The Judiciary's Approach to Incorporating the African Justice Systems (AJS) into the Formal Justice System: Challenges and Opportunities

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Abstract

The incorporation of African Justice Systems (AJS) into Kenya's formal legal system began during the colonial times, when native courts, administered by elders knowledgeable in African customs, operated alongside formal colonial courts. Clerks assisted by recording proceedings to align them with the African context-specific realities. The 1965 Magistrates' Court Act integrated these native courts by appointing clerks as district magistrates, preserving traditional dispute mechanisms such as the *Kithitu* Oath of Ukambani, a powerful community-witnessed truth-telling process. Over time, however, High Court rulings curtailed court involvement in such traditional practices, requiring their application outside formal courts, though consent judgments could follow. Reviving these practices could involve formal recognition of elders' decisions in courts, with paralegals supporting as clerks once did.

So far, African Justice Systems have persisted, and they are constitutionally recognized under article 159(2)(*c*) of the 2010 Constitution, which promotes alternative and traditional dispute resolution subject to human rights safeguards in article 159(3). These constitutional safeguards ensure traditional mechanisms align with Kenya's Bill of Rights and moral values enshrined in the preamble, articles 10, 20(4), and 259, ensuring cultural integrity complements constitutional justice. To support this integration, the judiciary formulated the Alternative Justice Systems Policy Framework, operationalized through the National Steering Committee on the AJS Policy (NaSci-AJS) and the rollout of county-specific Action Plans on AJS. These initiatives aim to mainstream traditional dispute resolution into the broader justice system, enhance access to justice, and affirm the cultural and constitutional validity of African Justice Systems in Kenya. To this end, this

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paper explores the opportunities and challenges that arise from integrating the African traditional system into the broader justice sphere.

Keywords: Africa Justice System, Alternative Justice Systems Policy framework, Elders.

1. Background

The journey of incorporating the African Justice Systems (AJS) starts with the struggles that continued after the dual court system under colonialism was mainstreamed into what we can today call the formal courts. Native courts had operated parallel to formal colonial courts. It was in the native courts where traditional justice systems operated. The Native Elders in these courts were illiterate but experts in traditional customs and values. Clerks were employed to record the proceedings, acting as interpreters in certain cases, and writing the judgments that the elders reached. Outside these courts, the systems also operated among the communities seeking restorative justice, while the Native Courts dealt with adversarial justice. The Magistrates Court Act of 1965 integrated the native courts into the formal court system by mainly recruiting the clerks in the native courts as District Magistrate III. Traditional methods of dispute settlement remained part of the jurisdiction of District Magistrates' Courts. An example of this is the settlement of land disputes by the administration of the Kithitu oath in Ukambani that Professor Celia Nyamweru has discussed in her excellent book, Some Traditions of the Akamba of Kenya.[1]

Practising law in Kitui in 1972-73, my major practice was on land disputes. Many of my cases were settled through the administration of the Kithitu oath. This system helped me see how powerful the administration of the Kithitu Oath was in ensuring that justice was done. The process of the administration of the Kithitu oath was such that I believe no party to the dispute would dare lie. The fact that the process took place on the land in dispute, where members of the community were in attendance, reinforced the truism that justice has to be done and also be seen to have been done. One important fact to note is that the proceedings in the District Magistrate Court were conducted in the Kiikamba language, particularly when the Magistrate was a Mkamba and when the Advocates for the parties, too, were Wakamba. The Magistrate in such cases was the translator. In all the cases I participated in, I can confirm the translations were great.

1. Celia Nyamweru, 'Some Traditions of the Akamba of Kenya' (Nairobi: Old Africa Books, 2021), pp.258.

This practice of administering the Kithitu oath in land matters came to an end when some decisions in the High Court ruled that the District Magistrates should cease the practice of participating in the process of the administration of the Kithitu oath in their proceedings. The decisions also stated that if parties wanted a settlement of their dispute by the administration of the Kithitu oath, they needed to do it out of court.[2] Thereafter, they could go back to court and file a consent judgment.

This practice can be resurrected by ensuring that decisions made by elders and others in the AJS could similarly be filed in formal courts and thereby acquire both a formal judicial record and authority. Paralegals could play the role of the clerks in the native courts who were not trained lawyers but had gained a lot of experience in their work.

The African Justice Systems continued to exist[3] and became part of the struggle for a new Constitution that would ultimately decree their constitutional existence. This happened under article 159 of the Constitution. Sub-article 2(*c*) provides that "alternative forms of dispute resolution, including…and traditional dispute resolution mechanisms shall be promoted, subject to Clause (3)." Sub-article (3) decrees that "Traditional dispute resolution mechanisms shall not be used in a way that contravenes the Bill of Rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law."

Who would have thought that the colonial and postcolonial repugnant clause would find its way into the progressive and decolonizing 2010 Constitution? I believe there is no need to worry because this clause has to be read in the context of other clauses, namely the Preamble, articles 10, 20 (4), 259, and section 3 of the Supreme Court Act, 2011. Our Constitution is unique in that it decrees a theory of its interpretation. Invoking this theory in interpreting the repugnant clause would not countenance the gross injustice and immorality of the colonial justice in Kenya, but would interpret it within the justice and morality of the 2010 Constitution. Indeed, under articles 10 and 259 of the Constitution, traditional African values, culture, and justice must be taken into account in the interpretation of the Constitution. These values are included in the national values and principles of governance under article

2 Read Dominicpiece, 'Kithitu, Oath of Justice,'(2022), available of https://lughayangu.com/post/kithitu-the-kamba-oath-of-justice accessed on (5 September 2025).

3 Land Adjudication officials relied on it as a last resort, e.g. when confronted with conflicting accounts of first possession, in a context of unwritten records of settlement. See Generally, K. Ndeti, The Institution of Kithitu and Question of Human Justice among the Kamba, (1971) Volume 1 in Journal of Eastern African Research and Development page 69-76.

10 of the Constitution.[4] Building on this background, the second part of this paper examines the policy framework guiding the African Justice Systems (AJS) and its implementation through the National Steering Policy. The third part explores the opportunities and challenges of integrating AJS into the formal legal system, while the fourth section provides a conclusion.

2. The Alternative Justice Systems Policy Framework and its Implementation by the National Steering Policy on the AJS Policy (NaSci-AJS)

To complement the formal judicial system, the Alternative Justice System (AJS) was developed by the Task Force on Informal Justice Systems.[5] The policy was gazetted in May 2016. The story of AJS is rooted in Kenya's rich heritage of communal dispute resolution.[6]

The Taskforce considers AJS Policy as a mechanism for reengaging citizens as active participants in the project of achieving equal access to justice. In the Taskforce's view, the state has become alienated from the people because "the state was speaking the language of law and order, while the people were speaking the language of relationships."[7] Building relationships with people and communities "depends on close relationships between justice providers and the communities in which they work and live … [and] a new culture of collaboration, of openness and of responsiveness to people and their needs."[8]

The Policy's principal objective is anchored in the Kenyan Constitution, particularly article 159(2)(c), which mandates the Judiciary, as a state organ, to promote AJS, including the use of reconciliation, mediation, and arbitration, provided they do not contravene constitutional principles or human rights. At the global stage, the policy aligns with international human rights standards and the Constitution's recognition of culture especially in article 11 as a key aspect of national identity, aiming to ensure fairness and justice while respecting local customs. Similarly, AJS aim to provide access to justice under the United Nation's

4 Kang'ara, Okello and Makokha, Beacons of Judiciary Transformation: Selected Speeches, Writings, and Judicial Opinions of Chief Justice Willy Mutunga' (Nairobi: Sheria Publishing House 2021) ch7, 255–90.

5 'Alternative Justice Systems Framework Policy' available at https://ajskenya.or.ke/mooxowhi/filr/3585/AJS%20Policy%20Framework%20Policy_fa_web%20(1).pdf accessed on (5 September 2025).

6 See Chief Justice Martha Koome, 'A Multi-door Exploration of Dispute Resolution in Kenya: Unlocking Justice' (The African Research Consortium) (2024).

7 Interview with NaSCI-AJS member.

8 Task Force on Justice, Justice for All, 113.

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'. The policy further supports a pluralistic justice approach that respects Kenya's diverse cultural, socio-economic, and geographic realities, making justice more accessible, affordable, and culturally relevant to many Kenyans who often do not use the formal court system for dispute resolution.[9] AJS policy is also grounded in evidence that a majority of Kenyans rely heavily on alternative justice mechanisms for resolving disputes as compared to formal courts, which are often burdened with High Court fees, backlogs and inaccessibility. By institutionalizing AJS, Kenya seeks to reduce congestion in formal courts and promote the timely resolution of disputes through community-based, traditional, and informal justice systems.

The policy outlines strategic interventions such as strengthening the selection and accountability of AJS practitioners, developing procedures that align with constitutional and human rights standards, and facilitating effective intermediary interventions in dispute resolution. Additionally, it promotes sustainable resource allocation to support these systems. The AJS Policy also seeks to dismantle colonial legacies, social injustices, and gender oppression by fostering a dialogic space where formal courts and AJS operate complementarily.

The National Steering Committee on the Implementation of the AJS Policy (NaSci-AJS) plays a critical coordinating role in the rollout and institutionalization of AJS across Kenya. This multi-stakeholder body, chaired by the Chief Justice, has overseen initiatives such as the launch of AJS Suites (informal justice centres) in various counties such as Isiolo, Kajiado, Nakuru, and Lamu.

It has also facilitated the development of County Action Plans to embed AJS mechanisms within county justice and peace structures. The NaSci-AJS further engages in capacity building of local leaders and communities on conflict sensitivity and transformative dispute resolution, enabling peaceful and sustainable conflict management at the grassroots level.

While the foregoing must be seen from the prism of the fact that the promise of our 2010 Constitution is no longer an abstract, but a tangible reality for bringing justice closer to the people, just as in the time of our ancestors, we must recognize that, despite these positive ramifications, AJS requires

9 See 'Promoting Alternative Justice Systems' (AJS) available at; see, 'Multiple Doors to Justice in Kenya: Engaging Alternative Justice Systems' available at https://cic.nyu.edu/wp-content/uploads/2023/11/Multiple-Doors-to-Justice-in-Kenya-2023.pdf accessed on (5 September 2025).

collaboration between the Judiciary and other actors such as government agencies, civil society, and development partners for it to scale up access to justice to all individuals particularly the poor, the elderly, disabled, vulnerable and marginalized.

2.1. The rollout of the AJS Policy through the County Action Plans

The County Action Plans are localized frameworks that adapt the national AJS Policy to county-specific socio-cultural contexts, promoting the use of traditional and informal justice mechanisms alongside formal courts at the grassroots level. This innovative policy seeks to bridge the gap between the formal justice system and traditional, customary, and informal dispute resolution mechanisms by institutionalizing them within the judicial framework. In addition, the County Action Plan is rooted in the Judiciary's bold commitment to having in place an accessible, responsive, efficient, cost-effective, people-centred and expeditious system of justice in resolving communal disputes amicably. Nakuru County was the first to launch its AJS County Action Plan in May 2022, with support from the Judiciary, UNODC, and the European Union. The Plan engages a wide spectrum of stakeholders, including elders, clergy, civil society organizations, local government institutions, and community groups, to resolve communal disputes through AJS mechanisms, thereby fostering good human and interpersonal relationships among various communities.[10] The launch was heralded by the unique and vibrant diversity of Nakuru, a place that occasionally faces context-specific challenges like inter-community conflicts and complex land disputes. This event represents a significant step forward in alleviating formal court backlogs by encouraging amicable dispute resolution and strengthening social cohesion.

Other counties that have embraced the AJS initiative by formulating and operationalizing County Action Plans include Kajiado, Lamu, Samburu-Maralal, Turkana-Lodwar, Mandera, and Marsabit.[11]

The County Action Plans emphasize protecting vulnerable groups, including women, widows, and orphans, especially in sensitive areas like land and

10 Kenya's first County Plan to mainstream customary justice https://www.unodc.org/easternafrica/en/Stories/kenya-first-county-plan-to-mainstream-customary-justice.html accessed on (5 Sptember 2025).

11 See Supreme Court of Kenya Judges Paper Series Volume 1, available at https://supremecourt.judiciary.go.ke/wp-content/uploads/2025/03/SUPREME-COURT-JUDGES-PAPER-SERIES-final-3.pdf accessed on (5 September 2025).

succession disputes, ensuring their voices are heard. These plans operationalize the multi-door justice approach, aiming to reduce formal court backlogs by resolving disputes amicably and fostering social cohesion. Implementation includes establishing AJS suites, coordination through secretariats, community sensitization, and capacity-building for AJS practitioners, creating an accessible, culturally relevant justice system for all Kenyans.

3. Opportunities and Challenges

I will briefly outline a few of the opportunities and challenges for further discussion.

I believe opportunities for incorporating AJS into the formal system are embedded in the Judiciary approaches that started in 2012 and are ongoing. The three Judiciary blueprints (JTF, SJT and STAJ),[12] have been clear and show a trajectory of progress that is irreversible, irrevocable, and permanent. This is because there is great political will on the part of the Judiciary to continue these innovative and groundbreaking reforms.

The opportunity to develop an indigenous, progressive, and decolonized jurisprudence is given by the Constitution itself. Disobedience of court orders by the Executive and Parliament is likely to continue but this development of the jurisprudence will forge ahead as the integration of the justice systems progresses. The integration will enrich our jurisprudence and consequently, it will be appreciated by other jurisdictions. More important is the praise of the jurisprudence by our own people.

12 See the three Judiciary Blueprints as I explained herein. Judiciary Transformation Framework (JTF) 2012-2016: This was the first reform blueprint that marked the beginning of deliberate transformation of the Judiciary after the 2010 Constitution. It focused on internal capacity building, institutional reforms, efficiency improvement, accountability, service delivery enhancement, and restoring public confidence. It aimed to pull the Judiciary out of a history of paralysis into a modern service-oriented institution operating on world-class standards; Sustaining Judiciary Transformation (SJT) 2017-2021: Following the first blueprint, the SJT served as a continuation and consolidation of reforms. It concentrated on deepening service delivery reforms and institutionalizing gains made from the JTF. The SJT emphasized institutional restructuring, addressing case backlog, strengthening judicial integrity, and improving organizational efficiency to meet the rising expectations of Kenyans for justice; and finally, Social Transformation Access to Justice (STAJ) Blueprint 2023-2033: This current and most expansive blueprint builds on the achievements of the previous two. It extends the Judiciary's reach by focusing not only on internal reforms but also on social transformation through access to justice. It aims to break barriers such as geographical, economic, and structural challenges to justice access. The STAJ blueprint emphasizes inclusivity, accountability, transparency, and a multi-door approach to justice that incorporates mediation, traditional justice systems, arbitration, and conciliation. It envisions the Judiciary as a connector of justice champions with the goal of making justice a daily reality for all Kenyans, particularly the marginalized and vulnerable.

There lies on the horizon, a great contribution from our country, which we will realize when this process is completed. We will definitely be the first Judiciary under a transformative Constitution to integrate alternative justice systems and declare the triumph of a movement for justice for all. We will be a beacon for reverse learning in data, technology, enriched jurisprudence, and continued Constitution-making encounters that are ongoing on the African continent and in the Global South.

These approaches give the Judiciary an opportunity to gain popular support as it pursues the path of being pro-people and the development of a Temple of Justice, which all Kenyans can run to for people-centred justice. These approaches will breathe life into the Court Users Committees and the network of paralegals. Paralegals are critical to the future of AJS.

AJS cannot be separated from African Traditional Religions (ATR). Most Africans are syncretists, believers in more than one religion or faith.[13] The vision of the Constitution on faith/religion is progressive, namely, the building of a democratic secular state and society.[14] All religions are equal under the Constitution. Freedom of belief, opinion, religion, and conscience is protected under the Constitution. It has been a great experience for me to debate Harrison Mumia, the President of the Atheists Society of Kenya. The interaction between the AJS and ATR cannot be avoided. The political gains to be harvested are that the Judiciary will no longer be perceived as aloof, anti-people, and a captive of anti-people interests. The Judiciary will win both a secular and a religious following. The Judiciary will be the first institution in this country to show that it knows what delegated sovereign power[15] of the people is all about.

The Judiciary will be in a position to turn to the Kenyan people for its just share of the people's resources which at the moment are locked up in the pockets and coffers of the two arms of the state, namely, the Executive and Parliament.

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13 Gebeye Berihun Adugna, A Theory of African Constitutionalism, (Oxford University Press, 2021). In the book, Gebeye elaborates on syncretism as both a process and the resultant constitutional forms in Africa, highlighting adoption, rejection, invention, and transformation of diverse legal traditions into African constitutional law.

14 See Willy Mutunga, "ONE CREATOR Alternative Spiritual Movement", unpublished article (2024) that argues that there is in our Constitution, a site of struggle for a democratic secular state and society in Kenya that advocates freedom of religion and freedom from religion.

15 See articles 1,2 &3 of the Constitution. The Gen Z and Millennials Mass Action/Uprising/Revolt/ Resistance/ Revolution that stated on 25 June 2024 has confirmed that the Constitution itself has various sites of struggle that the people can invoke by making political demands anchored on the Constitutional provisions.

It will be naive to dismiss the challenges that lie ahead of this progress. The Judiciary cannot count on the political will of the elite on this journey. It is always a pleasure for me when the Judiciary is attacked by the elite. These attacks show that the Judiciary is doing something positive and beneficial to the Motherland. Until we get a political elite that sees the implementation of the Constitution as a path to social transformation, the Judiciary will have to continue its struggle for its independence (both at the institutional and personal levels) and its integrity. I see the AJS playing a pivotal role in this struggle.

Although I have said AJS and ATR can be twins of progress in the integration of the AJS in the formal legal system, conflicts are bound to occur because the current culture of seeing ATR as satanic continues. Maybe one aspect that will test this co-existence is when the Judiciary agrees to bring back into the courtrooms the traditional artefacts upon which those who believe in ATR will swear oaths in judicial proceedings.

Currently, the 2010 Constitution is available in English and Kiswahili. One of the issues raised about the development of a rich transformative jurisprudence is the issue of language. People ask how such jurisprudence is transformative when the Constitution has not been translated into our national languages. How will AJS succeed if the traditional mediators be they elders, pastors, imams, chiefs, youth or women, and paralegals are not armed with pocket Constitutions in our national languages? There is also a debate as to whether the translations should be direct from English into the national languages or from the Kiswahili version of the Constitution. This debate is yet to be settled. There has also been an argument that a translator who is well versed in both English and Kiswahili as well as her/his national language can do two translations direct from both English and Kiswahili. It is argued that the translator can use both versions of the translations from Kiswahili and English to come up with an enriched version of a translated version of her/his national language. Sub-article 259(2) states that if there is a conflict between different language versions of the Constitution, the English language version prevails. I believe the English version of the Constitution should not trump the other versions otherwise, there would be no integration and no decolonization of our justice system. I certainly hope that by the time this challenge reaches our courts, AJS will have shown the way of integration, inclusiveness, equity, and equality of all versions of the Constitution.

The integration of the justice systems, as well as cultures and religions, has its enemies. The forces that decreed that ATRs are satanic, that still marginalize our cultures and religions, are still alive. Integration and translations that I have

discussed can still be the basis for division of the people by our elite. A good example would be translations pertaining to the Luhya community in Western Kenya. Which of the languages spoken by the 18 sub-communities/nationalities will be the unifying language in this translation? As the projects seek integration, inter-faith dialogues, mutual respect and protection among communities and religions, how do we grow the constitutional vision in our preamble that states "PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation?"

We will require an alternative political leadership that at a minimum is anti-imperialist and anti-comprador, and committed to the implementation of the Constitution and the rescuing of its weaknesses as an ideological and political project. Our 2010 Constitution provides for provisions that can be framed as political demands for social transformation. Such political demands as the dismantling of the imperial presidency, the issue of sovereign debts, human rights and social justice, land, freedom of religion and freedom from religion, culture, strong institutions etc. can be anchored on the provisions of the Constitution. A glaring example of this is how the Gen Z and the Millennials breathed life in to articles 1,2, and 3 of Constitution on how delegated sovereign power can be revoked and exercised directly. The political demand that institutions that enjoy delegated power can lose it, be fired, and the sovereign power that belongs to the people of Kenya can be exercised directly by the people, heralds a regime change that is constitutional. It means that there are two parallel centres of political power that co-exist, one that is ultimate and the other delegated. The latter can be withdrawn by the people. What is direct exercise of sovereign power descries a political vacuum. When the people demand to exercise sovereign power directly, the people themselves, or through their movements and political parties, will have to have an agenda for this. And true to the decrees of the Constitution, robust participation of people will have to be undertaken to ratify such exercise of political power through the direct exercise of sovereign power.

4. Conclusion

I am very optimistic that the opportunities I have described will be utilized to fruition. I am also very optimistic that the challenges to the integration of justice systems will be overcome going forward. Justice for all Kenyans is possible. I see a future where Kenyans of all faiths will have a pocket Constitution in the various language versions of their choice. Elders and paralegals will have them. And these pocket Constitutions will sit next to the Bible, Quran, traditional armlets and pots, and other symbols of traditional African religions. They will

be in all courts and the courts will soon resurrect versions of how Kenyans who did not believe in any [conventional] faith swore to tell the truth in Court. I remember in the Kitui Court where I practised there was always a broken pot with a small stick that was used for that purpose.

I will not be surprised if, as a result of this open acknowledgement of our multiple belief systems, the so-called wizards, witches, and witchdoctors indeed Africa spiritualists and medicine people begin to display these objects openly as they practise their professions and faith hence heralding an era of religious diversity and toleration!