the courts, or through referral by the court. Where both parties to a dispute have consensually and voluntarily submitted themselves to AJS resolution, and where that consent is informed, mutual, free, and revocable, AJS practitioners may convene sittings in which they preside over the resolution of the matter. The AJS resolution may be brought before a court where consent of both parties is confirmed, and the process and outcome are reviewed for compliance with constitutional and legal protections. The court then “adopts” the AJS resolution in writing, providing a judicial endorsement that aids in its enforceability.



## Early impact of AJS Policy

The early impact of AJS Policy in Kenya resonates with global findings in the [Pathfinders Justice for All](#) report that supporting alternative pathways to justice can expand protection of human rights and make justice more affordable, durable, expeditious, and restorative for ordinary people. Launched in August 2020, AJS Policy implementation has just begun and it is too early to determine its impact at a national scale. At the time of this research, only three official sites for AJS engagement had been established and written guidelines for implementation and monitoring were not yet finalized. Nevertheless, because both autonomous CIJ mechanisms and court engagement with traditional justice systems existed prior to Policy development, the impact of those prior engagements can illustrate the potential for AJS implementation to shape access to justice nationwide.

Perhaps the main concern regarding AJS engagement is the potential for violation of human rights, particularly those of women and marginalized groups within the setting of traditional justice mechanisms. However, the evidence shows that many “traditional” elders are not only willing to change but actively work to promote such changes within their communities. The AJS Policy also fosters powerful incentive for change, as it elevates the authority of elders and renders their determinations enforceable by the courts. AJS practitioners affiliated with courts may also more likely be perceived as fair and impartial, thereby attracting a better reputation within the community in a virtuous cycle. The public participation characteristic of traditional justice in Kenya also serves to reinforce and promote the adoption of practices consistent with human rights. The fact that AJS practitioners engage communities in seeking appropriate resolutions provides a tremendous opportunity for transformation in both directions: from elders conveying constitutional values, to the public and the community reflecting back shifting norms. In these ways, “human rights can be given meaning at the local level,”<sup>22</sup> increasing their reach and impact.

The potential for more reparative, expeditious, and affordable outcomes under AJS Policy is well-supported by evidence both in Kenya and globally. The adversarial form of justice represented by the courts deepens rifts between parties, while reconciliation and reparation lay at the heart of CIJ in Kenya and are more likely to result in durable outcomes that prevent escalation of conflict and future violence.

AJS engagement also allows for more creative and constructive approaches to dispute resolution, which may be preferable to what the courts can offer. With criminal cases in particular, AJS resolution provides complainants an opportunity to speak about the harm suffered and receive compensation in return, and the emergent use of AJS to address recidivism by engaging the entire community in reintegration efforts shows promise beyond what state agencies otherwise have the resources to support.

AJS engagement further has potential to reduce case backlog and decongest the courts through more expeditious resolution and by preventing future conflict that escalates to court. This is especially true in cases relating to land and criminal justice. AJS engagement in the resolution of land and property disputes has the potential to free up vital social and economic resources while ameliorating one of the root causes of conflict in Kenya. AJS engagement in criminal matters can divert petty offences before prosecution, reduce unlawful and unnecessary incarceration, improve the quality of outcomes at sentencing, and reduce recidivism.

## Continuing challenges

**The potential for bias, discrimination, and corruption within AJS mechanisms remains a real threat** in spite of the efforts to ensure practitioners are well trained in constitutional rights and values. The AJS practitioner's familiarity with the context, parties, and terms of dispute renders impartiality a challenge as distinctions of family, wealth, gender, or other markers of status may play a role in how the parties are treated in both the process and outcome. The strength of AJS may therefore be its greatest potential weakness as the system's inherent process of compromise may reinforce existing social attitudes. These biases may be impossible to perceive when decisions are reviewed at arm's length by a court. Although the influence of such biases has not yet been reported, careful monitoring will be necessary to guard against these potential problems as AJS implementation progresses.

### **A lack of resources keeps AJS engagement from reaching its potential.**

AJS Policy implementation has not been allocated dedicated funding from the government. The lack of reliable resources has not yet stood in the way of policy development and implementation, seemingly thanks to the leadership, passion, and commitment of the individuals and organizations involved over the past decade. Efforts to develop robust monitoring systems are, however, adversely impacted. Dedicated funding will ensure that all corners of the country are able to benefit from the initiative. It will also aid timely and adequate capture of data on the progress of access to justice and what needs to be improved.

### **Remuneration of AJS practitioners remains unresolved and controversial.**

Such remuneration, including for those cooperating in Court-annexed and affiliated AJS mechanisms, will need to be considered as part of sustainable AJS resourcing, but also as a safeguard against improper influences of wealth and politics within AJS proceedings. There is as yet no consensus on whether and how practitioners should be paid.

### **Another noted concern is the possibility of capture by the state or political interests.**

If overly burdened with guidelines, reporting requirements, rules, and compensation, not only will incentives change among AJS practitioners, but the added friction could cost AJS its most valuable features: flexibility, creativity, and informality. A related concern is political capture, particularly during election season when political candidates seek endorsement of reputable community members. Careful selection of AJS practitioners and development of community feedback mechanisms may mitigate this risk.

## Key takeaways

Kenya is experiencing an extraordinary period of justice reform as its leaders strive to meet the aspirations of the new Constitution. Through the development and implementation of the AJS Policy, Kenya serves as a strong example of how states can work to achieve international commitments on expanding equal access to justice and transform their institutions to provide people-centered justice.<sup>23</sup> The following points reflect learning from Kenya's experience and are proposed as useful considerations for governments, judiciaries, civil society, funding partners, and justice stakeholders interested in collaborating and incorporating CIJ engagement into their people-centered justice policies.

### **Developing a people-centered justice policy requires deep understanding of what already exists, and building on its value.**

There is no one-size-fits-all model for justice. Developing a coherent and inclusive justice system responsive to the diversity and richness of any specific place requires policy makers and development partners to set aside preconceptions of how things should work.

## **A model of operationalizing people-centered justice must be flexible and responsive to local resources and constraints.**

Kenya's highly-contextualized approach allows each county to identify and prioritize the resolution of justice problems that matter most to people and adjust its AJS engagement model accordingly.

## **A multistakeholder and multidisciplinary approach to policy development and implementation results in a well-considered outcome.**

Involving stakeholders with potentially divergent and critical viewpoints from the very beginning and encouraging collective learning and creation through debate and dialogue contributes to a broadly-supported outcome.

### **Leadership matters.**

Kenya's experience underscores the importance of appointing individuals who are passionate, knowledgeable, and open to engaging in unlearning, learning, and relearning to achieve transformative results.

## **Promote culture<sup>24</sup> while engaging honestly in its critique in order to help it evolve and survive.**

In states where traditional justice systems have historically been subordinated or neglected, good faith exploration of their value may loosen perceived obstacles to their engagement.

### **Integrate learning of customary and informal justice systems.**

Understanding of culture and living customary law should be integrated into education and training across the justice sector to ensure smooth implementation of engagement with CIJ systems and unlock more innovative delivery of justice.

### **Secure sufficient and sustained resourcing.**

Although CIJ systems are less expensive to operationalize and sustain than state-operated systems, dedicated government funding is required to ensure their incorporation as part of a people-centered justice policy that leaves no one behind.

### **Explore creative mechanisms of accountability.**

Existing avenues include oversight by multistakeholder court users on codes of conduct, review of decisions by courts, and the feedback of communities served by AJS practitioners dependent on those communities for their legitimacy. As implementation progresses, more lessons will be learned about which mechanisms work best under varying circumstances.

## **Invest in research to understand how AJS engagement changes people's experience of justice.**

Beyond the indicators collected through monitoring processes, additional longitudinal studies can help us understand how the AJS Policy changes Kenyans' experiences of justice, and their relationship with the state. Such studies can further inform the effective development of people-centered justice policies worldwide.

# 1 Context of Access to Justice in Kenya

Traditional justice systems have formed the fabric of social life among communities in Kenya “since time immemorial.”<sup>25</sup> Although traditional mechanisms have changed and evolved through the interactions with colonial powers, capitalism, and modern values, many features of these systems have persisted over time. Restorative and reconciliatory approaches to dispute resolution, as well as their low cost, informality, and flexibility, contribute to continuing use of these systems by many Kenyan justice seekers today. This Section briefly reviews Kenya’s plural justice system from precolonial times to the current period; how ordinary Kenyans experience justice; and the political and social reforms that led to development of the Alternative Justice Systems Policy.

## 1.1 A legacy of plural justice systems

Colonialism left a complicated legacy of overlapping legal traditions and systems that Kenya is still grappling with today. When the British sought to deepen administrative control over what is now Kenya, traditional systems of governance and justice were already well-established among the diverse tribal, ethnic, and religious communities. The British therefore applied a policy of indirect rule, by which local administration and control was exercised indirectly through native laws and institutions. Colonialism introduced a “racially stratified dual legal system, with one system of law for Africans and another system for non-Africans.”<sup>26</sup> Native tribunals were administered by chiefs and village headmen installed by the colonial administration to adjudicate disputes according to local customary law in personal matters such as family law, land, and succession, so long as customs were deemed not repugnant to justice and morality in the opinion of the colonial administration. Other areas of law, including criminal law, contract, and torts, were officially governed by English law.

Throughout the colonial period, traditional justice systems continued to operate alongside the state-sponsored system and customary law evolved in response to the imposition of English law. The repugnancy clause as applied during precolonial times reflected the discretion of individual judges who brought to bear 19th century English ideas of justice and morality with occasionally contradictory results. In one case, an English judge held customary law applicable to the estate of an African who had converted to Christianity and rejected African customs. In another, the court refused to recognize a marriage under customary law in determining whether a woman could be compelled to give evidence against her husband.<sup>27</sup>

The influence of colonial law also arguably worsened the position of women in Kenya.<sup>28</sup> The breakdown of community institutions contributed to a decline in customary practices meant to protect the vulnerable, including women. In some communities, traditional practices—including inheritance of land through women—ensured that even if widowed, a woman and her children would continue to have a means to support themselves.<sup>29</sup> The individualization of land title disrupted these longstanding practices as “the processes of land adjudication and consolidation almost invariably led to vesting of legal title to land in men as the heads of households.”<sup>30</sup>

Following independence in 1963, the Kenyan government sought to integrate these multiple systems of justice into a unitary court system and harmonize customary laws with received law. In 1967, magistrates courts replaced native tribunals as courts of first instance, with jurisdiction over a variety of civil and criminal matters and the authority to apply customary law in matters of land, intestacy, family, and those relating to the status and treatment of women and children.<sup>31</sup> As before, customary laws could only be applied in civil cases to an extent “not repugnant to justice and morality or inconsistent with any written law.”<sup>32</sup> Still, the application of customary law within state courts arguably ossified rather than invigorated its development.<sup>33</sup> Judges applying customary law are not ordinarily from the same communities as the litigants, nor experts in the relevant custom.<sup>34</sup> While judges are empowered to consult experts to facilitate understanding of the applicable customary law, some instead have relied on outdated treatises of foreign scholars, effectively freezing customary law in its past interpretation.<sup>35</sup> A number of legislative initiatives have since sought to codify diverse customary laws on marriage, succession, and divorce, such as the Law of Succession in 1981 and the Marriage Act in 2014. Throughout myriad political changes and legal reforms, traditional justice mechanisms have remained vital sites for dispute resolution.

## 1.2 Traditional justice systems in modern Kenya

As in other contexts of sub-Saharan Africa, precolonial justice systems in Kenya have been broadly described as rooted in reconciliation and restoration of harmony. These goals are essential to the survival of the entire community in rural areas where relationships are based on past and future economic, political, and social dependence, and where the survival of the group relies on effective cooperation among individual members. While particulars may differ between communities, traditional justice mechanisms in Kenya include common salient features: voluntary submission of disputing parties; arbiters appointed on the basis of status or lineage; flexible procedures; nondistinction between civil and criminal matters; dynamic application of customary law; public participation; absence of professional legal representation; and a preference for restorative penalties.<sup>36</sup>

A common feature of Kenyan communities are elders knowledgeable in community customs who act as arbiters or mediators in dispute resolution.<sup>37</sup> Though the term of “elder” takes on various meanings in Kenya, they have been defined in legislation as people “who are recognized by custom in the community or communities as being, by virtue of age, experience or otherwise, competent to resolve issues between the parties.”<sup>38</sup> Such elders are elected or appointed by their community—through various means and rituals—on the basis of their reputation for integrity, impartiality, and honesty.<sup>39</sup> Historically, most elders have been men of advanced age, though in many communities women and younger people are increasingly being appointed.<sup>40</sup> The title of elder can thus be understood as a title of honor bestowed by a community regardless of age or economic status. Conflict management structures comprising elders can be seen across multiple dimensions of a community, including for example extended family, clan, age-set, and ethnicity.

Practices within traditional systems in Kenya often reflect patriarchal values and are criticized for entrenching inequality between men and women.<sup>41</sup> In some communities, women are not permitted to speak or even be present during these proceedings, even if they are the victim, and must rely on male relatives to plead their case. Aside from representation among the decision makers in traditional systems, customary norms may result in discriminatory outcomes against women, children, and other marginalized groups that also violate their human rights in the most brutal ways.<sup>42</sup> Studies have documented women and girls being forced to marry their rapists; limited recourse for women and child victims of domestic violence; and treatment of women and children as chattel in the elders’ consideration of whether harms were committed.<sup>43</sup> Nevertheless, traditional systems often constitute the only accessible and relevant justice systems where the majority of women in Kenya live.<sup>44</sup>

## 1.3 Lived realities of Kenyan justice seekers

National surveys and qualitative studies show clearly that most ordinary Kenyans prefer alternatives to the courts, and for a variety of reasons. A significant majority of adult Kenyans experience problems of a legal nature. The 2017 Justice Needs and Satisfaction Survey (JNS) found that 63 percent of Kenyans experienced one or more legal problems in the past four years, while the 2019 Afrobarometer Survey found 74 percent of Kenyans reported experiencing a dispute within the past two years, and the World Justice Project in 2019 found 53 percent of Kenyans experienced a legal problem in the past two years.<sup>45</sup> The most commonly faced problems related to crime (21 percent), land (15 percent), family (15 percent), employment (12 percent), and neighbors (11 percent).<sup>46</sup>

Despite the prevalence of Kenyan legal disputes, as few as 3 percent seek resolution through the courts.<sup>47</sup> Instead, ordinary Kenyans overwhelmingly utilized a variety of other strategies to resolve their legal problems, including self-help by engaging with the other party directly or through a friend or family member (64 percent).<sup>48</sup> The most significant dispute resolution alternative involved the assistance of chiefs<sup>49</sup> and other community-based authorities such as elders and religious leaders.

Around one in four Kenyans resolved their legal disputes through chiefs,<sup>50</sup> especially those in rural areas and with less formal education.<sup>51</sup> This is particularly true in land disputes (as much as 52 percent)<sup>52</sup> and in matters involving succession and inheritance (38.8 percent).<sup>53</sup> Chiefs are also ranked highly in terms of helpfulness, consistently scoring well across multiple dimensions of quality of process and outcome in the JNS. The 2015 Kenya Integrated Household Budget Survey found that people chose chiefs and traditional elders to resolve their disputes predominantly due to the respect in which

they are held by the community and their family. Chiefs and elders may also be more effective at resolving disputes. Chiefs were able to deliver a resolution 55.2 percent of the time, while traditional leaders and elders were able to resolve their disputes 72.1 percent of the time and courts 51 percent of the time.<sup>54</sup> Although courts are perceived as performing well in terms of quality of process and outcome, the courts score worst on dimensions of time and money spent in the resolution of the dispute.<sup>55</sup>

These costs of seeking justice through the courts are major deterrents to accessing justice in Kenya.<sup>56</sup> Resolving grievances through the courts costs an average of KES 32,689 (USD 332.75) per household, including both formal and informal costs, compared to just KES 2,344 (USD 23.86) per household via chiefs or KES 2,069 (USD 21.06) via traditional leaders and elders.<sup>57</sup> The adversarial nature of litigation exacerbates the perception of court-based justice as a contest of resources, and the province of people who can afford to hire the necessary lawyers and experts to obtain a favorable ruling.<sup>58</sup>

Although the length of time a case takes to resolve in court depends on a variety of factors (e.g., subject matter, complexity, and location), indicative data can be found in the case backlog reported by the judiciary. In fiscal year 2021/22, the magistrates' courts recorded 233,374 cases in backlog, of which 146,323 cases had been pending for between one and three years, and 86,854 cases had been pending for over three years.<sup>59</sup> By contrast, matters in traditional justice processes rarely last beyond a single "sitting" of adjudicators and are typically resolved within a month or two.<sup>60</sup>

These results also resonate with findings on public trust and perceptions of corruption in Kenyan institutions. Traditional (66 percent) and religious (73 percent) leaders rank more highly than courts (57 percent) in public trust, and in perceived corruption.<sup>61</sup> Thirty-five percent of Kenyans believe there is corruption in the courts, compared to just 15 percent among religious leaders, and 14 percent among traditional leaders.<sup>62</sup> Despite judicial reform efforts, Transparency International reports that in 2019 the Judiciary is perceived as the most bribery-prone public institution at 69 percent, followed closely by the Police at 64 percent.<sup>63</sup>

Gender dimensions of these national surveys suggest that Kenyan women are more frequently subjected to violations of rights, and also that their pathways to justice will be different from those of men.<sup>64</sup> Patriarchal attitudes and structural biases against women serve as a significant barrier for women seeking justice through both formal or informal channels.<sup>65</sup> Women report more problems relating to family (23 percent) compared to men (9 percent) and are significantly more likely to report domestic violence as well as property and violent crime than men.<sup>66</sup> Domestic violence is the most serious family legal problem (33 percent), followed by divorce or separation (14 percent) and inheritance (12 percent), and domestic violence disproportionately affects women with less formal education, the less affluent, and those who live in rural areas.<sup>67</sup>

Most Kenyans view domestic violence as a private matter to be resolved within the family (69 percent) rather than a criminal matter, and very few people report domestic violence to the police (7.7 percent) or seek to address it through the courts (2.5 percent), opting instead to keep resolution within extended family (31.4 percent).<sup>68</sup> A high proportion also seek resolution through chiefs (11.5 percent) and traditional leaders/elders (9.6 percent), highlighting a need to ensure these fora are safe spaces where the vulnerable party can receive the protection s/he needs.<sup>69</sup> Women are also more frequently involved in disputes around ownership or use of land (27 percent) than men (18 percent), which may reflect enduring discriminatory practices excluding women from land inheritance and land titling.<sup>70</sup> Due to the unique challenges women face, additional resources towards community sensitization, legal information, advice, and accompaniment are necessary to support justice seekers in navigating appropriate pathways to seek redress.

Though a large majority of Kenyans take some form of action to resolve a legal problem, 20 percent did not take any action at all, especially low-income respondents. The most common reasons were: the belief that they could not achieve a positive result (33 percent); that the other party was more powerful (20 percent); they didn't know what to do (19 percent); the judicial system is not effective (14 percent); and fear of aggravating the relationship (14 percent).<sup>71</sup> The sense of disempowerment was more pronounced among low income respondents, who more frequently declined to take action under the belief the other party was more powerful (28 percent, versus 13 percent for the high income group). Higher income groups also access professionalized institutions such as lawyers, police and courts at a higher rate than those with lower income.

## 1.4 The 2010 Constitution and era of reform

The violence which erupted following the contested 2007 elections resulted in the deaths of more than 1,100 people, displaced more than 600,000, and catalyzed an era of reform in Kenya. The crisis sharpened calls for change and provided momentum for addressing social, economic, and political disparities. It also awakened renewed interest in the role chiefs and elders play in both inflaming and ameliorating conflict within and between communities. Inspired by the success of Gacaca courts following the genocide in Rwanda, a number of human rights and legal aid organizations began exploring the engagement of traditional dispute resolution mechanisms in Kenya as a way to bring reconciliation and reparation to tens of thousands of victims of violence and displacement whose claims went unaddressed by national and international mechanisms. Decades-long efforts toward constitutional reform also accelerated as the power-sharing agreement which ended the postelection crisis explicitly committed to undertaking constitutional, legal, and institutional reform.<sup>72</sup>

The 2010 Constitution ushered in a period of rapid and significant transformation for the Judiciary of Kenya. Kenya's Judiciary faced criticism over inefficiency, corruption, and a lack of independence.<sup>73</sup> The 2010 Constitution reshaped the institution, recognizing that judicial authority is derived from the people; requiring that all sitting judges and magistrates be vetted to determine their suitability to continue to serve; creating a Supreme Court; and reconstituting a Judicial Service Commission independent of the executive branch.<sup>74</sup> A National Council on the Administration of Justice (NCAJ) was established as a high level policy making, implementation, and oversight mechanism for the justice sector, chaired by the Judiciary and comprising both state and nonstate members reflecting local Court Users Committees.<sup>75</sup>

Under an ambitious program entitled Judiciary Transformation Framework 2012-2016 (JTF), the new Chief Justice Dr. Willy Mutunga structured judicial reform around four pillars: people-centered delivery of justice, organizational culture and professionalism, adequate infrastructure and resources, and information technology as an enabler for justice. During this period, the Supreme Court focused on increasing public outreach and engagement; streamlining court procedures and making them transparent and understandable to the public; and strengthening accountability mechanisms through the creation of a case management system, a performance management system, and a complaints mechanism, as well as the physical expansion of courts to more locations across the country.<sup>76</sup>

Through this strategy and its successors, Sustaining Judiciary Transformation (SJT) A Service Delivery Agenda, 2017-2021, under Chief Justice David Maraga, and Social Transformation through Access to Justice (STAJ), 2022-2026, under the current Chief Justice Martha Koome, the Judiciary has over the past decade charted a course from building foundational institutional capacity, to improving the quality of services, to enabling justice seekers greater freedom in how they resolved their disputes.

*“Kenya is becoming a model because the whole objective is faster justice, cheaper justice and restorative justice.”*

**Member, National Council of Elders**

The 2010 Constitution also reconceived access to justice as more than simply access to courts or tribunals, and much more than the resolution of disputes, but “as realization and preservation of human dignity.”<sup>77</sup> The Constitution restored customary law and culture to a place of prominence, mandating the courts to promote “alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.”<sup>78</sup> In response, the Judiciary piloted and expanded Court Annexed Mediation (CAM) beginning in 2015, in which appropriate civil matters are referred from the courts to accredited mediators for resolution. Small claims courts (SCC) were established by legislation in 2016 as subordinate courts with jurisdiction over any civil claim not exceeding KES 1 million.<sup>79</sup> In this environment of transformation and reform, and under the auspices of the new vision and mandate of the constitution, the Judiciary also sought to tackle the elephant in the room: that despite the backlog of cases, courts were a forum for justice for very few Kenyans.

[Multiple Doors to Justice in Kenya: Engaging Alternative Justice Systems](#)

In order to truly reach the people and improve the quality of their experiences in seeking justice in line with the Constitution, the Judiciary needed to answer the question of how to engage with and promote traditional dispute resolution mechanisms. Consequently, it formed the Taskforce on Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya.

## 2 Developing an AJS Policy, an Implementation Strategy

The finding that fewer than one in ten Kenyans seek justice at courts of law came as a shock but also as motivation to those working to improve access to justice in Kenya.<sup>80</sup> This research and others confirmed what many already knew: that most people with legal problems seek alternative means that are cheaper, faster, and closer to home; can help maintain and repair relationships; and are responsive to their culture and circumstances. In light of these realities, the Judiciary formed a Taskforce on Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (“the AJS Taskforce” or “the Taskforce”) to examine existing practices of dispute resolution taking place outside of the courts and to formulate an appropriate judicial policy in response. This Section reviews how the Taskforce developed the AJS Policy and an implementation strategy aimed at addressing the main concerns and challenges of engaging AJS in expanding access to justice.

### 2.1 Taskforce findings on AJS in Kenya

The AJS Taskforce was officially appointed in 2016 with a mandate 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.”<sup>81</sup> The Taskforce was empowered to convene stakeholders and AJS practitioners to understand how these systems were working and interacting with the courts; extract best practices and highlight challenges of existing interactions; review research or guidance relating to AJS engagement with courts; design pilot models of engagement; and formulate a strategy for implementation.<sup>82</sup> The resulting policy was also explicitly meant to consider how AJS engagement could reduce case backlogs in the courts.<sup>83</sup>

The Taskforce membership reflected its origins as an outgrowth of existing initiatives and dialogue among human rights lawyers, academics, and reform-minded members of justice sector agencies. Headed by a representative of the Judiciary, the membership was intentionally multistakeholder and interdisciplinary, including representatives from academia, community elders, the Law Society of Kenya, and nongovernmental organizations, as well as key governmental agencies such as the Office of the Director of Public Prosecutions (ODPP), National Land Commission, National Police Service, and the National Commission on Human Rights. The membership was intentionally inclusive of both proponents of AJS engagement and its critics.<sup>84</sup>

#### *“Unlearning, learning and relearning”*

*Kituo Cha Sheria describing the process by which the AJS Taskforce undertook development of AJS Policy<sup>85</sup>*

The Taskforce describes the process undertaken to develop the Policy as “a creative process of social inquiry.”<sup>86</sup> It sought to “break new ground in the pursuit of universal access to justice for all people in Kenya,” by taking seriously the expansive and people-centered framing of access to justice in the Constitution, and the mandate to promote traditional justice systems.<sup>87</sup>

The path taken was both widely consultative and deeply thorough, beginning with an effort to understand both the origins of traditional justice and the expression of its modern form. The Taskforce convened councils of elders in dialogue over their traditions and practices.<sup>88</sup> It organized roundtable discussions with academics, representatives from religious organizations, NGOs, and others from the civil society, aimed at identifying how AJS engagement might be leveraged to



expand access to justice in Kenya. Taskforce members visited almost every county and spent time with a wide range of communities in rural and urban areas to learn how community justice groups, civil society organizations, councils of elders, and court-initiated engagements with CIJ mechanisms were working in practice to resolve conflict and disputes on the ground. The Taskforce commissioned research on both practical and philosophical underpinnings of the Policy. It also consulted institutions responsible for promoting and providing justice services to determine practical challenges and opportunities in linking AJS with the courts.

Originally appointed for a term of six months, the Taskforce ultimately took more than four years to complete development of the Policy. The time was attributed to the lack of resources, including the part-time nature of the appointment of its members, and the complexity of the task. The Taskforce was unfunded, requiring partnerships with various local NGOs and international donor agencies to receive support for specific components of its work.

The extensive process resulted in a robust final Policy. One Taskforce member noted that engaging in this work over such a lengthy period allowed them breathing room to absorb the challenging ideas they encountered through the various learning sessions, workshops, and debates, which tested the existing worldviews of many members. Taskforce members, who represented the elite—well-educated, well-resourced, with cosmopolitan worldviews derived from relative privilege and exposure to international norms and practices—were forced to confront and reconcile the lived realities of the majority of ordinary Kenyans with their preconceptions of the superiority of the courts of law.<sup>89</sup>

Time spent sitting with opposing viewpoints softened resistance to new ideas, allowing for greater depth of conversation in developing the Policy. Said one Taskforce member: “We changed our way of listening.”<sup>90</sup> The AJS Policy launched on August 27, 2020, to commemorate the ten-year anniversary of the 2010 Constitution.

To illustrate the process of unlearning and relearning, one Taskforce member provided an example from her personal experience of purchasing land. Her first costly attempt proceeded through a lawyer, but ultimately fell apart. In a second attempt, negotiated through her father and local elders of her community, she was shocked to learn that the parties were expected to proceed on the basis of trust alone, rather than the exchange of written offers and promises, until the title deed was transferred. Speaking as a trained lawyer, “this is what we had to unlearn”: that only written transaction could be enforceable, that only written agreement could be valued, and that there was only a single superior way of proceeding. A transaction between people can instead be a reaffirmation of trust between them, and there is value in investing in trust.

### **Third Party Autonomous AJS Engagement: A model predating the AJS Policy**

Kituo Cha Sheria is a nongovernmental legal aid and human rights organization founded in 1973 by a group of young advocates committed to helping poor people who could not afford legal services. Kituo employs a variety of strategies to achieve its vision of equity and access to justice for all, including through direct services provided by lawyers and community-based paralegals, litigation in the public interest, community mobilization, policy advocacy, and dispute resolution.

#### **How did Kituo’s AJS engagement begin?**

Kituo’s AJS programming traces its roots to transitional justice and constitutional reforms and predates the AJS Policy. Following the postelection violence in 2007/2008, Kituo Cha Sheria saw a need to promote local accountability processes for conflict between individuals and communities that remained unresolved by the high-level and high-profile investigations within Kenya and at the ICC. Inspired by the use of Gacaca courts in Rwanda following the 1994 genocide and article 159 of the new Kenyan Constitution, Kituo’s AJS project aimed to foster forgiveness, reconciliation, and peaceful coexistence between communities and among neighbors who had lived peacefully together prior to the election. Kituo representatives and grassroots rights

defenders approached then Chief Justice Dr. Willy Mutunga to spearhead the implementation of traditional dispute resolution mechanisms recognized in article 159.

Acknowledging the powerful role played by elders in either preventing or sanctioning postelection violence in different communities across Kenya, Kituo engaged with community elders and other local community leaders in its project design. In 2010, Kituo piloted its AJS model in the postelection hotspots of Kisumu and Eldoret. The program has since been expanded to other parts of the country. More recently, Kituo started training its wide network of community paralegals on its AJS model, as well as incorporating a training module on the AJS Policy developed by the NaSCI-AJS. The objective of that collaboration is to support operationalization of the Policy through the development of county action plans that establish how matters will be referred between communities, courts, and AJS mechanisms. The approach will support the implementation of all three models of AJS, including the court-annexed model. In the context of the typologies identified in the AJS Policy, Kituo operates an Autonomous AJS mechanism, as its AJS mechanisms operate entirely without interference from or engagement with the courts.

### **How do disputes reach the AJS mechanism?**

Kituo's AJS model is structured along two tracks, involving AJS commissioners and AJS adjudicators. AJS commissioners comprise village elders, internally displaced persons, religious leaders, former and current local government officials including chiefs, and others knowledgeable about the community. They are trained to raise awareness of the AJS mechanism, identify community members who wish to access it, and work with the parties to understand the nature of their disputes. The commissioners then liaise with AJS adjudicators and others to convene AJS sittings.

### **Who presides over an AJS sitting?**

AJS adjudicators preside over AJS sittings in panels of three to hear disputes via mediation, negotiation, and dialogue to seek a resolution both parties can accept. Adjudicators are carefully selected and must be people well respected in the community regardless of their age or social status. They may include community elders, teachers, community paralegals, and others with a reputation for integrity and impartiality. Approximately twenty-five adjudicators are selected for each AJS location, forming a pool from which three-person panels are selected for each sitting. Each AJS location includes women in its pool of adjudicators, and each AJS panel must include a woman. When a matter is submitted to the AJS process, the adjudicators determine among themselves who should be on the panel based on characteristics and vulnerabilities of the parties (e.g., at least one person who speaks the mother tongue of the parties). Adjudicators receive training on both substantive law and the various dispute resolution skills they will utilize in AJS sittings.

### **Where is the AJS sitting held?**

The AJS sitting is held in the location where the disputants come from in order to facilitate community participation without excessive travel. AJS commissioners and adjudicators sometimes also travel to the site of disputed land or property complaints to understand the context of the dispute.

### **What happens during an AJS sitting?**

The parties agree to appear before a panel of three adjudicators together with commissioners, family members, and supporters of each party and other interested members of the public. Especially in cases involving marital affairs, the parties may request the sitting be held in private in order to discuss more sensitive matters. The parties are given time to air each side of the case, after which the AJS panel asks questions of the parties and other community members to clarify the issues, sometimes speaking privately

with either party or witnesses. Occasionally, matters which cannot be resolved in a single sitting are adjourned to a subsequent date.

### What types of legal disputes are handled through AJS?

Most disputes handed by Kituo's AJS mechanism involve land, succession, theft, breach of contract, and domestic disputes within families. Crimes involving violence of any kind, including sexual and gender-based violence, are strictly prohibited from resolution through Kituo's AJS mechanism, as are disputes involving domestic abuse.

### What are important lessons learned from Kituo's AJS experience?

Kituo believes its AJS model is successful because the approach allows local context to drive solutions while avoiding over-regulating or overprescribing how adjudicators work with parties to find resolutions. Respecting local context begins with dialogue involving elders in order to understand existing approaches and any unique dynamics or circumstances in their community. Only after reaching a clear and common understanding of the challenges can productive discussion be entered into about what practices they think need to change, what those changes might look like, and whether they might contravene the constitution.

Accountability and quality control are reinforced through various strategies. Choosing AJS practitioners with an established reputation for impartiality and integrity is the most effective way to prevent potential problems. Following training, AJS practitioners sign a code of conduct which sets clear expectations that are communicated publicly to the community in a "graduation" ceremony. Finally, Kituo conducts light touch monitoring through check-in calls and community visits to get a sense of progress, relying also on community feedback to understand if there have been issues with how AJS is being conducted.

Neither AJS adjudicators nor AJS commissioners are paid, though in some areas where Kituo also supports paralegal programming, an office is available for their use and occasionally there are funds available for reimbursement of expenses. The lack of funding to defray expenses does create the possibility of vulnerability to sustainability and external interference. Inclusivity remains a challenge in representation among AJS practitioners and in forging an equitable resolution in AJS sittings. However, Kituo is working to promote greater inclusion, especially for people with disabilities, youth, and refugees across all their programs.

*Sources: KCS Case Digest, KCS Reflections on the Alternative Justice Systems (AJS) Policy and Practice, and interviews with multiple respondents involved in the design and implementation of Kituo's AJS model.*

## 2.1 Taskforce findings on alternative justice systems in Kenya

The Taskforce concluded the following key findings on AJS in the Kenyan context, which form the basis for the AJS Policy.<sup>91</sup>

- a. **AJS reflects the lived realities of Kenyans and is an effective mechanism for increasing their access to justice.** Most disputes are resolved through informal and non-state-based means outside the confines of Courts. These informal means include a myriad of dispute resolution processes of which AJS is just one, and the movement is toward multiple justice systems.
- b. **AJS is a framework for expanding human rights and human autonomy.** Correctly conceived, AJS is an important tool for the vindication and expansion of human rights and human autonomy. It is not, as is often portrayed, an avenue for the diminution or abuse of human rights.
- c. **AJS is a mode of doing justice differently and more effectively.** AJS is seen as a different and better mode of doing justice in at least six ways: (i) it is a form of restorative justice, unlike the adversarial process which prevails

in Court; (ii) it ensures more social inclusion since it is participatory in nature; (iii) it is more affordable; (iv) it has minimum formalities and technicalities, and focuses on substantive justice; (v) it is more expeditious; and (vi) it is less adversarial and more creative in terms of remedies.

- d. **AJS is an effective mechanism for the reduction of case backlog and decongestion of courts.** By dealing with appropriate disputes and preventing others from becoming active disputes, AJS reduces congestion of cases in courts.
- e. **AJS is a mechanism for social re-engagement with (and re-legitimizing) the state.** A transformative objective of the Constitution is to re-legitimize the state by bringing Government closer to the people. One way of meeting this objective is through public participation, a key pillar of the Constitution. Informal justice systems enhance public participation in the justice system.
- f. **AJS is a mechanism for reconstituting the state and the citizen as part of the constitutional project to remake the Kenyan state.** AJS seeks to enhance the role of the state and the citizen as direct actors making contributions toward their civic autonomy. The state is reconstituted by accommodating the lived realities of Kenyans and by allowing them to make direct contributions to governance. Citizens are no longer subjects of the state; rather, they are partners in the running of the country. Like devolution, AJS brings the government closer to the mwananchi, the citizen. Additionally, since AJS expands civic autonomy, it also reconstitutes the citizen and the exercise of citizenship rights.
- g. **AJS is a site for reclaiming ossified customary norms and a project to resituate the traditional as rational.** The AJS mechanism is a site for preserving and promoting cultures and preventing them from “ossifying,” or becoming “stale.” The practice of AJS also refutes the false premise that everything “traditional” and “African” is irrational and unfit for contemporary life.

## 2.1.1 Main concerns and criticisms of AJS engagement

The Taskforce highlighted three main areas of concern raised in the practice of traditional justice systems in Kenya, as well as the challenges anticipated in implementing a policy of AJS engagement.

The first category of concerns relates to the protection of marginalized and vulnerable people from discriminatory treatment within AJS proceedings, and from outcomes which may violate their human rights.<sup>92</sup>

The Constitution proscribes the use of traditional mechanisms in any way that contravenes the Constitution, Bill of Rights or other written law, or is repugnant to justice and morality.<sup>93</sup> Nevertheless, protection of the rights of women and girls remains a concern, as discriminatory treatment and their exclusion from meaningful participation in some communities’ traditional justice systems is well-documented. Of equal concern is the protection of people who may be socially, economically, or culturally marginalized and vulnerable due to disability, age, displacement, poverty, health status, ethnic origin, or other circumstances.<sup>94</sup> AJS stakeholders are concerned that court engagement with traditional mechanisms might be perceived as sanctioning unlawful and unconstitutional practices such as FGM, or other forms of violence and abuse against marginalized people. Guidelines requiring adherence to constitutional protections and quotas to ensure gender balance may be inadequate to address biases, prejudices, and beliefs that may assert themselves in AJS proceedings. AJS elders may promote “harmful cultural practices” outside of AJS sittings, undermining the objectives of the Policy and the goal of providing meaningful access to justice for all.

The second category of concerns addresses the absence of procedural mechanisms to ensure the rights of justice seekers are adequately protected and AJS mechanisms are held accountable. The composition of traditional justice mechanisms skews heavily toward men of advanced age, though the composition of these groups is beginning to diversify in some communities. However well-intentioned, a largely homogenous panel of adjudicators cannot be expected to appreciate the full spectrum of perspectives of marginalized and vulnerable people in their communities. Likewise, marginalized and vulnerable people appearing before such mechanisms may not believe that their circumstances have been considered fully. Such concerns undermine the legitimacy and durability of the outcome. Procedural trappings of state-operated

justice systems are also absent in traditional justice mechanisms. In theory, within the Kenyan courts of law, clear and standardized procedures serve as a check against the individual biases of individuals working within the system, with the right of appeal being a final safeguard against abuses. In contrast, traditional justice proceedings are governed by unwritten (though commonly understood) norms and flexible practices, leading to unpredictable outcomes—i.e., like cases are not always treated alike—that are rarely documented in writing and therefore difficult to review.<sup>95</sup>

The third category concerns the fear that AJS engagement will undermine the rule of law as it lessens the role court adjudication plays in affirming public values, reducing the role of the state in both delivering and being seen to deliver justice. This concern is both general and specific. Generally, critics have argued that litigation before the courts and the adjudication of contentious social issues serve a performative public function about social values beyond simply settling the matter between the parties. Matters resolved through AJS in a manner that fails to adhere to constitutional and statutory requirements—e.g, through resolutions that fail to protect the rights of women and other marginalized groups—are seen to undermine the legitimacy of courts and the rule of law. “While peace between the parties might be achieved, society is left without a remedy.”<sup>96</sup> More specifically, use of AJS to resolve criminal matters may undermine the accepted constitutional role of the ODPP. Allowing parties in criminal matters to resolve cases through AJS may weaken the deterrent effect of criminal penalties, creating perverse incentives for the wealthy to buy their way out of criminal activities. AJS resolutions also remove the state from the process of delivering justice. Moreover, the absence of legal representation and paralegal support within AJS proceedings may make parties more vulnerable to rights violations.

## 2.1.2 Alternative Justice Systems policy framework

In response to these concerns, the Taskforce developed an AJS Policy rooted in the dynamism of culture and custom, taking the view that conflicting values and practices within traditional systems can be brought in line with the Constitution.<sup>97</sup> The Policy urges a critical reconsideration of the international discourse on human rights, which in its colonial origins has subordinated the respect for human rights inherent in traditional justice systems.<sup>98</sup> The Policy accordingly aims to engage with traditional justice mechanisms in order to transform their practices toward protection of human rights, much as other reform efforts aim to reduce violations of these within the state-operated justice system. The Policy envisions this effort along multiple streams: sensitization of AJS practitioners to Constitutional rights and potential points of conflict with customary values or practices; empowerment of marginalized and vulnerable groups to meaningfully participate in AJS mechanisms; and a broad engagement, both philosophical and practical, with the meaning of human rights in plural cultural traditions. Guidelines relating to the selection of AJS practitioners and the practice (not yet finalized at the time of this research) will help to ensure adequate procedural protections. The primacy of the ODPP’s role in determining which criminal matters must be prosecuted by the state will be maintained.

The AJS Policy framework outlined below is therefore a recognition of both the realities and benefits of AJS, and a response to managing the challenges and concerns raised.

### Models of AJS institutions<sup>99</sup>

The Policy organizes AJS institutions into four typologies: Autonomous, Autonomous Third-Party, Court-Annexed, and Regulated. The Taskforce recommended that Kenya should only apply the first three models, and rejected the application of the fourth. Regulated AJS Institutions—those created, regulated, and operated partially or entirely by state-based law or statute—have been constituted in other African systems and have precedent in Kenyan history. However, the Taskforce found the Regulated model likely to unduly distort AJS practices, too amenable to appropriation by political or state interests, and prone to undermine rather than promote AJS.

## AJS models endorsed by policy

**Autonomous AJS institutions:** These are independent mechanisms which are run entirely by the community, without any interventions or regulations from the state. The decision makers selected resolve disputes by applying the laws, rules, and practices governing that particular community.

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

**Court-annexed AJS institutions:** These refer to AJS processes that are used to resolve disputes outside the Court, under the guidance and partial involvement of the Court. They work closely with the Court and Court officers in the resolution of disputes through a referral system between the Court, Court Users Committees, the AJS processes, and other stakeholders such as the ODPP, the Probation Office, and Children's Office. This method of dispute resolution involves both community-based mechanisms and the formal justice system.

*Source: AJS Policy Framework*

## Human rights-based obligations framework<sup>100</sup>

The Policy endorses a human rights-based obligations framework anchored on three Pillars or Guiding Principles: duty to Respect, Protect, and Transform. In the context of AJS Policy, the claim holders are the users of the AJS system, and the duty bearers are the AJS officers,<sup>101</sup> Judiciary, ODPP, and others involved in driving implementation.

The **Duty to Respect** requires noninterference with the enjoyment of rights and freedoms, including the use of AJS processes, except to the extent necessary to ensure AJS processes and outcomes comply with the Constitution and other laws. The Taskforce notes that this obligates the Judiciary to dedicate resources to enable AJS mechanisms to operate and develop capacity, as well as be monitored and assessed, and take necessary steps in case of human rights violations.

To safeguard the rights enshrined in the Constitution's Bill of Rights, the Duty to Protect entails developing laws, policies, and regulations for AJS processes that guard against human rights violations and provide remedies where these processes have resulted in such violations. To facilitate unimpeded access by rights-holders to AJS mechanisms, the **Duty to Protect** also requires the State to guard against third-party interference, whether from individuals, state agencies, police, lawyers, court officials, and others, through the development of guidelines on third-party involvement.

### Human rights-based obligations approach to AJS:

Participation of all

Accountability of the AJS personnel and framework

Nondiscrimination of all AJS users

Transparency of the AJS framework

Human dignity

Empowerment of AJS users and officers equally and equitably

Rule of law compliancy

*Source: AJS Baseline Policy*

Finally, the **Duty to Transform** involves the mainstreaming of the Constitution’s goal of instituting “social change and reform through values such as social justice, equality, devolution, human rights, rule of law and democracy” in AJS processes and determinations.<sup>102</sup> This requires strengthening capacity of the various actors involved in implementing AJS to ensure “their minds are geared towards meeting this transformative agenda.” It also means encouraging decision makers within the system to deliver decisions that reflect achievement of substantive equality and socioeconomic transformation. At the heart of AJS engagement is improvement in the observance of human rights and constitutional values across judicial and AJS mechanisms. This requires training for AJS practitioners and other duty bearers not only in the Constitution and human rights standards, but also in skills like documentation and record-keeping in order to enable effective monitoring. Empowerment of justice seekers will ensure they are able to access and participate in AJS processes meaningfully, and also be in a position to hold those processes accountable where necessary.

### Agency theory of jurisdiction of AJS<sup>103</sup>

The Constitution does not expressly address the question of the jurisdiction of AJS mechanisms. The Policy therefore proposes an Agency Theory to make this determination. Rather than distinguishing civil from criminal law, the important question is whether the parties have consensually and voluntarily submitted themselves to AJS resolution, and whether that consent is informed, mutual, free, and revocable. Where such consent can be objectively determined, and if there is no specific legislation or public policy circumscribing the jurisdiction of AJS, then the dispute is deemed amenable to the AJS mode of dispute resolution.

This approach seeks to address specific concerns over the protection of vulnerable and marginalized people from potential mistreatment within AJS processes. Minors are not legally able to consent, so cases involving children cannot be referred to AJS. In cases of violence against one of the parties, consent is required from the victim of violence as well as the prosecutor. The Policy recognizes the involvement of the Director of Public Prosecutions (ODPP) as the representative of State-based interests in criminal cases; such consent is also necessary, together with the victim and other stakeholders, to allow a criminal matter to proceed to AJS resolution.<sup>104</sup>

Notably, the Agency Theory allows for AJS resolution regardless of the gravity of an offence: indeed, the Agency Theory is reflected in a controversial 2013 decision by a High Court to allow for the withdrawal of murder charges at the request of the ODPP and mark the case as settled.<sup>105</sup> In that case, the ODPP received letters from the families of the deceased and the accused indicating they had “submitted themselves to traditional and Islamic laws which provided an avenue for reconciliation,” that each party was satisfied, and that the family of the deceased indicated they would no longer testify at trial as it would violate their tradition now that compensation had been paid. With no prospect of proceeding to trial, the prosecutor invoked the promotion of traditional dispute resolution mechanisms under Article 159 of the Constitution in its request to withdraw the case.

## Operational doctrines of engagement

### Compatible with AJS

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

**Deference:** The Court reviews previous AJS proceedings and awards for procedural propriety and proportionality only. The Policy deems this the most appropriate interaction between the Courts and AJS.

**Facilitative:** AJS awards and processes are taken as providing evidence for the parties in the Court process. Following an AJS process in which an outcome was agreed, the parties bring the decision to the Court "as evidence in support of resolution of a dispute pending before Court in consonance with the recommendations contained in the minutes of the clan elders."

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

### **Incompatible with AJS**

**Monism:** The Court could treat previous AJS proceedings or awards as a tribunal of first instance from which a dissatisfied party is permitted to appeal to the Court. In this mode, the Court conducts a de novo review of both facts and law. As this would veer into the territory of undue interference with AJS, the Policy considers it undesirable but potentially applicable in limited circumstances.

**Avoidance:** The Court could simply ignore previous AJS proceedings and awards, but this would contravene Article 159 of the Constitution.

*Source: AJS Baseline Policy*

## **Operational doctrines of interaction between the AJS and courts<sup>106</sup>**

Through a discussion of six operational doctrines and their appropriateness in AJS engagement, the Policy offers recommendations on how court actors should engage with AJS mechanisms and decisions. The Policy encourages the Judiciary to deploy either Deference, i.e., limiting review of AJS proceeding for procedural propriety and proportionality only, or Recognition and Enforcement in the Mode of Arbitral Awards. However, the Policy also recognizes that there may be instances where a prior agreement of the parties or the specific circumstances of the case make the Convergence or Facilitative Doctrines appropriate. The Policy rejects Avoidance and Monism doctrines as inappropriate in view of Articles 159, 11, and 44 of the Constitution. The guidance thus allows courts to ensure adherence to human rights and Constitutional principles and legitimize AJS processes and outcomes, while guarding against over-regulation of AJS proceedings and preventing the over-formalization of AJS as tribunals of first instance.



## Key areas of intervention

The Taskforce identified the following strategic areas of intervention as crucial for effective delivery of the AJS Policy.<sup>107</sup>

<b>Strategic objective 1:</b> To recognize and identify the nature of cases AJS mechanisms can hear.	<b>Strategic objective 2:</b> Strengthening the processes for selection, election, appointment, and removal of AJS practitioners	<b>Strategic objective 3:</b> Develop procedures and customary law jurisprudence.	<b>Strategic objective 4:</b> Facilitate effective intermediary interventions.	<b>Strategic objective 5:</b> Strengthened sustainable resource allocation and mobilization.
<ul style="list-style-type: none"> <li>• Formal recognition of AJS as an access to justice tool and ensure safeguards to respect the human rights of individuals who seek redress through AJS.</li> <li>• Enhanced nondistinction between civil and criminal matters in AJS.</li> <li>• Enhanced stakeholder and peoples' involvement in cases of public interest and concerns of aggrieved parties.</li> <li>• Enhanced efficiency and effectiveness of the justice system.</li> <li>• To promote use of Court-annexed AJS systems to resolve disputes.</li> <li>• To strengthen autonomous and third-party institutions.</li> </ul>	<ul style="list-style-type: none"> <li>• Enhanced selection, election, appointment, and removal procedures for competent and capable AJS practitioners.</li> <li>• Enhanced outcomes by AJS practitioners that comply with the rule of law and human rights principles.</li> <li>• Enhanced environment of trust and legitimacy of the practice of AJS.</li> </ul>	<ul style="list-style-type: none"> <li>• Enhanced access to and administration of justice infrastructure.</li> <li>• Enhanced compliance with the Constitution and human rights principles.</li> <li>• Enhanced application of customary law and practice.</li> </ul>	<ul style="list-style-type: none"> <li>• Enhanced awareness of the role and place of intermediaries in the administration of justice.</li> <li>• Developed infrastructure to encourage use of intermediaries.</li> <li>• Enhanced promotion and protection of the rights and voices of the vulnerable and marginalized.</li> </ul>	<ul style="list-style-type: none"> <li>• Strengthened capacity of communities to manage their own affairs in the administration of justice.</li> <li>• Targeted allocation of resources for the promotion of AJS.</li> <li>• Optimal utilization, flexibility, and accountability in the use of public resources for AJS.</li> </ul>

### 3 AJS Policy Implementation

Following the publication of the AJS Policy in August 2020, the Chief Justice of the Supreme Court formed the National Steering Committee for the Implementation of the Alternative Justice Systems (AJS) Policy (NaSCI-AJS, or “Steering Committee”), comprising twenty-six members representing state and non-state actors as well as academia and civil society. This makeup largely mirrored the institutional membership of the Taskforce, with notable additions of members representing the Department of Probation and After Care Services (DPACS) and the National Legal Aid Service (NLAS).<sup>108</sup> Members were appointed for a period of five years to oversee implementation of the Policy. Importantly, most of the individuals appointed also served on the Taskforce, and the NaSCI-AJS retained the leadership of chairperson Prof. Joel Ngugi and vice chairperson Dr. Steve Ouma Akoth, ensuring continuity of purpose between policy development and implementation.

The NaSCI-AJS is organized into three subcommittees: Training, Public Education, and Awareness; Jurisprudence and Drafting; and Resource Mobilization, Monitoring, and Documentation. Additionally, the committee established a Policy Implementation Unit, housed at the Kenya Judiciary Academy, to aid coordination and administrative support to committee activities.

#### NaSCI-AJS sub-committees<sup>109</sup>

##### Duties and responsibilities

Training, public education, and awareness	Jurisprudence and drafting	Resource mobilization, monitoring, and documentation
<ul style="list-style-type: none"> <li>• To undertake the primary task of leading educational engagement on the AJS Policy through provision of awareness, sensitization, training, and dialogues between different AJS practitioners</li> <li>• To undertake the task of preparing awareness, sensitization, training materials, and documents on the AJS Policy.</li> <li>• Conduct thematic bimonthly meetings to report and review its progress in achieving obligation 1 and 2.</li> <li>• Generate reports for consideration by NaSCI-AJS on implementation of the AJS Policy.</li> </ul>	<ul style="list-style-type: none"> <li>• To synthesize NaSCI-AJS awareness, sensitization, training reports, meeting minutes, and case reports to determine whether there are emerging issues that necessitate amendment of the AJS Policy.</li> <li>• To develop tools and knowledge forums that would strengthen the competence of AJS mechanisms and Judiciary staff toward implementation of AJS Policy in Kenya.</li> <li>• To lead in development of operational guidelines for each of the AJS typologies defined by the AJS Policy in Kenya.</li> <li>• To develop and keep a detailed baseline and compendium of the various AJS actors and systems on behalf of NaSCI-AJS.</li> <li>• Conduct thematic bimonthly meetings to report on and review progress in achieving the above obligations.</li> <li>• Generate reports for consideration by NaSCI-AJS on implementation of the AJS Policy.</li> </ul>	<ul style="list-style-type: none"> <li>• To carry out mobilization of financial, nonfinancial, and technical resources toward implementation of the AJS Policy.</li> <li>• To develop tools and strategies that would strengthen the competence of NaSCI-AJS and the Policy Implementation Unit.</li> <li>• To work with the Judiciary Training Institute, National Council on Administration of Justice, and development partners on implementation of AJS Policy.</li> <li>• Conduct thematic bimonthly meetings to report on and review progress in achieving the above obligations.</li> <li>• Generate reports for consideration by NaSCI-AJS on implementation of the AJS Policy.</li> </ul>

#### Policy implementation unit

- Hosted by the Kenya Judiciary Academy
- To process communications on all issues related to meetings, workshops, and travel aimed at achieving objectives of NaSCI-AJS.
- To organize awareness, sensitization, and training workshops materials and logistics for NaSCI-AJS members in consultation and concurrence with the Resource Mobilization, Monitoring, and Documentation (RMMD) Committee.
- Archive in a logical sequence all material and data related to AJS Policy implementation and facilitate access by judicial officers, staff, and members of the public.
- Implement such other activity as may be instructed by Director KJA and NaSCI-AJS in furtherance of the Committee's Terms of Reference.

In the three years since the launch of the AJS Policy, the Steering Committee has worked on building a foundation for successful AJS engagement. Key to this has been a wide-ranging sensitization strategy involving public relations and outreach through broadcast and online media outlets, along with dialogue within the Judiciary and related government ministries involving Court Users Committees, AJS practitioners across Kenya, and the public at large.

Though robust monitoring and reporting has not been possible due to a lack of resources, existing data shows that the efforts of the NaSCI-AJS have been far-reaching. In FY 2021/22, the last year for which data is available, the NaSCI-AJS engaged in fourteen counties in Kenya, raising awareness of 4,478 people directly, of which 1,290 were trained and designated as AJS champions.<sup>110</sup> Additionally, thirty-five judicial officers from fourteen counties were trained on operationalizing AJS Policy, and a pool of 252 AJS practitioners (including village elders, traditional leaders, etc.) were trained in Kajiado, Isiolo, Nakuru, Uasin Gishu, Kitui, and Meru Counties. In total, 71,090 people were reached through a variety of awareness, sensitization, training sessions, and media engagements.<sup>111</sup> The Steering Committee also developed draft guidelines for Court Annexed, Autonomous, and Third-Party AJS mechanisms, a draft Training Manual, and a Monitoring and Evaluation Framework consisting of three Pillars, thirteen Targets and thirty-one Indicators.

The Steering Committee also established official locations for AJS engagement in three counties: Nakuru, Kajiado, and Isiolo, which they hope can serve as examples and test sites for localized, contextualized models of AJS. Implementation of AJS Policy in these counties is proceeding through the development and implementation of County AJS Action Plans (CAP), which entails creating awareness to the general public, sensitization to strategic actors, training of strategic AJS champions, and the development of the action plan.<sup>112</sup> Additionally, the Committee is facilitating the identification of underutilized rooms within the compounds housing courts of law to serve as "AJS suites" which elders and other AJS practitioners may use as physical spaces for AJS sittings. Courts are engaging with AJS mechanisms in many locations, but due to limited resources, Nakuru, Kajiado, and Isiolo were the only counties at the time of this research where the NaSCI-AJS has been able to roll out full AJS implementation.

*"Land is an essential factor of production and a guarantor of food security and communal identity. It is a source of life and livelihoods and therefore at the heart of justice and human dignity."*

Hon. Justice Martha Koome, EBS, Chief Justice & President of the Supreme Court of Kenya at the launch of the Kajiado Law Courts Complex and AJS Model, October 19, 2021.

**Nakuru County** lies in the Rift Valley along the Kenya-Uganda railway line and is a major transportation hub and gateway to more remote counties to the north and west. While Nakuru Town is the fourth largest urban center in Kenya, and one of the fastest growing in the region, most of the county is rural and dependent on agriculture. The population is diverse,

particularly in the urban center, but the majority are from the Kikuyu and Kalenjin communities. The chairperson of the NaSCI-AJS also serves as the presiding judge of the Nakuru High Court, located in Nakuru Town.

Finalized in May 2022, Nakuru County AJS Action Plan was developed by a working group selected from the Court Users Committee (CUC). It began with formative research identifying the main justice needs in Nakuru County, and where people go to seek resolution of disputes. Considering the justice issues of the county, as well as unique resources available among governmental (Nakuru County Government’s own AJS mechanism) and nongovernmental (a legal aid program operated by local university law faculty) stakeholders, the resulting County Action Plan proposed a hybrid model of AJS engagement situated somewhere between the Autonomous and Court-Annexed typologies. This approach establishes a Court-Annexed AJS mechanism alongside engagement with “affiliated” Autonomous AJS mechanisms through the operation of an AJS secretariat under the Court Users Committee. “Unaffiliated” Autonomous AJS mechanisms will continue to be encouraged and incentivized to “affiliate” with the Nakuru AJS model, but otherwise will be unhindered.

Affiliated AJS mechanisms need to adhere to guidelines set by the Nakuru CUC, and among their other responsibilities, must submit records relating to the disputes they handle. The Court Annexed mechanism will constitute panels of three to five members from a pool of around twenty AJS practitioners in the metropolitan area, take referrals directly from the court, and mainly serve in situations where parties are not comfortable with existing Autonomous AJS mechanisms. As of July 2022, the Nakuru Court Annexed AJS mechanism had resolved seventy-four cases.<sup>113</sup>

**Kajiado County** is located in the Rift Valley in the southern part of Kenya bordering the Republic of Tanzania. The population is highly dependent on agriculture, with nomadic pastoralism as the main form of livestock production. The proximity of Kajiado County to Nairobi has led to a rapidly growing and diversifying population, especially in urban centers, while the rural areas and reserves are predominantly Maasai.

As the Steering Committee set out to develop the Kajiado County AJS Action Plan, they found a majority of local disputes arise from issues involving land. Working closely with the National Land Commission and the Maasai elders, the Steering Committee is crafting an AJS engagement model with emphasis on resolving land matters. As of July 2022, ten AJS panels had been constituted in Kajiado County, and the pool of AJS practitioners trained included thirty-eight women and twenty-one people below the age of thirty-five.<sup>114</sup> This marks a significant step for a community in which women are forbidden by Maasai culture from sitting on the Council of Elders.<sup>115</sup>

Initial AJS engagement resulted in the rapid resolution of sixty-one land disputes which had been pending before the National Land Commission and the courts for years.<sup>116</sup> Once the parties realized that agreements facilitated by their elders would be recognized and honored by the courts, they immediately submitted their matters to the elders for resolution.

**Isiolo County** lies in the northeastern region of Kenya and comprises mostly arid and semi-arid lands where a majority of the population rely on raising livestock through nomadic pastoralism. At the time of the AJS Policy’s development, a robust practice of conflict and dispute management already existed in the capital.

In Isiolo town, councils of elders—all of which now include women—from the five main communities (Somali, Samburu, Turkana, Borana, and Meru) typically hear disputes within their own communities, while an intercommunity council resolves disputes between communities. A majority of cases relate to conflict arising from disputes over boundaries, land use, or family matters. Disputants may bring their problems directly to elders for resolution without ever going to the courts. Disputes pending before the Isiolo Courts, including the Environment and Land Court, may be referred to AJS if the judge thinks the matter is suitable for AJS resolution and the parties consent. In more rural and remote areas of the county, village elders constitute Autonomous AJS mechanisms to resolve local conflicts.

All manner of criminal or civil disputes may be referred by the courts to AJS for resolution, but serious crimes and sexual and gender-based violence are not. Though harmful practices including FGM, defilement, and domestic violence remain a challenge in these communities, elders in Isiolo play an important role in combating such practices through advocacy and local educational and sensitization initiatives. Some elders believe the elevation of their authority through AJS engagement will aid these efforts.

## AJS engagement anticipated in urban centers

Though most existing AJS engagement sites are peri-urban to rural, the NaSCI-AJS is also planning to expand Policy implementation to urban areas. What constitutes “community” in culturally diverse urban areas may not be the same as in rural, ethnically homogenous counties.<sup>117</sup> Urban residents have different justice problems and rely on different CIJ actors for help. Human rights and legal aid organizations operate community-based paralegal programs through established community justice centers where many of the urban poor seek resolution of legal disputes. Chiefs and assistant chiefs also play a central role in dispute resolution, especially in informal settlements. The NaSCI-AJS anticipates AJS engagement through these community-based actors rather than traditional elders, prioritizing matters relating to rent and housing, loan repayment and debt amelioration, and public planning.<sup>118</sup>

## 3.1 Early impact of AJS Policy

The early impact of AJS Policy in Kenya resonates with global findings in the Justice for All Report: supporting alternative pathways to justice can expand protection of human rights and make justice more affordable, durable, expeditious, and more restorative for ordinary people. At this early stage in AJS Policy implementation, only an incomplete picture can be drawn of its impact, particularly at a national scale. However, because both autonomous CIJ mechanisms and court engagement with traditional justice systems predates policy development, the impact of those prior engagements can illustrate the potential for AJS implementation to shape access to justice nationwide. Where impact has been observed since adoption of the AJS Policy, that is noted below.

### 3.1.1 A framework for expanding human rights and human autonomy

A concern with AJS engagement is the potential for violation of human rights, particularly of women and marginalized groups. This concern rests on the assumption that AJS practitioners, especially elders who come from communities in which harmful cultural practices are prevalent, are disinterested or incapable of shifting beliefs and practices to comply with constitutional requirements. The evidence shows that many “traditional” elders are in fact not only willing to change, but actively work to promote such changes within their communities.<sup>119</sup> As detailed below, AJS engagement demonstrates that “human rights can be given meaning at the local level,” increasing their reach and impact.<sup>120</sup>

Elders interviewed for this paper include both those at the forefront of promoting AJS engagement with the courts and those not yet exposed to outreach and sensitization programs undertaken through the Policy. Both groups expressed commitment to developing adherence to constitutional values within traditional justice mechanisms in their communities, including the abolition of practices that harm women, girls, and marginalized groups.<sup>121</sup> Elders are reportedly changing various cultural practices in response to AJS Policy implementation: appointing women as elders;<sup>122</sup> allowing women to speak for themselves in AJS sittings; adjusting compensation schemes to value the lives of women and men equally; rejecting the use of punishments that undermine human dignity such as whipping; and applying the agency theory of jurisdiction in declining to handle matters involving children due to their inability to consent.

*“We should evolve, we should be proud of being Kenyan, despite our different cultures, different religions, different this and that, for the sake of peaceful coexistence.”*

Member, National Council of Elders

*“It’s up to us, it’s up to the elders of the community to align [the community’s] practices with the Constitution.”*

Village elder, Kericho County

According to elders, the AJS Policy also creates a new and powerful incentive for change, as it elevates their authority. Prior to the Policy, determinations of the elders were only enforceable to the extent that the community and parties decided to recognize it.<sup>123</sup> Now that communities know the courts will adopt these determinations, parties will be more inclined to abide by resolutions reached in AJS sittings. “This closes the gap; now they have nowhere to run,” stated a village elder in the Rift Valley. In a recent corruption case involving dispossession of a widow’s land, the mere knowledge that AJS elders were conducting preliminary fact-finding was enough for the wrongdoers to return her land.<sup>124</sup> AJS practitioners which affiliate with courts may also be more likely to be perceived as fair and impartial, thereby attracting a better reputation within the community in a virtuous cycle. Elders are also “bound to be much more rigorous in the way that they handle things because they know they must abide by what is said in the constitution.”<sup>125</sup>

The public participation characteristic of traditional justice in Kenya further serves to reinforce and promote adoption of practices consistent with human rights. As reconciliation and restoration of peace within the community lays at the heart of these processes, members of the community are often engaged throughout the fact-finding process. Agreements and/or penalties are tempered by what the community deems acceptable, particularly since enforcement relies on public perception of the legitimacy of the process as well as social pressure on the disputing parties. The fact that AJS practitioners engage communities in seeking appropriate resolutions provides a tremendous opportunity for transformation in both directions: elders conveying constitutional values, and the community reflecting back shifting norms.

### 3.1.2 A mode of doing justice differently and more effectively

The potential for more reparative, expeditious, and affordable outcomes through AJS engagement is well supported by the evidence. As discussed above, national surveys and qualitative studies show clearly that most ordinary Kenyans prefer alternatives to the courts for those reasons.

Whatever happens in the courts, the parties bring their grievances back to the community where they still must be addressed by the elders in order to prevent further conflict.<sup>126</sup> The adversarial form of justice represented by the courts can deepen rifts between parties. In most disputes, the parties are close, either in proximity (18 percent neighbors) or kinship (17 percent), and fear of aggravating relationships features prominently as a reason people take no action at all when experiencing a dispute.<sup>127</sup> These factors underscore the importance of reconciliation and restoration among disputing parties and how court adoption of community-level resolution can prevent escalation and future conflict.

AJS engagement also allows for more creative and constructive approaches to dispute resolution—which often may be perceived as better than what the courts can offer, particularly in criminal matters. In criminal cases, AJS resolution provides complainants an opportunity to speak about the harm they have suffered and receive compensation in return. The emergent use of AJS to address recidivism by engaging the entire community in reintegration efforts also shows promise beyond what state agencies have the resources to support.<sup>128</sup> “We have a saying that ‘the one who praises the rain has been rained on’ and I have been rained on,” declared one magistrate, explaining how AJS has made her a champion of the approach by reducing caseloads and allowing for reparative resolutions between parties.

## Creative solutions to find a win-win

Five young men were brought up by their grandmother on her land. Following the 2007 elections, the young men fled the violence where they were working and returned home to find their grandmother's land now occupied by someone else. While the young men had been away, the aging grandmother had sought help from a kind neighbor, promising land in return for his assistance. Although the title deed was never transferred, when the grandmother passed the neighbor occupied her land and developed it, erecting a fence and other structures. The community resisted returning the land to the young men because the grandmother had been an outsider, someone who had settled in the community but was not from the same clan. To them, the kindness shown by the neighbor, the assistance provided when the grandmother was in need, and her promise to give him land, were more than enough to justify his ownership.

This case illustrates a great deal of complexity in the relationships between the individuals involved. Biologically, the "grandmother" was the great-aunt of the boys. She adopted their father when his parents had passed, and following his first marriage, the family lived together on the compound. The father later left his first wife and children to settle elsewhere with a second wife. When the mother of the boys passed away, the father failed to attend her funeral. This was a sacrilegious act, and as a result the father was forbidden from setting eyes on the children or sharing space with them until and unless he submitted to elaborate and expensive ritual cleansing. The boys thus became culturally orphaned and were raised by their great-aunt, whom they called grandmother.

These cultural and relational dimensions were brought to bear in the dispute in several ways. Upon the grandmother's death, the young men were "culturally stranded;" although their father was alive, they could not join him. Nor could they return to the land on which they were raised because it had been occupied by another. The fact that the young men were not the biological grandchildren of the original landowner was emphasized by the community as a way to distance them from inheritance.

The AJS panel observed that while the young men were legally entitled to their grandmother's land, if a court were to order the land returned, the neighbor would also lose the value of the improvements he had made. The young men were not set on ownership of that particular plot of land, so the AJS panel proposed a solution in which the young men would be paid the value of the land, subtracting the value of the assistance the neighbor had provided to their grandmother. In persuading the parties and the community to consider this proposal, the elders leaned heavily on the protection of property rights in the Constitution and other laws, emphasizing the strength of the young men's legal claim, the difficulty for them in being "culturally stranded" in this way, and the financial and social costs of requiring the parties to proceed through a court settlement. The parties agreed to the AJS resolution. The young men received the monetary value of the land, and the title deed for the property was transferred to the neighbor.

This case was resolved through an AJS mechanism established by the legal aid and human rights organization Kituo Cha Sheria. Although it predates implementation of the AJS Policy, it represents one of the Third Party Autonomous AJS mechanisms the court will also engage to implement the Policy.

### 3.1.3 An effective mechanism for the reduction of case backlog and decongestion of courts

It is difficult to distinguish the impact of AJS implementation on case backlogs in the courts from the overall trend towards reduction since 2010. With the progressive implementation and upscaling of Court-Annexed Mediation (CAM) and Small Claims Courts (SCC), the courts have seen a significant diversion of cases from the dockets of magistrates' courts, including those in the AJS demonstration counties. For example, eleven SCCs were operationalized in FY 2020–21 including in Nakuru and Kajiado counties.<sup>129</sup> In two years, the number of cases filed in the SCCs nationwide grew substantially, from 1,023 cases filed in FY 2020–21 to 8,729 cases filed in FY 2022–23.<sup>130</sup>

Standardized and verified numbers on court referrals to AJS are not yet available from the AJS demonstration counties. These numbers may also not reflect disputes which never reach the courts due to efforts to encourage chiefs, assistant chiefs, and police to refer them directly to AJS. However, we may extrapolate the potential for AJS to decongest the courts using figures from other courts practicing AJS engagement.<sup>131</sup> Preliminary figures from the Othaya magistrates' courts (which only refers criminal matters to AJS, as appropriate civil matters are now referred to CAM) suggest that at least 6 percent of criminal matters may be suitable for AJS referral with a rate of 62 percent successful resolution.<sup>132</sup> In FY 2021–22, 266,108 criminal matters were pending in the magistrates' courts.<sup>133</sup> Applying the above rates of referral and successful resolution, as many as 9,899 criminal matters could be successfully resolved through AJS nationwide.

### 3.1.4 A mechanism for social reengagement with (and relegitimizing) the state, and reconstituting the state and the citizen as part of the constitutional project to remake the Kenyan state

The Taskforce considers AJS Policy a mechanism for reengaging citizens as active participants in the project of achieving equal access to justice. AJS is likewise considered a vital part of the transformative state-building envisioned in the Constitution. In the Taskforce's view, the state has become alienated from the people because "the state was speaking the language of law and order, while the people were speaking the language of relationships."<sup>134</sup> Building relationships with people and communities "depends on close relationships between justice providers and the communities in which they work and live ... [and] a new culture of collaboration, of openness and of responsiveness to people and their needs."<sup>135</sup> AJS engagement breaks down barriers between community leaders and the courts, nurturing mutual learning, exchange, and collaboration. These interactions strengthen the quality of justice delivered through both courts of law and AJS proceedings, facilitating greater understanding of rights and remedies among communities served.

Do Kenyan people experience AJS engagement as prioritizing their needs, and will this contribute to a restoration of trust in the state? Initial signs suggest the AJS Policy is indeed perceived in this way by at least one local government. The NaSCI-AJS will soon launch an AJS site in Mandera<sup>136</sup> at the request of its County Government who "want the people of Mandera to feel they are part of Kenya and part of the State."<sup>137</sup> The multistakeholder Court Users Committees present at every court station have become invigorated by AJS engagement—their membership increasingly includes elders and civil society representatives implementing AJS—and they are becoming a conduit for community outreach and engagement on local justice matters. Additional research and user surveys will be necessary to confirm these encouraging early signs.



## 3.2 Potential to resolve and prevent land-related conflict

A majority of the population of Kenya continues to depend on land for livelihoods and economic wellbeing. Land is not just a critical resource: it has economic, political, social, and spiritual dimensions that complicate resolution of disputes and make the consequences of unresolved and insecure tenure potentially volatile. AJS engagement in the resolution of such disputes has the potential to free up vital social and economic resources, as well as ameliorate one of the root causes of conflict in Kenya.<sup>138</sup>

Historical efforts to replace customary land tenure with private, titled property, together with a colonial regime of redistribution of land to European settlers, created a legacy of muddled property rights laws in Kenya.<sup>139</sup> Land reform initiatives since independence sought, with varying success, to unify numerous systems of land registration while bringing land held under customary law under the modern tenure system. Although the 2010 Constitution and the National Land Commission Act recognize the basis of property rights in customary law, observers note that CIJ systems have been largely ineffective at protecting property rights due to the difficulty of their enforcement in courts of law.<sup>140</sup> As customary law governs an estimated 65 percent of the land in Kenya, this means that the right to land for most Kenyans remains insecure. Allowing courts to adopt decisions of AJS panels in land disputes closes that gap.

Restorative and reconciliatory approaches offered through AJS can play a key role in preventing conflicts as well as reducing the cost of justice for ordinary people. Land cases may be the costliest form of dispute, with an average cost of KES 14,418 (USD 146.76) per household, though the data does not distinguish between resolution through litigation or other avenues.<sup>141</sup> People with land problems report suffering from stress and loss of time considerably more often than people with other problems, and violence and vandalism arising out of land disputes is also more commonly reported.<sup>142</sup> Given that land insecurity may be a driver of conflict, violence, and insecurity in Kenya, durable resolution through AJS engagement can contribute to long term stability and peace.<sup>143</sup>

Women face particular challenges in protecting their right to land. AJS engagement has enormous potential to mitigate cultural barriers to their ownership and inheritance of land. Although an estimated 32 percent of households in Kenya are headed by women, a mere 1 percent of land titles are held by women alone, and an additional 5 percent is held by women jointly with men.<sup>144</sup> This disparity is particularly striking considering approximately 75 percent of Kenyan women are involved in agricultural labor compared to 51 percent of men.<sup>145</sup> In spite of progressive legislation over the past decade that expands women's rights to own and inherit land, discriminatory customary practices and patriarchal values continue to deprive women of their right to land which they have cultivated, improved, and occupied with their families for their entire lives.<sup>146</sup> For example, the practice of widow inheritance, in which a widowed woman is expected to marry into the in-laws' family in order to remain on her land, has been exploited to evict many women and children from property that is rightfully theirs under both statutory and customary law.<sup>147</sup> Observers have noted the contradiction in respecting or reifying culture for the purpose of using it to claim rights to land, while also wielding it to dispossess others.<sup>148</sup>

AJS engagement presents a viable way to bring law and custom into alignment for the benefit of women and other marginalized groups. Traditional leaders are becoming more effective voices in the protection of women's rights, including the right to own and use land.<sup>149</sup> AJS elders encourage registration of land in women's names, promote succession planning that includes women and girls, and can use AJS proceedings as opportunities to reinforce community understanding and adoption of protective laws.<sup>150</sup> The cultural authority held by AJS elders is reinforced by court recognition of their decisions, and where elders' decisions follow constitutional requirements, this mutually reaffirming relationship has the potential to bolster community rejection of harmful and discriminatory practices.

## Impact of AJS Policy in a land case

A 90-year-old widow had lived on a parcel of land for most of her life, raising her children and burying her husband within the compound according to the custom of her community. Burial of family members on the land renders it sacred and such land is never sold. When surveyors turned up one day to measure her plot, she learned that a relative had sold the land without her knowledge or permission, and that the new owner had then sold it on to yet another person. The widow's daughter, trying to get to the bottom of what happened, was rebuffed by the new owner who possessed a title deed for the land in his name. Without the resources to challenge the sale in court, the widow's daughter appeared on a local radio program to appeal to the elders to prevent her mother from being dispossessed of land that was sacred to her family.

The Luo Ker—the head of the Luo Council of Elders—learned of the widow's plight and convened a group of elders for an initial fact-finding at the family's compound. The intention was to gain a better understanding of the issues involved and explain the benefits of the AJS process to the parties so that they could decide whether to engage in the process. The elders met with the widow, her daughter, and extended family members. The relative who sold the property, the buyer, and the chief who had presided over the sale were also invited, but none attended the initial meeting.

The elders learned that the title deed to the land had been in the name of the widow's husband and had never been transferred following his death. Absent this, obtaining a title deed in the name of the purchaser was legally impossible. The elders advised the widow's daughter to return to the land office and tell them the transfer could not have been legal because the title deed had never been transferred from her father. As the efforts of the elders revealed possible corruption within the local administration, the land office quickly recalled the title deed issued to buyer, reverting ownership back to the widow.

### What can we learn from this case?

The daughter's decision to raise the public profile of her mother's plight through a local radio program proved highly effective in enlisting public pressure to achieve a fair outcome to these proceedings. Indeed, the elders and social justice organizations all learned about the case through this radio program, though arguably their involvement could have been engaged through other means.

The Judiciary's recognition of the authority of elders led to a speedy and just resolution in this case. While the elders already had the respect of their community, court engagement as a result of the AJS Policy provided them with a new level of legal credibility and authority. Their involvement "got everybody scared"<sup>151</sup> because the community—especially the local administrators and others involved in the corruption—recognized that the elders now had the backing of the courts. Rather than risk the prospect of defending their actions or an official investigation, the bad actors quickly gave up and restored rightful possession to the widow.

Another important dimension of this case involves the participation of local social justice organizations, which facilitated the elders' travel for the initial fact-finding, joined the fact-finding as observers, and accompanied the daughter as she contested the legality of the transfer of title with the land office. If engagement of the elders was the fuel that fired the engine of justice in this case, the involvement of social justice organizations greased the component parts, enabling the elders to meet with the family and providing moral and social support to the daughter's claims at the government office.

### 3.3 Entry points for AJS in criminal justice

Engagement of AJS in criminal proceedings is a conspicuous feature of AJS Policy implementation in Kenya. The Policy recognizes that traditional dispute resolution mechanisms do not distinguish civil from criminal matters, and takes into consideration the value in reducing the numbers of criminal matters contributing to the courts' perennial backlog. Accordingly, the Policy intentionally declines to proscribe any type of dispute on the basis of the gravity of the offence.

Concerns over permitting AJS engagement in criminal cases largely mirror the broader concerns over AJS: that substantive and procedural justice cannot be ensured in a forum with no written rules to ensure fair consideration of evidence; that punitive measures may be imposed which violate human rights; and that the Constitution and the rule of law will be undermined if perpetrators can escape punishment under the law by opting for an AJS sitting.

The state-operated criminal justice system in Kenya also faces serious challenges despite reform efforts. On top of case backlogs and a high proportion of people in pretrial detention, findings from a 2016 NCAJ Audit reveal a number of serious issues: over-policing of low level and regulatory offences that disproportionately result in court cases; a high proportion of unlawful arrests; evidence of police corruption; low conviction rates for sexual and violent offences; a high rate of overturned convictions; and an unlawfully high number of children remanded to prison.<sup>152</sup> The recent promulgation of new guidelines relating to bail and bond, plea bargaining, diversion, and sentencing all reflect a push toward resolution of criminal prosecutions in a way that is faster, less arbitrary, free from corruption, and proportionate to the petty nature of a vast majority of criminal offenses in the system.

AJS engagement contributes toward these objectives by diverting petty offences prior to prosecution, reducing unlawful and unnecessary incarceration, and improving the quality of outcomes—for both victims and offenders—at sentencing. Criminal matters comprise 73 percent of new cases filed in magistrates' courts, and thus constitute the majority of pending cases in the system.<sup>153</sup> The diversion of petty offences through AJS and other initiatives would allow police, prosecutors, defense lawyers, and others to focus limited resources on more serious offenses. In some counties, AJS elders visit prisons to secure bond for people from their communities in an effort to mitigate the economic impact of detention on the accused and reduce the numbers of pretrial detainees. Their presence in these facilities may also act as a check against abuses and unlawful detention. Engaging with AJS at sentencing allows for the possibility of creative combinations of penal and reparative outcomes more beneficial to the complainant and the accused, as well as opportunities to explore alternatives to incarceration and community-based reintegration programming to reduce recidivism.<sup>154</sup> The impact of AJS engagement in criminal matters resonates with global findings that restorative justice schemes have positive effects in curbing rates of reoffending, giving victims a sense of fairness, reducing post-traumatic stress, and offering remedies that build relationships and restore community harmony.<sup>155</sup>

#### **AJS engagement in criminal justice: Othaya, Nyeri County**

The town of Othaya lies within a fertile valley between Mt. Kenya and the Aberdares mountain range. A medium sized town reliant on agriculture, a majority of its residents belong to the same tribal community and are relatively well-educated with easy access to Nairobi just two hours to the south. Othaya's small size, relatively homogenous population, and peri-urban to rural character all contribute to how this form of AJS engagement has evolved.

#### **How did AJS engagement begin?**

The Othaya courts started exploring AJS in 2012, when matters involving a father and son were referred to the probation office. In the absence of existing guidelines, the probation officer arranged for the parties and other family members to sit together to foster reconciliation. Following the successful resolution of these matters, the local Judiciary started exploring how reconciliation and restorative practices could be mainstreamed more effectively at every stage in legal disputes to prevent cases from unnecessarily entering

the court system and promote more reparative and durable outcomes. From its beginnings in 2013 with an initial sensitization workshop involving key stakeholders including chiefs, Assistant chiefs, village elders, and members of the Court Users Committee (CUC), the Othaya Court AJS engagement has evolved and adapted over time in response to ongoing learning and appreciation for the value that coordinated efforts could bring. The Judiciary's adoption of the AJS Policy has since deepened stakeholders' investment in AJS engagement, justified the allocation of resources to track and evaluate AJS referrals, and created greater opportunities to share lessons learned with other courts. All cases illustrated below are matters handled since the launch of the AJS Policy.

### **What types of legal disputes are handled through AJS?**

Most disputes in the community are handled through AJS, especially boundary disputes between neighbors, disputes within families over succession or maintenance, and petty offences such as theft. Although the AJS Policy does not designate any category of dispute as outside the potential jurisdiction of AJS, several categories have been mutually agreed among the Othaya CUC, chiefs, and elders to be unsuitable for AJS resolution. Sexual offences, murders, robberies involving violence, and other serious crimes are automatically escalated to the police for investigation and prosecution through the courts. Criminal offences which do not involve complainants, such as traffic violations, are likewise unsuitable for AJS. However, while serious crimes must be handled through the courts, AJS mechanisms still play a role in plea bargaining, sentencing, and rehabilitation of the offender. In 2021, Court Annexed Mediation (CAM) was established at the Othaya courts and since then all civil matters deemed appropriate for out-of-court settlement are referred to CAM for resolution.

### **How do disputes reach the AJS mechanism?**

Referral to AJS is available at any time throughout the life of a dispute and the majority of disputes never make it to the courts. Most people approach a local Chief, elder, or the police in the first instance, and if the subject matter is suitable for AJS, the matter will proceed to AJS without further escalation. If court proceedings have already been initiated, any actor involved in the case (e.g., the presiding magistrate, the public prosecutor, the parties or their lawyers, and the probation officer) can nevertheless request that the matter be referred for resolution through AJS.

If the presiding magistrate finds the matter suitable for AJS resolution, she will discuss the AJS referral process with both parties at the next hearing date, explaining the training undertaken by AJS panelists, the advantages of AJS resolution compared to lengthy court proceedings, that statements made during AJS sittings will not be used as evidence in the court case, and the voluntary nature of engaging in the process. Whether or not the parties agree to be referred for an AJS sitting, the magistrate records their reasons in the court proceedings. Ninety percent of the time AJS is offered, both parties consent to the referral.

Following consent, the magistrate will introduce the parties to the probation officer and issue a written order to the Sub-County Probation Officer and the Chief from the parties' location. The court case is adjourned for a hearing in thirty days, with the AJS sitting expected to convene before that date. The Probation Officer and Chief (or Assistant Chief) are then responsible for familiarizing themselves with the circumstances surrounding the dispute and organizing a venue and date for the AJS sitting to convene.

### **Who presides over an AJS sitting?**

The administrative jurisdiction over which the Othaya Court presides is divided into thirteen administrative locations, each headed by a Chief and Assistant Chief.<sup>156</sup> For each location, the CUC selects a pool of elders

recommended by the chiefs for their reputation for integrity, wisdom, and good behavior. When organizing an AJS sitting, a panel of five or six elders is drawn from this pool. In keeping with the constitutional provisions on nondiscrimination, gender equality, and gender representation, each pool of elders includes women, and the chair of each AJS panel strives to ensure gender representation at each sitting.

### **Where is the AJS sitting held?**

The AJS sitting is typically held in the disputants' village to minimize travel for all involved. Where one of the parties is remanded in custody and unable to post bond, the AJS sitting may be convened at the courts, requiring the AJS panel, the complainant, and supporters for both parties to travel at their own expense.

### **What happens during an AJS sitting?**

The AJS panel is generally chaired by the Chief or Assistant Chief in addition to the elders they select. The parties may object to the inclusion of any panel members, including the Chief. In that instance, replacements will be sourced until both parties are satisfied. Both parties may also bring elders, family members, friends, and community members to the sitting, subject to space limitations. The Probation Officer attends the AJS sitting to record and summarize the proceedings for the court.

During the AJS sitting, both parties are provided time to air their grievances starting with the complainant. The AJS panel asks questions to clarify the root causes of the dispute, guides discussion around reparations, compensation, or other modalities of resolution, and invites participants to share their insights on the dispute. The AJS panel then meets privately to discuss how the dispute should be resolved, whether compensation is appropriate, and in what form. The parties and their supporters are then presented with the panel's determination and given an opportunity to respond to the proposed resolution and/or further negotiate terms. The aim of this process is to come up with a "win-win" outcome for both parties.

If the parties endorse the resolution proposed during the AJS sitting, they are encouraged to shake hands as a sign of reconciliation. The parties must then return to court on the appointed date for the resolution to be presented to the court for adoption. Prior to the court appearance, the magistrate reviews the probation officer's report to ensure neither the process nor resolution includes anything that contravenes the Constitution or Kenyan law. In court, the magistrate ascertains whether both parties freely agree to the terms or object to the resolution.<sup>157</sup> If there are no objections, the court adopts the resolution and issues orders consistent with the agreed upon terms; e.g., ordering compensation or withdrawing the matter from court. Where compensation or another reparative sentence is ordered, the court will schedule an additional date to ensure compliance. If the parties are unable to come to a consensus at the AJS sitting, the matter will return to court for hearings and trial.

### **How does AJS engagement change the outcomes of cases?**

Case outcomes from AJS sittings are more durable because the elders, parties, and community tackle the root causes of disputes. Resolutions arising from AJS sittings consider the needs and desires of the complainant as well as the circumstances of the offender, and reparative penalties can be customized accordingly. In reaching "win-win" resolutions, these outcomes also serve to restore relationships within the community, thereby laying groundwork to prevent future conflict and reintegrate offenders. Matters referred to AJS are usually resolved within a single sitting one or two months after being filed in court, making them moreover a more expeditious form of justice.

Although the Othaya Court has a relatively long history of AJS engagement, the numbers show that referral to AJS from the courts remains relatively small though significant if extrapolated at a national level. In the seventeen-month period between January 2022 and May 2023, out of a total of 1,026 criminal matters filed, sixty-six (6.4 percent) matters were referred to AJS, of which forty-one (62 percent) were resolved and eleven (17 percent) referred back to court. The Othaya Court has seen a reduction in its case backlog, though with existing data it is not possible to determine the extent to which Court-Annexed AJS, Court Annexed Mediation, and related initiatives contributed to the reduction. Compliance with terms agreed in an AJS sittings is also high. Most AJS resolutions involve compensation, and often the court finds the compensation already paid by the time the parties request court adoption of the resolution.

### **How does AJS engagement work at sentencing and postconviction?**

The Othaya Court is also exploring ways in which AJS engagement can help improve outcomes for the offender and their community even after a plea or conviction requiring a custodial sentence. When the circumstances of a case suggest that it might be appropriate—e.g., when the offender is young, or the family is involved as complainants—the magistrate will order a “family conference” before sentencing, which functions much like a typical AJS sitting but with an emphasis on reconciliation and reintegration rather than fact-finding.

In a case in which a young man had repeatedly been arrested and convicted for stealing crops from his neighbor’s land, the family conference finally allowed them to “untie the knot.” The complainant unburdened himself of the frustration of being repeatedly victimized, the offender accepted responsibility for his actions, and the elders committed to organizing a community baraza (meeting) complete with the ritual slaughter of a goat to reassure the young man that despite the harm he had caused and a possible custodial sentence, he would still be welcomed back into the community as one of their own. Even in more difficult cases involving violence, family conferences with elders can offer the offender an invaluable opportunity for redemption, moral support, and creative, concrete actions to reintegrate and prevent recidivism.

### **How does the community view court engagement with AJS?**

The Court-Annexed AJS model has become well-recognized and highly regarded by the community due to its long operation in Othaya. Deeper engagement between justice sector actors, chiefs, and elders has also resulted in greater mutual sensitization of the roles each play in maintaining peaceful communities.

### **An atypical case nevertheless finds resolution through AJS**

A woman was accused of throwing acid at her husband, causing severe injuries to his face requiring hospitalization. Given the serious injury involved, the case proceeded through police investigation and the accused was charged and remanded because she could not post bond. The magistrate, public prosecutor, and other court actors did not believe the matter appropriate for AJS referral; nevertheless, after the accused was eventually released on bond, the parties asked to be sent to AJS, as they had children together and wanted a forum in which they could resolve their familial entanglements. Since the couple indicated that they had already begun seeking the intervention of their elders, the presiding magistrate reluctantly sent the case for an AJS sitting.

In addition to addressing the violent act which led to the court case, the AJS sitting gave the couple an opportunity to air longstanding frustrations with each other and their concerns over the fate of their children. Rather than attempting to diagnose and repair the problems between them, the AJS panel insisted that the

couple attend a number of counseling sessions to address the specific issues raised in the sitting. The case could only be withdrawn when the court was satisfied that the couple had adequately addressed these issues. The couple endorsed the AJS resolution, and the magistrate ordered them to meet with a counselor at the nearest hospital for an assessment. A few months later, following the mandated counseling sessions, the case was withdrawn. Through counseling, the couple decided not to reconcile but came to an agreement on how they would continue to raise their children and refrain from interfering in each other's personal lives. Although initially reluctant given the injury involved, the magistrate felt this was the best possible outcome, and would not have been achieved through the courts alone.

### What are some of the challenges in implementing Court-Annexed AJS in Othaya?

For people in custody, impoverished, or already estranged from their families or the community, accessing and utilizing the AJS mechanism presents particular challenges. An incarcerated or socially marginalized person may not have the resources to bring supporters to join an AJS sitting held at the courts; may not be in a strong position to present their side of the story or negotiate terms of an AJS resolution; may feel pressured to agree to terms simply to secure release; and may be less able to meet the terms of the agreement upon release.

Court-Annexed AJS in Othaya, like all AJS engagement under the Policy, is unfunded. While some existing resources may be leveraged to support AJS referrals (such as providing a physical space for AJS sittings at the courthouse), AJS panels and parties receive no remuneration from the courts to offset travel costs or time. Witnesses required to give evidence at trial are able to claim travel expenses and accredited mediators in the CAM initiative are paid for their role, but these facilities are not yet available to elders resolving cases referred to them by the court. Although the elders take great pride in their role in resolving conflict and restoring peace within their communities, some modest level of future remuneration may need to be considered to defray their expenses and recognize the crucial service they provide to the courts.

## 3.4 Continuing challenges

**Potential for bias, discrimination, and corruption** within AJS mechanisms remains a real threat in spite of the efforts of the NaSCI-AJS to ensure practitioners are well-trained in constitutional rights and values. AJS practitioners' familiarity with the context, parties, and terms of dispute can render impartiality a challenge as distinctions of family, wealth, gender, or other markers of status may play a greater role in how the parties are treated in both the process and outcome. The strength of AJS may be its greatest weakness in this regard, as "the process of compromise inherent in the system tends to reinforce existing social attitudes whether desirable or not."<sup>158</sup> Part of what makes traditional justice systems so powerful is the delegation of authority from a community which espouses the same cultural and social values and practices. However, this same strength of culture can cause a community to marginalize people who violate those norms—willfully or not—and create outgroups among their own, such as discrimination against women who refuse circumcision. These inherent biases may be impossible to perceive when decisions are reviewed at arm's length by a court. As AJS implementation progresses, careful monitoring will be necessary. At the time of this report, no disputant who opted in to AJS proceedings in lieu of court litigation has filed an appeal against the court's adoption of the AJS resolution.<sup>159</sup> However, the ability to appeal on the grounds an AJS resolution or process contravened the Constitution may in the future serve as a mechanism for accountability.

**Lack of resources keeps AJS engagement from reaching its potential.** At present, AJS Policy development and implementation have not been allocated dedicated funding from the government. They rely instead on ad hoc support through partnerships with national NGOs and international development agencies, and leveraging resources of the

Judiciary and other concerned state agencies at the margins.<sup>160</sup> Members of the Taskforce and NaSCI-AJS volunteer their time for AJS around the responsibilities of their full-time positions in the Judiciary, justice sector ministries, and civil society.

Institutionalizing AJS engagement will require a permanent source of government funding. Although the lack of reliable resources has not yet hindered policy development and implementation, this seems down to the leadership, passion, and commitment of the individuals and organizations involved over the past decade. To date only three official sites for AJS engagement have launched, and efforts to develop robust monitoring and reporting systems are stymied by a lack of resources. Reliable funding will ensure that all corners of the country are able to benefit from the AJS engagement, and also ensure that useful experiential evidence is captured and fed back in a timely manner to its evolving approach.

**Remuneration of AJS practitioners remains unresolved and contested.** The potential remuneration of AJS practitioners, including those cooperating in Court-Annexed and affiliated AJS mechanisms, should be considered as part of sustainable AJS resourcing. It also acts as a safeguard against the improper influences of wealth and politics within AJS proceedings. There is as yet no consensus on whether and how practitioners should be paid.

Traditional elders presiding over dispute resolution proceedings are often remunerated by the parties, including through a set monetary fee; an offering of a meal shared by the parties; reimbursement of any transportation costs; or a symbolic offering commensurate to what the parties can afford. As the position of elder is one of honor, many consider dispute resolution a duty to the community and the negligible compensation does not incentivize the performance of that duty.<sup>161</sup> Standardizing an unduly high sitting fee for AJS practitioners may unintentionally commercialize the process.

On the other hand, as some AJS practitioners observe, broadening and diversifying the pool of elders who may be called upon to join an AJS sitting means more of them will include women and men of prime working age who must leave their fields, shops, children, or other responsibilities for lengthy periods to help the courts resolve their cases. Providing at least a minimal amount of reimbursement for costs incurred may serve to recognize the important role they play in helping expand access to justice and mitigate against other corrupting influences.<sup>162</sup>

**Mitigating against overregulation and capture.** The most notable concern for the future of AJS is the possibility of “state capture:” i.e., that traditional ways will become coopted by the State through AJS engagement, annexation, and regulation. Unduly burdening AJS practitioners with guidelines, reporting requirements, rules, and compensation can change their incentives. Moreover, the friction added to the process could result in the loss of the most valuable features of AJS: flexibility, creativity, and informality. Although the Policy explicitly embraces hands-off doctrines of engagement with AJS, it remains to be seen whether this will continue under new leadership at the NaSCI-AJS and the Supreme Court. Interestingly, none of the elders interviewed raised concerns that engagement with the courts could lead to diminishment of the legitimacy they derive from their communities.

Related to this concern is political capture, where AJS practitioners by virtue of their reputation in the community are coopted during election season by political candidates seeking their support.<sup>163</sup> Legal aid provider Kituo Cha Sheria, in implementing its third-party autonomous model of AJS, applies multiple strategies to prevent corruption and undue influence over its practitioners. For Kituo, choosing AJS practitioners with a reputation for impartiality and integrity is the most effective way to prevent potential problems. Following training, AJS practitioners sign a code of conduct which sets clear expectations that are communicated publicly to the community in a “graduation” ceremony. Finally, Kituo conducts light touch monitoring through check-in calls and community visits to get a sense of progress, also relying on the community to speak up if there have been issues with how AJS is being conducted.



## 4 Key Takeaways

Kenya is experiencing an extraordinary period of justice reform as its leaders strive to meet the aspirations of the new Constitution. The early impact of AJS Policy in Kenya resonates with global findings in the Justice for All Report that supporting alternative pathways to justice can expand protection of human rights and make justice more affordable, durable, expeditious, and restorative for ordinary people. Kenya serves as a strong example of how states can utilize AJS to transform their institutions and meet international commitments on expanding equal access to people-centered justice.<sup>164</sup> The following points reflect learning from Kenya's experience and are proposed as useful considerations for governments, judiciaries, and justice stakeholders interested in incorporating CIJ engagement in their people-centered justice policies.

**Developing a people-centered justice policy requires deep understanding of what already exists and building on its value.** There is no one-size-fits-all model for justice. To develop a coherent and inclusive justice system responsive to the diversity and richness of any specific place, policy makers and development partners must be prepared to set aside preconceptions of how things should work.<sup>165</sup> Spending time with existing alternative approaches to justice reveals their valuable established foundations, on which enhanced access to justice can be built. This applies equally to so-called customary and informal justice mechanisms as well as state-operated justice systems. By looking honestly at the strengths and challenges within each, we can identify complementary linkages to fill the gaps.

**A model of operationalizing people-centered justice must allow flexibility responsive to local resources and constraints.** An extension of the highly context-driven approach discussed above, the operational strategy of a country as diverse as Kenya must be designed to accommodate diverse local conditions and communities. The focus on land in Kajiado County and criminal matters in the largely homogenous and well-resourced community of Othaya both lean into the potential to maximize the value of AJS while addressing each community's specific needs and main concerns. In so doing, Kenya designed a policy that lays effective groundwork to resolve the justice problems that matter most to its people.<sup>166</sup>

**A multistakeholder, multidisciplinary approach to policy development and implementation results in a well-considered outcome.** A key lesson from both AJS Policy development and implementation is the need to adopt an approach that includes stakeholders with potentially divergent and critical viewpoints in the process from the very beginning. The exercise becomes one of collective learning and creation through debate and dialogue, and even the most ardent critics on any side become enveloped and invested in the outcome. Taking time in the process also allows for better consideration of context, learning, unlearning, and relearning along the way.

**Leadership matters.** A key driver of Kenya's success in developing and implementing AJS Policy has been consistent progressive and transformative thinking of all its stakeholders. All involved seized on the momentum for reform created by the Constitution and are still carrying it forward. From the successive Chief Justices of the Supreme Court who supported developing multiple doors to justice, to the leadership and members of the Taskforce and NaSCI-AJS who have shepherded AJS engagement to the present day, Kenya's experience underscores the importance of appointing individuals who are passionate, knowledgeable, and open to engaging in unlearning, learning, and relearning to achieve transformative results.

**Promote culture while engaging honestly in its critique in order to help it evolve and survive.** The 2010 Constitution promotes and protects culture, but also circumscribes practices which may violate human rights. To ensure the survival of Kenya's diverse cultures, proponents engage in open and honest debate about elevating those aspects that are good, and setting aside practices that no longer fit the world we now live in. AJS engagement is part of this ongoing dialogue: it aims to harness the strengths of cultural practice while animating discussion about how cultural values and customary norms interact with the Constitution. In states where traditional justice systems have historically been subordinated or neglected, good faith exploration of the value of promoting such systems may loosen perceived obstacles to their engagement as sites of justice.

**Integrate learning of customary and informal justice systems.** Understandings of culture and living customary law

should be integrated into the legal education and training of relevant governmental and legal professionals to ensure respect for and smooth implementation of engagement with CIJ systems. Education at primary and secondary levels should also be considered so that the citizens who inherit these systems can develop a deep appreciation for interactions among multiple justice systems, unlocking more innovation in the delivery of justice.

**Secure sufficient and sustained resourcing.** Reliable financial resources must be committed to institutionalize AJS engagement, support significant levels of outreach, sensitization, and training still needed around the country, and ensure that lessons can be learned in real time during implementation. Although CIJ systems are less expensive to operationalize and sustain than state-operated systems, dedicated government funding is required to ensure CIJ is incorporated in a people-centered justice policy that delivers effective justice journeys and leaves no one behind. To identify resources, states can explore evidence-based financing strategies that redirect resources away from ineffective approaches and toward what works, as well as partnerships with other sectors and nontraditional partners.<sup>167</sup>

**Explore creative mechanisms of accountability.** As AJS Policy implementation progresses, more lessons will be learned about which mechanisms of accountability work best under varying circumstances and in different communities. Existing avenues for such accountability include oversight by multistakeholder court users' committees, codes of conduct, court review of decisions, and feedback on AJS practitioners from the communities on whom their legitimacy depends. Time will tell whether these points of accountability will be adequate to protect against political capture and other forms of corruption, but care must be also taken to avoid draining the value of these mechanisms through over-regulation.

**Invest in research to understand how AJS engagement changes people's experience of justice.** This paper concludes that the AJS Policy has enormous potential to reshape access to justice in Kenya. The Kenyan experience demonstrates how increased awareness and understanding of the justice gap can motivate and guide transformational reform.<sup>168</sup> Beyond the indicators collected through monitoring processes, there is a need for research on the cost savings of AJS for the people and the state. Longitudinal studies will also foster deeper understanding of how the AJS Policy changes Kenyan citizens' experiences of justice and their relationship with the state. Will AJS sittings increasingly become sites for the protection of human rights and human dignity? Will sustained interaction between AJS practitioners and the courts enliven the practice of customary law? The Taskforce considered AJS Policy a mechanism for reinstating citizens as active participants in the project of achieving equal access to justice and the transformative state-building envisioned in the Constitution. Do Kenyan people experience AJS engagement as a centering of their needs, and will this contribute to a restoration of trust in the state? It is too soon to convincingly answer many of these important questions, but the ambition at the heart of Kenya's AJS Policy should compel global justice leaders and stakeholders to take note and be invested in its outcome.

# Endnotes

- 1 Task Force on Justice, Justice for All – Final Report (New York: Center on International Cooperation, 2019), <https://www.justice.sdg16.plus>. Many people suffer from multiple forms of injustice, so these figures add up to more than the estimated 5.1 billion individuals who face injustice.
- 2 Hague Declaration on Equal Access to Justice for All by 2030, adopted at the Ministerial Roundtable on Access to Justice in The Hague (2019). See also Task Force on Justice, Justice for All; USAID, Rule of Law Policy, (Washington, DC: USAID, 2023). To this end, the United Nations SDG Summit called for expediting the implementation of SDG 16 in 2019. The Task Force on Justice outlined three crucial recommendations to accelerate action: (i) prioritize justice in sustainable development efforts; (ii) place individuals at the center of justice systems; and (iii) transition from justice for a select few to justice for all.
- 3 Task Force on Justice, Justice for All, 68.
- 4 Hague Declaration. See also, Task Force on Justice, Justice for All; USAID, Rule of Law Policy.
- 5 Task Force on Justice, Justice for All, 69.
- 6 Lisa Denney and Pilar Domingo, Taking people-centred justice to scale: the role of customary and informal justice in advancing people-centred justice (London: ODI, 2023), 11. See also IDLO, Policy and Issue Brief: Navigating Complex Pathways to Justice: Engagement with Customary and Informal Justice Systems (2019); UN Women, UNICEF, and UNDP, Informal Justice Systems: Charting a Course for Human Rights-Based Engagement (2013).
- 7 Denney and Domingo, Taking people-centred justice to scale: the role of customary and informal justice in advancing people-centred justice, 12, <https://odi.org/en/publications/taking-people-centred-justice-to-scale-the-role-of-customary-and-informal-justice-in-advancing-people-centred-justice/>, citing the Working Group on CIJ and SDG16+. In 2020, a new indicator for SDG 16.3 was adopted to measure the proportion of the population experiencing a dispute. The measure also disaggregates the type of dispute resolution mechanism to provide additional information about the pathways used by people in need of enforcing or defending rights.
- 8 UN OHCHR, Human Rights and Traditional Justice Systems in Africa (Geneva: UN Office of the High Commissioner for Human Rights, 2016), 20. See also Denney and Domingo, Taking people-centred justice to scale.
- 9 UN OHCHR, Human Rights and Traditional Justice Systems, 79.
- 10 Judiciary of Kenya, Alternative Justice Systems Baseline Policy | Justice as Freedom: Traditional, informal and other mechanisms used to access justice in Kenya (2020), [https://ajskkenya.or.ke/mooxowhi/filr/3584/AJS\\_Baseline\\_Policy\\_2020\\_Kenya.pdf](https://ajskkenya.or.ke/mooxowhi/filr/3584/AJS_Baseline_Policy_2020_Kenya.pdf).
- 11 International Commission of Jurists, Kenya: Judicial Independence, Corruption and Reform (Geneva: ICJ, 2005).
- 12 Simon Templer Kodiaga and Paul Kamau, “Most Kenyans seek – and find – justice outside formal court system,” Afrobarometer Dispatch No. 442 (April 16, 2021).
- 13 Hiil, Justice Needs and Satisfaction in Kenya: Legal problems in daily life (The Hague: 2017), 73, [https://www.hiil.org/wp-content/uploads/2018/07/hiil-report\\_Kenya-JNS-web.pdf](https://www.hiil.org/wp-content/uploads/2018/07/hiil-report_Kenya-JNS-web.pdf).
- 14 Denney and Domingo, 8.
- 15 Francis Kariuki, “Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology,” Alternative Dispute Resolution 3, No.1 (2015), 163-183.
- 16 Notably, Kenyan courts of law include Kadhis’ Courts, which are a formalization of the customary law of a particular community.
- 17 Constitution of Kenya, 2010, <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010>.
- 18 Alternative Justice Systems Baseline Policy, 6.
- 19 Constitution of Kenya, 2010, art. 159(2)(c). See also Art. 11, recognizing “culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation” and Art. 44, recognizing the right of any person belonging to a cultural or linguistic community to enjoy that culture and use that language.

- 20 Eric K. Mwangi, “What is People-Centered Justice?” April 28, 2021, <https://ea.hiil.org/news/article/>.
- 21 Alternative Justice Systems Baseline Policy, xv-xvi; Judiciary of Kenya, Alternative Justice Systems Framework Policy | Traditional informal and other mechanisms used to access justice in Kenya (2020), 4, [https://ajskenya.or.ke/mooxowhi/filr/3585/AJS%20Policy%20Framework%20Policy\\_fa\\_web%20\(1\).pdf](https://ajskenya.or.ke/mooxowhi/filr/3585/AJS%20Policy%20Framework%20Policy_fa_web%20(1).pdf).
- 22 Task Force on Justice, Justice for All, 75.
- 23 UN SDG 16.3; African Union Agenda 2063 Goal 11; Government of Kenya, Open Government Partnership National Action Plan IV 2020-2022 Commitment 7.
- 24 Here, the term “culture” is used in its broadest sense to denote the ideas, customs and social behaviors of different communities. The author notes that the Constitution of Kenya includes multiple meanings of culture in the Kenyan context, which are not addressed in this paper.
- 25 A common refrain from respondents when describing the deep roots of CIJ in Kenya.
- 26 Winifred Kamau, “Customary Law and Women’s Rights in Kenya” (Nairobi: The Equality Effect, 2014), 4, <https://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf>. See also Francis Kariuki, “Customary Law Jurisprudence from Kenya Courts” (Nairobi: Strathmore University Law School, 2015), <https://su-plus.strathmore.edu/server/api/core/bitstreams/198547ba-0b59-4162-8c2f-d3c3eed189a8/content>.
- 27 Kariuki, “Customary Law Jurisprudence from Kenya Courts,” 4.
- 28 Kamau, “Customary Law and Women’s Rights in Kenya,” 6.
- 29 Evelyn Makena Gatobu, “How alternative dispute resolution is securing land rights for widows in Luo Nyanza,” ImpactHub, 2021, <https://impacthubmedia.com/14617/how-alternative-dispute-resolution-is-securing-land-rights-for-widows-in-luo-nyanza/>.
- 30 Kamau, “Customary Law and Women’s Rights in Kenya,” 6. As discussed below, some traditional leaders are now revitalizing such cultural values to explain the application of constitutional protections of women’s rights.
- 31 The Magistrates’ Courts Act, 1967. Similarly, the 1967 Kadhis’ Courts Act established Kadhis’ Courts for the sole application of Islamic law in matters of personal status, marriage, divorce and inheritance in proceedings in which all parties profess the Muslim religion.
- 32 Judicature Act, 1967, 3(2).
- 33 Francis Kariuki, “Customary Law Jurisprudence from Kenya Courts.” See also Kamau, “Customary Law and Women’s Rights in Kenya,” 7; J. Osogo Ambani and Ochieng Ahaya, “The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era,” *Strathmore Law Journal* (June 2015), 41-58.
- 34 J. Osogo Ambani and Ochieng Ahaya, 41.
- 35 Kamau, “Customary Law and Women’s Rights in Kenya,” 7. These include principally the works of Eugene Cotran in the 1960s: Report on Customary Criminal Offences in Kenya (Government Printer: Nairobi, 1963); Restatement of African Law: Volume I – The Law of Marriage and Divorce (Sweet and Maxwell: London, 1968); Restatement of African Law: Volume 2 – The Law of Succession (Sweet and Maxwell: London, 1969). Emily Kinama, “Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya, 2010,” *Strathmore Law Journal* (June 2015), 36-37. Kinama describes a South African case in which a lower court overturned the decision of traditional leaders to convey a royal title upon the eldest daughter of a deceased ruler, holding that custom required the title pass to a male heir. The constitutional court overturned the lower court ruling, finding that customary law is living law.
- 36 Kariuki Muigua, “Traditional Conflict Resolution Mechanisms and Institutions,” October 24, 2017, <http://kmco.co.ke/wp-content/uploads/2018/08/Traditional-Conflict-Resolution-Mechanisms-and-Institutions-24th-October-2017.pdf>; Francis Kariuki, “African Traditional Justice Systems,” August 2018, <http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf>. See also, Penal Reform International, Access to Justice in Sub-Saharan Africa: the role of traditional and informal justice systems (London: PRI, January 2001), 21-37.
- 37 Kariuki Muigua, “Traditional Conflict Resolution Mechanisms and Institutions,” 7.
- 38 Land Disputes Tribunal Act, 1990, repealed 2011.

- 39 Francis Kariuki, “African Traditional Justice Systems,” 6. See also Francis Kariuki, “Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities” (paper presented at Chartered Institute of Arbitrators Centenary Conference ‘Learning from Africa,’ Livingstone, Zambia, July 15, 2015).
- 40 Kinama, “Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya, 2010,” 32; Celia Nyamweru and Tsawe-Munga Chidongo, “Elders in modern Kenya: ‘Dying institutions’ or ‘reinventing themselves?’” *African Studies* 77, no. 2, 240-256 (April 2018).
- 41 Kamau, “Customary Law and Women’s Rights in Kenya,” 2. See also ICJ-Kenya, Report on Access to Justice for the Marginalised in Africa (Nairobi: 2009).
- 42 ICJ-Kenya, Report on Access to Justice, 45-47; Muigua, Note 6, 12. See also Katiba Institute, Alternative Approaches to Access to Justice in Kenya: A cost-benefit analysis (November 15, 2021).
- 43 ICJ-Kenya, Report on Access to Justice, 45-47.
- 44 Kamau, “Customary Law and Women’s Rights in Kenya,” 1. See also Kinama, “Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya, 2010,” noting that the term “alternative” is inappropriate because for many Kenyans traditional justice systems comprise the only form of justice available.
- 45 HiiL, Justice Needs and Satisfaction in Kenya: Legal problems in daily life (2017), 26; Afrobarometer, Summary of results, Afrobarometer Round 8 (Institute for Development Studies, University of Nairobi, 2019); World Justice Project, Global Insights on Access to Justice: Findings from World Justice Project General Population Poll in 101 Countries (2019). In contrast, a 2015 survey by the Kenya National Bureau of Statistics returned a startlingly low number: just 16 percent of households reported experiencing grievances in the past two years. However, this divergent result may be attributable to the survey’s different methodology, in which only heads of households were surveyed about their experiences of justice. Kenya National Bureau of Statistics, 2015/16 Kenya Integrated Household Budget Survey (KIHBS) Basic Report (2016), 189-90.
- 46 HiiL, Justice Needs and Satisfaction in Kenya, 30.
- 47 Simon Templer Kodiaga and Paul Kamau, “Most Kenyans seek – and find – justice outside formal court system,” Afrobarometer Dispatch No. 442 (16 April 2021). Results from other surveys were somewhat, but not significantly higher. The 2017 HiiL survey found that 10 percent of Kenyans with legal problems tried to solve their problems through the courts. The 2015 survey by the Kenya National Bureau of Statistics found just 9.3 percent and the World Justice Project found that fewer than 9 percent were able to access help through the courts.
- 48 HiiL, Justice Needs and Satisfaction in Kenya, 64.
- 49 Although chiefs were installed during the colonial period as a means of controlling the native population, the office has persisted through independence and survived the calls for devolution which underpinned recent constitutional reforms. The institution now constitutes the most highly localized representative of the national government, and though chiefs are civil servants, they are largely appointed from among the local communities and serve for long periods of time within the same post. Additionally, though their adjudicatory function was stripped following independence and the creation of the Magistrates’ Courts, recent studies confirm that they retain this function in practice if not statute.
- 50 HiiL, Justice Needs and Satisfaction in Kenya, 69; Kenya National Bureau of Statistics, 2015/16 KIHBS, 192. Specifically, the HiiL survey found 22 percent sought resolution through chiefs, while the Kenya National Bureau of Statistics found 23.3 percent of households did so.
- 51 HiiL, Justice Needs and Satisfaction in Kenya, 68; Kenya National Bureau of Statistics, 2015/16 KIHBS, Table 12.3, 194. Both surveys found that using chiefs is nearly twice as popular in rural (28 percent) than in urban areas (14 –17 percent for KIHBS). See also Katiba Institute, Alternative Approaches to Access to Justice in Kenya.
- 52 HiiL, Justice Needs and Satisfaction in Kenya, 68.
- 53 Kenya National Bureau of Statistics, 2015/16 KIHBS, 192.
- 54 Kenya National Bureau of Statistics, 2015/16 KIHBS, Table 12.4, 196.
- 55 HiiL, Justice Needs and Satisfaction in Kenya, 78-79.
- 56 Katiba Institute, Alternative Approaches to Access to Justice in Kenya, 7.

- 57 Kenya National Bureau of Statistics, 2015/16 KIHBS, Tables 12.6 and 12.7, 198-199. Calculations assume an average rate of exchange at KES 98.24 to USD 1 in 2015. In this survey, lawyers ranked as the most expensive forum through which to resolve disputes, at KES 65,504 (USD 666.78). See also Emily Akinyi Kungu, “Influence of traditional justice system on effective conflict management in Muhuroni sub county Kenya,” MAPE diss. (University of Nairobi, 2015).
- 58 Mumbi S. Mwiuhurih, “Analyzing the Effectiveness of Informal Access to Justice in Kajiado North and Kajiado West Constituencies,” LLM Thesis (University of Nairobi School of Law, 2015).
- 59 Judiciary of Kenya, State of the Judiciary and the Administration of Justice Annual Report 2021-2022, (2022) 86. Notably, this represents a 15 percent decrease in backlogged cases from the prior year.
- 60 AJS Baseline Policy, 12-17; Interviews with AJS elders and NaSCI-AJS members. See also Emily Akinyi Kungu, “Influence of traditional justice system on effective conflict management,” MAPE Thesis (University of Nairobi, 2015), [http://erepository.uonbi.ac.ke/bitstream/handle/11295/94640/Kungu\\_%20Influence%20of%20traditional%20justice%20system%20on%20effective%20conflict%20management%20%20.pdf?sequence=1](http://erepository.uonbi.ac.ke/bitstream/handle/11295/94640/Kungu_%20Influence%20of%20traditional%20justice%20system%20on%20effective%20conflict%20management%20%20.pdf?sequence=1).
- 61 Kodiaga and Kamau, Afrobarometer Dispatch No.442.
- 62 Ibid.
- 63 Transparency International Kenya, Kenya Bribery Index 2019 (Nairobi: 2020).
- 64 These national surveys do not explore the justice needs and experiences of gender non-conforming or intersex people. However, research shows that these communities experience significant discrimination, marginalization, and violation of their human rights. See Kenya Human Rights Commission, *The Outlawed Among Us: A Study of the LGBTI Community’s search for Equality and Non-Discrimination in Kenya* (Nairobi: 2011); Kenya National Commission on Human Rights, *Report of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya* (Nairobi: 2018).
- 65 Katiba Institute, *Alternative Approaches to Access to Justice in Kenya*, 24.
- 66 Hiil, *Justice Needs and Satisfaction in Kenya*, 40.
- 67 Ibid; Mercy Kaburu and Alfred Kwadzo Torsu, “Most Kenyans see domestic violence as a private rather than criminal matter,” Afrobarometer Dispatch No. 560 (October 6, 2022), finding that perception of gender-based violence as a widespread problem is significantly more common among respondents with less wealth and less education, and that rural, less wealthy, and less educated respondents are more likely to condone the use of physical force against women.
- 68 Kaburu and Torsu, Afrobarometer Dispatch No. 560; Kenya National Bureau of Statistics, 2015/16 KIHBS, Table 12.2, 193.
- 69 Kenya National Bureau of Statistics, 2015–16 KIHBS, Table 12.2, 193.
- 70 Hiil, *Justice Needs and Satisfaction in Kenya*, 102.
- 71 Hiil, *Justice Needs and Satisfaction in Kenya*, 73. This survey question allowed for multiple answers, so results do not add up to 100. Lesser results are also not included above.
- 72 Eric Kramon and Daniel N. Posner, “Kenya’s New Constitution,” *Journal of Democracy* 22.2 (Johns Hopkins University Press, 2011), 89-103.
- 73 International Commission of Jurists, *Kenya: Judicial Independence, Corruption and Reform* (Geneva: 2005).
- 74 Heralding reforms efforts to come, the selection process for the first chief justice of this new Supreme Court took place in public view, with an open call for applications and candidate interviews on live television.
- 75 Judicial Service Act, 2011. Notably, Court Users Committees pre-existed the NCAJ as an innovation of local courts to improve coordination around case management.

76 The Judiciary has substantially expanded its physical presence across Kenya, growing from forty-three judges and 347 magistrates in 2011, in sixteen High Courts and 111 Magistrates' Courts nationwide, to 170 judges and 593 magistrates in forty-one High Courts and 127 Magistrates' Courts in 2022. In FY 2010-11, Kenya's courts received KES 3.9 billion (approximately USD 48 million at the time); in FY 2023-24 the Judiciary's allocation is KES 22.9 billion (over USD 164 million). Despite an actual increase in budget year over year, the Judiciary allocation as a proportion of the national budget has remained constant at 0.6 percent and continues to fall far short of funding requirements. Judiciary of Kenya, State of the Judiciary and the Administration of Justice Annual Report 2011-2012; Judiciary of Kenya, State of the Judiciary and the Administration of Justice Annual Report 2021-2022; Maureen Kinyanjui, "Ruto walks the talk, increases judiciary budget by Sh.4.1bn," The Star, April 28, 2023, <https://www.the-star.co.ke/news/2023-04-28-ruto-walks-the-talk-increases-judiciary-budget-by-sh41bn/>.

77 AJS Baseline Policy, 6.

78 Constitution of Kenya, 2010, art. 159(2)(c). See also Art. 11, recognizing "culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation"; and Art. 44, recognizing the right of any person belonging to a cultural or linguistic community to enjoy that culture and use that language.

79 Small Claims Court Act, 2016, rev. 2021.

80 Interview with a current member of the Judiciary.

81 The National Council for Law Reporting, The Kenya Gazette, CXVIII (Notice No. 1339), Appointment: Taskforce on Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems), March 4, 2016, 838.

82 Ibid.

83 Ibid.

84 Interview with Taskforce member.

85 Kituo Cha Sheria is a nongovernmental legal aid and human rights organization founded in 1973 by a group of young advocates committed to helping poor people who could not afford legal services.

86 AJS Baseline Policy, 6.

87 AJS Baseline Policy, 8.

88 "These conversations questioned the very notion of 'alternative': as the elders eloquently argued, the Courts are much more the 'alternative' to their work and not vice-versa." AJS Baseline Policy, 6.

89 In the words of one Taskforce member, "We had to confront our own brainwashing."

90 Interview with Taskforce member.

91 AJS Baseline Policy, xv-xvi; AJS Framework Policy, 4.

92 AJS Baseline Policy, 41-42, 44-45.

93 Article 159(3). The repugnancy clause has been criticized for being applied in contradictory and overly subjective ways in the past. Kariuki, "Customary Law Jurisprudence from Kenya Courts," 4. It is perhaps too early to tell how the repugnancy clause will be applied in jurisprudence arising from the implementation of AJS Policy.

94 Article 27(4) of the Constitution provides: "The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

95 Celestine Nyamu-Musembi, "Review of experience in engaging with 'non-state' justice systems in East Africa" (commissioned by Governance Division, DFID, 2003), 4. "[T]he less formal and visible a forum is, the more difficult it will be to assess the level of accountability to the people it serves."

96 AJS Baseline Policy, 45.

97 AJS Baseline Policy, 18.

98 AJS Baseline Policy, 18.

- 99 AJS Baseline Policy, 51.
- 100 AJS Baseline Policy, 59.
- 101 Meaning the practitioners of AJS who preside over AJS proceedings.
- 102 AJS Baseline Policy, citing Supreme Court of Kenya’s Advisory Opinion Reference No.2 of 2013, delivered 1 Nov 2013.
- 103 AJS Baseline Policy, 22.
- 104 In Kenya, the office of the Director of Public Prosecution is established by Article 157 of the Constitution and is vested with State powers of prosecution of criminal offences.
- 105 Republic v Mohamed Abdow Mohamed [2013] eKLR, High Court at Nairobi (Nairobi Law Courts), Criminal Case 86 of 2011.
- 106 AJS Baseline Policy, 55.
- 107 AJS Baseline Policy, 65.
- 108 The National Council for Law Reporting, The Kenya Gazette, CXXIII (Notice No. 12387), The National Steering Committee for the Implementation of the Alternative Justice System Policy: Appointment, November 19, 2021, 6336.
- 109 NaSCI-AJS, AJS Annual Report 2021-2022.
- 110 Judiciary of Kenya, State of the Judiciary and the Administration of Justice Annual Report 2021-2022.
- 111 NaSCI-AJS, AJS Annual Report 2021-2022.
- 112 NaSCI-AJS, Nakuru County AJS Action Plan (May 2022).
- 113 Judiciary of Kenya, State of the Judiciary and the Administration of Justice Annual Report 2021-2022, 105.
- 114 Ibid., 103.
- 115 Mwiuhurih, “Analyzing the Effectiveness of Informal Access to Justice in Kajiado North and Kajiado West Constituencies.”
- 116 Judiciary of Kenya, State of the Judiciary and the Administration of Justice Annual Report 2021-2022, 103.
- 117 Article 63 of the Constitution identifies communities on the basis of “ethnicity, culture or similar community of interest.”
- 118 Interview with NaSCI-AJS member.
- 119 Nyamweru and Chidongo, “Elders in modern Kenya: ‘Dying institutions’ or ‘reinventing themselves?’”; Gatobu, “How alternative dispute resolution is securing land rights for widows in Luo Nyanza.” See also Kinama, “Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya, 2010.”
- 120 Task Force on Justice, Justice for All, 75.
- 121 Interviews with elders from four communities in Western and Eastern Kenya.
- 122 Adoption of new practices is not uniform, even among the same communities present in multiple regions of Kenya. Notably, when an elder from one community in Eastern Kenya was interviewed, he stated that he didn’t believe women would ever be permitted to become elders due to the strict requirements and rituals involved. However, a subsequent interview with an elder in Isiolo revealed that the same community had already appointed a women to the council of elders.
- 123 See Nyamweru and Chidongo, detailing a case in the coastal region of Kenya in which a landowner attempted to evict squatters on his land for fifteen years before seeking the assistance of a village elder. Although the elder ruled in his favor, the decision was unenforceable because the squatters were not afraid of the types of sanctions the elders could impose (including social disapproval and oaths). Nevertheless, many elders interviewed also believe the social sanctions available to them are more than adequate to enforce decisions within their communities.
- 124 See Impact of AJS engagement in Land Case, below for full details.
- 125 Interview with AJS elder in Kisumu County.
- 126 Interviews with elders from Western and Eastern Kenya.



- 127 HiiL, Justice Needs and Satisfaction in Kenya, 40.
- 128 See Entry Points for AJS in Criminal Justice, below.
- 129 Judiciary of Kenya, Judiciary Budget, Citizen Guide for 2023–24 (2023).
- 130 Kenya National Bureau of Statistics, Economic Survey 2023 (2023) Table 17.11.
- 131 One important effect of the AJS Policy is that courts will now be able to collect information on AJS engagement for national analysis of trends and feedback into the evolving design and implementation of contextualized AJS in each county.
- 132 See AJS Engagement in Criminal Justice: Othaya, Nyeri County, below.
- 133 Judiciary of Kenya, State of the Judiciary and the Administration of Justice Annual Report 2021-2022, fig. 2.31. 85.
- 134 Interview with NaSCI-AJS member.
- 135 Task Force on Justice, Justice for All, 113.
- 136 Mandera County lies in a semi-arid part of northeastern Kenya bordering Somalia, geographically remote from the usual hallmarks of the State. It is highly vulnerable to droughts, heat stress, and other climate pressures, though almost all residents are dependent on agriculture and livestock production.
- 137 Interview with NaSCI-AJS member.
- 138 Task Force on Justice, Justice for All, 109. Preventing justice problems opens up opportunities for people to participate fully in their societies and economies. Patricia Kameri-Mbote and Kithure Kindiki, “Trouble in Eden: How and Why Unresolved Land Issues Landed ‘Peaceful Kenya’ in Trouble in 2008,” *Forum for Development Studies* 35, no. 2 (2008): 167-193. The authors argue that a century of repeated fragmentation and displacement of communities through deprivation of land rights, inability of post-independence governments to formulate and effectuate land policy to repair and redress historic disinheritance, and subsequent tenure insecurity exacerbated by poor governance underpinned the violence that erupted following Kenya’s 2007 presidential election.
- 139 Joseph Kieyah and Patricia Kameri-Mbote, “Securing Property Rights in Land in Kenya: Formal versus Informal,” in *Kenya Policies for Prosperity*, edited by Christopher Adam et. al. (Oxford University Press, 2010), 309-328.
- 140 Ibid.
- 141 Kenya National Bureau of Statistics, 2015/16 KIHBS, Table 12.8, 199.
- 142 HiiL, Justice Needs and Satisfaction in Kenya, 105.
- 143 Kameri-Mbote and Kindiki, “Trouble in Eden.” See also Katiba Institute, *Alternative Approaches to Access to Justice in Kenya*.
- 144 Federation of Women Lawyers Kenya (FIDA-Kenya), *Women’s Land and Property Rights in Kenya: A Training Handbook*, <https://land.igad.int/index.php/documents-1/countries/kenya/gender-3/625-women-s-land-and-property-rights-in-kenya/file#:~:text=This%20handbook%20will%20not%20only,for%20land%20ownership%20and%20registration.>
- 145 Evelyne Kihui and Bonface Munene, Policy Brief No. 03/2020-2021 *Women’s Access to Agricultural Finance in Kenya* (Kenya Institute for Public Policy Research and Analysis, 2021).
- 146 Sophie Mbugua, “Despite New Laws, Women in Kenya Still Fight for Land Rights,” *Women’s Advancement Deeply*, 23 February 2018; POLICY Project-Kenya and Kenya National Commission on Human Rights, *From Despair to Hope: Women’s right to own and inherit property* (2005).
- 147 Evelyn Makena Gatobu, “How alternative dispute resolution is securing land rights for widows in Luo Nyanza,” *ImpactHub*, 2021, <https://impacthubmedia.com/14617/how-alternative-dispute-resolution-is-securing-land-rights-for-widows-in-luo-nyanza/>.
- 148 Steve Ouma Akoth, “Land as culture: Discourse and narratives of land claims in postcolonial Kenya,” *African Studies* 77, no. 2 (2018): 189-203.
- 149 Interviews with elders in Western and Eastern Kenya; Gatobu, “How alternative dispute resolution is securing land rights for widows in Luo Nyanza.”
- 150 Interviews with elders.

- 151 Interview with elder in Western Kenya.
- 152 National Council on Administration of Justice (NCAJ), *Criminal Justice System in Kenya: An Audit* (2016).
- 153 Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report 2021–2022*.
- 154 Christine Achieng’ Okoth Obondi, “Effective Resettlement of Offenders by Strengthening ‘Community Reintegration Factors’: Kenya’s Experience,” UNAFEI Resource Material Series No. 82 (United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, 2010); Francis Kariuki, “Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR” (paper presented at Chartered Institute of Arbitrators Conference ‘Broadening Access to Justice through ADR-30 Years On,’ Mombasa, Kenya, August 7-8, 2014).
- 155 Task Force on Justice, *Justice for All*, 73-75.
- 156 As is true elsewhere in Kenya, chiefs and Assistant chiefs in Othaya are salaried government employees but tend to be appointed from the local community and therefore have deep cultural roots and an understanding of local dynamics.
- 157 Since the Othaya Court Station began engaging AJS mechanisms in this way, they have never encountered an objection from one of the parties at this point in the process.
- 158 UN OHCHR, *Human Rights and Traditional Justice Systems in Africa*, citing others, 50.
- 159 Court adoption of an AJS resolution requires a determination that both parties freely accept and accede to that resolution, rendering a later change of heart unlikely though not impossible.
- 160 A partial list of such partners includes Legal Resources Foundation, KELIN, Kituo Cha Sheria, ICJ-Kenya, Pamoja Trust FIDA-Kenya, Malaika Foundation, UNODC through its EU-funded PLEAD program, UNDP, GIZ-CPS, FAO, and IDLO.
- 161 Interviews with elders; Kariuki, “Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities”.
- 162 As stated by one AJS practitioner, “We are talking about 10 dollars, not 200 dollars, which is what accredited mediators make” under the CAM initiative.
- 163 Ayoki Onyango, “Why council of elders have become spanner boys for Kenyan politicians,” *The Standard Online*, October 2022, <https://www.standardmedia.co.ke/politics/article/2001453410/council-of-elders-are-spanner-boys-for-politicians>.
- 164 UN SDG 16.3; African Union Agenda 2063 Goal 11; Government of Kenya, *Open Government Partnership National Action Plan IV 2020-2022 Commitment 7*.
- 165 Task Force on Justice, *Justice for All*, 104.
- 166 Task Force on Justice, *Justice for All*, 108.
- 167 Task Force on Justice, *Justice for All*, 102-103.
- 168 Task Force on Justice, *Justice for All*, 101.

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