Reflections on the "Autonomous Alternative Justice System Institutions" in Kenya's Alternative Justice Systems Policy Frameworks

*Francis Kariuki / Enyinna Sodienye Nwauche**

Abstract

On 27th August 2020, the Kenyan Judiciary together with its partners formally launched the AJS Framework Policy and the AJS Baseline Policy (AJS Policy Frameworks) which coincided with the ten-year anniversary of the promulgation of the 2010 Constitution of Kenya. The launch of the policy was awaited with huge expectations, as it was hoped that it would provide an appropriate framework for the operationalisation of "Autonomous Alternative Justice System" (AAJS) which is one of the institutions approved by the AJS Policy Frameworks to anchor Kenya's emergent alternative justice system. This paper evaluates some of the options adopted by the AJS Policy Frameworks in the conception and implementation of the AAJS. Comparative lessons from the jurisprudence of 'customary arbitration' in Nigerian and Ghana, which are similar to the AAJS, are utilised to argue for more care and caution in the operationalisation of the AAJS Institutions in Kenya.

I. Introduction

One of the enormous challenges of liberal modern African States is the nature and extent to which they will accept and accommodate the outcomes of the settlement of disputes by traditional justice systems. Traditional justice systems have been described using diverse tags, in different countries, such as 'customary arbitration' in Nigeria[1] and Ghana,[2] 'Traditional Dispute Resolution Mechanisms' (TDRM) in Kenya[3] as well as the recently named Autonomous Alternative Justice Systems (*AAJS*) by the AJS Frameworks. However, in this work we have adopted the term 'African Traditional Justice Mechanisms' (ATJMs) as a

* *Francis Kariuki,* Lecturer, Strathmore Law School, Strathmore University, Kenya (kariukifrancis06@gmail.com).

Enyinna Sodienye Nwauche, Professor, Nelson Mandela School of Law, University of Fort Hare, South Africa (enwauche@ufh.ac.za).

1 See for example *Agu v Ikewibe* (1991) 3 NWLR (Pt. 180) 385.

2 See for example B. Koblavie and C. Nyinevi, "A Review of the Legislative Reform of Customary Arbitration in Ghana", in: 45 (2019) *Commonwealth Law Bulletin,* p. 587.

3 See for example Francis Kariuki, "Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology", in: *Alternative Dispute Resolution Journal* (2015), pp. 163–183.

broad canopy to cover such mechanisms in different African States. ATJMs are widespread, embraced by many Africans and are generally customary law-based mechanisms.

One common feature of ATJMs is that they are generally outside the hierarchy of state courts but engage with state courts when parties who appeared before them seek the assistance of courts in the recognition, review or enforcement of ATJMs decisions. Accordingly, ATJMs are not customary courts[4] that are designed as part of the state judiciary in many African States[5] and that apply customary law in the main.[6] It may be stated also that they are not religious courts such as Sharia courts in Nigeria[7] and Khadhi Courts in Kenya[8] even though in countries like Nigeria[9] and Kenya[10] dispute mechanisms based on African Traditional Religion (ATR) have been recognised as 'customary arbitration' and Traditional Dispute Resolution Mechanisms (TDRMs) respectively. Since ATJMs are part of customary law, their efficacy is often tied to the rules of recognition and enforcement of the outcomes of their deliberations by state courts especially where a party to an ATJM challenges the outcome. Thus, unless state courts accept an outcome of an ATJM, it remains inchoate unless it is executed and obeyed by the parties to the ATJM. However, most ATJMs have enforcement mechanisms (social pressure, customary sanctions) that ensure compliance with their decisions without the necessity of resorting to courts. This explains why in most countries, such as Kenya, statistics show that 95 % of disputes are generally resolved outside courts.[11]

As stated above, African States continue an inevitable engagement on the relationship of ATJMs to their legal systems. For example, Nigeria has fashioned rules of recognition[12] by which outcomes of customary arbitration are cognisable before Nigerian courts where they act as estoppel and a complete answer to a plaintiff's case. Ghanaian courts for long also articulated a framework of principles to adjudge the validity and enforcement of customary arbitration before the promulgation of the Alternative Dispute Resolution Act 2010, through which customary arbitration applies within a statutory framework that learned commentators have argued is a codification of the common law rules on customary

4 Customary courts are recognised usually by legislation in countries like Nigeria. See for example, the Customary Courts Law of Bayelsa State, Chapter C17 Laws of Bayelsa State 2006.

5 See for example the Customary Courts Act Botswana, Cap 04:04.

6 The application of customary law is not a significant distinguishing characteristic.

7 See section 275 of the Constitution of the Federal Republic of Nigeria that recognizes Sharia Courts of Appeal. See also AA Oba "Islamic Law as Customary Law: The Changing Perspective in Nigeria", in: 51 (2002) The International and Comparative Law Quarterly, p. 817.

8 See Constitution of Kenya, 2010, art. 170.

9 See for example the cases of *Onyenge v Ebere* [2004} All FWLR (Pt 219) 981 that have turned on juju oath. See further A A Oba "Juju Oaths in Customary Arbitration and their Validity in Nigeria", 52 (2008) Journal of African Law 139.

10 Constitution of Kenya 2010, art. 159 (2)(c) and (3).

11 Justice Needs and Satisfaction in Kenya 2017-Legal problems in daily life available at https://www.hiil.org/wp-content/uploads/2018/07/hiil-report_Kenya-JNS-web.pdf.

12 See for example the case of *Agu v Ikewibe* (note 1).

arbitration.[13] Kenya has signalled a major intent to 'revolutionise' its ATJMs. On 27th August 2020, the Judiciary together with its partners formally launched the AJS Framework Policy and the AJS Baseline Policy (AJS Policy Frameworks).[14] The launch coincided with the ten-year anniversary of the promulgation of the 2010 Constitution of Kenya and the launch of the policy was awaited with huge expectations, as it was hoped that it would provide a proper policy framework for the operationalisation of Traditional Dispute Resolution Mechanisms – (TDRMs) which are commonly anchored on customary law but described as Autonomous AJS Institutions (AAJS) in the AJS Policy Frameworks.

This article addresses salient issues in the vision set out in the AJS Policy Frameworks for AAJS against the background of the practice of TDRMs, which as stated above is identical to the AAJS before the Kenyan Judiciary launched the AJS Policy Frameworks. These issues include the manner in which Kenyan courts have evaluated and recognised AAJS. Relevant here is whether Kenyan courts defer to the outcomes of AAJS, and if so, whether this deference is total or limited. If it is limited, it is important to determine the relevant principles that guide Kenyan courts. In other words, the question to ask is whether Kenyan courts accept all or some of the outcomes of TDRMs. Another related question is the effect of the recognition by the court of the outcomes of the TDRMs. The question to address is whether the recognition of the TDRMs outcome by the Court disposes of the matter before the Court or is simply used as proof of a fact that a Court takes into consideration in reaching its decision. Yet, another issue is whether there is a distinction made between religious inspired AAJS and other non-religious AAJS. It is also important to determine the extent to which different provisions of the Kenyan Constitution have influenced the vision of the AJS Policy Frameworks. Within this rubric, it is important to think carefully of the impact of the Bill of Rights in the Kenyan Constitution on the evaluation of outcomes of the TDRMs and how this would apply to *AAJS*. It is also appropriate to interrogate the broad objectives of the AJS Policy Frameworks and the goal of the AAJS as part of an alternative dispute settlement framework.

13 See Koblavie and Nyinevi (note 2).

14 The *AJS Policy Frameworks* are available at https://www.judiciary.go.ke/download/alternative-justice-systems-baseline-policy-and-policy-framework/ The AJS Baseline Policy is the result of a task force formed by the former chief justice Dr. Willy Mutunga established through The Kenya Gazette (Special Issue) Gazette Notice. Vol. CXVIII-No.21, 4th March 2016. The AJS Framework Policy is an important guide in the operationalisation of the Alternative Justice Systems. The AJS Baseline Policy was conducted through a research design that entailed: dialogues convened between various councils of elders and the then Chief Justice Dr. Willy Mutunga; learning sessions conducted by the Taskforce mainly in Othaya, Nyeri, Isiolo, and Kericho; a series of town-hall conversations that were named "Community empowerment workshops on AJS" convened by the Taskforce between 2016 and 2017; in house research on various subject areas; and stakeholder forums convened with representatives from various institutions that are charged with the duty to provide or promote access to justice in Kenya. The result was the formulation of the Alternative Justice Baseline Policy that informed the formulation of the AJS Framework Policy.

This article is organised as follows. In the next part, we evaluate the jurisprudence of TDRMs largely articulated by Kenyan courts as a context of the reflections on the content of the AJS Policy Frameworks on AAJS. In that section, we address issues such as how Kenyan courts should interact with the 'AAJS'; the consent of parties to the commencement of AAJS and the capacity of parties to an AAJS to reject the outcomes; human rights as limitations of the validity of AAJS*;* the consent of the Director of Public Prosecutions (DPP) as a limitation to the validity of AAJS and the enforcement of TDRMs outcomes. Part three of the paper addresses comparative lessons from Nigerian and Ghanaian jurisprudence on the practice of customary arbitration. Concluding comments follow in part four.

II. Prospects and Challenges for AAJS in view of the Jurisprudence on TDRMs under Kenyan Law

In this section, we proceed to examine the jurisprudence on the status and functions of TDRMs especially in the context of and aftermath of the 2010 Constitution of Kenya. This contextual consideration provides a basis for a further reflection on the AJS Policy Frameworks which declares that AAJS are independent mechanisms run entirely by the community which determines the decision-makers and the processes to be followed without any interventions or regulations from the State.[15] The only caveat on this autonomy arises from an obligation on the Judiciary to audit AAJS to ensure that due process standards are maintained. The Judiciary is required to report incidents of non-compliance, and advise key personnel in the AAJS on steps to be taken towards remediation.[16] At first blush, it may be stated that where Kenyan litigants plead the outcomes of the AAJS in a matter, the AJS Policy Frameworks suggest that a court is generally bound to accept the outcomes, if it is satisfied that it passes the constitutional muster which includes fidelity to the Bill of Rights.[17]

To understand what the 'autonomy' of the AAJS means, it is appropriate to review how Kenyan Courts have treated the outcomes of TDRMs, especially in the wake of the 2010 Constitution, and reflect on how outcomes of AAJS would fare. But first, it is also important to sketch the constitutional remit of TDRMs and AAJS. A number of constitutional provisions support TDRMs in general. First, Article 159(2)(c) of the Constitution provides that in exercising judicial authority, the judiciary is to be guided by a number of principles including the promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Article 159(3) cabins the use of TDRMS by requiring that their use shall not (a) contravene the Bill of Rights; (b) be repugnant to justice and morality or result in outcomes that are repugnant to justice or morality; or (c) be inconsistent with the Constitution or any written

15 Judiciary of Kenya, "Alternative Justice Systems Baseline Policy", Judiciary of Kenya (2020), 51.

16 Ibid.

17 Ibid.

law. In furtherance of this point, Article 2(4) of the Constitution provides that customary law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. The fact that TDRMs are specifically applicable subject to these constitutional restrictions suggest that they are circumscribed and expresses a constitutional vision of a customary law that is not regarded as a source of Kenyan law. It could be argued, for example that if customary law were regarded as an equal source of law like common law or doctrines of equity, the only limitation in the application of TDRMs would have been constitutional and statutory inconsistency just like the limitation on common law. The additional requirement on the application of a repugnancy clause with principles of justice and morality, appears as a relic of the application of customary law in the Kenyan courts. The limited scope of applicability of customary law is evident in section 3(2) of the Judicature Act that requires Kenyan superior courts to be guided by African customary law in civil cases where one or more of the parties is subject to it or affected by it and in so far as it is applicable and not repugnant to justice or morality or inconsistent with written law. Superior courts are to decide cases according to substantial justice without undue regard to procedural technicalities and delay.

In the main since 2010, a body of case law has emerged during interpretation by Kenyan Courts of their duty to promote the use of TDRMs within the aforesaid constitutional constraints. The ensuing discussion identifies the issues that may frame these developments in the context of the AJS Policy Frameworks. The idea is to establish a baseline of the framework of the AAJS as currently applicable and then discus how the AJS Policy Frameworks address these issues.

1. How Should a Kenyan Court 'Interact' with AAJS

The fundamental challenge of a plural constitutional order in which State courts represent the primary judicial institution is the way such courts evaluate the outcomes of alternative judicial institutions such as TDRMs. Two broad options are thought to exist. On one hand, state courts evaluate outcomes of AAJS with respect to procedural fidelity and adopt outcomes of TDRMs as judgments of the court, thereby enabling enforcement of the AAJS outcome as a judgment. Such state courts would likely develop rules of recognition including scrutiny for constitutional compliance. If a state court rules that TDRM outcomes are valid, the latter becomes a judgment of the court. As a judgment of a court, appeals would lie through the appellate process for dissatisfied litigants. The other option is to recognise outcomes of the TDRMs as valid and enforceable without the sanction of a state court. Parties to the TDRMs have access to judicial machinery for enforcement of the outcomes. Parties aggrieved under the second model could be entitled to appeal to a state court on grounds that would include constitutional breaches. Even though the two models appear similar, the second model reflects a recognition that customary law is a legal order equal to the common law and that its dispute settlement mechanism should be treated like judgments of state courts. The first model hands considerable discretion to a

state court which is more likely to view the AAJS unfavourably especially where there are no defined rules for the recognition of outcomes of a TDRM. It would appear clearly from the discussions in this section that Kenyan courts follow the first model and do not have clear-cut rules of recognition. For example, Francis Kariuki makes the point of uncertainty in the review by a state court of the outcomes of a TDRM.[18]

The AJS Framework Policy recognises two models for the interaction of the judiciary with AJS. The first one is 'Deference' which applies "…where the Court reviews previous AJS proceeding and awards for procedural correctness and proportionality only."[19] Second, is Recognition and Enforcement which applies "... 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."[20] Both models appear similar even though the 'Recognition and Enforcement' model seems closest to the current practice of Kenyan Courts as the discussion below demonstrates. That said, it is also correct to point out that a review of procedural correctness and proportionality in the 'Deference' model are implicit also in the 'Recognition and Enforcement' model. However, the 'Deference' model appears more suited to a recognition of customary law as an equal source of law and appropriate respect of its dispute settlement mechanism. To construct an appropriate model, it must be recognised that the nature of a plural constitutional order requires the mediation of all legal orders by the constitution generally and the Bill of Rights. It is therefore possible, it can be argued, that the enforcement mechanisms of the state should be available to enforce an AAJS outcomes. Dissatisfied litigants can approach the courts alleging a breach of human rights just like other litigants involved in the application of common law.

If customary law is regarded as an equal source of law like common law in Kenya, it is important that outcomes of AAJS are enforceable without the judicial sanction that is at the heart of the 'Deference' and the 'Recognition and Enforcement' models recognised by the AJS Framework Policy. To differentiate our model from the recommended 'Recognition and Enforcement' model, we choose to characterise that model as 'Direct Enforcement'. For such a model to operate, and to enable the enforcement of AAJS outcomes without judicial sanction, there ought to be 'certainty' in the commencement, cessation and effect of an AAJS process. These points are explored further below.

18 See Francis Kariuki, "Traditional dispute resolution mechanisms in the administration of justice in Kenya", in: E. S. Nwauche (ed.), Citizenship and Customary Law in Africa, Centre for African Legal Studies,Accra, 2020, pp. 33–68.

19 See AJS Framework Policy, p. 9.

20 Ibid.

2. *Consent of Parties to the Commencement of AAJS and the Capacity of Parties to an AAJS to Reject the Outcomes of the AAJS*

To achieve certainty in the capacity of AAJS to contribute to dispute settlement, there ought to be a clear commencement and cessation of a matter before an AAJS institution. It is important for parties to understand how an AAJS commences, and the effect of an award made in the process as a cessation of the process. While it is not a matter of contention that parties must voluntarily commence or submit to an AAJS, it is also important there is a consequence of the voluntary commencement of the AAJS. That consequence is the inability of a party to an AAJS proceeding to reject an award especially if it is not favourable to a party to the proceeding. Three options are available in the design of the voluntary commencement of an AAJS process. First, parties can indicate that they will be bound by the outcome of the AAJS in which case they are not able to reject the award. Secondly, the inability of the parties to reject an award can be implicit. Thirdly, it may be declared that once a party has voluntarily submitted to an AAJS, they are bound by the outcome of an AAJS. The third option appears to represent TDRMs where community leaders 'summon' members of the community in their quest to maintain the peace and well-being of the community. Our recommended 'Direct Enforcement' of an AAJS is better aligned to the third option above which is that once a party has voluntarily submitted to an AAJS, the outcome of the AAJS is binding on the parties. Having sketched this brief introduction, we turn now to the practice of Kenyan courts.

Kenyan Courts have consistently held that the consent of the parties to a TDRM is crucial to the validity of the process. For example, in *Erastus Mutuma v Mutia Kanuno*[21] the High Court held that a party can refuse to submit to the jurisdiction of the *Njuri Ncheke* who are bound to refer that party to a court of law. This point was also highlighted in *R v Land Adjudication Officer Tigania East/West.*[22] Beyond the question of consent, there are limited rules of validity set out by Kenyan courts in their evaluation of outcomes of *AAJS* with regard to consent to commence a TDRM process. For instance, in *Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another*[23] the High Court noted that in determining whether TDRMs is applicable in a criminal case, the parameters under Article 157 (11) of the Constitution for the exercise by the Director of Public Prosecutions of the prosecutorial mandate to wit: "*the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process*" are important considerations. However, there is no consensus on the consequence of the commencement of an AAJS. An appropriate question is whether a party can withdraw from the TDRM at any time even if the outcomes of the TDRM is unfavourable. Even though the possibility of withdrawal at any time was discussed in the case of *Erastus Mutuma v Mutia Kanuno,* it

21 [2012] eKLR.
22 [2018] eKLR.
23 [2016] eKLR.

would appear that Kenyan courts are left with a discretion in deciding whether to recognise or reject the outcomes of an AAJS. A criterion for recognition articulated by the judiciary would set precedential parameters that would guide courts in their evaluation of outcomes of AAJS.

3. Human Rights as Limitations to the Validity of TDRMs and AAJS

A key part of the constitutional recognition of TDRMs is that they are to apply subject to the Bill of Rights. Even if this fact was not expressly recognised, other provisions of the Kenyan Constitution such as Article 20(1) which provides that the Bill of Rights "…applies to all law and binds all State organs and all persons" ensure that the Bill of Rights applies to TDRMs. Kenyan courts have evaluated the processes and outcomes of TDRMs for fidelity to the Bill of Rights. There is evidence of certain rights that are in issue in the review of TDRMs. A reference to the Bill of Rights is found in *Sakayo Mwimbi v Kithombe Katumi*[24] where the High Court adopted the decision of elders of a community contained in a letter from the Chief of that community because of the absence of evidence of a breach of the Bill of Rights. Given the nature of TDRMs and AAJS, procedural rights such as the right to fair hearing protected by Article 50 of the Kenyan Constitution are relevant. In interpreting fidelity to fair hearing the provisions of section 3(2) of the Judicature Act requiring compliance with substantial justice in the application of customary law will be relevant. However, the interpretation of the fidelity of AAJS to the right of fair hearing will task Kenyan courts of their understanding of the informal nature of *AAJS*. The protection against discrimination in favour of daughters and wives by Article 27 of the Constitution is a right likely to be used to impugn a TDRM outcome of *AAJS*. Cases such as *Rono v Rono,*[25] *In the Matter of the Estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Mirit*[26] and *Peter Karumbi Keingati & 4 others v Dr. Ann Nyokabi Nguthi & 3 others*[27] recognise the right of wives and daughters to inherit property. It is not far-fetched to suggest that Kenyan courts will strike down an AAJS outcome that disinherits wives and daughters. Another right likely to be infringed in the TDRM process is the protection offered by Article 32 of the Constitution to freedom of conscience, religion, thought, belief and opinion. In *Erastus Mutuma v Mutia Kanuno*, it was alleged that any compulsion to take a traditional oath used by the *Njuri Ncheke* Council of Elders would be contrary to Christianity and therefore in breach of Article 32. What may be in contention is whether a party who is a Christian and has consented to proceedings before the *Njuri Ncheke* could impugn those proceedings on the basis of breach of his right to freedom of religion.

24 [2019] eKLR.
25 [2008] 1 KLR 803.
26 [2017] KLR.
27 [2014] eKLR.

We shall now turn to examine the transformative potential of the Kenyan Constitution and its potential effect. The *AJS Baseline Policy* proceeds from the provisions of Article 21 of the Constitution which imposes a duty on the state and all State organs to observe, respect, protect, promote and fulfil the rights and fundamental freedoms when it recommends the obligations of a duty to respect, a duty to promote and a duty to transform TDRMs.[28] These duties are developed in furtherance of the mandate of the judiciary to develop TDRMs. In sum, these duties capture the protection of human rights in Kenya in general which encompasses AAJS. Of concern, is the meaning of the duty to transform. The AJS Baseline Policy adopts the meaning of 'transformation' by the Kenyan Supreme Court in its Advisory Opinion Reference No 2 of 2013:[29]

> *"Kenya's Constitution of 2010 is a transformative Charter. Unlike the conventional 'Liberal' Constitutions of earlier decades, which essentially sought the control of legitimization of public power, the avowed goal of today's constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy."*[30]

One way in which the *AJS Baseline Policy* addresses transformation is that decision makers in the system should ensure that

> *"While protecting cultural practices that are consistent with the Bill of Rights… they must deliver decisions that reflect achievement of substantive equality and socio-economic transformation."*[31]

The right to freedom from discrimination is certainly a flashpoint in the transformation of customary law in general and will be a significant objective to assess the viability of AAJS. For example, since Kenyan courts have sought to achieve gender equality in areas such as succession,[32] it will be difficult as argued above, to contend that an AAJS outcome that discriminates against wives and daughters is constitutionally compliant.

What is also in contention in the application of human rights to the AAJS is how it will fit with the 'Direct Enforcement' model that this paper advocates. The 'Deference' and the 'Recognition and Enforcement' models favoured by the AJS Framework Policy integrate fidelity to the Bill of Rights as part of the scrutiny towards the enforcement of outcomes of an AAJS. The 'Direct Enforcement' Model approaches the enforcement of

28 See for example the *AJS Baseline Policy*, pp. 59–62.

29 [2013] eKLR.

30 Ibid.

31 *AJS Baseline Policy*, p. 63.

32 See for example, the case of re Estate of Priscillia Warimu Kamau (2005) eKLR. It should be noted that section 2(3) and (4) of the Law of Succession Act, Cap 160 Laws of Kenya read together with Articles 24(4) and 27 of the Constitution exclude the estate of Muslims from the gender equality provisions of the Constitution. See generally J.D. Mujuzi, "The Islamic Law of Marriage and Inheritance in Kenya", in: 65 (2021) Journal of African Law, p. 377.

human rights in a review process where dissatisfied litigants would impugn an *AAJS* award before a court.

4. The Consent of the DPP to Withdraw Criminal Prosecution in furtherance of an Outcome of AAJS

In this part, we explore how Kenyan courts have upheld requirements of appropriate legislation before giving effect to outcomes of TDRMs. In particular, the exercise of the powers of the Director of Public Prosecutions (DPP) have featured in cases where outcomes of AAJS such as reconciliation between an accused person and complainant brokered by traditional authorities leads to applications to withdraw criminal prosecution. Kenyan courts grant such applications, if the DPP in furtherance of powers of discontinuance granted by Article 157 (6) and (8) of the Constitution make such a request and following the parameters highlighted in *Mary Kinya Rukwaru* (supra). In *Republic v Mohamed Abdow Mohamed*[33] the High Court in Kenya upheld the application of TDRMs that followed Islamic law and customs and resolved a murder allegation for which the alleged murderer faced criminal prosecution before a court. The families of the accused and the deceased person meet and agreed on some form of compensation 'wherein camels, goats and other traditional ornaments were paid to the aggrieved family' including a ritual that was performed to pay for the blood of the deceased to his family as provided for under Islamic Law and customs. Subsequently, the court allowed the application for withdrawal filed by the DPP in furtherance of the powers of the DPP to discontinue proceedings. In *Republic v Musili Ivia & Anor*[34] the DPP's application to the Court to terminate criminal prosecution of two accused persons charged with murder was granted by the court based on an amicable settlement between representatives of the accused persons and the clan members of the deceased. Without the support of the prosecution in the case of *R v Abdulahi Noor Mohammed*[35] the court declined a request by the families of a deceased and accused person in a murder trial to adopt a pre-signed agreement that captured the settlement between the parties in accordance with Somali law and custom. In *Mary Kinya Rukwaru (supra)* the DPP's refusal to grant consent to a settlement between an accused persons and the wife of a deceased person and her children who were killed in a motor accident was challenged before a High Court. The Court rejected the petition to reverse the refusal of the DPP on a number of grounds. These grounds include the fact that the denial of the DPP's consent was in furtherance of the duty of the DPP to promote the public interest in prosecuting a serious offence; was not an abuse of the criminal process; and reflected the DPP's belief that the traffic offence is a crime against the Kenyan public. What is interesting from

33 *R v Mohamed Abdow Criminal Case No. 86 of 2011* [2013] eKLR.

34 [2017] eKLR.

35 [2016] eKLR.

the recognition of AAJS in criminal matters, is the manner in which such recognition transcends the orthodoxy that the State has exclusive preserve of criminal matters.

5. The Enforcement of outcomes of AAJS and TDRMs

The last issue considered in this section is the effect of a TDRM outcome. A number of questions are important in this regard. Should the outcomes of a TDRM be dispositive of a case before a Kenyan court, in which case it serves as a complete defence to an action? Can a successful party to an AAJS bring an action to enforce an AAJS outcome? If an AAJS is conceived to be autonomous, it is important that Kenyan courts regard AAJS outcomes as equal to their judgments. The consideration of equality can arise in the effect of an AAJS outcome or in the ability of parties to an AAJS outcome to be able to enforce the same. Unfortunately, it would appear that the importance of clarity of the effect of submitting to an AAJS is lost on the Kenyan judiciary. When the question of the consent of parties to be bound by the resultant award of a *TDRM* was brought before the Kenyan Supreme Court in *Ananias Kiragu v Eric Mugambi*[36] the Court decided that the proper implementation of Article 159(2)(c) & (3) was not a matter of public importance on a rather technical point. In the opinion of the Court, the application that by submitting to an ADR process, the parties should be taken to have consented to be bound by the outcome is a private matter between the parties. To the contrary, the manner in which disputes are settled is not a private matter since it impacts at the least on the capacity of courts to address disputes. If nothing else, the AJS Policy Frameworks sufficiently demonstrate that the AJS system is a matter of considerable public importance.

III. Comparative Lessons: Customary Arbitration in Nigeria and Ghana

This part of the paper discusses some trends from the concept of 'customary arbitration' in Nigerian and Ghanaian jurisprudence that is similar to TDRMs and AAJS in Kenya. The first lesson is that customary arbitration in Nigeria was recognised and developed by the Nigerian judiciary while Ghana has encased the practice of customary arbitration in a legislation and as a part of the broader rubric of alternative dispute resolution.

The case of *Agu v Ikewibe*[37] is usually regarded as the turning point in the articulation and elaboration of the rules of recognition of customary arbitration by Nigerian courts.[38] In *Agu v Ikewibe,* Karibi-Whyte JSC defined a customary arbitration and listed the ingredients

36 [2020] eKLR.

37 *Agu v Ikewibe* (note 1).

38 In *Okporowo v Okpokam* [1988] 4 NWLR (Pt. 90) 554 the Nigerian Court of Appeal declared that customary arbitration was not known in Nigeria because "… there is no concept known as customary or native arbitration in our jurisprudence. Even if there had ever been such (which I do not accept), it would have had no place under the 1979 Constitution which vest judicial powers in the judiciary under section 6."

of that concept which appeared to him to have become clear from a number of cases. According to him, customary arbitration is "an arbitration of a dispute founded on the voluntary submission of the parties to the decision of the arbitrators who are either the chiefs or elders of their community, and the agreement to be bound by such decision or freedom to resile where unfavourable."[39] The ingredients of a valid customary arbitration were set out as follows:

> *"(a) If the parties voluntarily submit their disputes to a non-judicial body, to wit elders or Chiefs as the case may be for determination; (b) The indication of the willingness of the parties to be bound by the decision of the non-judicial body or freedom to reject the decision where not satisfied (c) That neither of the parties has resiled from the decisions so pronounced."*[40]

In the aftermath of *Agu v Ikewibe,* Nigerian courts are divided whether a party can reject an award. In some cases, courts have held that a party to the customary arbitration proceedings can withdraw at any time including after the publication of the award.[41] Other cases[42] have held that a party to a customary arbitral proceeding cannot resile from the award. Apart from the controversy over the ability of a party to reject an award, other aspects of customary arbitration are settled including the fact that a valid customary arbitration is dispositive of a case before a state court because it is regarded as an issue estoppel.

Ghana like Nigeria for long resorted to the common law to accept outcomes of ATJM as 'customary arbitration' through common law validity and recognition rules. In a significant shift, Ghana has formalized its recognition of customary arbitration by the promulgation of the Alternative Dispute Resolution (ADR) Act 2010.[43] The requirement that parties to a customary arbitration must consent to an arbitration was part of the requirements developed by the Ghanaian common law[44] and recognised by the ADR Act.[45] Closely related to the requirement of consent is the irrefutable presumption that is now part of the ADR Act, that once the customary arbitration has commenced, a party cannot withdraw from the customary arbitration.[46] The ADR Act appears to chart a different course by stating that an award in a customary arbitration is binding between the parties and those

39 *Agu v Ikewibe* (note 1) p. 407.

40 Ibid., p. 408.

41 See for example *Ohiaeri v Akabeze* (1992) 2 NWLR (Pt 221) 1.

42 See for example *Ojibah v Ojibah* [1991] 5 NWLR (Pt 191) 296.

43 Customary arbitration is provided for in part three of the Alternative Dispute Resolution Act 2010.

44 The five requirements of a valid customary arbitration in Ghana before the ADR Act is set out in *Budu II v Ceasar* [1959] GLR 410 are voluntary submission; a prior agreement to accept the award; an ward on the merits of a case; fidelity to the procedure of a native tribunal and publication of the award. See also *Akunnor v Okan* (1977) 1 GLR 173 and *Republic v Arbitration Committee of the Central Regional House of Chiefs* (2017) JELR 64755(CA).

45 See Alternative Dispute Resolution Act 2010, sections 89 and 90.

46 Ibid., section 105.

claiming through them without a need to register the award.[47] Furthermore, an award can be enforced in the same manner as a judgment of a Court.[48] The possibility of a judicial review by virtue of section 112 of the ADR Act on three broad grounds suggest a conviction that customary arbitration is an inferior adjudicatory process of a lesser status than the other dispute resolution mechanisms – arbitration and mediation – under the ADR Act. Rather than broad grounds of review, the ADR Act is specific on the grounds to challenge an arbitration award in section 58.[49] Such specific grounds of appeal narrow the potential of overturning arbitral awards rather than broad grounds of review that may contemplate wide discretion of the powers of a court of law. The first ground on which the ADR Act provides that a customary arbitral award can be reviewed is that the award was made in breach of the rules of natural justice. The second ground is that the award constitutes a miscarriage of justice and the third ground is that the award is in contradiction to known customs of the concerned area.

IV. Conclusion

The above discourse has highlighted some of the salient issues at the heart of the discourse surrounding TDRMs in general and AAJS in particular in Kenya. From the review of judicial pronouncements, literature and experiences from both Nigeria and Ghana, there is need for more care and caution as Kenya seeks to operationalise the AAJS institutions. Consequently, we find that in the operationalisation of AAJS, some challenges might be encountered due to the constitutional constraints imposed on TDRMs, and customary law as a source of law. These statutory and constitutional fetters will consequently affect how AAJS outcomes will be treated by the courts. Relatedly, we have demonstrated that, if customary law is a source of law, like statute or common law, AAJS outcomes ought to be enforceable without judicial sanctioning, as proposed in the 'Deference' and 'Recognition and Enforcement' models in the AJS Policy Framework. It is for this reason that we proposed a 'Direct Enforcement' Model.

47 Ibid., section 109. See the case of *The Republic v The Ada Traditional Council v Atteh Agudey* (2017) JELR 65771 (CA); *Vincent Kanu v Komla Agune* (2017) JELR 64155 (CA).

48 See Alternative Dispute Resolution Act 2010, section 111.

49 Ibid., section 58. (1) An arbitral award may subject to this Act be set aside on an application by a party to the arbitration. (2) The application shall be made to the High Court and the award may be set aside by the Court only where the applicant satisfies the Court that (a) a party to the arbitration was under some disability or incapacity; (b) the law applicable to the arbitration agreement is not valid; (c) the applicant was not given notice of the appointment of the arbitrator or of the proceedings or was unable to present the applicant"s case; (d) the award deals with a dispute not within the scope of the arbitration agreement or outside the agreement except that the Court shall not set aside any part of the award that falls within the agreement; (e) there has been failure to conform to the agreed procedure by the parties; (f) the arbitrator has an interest in the subject matter of arbitration which the arbitrator failed to disclose."

The proposed 'Direct Enforcement' model requires clarity, which is lacking in the AJS Framework Policy, as to commencement, cessation and effect of the AAJS outcome. One of the lessons that can be learnt from Nigeria and Ghana, is the clarity on whether or not the outcome of the AJS is final and binding on the parties. Moreover, there is need to clarify whether an AAJS outcome or award can dispose of the matter or in other words operate as issue estoppel. We are of the view that since the aim of recognising TDRMs is to enhance access to justice, the outcomes thereof should be dispositive of a case. Such an approach would ensure equal treatment of the outcome of TDRMs and those of formal courts. This will definitely require clear rules for the recognition of outcomes of TDRMs since the AJS Policy Framework does not offer useful guide in this regard. We also hope that this will perhaps help address the current uncertainty within the courts regarding how to treat TDRM outcomes.

Most fundamentally, the discourse has brought to the fore the need for clarity in defining whether a party to an AAJS can withdraw from the process at any time. There are two possibilities that we draw attention to. First, in appropriately defined cases similar to the mediation process, where parties are not bound until a binding settlement is arrived at, we believe that parties should be free to walk out at any time before an award is made. Secondly, in other cases, a party cannot withdraw from an AAJS process so that Kenya sidesteps the controversies around the finality of arbitral awards in Nigeria.

Lastly, from the Ghanaian experience, Kenya might need to consider whether it needs to take the route of codification of TDRMs or not. Codification is likely to create certainty and uniformity in terms of ensuring due procedures are followed. However, this might create rigidity and hamper the growth of customary laws and kill the informality of TDRMs which is their pride. That notwithstanding, a law on TDRMs might be useful in setting certain guidelines, as is the case in Ghana. For instance, the law can address issues such as whether or not once a party submits to the TDRM process they can withdraw or not; whether the award is binding and set the grounds for challenging or setting aside a TDRM outcome.