

# Alternative Justice Systems in Kenya: An Access to Justice Novelty or Institutional Co-optation?

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## Abstract

*The Judiciary's Task Force on Alternative Justice Systems introduced into the Kenyan judicial system what it referred to as novel ways of achieving access to justice (A2J) called, in its terminology, Alternative Justice Systems (AJS). This paper is a critique of these systems as proposed by the Task Force and implemented by the Judiciary. The paper begins by providing a brief overview of the development of the concept of Access to Justice (A2J) since the 1970s, from what has been referred to as rule of law orthodoxy (the focus on reforms in the judicial system), through social justice (the attempt to connect A2J to other aspects of the society in which it operates), to legal empowerment (use of the legal system to tackle socio-economic issues affecting the society, especially the poor). It briefly discusses the concept*

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*of A2J as it is applied in Kenya in its Rule of Law orthodoxy form, and the various models of AJS the Task Force identified; its recommendations regarding the models of AJS that should be introduced and how they should be implemented; the constitutional context of AJS, and the statutory basis and process of adoption of AJS as an approach to A2J. In the critique, the paper argues that the Task Force did not have a basis for deriving AJS from the constitutional context; that models of AJS being implemented are dispute resolution mechanisms and do not address disempowerment; that their conceptualisation and implementation are Judiciary-driven and are not organically developed, and that the implementation will be heavily influenced by the Judiciary and, therefore, make AJS simply a mechanism of the Judiciary for resolving its challenges in relation to A2J. The final critical comment the paper makes is that any claim by the Task Force and the Judiciary that adoption of AJS represents a paradigm shift and a novelty is not borne out in reality, since AJS does not confront the social problems of socio-economic disempowerment engendered by the capitalist system in Kenya, and within which the Judiciary operates and attempts to enhance A2J.*

**Key Words:** Access to Justice, Alternative Justice Systems, Disempowerment, Socio-economic Justice, Capitalist Social-economic System

## Introduction and Background

As a general concept, access to justice<sup>1</sup> has exercised the minds of commentators since the 1970s, especially from the time of the Florence Project study<sup>2</sup>. The commentators have identified the phases through which the concept has passed from the 1960s to now.<sup>3</sup> From the commentaries, these phases have not followed each other like clockwork in a linear form. On the contrary, and like historical developments generally, the various phases have existed, provided the framework within which others have arisen and, in virtually all cases, continued to exist within the context of the new concepts.

Inevitably, this creates overlaps that may, sometimes, make it difficult to determine the specific phase in a particular polity. This piece is not intended to address these phases and their distinctness, overlaps or other characteristics. It does not, therefore, engage in the debates on the correctness of classification of a particular phase and the distinctions among the phases and their respective components. It only deals with the phases in terms of their overall trajectory of development. Their discussion here is intended to only provide the context within which the idea of alternative justice systems is proposed and implemented in the Kenyan legal system.

Briefly, commentators have identified and characterised the phases as the Rule of Law (RoL) orthodoxy; Social Justice, and Legal Empowerment, within which we identify the strands of Legal

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<sup>1</sup> Allan Munyao Mukuki, The Various Alternative Dispute Resolution (ADR) Mechanisms and Access to Justice in Kenya, *Kenya Law Review Journal*, Vol 5:1, 2016, page 205 herein referred as 'A2J'.

<sup>2</sup> Milan, Sijthoff and Noordhoff-Alphen aan den Rijn, *Access to Justice: A World Survey*, Mauro Cappelletti and Bryant Garth (eds), 1978. See also Milan, Sijthoff and Noordhoff-Alphen aan den Rijn, *Access to Justice: A World Survey*, Mauro Cappelletti and Bryant Garth (eds), 1979.

<sup>3</sup> Roderick A. MacDonald, Access to Justice and Law Reform, *Windsor Yearbook of Access to Justice*, vol 10, 1990, page 287. See also Roderick A. MacDonald, Access to Justice in Canada Today: Scope, Scale, Ambitions, in Julia Bass, W. A. Bogart and Frederick Zemans (eds), *Access to Justice for a New Century: The Way Forward*, Law Society of Upper Canada/Irwin Law, 2005, page19.

Empowerment (LE); Micro-justice, Legal Empowerment of the Poor (LEP) and Equal Access to Justice (EA2J). The concept of A2J as RoL orthodoxy revolves around access to law and dispute resolution mechanisms and processes. The latter could be judicial, quasi-judicial or alternative, or other justice-related institutions. In its later formulations, it also encompasses dispute prevention mechanisms and processes; review of substantive laws to expand protection of citizens' rights; restorative justice, and public engagement in the formulation of laws.<sup>4</sup> As a concept of A2J, it has been criticised for being too judiciary- or state-centric; focussing too much on dispute resolution, and not connecting law and dispute resolution mechanisms and processes to the realities of society in general, and communities in particular.<sup>5</sup>

A2J as Social Justice attempts to connect legal issues and disputes to the society in which they arise, which proponents argue is a major failure of the RoL orthodoxy.<sup>6</sup> Thus, the approach argues that it is only when practitioners of A2J engage with communities that they may be able to understand the latter's idea of justice and what access and, ultimately, social justice, mean. This engagement requires involving communities in making and applying laws; aligning institutions and processes with the day-to-day needs and realities of the communities, and incorporating communities' understanding of a dispute, processing systems and practices, and acceptable consequences.<sup>7</sup>

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<sup>4</sup> Janet E. Mosher, *Lessons in Access to Justice: Racialized Youths and Ontario's Safe Schools*, *Osgoode Hall Law Journal* vol 46, 2008 page 817. Adriaan Bedner and Jacqueline A. C. Vel, *An Analytical Framework for Empirical Research on Access to Justice*, *Law, Social Justice & Global Development Journal*, vol 1, 2010.

<sup>5</sup> Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, *Law Society Review*, Vol 9:1, page 95-160. See also Patricia Hughes and Mary Jane Mossman, *Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs, Responses and Restorative Justice Initiatives*, Ottawa: Department of Justice, 2001.

<sup>6</sup> Roderick A. MacDonald, *Access to Justice in Canada Today: Scope, Scale, Ambitions*, in Julia Bass, W. A. Bogart and Frederick Zemans (eds), *Access to Justice for a New Century: The Way Forward*, Law Society of Upper Canada/Irwin Law, 2005. See also Felstiner, William L.F, Richard L. Abel and Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, *Law and Society Review*, vol. 15:3/4, 1980/1981, page 631.

<sup>7</sup> See, specifically, Stein and Cook, *ibid*; Felstiner, Abel and Sarat, *ibid*, and Galanter, *ibid*

LE,<sup>8</sup> as a broad approach to the concept of A2J, incorporates a number of strands which include Micro-justice, LE, LEP and EA2J. We consider them strands of LE because they all claim to be bottom-up approaches to A2J, and focus, in a variety of ways, on enhancing the capacities of communities.

Micro-justice approaches focus on dispute resolution but argue for the use of local resources, whether human or others, to resolve disputes, that is, community self-help. Minimal external support could be in the form of necessary elements of the formal legal system and or relevant technologies.<sup>9</sup> LE refers to an approach to A2J which uses legal services in particular, and development activities in general, to increase the ability of disadvantaged communities or populations to control their lives and advance their freedoms as active participants in social processes.<sup>10</sup> The strategies adopted include focusing on the needs of these communities as they see them; enhancing the power, capacities and roles of these communities and their organisations and any other institutions and processes beyond the limited justice sector which are relevant; putting pressure on the state in the interests of such communities and, generally, adopting and using local, rather than importing, ideas and initiatives.<sup>11</sup>

As a further development of LE, LEP is defined by the United Nations Development Programme hosted Commission on the Legal Empowerment of the Poor (CLEP)<sup>12</sup> as the process through which the

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<sup>8</sup> Goodwin and V. Maru, What Do We Know about Legal Empowerment? Mapping the Evidence, *Working Paper*, Washington, DC, 2014. See also Alexander J. Trebilcock and R. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Northampton, MA: Edward Elgar, 2008).

<sup>9</sup> Maurits Barendrecht, *Best Practices for an Affordable and Sustainable Dispute System: A Toolbox for Microjustice*, Tilburg University, 2008. See also Gideon K. Hadfield, Where Have All the Trials Gone? Settlements, Non-Trial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases, *Journal of Empirical Legal Studies*, Vol 1:3, 2004, page 705.

<sup>10</sup> D. Golub, The Commission on Legal Empowerment of the Poor: An Opportunity Missed" (2009) 1(2) *Hague Journal on the Rule of Law*, Volume 1 issue 2, 2009.

<sup>11</sup> D. Golub, The Commission on Legal Empowerment of the Poor: An Opportunity Missed" (2009) 1(2) *Hague Journal on the Rule of Law*, Volume 1 issue 2, page 25-26. See, generally, note 8

<sup>12</sup> Debora J. Jakobowicz, Gender and Access to Justice, *International Law Review*, initiative

poor become protected and are enabled to use the law to advance their rights and their interests, vis-à-vis the state and in the market.<sup>13</sup> LEP aims to enhance poor people's knowledge and use of the law and the legal system, and their economic empowerment through recognition and protection of property and market rights.<sup>14</sup>

Finally, EA2J, while seeking to address the needs of poor and marginalised people through the justice system and empowerment as LEP does, also emphasises fairness and inclusiveness.<sup>15</sup> Consequently, it calls specific attention to justice for women; children; people with disabilities; people from ethnic minorities; migrants, refugees, and stateless people, and Lesbian, Gay, Bisexual, Transgender/Transsexual and Intersex-plus (LGBTI+) people<sup>16</sup>.

What is the Kenyan situation?

## Access to Justice in Kenya

From an analysis of official sources and commentaries, the concept of A2J that is predominant in Kenya is RoL orthodoxy. Consequently, the reform agenda has been, largely, justice-sector (especially, judiciary) oriented, with proposals aimed at making the judicial and quasi-judicial system more accessible, fair, efficacious and accountable as indicated

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started by Denmark, Finland, Iceland, Norway, Sweden, Canada, Egypt, Guatemala, Tanzania and the United Kingdom (UK), in cooperation with UNDP and UN Economic Commission for Europe (UNECE) on September 6, 2005: Debroy, Bibek (2009). See also Oslo Governance Centre, *Legal Empowerment for the Poor [LEP]: An Agenda for Asia*, UNDP, 9.

<sup>13</sup> Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, United Nations Development Programme, 2008, 25. See also, UNDP (2009 and (2013), *op. cit.*

<sup>14</sup> Marcus Manuel and Clare Manuel, *Achieving Equal Access to Justice for All by 2030: Lessons from Global Funds*, Overseas Development Institute, 2018.

<sup>15</sup> Center on International Crime and Justice, Task Force on Justice, *Justice for All – Final Report*, Center on International Crime and Justice, 2019.

<sup>16</sup> *Ibid*, 58-59

in the Judiciary Transformation Framework.<sup>17</sup> Notably, for our current purposes, one of the basic objectives of JSTs proposals focused on AJS.<sup>18</sup>

This analysis of the Task Forces report discusses the constitutional context of AJS; the statutory basis and process of adoption of AJS as an approach to A2J, and the current state of its implementation through the Judiciary. Thereafter, the analysis provides a brief critical review and concluding remarks.

### **A cautionary remark**

A cautionary remark is necessary at this point. The process of implementation of AJS in Kenya is still in its very early stages. Thus, what is determined is the implementational models of AJS and the initial steps of implementation. Information regarding the overall planning of the process and how it is proceeding is inadequate. Thus, any description of implementation is still quite preliminary and the consequent critique largely dependent on the framework model and the limited information available. Subsequent availability of more information, or tweaks in the implementation, may well render part of our critique irrelevant or obsolete.

### **The Constitutional Context**

In this section, we discuss the provisions of the Constitution of Kenya which provide the context within which the idea of AJS has been introduced by the Judiciary, and also provide an overview of ADR mechanisms in general and a brief summary of the various alternative forms of dispute resolution. The Constitution of Kenya, 2010, provides for the Judiciary as an arm of government in Chapter Ten (Articles 159

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<sup>17</sup> The Judiciary, Judiciary Transformation Framework (2012-2016): Laying the foundations for the transformation of the Kenyan Judiciary, 2012, 1.

<sup>18</sup> Ibid, 13-18

to 173). It establishes a system of Superior Courts<sup>19</sup> composed of the Supreme Court, the Court of Appeal, the High Court and specialised courts (for employment and labour relations, and for the environment and land), and subordinate courts<sup>20</sup> (Magistrates and Kadhis courts, Courts Martial and any other court or local tribunal established by an Act of Parliament) (Article 164).

Apart from providing for judicial independence, Part 1 of the Chapter also states the principles which guide the judiciary in its exercise of judicial authority. One of these principles is the promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.<sup>21</sup> The promotion of traditional dispute resolution mechanisms is, however, subject to the requirement that it must not be used in a way that contravenes the Bill of Rights; is, or bears outcomes that are, repugnant to justice and morality, or is inconsistent with the Constitution or any written law.<sup>22</sup> It is from this constitutional context that the Judiciary derived the idea of alternative justice systems.

## **ADR mechanisms in general**

As popularly perceived, ADR mechanisms are dispute resolution forms other than those through formal adversarial or inquisitorial *litigation* in judicial or quasi-judicial institutions (courts and other formal or state tribunals) and processes.<sup>23</sup> It is getting progressively more difficult to make the distinction for a number of reasons: whereas they are called alternative, they are the most popular mechanisms in

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<sup>19</sup> Elaborated in Part 2, See also the Constitution of Kenya 2010, Articles 163-168

<sup>20</sup> Elaborated in Part 3, See also the Constitution of Kenya 2010, Articles 169-170

<sup>21</sup> The Constitution of Kenya 2010, Article 169(2)(c).

<sup>22</sup> The constitution of Kenya 2010, Article 159(3).

<sup>23</sup> Kariuki Muigua, ADR: The Road to Justice in Kenya, Paper Presented at the Chartered Institute of Arbitrators-Kenya Branch, International Arbitration Conference Held on 7th & 8th August, 2014. See also, Mbori Otieno, Alternative Dispute Resolution (ADR): Enhancing Access to Justice in Kenya, 2023.

terms of day-to-day use; research estimates indicate that only about 10-15% of the disputes are resolved through the ordinary judicial system,<sup>24</sup> they are, more often than not, the first port of call, even for those who eventually end up in the formal judicial system, the formal judicial system sometimes refers disputants to these processes as prerequisites for, or as stages within, the trial process, the formal judicial system has, in some cases, *informally* adopted the alternative *processes* in its own, the formal judicial system has, in some cases, incorporated or annexed the methods as avenues for easing or resolving some of the challenges it faces, for example, delays and case-backlogs, expense, legal and technical ignorance of parties and scarcity of resources,<sup>25</sup> and some of the ADR mechanisms, for example, arbitration and private judging, have become progressively more formal like judicial proceedings and, in some cases, equally expensive.

Overall, the adoption or use of ADR mechanisms has been justified on the basis that they (i) are more accessible, less procedurally stressful and faster compared to litigation; (ii) save time and resources; (iii) provide parties with better control of the dispute resolution process since the choice of the method and the process is, more or less, in their hands; (iv) avoid the adversarial and combative approach of litigation and are, therefore, more likely to result in a more positive relationship between the disputants; (v) often avoid the costly involvement of advocates, and (vi) provide an opportunity for a win-win rather than a win-lose result. It is note-worthy, however, that these positive attributes may vary, depending on the type of mechanism, and on the basis of modern practices which sometimes erode these benefits.

A number of downsides of the application of ADR mechanisms have also been noted by commentators. While these mechanisms have only slightly improved access, they have also generated challenges

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<sup>24</sup> Judiciary of Kenya, *Alternative Justice Systems Baseline Policy: Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya*, the Judiciary, 2020.

<sup>25</sup> Law Reform Commission of Ireland, *Alternative Dispute Resolution*, Dublin, 2008. See also Law Reform Commission of Ireland, *Alternative Dispute Resolution: Mediation and Conciliation*, Report No. 98, Dublin, 2010.

of their own, often reducing the positive effects that gave rise to their adoption in the first place. For example, it has been noted that, with time, some of these mechanisms also adopt or develop some of the formalities and rigidities associated with the formal justice system. The more they get structured within the current dispute resolution terrain, the more they become formalised and recreate the challenges that were intended to be addressed. These include a rise in costs; increased complexity in procedures on the one hand and, on the other, simplification, short-circuiting or sacrificing of procedure and other formal requirements to the point of often compromising the right of parties to be heard and impartiality, and buttressing marginalisation by ignoring existing power relations between the disputants<sup>26</sup>. Besides, mandatory or quasi-mandatory court-adopted or -annexed mechanisms significantly reduce the informed consent that is supposed to be part of the resolution process and, consequently, diminish personal autonomy and dignity, and raise issues of substantive and procedural fairness. At the same time, just like the formal mechanisms, they treat both parties as if there is equality in their capacities.<sup>27</sup> Overall, however, ADR mechanisms have expanded A2J within the already-noted limited framework of the RoL orthodoxy.

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<sup>26</sup> Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know and Think We Know About Our Allegedly Contentious and Litigious Society, *UCLA Law Review* vol 31, 1983 where Galanter refers to judicial settlements generally as 'litigation', the 'strategic pursuit of a settlement through mobilizing the court process page 268). On ADR, Cohen and Alberstein have argued that: 'Yet, while the ADR movement was first welcomed for its promise to help disempowered communities, it was later criticized for doing just the opposite when convincing disempowered litigants to give up their rights in exchange for voicing their complaints in the courtroom. The ADR movement was accused of refraining from promoting social awareness of inequality, and for repressing disempowered communities through privatization and soft practices see page 8-9.

<sup>27</sup> Fiss, Owen M., Against Settlement, *Yale Law Journal*, Vol 93, 1984, Page 1073, 1085-87.

## The specific ADR mechanisms

Below, we discuss, briefly, the ADR mechanisms listed in the Constitution. The list of mechanisms is not exhaustive<sup>28</sup>. Consequently, we also mention some of the non-listed mechanisms.

### Reconciliation

The term reconciliation is not normally used in the arena of individual dispute resolution. It is ordinarily used in situations of broad social conflicts, including armed or violent confrontation or engagement, involving large communities, nations or states<sup>29</sup>. The conflicts include clan, ethnic, racial or general civil wars; uprisings or insurrections, or inter-state wars. Reconciliation is, in this context, intended to create harmonious relationships among the parties by addressing and resolving the differences or disagreements which gave rise to the conflict, and redressing any outstanding grievances.

In the field of ADR, the term commonly used is conciliation, a process in which disputing parties use a third party, known as a conciliator, to assist them in resolving the dispute. The conciliator caucuses with each party – usually separately – in order to understand and establish their respective positions. There may be several of such caucuses with each party, with the conciliator shuttling between them to try and get a meeting of minds – a consensus – on how to resolve the dispute. This, where successful, then leads to an agreement. The process does not involve any witnesses, recording or writing, or information other than what the conciliator gets from the parties. The resultant resolution is not legally binding, its implementation depending entirely

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<sup>28</sup> Note the use of the term ‘including’ in the Constitution

<sup>29</sup> Hidalgo, Diego Checa, *Conflict Resolution and Reconciliation Studies: Strengthening of National Research Capacity on Policy, Conflict Resolution, and Reconciliation (PEACE) project*, 2022. See also Kelman, Herbert C., *Conflict Resolution and Reconciliation: A Social-Psychological Perspective on Ending Violent Conflict Between Identity Groups*, *Landscapes of Violence*, Vol. 1, 2010.

on the voluntary willingness of the parties to perform their part of the bargain. The parties may, however, decide to give it legal effect. This voluntariness may, however, be reversed in situations where (i) a law requires that parties engage in conciliation as a prerequisite for, for example, litigation, or (ii) a court makes an order for conciliation as a stage in the trial process. In either case, it becomes involuntary, compulsory or mandatory conciliation.

## **Mediation**

Mediation, like conciliation, is a process in which a neutral third party, called a mediator, helps disputing parties to arrive at a mutually acceptable resolution. The mediator does this by reducing the respective differences that the parties perceive as essential to their individual interests. He(s) acts as a catalyst by assisting the parties to: communicate with each other more effectively by, usually, improving their ability to listen and to articulate what they feel and think and, therefore, identify their respective interests, but at the same time, recognize the other parties' interests, clarify, identify and frame the issues, engage in structured discussions in search of potential resolution(s) to their dispute and determine and agree on a suitable resolution of the dispute.

Unlike an arbitrator, a mediator does not have to have knowledge, or be an expert, in the matter in dispute. However, he or she must have the ability to be neutral, and the skills to assist the disputing parties to negotiate and eventually resolve their dispute.

The mediator ordinarily meets the parties together. This is the major difference between a mediator and a conciliator. However, the mediator may, in very *exceptional circumstances*, meet the parties separately (or caucus), as is the case in conciliation. This may happen where the mediator needs to delve deeper into a party's special interests, misgivings or motivations, or get information which may not easily come out in the two-party discussions. A mediator must, however, avoid such situations as much as possible, since the other party may become

suspicious and get out of the mediation process. Such a development may mar the reputation of the mediator as a neutral and mutually acceptable arbiter.

In the course of helping the parties come to a resolution, the mediator may make proposals to the parties. However, the mediator cannot impose a resolution on the parties; they are at liberty to accept or reject any proposals the mediator makes.

As it is in the case of conciliation, a court may order parties to engage in mediation. Mediation may also be carried out as one of the initial steps in a judicial process. Again, it may be voluntary or compulsory. Such mediation is usually referred to as court-annexed.

Generally, there are three main draw-backs of mediation. The first is that the resolution arrived at during the process is not binding on the parties. The second is that it may not address any imbalances of power existing between the parties, since the mediator is required to be neutral and not take into account extraneous matters<sup>30</sup>. The last is the potential danger that a mediator who feels that he or she is an expert in the area of the dispute may move the parties towards his or her solution rather than theirs.

The Kenyan Judiciary introduced Court-Annexed Mediation on a pilot basis from April 2016 to July 2017 under the Mediation (Pilot) Rules, 2015. The pilots were conducted in the Commercial and Family Divisions of the High Court at Nairobi. After the piloting and review, the Mediation (Pilot Project) Rules were repealed and replaced by the Practice Directions on Mediation, 2017. These were amended in 2018. The amendments expanded the scope of application of mediation to include civil actions filed in the High Court, the Environment and Land Court, the Employment and Labour Relations Court and the Subordinate courts. Besides, the *Alternative Dispute Resolution (ADR) Taskforce on Court Annexed Mediation* was established by the Chief Justice

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<sup>30</sup> Claire Baylis and Robyn Carroll, 'Power Issues in Mediation' (2005) 7 (8) *ADR Bulletin*, Vol 7, 2005, page 135. See also, Jacob Bercovitch, 'Mediation Success or Failure: A Search for the Elusive Criteria' 7 (249) *Cardozo Journal of Conflict Resolution*, Vol7.

in July 2017 with the main mandate was to oversee a national rollout of CAM. It is chaired by Hon. Mr. Justice Fred A. Ochieng. The Task Force developed the *Court Annexed Mediation Action Plan (2021-2024) – Solution by You for You*, whose purpose is to spread the use of CAM, as an A2J mechanism, to all the courts. Its objectives are to: (i) outline the requisite legal and policy framework; (ii) define the required steps in building capacity for mediation; (iii) establish the necessary capacity to support mediation; (iv) determine the essential strategies to promote mediation, and (v) develop a framework for monitoring implementation of CAM.

The Kenyan Judiciary has adopted the mandatory model in which a court seized of a matter screens cases and, where it is found suitable, appoints a mediator from the Register of Accredited Mediators, and refers the case for mediation. Mediation proceedings are required to be concluded within 60 days, though an extension of not more than 10 days may be sought thereafter<sup>31</sup>.

## Arbitration

Generally, arbitration<sup>32</sup> is much closer to a judicial process compared to conciliation or mediation, although it still involves a third-party intervention. The Kenyan Arbitration Act defines (i) arbitration as any arbitration whether or not administered by a permanent arbitral institution; (ii) arbitration agreement as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not; (iii) an arbitral tribunal as a sole arbitrator or a panel of arbitrators, and (iv) an arbitral award as any award of an arbitral tribunal.

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<sup>31</sup> See The Judiciary, Government of Kenya, *Action Plan (2021-2024)*, 2020, 6-7.

<sup>32</sup> In Kenya, arbitration is governed by the Arbitration Act (Act No. 14 of 1995), as amended in 2009. Government Printer: Nairobi.

The Constitution of Kenya 2010, Article 48.

Arbitration is conducted, through a hearing, by either a single arbitrator or (usually) an odd number of arbitrators called a board (or panel in Kenya) of arbitrators (or arbitration board or panel). The parties may, by an agreement, appoint an arbitrator or a board, or state the mechanism or modalities for such appointment. The person (or collectively, the board) appointed has some knowledge or expertise in the matter in dispute as well as the nature of, and skills in, arbitration.

Generally, the process of arbitration is quite close to a trial although it is less formal since the rules of procedure and evidence are more flexible. This often contributes to less time being consumed in arbitration as compared to trials. Still, it involves the arbitrator or board receiving evidence from both parties. The parties are also entitled to make their respective arguments and submissions.

Once the taking of evidence and the making of arguments and submissions are completed, the arbitrator or board makes a decision, which is called an award. It usually contains the decision of the arbitrator or board, and the reasons upon which it is based. In the absence of any special agreement by the parties, the award is binding on the parties and can be enforced in the manner provided by law. It is usually final; it is not subject to review or appeal except where special circumstances demand. Such circumstances may include an award being affected by fraud, or being contrary to established legal principles binding on the parties or to rules of natural justice, or being *ultra vires* the arbitrators or boards authority. In Kenya, the circumstances under which the High Court may set aside an award are: (i) incapacity of a party; (ii) invalidity under the relevant law; (iii) lack of proper notice of appointment of an arbitrator or arbitral proceedings; (iv) the arbitral award dealing with matters that are not within the agreement; (v) the composition of the arbitral tribunal or the procedure being in conflict with a legitimate agreement; (vi) fraud, bribery, undue influence or corruption; (vii) the subject-matter not being capable of settlement under the law, and (viii) award being in conflict with public policy.<sup>33</sup>

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<sup>33</sup> The Arbitration Act, Act No. 14 of 1995, Section 35.

As it is with conciliation and mediation, a court may order an arbitration, or it may be carried out as a preliminary step in the trial process. This may be compulsory or voluntary, and is referred to as court-annexed arbitration.

There are permutations which involve arbitration. They include:

- (a) Con-Med-Arb (Conciliation-Mediation-Arbitration), where arbitration is preceded by conciliation and mediation
- (b) Med-Arb (Mediation-Arbitration), where arbitration is preceded by mediation
- (c) Arb-Med (Arbitration-Mediation), where arbitration is followed by mediation after a sealed award has been given in arbitration and the parties are required to proceed to mediation, the failure of which activates the award<sup>34</sup>.

## **Traditional Dispute Resolution Mechanisms**

Traditional dispute resolution mechanisms are, generally, not easy to define because of the ambiguity of the term traditional and the different contexts within which it is used.<sup>35</sup> In every social group or milieu, a custom, usage or practice whether economic, political, socio-cultural or moral/ethical - which has existed for a long time can be referred to as traditional, in the sense of something that has become ingrained. Yet such custom, usage or practice is also dynamic. Such dynamism may be evolutionary or revolutionary, and may depend on internal factors or external interventions or influences.

In the context of the constitutional provisions on dispute resolution mechanisms, traditional refers to dispute resolution mechanisms used

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<sup>34</sup> Mbori Otieno, *Alternative Dispute Resolution (ADR): Enhancing Access to Justice in Kenya*, 2023.

<sup>35</sup> Kariuki Muigua, *Traditional Dispute Resolution Mechanisms Under Article 159 Of the Constitution of Kenya 2010*, 2017 available at <https://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf> accessed 12/09/2020

or practiced by the African communities based on their customs and norms as they regulate the social behaviour of community-members, beginning before colonial intervention. Some of these are recognised by the state as Customary law. They are, generally, unwritten/un-codified. The restrictions placed by the Constitution on the use of these mechanisms are precisely because some of these customs and norms are, or are applied in ways that are, contrary to accepted constitutional principles, especially those that relate to human rights. They are, thus, intended to restrict the use of discriminatory substantive norms or procedural practices.

The restrictions notwithstanding, these dispute resolution mechanisms are informal and flexible; are more accessible due to their existence within the communities or social groups, collective processes and simple procedures; apply every-day and familiar norms and practices; give rise to consequences that revolve around reconciliation and reparation, but which also include or included disapprobation, denial of certain socio-economic entitlements, banishment and community service, and are more attuned to positive social relationships within the communities and between disputants.

## Other ADR mechanisms

There are other ADR mechanisms which are not listed in the constitutional provisions discussed above.<sup>36</sup> We give examples of some of them below.

- (a) **Negotiation** is where the disputing parties identify the issues and the available solutions, and agree on the most appropriate resolution. Strictly speaking, it is not a third-party-based ADR mechanism, although, in some instances, there may be

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<sup>36</sup> Mbori Otieno, *Alternative Dispute Resolution (ADR): Enhancing Access to Justice in Kenya*, 2023. See also Kariuki Muigua, *Traditional Dispute Resolution Mechanisms Under Article 159 Of The Constitution Of Kenya 2010, 2017* available at <https://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf> accessed 12/09/2020

persons, for example lawyers, assisting the parties behind the scenes.

- (b) **Convening** is a process in which a neutral third party identifies the issues and the stakeholders or potential parties with respect to a dispute, and then convenes the parties to negotiate a mutually acceptable solution. Convening may be a step towards other ADR mechanisms.
- (c) **Neutral fact-finding** may be a stage in conciliation or mediation. It involves a neutral third party conducting an investigation to identify the facts or some complex technical matters, including through seeking and collecting evidence separately, or listening to the parties' representations. The third party then provides an opinion on the findings, which opinion is not binding but may, nevertheless, be adopted.
- (d) **Neutral evaluation (or early neutral evaluation)** involves a neutral third party who – on the request of a party or parties, or a court - evaluates the merits of a disputing party's case to determine its strengths and weaknesses and potential judicial or quasi-judicial result. The third party is called an evaluator. The evaluation is not binding, but may, where accepted, lead to a settlement.
- (e) **Facilitation** is where a neutral third party, called a facilitator, helps the third parties to understand the procedural requirements of a dispute in order to provide a direction and facilitate an effective negotiation process.
- (f) **Settlement conferences** are a process where parties present their respective cases to a third party, known as a settlement officer, who assesses them, provides an opinion and negotiates settlement in a mutually acceptable manner. The assessment is not binding, but may persuade the parties to get into a settlement.
- (g) **Private judging**, often referred to as rent-a-judge, is a private or judicially-connected process in which parties to a dispute

use the services of a private individual - a private judge - to hear and determine the dispute by providing a binding decision based on the relevant facts and legal principles.

- (h) **Ombuds** involves a neutral third party who is appointed by a state or private body to look into a complaint - for example, from employees, stakeholders or clients - and provide an independent opinion. The opinion is not binding but may be adopted by the appointing authority.

## The Basis and Process of Adoption of AJS

### The Task Force

The Taskforce on Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems) was established by the then Chief Justice, Hon. Justice Willy Mutunga, through a Gazette Notice<sup>37</sup> under the Judicial Service Act, 2011.<sup>38</sup> The overall objective of the Task Force was 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>39</sup>

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<sup>37</sup> Gazette Notice No. 1339 (Vol. CXVIII—No. 21 NAIROBI, 4th March, 2016, at 838)

<sup>38</sup> Judicial Service Act, Act No. 1 of 2011

<sup>39</sup> *Ibid.* The detailed Terms of Reference were to '(a) Convene stakeholders and practitioners in Alternative Justice System in order to map out and understand the prevalence of use of Alternative Justice System, its intersection with the Judicial System and the progress made in infusing it with national and constitutional values; (b) Undertake a situational analysis of any existing reports, manuals, guidelines, practice notes, legal provisions on mainstreaming Alternative Justice System; (c) In conjunction with the Judiciary Training Institute to pilot and bench-mark existing models of Court-Annexed Alternative Justice System, to capacitate them, observing them and document their functioning to glean best practices to be used to develop potential national model; (d) Work with any seconded Consultants to synthesize secondary and primary data collected to address the objectives of the policy formulation exercise; (e) Consolidate best practices from selected traditional justice systems of selected communities; (f) Highlight challenges and effects of inter-linkage between traditional justice systems

## Recommendations

After engaging in a discourse on a conceptual framework and practical justifications<sup>40</sup> for AJS, and discussing and responding to the many challenges facing the system,<sup>41</sup> the Task Forces overarching and most significant recommendation was the adoption of AJS as part of the reform agenda of the Judiciary to enhance access to justice.<sup>42</sup> It identified four main models of AJS: Autonomous AJS Institutions; Third Party Institution-Annexed Institutions; Court-Annexed AJS Institutions, and Regulated AJS Institutions. The first are those which are run entirely by the community without the involvement of the state,<sup>43</sup> while the second involve third-parties who are not necessarily members of the community, including State-sanctioned institutions (chiefs, the police, probation officers, child welfare officers, village elders under the County government, and the chair of *Nyumba Kumi* groupings) and non-State institutions (religious leaders and functionaries of social groups such as *Chamas* and civil society organisations (CSOs)).<sup>44</sup> The third are dispute resolution processes that are outside, under the guidance and partial involvement of, Courts and work closely with them through referral

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and the formal justice system; (g) Consult with key stakeholders and recommend a linkage between traditional and informal Justice Systems and the formal justice systems; (h) Study best practices, formulate the policy on mainstreaming alternative techniques for reducing case backlog and produce a draft; (i) Develop a strategic plan to implement the policy; (j) Present the draft documents to key stakeholders within the justice sector through meetings and workshops and incorporate comments as necessary; and (k) Develop a National Model for Court-annexed traditional justice resolution mechanism for possible adoption.' Ibid (emphasis ours)

<sup>40</sup> Alternative Justice Systems, Alternative Justice Systems Baseline Policy: traditional, informal and other mechanisms used to access justice in Kenya (alternative justice systems), 2020, (9-40).

<sup>41</sup> Ibid n 40 above, 41-50.

<sup>42</sup> Ibid n 40 above, 51-54.

<sup>43</sup> Ibid n 51

<sup>44</sup> Ibid. *Nyumba Kumi* (in Kiswahili) refers to groups established in communities and neighbourhoods, through the encouragement and recognition of the state, to oversee and ensure security. *Chamas* (Kiswahili) refers to self-help groups established to pursue both economic and social welfare objectives

systems.<sup>45</sup> The last are those which are created, regulated, and practiced either entirely or partially by State-based law or statute<sup>46</sup>. The Task Force recommended adoption of the first three models and rejected the fourth one. Its argument was that the three were the ones being applied in practice.

Sections 5-9 of the report deal with the principles that should govern the interactions of the courts with AJS;<sup>47</sup> the human rights framework and the duties placed on the state and other stakeholders with respect to AJS, including capacity building;<sup>48</sup> the strategic objectives for the implementation of AJS,<sup>49</sup> and key actors in the implementation of AJS and the implementation framework, respectively.<sup>50</sup>

The second significant but operational recommendation of the Task Force was the establishment of a Standing Committee on Alternative Justice Systems to move the implementation of the recommendations forward<sup>51</sup>.

## Implementation

The implementation committee for AJS is the National Steering Committee for the Implementation of the Alternative Justice System Policy (NaSCI-AJS), a body proposed as part of the Task Force's recommendations.

NaSCI-AJS was gazetted on November 8, 2021, by Hon. Justice Martha Koome, the current Chief Justice. Its initial term is five years.<sup>52</sup> We have not been able to get any strategic or action plans or

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<sup>45</sup> Ibid, 52

<sup>46</sup> Ibid, 53

<sup>47</sup> Ibid n 40 above, page 55-58.

<sup>48</sup> Ibid n 40 above, page 59-64.

<sup>49</sup> Ibid n 40 above, page 65-80,

<sup>50</sup> Ibid n 40 above, page 81- 90.

<sup>51</sup> Ibid.

<sup>52</sup> Gazette Notice No. 12387 of 2012.

comprehensive activity reports with respect to the implementation of AJS by the Judiciary in general or the Steering Committee in particular<sup>53</sup>. This is probably because the programme is in its early stages.

The information available suggests that the Steering Committee has engaged in activities intended to popularise AJS and sensitise a number of groups and or communities on the need to use AJS for dispute resolution. It has conducted a variety of training and orientation and facilitated the development of plans of action for implementation of AJS in various counties.

The Steering Committee held the first Annual AJS Conference of stakeholders on 2022 and trained judges of the Environment and Land Court on AJS on December 21, 2022. It has also developed guidelines for Autonomous and Court-Annexed AJS<sup>54</sup>.

## **AJS: A Critical Review**

For the critique, we address the Task Forces (i) derivation of the idea of AJS from the constitutional provisions on ADR mechanisms, and (ii) models of AJS and how, from the information available, they are being implemented.

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<sup>53</sup> We have corresponded with the NaSCI-AJS Vice Chair and Secretariat seeking this information but it has not been forthcoming. However, the latest State of the Judiciary and Administration of Justice Report (SOJAR) contains brief reports of the number of engagements that the Committee has held in various Counties; trainings in AJS; partnerships with other organizations, and establishment of AJS panels (102-106). NaSCI-AJS' website also contains reports of events that have been carried out and those that are planned. For the current purposes, however, the nature of AJS and its implementation as a 'programme' of the Judiciary to address some of the challenges of A2J is what is of conceptual importance

<sup>54</sup> The Judiciary, Government of Kenya, State of the Judiciary and the Administration of Justice Annual Report, 2021-2022, 46. In its The Judiciary Budget: A Guide for the Citizen FY [Financial Year] 2023/2024 (undated), the Judiciary states, with respect to AJS, that it: 'has launched three AJS suites and models in Kajiado, Isiolo and Nakuru. Additionally, ten AJS mechanisms panels were launched in Kajiado County. The Kajiado model currently focuses on land related matters out of which sixty-one have been resolved successfully. These are cases that had been pending with the National Land Commission for a long time.' (at 10)

## The Idea of ADR as AJS

How does the Judiciary derive the idea of AJS from the constitutional context of ADR mechanisms discussed above? In answering this question, we begin by looking at what the legal system is before discussing the justice system.

We define the Kenya legal system as all the laws and legal principles; institutions, and practices, which regulate social behaviour in Kenya. It is important to point out that every legal system also has a set of overarching principles - or philosophy - which guide both its substantive and procedural content; is influenced by its historical development into a tradition, and, due to its dynamism, has a general trajectory of development. Besides, the citizens perceptions and attitudes towards the system also affect the form in which it operates and the extent to which it is implemented. In the context of Kenya, the system of laws applicable is determined by the Constitution and the Judicature Act.<sup>55</sup> The Constitution states that it is the supreme law of the Republic and that any law that is inconsistent with it is void to the extent of the inconsistency.<sup>56</sup> Under section 3 of the Judicature Act, the Constitution is the supreme law; all other laws are subject to it and are applicable subject to specific conditionalities: common Law, Equity and Statutes of General Application (SOGA) are subject to written laws and apply so far only as the circumstances of Kenya and its inhabitant's permit, SOGA are only applicable if they were in existence as at the 12<sup>th</sup> of August, 1897, Customary Law is not applicable where it is repugnant to justice and morality, and is applicable only where two or more parties are subject to or affected by it, and only in specified personal matters,<sup>57</sup> and Islamic criminal law is not applicable, and Islamic Law applies only in personal matters where both parties profess the Islamic religion.<sup>58</sup> (Article 170, Constitution of Kenya).

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<sup>55</sup> The Constitution of Kenya 2010, Chapter 8, Laws of Kenya.

<sup>56</sup> The Constitution of Kenya 2010, Article 2(1) and (4).

<sup>57</sup> The Constitution of Kenya 2010, Article 159(3), Judicature Act, CAP. 8 No. 8 of 1968, on section 3(2).

<sup>58</sup> The Constitution of Kenya 2010, Article 170.

In our view, a justice system encompasses the norms, institutions, processes and practices in the enforcement of law, prevention and arbitration of disputes and enforcement of judicial and quasi-judicial decisions or awards. Thus, its components are the normative framework, processes and practices which relate to the police and other security-related institutions; the judicial, quasi-judicial and analogous institutions, and the penal and other (after-care) institutions.<sup>59</sup>

In the context of this definition of a justice system, the provisions of the Constitution quoted above do not, in our view, introduce any other justice system in the Kenyan justice terrain. Contrary to views that Kenya's is a pluralistic justice system, we posit that it is, in theory, conceptually and in practice, a single – monolithic or monistic - justice system. This is why: All substantive and procedural laws, legal institutions, principles and practices derive their legality, authority and legitimacy from the Constitution of Kenya. What the Task Force and commentators call alternative justice systems cannot be, and are not, independent from the Constitution, nor can, or do, they operate outside the constitutional confines. Indeed, the Constitution itself provides the parameters within which the judicial system applies the alternative mechanisms for dispute resolution. Thus, the Task Forces derivation of AJS from the Constitution of Kenya has no basis therein. It is a leap from mechanisms to systems which is not supported by the constitutional provisions even if the proposals or recommendations made by the Task Force were to be taken as salutary to the extent that they expand avenues for A2J.

### **Implementation of the recommended models**

As we indicated earlier, the models that were recommended by the Task Force are three: Autonomous AJS Institutions, Third Party Institution-Annexed Institutions and Court-Annexed AJS Institutions. The

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<sup>59</sup> UNDP, *Programming for Justice: Access for All, A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*, The World Bank, 2005. See also Hammergren, Linn, Dory Reiling and Adrian Di Giovanni, *Justice Sector Assessments – A Handbook*, World Bank, 2007.

Task Force also proposed, together with outcomes, immediate results and activities, the following strategic objectives: formal recognition and determination of jurisdiction, strengthening of institutional processes (selection, election, appointment and removal of AJS practitioners), development of procedures and jurisprudence, facilitation of intermediary interventions and strengthening a sustainable resource base.

The Task Force, finally, proposed a discussion on the nature of the regulatory framework for the adopted AJS, the roles of different actors and an implementation matrix based on the strategic objectives. It is this matrix that is guiding the NaSCI-AJS in the implementation of AJS.

A number of things are worth noting in this schema, tentative as it may be. The first is that, in the second category, the mentioned State-sanctioned bodies or offices are, in fact, part of the state machinery, although they are not in the Judiciary and play quasi-judicial roles. Those called non-state institutions are the state-sanctioned ones. Second, the models that have been selected and are being implemented are dispute resolution mechanisms. Granted that the models, according to the Task Force and NaSCI-AJS, adopt mechanisms that are operating within the communities. However, that is as far as they go. They do not address socio-economic disempowerment except to the extent that they widen the dispute resolution avenues through additional (hopefully), readily available, cheaper and simpler processes and procedures. To this extent, they widen access to justice in the sense of RoL orthodoxy. They do not expand the concept of A2J beyond this.

Third, both the conceptualisation and implementation of AJS is Judiciary-driven. This is not in itself an issue, provided we recognise that this is the case and not claim any *organic* development, which is one of the Task Forces defining features of AJS. This means that the Judiciary's vision of AJS and its objectives and mission of increasing the number of disputes resolved; reducing backlog and congestion; simplifying procedures, and reducing costs by galvanising AJS influence the nature and process of implementation. The activities that have been carried out so far include training and orientation for members of the Judiciary, specific commissions and other government

bodies, court users' committees, elders and AJS practitioners and other community-based stakeholders; sensitisation and dialogue; planning; establishing structures, and holding meetings and conferences. They are all determined, conducted or driven by the Judiciary.<sup>60</sup> So are the places where they have been carried out.<sup>61</sup>

Fourth, even though there are claims of complementarity, the Judiciary will, inevitably, influence the regulatory framework (since the framework must accord with the Constitution, the basic principles of dispute resolution and the Judiciary's standard operating procedures, except where modified); where and when the various models are established; their jurisdiction; the guidelines for establishment of the models and their structure, composition, processes and procedures; how their decisions are eventually executed and, very importantly, the *resource outlay*, the resources being part of the budget of the Judiciary<sup>62</sup>.

Fifth and final, the existence of a regulatory framework changes the nature and workings of AJS, even if it is for the very positive purposes of ensuring compliance with the Constitution, other laws and general human rights principles. Again, to the extent that this is done, we must accept that, conceptually, we are no longer dealing with AJS as originally defined, but as structural appendages of the Judiciary. We are aware that, on this and other areas, we will be met with claims of stakeholder participation in determining all these things, but we have been here before, with respect to haphazard and ineffective public participation in general; statutory court-annexed mediation through amendments to the Civil Procedure Act, 2010 in 2012<sup>63</sup>, and

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<sup>60</sup> See <https://ajskenya.or.ke/events/list/page/2/?eventDisplay=past> (Events page) (accessed 17/03/2023). We are, of course, aware that such things have to be planned and arranged in consultation with the stakeholders. This does not, however, detract from the point we are making

<sup>61</sup> Ibid, for example, Kajiado, Kikuyu, Nakuru, Siaya, Mombasa, Voi and Kabarnet.

<sup>62</sup> Task Force Report, *op. cit.*

<sup>63</sup> The Judiciary, Government of Kenya, Court Annexed Mediation Action Plan, 2023, at page 6-7.

incorporation of (originally, community-based) paralegal workers through the Legal Aid Act, 2016<sup>64</sup>.

### **Paradigm shift or novelty?**

Is there any paradigm shift demonstrated in the conceptualisation, modelling or implementation of AJS in Kenya? The answer is yes if all we are concerned about is expanding avenues for A2J through the Judiciary implementing AJS. But this can hardly be called paradigmatic, which is associated with a world view, outlook or, in its more technical sense, theory or philosophy. The answer is no if we are concerned about expansion of the concept of A2J. As we have demonstrated, the concept of A2J long went past its judiciary-/state-centric, dispute resolution, beginnings, and now revolves around issues of empowerment, non-discrimination and social inclusion. We argue, further, that the trajectory of its development is going towards socio-economic justice. Despite the promise of a holistic concept of AJS covering the entire spectrum of activities and lives, what we end up with is simply a schema that attempts to resolve challenges of access to dispute resolution mechanisms, even if the ethos and methods are derived from the customs, norms and practices of the traditional Kenyan communities.

Is AJS a novelty? Yes, if we are referring to the fact and manner of its introduction in the *formal* Kenyan dispute resolution system. No if we are looking at it as a process that has existed in varying and dynamic forms in the Kenyan social milieu. No if we are looking at it from the broader perspective of the theorisation, conceptualisation and development of A2J in Kenya, Africa and elsewhere. As seen from the literature, there are many studies on, and examples of, various forms of alternative justice and dispute resolution systems outside the mainstream legal and judicial systems, some of which the Task Force mentions in its justification. Indeed, and as can be seen from the lists, the general A2J literature on customary, community, traditional or

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<sup>64</sup> Legal Aid Act, No. 6 of 2016

indigenous systems dates as far back as far as the 1960/70s. No, finally, if we are looking at their adaptation and adoption within the context of the political economy of capitalism in both its colonial and *non*-colonial form. Capitalism has expropriated and adopted local customs, norms and institutions to the extent that they resolve some of its challenges, a process that we argue, began in Kenya in 1897. So, the expropriation and use of AJS in dispute resolution by the Judiciary is not novel. Thus, our overall verdict on the introduction of AJS in Kenya is that it is an institutional co-optation and not an A2J novelty.

### **Concluding Remarks**

Our prognosis is that the capitalist socio-economic formation will continue to co-opt, re-configure in its own image, integrate or incorporate and eventually erode traditional, customary, communal and any other social relations (whether production, reproduction, politico-legal, socio-cultural, ethical or aesthetic) based on pre-existing (pre-capitalist) socio-economic formations, and establish its hegemony. No amount of lamentation will stop this process. This is the general trajectory of social development. It has been demonstrated over the entire existence (history) of the species of *Homo sapiens sapiens* that human development, even if, apparently, in a spiral form, moves towards a higher, more advanced, system of production, distribution and consumption. This tends to carry with it analogous relationships in other social spheres. As things stand, capitalism is the dominant socio-economic formation in the world today and has shaped much of it. It is not rocket science to look back at anthropological and sociological developments to predict the future direction, even if only in immediate terms. Of course, as human beings, we participate in shaping our history, but within the bounds of material reality. Consequently, the rough edges of capitalism will push us to re-mould it, as has happened in its development from *laissez faire*, through liberal, to state welfare, capitalism and, now, neoliberalism and *ordo-liberalism*. This remoulding - an evolutionary process - is bound to reach its outer limits since some of what we call the rough edges of

capitalism define, and are inherent in, its character as a socio-economic formation: its exploitative relations of production and oppressive socio-political relations as expressed in the limits of liberal democracy.

With respect to our focus in this analysis – AJS – we have already demonstrated that, despite all the laudatory discourses that have gone on within the Task Force, NaSCI-AJS and elsewhere, we are remoulding the systems in capitalism's image, to resolve problems that capitalist systems, institutions and processes have spawned. (In fact, the use and introduction of AJS is often explained by its proponents on the basis of the challenges of the judicial system, rather than its own characteristics). In outline, this legal process began in 1897 with the introduction of capitalism-inspired East Africa Order-in-Council and through other law-related and institutional developments during colonialism, and was continued in 1963 when we got independence, and the 2010 Constitution, through constitutional and other legal provisions. As we have argued, re-definition and co-optation of (what used to be) community-based paralegal workers, court-annexed mediation and AJS are just the more recent examples at the level of the legal and justice systems. This is not, in any way, an indictment of, or to belittle, the salutary effects of these processes for A2J in its narrow sense; it is only to put the developments in perspective and call attention to their limits.

The enthusiasm that AJS has generated among cultural anthropologists and its other supporters that African traditional culture is finally getting its pride of place at the high table of socio-legal systems, and that there is some sort of a renaissance (this global renewal of interest in AJS),<sup>65</sup> is highly misplaced. Whether it is in Ghana, Rwanda, Uganda or Kenya, the capitalist state is selectively appropriating and incorporating what it considers usefully positive elements of customary systems, institutions, norms and practices which address its identified challenges – in this case, at the socio-legal or judicial level. None of these elements' challenge, beyond a small inconsequential dent, the structure of the capitalist socio-economic system. They cannot, therefore, comprehensively

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<sup>65</sup> Victor Sibusiso Xulu, *The Place of African Renaissance in South African Education*, *The Journal of Pan African Studies*, vol.8, 2015.

and effectively address the most basic effects of capitalism – economic inequity and poverty, and attendant environmental degradation and social exclusion. Our - Kenyan - conception, modelling and implementation of AJS confirms this last point.