



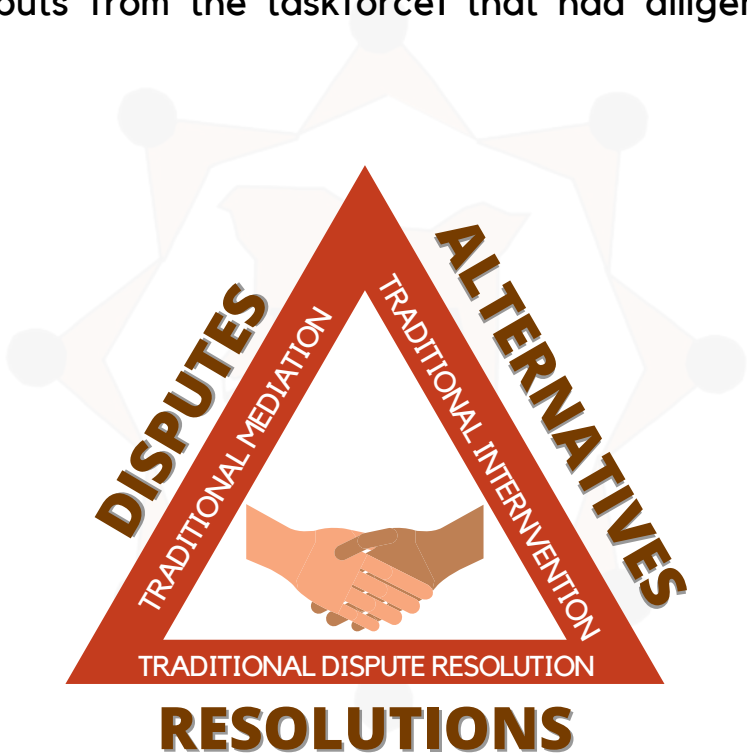
Accelerating Women and Girl's Rights in Kenya:

The Role of the Alternative Justice Systems Policy in Kenya.

Policy Brief

INTRODUCTION

On August 27th 2020, the Hon. Chief Justice hosted stakeholders from various interest groups and government agencies at the Supreme Court. The occasion was the launch of the Baseline and Framework AJS Policies that are useful in unbundling the meanings of Article 159(2) c of the Constitution of Kenya. This article, as is the case with various other provisions of the Constitution, obligates the Judiciary to Promote Traditional Dispute Resolution Mechanisms. The two policies, were outputs from the taskforce¹ that had diligently worked for four years.



In its reading, the taskforce understands the notion of 'Traditional' as an expression for the diversity and plural nature of our country. This diversity has variations such as gender, ethnicity, occupation, geographies, and generations and so on. Overtime, each of these diverse groups have generated norms and practices that characterize the way they prevent and resolve conflicts. Thus, what the constitution talks about is not 'Traditional' in its anthropological sense, rather it is in the sense of plural society.

¹ Hon. (Dr.) Willy Mutunga, vide The Kenya Gazette (Special Issue) Gazette Notice. Vol. CXVIII-No.21, 4th March 2016, the Taskforce on Alternative Justice Systems was appointed to look at the various Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems).

At the same time, the utility of these 'Traditional systems' is not only in their function of resolving disputes, rather in preventing occurrence of dispute and as such expanding access to justice. These are the reasons why the taskforce has suggested the name Alternative Justice Systems (AJS) as the most appropriate naming for the provision in Article 159 (2) c. This article offers a brief background on AJS policy. Its focus is the AJS champions who need to understand the substantive as well as strategic intentions of the AJS policy. The particular context for this paper is response to gender justice gap that is glaring in many sector in Kenya and more so the land sector.

TYPOLOGIES OF AJS MECHANISM IN KENYA

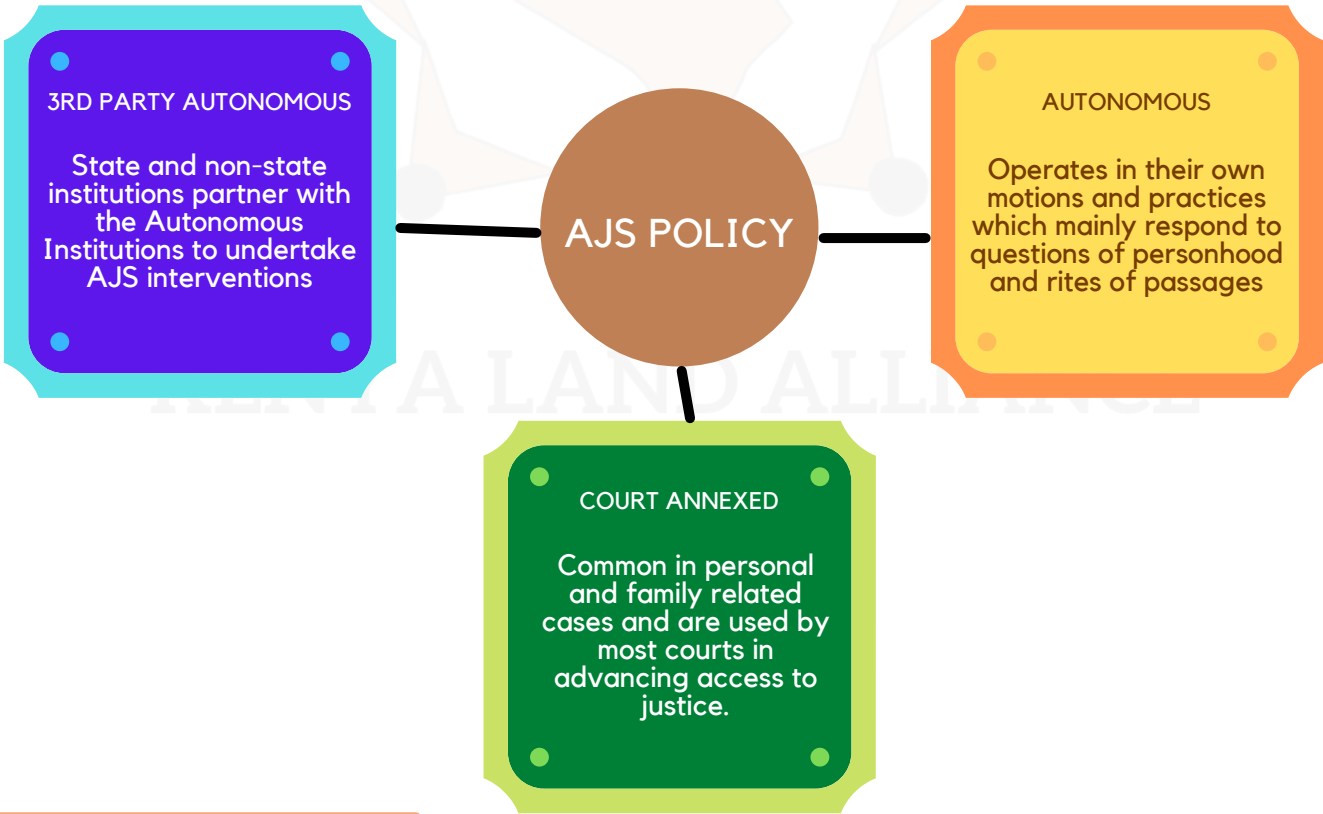
The policy itself is developed within the tradition of pluralism. Thus, rather than suggest a single national model of AJS, the AJS taskforce has documented three types of AJS mechanisms. The first is the Autonomous AJS mechanism that operates in their own motions and practices which mainly respond to questions of personhood and rites of passages. In most occasions, Councils of elders preside over these forums. The second refers to circumstances where state and non-state institutions partner with the Autonomous Institutions to undertake AJS interventions. This has been called the 3rd party Autonomous mechanism. Quasi-judicial institutions such the National Land Commission and non-government organizations such as the FIDA- Kenya, the Kenya Land Alliance (KLA), the Legal Resources Foundation (LRF) and Pamoja Trust (PT) have had a long tradition of working with such mechanisms in advancing access to justice. The third type is the Court Annexed AJS Mechanisms. These have become common in personal and family related cases and are used by most courts in advancing access to justice.

AJS POLICY

- The AJS policy is developed within traditional pluralism.
- AJS task-force proposed 3 types of AJS mechanisms
 - Autonomous
 - Third party autonomous
 - Court Annexed

2 The idea of Councils of elders as used here has moved beyond its common patrilineal meaning and now includes generational and gender diversity.

Third, AJS’s contribution to Judiciary transformation is seen in its potential to recruit many agents of social transformation, such as individual actors, community, and institutions within and outside the judiciary. It is these stakeholders of national and importantly large AJS actors who shall individually and collectively to take AJS forward. The embrace of AJS by the Judiciary is evident. For instance, many are the times the judicial officer allows the prosecution withdraw³ matters when the complainant and an accused person come to court and the complainant says, “we have spoken at home, I have paid, I have done compensation, I have restituted the complainant.” The accused person would say, “I paid the traditional fine, I paid this and that.” What the judicial officers do under those circumstances is to allow the prosecution to make an application to withdraw the matter under Section 204 of the Criminal Procedure Code. While this provision has been deployed for long in what are called ‘minor offences’ in the advent of Article 157 of the CoK, it been used in numerous manner on cases⁴ ranging from Murder, manslaughter, robbery, threat to kill and causing disturbance and so on.



³ Only the office of the director of public prosecutions have the capacity to withdraw this matter, and they must provide substantial reasons why because ultimately, it’s the court that will make the order ⁴ Some of the most cited cases include murder case of Republic v. Mohammed Adow Mohamed [2013] eKLR the court (R. Lagat – Korir, J.); Republic v. Juliana Mwikali Kiteme & Others [2017] eKLR the court (Dulu, J.) and Republic v. P K M [2017] eKLR, the court (G.W. Ngenye – Macharia J.)

THE AJS AS A FIT FOR PURPOSE POLICY

The Alternative Justice Systems (AJS) is both a philosophical concept as well as a practice for accessing justice. As a philosophical concept, and consistent with the human rights school of thought, it is an obligatory category expanded through fundamental ideas of: freedom, equality, nondiscrimination, dignity, and equity. All these are contained in the Constitution of Kenya. As a practice for access to justice, AJS refers to initiatives that can be taken to attain equality and equity for all members of a particular cultural, political and social identity. For the judiciary in Kenya, AJS has become a pragmatic avenue of responding to backlog of Court cases. Beyond the pragmatic questions of numbers and efficiency, AJS is a deeply philosophical approach with far reaching implications to jurisprudence, human relations, teaching and humanities research.



In blending judicial philosophy and the pre-eminence of social and economic concerns, AJS aims to strengthen public citizenship and participation is advancing justice in Kenya. Herein is offered an environment of principled relativism and free will to participate in common realm. Perhaps it is not an exaggeration to say that the learned and magisterial presence of elders and seasoned AJS partners in the Taskforce on Traditional, Informal and other mechanism used for access to justice in (Alternative Justice Systems) that enabled this progressive AJS policy. Ultimately however it is its moral vision and idea of freedom that shall enhance the chances of AJS in promoting human freedom and excellence envisaged by the CoK.

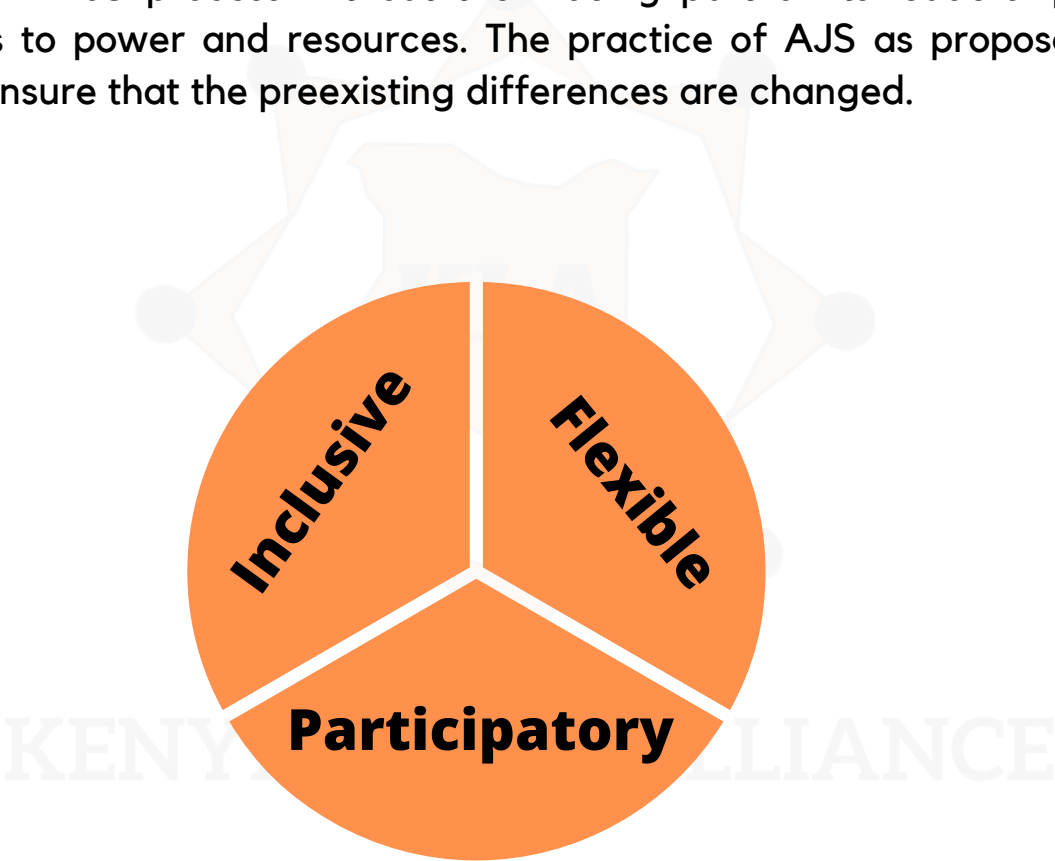
Fit-for-purpose in the context of responding to gender justice gap means that the Alternative Justice Systems (AJS) should be designed for the purpose of managing current gender inequalities within a specific times, county or region rather than simply following a single template technical standard. The fit-for-purpose approach is participatory, transformative and inclusive. Because of these characteristics, it stands out as a fundamentally a human rights approach. Yet, it only departure from the human rights globalized documentation (which is different from what we call approach) as it is captured using the term universal. In other words, while the outcomes of accessing justice are shared, the idea of justice requires more situating. The fit-for-purpose approach that is articulated in the AJS policy offers the Autonomous AJS institutions, the judiciary and justice sector professionals the opportunity to make a significant improvement in specific and cross cutting issues. It is a realistic approach that is scalable and could make a significant difference in the intermediate timeframe. The particular focus on gender questions highlight just how successful this approach can be. The term "fit-for-purpose" is not new at all, but what is new is relating this term to building situated and adaptable AJS systems that adhere to the transformative aspirations. In essence, the approach as used in Kenya's AJS policy should be flexible and focused on citizens' needs, such as reversing the preexisting justice gaps, providing justice in the rubric of everyday idea, rather than focusing on top-end judiciary canted solutions and high legalese approach.

KENYA LAND ALLIANCE

AJS Fit for purpose?

- AJS is a realistic approach that is scalable and could make a significant difference in the intermediate timeframe.
- It offers the Autonomous AJS institutions, the judiciary and justice sector professionals the opportunity to make a significant improvement in specific and cross cutting issues.

A fit-for-purpose approach includes the following elements: Flexible in the procedures and evidence capture approaches to provide opportunity for agency and negotiations. This also means that AJS is tailor made so much so that it is an agreement between the two and a third person cannot come in so they do their negotiations in villages; the only thing they come to do in court is maybe to file a settlement agreement. When the complainant and the accused, the plaintiff and the defendant come in court and say, "we sat with the village elder this is what we agreed," then the court will adapt that as consent and that is recommendable. AJS is Inclusive in scope to cover matters that transcend between criminal and civil claims. The AJS policy as an inclusive system further provides tools and process that can be used to correct biases that impact on women. It recognizes that to the extent that process, actors and interactions of access to justice has an impact on people, it will very likely have different impacts on women and men because they have different roles, expectations and life experiences. It identifies differences arising out of the gender division of labour, insists that women cannot participate⁵ in AJS process without them being part of its leadership and of equal access to power and resources. The practice of AJS as proposed in the policy must ensure that the preexisting differences are changed.



AJS Approach

⁵This is a subject of politics of the voice often captured in the useful matra which I agree with 'nothing for us without us'

AJS is a participatory in approach to administration and diversity management. Such participation is based on understanding that major differences between women and men persist in many areas of life including occupational status, employment, income levels, family responsibilities, education, social status, political influence and vulnerability to violence. Participation must therefore ensure that women are included taking into account differences that exist amongst them based on their age, religion, histories, ethnicity, ability/disability and socioeconomic status. Community support, in terms of authoritative and up-to-date. AJS is reliable in terms of predictability of outcome and referral. It is also attainable in relation to establishing the system within a short timeframe and within available resources. Finally AJS is upgradeable with regard to interaction with other actors such as quasi-judicial institutions. The approach of fit-for-purpose approach requires change from both the AJS mechanism and Judiciary

REMOVING GENDER UNFREEDOMS IN AJS

Why women's rights are important in advancing and using AJS? From my point of view, I look at women as a vulnerable group; women have not had the voice, women have not had a speaker at the table of justice, but that is changing with time. The AJS policy and its grounding of human agency, is about power. It's about reversing the assumptions that normalize domination. Such assumptions are those which presume that normalize domination of women. This is why the policy insists that in operationlising the AJS in any context, the actors must pose the following questions: How does the AJS mechanism handle the power imbalance between herself and the parties? Between the Parties? How and when are power imbalances between the parties assessed? How does the program respond to unequal power between the parties? What techniques to balance power are used?

AJS plays a
role in
Women
Rights



The AJS policy is explicit that the systems that are oppressive or those which institutionalize or systematize exclusion and indignity for women or any other identity groups cannot be negotiated. When it comes to women's rights, we have a special category which is called the sexual offense. The sexual offenses include defilement, rape, and most of these are geared towards protecting sexual rights of girls and women. When it comes to sexual offenses we do not encourage AJS. Why? Because sexual offenses have far reaching psychological and physiological effects on the minor, on the girls, and women. It robs the victims of their faculty for consent which can best be restored through state intervention. There are other matters like corruption cases, terrorism, as well as cyber related crime offenses that are best managed by the state. This does not mean AJS is against women or inherently oppressive. In Luo Nyanza, there have been evidence that working with the Luo Council of Elders, the widows can be safeguarded against rampant disinheritance. Indeed, in the example of Land disinheritance in Luo Nyanza, it become apparent that the so-called cultural practices that were being used to disposes the widows, was never Luo authentic culture. Working with third parties that ensured convergence between Luo culture, human rights and values that preserve and advance human dignity. In essence when someone speaks about culture we have to pose the question – whose culture? In this regard, actors must insist to know who is involved in articulating the values, principles of the AJS mechanism. Who defines behaviour that is considered inappropriate and subject to the AJS?



Such focus on the transformative role of AJS is expanding women's access to justice, must go hand in hand with transformation of the judiciary to bridge women's justice gap. A specific focus of land related litigation, attests that Women continue to encounter discrimination in the justice system - in the laws themselves, the procedures used and in accessing the system. They frequently see their experience disregarded. An illustration of this is found in court judgements on land succession cases, particularly with regards to whether contribution was made in the acquisition or accumulation of marital property given or not. Besides, the law operates by legal categories and in many occasions experiences which women experience do not fit into those categories, the protection of the law is limited. Often important factors about women's situations are not allowed to be stated in court. For example, in decisions about custody of children, some judges will not listen to evidence about the father's abusive behavior towards the mother. Women also report that factors like ethnicity and disability and how these affect their circumstances are not always considered by the courts.



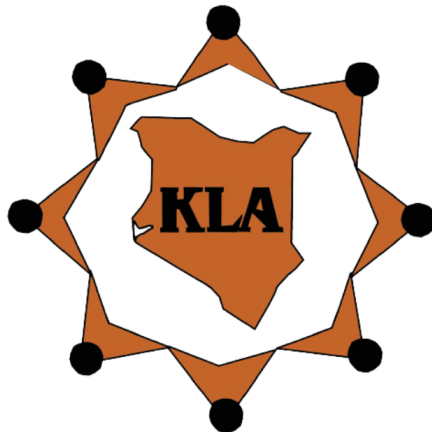
CONCLUSION

When the Constitution of Kenya affirmed the place of AJS in Kenya, it grounded the country towards a future that is inclusive. The same Constitution was designed and positioned to reverse all the barriers to accessing human rights and justice. However, these rights and justice cannot ignore our diversities. Rather, our society has become more aware of the barriers to justice as experienced differently by the diverse actors. The AJS is one such framework that advances access to justice and citizenship for various identity groups. There is no doubt that access to justice for women is amongst these priority questions of our times. The AJS, as all mechanisms for accessing justice has long been gender blind. Yet, the policy promulgated by the Hon. Chief Justice in August 2020 provides an opportunity to expand judiciary transformation by taking an engendered approach in implementing the policy. Because of its sensitivity to identities, the AJS policy and its human rights centered framework, provides an opportunity for a fit for purpose strategy for removing the unfreedoms that contribute to the currently gender justice gap in Kenya.



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