

Mainstreaming Alternative Justice Systems in Africa

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Mainstreaming Alternative Justice Systems in Africa
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Abstract

Access to Justice is a fundamental human right. However, access to justice in Africa especially by the marginalized, poor, uneducated and underprivileged in the society is hampered by many unfavourable factors such as high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts, lack of legal knowhow and the long durations of time it takes to resolve disputes in courts. In light of these challenges, Alternative Justice Systems have been advocated as a catalyst for advancing access to justice in Kenya and Africa. The paper critically discusses the need to mainstream Alternative Justice Systems (AJS) in Africa. It argues that mainstreaming AJS is an important step towards the fulfilment, respect, observance, promotion and protection of the right to access to justice. It defines Alternative Justice Systems and highlights their advantages in enhancing access to justice in Africa. The paper further examines the progress and challenges made towards mainstreaming AJS in Africa. It further proposes reforms towards mainstreaming AJS in Africa in order to promote access to justice.

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1.0 Introduction

Access to justice has been conceptualized as a situation where people in need of help, find effective solutions available from justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, expeditiously and without discrimination, fear or favour and a greater role for alternative dispute resolution¹. It has also been defined as the presence of a fair and equitable legal framework that protects human rights and ensures delivery of justice². Access to justice also refers to judicial, non-judicial and administrative remedies and procedures available to a person (natural or juristic) aggrieved or likely to be aggrieved by an issue³. It has been asserted that access to justice has two dimensions: procedural access (having a fair hearing before a tribunal) and also substantive justice (to receive a fair and just remedy for a violation of one's rights)⁴.

The right of access to justice is an internationally acclaimed human right that is considered to be basic and inviolable⁵. According to the United Nations, access to justice is a basic principle of the rule of law⁶. The United Nations further asserts that in the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable⁷. Delivery of justice should therefore be impartial and non-discriminatory⁸. The International Development Law Organization (IDLO) further posits that access to justice is a critical pillar of poverty

¹ Ladan. M., 'Access to Justice as a Human Right Under the Ecowas Community Law.' Available at https://www.researchgate.net/publication/272246292_Access_to_Justice_as_a_Human_Right_Under_the_Ecowas_Community_Law (Accessed on 19/11/2023)

² Ibid

³ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

⁴ Ibid

⁵ Ibid

⁶ United Nations., 'Access to Justice.' Available at <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (Accessed on 19/11/2023)

⁷ Ibid

⁸ Ibid

reduction and Sustainable Development⁹. Access to justice has been enshrined as a fundamental human right in Kenya¹⁰. The Constitution of Kenya requires the state to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice¹¹.

Access to justice is a fundamental concern in Africa. It has been asserted that the justice system and effective rule of law represent significant mechanisms in ongoing social, political and economic developmental landscapes which reflect the interests of citizens of a state and provide an avenue through which these interests can be protected¹². Therefore, in ideal scenario, access to justice should be equal; the poor should not be excluded on the basis of poverty; women should not be silenced by the voices of men; the young should be protected by adults when necessary; and there should be equity between the provision of justice in rural and urban areas¹³. The level of access to justice in a state can be vital in underpinning the roots of democracy and the development of that state¹⁴. However, it has been pointed out that the rule of law in many African countries remains fragile, leaving marginalized populations highly vulnerable to exclusion, discrimination and extreme poverty¹⁵. The right of access to justice in Kenya, East Africa and Africa at large has hitherto been hampered by many unfavourable factors such high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow¹⁶. It has also

⁹ International Development Law Organization., 'An Overview of IDLO's Work in Kenya.' Available at <https://www.idlo.int/sites/default/files/pdf/Overview%20of%20IDLO%27s%20Work%20in%20Kenya.pdf> (Accessed on 19/11/2023)

¹⁰ Constitution of Kenya, 2010., Article 48

¹¹ Ibid

¹² Bowd. R., 'Access to Justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia.' Available at <https://www.files.ethz.ch/isn/112459/NO13OCT09.pdf> (Accessed on 19/11/2023)

¹³ Ibid

¹⁴ Ibid

¹⁵ United Nations Development Programme., 'Strategic Partnerships needed to Improve Access to Justice for Women and Girls across Africa.' Available at <https://www.undp.org/africa/news/strategic-partnerships-needed-improve-access-justice-for-women-and-girls-across-africa#:~:text=A%20recent%20survey%20by%20Japan,exclusion%2C%20discrimination%20and%20extreme%20poverty>. (Accessed on 19/11/2023)

¹⁶ Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

been pointed out that access to justice in Africa, especially by the marginalized, poor, uneducated and underprivileged in the society, has been hindered by several factors including lack of infrastructure, high advocacy fees, illiteracy, lack of information, long distance to the courts and the long durations of time it takes to resolve disputes in courts¹⁷.

In the wake of the foregoing concerns, AJS has been advocated as a catalyst for advancing access to justice in Kenya and Africa¹⁸. It has been argued that mainstreaming AJS is an important step towards the fulfilment, respect, observance, promotion and protection of the right to access to justice¹⁹. The paper critically discusses the need to mainstream AJS in Africa. It defines AJS and highlights their advantages in enhancing access to justice in Africa. The paper further examines the progress and challenges made towards mainstreaming AJS in Africa. It further proposes reforms towards mainstreaming AJS in Africa in order to promote access to justice.

¹⁷ Muigua. K., 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2018/09/ACCESS-TO-JUSTICE-AND-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA-23rd-SEPTEMBER-2018.pdf> (Accessed on 19/11/2023)

¹⁸ United Nations Office on Drugs and Crime., 'Alternative Justice System as a Catalyst for Advancing Access to Justice in Kenya.' Available at <https://www.unodc.org/easternafrika/en/Stories/alternative-justice-system-as-a-catalyst-for-advancing-access-to-justice-in-kenya.html#:~:text=Alternative%20justice%20processes%20reduce%20the,than%20replacing%20reliance%20on%20courts.> (Accessed on 19/11/2023)

¹⁹ United Nations Office on Drugs and Crime., 'Partners Welcome move to Mainstream Alternative Justice Systems in Kenya.' Available at <https://www.unodc.org/easternafrika/en/Stories/partners-welcome-move-to-mainstream-alternative-justice-systems-in-kenya.html#:~:text=AJS%20may%20be%20defined%20as,more%20expeditious%20than%20court%20processes.> (Accessed on 19/11/2023)

2.0 Alternative Justice Systems in Africa

AJS has been described as both a philosophical concept as well as a practice for accessing justice²⁰. As a philosophical concept, AJS are consistent with the human rights school of thought and are based on the fundamental ideas of freedom, equality, non-discrimination, dignity, and equity²¹. Further, as a practice for access to justice, AJS refer to initiatives that can be taken to attain equality and equity for all members of a particular cultural, political and social identity²². AJS may be defined as the administration of justice by the people using their culture, customary law, practices and beliefs to resolve disputes²³. AJS are a form of restorative justice that aims to ensure social inclusion, and are generally more affordable, participatory and more expeditious than court processes²⁴. AJS have been described as a useful avenue of responding to the challenge of backlog of court cases²⁵. AJS can therefore be related to the use of Alternative Dispute Resolution (ADR) mechanisms to access justice.

ADR denotes a wide range of dispute management techniques that function outside but may be linked to formal court processes²⁶. ADR has also been defined as a set of processes that are used to manage conflicts without resort to courts²⁷. The term ADR encompasses many dispute resolution techniques including negotiation, mediation, arbitration, conciliation, adjudication, early neutral evaluation, expert determination, minitrials, traditional justice systems among others²⁸. The *Charter of the United Nations*²⁹ provides the legal basis for the application of ADR mechanisms at the global level. It stipulates that

²⁰ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Available at <https://judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/> (Accessed on 20/11/2023)

²¹ Ibid

²² Ibid

²³ United Nations Office on Drugs and Crime., 'Partners Welcome move to Mainstream Alternative Justice Systems in Kenya.' Op Cit

²⁴ Ibid

²⁵ Judiciary., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

²⁶ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

²⁷ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

²⁸ Kerbeshian. L., 'ADR: To be Or...'. *North Dakota Law Review*, Volume 70, No. 2

²⁹ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration*, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice³⁰. Further, in Kenya, the Constitution urges courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms³¹. It has been asserted that ADR offers numerous advantages in the administration of justice including a system with procedural flexibility, a broad range of remedial options, and a focus on individualized justice³². These mechanisms possess certain attributes which include informality, flexibility, privacy, confidentiality, party autonomy and the ability to foster expeditious and cost effective management of disputes making them ideal in enhancing access to justice³³.

It has been asserted that the concept of AJS goes beyond resolution of disputes³⁴. AJS including most ADR mechanisms also focus on dispute prevention and ensuring minimal or non-recurrence of disputes³⁵. AJS have huge potential for enhancing access to justice, strengthening the rule of law and bringing about development among communities, hence their recognition³⁶. AJS also promote and achieve social justice and inclusion, particularly amongst groups that have been excluded from the formal justice system³⁷.

³⁰ Ibid, Article 33 (1)

³¹ Constitution of Kenya, 2010., Article 159 (2) (c)

³² Main. T., 'ADR: The New Equity.' Available at

https://www.researchgate.net/profile/ThomasMain/publication/228182886_ADR_The_new_equity/links/53d00e470cf2fd75bc5c57a5/ADR-The-newequity.pdf (Accessed on 20/11/2023)

³³ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

³⁴ Pamoja Trust., 'Alternative Justice Systems (AJS) Guidelines.' Available at

<https://www.trocaire.org/wp-content/uploads/2021/04/Alternative-Justice-Systems-regulations-final.pdf?type=policy> (Accessed on 20/11/2023)

³⁵ Ibid

³⁶ Ibid

³⁷ Ibid

AJS have been hailed for recognizing the role of culture in the resolution of disputes³⁸. The Constitution of Kenya recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation and urges the state to promote all forms of national and cultural expression³⁹. AJS embrace culture and uphold the importance of integrating traditional values, customs, and beliefs into the justice system in order to ensure its relevance and effectiveness in diverse communities⁴⁰.

AJS including ADR mechanisms have been practiced in Africa for many centuries and were firmly embedded in the culture and customs of African communities⁴¹. Before the advent of formal justice systems in Africa, conflict management in African societies was well-entrenched in the traditions, customs, norms and taboos of the people⁴². Conflict management in African societies was premised on the values that were held sacrosanct including peace, harmony, truth, honesty, unity, cooperation, forgiveness, reconciliation, and respect⁴³. The philosophy of *Ubuntu/Utu* was essential in fostering social harmony and was effectively incorporated in conflict management strategies⁴⁴. Conflict management in African societies was therefore aimed at creating consensus, facilitating reconciliation, fostering peace, harmony and cohesion and gave prominence to communal needs over individual needs⁴⁵. African communities therefore embraced AJS including traditional forms of mediation, adjudication, reconciliation, arbitration and

³⁸ United Nations Office on Drugs and Crime., 'Alternative Justice System as a Catalyst for Advancing Access to Justice in Kenya.' Op Cit

³⁹ Constitution of Kenya., 2010., Article 11

⁴⁰ United Nations Office on Drugs and Crime., 'Alternative Justice System as a Catalyst for Advancing Access to Justice in Kenya.' Op Cit

⁴¹ Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

⁴² Ademowo. A., 'Conflict Management in Traditional African Society.' Available at https://www.researchgate.net/publication/281749510_Conflict_management_in_Traditional_African_Society (Accessed on 20/11/2023)

⁴³ Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa* , Volume 17, No.1, 2015

⁴⁴ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

⁴⁵ Ibid

negotiation since these techniques fitted comfortably within traditional concepts of African justice, particularly its core value of reconciliation⁴⁶.

AJS therefore seek to promote restorative justice as opposed to retributive justice⁴⁷. They aim at reconciliation by restoring parties' relationships, peace-building and focusing on parties' interests rather than allocating rights between disputants⁴⁸. It has been observed that these mechanisms have been resilient despite non-recognition in law for a long time⁴⁹. AJS are important in enhancing access to justice particularly in rural areas and have the ability to strengthen the rule of law and contribute to development⁵⁰. It is therefore imperative to mainstream AJS in Africa in order to enhance their role in accessing justice.

3.0 Mainstreaming Alternative Justice Systems in Africa: Progress and Challenges

Mainstreaming AJS entails putting in place appropriate legal, policy, institutional and administrative measures that will ensure that ADR, Traditional Dispute Resolution (TDR) mechanisms and other informal justice systems find their rightful place in the conventional judicial system and that the same are meaningfully and actively utilized in facilitating access to justice especially for the marginalized, poor, uneducated and underprivileged in the society⁵¹. It involves recognizing and providing space by which AJS can continue to be utilised to manage disputes and their existence and outputs not just appreciated but respected by the formal justice system⁵². Mainstreaming therefore

⁴⁶ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.'

⁴⁷ Muigua. K., & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf> (Accessed on 20/11/2023)

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISING-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf> (Accessed on 20/11/2023)

⁵² Odote. C., 'Effect Alternative Justice Beyond Tokenism.' Available at <https://www.businessdailyafrica.com/analysis/columnists/Effect-alternative-justice-beyond-tokenism/4259356-5619882-wmkrv8z/index.html> (Accessed on 20/11/2023)

does not seek to create but rather to provide anchorage and uphold alternative and traditional mechanisms practised by communities in resolving their disputes⁵³.

Mainstreaming AJS is important in bringing customary and traditional means of dispute resolution from the periphery into the mainstream and recognizing the legitimate place of alternative systems in contemporary administration of justice⁵⁴. It further recognizes the role of culture and the importance of integrating traditional values, customs, and beliefs into the justice system to ensure its relevance and effectiveness in diverse communities⁵⁵. It has been asserted that mainstreaming AJS through appropriate policy, statutory and administrative interventions is necessary to ensure the efficacy of both conventional and ADR mechanisms including traditional dispute resolution strategies and community-based justice systems⁵⁶. Mainstreaming AJS is also essential in promoting a pluralistic approach to justice that is sensitive to the cultural, socio-economic, and geographic diversity of the population⁵⁷. Mainstreaming AJS is therefore vital in enhancing access to justice by reducing the burden on courts and strengthening the links between formal and informal justice systems⁵⁸. It has been pointed out that many people in Africa face formal, informal and systemic barriers in their attempts to access formal justice institutions⁵⁹. This undermines the rule of law, erodes public trust and confidence in the justice system and perpetuates inequality and injustice⁶⁰. Informal

⁵³ Ibid

⁵⁴ United Nations Office on Drugs and Crime., 'Partners Welcome move to Mainstream Alternative Justice Systems in Kenya.' Op Cit

⁵⁵ United Nations Office on Drugs and Crime., 'Alternative Justice System as a Catalyst for Advancing Access to Justice in Kenya.' Op Cit

⁵⁶ Muigua. K., 'Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/Institutionalising-Traditional-Dispute-Resolution-Mechanisms-and-other-Community-Justice-Systems-25th-April-2017.pdf> (Accessed on 20/11/2023)

⁵⁷ Judiciary of Kenya., 'Promoting Alternative Justice Systems (AJS).' Available at <https://judiciary.go.ke/promoting-alternative-justice-systems-ajs/#:~:text=The%20implementation%20of%20the%20AJS,Kajiado%2C%20Nakuru%20and%20Lamu%20counties.> (Accessed on 20/11/2023)

⁵⁸ United Nations Office on Drugs and Crime., 'Alternative Justice System as a Catalyst for Advancing Access to Justice in Kenya.' Op Cit

⁵⁹ Ibid

⁶⁰ Ibid

justice systems, such as customary and traditional dispute resolution mechanisms, are often more accessible and affordable than formal justice systems and mainstreaming them can enhance access to justice and foster the rule of law⁶¹. Further, due to their participatory nature, they ensure more social inclusion⁶².

Sustainable Development Goal 16 requires all countries to promote peaceful and inclusive societies for Sustainable Development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels⁶³. This is to be achieved through measures such as promoting the rule of law at the national and international levels and ensuring equal access to justice for all⁶⁴. It has been argued that AJS have huge potential for enhancing access to justice, strengthening the rule of law and bringing about development among communities, hence the need to recognize and mainstream them⁶⁵.

It has been observed that there is a growing recognition and implementation of AJS as a means of advancing access to justice in Africa⁶⁶. For example, in Kenya, the Constitution recognizes AJS and urges courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms⁶⁷. It has been argued that the recognition of ADR and TDR mechanisms under Article 159 of the Constitution is a restatement of the customary jurisprudence of Kenya⁶⁸. This is because ADR and TDR mechanisms have existed in Africa since time immemorial and are therefore derived from the customs and traditions of the communities in which they operate⁶⁹. In most African communities, ADR and TDR mechanisms existed even before

⁶¹ Judiciary of Kenya., 'Promoting Alternative Justice Systems (AJS).' Op Cit

⁶² Ibid

⁶³ United Nations., 'Transforming Our World: The 2030 Agenda for Sustainable Development.' SDG 16, Available at

<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 20/11/2023)

⁶⁴ Ibid, SDG 16.3

⁶⁵ Pamoja Trust., 'Alternative Justice Systems (AJS) Guidelines.' Op Cit

⁶⁶ Ibid

⁶⁷ Constitution of Kenya., 2010., Article 159 (2) (c)

⁶⁸ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit

⁶⁹ Ibid

the formal dispute settlement mechanisms were introduced⁷⁰. Constitutional recognition of ADR mechanisms is an important step in mainstreaming AJSs in Kenya.

Further, the *Alternative Justice Systems Framework Policy*⁷¹ seeks to ensure affective and efficient access to justice in Kenya through respecting, protecting and transformation of AJS mechanisms in Kenya⁷². The Policy upholds the relevance and importance of AJS in Kenya and acknowledges that AJS reflect the lived realities of Kenyans and are an effective process for increasing access to justice for most Kenyans; AJS are a mode for doing justice differently and more effectively; AJSs are effective mechanisms for the reduction of case backlogs and decongestion of courts; AJSs are mechanisms for social re-engagement with (and re-legitimizing) the State; AJSs are mechanisms for reconstituting the state and the citizen as part of the constitutional project to remake the Kenyan State; and that AJSs are a site for reclaiming neglected customary norms and as a project to resituate the traditional as rational⁷³. It identifies challenges facing AJSs in Kenya including lack of recognition, lack of accountability mechanisms, and the potential to promote gender injustices and exclude marginalized groups and vulnerable individuals⁷⁴. It identifies key measures towards mainstreaming AJSs in Kenya such as the formal recognition of AJS and identification of the kinds of cases that can be handled through AJS; strengthening the process for selection, election, appointment and removal of AJS practitioners; development of procedures and customary law jurisprudence; facilitation of effective intermediary interventions; and strengthened and sustainable resource allocation and mobilization⁷⁵. There is need to fully implement the *Alternative Justice Systems Framework Policy* in order to effectively mainstream AJS in Kenya.

⁷⁰ Ibid

⁷¹ The Judiciary of Kenya, 'Alternative Justice Systems Framework Policy.' Available at https://www.unodc.org/documents/easternafrika/Criminal%20Justice/AJS_Policy_Framework_2020_Kenya.pdf (Accessed on 20/11/2023)

⁷² Ibid

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

In addition, the *National Alternative Dispute Resolution Policy*⁷⁶ of Kenya recognizes ADR as a major apparatus for access to justice in Kenya. The Policy outlines that inadequate access to justice is negatively correlated to development and that high transactional costs of litigation disempower and impoverish the indigent who cannot afford means for redress hence the need to embrace ADR in Kenya⁷⁷. The Policy acknowledges that ADR has the potential to divert focus from litigation and thereby complement and de-clog the court system and that through its reconciliatory and mostly non-adversarial approach, ADR is a catalyst to peace and cohesion in the Country⁷⁸. The Policy seeks to actualize the Constitutional provisions on AJSs in Kenya through a robust framework for strengthening, guiding and supporting the coordinated growth of ADR practice and uptake in Kenya⁷⁹. It aims to achieve this by proposing a balanced and necessary co-existence of ADR and the court system, while at the same time maintaining the autonomy of ADR as a distinct dispute resolution system⁸⁰.

The Policy identifies challenges facing the practice of ADR in Kenya including conceptual and definition problems, unclear scope of ADR, jurisdictional challenges, questions of justiciability, and lack of sectoral framework legislation, and inadequate institutional development⁸¹. It also proposes reforms aimed at addressing these challenges and gaps, towards development of ADR in Kenya including adapting an inclusive approach to the definition and scope of ADR; Situating the oversight mandate for the ADR sector in a National umbrella agency; Promoting self-regulation and governance of ADR; Encouraging the establishment of an ADR Centre at the Judiciary as the focal point for linkage and coordination of the Judiciary with the ADR sector, and promotion of ADR in the Judiciary; Proposing strategies and modalities for the promotion of availability, accessibility, and uptake of ADR in the Country including compulsory subjection of

⁷⁶ Judiciary of Kenya., 'Draft National ADR Policy Discussed.' Available at <https://judiciary.go.ke/draft-national-adr-policy-discussed/> (Accessed on 20/11/2023)

⁷⁷ Ibid

⁷⁸ Ibid

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ Ibid

disputes to ADR, and compulsory pre-court ADR information sessions; and inculcating ADR as a way of life through embedding, integrating, and mainstreaming it in all spheres of life such as through school curricula and agents of social change⁸². There is need to actualize the ADR Policy in order to mainstream AJS in Kenya.

The *Alternative Dispute Resolution Bill*⁸³ has also been introduced into parliament. The Bill seeks to provide a legal framework for the management of civil disputes through ADR mechanisms such as conciliation, mediation and traditional dispute resolution mechanisms⁸⁴. It seeks to achieve certain objectives inherent in the African conceptions of justice including promoting a conciliatory approach to dispute resolution, enhancing community and individual involvement in dispute resolution and fostering peace and cohesion⁸⁵. There is need to enact the Bill into law (with necessary amendments) in order to mainstream AJS in Kenya through ADR mechanisms.

Kenya has therefore made some progress towards mainstreaming AJS in the quest towards access to justice. Other African countries are also having a positive experience with AJS including Ghana which has been hailed for mainstreaming AJS through the enactment of a comprehensive ADR legislation⁸⁶. The Alternative Dispute Resolution Act of Ghana sets out the legal framework for settlement of disputes by arbitration, mediation and customary arbitration⁸⁷. It also establishes an Alternative Dispute Resolution Centre whose function is to promote the growth of ADR in Ghana⁸⁸. The Act also upholds the binding nature of ADR outcomes including mediation agreements which are recognized

⁸² Ibid

⁸³ Republic of Kenya., 'The Alternative Dispute Resolution Bill, 2021.' Available at <http://www.parliament.go.ke/sites/default/files/2021-06/34-The%20Alternative%20Dispute%20Resolution%20Bill%2C%202021%20%281%29.pdf> (Accessed on 20/11/2023)

⁸⁴ Ibid

⁸⁵ Ibid

⁸⁶ Republic of Ghana., 'Alternative Dispute Resolution Act, 2010.' Available at <https://www.dennislawgh.com/law-preview/alternative-dispute-resolutionact/1324#:~:text=AN%20ACT%20to%20provide%20for,ASSENT%3A%2031st%20May%2C%202010.> (Accessed on 20/11/2023)

⁸⁷ Ibid

⁸⁸ Ibid

as binding and enforceable as court judgments⁸⁹. The Act also embraces customary arbitration a move geared towards upholding customary management of disputes in line with African conceptions of justice⁹⁰.

It has been asserted that AJS and the notion of ADR fits comfortably within traditional concepts of African justice, particularly its core value of reconciliation⁹¹. Further, it has been observed that pioneering ADR projects in African countries such as Ghana, Ethiopia, and Nigeria have generated positive results and illustrate the suitability of AJS in African contexts⁹². AJS can contribute to building an effective dispute settlement system and bridge the gap between the formal legal system and traditional modes of African justice in Africa⁹³. It has been pointed out that many African countries are still struggling to establish functional, timely, and trusted judicial systems⁹⁴. AJS are therefore vital in enhancing access to justice in Africa. However, despite their viability, AJS face several challenges which undermine their capability in delivering justice to Africans.

It has been asserted that AJS including customary and TDRMs suffer from several drawbacks including disregard for basic human rights (for example where women are discriminated against or where corporal punishment is meted out); application of abstract rules and procedure/lack of a legal framework; lack of documentation/record-keeping; limited resources and financial inability of the systems; evolution of communities and mixing up of different cultures thereby eroding traditions; negative attitudes towards the systems and bias at times; the jurisdiction is vague/undefined and wide; and lack of consistency in the decisions made⁹⁵.

⁸⁹ Ibid, S 82

⁹⁰ Ibid, Part III

⁹¹ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

⁹² Ibid

⁹³ Ibid

⁹⁴ Ibid

⁹⁵ Muigua. K., 'Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems.' Op Cit

In addition, effective adoption of AJS in Africa is hindered by several legal, political, institutional, capacity and financial challenges including inadequate political support, human resources, legal foundations, and sustainable financing⁹⁶. It has been observed that many African governments are slow to understand or recognize the need for ADR, hence most ADR programs in Africa are often donor initiated⁹⁷. In addition, the lack of national or local government support constrains institution-building that will in turn spur the development of personnel and create an enabling legal framework for AJS⁹⁸. Further, the introduction of western justice systems resulted in disregard and subjugation of AJS in favour of formal court processes whereby AJS could only be applied in Africa to the extent that they were not repugnant to the western conception of 'justice and morality'⁹⁹. For example, in Kenya, the Constitution provides that AJSs such as TDRMs shall not be used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality¹⁰⁰. There is need to address these problems in order to effectively mainstream AJSs in Africa.

4.0 Way Forward

In order to effectively mainstream AJS in Africa, there is need to for African countries to enact robust legislations on AJS including ADR mechanisms. It has been asserted that

⁹⁶ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Muigua. K., 'Preparing for the Future: ADR and Arbitration from an African Perspective.' Available at <https://kmco.co.ke/wp-content/uploads/2023/10/Preparing-for-the-Future-ADR-and-Arbitration-from-an-African-Perspective.pdf> (Accessed on 21/11/2023)

¹⁰⁰ Constitution of Kenya., 2010., Article 159 (3) (b)

enacting legislation on AJS would elevate the status of these mechanisms before skeptical disputants, build public confidence in AJS, and further increase their utilization¹⁰¹. Legislation is important in recognizing and affirming the importance of AJS in the administration of justice¹⁰². It is therefore necessary for African countries to formally recognize AJS as an access to justice tool and widen the scope of AJS for the provision of the full spectrum of access to justice while ensuring that there are safeguards that will recognize the rights of individuals who seek redress¹⁰³. African countries should therefore enact legislations which recognize and harmonize AJS. It is imperative that such legislations promote the uptake of AJS in a manner that adheres with the core principles enshrined in states Constitutions and international law including human rights standards¹⁰⁴.

Further, it is essential to establish a clear interface between AJS and formal courts through measures such as formulating clear referral systems providing for referral of disputes from courts to AJS including ADR mechanisms and vice versa¹⁰⁵. In order to achieve this goal, there is need to adopt policies which promote appropriate interactions between the Judiciary and the various models of AJS in order to enhance their uptake in access to justice; promote AJS as a forum of first instance for appropriate cases; formulate systems to facilitate appropriate cooperation between the Courts and AJS to enable co-references of cases between them; and develop and adopt AJS User guidelines for all stakeholders¹⁰⁶. Establishing a clear interface between AJS and the formal processes is therefore important in mainstreaming AJS in Africa.

It is also necessary to ensure that mainstreaming AJS is done in a manner that does not result in the loss of some of the salient features of these mechanisms such as informality,

¹⁰¹ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

¹⁰² Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit

¹⁰³ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

¹⁰⁴ Ibid

¹⁰⁵ Muigua. K., 'Preparing for the Future: ADR and Arbitration from an African Perspective.' Op Cit

¹⁰⁶ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

voluntariness, confidentiality, flexibility, and party autonomy¹⁰⁷. These features are the hallmarks of AJS including ADR mechanisms and losing them will hinder the viability and efficacy of AJSs in access to justice¹⁰⁸. It is therefore crucial to preserve the key features of AJS in modern legal practice in order to ensure their viability in promoting access to justice¹⁰⁹.

There is also need for African countries to invest in broad capacity building in order to effectively mainstream AJS. This can be achieved by enhancing the capacity of AJS practitioners through education, training and mentorship¹¹⁰. This will enhance their skills and ability to manage disputes through AJS in a manner that safeguards the key concepts of justice such as human rights¹¹¹. It is also important to strengthening the processes for selection, election, appointment and removal of AJS practitioners in order to enhance their competence and accountability in the administration of justice¹¹². There is also need for continued public sensitization and enhancing access to information on AJS in order to boost support and accelerate the uptake of AJS including ADR mechanisms in Africa¹¹³. It is also imperative for African countries in collaboration with other stakeholders to facilitate resource mobilization and management for the development and enhancement of AJS¹¹⁴.

Finally, there is need to embrace the true spirit of conflict management in Africa in order to effectively and efficiently mainstream AJS. It has correctly been observed that conflict management in African societies was guided by culture and premised on the values that

¹⁰⁷ Shako. F., 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' *Alternative Dispute Resolution* (2017): 130

¹⁰⁸ Muigua. K., 'Preparing for the Future: ADR and Arbitration from an African Perspective.' Op Cit

¹⁰⁹ Shako. F., 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' Op Cit

¹¹⁰ Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at <https://kmco.co.ke/wp-content/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Moving-from-Alternative-to-Appropriate-Dispute-Resolution-1.pdf> (Accessed on 21/11/2023)

¹¹¹ Ibid

¹¹² Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

¹¹³ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

¹¹⁴ Judiciary of Kenya., 'Alternative Justice Systems Baseline Policy and Policy Framework.' Op Cit

were held sacrosanct including peace, harmony, truth, honesty, unity, cooperation, forgiveness, reconciliation, and respect¹¹⁵. The philosophy of *Ubuntu/Utu* was essential in fostering social harmony and was effectively incorporated in conflict management strategies¹¹⁶. As a result, mainstreaming AJS should be done in a manner that promotes and preserves the African values of justice, which are based on reconciliation and restorative justice¹¹⁷. It has been observed that the role of AJS in access to justice goes beyond dispute resolution since these mechanisms also seek to promote social cohesion, coexistence, peace and harmony besides the reactive role of dispute resolution¹¹⁸. Mainstreaming AJS in Africa should therefore be targeted at promoting access to justice while preserving customs and traditions of the people of Africa.

Through the foregoing measures, AJS will effectively be mainstreamed in Africa.

5.0 Conclusion

AJS have huge potential for enhancing access to justice, strengthening the rule of law and bringing about development among communities¹¹⁹. AJS also promote and achieve social justice and inclusion, particularly amongst groups that have been excluded from the formal justice system¹²⁰. Mainstreaming AJS is an important step towards the fulfilment,

¹¹⁵ Awoniyi. S., 'African Cultural Values: The Past, Present and Future' Op Cit

¹¹⁶ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

¹¹⁷ Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Available at https://www.researchgate.net/publication/228182138_Alternative_Dispute_Resolution_ADR_in_SubSaharan_Africa_The_Role_of_Customary_Systems_of_Conflict_Resolution_CSCR (Accessed on 21/11/2023)

¹¹⁸ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit

¹¹⁹ Pamoja Trust., 'Alternative Justice Systems (AJS) Guidelines.' Op Cit

¹²⁰ Ibid

respect, observance, promotion and protection of the right to access to justice¹²¹. There has been some progress towards mainstreaming AJS in Africa as evidenced by their Constitutional recognition in some countries and the enactment of laws and Policies on AJS¹²². However, effective adoption of AJS in Africa is hindered by several legal, political, institutional, capacity and financial challenges including inadequate political support, human resources, legal foundations, and sustainable financing¹²³. It is therefore essential to mainstream AJS in Africa in order to enhance their role in access to justice. Mainstreaming AJS in Africa can be achieved through enactment of robust legislations on AJS including ADR mechanisms, establishing a clear interface between AJS and formal courts, preserving the key features of AJS in modern legal practice, investing in broad capacity building, and embracing the true spirit of conflict management in Africa¹²⁴. Mainstreaming AJS in Africa is a goal that can be realized.

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¹²¹ United Nations Office on Drugs and Crime., 'Partners Welcome move to Mainstream Alternative Justice Systems in Kenya.' Op Cit

¹²² For example, article 159 (2) (c) recognizes ADR mechanisms in Kenya; the Alternative Dispute Resolution Act of Ghana sets out the legal framework for settlement of disputes by arbitration, mediation and customary arbitration. Further in Kenya, there has been progress towards strengthening the legal and policy framework on AJSs through the Alternative Justice Systems Framework Policy, the National Alternative Dispute Resolution Policy and the Alternative Dispute Resolution Bill.

¹²³ Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

¹²⁴ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit; See also Muigua. K., 'Preparing for the Future: ADR and Arbitration from an African Perspective.' Op Cit

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