'Alternative Justice Systems' in Kenya: The Taskforce's Conceptual Minefield

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Abstract

This paper critiques several fundamental concepts conceived and introduced into the discourse on Alternative Justice Systems (AJS) in Kenya by the Judiciary's 'Taskforce on AJS'. To attain this objective, the authors highlight the lack of clarity on the concepts of Access to Justice (A2J), AJS, mechanisms and methods, customs and norms, law and legal systems, and repugnancy as used by the Taskforce. This paper provides clarity on the concept of A2J as 'socio-economic justice', AJS as a 'justice system' within the general legal system and serves only as an alternative to a dispute resolution mechanism, 'mechanisms' as a broader framework which contains 'methods', customs and norms which are not analogous with, and may or may not be part of, the 'law and legal system', and the 'repugnancy clause', which is innocuous and has no content until applied within a specific space-time. Within the discussion on AJS, the authors also clarify the distinctions among the concepts of 'legal system', 'justice system' and the 'judiciary'; 'state or formal' and 'non-state or informal' institutions and processes; 'judicial' and 'non-judicial' institutions and processes, and 'traditional', 'community', 'customary', 'African' or 'indigenous' systems. The paper concludes that the Taskforce's report applies these concepts in a manner that is confusing or conflated, hence, leading to a conceptual minefield.

Keywords: Access to Justice, Alternative Justice Systems, Concepts, Legal Systems, Repugnancy

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I. Introduction

By a Gazette Notice[1] under the Judicial Service Act (2011),[2] Chief Justice of Kenya, Hon. Justice Willy Mutunga, as he then was, appointed the 'multi-stakeholder' 'Taskforce on Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems)'[3] (hereafter 'the Taskforce'). The appointment was based on Article 159 of the Constitution of Kenya, 2010, which 'provides for the use of alternative forms of dispute resolution mechanisms, *including traditional dispute resolution mechanisms*'.[4] The overall objective of the Taskforce was 'to formulate an appropriate judicial policy on Alternative Justice Systems, to consider the methodology and viability of mainstreaming Alternative Justice Systems, and to suggest concrete ways of doing so'.[5] The Taskforce completed its work in 2020 when it transmitted a report to the then Chief Justice of Kenya, Hon. Justice David Maraga.[6]

In its report, the taskforce defined and, in some instances, attempted to distinguish several fundamental concepts regarding access to justice. The taskforce, along with the subsequent National Steering Committee for the Implementation of the Alternative Justice System Policy (hereafter 'NaSCI-AJS'[7]), leaves a substantial amount of confusion and or reflects unfamiliarity with the extensive information (factual or analytical) and ongoing debates on the concept of 'access to justice' that have emerged over the past thirty years both within and without Kenya.[8]

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1 No. 1339, Vol. CXVIII—No. 21, NAIROBI, 4 March, 2016, 838.

2 Act No. 1 of 2011.

3 The 19-member Taskforce was composed of Hon. Justice Joel Ngugi (Prof.), Judiciary/JTI—(Chairperson); Hon. Justice Joseph Sergon, Judiciary; Hon. Clara Otieno-Omondi, Judiciary/JTI; Hon. Florence Macharia, Judiciary; Hon. Peter Mulwa, Judiciary/RMC; Hon. Joan Irura, Judiciary; Masha Baraza (Dr), Judiciary/ODCJ; Steve Ouma Akoth (Dr), Pamoja Trust—(Vice-Chairperson); Katto Wambua, ODPP; Tom Chavangi, National Land Commission; Sheikh Ahmed Set, National Council of Elders; Commissioner Jedidah Wakonyo, KNHR; James Aggrey Adoli, Director, Community Policing; Morris Kimuli, LSK; Linet Njeri (Ms), Strathmore Law School; Anita Nyanjong (Ms), ICJ-Kenya; a representative from FIDA-Kenya; a representative from Legal Resources Foundation (LRF); Maina SN Njema. The Taskforce was given an initial period ending on 30 September 2016.

4 No. 1339, Vol. CXVIII, 838 (emphasis ours).

5 No. 1339, Vol. CXVIII, 838.

6 See 'Letter of transmittal' dated 17 August 2020, attached to the policy. See, Judiciary of Kenya, *Alternative justice systems baseline policy: Traditional, informal and other mechanisms used to access justice in Kenya*, August 2020.

7 The formation of the NaSCI-AJS was proposed in the Taskforce's report. It was established in December 2020 by the Chief Justice, and gazetted, almost a year later, on November 8, 2021, by the next - and current - Chief Justice, Hon. Justice Martha Koome.

8 There is a huge body of literature on A2J and 'AJS' (not necessarily as perceived by the Taskforce

In this analysis, the authors focus on five composite terms because of their centrality to the critical arguments and recommendations made by the Taskforce and NaSCI-AJS. These are 'access to justice' (which we refer to hereafter as 'A2J'[9]); 'AJS'; 'mechanisms and methods'; 'customs and norms' and 'law and legal systems', and 'repugnancy'. The next five sections of this work are geared towards achieving this objective and the last section is a conclusion.

II. Access to Justice

The Constitution of Kenya (2010) ('the Constitution'), by virtue of Article 48, requires the state to 'ensure access to justice for all persons'. The Taskforce's concept of Access to Justice (A2J) is as follows:

> '"Access to justice" would then have meaning from an outcome perspective as well as operation perspective. As a question of *outcome*, the taskforce understand access to justice as *realization and preservation of human dignity* as expressed in Article 28(2)[10] of CoK Constitution (*sic*). In other words, justice is said to have (*sic*) done when dignity is realized, advanced and preserved. As a *process*, access to justice *ought to* encompass *how people navigate and are treated in the many relations and transactions* (with *dignity* and *legal consequences*) that comprise *everyday life*'.[11]

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and NaSCI-AJS, which they hardly make any reference to). We list a selected few: Cappelletti M and Garth B (eds), *Access to justice: A world survey*, vol. 1, Sijthoff and Noordhoff, Alphen aan den Rijn, Milan, 1978, and *Access to justice: Emerging issues and perspectives*, vol. 2, Sijthoff and Noordhoff, Alphen aan den Rijn, Milan, 1979; MacDonald RA, 'Access to justice and law reform' 10 *Windsor Yearbook of Access to Justice*, 1990, 287, and 'Access to justice in Canada today: Scope, scale, ambitions' in Bass J, Bogart WA and Zemans F (eds), *Access to justice for a new century: The way forward*, Law Society of Upper Canada/Irwin Law, Toronto, 2005, 19; Mosher JE, 'Lessons in access to justice: Racialized youths and Ontario's safe schools' 46 *Osgoode Hall Law Journal*, 2008, 807-851; Hughes P, 'Law commissions and access to justice: What justice should we be talking about?' 46 *Osgoode Hall Law Journal*, 2008, 773-805; Galanter M, 'Why the "haves" come out ahead: Speculations on the limits of legal change' 9 (1) *Law & Society Review*, 1974, 95-160; Golub S, *Beyond rule of law orthodoxy: The legal empowerment alternative*, Carnegie Endowment for International Peace, New York, 2003; Rhode D, *Access to justice*, Oxford University Press, New York, 2004; UNGA, *Legal empowerment of the poor and eradication of poverty: Report of the Secretary-General*, UN A/64/133, 13 July 2009; Stephens M, 'The Commission on Legal Empowerment of the Poor: An opportunity missed' 1 *Hague Journal on the Rule of Law*, 2009, 132-157; UNDP, *Envisioning empowerment: A portfolio of initiatives for achieving inclusion and development*, UNDP, New York, 2009; Commission for Legal Empowerment of the Poor, *Making the law work for everyone*, UNDP, New York, 2008; and Manuel M and Manuel C, *Achieving equal access to justice for all by 2030 - Lessons from global funds*, Overseas Development Institute, 2018 – <https://www.odi.org/sites/odi.org.uk/files/resource-documents/12307.pdf> on 12 September 2020.

9 The term is also abbreviated as 'AtoJ'.

10 The version of the Constitution we are aware of, Article 28, which refers to 'Human dignity', does not have sub-Articles and – unless there is an amendment we have not noticed - provides as follows: 'Every person has inherent dignity and the right to have that dignity respected and protected'.

11 Judiciary of Kenya, *Alternative justice systems baseline policy*, 6 (emphasis ours).

The authors would struggle to convey a 'concept' of A2J arising from this rendition, except to the extent that it revolves around the *process* of attaining, and the *outcome* of, *human dignity*.[12] Significantly, assuming the authors are correct in this interpretation, 'dignity' as expressed in Article 28 of the Constitution is a single and 'very thin' right referring to being, individually or personally, *recognised* and *treated with respect*. This right is buried among the many 'human rights' in Chapter Four of the Constitution.

At this level, the authors can expand the second part of the definition ('*how people navigate and are treated* … [in] *everyday life*') to mean 'social justice', which appears to be the Taskforce's intended vision, though not clearly articulated. Even then, the *parameters* and *components* of social justice would still be unclear. Society in general (and '*everyday life'* in particular), is so complex that deeper analysis is required to clarify A2J as 'social justice'. *Beyond* the vindication of rights and pursuit of duties through dispute resolution mechanisms,[13] by social justice, are we referring to justice in our respective *primary* relationship with 'nature',[14] or to the other *primary* relationships of 'production' of the energy we 'consume' in order to exist[15] and of the production of new members of our species to ensure continuity and avoid extinction;[16] or to the *secondary* politico-legal relationships[17] or socio-cultural or moral relationships, or to mundane relationships based on aesthetics? In other words, are we referring to *specific elements* of social organisation or the *entire*, *complex, but integral* formation?

A2J is *not exclusively* a Kenyan idea. Though referred to by a variety of names, it has been, and is being, debated widely in a variety of contexts and forms. Indeed, some A2J 'programmes' being undertaken in Kenya, including the Judiciary's AJS initiative, for example, are supported by 'partners' who have identified 'alternative methods of dispute resolution' as potential solutions to challenges in the delivery of 'legal services' to the citizens, and the achievement of A2J.[18] Historically, at least from the 1970s, the concept of A2J has developed

[12] Peripherally, when one uses the word 'ought to', it suggests not what is, but what should be – an ideal. It is not clear what the Taskforce is contrasting this with, that is, what the 'what is' is.

[13] What we refer to as 'adjudicatory justice'.

[14] 'Environmental justice'.

[15] 'Economic justice'.

[16] 'Reproductive justice'.

[17] 'Political justice'.

[18] For example, the Taskforce was variously supported by the European Union through the United Nations Office on Drugs and Crime; GIZ; The World Bank; the Ford Foundation, the International Development Law Organization (IDLO), and the United Nations Food and Agriculture Organization (FAO), which espouse the idea of 'legal empowerment of the poor' as a concept of A2J. The Programme for Legal Empowerment and Aid Delivery in Kenya (PLEAD), which brings together 'criminal justice institutions in Kenya', is a programme of the European Union.

from a judiciary and state-centric focus of improving access to judicial and quasi-judicial services, also referred to as '*rule of law (RoL) orthodoxy'*, through '*social justice'*,[19] to the *'legal empowerment (LE)'* concept. LE, as a broad concept of A2J, has a number of strands, which include 'Micro-justice',[20] 'LE',[21] 'Legal empowerment of the poor (LEP)',[22] and 'equal access to justice (EA2J'). [23]

Although the Taskforce's concept settles at the very narrow 'RoL orthodoxy', it is the authors' considered view that a *relevant*, *realistic*, concept of A2J must encompass the challenges which form the basis of socio-economic *injustice*. It must be wide enough to cover injustices—that is, *lack of access*—arising from our relationship with the environment; our relations of production, and our politico-legal, socio-cultural, moral and aesthetic relations. These are the spaces where *disempowerment* resides. In this context, A2J means access to *socio-economic justice*, and justice in *every* important *facet* of *social relations*. This concept may look unrealistic, or even *idealistic*. If it does, this is only *apparent*. The trajectory of the development of the concept of A2J indicates that it has reached a point where it has a *socio-economic character* and *content*. However, it still lacks a clear, *systemic*, connection between *dis*empowerment and capitalism, which is what A2J as *access to socio-economic justice* demands.[24] Capitalism constrains (especially)

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19 The concept of A2J which attempts to connect legal issues and disputes to the society in which they arise.

20 The concept which focuses on dispute resolution through the use of local resources.

21 The concept which refers to the use of legal services and development activities to increase the ability of disadvantaged social groups to control their lives.

22 The approach which the Commission for Legal Empowerment of the Poor defines as the 'process through which the poor become protected and are enabled to use the law to advance their rights and their interests', in UNDP, *Making the law work for everyone*, 2008, 25.

23 The approach to A2J which, apart from adopting the concept of LEP, additionally emphasises *fairness* and *inclusiveness*.

24 Some 'legal empowerment' proponents point at 'socio-economic' or 'systemic' barriers to A2J and criticise 'the market' and liberal capitalism. They, however, do not go as far as critiquing capitalism as an *intrinsic* and *fundamental* barrier to A2J, and as far as *calling for its transformation*. Examples are Golub S and McQuay K, 'Legal empowerment: Advancing good governance and poverty reduction' in *Law and policy reform at the Asian Development Bank*, Asian Development Bank, Manila, 2001; Alffram H, *Equal access to justice: A mapping of experiences*, Swedish International Development Agency, 2011 – <https://www.sida.se/contentassets/8d1d0ea3d9464589af9259c07937ce35/equal-access-to-justice-a-mapping-of-experiences_3124.pdf> on 12 September 2020; USAID Center for Development Information and Evaluation, *Linking democracy and development: An idea for the times*, USAID, Washington DC, December 2001; Goetz AM and Jenkins R, *Reinventing accountability: Making democracy work for human development*, Palgrave Macmillan, Basingstoke, UK, 2005; Trubek DM and Santos A (eds), *The new law and economic development: A critical appraisal*, Cambridge University Press, Cambridge, 2006; Palacio A, *Legal empowerment of the poor: An action agenda for the World Bank*, The World Bank, Washington DC, 2006; Cotula L, *Legal empowerment for local resource control: Securing local resource rights within foreign investment projects in Africa*, IIED, London, 2007; and Gauri V and Brinks D (eds), *Courting social*

poor and marginalised people's *equitable access* to the environment, productive property, and the 'market', and to *equitable* politico-legal, socio-cultural, moral and aesthetic relations.[25] Thus, we need to identify ways of re-organising socio-economic relationships to attain and sustain access to *socio-economic justice*. This is the stage that current concepts of A2J and attendant reform agenda, including the Taskforce's and NaSCI-AJS' social analysis and *proposed* 'transformation', have not reached.

III. Alternative Justice Systems

While a comprehensive concept of 'Alternative Justice Systems (AJS)' in the Taskforce report seems hard to come by, the authors wish to clarify that this is not the result of a lack of diligence on our part.[26] Whereas it is possible to develop a comprehensive concept of AJS from the point of view of the Taskforce, this is made difficult by the conflation, and very eclectic use, of a number of concepts in the report, for example, (i) 'non-state', 'informal', 'traditional', 'community', 'customary', and 'African'; (ii) 'lived realities', 'everyday lives', and 'disputes'; (iii) 'social' and 'legal' systems; (iv) 'mechanisms of justice' and 'justice systems'; and, (v) AJS as a 'justice system' and a 'dispute resolution mechanism'. Based on the foregoing, it seems most prudent to pick out the concept provided on the

justice: Judicial enforcement of social and economic rights in the developing world, Cambridge University Press, Cambridge, 2008.

[25] The historical and current body of literature which deals with socio-economic formations begins with the C19 classics of *political economy*. It includes Mill JS, *Principles of political economy*, Longmans, London, 1849 (1936); Smith A, *An inquiry into the nature and causes of the wealth of nations*, PF Collier and Sons, New York, 1902; Ricardo D, *On the principles of political economy and taxation*, Batoche Books, Kitchener, Ontario, 1817; Marxist Internet Archive, 'Marx's comments on Mill's book' – <http://www.marxists.org/archive/marx/works/1844-mil/index.htm> on 27 October 2019; Marx K, *Capital*, Vols. I and II, Progress Publishers, Moscow, 1888; Engels F, 'The origin of the family, private property and the state' in Marx/Engels, *Selected works*, Vol. III, Progress Publishers, Moscow, 1884; de Soto H, *The mystery of capital: Why capitalism triumphs in the West and fails everywhere else*, Black Swan, London, 2000; Birch K and Mykhnenko V (eds), *The rise and fall of neoliberalism: The collapse of an economic order?*, Zed Books, New York, 2010; Birch K, 'Neoliberalism: The whys and wherefores … and future directions' 9 (7) *Sociology Compass*, 2015, 571–584; Reiff MR, *Exploitation and economic justice in the liberal capitalist state*, Oxford University Press, Oxford, 2013; Kocka J, 'Capitalism and its critics: A long-term view' in Bosma U and Hofmeester K (eds), *The lifework of a labor historian: Essays in honor of Marcel van der Linden*, Brill, Leiden, 2018, 71-89; and D'Attoma J, 'Transnational hegemony and the formation of a transnational capitalist class' – <https://www.academia.edu/9795748/Transnational_Hegemony_and_the_Formation_of_a_Transnational_Capitalist_Class> on 3 December 2022.

[26] At some point, there is a very definite and clear indication that AJS is viewed as a *dispute resolution mechanism* ('Alternative justice systems baseline policy', 5). This idea appears in many parts of the report. The clarity is, however, lost through the conflation of various terms as discussed below.

website of the NaSCI-AJS, though the authors will make attempts to introduce some distinctions amongst the more essential terms.[27]

The website defines AJS as:

> 'the comprehensive *organic*, *non-state* mechanisms of *laws, norms, customs and social and legal systems* which govern and regulate the *entire spectrum of activities and lives of individuals from birth to death*. They are constituted, applied and enforced by the people themselves in their own communities. They include dispute resolution mechanisms which we call AJS mechanism which *does not usually involve using state courts*. Justice (Prof) Joel Ngugi, Presiding Judge Nakuru Law Courts'.[28]

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[27] Many writers, including Kenyan scholars, have commented on these 'systems' and attempted to clarify the differences among various related terms. Examples include Helbling J, Kälin W and Nobirabo P, 'Access to justice, impunity and legal pluralism in Kenya' 47 (3) *The Journal of Legal Pluralism and Unofficial Law*, 2015, 329-349; HiiL, *Justice needs and satisfaction in Kenya: Legal problems in daily life*, 2017 –<https://www.hiil.org/wp-content/uploads/2018/07/hiil-report_Kenya-JNS-web.pdf> on 12 September 2020; Harper E, *Customary justice: From program design to impact evaluation*, International Development Law Organization, Rome, 2011; Penal Reform International, *Eight years on… a record of Gacaca monitoring in Rwanda*, Penal Reform International, 2010 – <http://www.penalreform.org/wp-content/uploads/2013/05/WEB-english-gacaca-rwanda-5.pdf> on 27 December 2020; Human Rights Watch, 'Rwanda: Mixed legacy for community-based genocide courts: Serious miscarriages of justice need national court review' *Human Rights Watch*, 2011 – <https://www.hrw.org/news/2011/05/31/rwanda-mixed-legacy-community-based-genocide-courts> on 27 December 2020; International Association for Humanitarian Policy and Conflict Research, *Access to justice & peace-building processes: Traditional and informal justice systems*, 2007-2009 – <http://www.peacebuildinginitiative.org/index.cfm?pageId=1692, 296-360> on 1 July 2022; IDLO, *The Judiciary and International Commission of Justice, Report of the East, Horn and Southern African regional forum on alternative dispute resolution & customary and informal justice*, March 2–3 2020, Safari Park Hotel, Nairobi, Kenya; Muigua K, 'Institutionalising traditional dispute resolution mechanisms and other community justice systems', April 2017 – <http://kmco.co.ke/wp-content/uploads/2018/08/Institutionalising-Traditional-Dispute-Resolution-Mechanisms-and-other-Community-Justice-Systems-25th-April-2017.pdf> on 4 March 2023; Kariuki F, 'Community, customary and traditional justice systems in Kenya: Reflecting on and exploring the appropriate terminology' 3 (1) *Alternative Dispute Resolution*, 2015, 163-183; Kinama E, 'Traditional justice systems as alternative dispute resolution under Article 159(2)(c) of the Constitution of Kenya, 2010' 1 (1) *Strathmore Law Journal*, 2015, 22–40; Sergon JK, *Integrating traditional dispute resolution mechanisms with the formal justice system in Kenya: A case study of the Kipsigis community*, PhD Thesis, University of Nairobi, June 2017 – <http://erepository.uonbi.ac.ke/bitstream/handle/11295/155682/Sergon%20J_Integrating%20Traditional%20Dispute%20Resolution%20Mechanisms%20With%20the%20Formal%20Justice%20System%20in%20Kenya%20a%20Case%20Study%20of%20the%20Kipsigis%20Community.pdf?sequence=1> on 11 March 2023; Okalo AS, *Mainstreaming alternative justice systems for improved access to justice: Lessons for Kenya*, LLM Dissertation, University of Nairobi, 2019 – <http://erepository.uonbi.ac.ke/bitstream/handle/11295/108728/Okalo_Mainstreaming%20Alternative%20Justice%20Systems%20for%20Improved%20Access%20to%20Justice-lessons%20for%20Kenya.pdf?sequence=1&isAllowed=y> on 11 March 2023; and Forsyth M, 'A typology of relationships between state and non-state justice systems' 56 *Journal of Legal Pluralism and Unofficial Law*, 2014, 67–112.

[28] — <https://ajskenya.or.ke> on [enter access date] Justice Ngugi was the Chair of the Taskforce and now the Chair of NaSCI-AJS.

This definition can be contextualised by providing general definitions of the concepts of 'legal system', 'justice system' and 'judiciary'. Here, a funnel approach, beginning with the widest term, seems the best path of pursuit. Notably, there may be controversies regarding the definitions. Nevertheless, the authors may adopt working definitions for the current purposes.

A *legal system* is the *entire system*, the organised and dynamic structure, of overarching principles (loosely, 'philosophy', 'approach' or 'perspective'); laws and legal principles; institutions; and, practices, which regulate social behaviour in a polity, whether provincial, national, regional, or global. This, inevitably, includes the historical *rise and development* of a legal system into '*a tradition*', and its trajectory of development, since it is *dynamic*. The components of a legal system, therefore, include basic underlying values and principles; laws and the processes of their generation; institutions that generate and implement the laws; processes of implementation; institutions of dispute prevention and resolution; dispute prevention and resolution processes; adjudication-implementing institutions and processes; the behavioural practices that have been built over time; (probably controversially) the citizens' perceptions and attitudes towards the entire system; and, how all these *are developing*.

An important point to make in passing is that all these components of this organised and dynamic structure that make up the legal system are not isolated from, but are influenced by and, in turn, influence, the other elements of society—the economy, politics, socio-culture, morality and aesthetics—in their dialectical relationships. A point often forgotten in all this is that the legal system is *conceptual* in character and that its *reality* is expressed in interpersonal relationships, the relationships among human beings within the legal system in terms of power, authority, capacity, and jurisdictional roles and practices.[29]

A *justice system*[30] is the *sub-system* of the 'legal system' which encompasses the normative and institutional framework, processes and practices in the *implementation or enforcement* of laws, *prevention and arbitration* of disputes and *enforcement* of arbitral decisions. Thus, its components are the police and other security-related institutions; the judicial, quasi-judicial and analogous institutions,

[29] See, generally, Stychin CF and Mulcahy L, *Legal methods and systems*, 4ed, Sweet & Maxwell, London, 2010; Ambani J and Mbondenyi MK, *The new constitutional law of Kenya: Principles, government and human rights*, LawAfrica Publishing, Nairobi, 2013; Winters B, *Excellence of the common law compared and contrasted with civil law: In light of history, nature, and scripture*, Mountain Press, 2006; and Rene D and Brierley JEC, 'Major legal systems in the world today' – <https://lawfaculty.du.ac.in/files/course_material/Old_Course_Material/I%20Term%20Jurisprudence-I%20(Legal%20Method)%20July%202016.pdf> on 25 September 2022.

[30] In some cases referred to as the 'justice sector'.

and the penal and other ('aftercare') institutions, including their *normative framework, processes and practices*.[31] Furthermore, in concrete terms, the concept of interpersonal relationships as defined above, finds itself at the fore.

The *judiciary*, a *sub-system* of the 'justice system', comprises the institutions of dispute resolution, that is, the system of courts, tribunals and analogous institutions with the *formal* mandate to deal with disputes arising from alleged breaches of the law. In the form of a *judicial system*, it includes the normative frameworks, processes, and practices of the judiciary.

Considering the above nomenclature, AJS falls within the ambit of 'justice system' and, consequently, means the *alternative* normative and institutional framework, processes, and practices in the implementation or enforcement of law, prevention and arbitration of disputes and enforcement of arbitral decisions. There is, however, a caveat: *to the extent permitted (or not prohibited), recognised, accepted or tolerated (or ignored) by the legal system*. Thus, it is the second part of the definition of AJS on NaSCI-AJS' website that fits within this. The first part is too broad to fit within the concept of a 'legal system' as defined. Excluding the website's fluid and imprecise content,[32] it is, probably, closer to the concept of (*alternative*) 'socio-economic system'.

The other terms used by the Taskforce and many commentators in this area, very often interchangeably, are 'state/non-state'; 'formal/informal'; 'non-judicial/judiciary and 'judicial/judiciary'; and, 'traditional', 'community', 'customary', 'African' or 'indigenous'. Granted, the terms are not amenable to precise definitions, and commentators are not in general agreement in that regard, as can be surmised from the literature. Nevertheless, broad definitions may be posed, without getting too much into the intricacies, only to provide contextual clarity.

State or formal justice systems are those which are *established* by the state through its formal regulatory system, while *non-state or informal* ones are those

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31 See, UNDP, *Programming for justice: Access for all, a practioner's guide to a human rights-based approach to access to justice*, UNDP, Bangkok, 2005; The World Bank, 'Justice Systems' — <https://pubdocs.worldbank.org/en/988591611674066944/Justice-System.pdf> on 11 March 2023, 317, and Hammergren, L, Reiling, D, and Di Giovanni, A, *Justice sector assessments – A handbook*, World Bank, Washington DC, 2007 — <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JSAHandbookWebEdition_1.pdf> on 11 March 2023.

32 For example, 'laws, norms, customs and social and legal systems which govern and regulate the entire spectrum of activities and lives of individuals from birth to death'. First, 'laws' are part of the 'legal system'. Second, 'lives of individuals' include the 'spectrum of activities'. Third, *no system*, no matter how robust, has ever regulated *all* - 'the entire spectrum of' - 'activities and lives … from birth to death'!

established by entities (including 'communities') outside the state system through non-state *practices and norms*. Even though the latter might be outside the state system, they must still *not* contradict the general regulatory framework (the *legal system*), or they may court 'illegality'.

The *judiciary*, as defined above, is that part of the justice system that has the *formal* mandate to deal with disputes within a polity. Institutions that do not have this mandate and operate outside the judiciary are *non-judicial*.

The concepts of *'traditional', 'community', 'customary', 'African' or 'Indigenous'* pose the most intractable challenges, controversies and even confusion in this field of legal and justice systems.[33] In the authors' view, '*traditional*' stands for *historically long-standing* and or *embedded in a milieu* (or social environment). In the context of Kenya and AJS, it refers to the justice systems of the 'African' communities arising from their *customs and norms* as they regulated and regulate the social behaviour of those who belong to the community, beginning centuries before the intervention of colonialism. With the rise or introduction of *the state* (in the 19th Century in respect of Kenya, hereafter 'C19'), some of these customs and norms become recognised or defined as 'Customary law'. It is in this sense that one could say that AJS, in its *traditional* or *customary* form, applies 'Customary law' in dispute prevention and resolution. However, the customs and norms are not static, due either to internal dynamics or to influences from other cultures (other communities or state-related), especially with the emergence and strengthening of the intervention of the capitalist state and accompanying historical changes of 'modernity'.

Indigenous is not a typical term used in Kenya when referring to legal, justice and judicial systems, including AJS; it is hardly used in literature in this area. It appears that it is more commonly used when one refers to *knowledge* ('*indigenous* knowledge'), especially with reference to *environmental governance* and *medicinal information*. However, outside the Kenyan context, it has a different connotation.

At the international level, there are two important instruments on indigenous peoples: the United Nations *Declaration on the Rights of Indigenous Peoples*[34] and the International Labour Organisations (ILO's) *Indigenous and Tribal Peoples Convention,*

[33] We have referred to the large body of literature on these concepts, only a small number of which we cite. They form the context and, in some cases, generally relate to the 'content' of our concepts. Because we constitute these 'definitions' from our *dialectical materialist perspective* and *understanding* and do not draw any of them directly from the literature, we do not refer to specific writings.

[34] Annex to Resolution 61/295, adopted at the 107th Plenary Meeting of the General Assembly, 13 September 2007.

1989.[35] The Declaration does not define 'indigenous peoples', but the Convention does.[36] In the authors' view, the term 'indigenous' seems to, in this context, apply to situations where 'tribal' or 'ethnic' groups were historically uprooted from their traditional lands by invading colonisers, confined to specific 'reservations' or areas, and largely isolated from both other sections of the national community and national development in their country. Consequently, they largely retained their own identity in the economic, political, socio-cultural, and moral spheres, including regulatory rules and institutions—but with the overarching regulation by the state's legal system. The most typical loci of indigenous peoples are Canada, the Americas,[37] and Australasia.[38]

As the reader can glean from the above discussions, the concepts are quite fluid and overlap quite frequently. However, it is equally trite to state that they have *core* attributes that render them distinguishable from each other. In this context, the use of the term 'AJS' by the Taskforce in a generic manner and the interchangeable use of the other terms, creates confusion and impedes critical analysis.

IV. Mechanisms and Methods

In the AJS discourse, a distinction between *mechanisms* and *methods* ought to be made. In terms of categorisation, mechanisms occupy a comparatively higher position and cover a wider array of concepts than methods. This means that they include perspectives or approaches, principles, laws, institutions, processes, *methods,* and practices involved in a justice system. This is what AJS *mechanisms* generally, and traditional dispute resolution *mechanisms* (TDRMs) specifically, denote. They are, comparatively, more of 'systems' than methods. *Methods* are simply the set of *ideas* used and *steps* taken in the resolution of disputes, generally or in specific cases. Adversarial and inquisitorial adjudication, arbitration, mediation, conciliation, and the various other permutations, are examples of such ideas and ways (methods). Hence, just like AJS generally and TDRMs in particular may share some of the methods, they may both, similarly, share some with *state* justice systems. The 'systems' may even 'borrow' from each other through cross-influence.

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35 Convention 169 — <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> on 17 March 2023

36 Article 1, *Indigenous and Tribal Peoples Convention* (1989) C169.

37 United States and South American countries.

38 Australia, New Zealand and neighbouring Pacific Ocean islands. See also Forsyth, 'A typology of relationships between state and non-state justice systems'.

V. 'Customs and Norms' and 'Law and Legal Systems'

Right from the beginning of its historical analysis, the Taskforce makes a crucial anthropological statement that it is 'no simplification to say that each society in *pre-colonial* Kenya had a *legal system*, while some ethnic groups had multiple systems operating side by side.' It goes on to claim that, according to *anthropologists and legal historians*, the *legal systems* were 'informal, flexible, unwritten and un-codified procedures; relied on community participation; characterized by a primary focus on reconciliation and reparation'. This is a conceptual leap from the statement in the preceding paragraph where there is a reference to *'justice systems'*.[39]

In fact, 'anthropologists and legal historians' make a distinction between *pre-state* 'justice' systems on the one hand, and 'legal' systems on the other. The former is established to have been part of human *society* from its emergence, arising from *organic* social norms and customs on acceptable and reprehensible social behaviour. In these systems, individuals recognised as having wisdom, strength of character, understanding of the society or community, and the capacity to steer society harmoniously gained the role of 'elders'. Indeed, the Taskforce is right that these systems were 'flexible, unwritten and un-codified', though the consequences of being found in breach of the norms and customs were more varied than 'reconciliation and reparation'. They often included disapprobation, denial of certain socio-economic entitlements, banishment and community service. Those who have critically studied the emergence of social formations and their evolutionary and revolutionary development situate *law* and *legal* systems in tandem with that of *the state*. In the context of Kenya, the authors note that, although customs and norms existed, and continue to exist with dynamic changes, these were recognised as 'customary *law*' by the introduction of the colonial *state* in the late C19.

Lewis Morgan was one of the earliest anthropologists to comprehensively study and identify the earlier, *pre-state*, forms of human social existence and *evolution of society*, typically (and everywhere) characterised by low levels of development of productive forces and, thus, production; a largely appropriative but *egalitarian economy*, and *communal forms of socio-cultural organisation*.[40] John Locke,

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[39] Judiciary of Kenya, 'Alternative justice systems baseline policy', 1 (emphasis ours).

[40] Morgan HL, *Ancient society: Researches in the lines of human progress from savagery through barbarism to civilisation*, Charles H. Kerr & Co, Chicago, USA, 1906; Morgan HL, *Systems of consanguinity and affinity in the human family*, Smithsonian Institution, Washington, USA, 1871; and Morgan HL, *Houses and house-life of the American aborigines*, Government Printing Office, Washington, USA, 1881.

whose 'social contract' theory the Taskforce embraces in its argument on the citizen's autonomy,[41] called this the *state of nature*:

> 'Man lived in *a state of nature in which man had complete liberty to conduct one's life as one best sees fit*. This state of nature was, however, limited by *natural* law. This state of nature was *pre-political* but *not pre-moral*'.[42]

The Taskforce buttresses this point when paraphrasing Locke:

> 'Having created a *political society* and *government* through their consent, human beings then gained three things, which they *lacked* in the *state of nature*: *laws, judges to adjudicate laws, and the executive power necessary to enforce these laws*'.[43]

Building upon the work of Morgan and other C19 evolutionary anthropologists, Engels, a contemporary of Morgan, demonstrated that the rise of a central authority (apparently) standing above the rest of society, heralded the *state*, having eroded and thrown into disarray the existing 'gentile constitution' which was based on rules and institutions developed collectively by the tribes. As he put it:

> 'This so disturbed the regulated functioning of the organs of the gentile constitution that a remedy was already needed in the Heroic Age. A constitution, attributed to Theseus, was introduced. The main feature of this change was the *institution of a central administration* in Athens, that is to say, some of the affairs that hitherto had been conducted independently by the tribes were declared to be common affairs and transferred to a *general council* sitting in Athens. …This gave rise to a *system of general Athenian popular law*, which *stood above the legal usages of the tribes and gentes*. It bestowed on the citizens of Athens, as such, *certain rights and additional legal protection even in territory that was not their own tribe's*'.[44]

Thus, the conflation of pre-state customs and norms with law and legal systems is *unhistorical*. Of course, the claim is often made that this argument denies 'African' customs and norms the 'higher status' accorded to the 'Western' state and law. However, proponents of this view would struggle to explain the existence of these customs and norms in *pre-state Western societies*. They would also find it difficult to account for the fact that, even today, there exist customs and norms that have not been accorded the force of law, and informal institutions that the law has not recognised, not only in Africa, but elsewhere, including the 'western' ones. If we accept that customs and norms, laws, legal systems, and the state, are *social constructs*, it means that they did *not* arise with human beings and

41 Judiciary of Kenya, 'Alternative justice systems baseline policy', 34.

42 Locke, J, *Two treatises of government*, Yale University Press, London, 2003, as quoted in the AJS policy.

43 'Alternative justice systems baseline policy', 34 (emphasis ours).

44 Engels, *The origin of the family, private property and the state*, 108-109 (emphasis ours).

their societies as part of nature, although they were *partly shaped by* it. Therefore, one must place their emergence in the development of *social organisation*, and under certain precise *social conditions*. The authors theorise that, anthropologically and sociologically, it simply *cannot be* that a generalised *organically consensual* system of customs, norms and institutions arose at the *same time*, in the *same place* and under the *same social conditions* as the *coercive* system of laws, legal systems and the state. This would be a highly unusual (*social*) evolutionary process.

VI. The Concept of 'Repugnancy'

It does not seem to occur to some commentators on the 'repugnancy clause', including the Taskforce, that the clause is itself *innocuous* and has *no content*. It does not tell readers what 'justice' and 'morality' are. It is left to those who are applying it in discourse or decision-making to determine, at any historical moment, what the content is. That is why the phrase appears in a *variety of historical moments and documents with ease*. The colonial courts may have applied *their view* of the standards of 'justice and morality' (inevitably, with a British 'lens'). Just as much, post-1963, -1967, -1969 and -2010 courts have had, and have, a similar authority and *opportunity* to apply *their 'Kenyan', 'African' or 'community' view*. This assumes that it is possible to identify a *unified standard* in this *variegated land* of *capitalist* Kenya, with regional or community (ethnic), gender, sex, age and, most importantly, class, differences and orientations.

It is notable that, after spending about three pages kicking a non-existent horse and, ultimately declaring the constitutional provision a redundancy, the Taskforce declares that it has invented a new 'lens' through which the clause, as used in the 2010 Constitution, must be seen[45]. The constitutional provisions in general, and the Bill of Rights in particular, are just one set of factors, albeit significant, that can be used to *give content* to the clause. One may be reminded that the repugnancy clause is no different from the clause that says that any law which is contrary to the Constitution is null and void.[46] This clause is equally innocuous. Whether a particular law is, or is not, is *not determined* by the Constitution. Such determination is left to a court authorised to make it, after examining that law in light of the constitutional provisions. Consequently, what the crusaders should be *intellectually* targeting are *not* even *those who interpret and apply* the two clauses in space-time, but the *interpretations* (the *ideas*), and the *results* they produce.

[45] Judiciary of Kenya'Alternative justice systems baseline policy', 21.

[46] Article 2(4), *Constitution of Kenya*, (2010).

The authors wish to add that *all* the laws that operate in Kenya, except the Constitution, are authorised with *conditionalities*. All are subject to the Constitution. Common Law, Equity and Statutes of General Application (SOGA) are subject to written laws and 'apply so far only as the circumstances of Kenya and its inhabitants permit' with necessary qualifications. SOGA are, in addition, subject to the cut-off date of 12 August 1897. Customary Law is applied where two or more parties are subject to or affected by it, applies only in specific personal matters, and is subject to the 'repugnancy clause'. Islamic Law applies only in personal matters where both parties profess the Islamic religion. Islamic criminal law does not apply.[47] There is *no formal hierarchical relationship* between Customary Law and the English-sourced laws (contrary to the Taskforce's assertion[48]), only between it and the Constitution and other written laws. The two sets of laws apply in different jurisdictional areas even by statute. Besides, the fact that the English-sourced laws are in section 3(1)(c) and Customary Law in a subsequent section 3(2) of the Judicature Act is *no evidence* of such hierarchical relationship. In any case, the Court of Appeal long ago (1987) declared that the two 'great laws' are 'complementary'.[49]

VII. Conclusion

As the authors conclude this analysis, they urge that, no matter how difficult it is to define concepts used, or how controversial, fluid or confusing they are, it is still necessary, and useful, to provide and use a *consistent working definition*, even if *tentative*. In this way, those applying the concepts will avoid creating

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47 Section 3, *Judicature Act,* (CAP 8) and Articles 159 and 170, Constitution of Kenya, 2010.

48 Judiciary of Kenya, 'Alternative justice systems baseline policy', 4. It states thusly: 'Doctrinally, the Judicature Act placed African Customary Law hierarchically as the lowest source of law after the Constitution, Kenyan Statutes, English Statutes of General Application, and Common Law', 4.

49 In the case of *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR:
'*The place of customary law as the personal law of the people of Kenya is complementary to the relevant written laws. The place of the common law is generally outside the sphere of personal customary law with some exceptions. The common law is complimentary to the written law in its sphere*. Now suppose that exceptionally there is a difference between the customary and the common law in a matter of a personal law. First of all, if there is clear customary law on this kind of matter, the common law will not fit the circumstances of people of Kenya. That is because they would in this instance have their own customary laws. Then suppose by misfortune that in this instance those customs were held to be repugnant to justice and morality, and were thus discarded, there would be the common law to fall back upon, at least in a modified form. *In this way these two great bodies of law, for that is what they truly are, complement each other. They may be different but the way to operate them is to use them as complementary to each other without conflict* as laid down in section 3 of the Judicature Act (cap 8)', 6— http://kenyalaw.org/caselaw/cases/view/7898 on 18March 2023 (emphasis ours).

confusion, or unnecessary controversy. It is also difficult to make logically precise recommendations or proposals when concepts lack clarity or are conflated. Whereas the Taskforce is done and dusted, so to speak, the majority of its members are members of NaSCI-AJS and will, the authors suppose, continue to be guided by the recommendations within the report. It is, therefore, imperative that going forward, NaSCI-AJS progressively clarifies any of these or any other, concepts it uses to avoid the kind of *conceptual minefield* that the Taskforce's report may have created, which may be difficult for it and others to navigate.