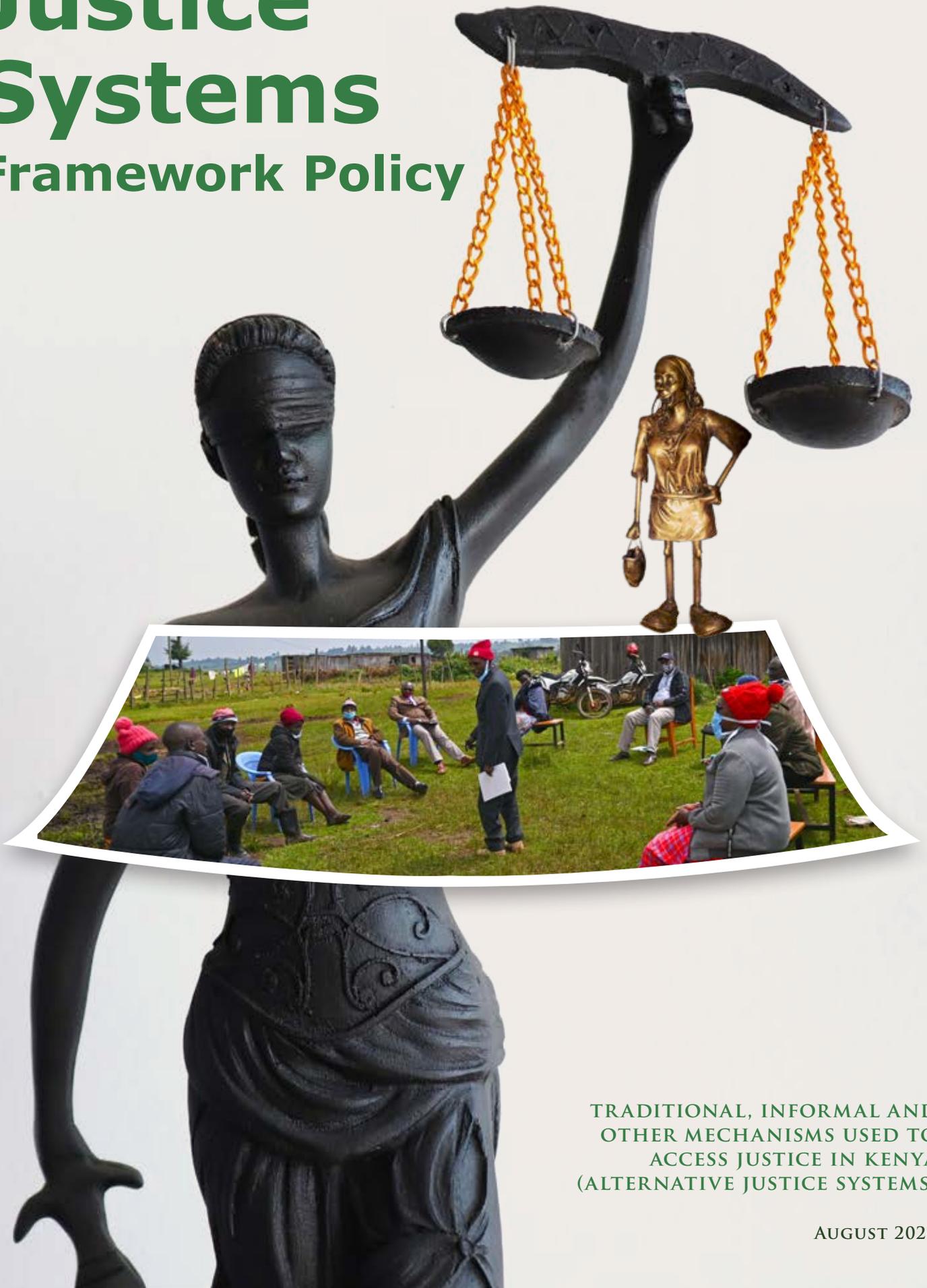


Alternative Justice Systems Framework Policy



TRADITIONAL, INFORMAL AND
OTHER MECHANISMS USED TO
ACCESS JUSTICE IN KENYA
(ALTERNATIVE JUSTICE SYSTEMS)

AUGUST 2020

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ACCESS JUSTICE IN KENYA (ALTERNATIVE JUSTICE SYSTEMS)

AUGUST 2020

Aligning AJS Mechanisms and Judiciary to the Constitution of Kenya (2010) and
The Judiciary's Framework for Sustaining Judicial Transformation

Acronyms and abbreviations

ADR	Alternative Dispute Resolution
AJS	Alternative Justice Systems
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRA	Commission on Revenue Allocation
CRC	Convention on the Rights of the Child
CSO	Civil Society Organization
CUC	Court Users Committee
DPP	Director of Public Prosecutions
GJLOS	Governance, Justice, Law & Order Sector
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Convention on Civil and Political Rights
IEBC	Independent Electoral and Boundaries Commission
JSC	Judicial Service Commission
KNCHR	Kenya National Commission on Human Rights
NGO	Non-Governmental Organization
NLC	National Land Commission
NPSC	National Police Service Commission
PSC	Public Service Commission
SRC	Salaries and Remuneration Commission
SWOT	Strengths, Weaknesses, Opportunities, Threats
UDHR	Universal Declaration on Human Rights



Foreword

One of the core principles laid down in the Constitution to guide the administration of justice and the exercise of judicial authority, is the requirement to embrace alternative forms of dispute resolution, including traditional dispute resolution mechanisms. This requirement is a fundamental shift from the approach to the idea and concept of justice, especially to our Kenyan context. Kenya's communities have, for generations, developed their own justice systems that have and continue to hold societies together. While justice dispensed by the Courts has occupied the centre-stage in the administration of justice, the reality is that the vast majority of disputes (the Policy estimates around 90 percent) among Kenyans are resolved through justice systems that are outside the formal Court process. Therefore, the constitutional guidance to embrace and recognize Alternative Justice Systems is located within a wider frame of response that addresses, holistically, the concept of justice in the Kenyan context.

It is in the above context that my predecessor, Retired Chief Justice Dr. Willy Mutunga appointed the Taskforce on the traditional, informal, and other mechanisms for dispute resolution in Kenya. The team was required to examine the constitutional, legal, and policy options available to fulfil the requirement under Article 159 (2) of the Constitution. More importantly, the Judiciary has, through its key blueprints (Judiciary Transformation Framework (2011-2016) and Sustaining Judiciary Transformation 2017-2021) laid down the strategies, plans, and institutional policies to accommodate and recognize alternative systems of justice. The Policy is, thus, a critical output for the future of administration of justice, and specifically, the manner in which judicial services can be offered while taking cognizance of the wider justice processes in the country.

There is no doubt that Alternative Justice Systems hold great promise in enhanced access to justice, in a holistic sense of the concept. The Policy makes clear recommendations and viable options on how the judicial system and Alternative Justice Systems can interact in a manner that is mutually reinforcing and focused on an effective system of justice. The Policy has also identified useful and immediate steps to be taken in order to animate this important aspect of the administration of justice. These steps include: identification of matters to be brought under AJS, regulation of practitioners of AJS, appropriate procedures and processes in AJS, appropriate interventions, and resource allocation to support the process.

More importantly, however, it is critical that the Policy is seen as a momentous step towards fulfilling the Transformational agenda of the Constitution of Kenya, 2010. Through both unleashing the transformative potential of Alternative Justice Systems and embracing sociological and situated jurisprudence required by the Constitution, the Policy offers a dialogic space for both the Judiciary and Alternative Justice Systems to deliver on the transformative vision of the Constitution of Kenya: reversal of structures that lead to gender oppression; social injustice and stigma; cultural domination; distributive and social injustice and other forms of oppression.

The Policy is an important guide on the operationalization of Alternative Justice Systems, not only to the Judiciary, but to all institutions in the justice sector. I thank the entire team, under the leadership of Hon. Justice (Prof.) Joel Ngugi, for this important work that will help define an important part in the administration of justice in the country.

Hon. Justice David K. Maraga, EGH
Chief Justice of the Republic of Kenya &
President of the Supreme Court.

Nairobi
27th August 2020

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Summary

On 4 March 2016 the then Chief Justice, Hon. (Dr) Willy Mutunga appointed a Taskforce on Alternative Justice Systems to evaluate various *Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems)* and develop a national policy on Access to Justice. For over four years, the Taskforce, whose tenure was extended to April 2020 by Chief Justice Hon. David Maraga, conducted research, field visits, and extensive consultations with stakeholders. The work of the Taskforce resulted in a draft policy - *Justice as Freedom: Traditional, Informal and Other Mechanisms for Dispute Resolution in Kenya* - which serves as a roadmap for implementation and interventions to establish Alternative Justice Systems (AJS). This AJS Framework Policy (Policy) is the result of the work of the Taskforce.

The Policy considers AJS as a necessary component of access to justice and its' principal objective is to give effect to Article 159(2)(c), which mandates the Judiciary, as a State organ, to promote AJS. At a global level, AJS is a mechanism to provide access to justice under the United Nation's Sustainable Development Goal 16, which obliges its signatories to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'.

Mandate: The mandate of the AJS policy is to respond to the requirement of Article 159(2)(c) of the Constitution (2010) and everyday experiences of justice by Kenyans and in so doing to propose strategies for mainstreaming and upholding autonomous practices of AJS mechanism using methods that meet the threshold of the Constitution of Kenya and international human rights standards.

Vision: Expanded freedom, inclusive, equitable and balanced access to and outcome of justice for all in Kenya.

Mission: To ensure affective and efficient access to justice though respecting, protecting and transformation of AJS mechanisms in Kenya.

Policy Initiatives

The Taskforce identified five strategic intervention areas, each with corresponding activities. These are:

1. The formal recognition of Alternative Justice Systems and identification of the kinds of cases AJS can hear;
2. Strengthening the process for selection, election, appointment and removal of AJS practitioners;
3. Development of procedures and customary law jurisprudence;
4. Facilitation of effective intermediary interventions; and
5. Strengthened and sustainable resource allocation and mobilization.

This framework document should be read in conjunction with the main document, the Alternative Justice Systems Baseline Policy.

1.0 Introduction

1.1. Background

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 based on the following fundamental ideas: freedom, equality, non-discrimination, 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 useful 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 and human relations.

On 4 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)*. The principle objective of the Taskforce was to examine the legal, policy and institutional framework for AJS in order to give effect to the Judiciary's constitutional mandate under Article 159(2)(c) which requires the Judiciary to promote alternative forms of dispute resolution including traditional dispute resolution mechanisms. The goal Taskforce aimed to develop a policy to promote robust cooperation and harmony between Alternative Justice Systems and the Court system, as well as enhance access to and expeditious delivery of justice. These goals have been included in the most recent judiciary strategy elaborated in the *Sustaining Judiciary Transformation Blueprint*.

1.2. The process of developing the policy

This policy was developed through a series of dialogues and pedagogies. While the taskforce collected and collated the materials that have been used to develop the document, the first stage was characterized by mutual learning by taskforce members, AJS users and leaders of AJS mechanisms. Many of these ideas have been tested and given significant expression in AJS practices in traditional practices, as well sources associated with everyday ideas of justice. A more detailed account of these conversations is captured in the Baseline Policy document that is the premise for this Framework policy. The taskforce's conversations with the AJS actors centred on understanding, explaining and debating different approaches to addressing the many forms of injustice that require attention. The taskforce found this area to be a dynamic and difficult terrain replete with competing approaches, different conceptions of justice and different levels of operation. Just as the process of developing the policy was not taskforce centric, the policy has suggested an implementation process that is transformative and lead by all stakeholders.

1.3. Historical perspective

Before the colonial occupation, communities in Kenya had their own systems of justice. Colonialism, however, imposed a dual system of justice. One system, Native Courts, applied customary law to indigenous communities (who were referred to as ‘Natives’) and primarily addressed family law, land tenure, and succession issues. The second system, Colonial State Courts, applied law adopted from England and other colonial systems to the settlers. Although the central colonial State intended to merge the two legal systems, they limited the application of customary law via the ‘repugnancy clause,’ which stated that customary law would be applicable provided it was not repugnant to justice and morality. Justice and morality, in turn, were interpreted from the perspective of English Common Law and the English people.

At the end of colonial rule, Kenya’s 1963 Constitution recognized traditional dispute mechanisms as part of Kenya’s post-colonial legal system. Traditional dispute mechanisms, however, applied only to the extent that they were not ‘repugnant to any written law’. African Customary Law was placed on the lowest rung of the legal ladder: lower than the Constitution, Kenyan Statutes, English Statutes of General Application, and Common Law. However, because Africans used both the formal and informal systems, there continued to be significant interaction between them and it was unreasonable to expect the two systems to operate in isolation. They were bound to and influenced each other both in terms of process and outcomes.

The 2010 Constitution revived the prominent place of African Customary Law and traditional systems through Article 159(2)(c) which gives the Judiciary the mandate to promote traditional methods of dispute resolution while at the same time subjecting these mechanisms to the human rights framework of the Bill of Rights [Article 153(3)]. Thus, the use of “traditional”, “customary” or “alternative” (“Alternative Justice Systems”) has continued to endure.

2.0 Rationale and context

2.1. Prevailing environment

Kenya's history is based on multiple avenues of access to justice. There are many disputes that occur in everyday life, but very few of them are resolved by the formal Courts. Instead, a majority of them are resolved using Alternative Justice Systems (AJS). AJS is the detailed meaning of what the Constitution refers to in Article 159(2)(c) as **traditional, informal and other mechanisms used in access to justice in Kenya**. In spite of the constitutional mandate AJS has yet to be institutionalized and there are no adequate legal and policy guidelines to govern AJS. Taskforce therefore set out to examine the role AJS plays in the justice chain and provide guidance on how to ensure that AJS mechanisms are administered within the provisions of the Constitution.

In their research, the Taskforce found that AJS is part and parcel of the everyday lives of Kenyans and is effective in increasing access to justice for the people. In 2007, a study by the Governance, Justice, Law and Order Sector (GJLOS) found that confidence in the Judiciary remained low. A later survey by the Judiciary, together with the Hague Institute for Innovation of Law found that only 10% of Kenyans use the formal justice system to resolve their disputes (See *Justice Needs and Satisfaction in Kenya* survey, 2017). The pilot field studies conducted by the Taskforce showcase the important societal and cultural values surrounding AJS in Kenya. In addition to the daily practicing of AJS, it is apparent that the communities studied have made efforts to protect, preserve, and promote their cultures. The field studies also confirmed that AJS is indeed an avenue Kenyans around the country, in both rural and urban settings, invoke when they have disputes. This stems from the several advantages these fora offer, compared to formal Courts. The fact that the examples are drawn from across the country affirms that this form of dispute resolution is widespread.

2.2. Imperatives for engaging with AJS

2.2.1. Provisions of the Constitution

The Constitution of Kenya imposes an obligation on the judiciary to Promote Alternative Justice System. It also affirms vision for prompting and expanding the freedom of citizens to exercise their agency, conduct themselves accountably and hold those in authority to accountable for their actions. These requirements are detailed in numerous provisions that promote access to justice for all, specifically Articles 10, 48, 50, 159 and 174. (See Annex p. x)

2.2.2. Regional and International Frameworks

Kenya is a signatory to several international and regional human rights instruments that promote access to justice for all. These include the Universal Declaration of Human Rights

(UDHR); the International Covenant on Civil and Political Rights (ICCPR); Convention on the Elimination of All Forms of Violence Against Women (CEDAW); International Covenant on Economic, Social and Cultural Rights (ICESCR); the African Charter on Human and People's Rights (Banjul Charter); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol); the Convention on the Rights of the Child (CRC). The Constitution of Kenya, 2010 makes it clear that not only do general rules of international law form part of the laws of Kenya but so does any treaty or convention ratified by Kenya.¹

2.2.3. Relevance of the AJS

(a) AJS reflects the lived realities of Kenyans and is an effective process for increasing access to justice for most Kenyans.

(b) AJS as a framework for expanding human rights and human autonomy: AJS is an important tool for expanding human rights. Because AJS is a lived reality, it changes and adapts to new circumstances and is capable of responding to legal changes and therefore adapts to human rights norms.

(c) AJS as a mode for doing justice differently and more effectively: AJS accomplishes this in at least six ways – (i) it is not adversarial and is a form of restorative justice; (ii) it ensures more social inclusion since it is more participatory; (iii) it is more affordable; (iv) it has minimum formalities and technicalities and focuses on substantive justice; (v) it is more expeditious; and (vi) it is less adversarial and incorporates more creative remedies.

(d) AJS is an effective mechanism for the reduction of case backlogs and decongestion of Courts: One of the main issues of the formal justice system in Kenya is the serious backlog of cases. Reducing backlog in the Courts is, therefore, one of the primary goals of the Judiciary. By dealing with appropriate disputes and actively preventing others from becoming active disputes, AJS reduces congestion of cases in Courts.

(e) AJS is a mechanism for social re-engagement with (and re-legitimizing) the State: One of the transformative objectives of the Constitution is to re-legitimize the State by bringing Government closer to the people. Alternative Justice Systems enhance public participation in the justice system thereby re-engaging the people with the State.

(f) AJS is a mechanism for reconstituting the State and the Citizen as part of the constitutional project to remake the Kenyan State: AJS seeks to enhance the role of the State and Citizen as direct actors making contributions towards their civic autonomy. Most of the authority of AJS institutions is not derived from the powers delegated to the State by the people of Kenya, rather, it is derived directly from the people. Thus, AJS seeks to enhance the role of the State and the citizen as direct actors making contributions towards their civic autonomy.

(g) AJS as a site for reclaiming ossified customary norms and as a project to resituate the traditional as rational: The AJS mechanism preserves and promotes cultures and prevents them from becoming “stale” and therefore fits into contemporary life.

¹ See Article 2 (5) & (6).

2.2.4. Challenges to the practices of AJS

Although AJS mechanisms are used by a majority of Kenyans seeking justice, and play a complementary role to the formal justice systems, they face several challenges including:

Lack of recognition: The Constitution of Kenya, 2010 recognizes alternative dispute resolution and raises its status to a judicial principle, however, AJS has not been formally recognized as a complementary arm in the administration of justice.

Gender injustice: AJS mechanisms are mostly male-dominated and are seen to provide less room for women as decision-makers. Additionally, because most AJS panels are predominantly male, disputes that affect women or girls are deemed unlikely to be handled in a fair and sensitive manner.

Marginalized and Vulnerable Persons: AJS mechanisms are seen to exclude marginalized groups and vulnerable individuals.

Lack of accountability and undermining the Constitution: AJS is not regulated and therefore lacks proper mechanisms for accountability. AJS is seen to lack procedural fairness as well as undermining constitutional values and roles, e.g. the role of the Director of Public Prosecutions (DPP). Additionally, there are concerns that some of the outcomes of AJS Mechanisms may not be in accord with constitutional and human rights standards.

This Policy takes into consideration that AJS mechanisms, like all dispute resolution processes, have some challenges while recognizing that the freedom to practice one's culture and religion is a fundamental human right. The Policy and Guidelines allow for the development of alternative approaches and interpretations that will open space for challenges to cultural beliefs. The Policy charts an avenue for recognizing and animating AJS Mechanisms while mitigating the identified challenges through a robust human rights framework which involves didactic engagement with the AJS Mechanisms as well as adoption of appropriate doctrines for determining the jurisdictional reach of the AJS Mechanisms as well as operational doctrines on interaction between AJS Mechanisms and the Courts.

2.2.5. SWOT Analysis

Despite the challenges faced by AJS, the mechanism also has its strengths and opportunities which are summarized below in the SWOT analysis.

Strengths	Weaknesses
<ul style="list-style-type: none"> • Demand for and high use of AJS • Awareness of AJS • AJS proceedings conducted in local language and use local culture that is understood by the people • Involves community inclusion and participation • Focus and use of restorative justice • AJS is less adversarial and provides creative remedies • AJS is affordable • AJS has jurisdiction over civil and criminal matters 	<ul style="list-style-type: none"> • Lack of legislative and policy framework • Lack of designated funding for AJS • The perception of AJS as being discriminatory towards women, children and marginalized persons • Lack of accountability • Lack of selection/election process for AJS elders and practitioners • Lack of defined jurisdiction for AJS • Lack of enforcement mechanisms • Some traditions challenge general standards of human rights • Women, youth and persons with disabilities excluded from the decision-making process • Lack of documentation of the process and decisions
Opportunities	Threats
<ul style="list-style-type: none"> • Constitution of Kenya, 2010 • International and Regional Legal Frameworks • Coordination between AJS and the formal Court system • 	<ul style="list-style-type: none"> • Lack of knowledge and incorporation of a human rights framework by AJS practitioners • Lack of capacity and training for AJS practitioners • Familiarity with disputants can lead to corruption or bias by decision-makers • AJS panels can be politically co-opted and manipulated • Lack of defined roles for National, Interior and County Administration

3.0 The AJS policy initiatives

3.1. A human rights framework and AJS mechanisms

Article 159(2)(c) obligates the Judiciary to promote AJS. This means that the AJS framework adopted in Kenya will have to interact with the Courts and therefore a human rights framework - an appropriate balance between civic autonomy and constitutional values is essential. AJS expands human rights because its mechanisms are based on three human rights-based avenues: Article 48 which mandates the State to ensure access to justice for all; Article 10 and 28 which provide for the national values and the right to dignity; and Article 44 which enshrines everyone's right to use the language and to participate in the cultural life of their choice. This human rights framework is not just philosophical, it also reflects the practical considerations of AJS.

3.1.1. Duty to Respect requires non-interference by the State in the enjoyment of rights and freedoms. This requires the Judiciary and other State organs ensure that there is no interference with the AJS process from start to finish. However, this duty is not without limitations – where there are allegations of human rights violations within the AJS process, the Judiciary and other State organs must scrutinize the AJS process, but must do so in a manner that is in compliance with the Constitution.

3.1.2. Duty to Protect – This requires the generation of laws, policies and regulations for AJS that guard against human rights violations and provide remedies for these violations. Under this pillar, the Judiciary has the legal duty to examine the circumstances of all violations or alleged violations of the rights protected under Article 159.

3.1.3. Duty to Transform – The Kenyan Constitution is a transformative Constitution which means that it ensures that the State fulfils its obligations by introducing far-reaching changes. The goal of the Constitution is to institute social change and reform by addressing the social inequalities that existed in Kenya. This means that the barriers to social equality have to be removed and replaced by a system that facilitates social justice. The Judiciary therefore has to ensure that the transformative character of the Constitution is sustained in all AJS processes at all times. With regard to: Autonomous AJS Institutions – the Judiciary must establish minimum standards for State actors to ensure conformity with constitutional values; Third-Party – the Judiciary is required to remedy the gaps that exist in entities that practice AJS and the AJS process itself; and Court- Annexed AJS – the Judiciary is required to develop and implement, in good faith, a Plan of Action for the AJS processes and mechanisms.

3.2. Models of AJS and policy recommendation

The Taskforce identified the different ways in which AJS is practiced and categorized them into four main models (typologies): Autonomous AJS Institutions, Autonomous Third-Party

AJS Institutions, Court-Annexed AJS Institutions and Regulated AJS Institutions and endorsed the first three. Below is a description of each:

- 3.2.1. Autonomous AJS Institutions:** These are independent mechanisms which are run entirely by the community. The community determines the decision makers and the processes to be followed without any interventions or regulations from the State. The decision makers selected resolve these disputes by applying the laws, rules and practices that govern that particular community.
- 3.2.2. Autonomous Third-Party AJS Institutions:** These can be State-sanctioned institutions such as chiefs, the police, probation officers, child welfare officers, village elders under the County government, and the chair of *Nyumba Kumi* groupings, among others. They can also be non-State or related institutions such as church leaders, Imams and Sheikhs among Muslims, as well as other religious leaders and functionaries of social groups such as *Chamas*, NGOs and CSOs. The main characteristic of this model is that the State and non-State third parties are not part of any State judicial or quasi-judicial mechanisms.
- 3.2.3. Court-Annexed AJS Institutions:** These refer to AJS processes that are used to resolve disputes outside the Court, under the guidance and partial involvement of the Court. They work closely with the Court and Court officers in the resolution of disputes through a referral system between the Court, Court Users Committees (CUCs), the AJS processes, and other stakeholders such as the DPP, the Probation Office, and Children's Office. This method of dispute resolution involves both the community-based mechanisms and the formal justice system.
- 3.2.4. Regulated AJS Institutions:** These are AJS mechanisms created, regulated, and practiced either entirely or partially by State-based law or statute. An example of this is the short-lived Land Disputes Tribunals in Kenya.

Having identified these four typologies, the Taskforce endorsed the first three – Autonomous AJS Institutions, Autonomous Third-Party AJS Institutions, and Court-Annexed AJS Institutions as the typologies that adhere to the human rights framework of AJS. The fourth model, Regulated AJS Institutions is easily manipulated and could undermine rather than promote AJS practices.

3.3. Interaction between AJS mechanisms and the judiciary

Article 159(2)(c) of the Constitution explicitly requires the Judiciary to promote AJS as a principle and a practice. It is inevitable that the three models of AJS recommended by the Taskforce will interact with the formal Court system and this interaction will increase access to justice for Kenyans. The Judiciary is required to develop parameters and standards to govern this interaction. This Policy endorses a rights-based obligations framework, grounded on the constitutional Guiding Principles of the duty to Respect, Protect and Transform, to govern the interaction between the proposed frameworks and the Courts. These principles are meant to inform and guide the policy implementation process by providing guidance on how the Courts should interact with the three endorsed AJS typologies.

The Taskforce identified different ways in which AJS interacts with the Judiciary and adopted four that are compatible with the Constitutional provisions on AJS and should be applied when AJS matters are referred to the Courts. These are:

- 3.3.1. Deference** – this is where the Court reviews previous AJS proceeding and awards for procedural correctness and proportionality only.
- 3.3.1. Recognition and enforcement** – this occurs when the Court recognizes an award or decision from an AJS Mechanism as it would its own decree subject only to the right of one party to set aside the award for an extremely narrow set of reasons
- 3.3.1. Facilitative interaction** – this occurs when the AJS award or process is used as evidence in an on-going Court process.
- 3.3.1. Monism** – where the Court treats previous AJS process or award as tribunal of “first instance” from which a dissatisfied party is permitted to appeal to the Court. The Court, in this mode, the Court conducts a review of both facts and law as a first appellate Court does.

However, the Policy articulates a preference for the application of either the Deference or Recognition and Enforcement Operational Doctrines. There may also be instances where a prior agreement of the parties or specific circumstances of the case make the Monist or Facilitative Interaction doctrines appropriate.

3.4. The social justice strategy of AJS

Since the promulgation of the Constitution of Kenya in 2010, social justice has moved to become a central principle and value within individuals or groups and communities. This policy has therefore presents an opportunity to initiate a dialogue between AJS providers’ and users’ understandings of social justice—built from long engagement with people experiencing poverty, gender disadvantage, injustice, oppression, stigma and discrimination—and the critical and social jurisprudence concerned with advancing concepts and principles of social justice. The AJS Taskforce found that the AJS mechanisms and the social jurisprudence applied by Courts in Kenya have offered significant contribution in protecting and advancing the transformative vision of the Constitution of Kenya of freedom, democracy, theories of distribution and justice, and practices that reverse social structures that perpetuate oppression, discrimination and stigma more so social jurisprudence for women, cultural minorities and other citizens in precarious situations. The specific use of transformation as an obligation for both the Judiciary and the AJS mechanism is an explicit requirement that as critical actors, AJS mechanism and Courts in Kenya ought to contribute to social justice.

4.0 Strategic policy intervention areas

Despite this reality and the tremendously important role that AJS plays in accessing justice, and despite the constitutional imperative in Article 159, which provides the opportunity for Kenya to promote alternative forms of dispute resolution, Kenya has not developed a policy and legal framework for the adoption and implementation of traditional justice mechanisms. The work of the Taskforce was to therefore create a methodology for AJS that worked in tandem with the Constitution from which a policy could then be crafted.

The specific policy strategic actions of this AJS Policy are:

- a. Strategic Intervention 1: The formal recognition of Alternative Justice Mechanisms and identification of the nature of cases AJS Mechanisms can hear.
- b. Strategic Intervention 2: Strengthening the processes for selection, election, appointment and removal of AJS practitioners.
- c. Strategic Intervention 3: Develop Procedures and Customary Law jurisprudence.
- d. Strategic Intervention 4: Facilitate Effective intermediary interventions.
- e. Strategic Intervention 5: Strengthened and Sustainable Resource Allocation and Mobilization.

5.0 Operational policy intervention areas

5.1. Recognition and identification of the nature of cases AJS can hear

Policy statement:

The Judiciary shall formally recognize Alternative Justice Systems 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 redress.

Interventions:

- a. Design and operationalise a framework that promotes appropriate interactions between the Judiciary and the various models of AJS to give effect to the constitutional mandate that promotes the use of alternative justice mechanisms.
- b. Outline and gazette guidelines that recognizes and adopts the three models of AJS namely:
 - i. Autonomous AJS Institutions
 - ii. Autonomous Third-Party AJS Institutions
 - iii. Court-Annexed AJS Institutions
- c. Promote AJS as a forum of first instance for appropriate cases.
- d. Produce and disseminate information on AJS mandate
- e. Consolidate emerging consensus on various aspects of AJS outlined in the Policy with a view to determining if a statute is recommended as the best way to guide the protection, respect and transformation of AJS in the country and if so develop such statute.
- f. Formulate a system to facilitate appropriate cooperation between the Courts and AJS Mechanisms to enable co-references of cases between them.
- g. Train Judicial Officers on appropriate applications of the agency principle on jurisdiction of AJS Mechanisms and the operational doctrines of interaction.
- h. Train Practitioners of AJS and the public on the appropriate jurisdiction for AJS Mechanisms.
- i. Audit and suggest possible review of existing legislations and judiciary guidelines to ensure coherent implementation of the AJS policy.
- j. Develop and adopt AJS User guidelines for all stakeholders.

5.2. Strengthening the processes for selection, election, appointment and removal of AJS practitioners

Policy Statement:

The Judiciary in partnership with other government agencies in the justice sector shall work in partnership with AJS mechanisms to enhance the competence and accountability of AJS practitioners and judicial officers.

Interventions:

- a. Establish objective systems that guarantee all-inclusive AJS panels.
- b. Design appropriate application processes and eligibility standards to ensure the inclusion of women, youth and persons with disabilities as AJS practitioners.
- c. Build the capacity and empower AJS practitioners and judicial officers in functionality and basic fundamental principles touching on cross-cutting issues.
- d. Develop procedures and guidelines on the principles of the Constitution and standards for human rights for AJS practitioners.
- e. Establish a quality assurance framework and a regulator for AJS practitioners.

5.3. Develop procedures and AJS jurisprudence

Policy Statement:

The AJS mechanisms and the judiciary co-operate shall deliver substantial and procedural justice, through the application of customary law in compliance with the Constitution and human rights principles.

Interventions:

- a. Identify cultural and social practices in conflict with the Constitution and human rights standards.
- b. Operationalise AJS through the development of a Standard Operating Procedures Guidelines that will enhance compliance with the Constitution and human rights principles.
- c. Facilitate the adoption of the following Operational Doctrines of interaction between Courts and AJS processes: Deference, Recognition and Enforcement, Facilitative Interaction, and Convergence.
- d. Using comparative jurisprudence, develop measures to engage with the repugnancy clause and give it meaning which is compatible with the spirit of the Constitution.

5.4. Facilitate effective intermediary interventions

Policy Statement:

All individuals or groups and communities using AJS mechanisms shall have the right to representation.

Interventions:

- a. Develop and adopt guidelines for intermediaries.
- b. Develop a Code of Conduct and ensure that all accredited AJS practitioners in the country have the skills required to provide such services professionally and ethically.
- c. Develop infrastructure to encourage the use of intermediaries.

5.5. Strengthened and sustainable resource allocation and mobilization

Policy Statement:

The State in collaboration with other stakeholders shall facilitate resource mobilization and management for the development and enhancement of AJS mechanisms.

Interventions:

- a. Promote a philosophy of self-sustenance by the AJS mechanisms
- b. Develop a targeted budget for AJS mechanisms.
- c. Leverage domestic resources.
- d. Enhance coordination for resource mobilization among the different actors, including multilateral and bilateral partners.

6.0 Cross-cutting issues

This Policy takes cognizance of the emerging and cross-cutting issues in AJS mechanisms. These include; gender and equity, children, marginalized and vulnerable people and human rights.

Policy statement:

The government shall promote and enhance the mainstreaming of emerging and cross-cutting issues in AJS legislation, policies and mechanisms.

Interventions:

- a. Develop strategies for mainstreaming cross-cutting issues into all AJS interventions.
- b. Develop a monitoring, evaluation and reporting framework to track progress in mainstreaming of cross-cutting and emerging issues.

7.0 Actors, processes and implementation mechanisms

This Policy recognizes the role played by different partners in promoting and enhancing AJS mechanisms. These partners include both State and non-State actors.

7.1. Actors

7.1.1. State Actors

These actors include the Judiciary and CUC's, the DPP, Article 15 Institutions - KNHRC, NLC, IEBC, PSC, JSC, CRA, SRC, NPSC. The role of these actors in the implementation of the policy will be to:

- a. Provide leadership, oversight and policy direction
- b. Ensure existence of adequate policy, legal and institutional frameworks
- c. Enforce implementation of the policy and guidelines in a coordinated and integrated way
- d. Set, maintain and ensure standards and professionalism in AJS practice
- e. Facilitate effective collaboration in the implementation of AJS mechanisms
- f. Ensure that communities are aware of their rights and entitlements under AJS mechanisms
- g. Ensure availability of necessary community support and infrastructure
- h. Develop feedback and accountability mechanisms
- i. Develop and facilitate capacity building for effective planning, implementation, monitoring and management of AJS mechanisms

7.1.2. Non-State Actors

These include; CSOs, Council of Elders and community justice institutions, the legal fraternity, paralegals, academia, and development partners. Their role in the implementation of the policy will be to:

- a. Provide additional financial and technical support for AJS mechanisms
- b. Provide checks and balances to the government to ensure implementation of the policy
- c. Ensure inclusion of all categories of communities and vulnerable groups
- d. Complement government interventions

7.2. Implementation mechanism

To guide the implementation of the AJS Policy, State actors in collaboration with non-State actors shall develop an Institutional Framework. The Institutional Framework shall detail the strategies; activities; target communities; timeframe; estimated costs and the responsible

stakeholders. Implementation will require the participation and support from the government, communities and other non-State actors promoting community development. Respective implementing agencies shall develop work plans detailing their interventions as outlined in this policy.

7.2.1. Management of the AJS Sector

The Taskforce recommends that the task of shepherding and monitoring the implementation of the Policy, the Judiciary forms and appoints a Standing Committee on Alternative Justice System. It is envisaged that the main mandate of the Standing Committee in the first four years will be the following:

1. First, to undertake the primary task of leading the didactic human rights engagement envisaged in this Policy as a mode of transforming Alternative Justice Systems in Kenya by capacitating the different actors – primarily the AJS Mechanisms – on the Human Rights Framework and minimum constitutional requirements as well as foster conversations between Judicial Officers and their interlocutors on the dialogic and social jurisprudence needed to fulfil the Judiciary’s mandate under the Human Rights Obligation presented in this Policy as a means to protect and advance the transformative vision of the Constitution of Kenya of freedom, inclusive equality, democracy, distributive justice and access to justice, and practices that reverse social structures which perpetuate oppression, discrimination and stigma;
2. Second, to consolidate emerging consensus on various aspects of AJS outlined in this Policy with a view to determining if a statute is recommended as the best way to guide the protection, respect and transformation of AJS in the country;
3. Third, to lead, shape, and frame conversations on AJS in Kenya and to monitor and map progress and retrogressions (if any) and where appropriate act as a resource in the field as well as assist various actors in implementing this Policy in meeting their obligations to protect, respect and transform AJS; and
4. Fourth, to mobilize and rationalize resources to do the three tasks above.

7.2.2. Stakeholder’s Management and Linkage with the NCAJ

The Taskforce recommends that the Standing Committee be technically housed at the Judiciary Training Institute (JTI) given its triple mandate of transforming the Judiciary through training, constructive engagement (with other actors in the justice sector) and policy development. It is further recommended that the Standing Committee to have a formal reporting requirement to the Honourable Chief Justice twice a year. Finally, it is recommended that given the stakeholders involved in the venture to animate AJS in the vision of the Constitution, that the Honourable Chief Justice formally tables the reports of the Standing Committee before the National Council for the Administration of Justice (NCAJ) for discussion and possible appropriate action.

8.0 Monitoring and evaluation

A monitoring and evaluation strategy shall be developed for approval by the Judiciary to provide a systematic and continuous assessment by stakeholders of the progress made in the implementation of the AJS Policy and Guidelines. The monitoring and evaluation strategy will be an inbuilt component in the Guidelines and shall outline the specific roles, tasks and responsibilities of the different State and non-State actors in terms of information gathering and transmission to the Judiciary.

9.0 Policy review

This Policy will be reviewed after four (4) years to take stock of the progress made in implementation. This process will be undertaken in a participatory manner and in collaboration with other stakeholders.

Annexes

Table 1. International legal framework

Instrument	Summary
Universal Declaration on Human Rights (UDHR)	Article 8 Guarantees full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations.
International Convention on Civil and Political Rights (ICCPR)	Article 2(3) of the ICCPR requires an effective remedy by a competent authority. Article 14 Provides for the right to equality before the Courts and tribunals and to a fair trial. Article 26 All persons are equal before the law and are entitled without any discrimination to the equal protection and benefit of the law.
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	Article 2(b) mandates State parties to adopt appropriate legislative and other measures, to prohibit discrimination against women. Article 2(c) obligates State parties to establish legal protection of the rights of women on an equal basis with men. Article 15(1) State parties shall accord to women equality with men before the law. Article 15(2) State parties shall accord to women in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity.
Convention on the Rights of the Child (CRC)	Article 3(1) provides that the best interests of the child shall be a primary consideration in all actions concerning the child.

Table 2. African regional framework

African (Banjul) Charter on Human and Peoples’ Rights (‘Banjul Charter’)	Article 3 guarantees every individual equality before the law and protection of the law.
Protocol to the African Charter on the Rights of Women in Africa (the Maputo Protocol)	Provides important procedural rights to ensure that women have a voice in the on going examination and reformulation of cultural practices and customary law.
International Covenant on Economic, Social and Cultural Rights (ICESCR)	Article 17(2) provides for the right of everyone to take part in the cultural life of their community.

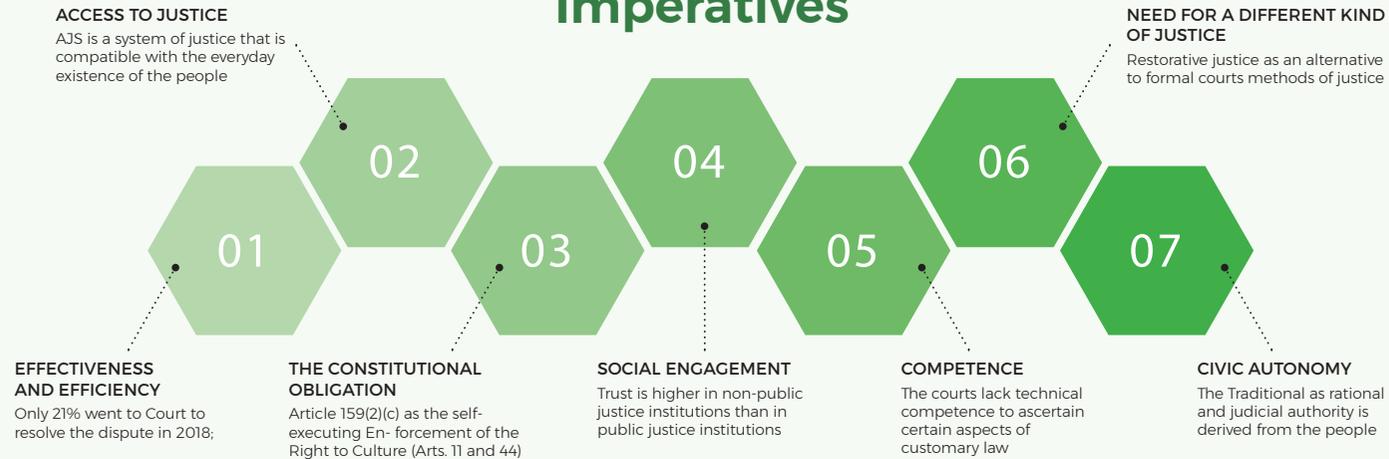
Table 3. National framework

<p>Constitution</p>	<p>Article 10 sets up the national values and principles of governance which include, human dignity and social justice the two principles that form the backbone of the transformational AJS.</p> <p>Article 11 recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.</p> <p>Article 27(1) guarantees equality before the law and the right to equal protection and equal benefit of the law.</p> <p>Article 44 grants to the people the right to use the language and to participate in the cultural life of their choice. This entails the right, with other members of that community, to enjoy the person’s culture and use the person’s language or to form, join and maintain cultural and linguistic associations and other organs of civil society.</p> <p>Article 48 obliges the State to ensure access to justice for all persons.</p> <p>Article 50 guarantees the right to have disputes resolved in a fair and public hearing before a Court or independent and impartial tribunal or body.</p> <p>Article 159 Introduces ADR and Traditional Justice Systems to bolster access to justice. 159(2)(c) places a categorical obligation on the Judiciary to promote alternative forms of dispute resolution, including traditional forms of dispute resolution.</p> <p>Article 174 (d) recognizes the right of communities to manage their affairs; and (e) protects and promotes the interests and rights of minorities and marginalized communities.</p>
<p>Judicature Act</p>	<p>Section 3(2) - The Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and all subordinate Courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to procedural technicalities and without undue delay.</p>
<p>Children’s Act</p>	<p>Prohibits cultural practices that dehumanize or are injurious to the physical and mental well-being of the child.</p>
<p>County Government Act</p>	<p>Section 98, 99, 100 & 101 embraces civic education aimed at citizen empowerment. Section 99(f) lists one of the objectives of civic education is awareness creation on the bill of rights among others an initiative necessary for fulfilling the right to access justice from an informed point. This creates an obligation on the respective county governments to undertake public education in the counties.</p>

ALTERNATIVE JUSTICE SYSTEMS POLICY FRAMEWORK



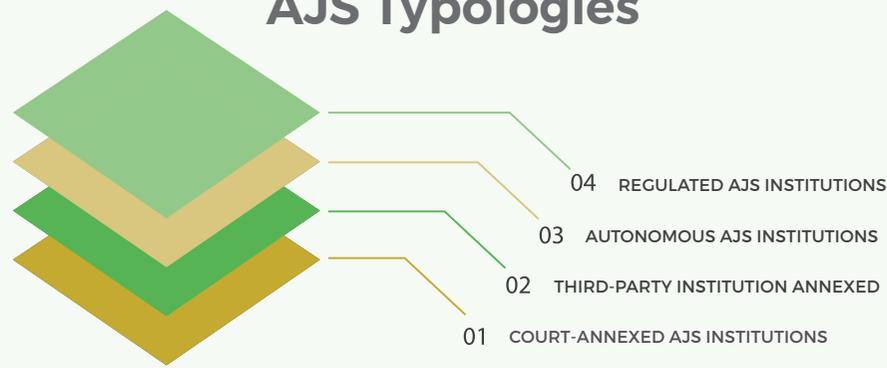
Imperatives



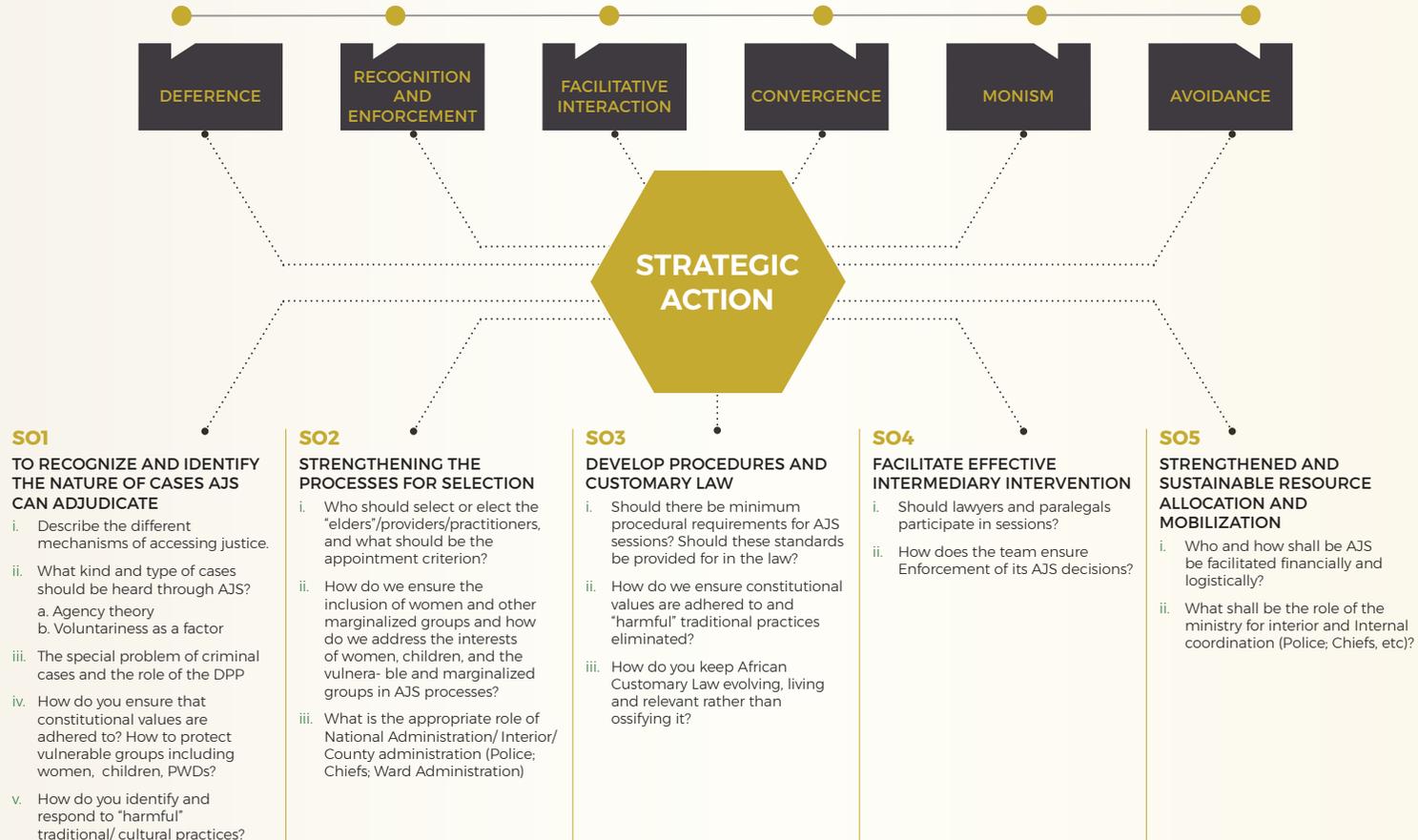
AJS Human Rights Framework



AJS Typologies



Models of judiciary interaction





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