ALTERNATIVE JUSTICE SYSTEM (AJS) STRATEGY FOR THE JUDICIARY OF UGANDA

June 2023

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ACRONYMS

ACA	Arbitration and Conciliation Act
ADR	Alternative Dispute Resolution
AJA	Administration of Justice Act
AJS	Alternative Justice System
CADER	Centre for Arbitration and Dispute Resolution
ICAMEK	International Centre for Arbitration and Mediation in Kampala
ICT	Information, Communication and Technology
IMS	Information Management Systems
JSPV	Judiciary Strategic Plan V
JTI	Judicial Training Institute
LDC	Law Development Centre
M&E	Monitoring and Evaluation
PESTEL	Political, Economic, Social, Technological, Environment, Legal
SCP	Small Claims Procedure
SWOT	Strengths, Weakness, Opportunities, and Threats

FOREWORD

The Constitution implores that the administration of justice be anchored and premised on the "aspirations, norms, and values of the people of Uganda". This is a core principle expected to guide the administration of justice and the exercise of judicial authority. This principle enjoins a requirement to embrace alternative forms of dispute resolution, including informal traditional justice mechanisms. This principle should form the basis for the shift in our ideas and conceptions of justice. Alternative forms of dispute resolution—commonly under the acronym ADR—is not new in Uganda, yet it continues to be misunderstood and, importantly, *restricted*. Dispute resolution by courts, as a measure of justice, has occupied the administration of justice in Uganda, when the reality is that the vast majority of disputes among Ugandans are resolved through justice systems located outside the formal courts. The studies, as underpinned by this Strategy, estimates that less than 5% of the dispute resolution takes place in courts of law, with majority of Ugandans relying on informal justice systems.

It is in the above context that this Alternative Justice Systems Strategy for the Judiciary has been developed to take a broader perspective of justice, including traditional, informal and other dispute resolution forms in Uganda. As Chief Justice, I appointed an *ad hoc* committee on the AJS strategy chaired by Honourable Justice Richard Buteera (Deputy Chief Justice). The membership of the committee included Honourable Justice Geoffrey Kiryabwire (Justice of the Court of Appeal); Honourable Judge Paul Gadenya (Judge of the High Court); Honourable Judge Richard Wabwire Wejuli (Judge of the High Court); Mr. Francis Atoke (Solicitor General); Mr. Francis Gimara SC (ULS President emeritus); Ms. Rachel Odoi-Musoke (Senior Technical Advisor, Governance and Security Programme). An additional member and secretary to the committee is Professor Andrew Khaukha (Judiciary Technical Advisor). The committee was required, as part of its initial remit, to develop the Alternative Justice System Strategy to guide the ADR approach of the Judiciary.

The committee, and team of consultants, were required to examine the constitutional, legal, and policy options available to fulfil the requirement under Article 126 of the Constitution. Notably, the Judiciary has, through its key strategic blueprint (*Judiciary Strategic Plan V, 2021/22-2024/25* (JSPV)) laid down the strategies, plans, and policy framework to recognize and accommodate alternative systems of justice. At the national level (*National Development Plan III*, 2020/21-2024/25) there is a recognition of the necessity for access to justice for all and, as a critical intervention, the call for, among others, the strengthening of "informal justice processes" to ensure a people centred delivery of justice, law and order services. The AJS Strategy is therefore a critical output for the future of the administration of justice, and specifically, the manner in which judicial services can be offered while taking cognizance of the wider justice processes in Uganda.

It cannot be gainsaid that alternative justice systems offer a great promise in enhanced access to justice, in a holistic and broader sense of the concept. The Strategy sets out the strategies and approaches as regards linkages and synergies between the judicial system and AJS forms and their interaction in a mutually-reinforcing manner for an effective system of justice.

The Strategy has identified useful and immediate steps to be taken in order to position AJS as an important aspect of administration of justice in Uganda. The steps include delineating the key pathways for AJS institutions (in form of autonomous AJS institutions, autonomous

third-party AJS institutions, and court-annexed AJS institutions). The Strategy is premised on four pillars for AJS that include the pre-dispute stage, dispute stage, active dispute stage, and AJS in criminal matters. In terms of the actionable strategies, the AJS Strategy provides, among others:

(a) Promotion of AJS institutions as forums of first instance for appropriate matters.
(b) Capacity building and training of practitioners to embrace AJS in resolution of disputes.
(c) Consider emerging consensus on AJS approaches with a view of determining the appropriate legislative or regulatory framework.
(d) Development and adoption of user guidelines on AJS approaches.
(e) Development of a system to facilitate the linkages and synergies between the Judiciary and AJS institutions.
(f) Leadership by the courts and judicial officers in relation to AJS forms and mechanisms.

More importantly, it is critical that the AJS Strategy is seen as a momentous step towards the fulfilment of the Judiciary's strategic plan and judicial transformation agenda. Crucially, the Strategy is an important guide on the operationalization of AJS, not only to the Judiciary, but to all institutions in the justice sector. I thank the entire team, under the leadership of Honourable Justice Richard Buteera, for this momentous work that should help define and clarify an important part in the administration of justice in the country.

Finally, I extend gratitude and thanks, on my behalf and the Judiciary, to the International Development Law Organization (IDLO) for its technical and financial support towards the development of the AJS Strategy.

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Chief Justice of Uganda

Kampala
June 26, 2023

1. INTRODUCTION

1.1. Background

Since the pre-colonial era, communities in Uganda have maintained justice administration systems and structures that were community-centered and reflective of acceptable moral values and standards, customs, rights and privileges of members of the society. In the present day, such systems continue to administer justice to those who seek it. However, as has been pointed out, the formal justice system imposed by the colonial powers after 1894, is largely aimed at maintenance of law and order, generally oppressive in approach, adversarial and not suited to the restorative precepts of the informal traditional justice systems.

The traditional justice systems predated the now current formal justice system which largely constitutes vestiges of a transplanted colonial legal system. This imported justice (and legal) system has, since early 1900s, largely influenced adjudication of justice and understanding of the law. It has however not been without challenges. Principally, the system was not specifically suited for African people and, as a famous English jurist, Lord Denning, noted people must have a law they understand and they will respect.[1]

In a paper presented at the Annual Judges Conference in 2018, an eminent retired Ugandan law scholar critically highlighted that a crisis of formal justice system (and access to justice) is a crisis of the State.[2] As set out in the paper, the law scholar underscores the crisis of the formal system in delivering justice as:

(i) the growing case-backlog in the courts as the formal justice system is process laden and cannot therefore expeditiously dispose of cases;

(ii) the inaccessibility of the courts, physically and economically;

(iii) the cultural and value distance between the formal justice system and communities (and this bears on the legitimacy of the formal justice system);

(iv) the public perception of the formal justice system as corrupt, filled with State-leaning cadre judicial officers (and this too goes to the issue of legitimacy); and

(v) the substantive laws of formal justice systems are unjust, oppressive, exploitative, and therefore unable to deliver justice.

At the close of the annual judges conference, and guided by the presentation by the retired law scholar, the judges passed a resolution to promote *legal pluralism* as part of the justice system and access to justice.

1.2. Positioninig and rationalizing AJS

1.2.1. Constitutional imperative: values, norms and aspirations

The idea of alternative justice system (AJS) is in fact anchored in the 1995 Constitution of Uganda, in positioning aspects of Ugandan life in terms of:

(a) cultural and customary values that are consistent with fundamental rights and freedoms, providing for justice to underpin the "aspirations, norms, and and values of the people of Uganda";

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[1] *Nyali Limited v Attorney General* [1956] 1 QB 1. The application of common law principles in African legal systems was likened to transplanting an English Oak to African soil and expecting it to retain the tough character which it has in England without careful tending.

[2] Frederick W. Jjuuko, 'The role of informal justice mechanisms in deepening access to justice: options and opportunities for legal pluralism in Uganda', being a paper presented at Annual Judges Conference, January 5, 2018.

(b) promotion of dispute resolution methods, such as "mediation", "conciliation" and most importantly, "reconciliation"; and

(c) enjoining the Parliament to make law that provide for the participation of people in the administration of justice by the courts.

What are the "aspirations, norms, and and values of the people of Uganda"? According to the report of the Uganda Constitutional Commission, the people wanted the following values to inform the administration of justice: (i) independence of the judiciary; (ii) the rule of law; (iii) just and fair trials; (iv) African values (a majority of people agreed that both the law and the way in which justice is administered should reflect more values of African people); and (v) improved and fair access and equality before the law.[3]

It is to be noted that, in spite of the ingenuity of courts in using ADR mechanisms over the past twenty years, case-backlog problem is still prevalent (according to the *Annual Judiciary Report*, 2021/2022, the total case backlog stood at 50,592 cases (30.11 %) against 168,007 pending ones).

The foregoing diagnosis of the justice system (and access to justice) makes a strong case for an alternative justice system, as an anchor for, and medium of, informal justice dispute resolution processes. Today, the elements of informality abound, e.g., in the administrative functions of local governance, support towards community policing in local governments, informal dispute resolution processes managed by community leaders such as clan heads and chiefs, police, local council members, and religious leaders. These have contributed to the informal administration of justice to the public in terms of resolution of disputes. Such approaches together with dispute resolution mechanisms, which exist outside of the court processes, are jointly referred to as alternative justice systems (AJS). Notably, even within the formal legal system, recourse to alternative dispute mechanisms has taken a heightened significance in legal and judicial practice within the common law jurisdictions.[4] This has been attributed to the complementary nature of alternative justice processes and the result in alleviating the burden on formal courts.

1.2.2. Judiciary strategy: access to justice for all

Alternative justice processes have been a feature of access to justice in Uganda. The critical discourse is what access and for whom!

Alternative dispute resolution (ADR) is a key aspect of the Judiciary's strategic planning under the *Judiciary Strategic Plan V, 2021/22-2024/25* (JSPV). In its situational analysis, the JSPV lists "adoption of appellate mediation as an [ADR] mechanism" as one of the measures towards enhancing the Judiciary's business processes. The SWOT analysis lists, as one strength, the Judiciary's "innovation in adjudication of cases (plea bargaining, ADR, mediation and SCP)". In terms of key Strategic Objective 2 ("To improve court processes and case management"), the JSPV identifies, under intervention measure 2.4. ("Reduce case backlog"), the output "Alternative dispute resolution (ADR) mechanisms strengthened". The actions (activities) on ADR are largely institutional and capacity-building—mediation spaces, accreditation of mediators, sensitization/awareness (on mediation/SCP), M&E, SCP roll-out and trainings.

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[3] *Report of the Uganda Constitutional Commission: analysis and recommendations* (1994) 444-445.

[4] Geoffrey W.M. Kiryabwire, 'Alternative Dispute Resolution, A Ugandan Judicial Perspective' (being a paper delivered at a continuation seminar for Magistrates Grade One at Colline Hotel Mukono) (2005).

At the launch of *New Law Year* 2022 on February 4, 2022, the Hon. Chief Justice deferred to the Judiciary's case management approach in delivery of judicial services in initiatives such as *mediation*, etc. On his part, the Hon. Deputy Chief Justice alluded to the necessity, arising from case backlog monitoring work, to "support the implementation of the robust ADR framework including reform of the existing mediation practice and placement".[5]

As a mainstay of the strategic planning for 2020/22-2024/25, the *Judicial Transformation Agenda*, is framed on the idea of "justice for all" and requires a ***clear and coherent national strategy*** with a concrete ***action plan*** that will—

(i) ensure ***access to justice*** for all;
(ii) build stronger justice institutions or actors;
(iii) empower communities to take control of their own justice processes; and
(iv) enhance confidence in justice delivery systems.

1.2.3. National development context

The *National Development Plan III*, 2020/21-2024/25 recognizes the necessity for access to justice for all. As a critical intervention, the Plan call for, among others, the strengthening of "informal justice processes" to ensure a people centred delivery of justice, law and order services.

2. RATIONALE AND CONTEXT FOR ALTERNATIVE JUSTICE SYSTEMS

2.1. Robust Judiciary ADR framework

The AJS strategy is framed and guided by the Judiciary's strategic plan (SPJV) and *judicial transformation agenda*. The AJS is to anchor and provide a broader reform towards a robust ADR framework (in light of the fact it is now a given that "ADR is no longer the exception—it's the rule") and Judiciary's efforts to improve "court processes and case management".

The objectives of the AJS strategy are guided by key access to justice goals—

(a) Serve as a tool-box for enhancing access to justice for all.
(b) Serve as a case backlog reduction/caseload management measure (as a key objective of the existing ADR framework, in for instance, court-annexed mediation and arbitration).
(c) Provide for and support existing Judiciary ADR mechanisms and the inclusion or incorporation of traditional approaches and institutions.
(d) Empower/enable particular sectors/communities (e.g., "private" or "business" sector) in terms of expert-based justice rendered relevant to community/sector.
(e) Localize justice and justice delivery (and inculcate an "ownership" principle, with users of AJS pathways and processes embracing them as their own in resolving their disputes).
(f) Create a framework that promotes ADR as vehicle for timely resolution of disputes while preserving critical relationships.
(g) Provide a ground on which developing forms of ADR—e.g., appellate mediation, community mediation—can be anchored on.

[5] Hon. Justice Richard Buteera, DCJ, 'A New Paradigm Shift: Transitioning from Case Backlog to Caseload Management' (being a paper delivered at the Annual Judges' Conference on February 2, 2022).

(h) Establish a legal framework for all forms of ADR and reform of the existing ADR legal frameworks.
(i) Create a system that supports AJS to an extent that will encourage practitioners to develop relevant skills to enable them implement justice as understood by various stakeholders.
(j) Provide alternatives to relieve the court of cases that can be solved outside of the formal court system.

The strategy intends to include more institutions and forms of ADR to ultimately optimize delivery of justice to all in Uganda. For clarity, ADR refers to alternative dispute resolution in its traditional sense in terms of abitration, mediation, conciliation, etc. On the other hand, AJS refers to traditional, informal and other mechanisms used to access justice in Uganda.

2.2. Positioning traditional and informal justice systems

ADR has been a major counterpart to judicial litigation (before courts) in dispute resolution. The key ADR mechanisms include, among others, arbitration, mediation, conciliation, and inquiry. As a country, ADR has been a mainstay in dispute resolution processes in Uganda, including in civil litigation rules, a plethora of courts mediation/conciliation rules, as well as in labour disputes' settlement, and parliamentary elections rules (on the use of ADR in election petitions). The court-annexed mediation has been a fixture of civil (and related) litigation over the past 10-15 years.

These ADR processes have complemented the traditional adjudicative role of the courts and judges (in an adversarial judicial system).

In spite of these processes, a justice needs report in 2016[6] revealed that courts and lawyers are marginal to the experience of the day to day justice needs of the people of Uganda. The report revealed that less than 5% of the dispute resolution takes place in court of law and in less than 1% of all the cases, a lawyer is involved. The report further revealed that most Ugandan citizens rely on informal justice processes. At the time, the report recommended the adoption of ADR mechanisms as a means of resolving disputes in a fair manner. In a justice needs and satisfaction report of 2020, legal problems per year in Uganda was put as 12.8 million and, while many are resolved, majority are unresolved or the resolution is seen as unfair. The statistics are to the effect that every year, 4.7 million legal problems are abandoned without fair resolution, 1.9 million are ongoing, and 2.13 million are considered to be unfairly resolved. This is quite a significant justice gap, although it also marks a great opportunity for to improve access to justice, by building on those million legal problems each year that do not receive a resolution that is perceived as fair.

An AJS framework is informed by similar developments elsewhere. During a study tour to Kenya's Judiciary Academy in May 2022, a result of an applied research on a justice needs and satisfaction survey in Kenya found that 85%-90% of justice needs are met by informal systems in communities, and a result, the Chief Justice of Kenya appointed an alternative justice systems (AJS) taskforce to identify AJS pathways that can be mainstreamed in the formal justice system.

As the Judiciary calls for legal and judicial reforms and strengthening towards a ***robust ADR framework*** (including innovations such as *appellate mediation*), the reforms should be on a broader level. A national *Alternative Justice System (AJS)* will complement ongoing efforts to reform the formal State justice institutions. This is significant given that—

[6] *HiiL Justice Needs in Uganda Report* (2016).

(i) While the efforts to strengthen the formal justice sector is critical, such efforts will not be optimized if the people and communities are unaware of their rights, or are unable to access justice institutions due to physical, financial or tangible barriers.

(ii) The efforts at reform of the formal justice sector need to take into consideration the fact that most disputes are settled through non-formal (or informal) mechanisms.

(iii) The interaction between formal and informal justice systems, can serve to improve each other and, by so doing, improve the quality of justice provision in the country.

(iv) The comprehensive *judicial transformation* requires a dual track strategy which links *top-down* institutional reform and *bottom-up* access to, and demand for, better (or more effective) justice. Such a strategy would be expected to bring justice closer to the people and a realization of the drive for "justice for all".

The AJS strategic framework ejoins initiatives that can be taken to attain equality and equity for all members of a particular cultural, political and social identity. In that regard—

(i) AJS is a form of restorative justice which aims to ensure social inclusion, and is generally more affordable, participatory and expeditious than court processes.[7]

(ii) AJS strengthens the link between formal and informal justice systems and cushions litigants from over reliance on courts as formal justice mechanisms.

(iii) AJS presents a strong pathway to responding to backlog of court cases and ensuring expeditious access to and delivery of justice.

This conceptualization informs an understanding and the development of an AJS strategy for the Judiciary.

The above factors call for reform of existing practices and transition into a broader system that has an effective inclusion of informal justice processes in dispute resolution. This is the premise for the broader AJS to inform the design of a robust Judiciary ADR policy framework. ADR reforms are to take on a broader context in terms of establishing an AJS framework that incorporates institutions that have been left out of the justice system in the recent past, yet have been key in delivery of justice to communities since the pre-colonial days (and continue to exist to-date). The linkages and synergies between the formal and informal justices process are the framework for the AJS and its pathways.

The judicial system of Uganda stands on multiple avenues to access to justice. Formal courts predominantly stand out in this regard and have been used as recourse, for the settlement of disputes. However, to cope more effectively with a wide range of problems that have been a theme in court administration and overall performance of formal court system, thorough rationalization, streamlining, and fine-tuning must be undertaken to ensure that the judicial system copes more effectively with contemporary justice needs of the people. The reality is that, even with court-related interventions, increase in case backlog is a recurring barrier to access to justice. There is a pressing need for alternative interventions that position access to justice outside the mainstream court judicial process. For, as noted in the *HiiL Justice Needs in Uganda* report, the majority of Ugandans are accessing justice in other informal systems other than the courts.

As such, AJS through the various mechanisms, promises efficiency, and socially acceptable forums for resolution of disputes, as well as ensuring access to justice is enabled. It promises

[7] See: UNODC, 'Partners welcome the move to mainstream alternative justice systems in Kenya', September 30, 2020, accessed at https://www.unodc.org/unodc/en/press/releases/2020/September/welcome-alternative-justice-systems-in-kenya.html

to relieve court congestion by effectively and efficiently tracking and disposing cases.[8] A national *AJS* provides a strong framework for judicial transformation and achieving social justice (as "justice for all").

2.3. An AJS Situational Analysis

2.3.1. PESTEL

The AJS shall be expected to operate and act as a broader vehicle for access to justice in an environment shaped by political, economic, social, technological, environmental and legal factors.

Political ❖ Political support in country (or parts of country) that can impact on use of specific AJS pathways. ❖ Political goodwill to apply indigenous dispute resolution processes that are cost effective, given the limited resources and are easily enforced.	**Economic** ❖ Budgetary allocations and available support to AJS interventions ❖ Economic hardships increase case-load in the AJS pathways ❖ Business sector interest in reformed ADR processes. ❖ Public demand for quick and cost-effective resolution of disputes. ❖ High costs to the economy. ❖ Time costs to disputing parties.
Social ❖ Communities readiness to embrace AJS processes, e.g. *community mediation*. ❖ Express interest by community leaders, i.e. religious, cultural, etc. ❖ Access to justice in AJS pathways for women, girls, PWDs, etc. ❖ Literacy levels and capacity to engage AJS processes. ❖ Broadening justice products to meet societal justice needs across the age various segments of the society.	**Technological** ❖ Opportunities of technology for access to justice utilizing AJS pathways. ❖ Use of ICT in AJS processes (registry services, document management, adjudication, accountability, etc.) ❖ Leveage technology to deliver AJS (and ADR) services
Environmental ❖ Work environment for AJS actors and facilitators. ❖ Sensitivity of climate change to ADR. ❖ Infrastructure and policies.	**Legal** ❖ AJA 2020 as vehicle to promote AJS, e.g. review of laws, procedures. ❖ Judiciary and legal fraternity embrace and use of AJS pathways.

2.3.2. SWOT

The AJS is framed by leveraging the opportunities and strengths (enablers) and addressing the threats and weaknesses (pains) that underlie its pathways, processes, and stakeholders. A SWOT analysis is provided as follows.

[8] Harrington, Christine B., and Sally Engle Merry, 'Ideological production: The making of community mediation', In *Mediation*, pp. 501-527. Routledge, 2018.

Strengths	**Opportunities**
❖ Mainstreaming of ADR in the Judiciary has been successful. ❖ Available legal framework, e.g. justice for all program, plea bargaining. ❖ Credibility of the Judiciary as main forum for dispute resolution ❖ Quick/expeditions disposal ❖ Trained judicial officers. ❖ Presence of trained court-annexed mediators. ❖ Growing support by advocates. ❖ Availability of resources to support ADR and AJS pathways.	❖ Unburdened with formalities of the court (e.g., evidence, procedures) that drag the ADR process. ❖ Cheaper and more confidential than litigation ❖ Voluntary and flexible—parties' control over process (e.g. choice of the seat, governing rules). Best forum for dispute can be chosen. ❖ Cooperative and parties can maintain relationship, in most matters, resolution is agreed to by parties—there are no losers! ❖ Interest based approach—mediation, conciliation, and negotiation are interest-based ADR processes, the decision is not based on facts or law but business or subject of the dispute ❖ Frees up courts and saves judicial resources. ❖ Neutrality of third parties (well-founded ADR forms' practitioners trained to be neutral) ❖ Confidence in third parties (e.g. respected practitioner in sector, community elder) ❖ Saves time and resources. ❖ Confidential. ❖ Higher user satisfaction. ❖ Less prone to corruption. ❖ Embrace and adopy as many ADR processes, e.g., *appellate mediation, community mediation, business fast-track arbitration.* ❖ Centralise ADR institutions' access to make use of AJS forms easier. ❖ Increased innovations in the administration of justice. ❖ Huge potential of ADR in resolving criminal matters
Weaknesses	**Threats**
❖ *Unequal power dynamic*—because of cooperative nature of ADR, it is very easy for one party to exploit the other. ❖ Using *ADR as a tactic*, some lawyers use ADR as a tactic to delay court proceedings.	❖ Perception by certain judges and lawyers of ADR as a threat to the court system. And will be less likely to advise parties or clients to use ADR or promote ADR in any other way.

❖ Limited resources, e.g., lack of remuneration for ADR/AJS practitioners	❖ Parties' reluctance to utilize AJS pathways and to cooperate throughout process. ❖ Formalization of AJS/ADR processes by practitioners through replication of court processes within ADR/AJS ❖ Attitude of judicial officers/advocates ❖ Lack of effective training ❖ Limited number of qualified people who can teach AJS forms. ❖ Lack of effective legislation, e.g., on appellate mediation.

2.3.3. Stakeholder analysis

The AJS stakeholders includes the general public (as likely to interact with and require access to its pathways); court users; judicial officers; law society and private practitioners; justice ministry (as relevant line-ministry); LDC (as legal training institution); the public prosecutor (DPP); and police and prisons, etc. An important stakeholder is the Judicial Service Commission JSC) which is mandated to liaise with the Government on improving the administration of justice in Uganda (1995 Constitution, art. 147(1)(e)).

2.3.4. Emerging issues and implications

Whereas the challenge of backlog persists, in the years 2020-2021, the Judiciary handled 49% of the cases in the system which represented a 20% improvement in case management. As such, ADR were credited for the improved case management system. [9] Currently, various issues impact the effective application of and recourse to ADR. These include—

Lack of enthusiasm from legal practitioners: the misguided notion that ADR is a competitor with the court system and not a complimentary path may lead to some legal practitioners misusing or not recommending it to their clients to maintain the status quo that stands.

Misuse of ADR by legal practitioners: as it stands, some lawyers use mediation and arbitration as a stall tactic allowing them to further prepare their court cases until they are comfortable enough to take the case to court.

Suitability of ADR in all cases: an increase in the application of ADR will not necessarily equate toa decrease of case backlog in the court. There are several legal issues that require interventions by courts of law, for example legal interpretation causes, constitutional causes and criminal cases (s).

Lack of an enforcement and recognition mechanism for AJS/ADR outcomes: as noted in the SWOT analysis, naturally not many ADR tribunals settling cases will have any definitive power. While with the evolution of mediation, conciliation and arbitration, the courts are increasingly recognizing party autonomy on choice of dispute resolution forum, the key concern will be with the informal and traditional mechanisms that lack a recognition and enforcement mechanism through courts and therefore may not be effective. Therefore, for

[9] Address by the Hon. Chief Justice at the Launch of the Judiciary Annual Performance Report for 2020/21.

the AJS processes initiated outside of court processes, there is no clear framework to guide enforcement or recognition. Thus, decisions made using an AJS pathway may be ignored by either party without consequence and, if a victim party were to take the matter to court, this would add to the case backlog in courts massively and potentially make AJS redundant. It would be important that decisions arising from an AJS pathway (e.g., mediation) is accorded the same standing as abitral decisions. This may require or call for amendment of the law to recognise mediation decisions conducted outside the formal court structures or justice system.

3. STRATEGIC DIRECTION ON ALTERNATIVE JUSTICE SYSTEM

3.1. A Constitutional-legal framework

The 1995 Constitution of Uganda recognises the foundational idea of alternative justice dispute resolution, although it does not establish AJS. Objective XXIV provides for the development and incorporation into aspects of Ugandan life of cultural and customary values that are consistent with fundamental rights and freedoms. Further, under Article 126(2)(d) on administration of Justice, it provides that "reconciliation between parties shall be promoted" and under Article 127, the Parliament is enjoined to make law providing for participation of the people in administration of justice by the courts. Chapter 16 of the Constitution further recognizes traditional institutions and cultural leaders. Despite not having formal roles in the constitution, traditional institutions continue to play a critical role as custodians of custom and traditions as well as a permanent feature of our body polity and the closest institution of governance to the people at grassroots.

Additionally, the *Institution of Traditional or Cultural Leaders Act* 2011, in creating the traditional and cultural leaders, envisages any conflict or dispute within a community being handled by a council of elders or clan leaders or a representative body chosen and approved by the community, in accordance with traditions, customs and norms of dispute or conflict resolution about that community. This is the most apt affirmation of the informal justice system.

These provisions read together provide the constitutional premise for AJS and show the centrality of people in administration of justice, a hallmark, which lies central to alternative justice dispute resolution. At the subsidiary level, the recognition of and provision for AJS mechanisms is spread out in various legislation.

3.2. AJS models or pathways: proposals for strategic direction

The AJS strategic direction is to be framed by understanding of the key models or pathways for institutions of delivery of justice as:

(a) **Autonomous AJS institutions:** These are independent pathways for justice which are run entirely by the community, in which:

  (i) the community determines the decision makers and processes to be followed without any interventions or regulations from the State or government.

  (ii) the decision-makers selected resolve these disputes by applying the laws, rules and practices that govern that particular community.

  The primary example is traditional or community leaders.

(b) **Autonomous third-party AJS institutions**: These are characterized by State-sanctioned institutions such as, among others, chiefs, the police, probation officers, child welfare officers, local councils. However, they can also be non-State or related

institutions such as church leaders, Imams and Sheikhs among Muslims, as well as other religious leaders and functionaries of social groups, such as NGOs and CSOs. The main characteristic of this model or pathways is that the State and non-State third parties are not part of any State judicial or quasi-judicial mechanisms.

(c) **Court-annexed AJS institutions**: These are AJS processes that are used to resolve disputes outside the court, *under the guidance and partial involvement of the Court*. They work closely with the court and judicial officers in the resolution of disputes through a referral system between the court, court users committees, AJS processes, and other stakeholders such as the ODPP, probation office, etc. This model or pathway of dispute resolution involves both community-based mechanisms and the formal justice system.

3.3. Formal courts and nexus to Informal Justice Systems

Article 126(2)(d) of the 1995 Constitution unequivocally obligates the courts to promote reconciliation between parties in the adjudication of cases. The AJS mechanisms envisaged under the strategy will interact with the formal court system as by law established and this will go a long way in increasing access to justice, alleviating the impacts of case backlog and providing communally acceptable avenues for justice.

This strategy proposes the principles of respect, protect and promote to guide the nexus of courts to informal justice. The informal justice system mechanisms will interact with the courts in four acceptable and constitutionally compliant approaches—

(a) **Deference:** under this tenet, courts will review AJS proceedings and awards (or decisions, opinion) for procedural correctness and proportionality only. In light of the different principles and structures of AJS, harmonization or focus on standards of procedures may not be effective; however adopting an approach that seeks to promote the principles of rule of law is more effective and leaves the different AJS institutions with an opportunity to operate within their context whilst observing the rules of natural justice.

(b) **Recognition and enforcement**: under this tenet, courts will recognize an award or decision from an AJS mechanism as it would its own decree, subject to a limited right of parties to set aside the outcome for narrow scope of reasons, e.g., fraud, misconduct of ADR practitioner, public policy.

(c) **Facilitative interaction**: this is when the AJS award or process is used as evidence in an ongoing court process.

(d) **Monism:** this is where the Court treats previous AJS process or award as tribunal of "first instance" from which a dissatisfied party is permitted to appeal to the court. In this mode, the court conducts a review of both facts and law as a first appellate court does.

However, the strategy is framed by the application of and preference for either the **deference** or **recognition and enforcement** approaches. However, there may be instances where a prior agreement of the disputing parties (or specific circumstances of a matter) make the **monist** or **facilitative interaction** approaches the more relevant.

3.4. Deliniating AJS forms and actors

3.4.1. Community justice: traditional institutions

Community justice essentially connotes to the means and methods of hearing, handling and settlement of disputes within communities by themselves. As a facet of AJS, these informal community-based justice structures are better placed to provide inexpensive, expedient, readily accessible and culturally appropriate forms of justice.

These models of dispensation of justice have in the recent years found validation as an appropriate means for addressing backlog and fostering reconciliation among people. By way of example, in 1987, the then new government passed a law establishing Resistance Councils and Committees, whom by legislation, judicial capacity was extended to them, drawing from lessons of the NRA guerrilla experiences in settling disputes and community attempts to use LCs like fora to settle property disputes. Similarly in Acholi, the traditional chiefs (*rwodi)*, through mediation have traditionally resolved disputes, through *mato put*, which many people in Acholi community believe can bring true healing in a manner that the formal justice system cannot.[10]

Thus, community justice is simple, easily accessible and provides justice through culturally appropriate mechanisms and socially acceptable values, such as community participation, neighborliness, and fairness. There is however, a disclaimer that the different traditional AJS forms or mechanisms apply to those who belong to a particular cultural affiliation, e.g., the Baganda would have a different approach from *mato put*, and the distinction needs to be clear, that each cultural identity, had its own unique dispute resolution mechanism.

3.4.2. Faith based organisations

Faith based organisations are instrumental in dispute resolution in Uganda, and have equally helped to mediate conflicts and promote peacebuilding at national and grassroots levels. Notable examples include, among others, the Uganda Joint Christian Council and the Acholi Religious Leaders Peace Initiative (ARLPI) (serving as an umbrella organisation for major religious denominations in Northern Uganda).

The work of faith based organization extends to the ADR roles that religious leaders play in the resolution of family and non-family relationship, as well as political disputes. The work of particular faith based bodies (e.g., Khadi courts, ecumenical courts) should be recognized as ADR interventions.

4. SCOPE AND PILLARS OF THE STRATEGY

AJS in Uganda will be premised on the commitment under Objective XXIV of the Constitution which enjoins the development of and incorporation of aspects of Ugandan life. These cultural and customary values are consistent with fundamental rights and freedoms. These pillars will instill faith in the AJS pathways, cultivate its usage and encourage people to utilise the pathways.

[10]Afako, Barney, 'Reconciliation and justice: 'Mato oput' and the Amnesty Act' *Accord: An International Review of Peace Initiatives* 11 (2002): 64-67, accessed at: https://rc-services-assets.s3.eu-west-1.amazonaws.com/s3fs-public/Protracted_conflict_elusive_peace_Initiatives_to_end_the_violence_in_northern_Uganda_Accord_Issue_11.pdf

Regarding the AJS scope, the judiciary will formally institutionalize AJS, define its scope and provide for the nature of cases for which recourse to alternative dispute resolution may be made as an appropriate first forum.

The AJS shall be premised on **four** pillars.

4.1. Pillar I: pre-litigation stage

This pillar involves the effort to resolve a dispute before it goes to a third party. The stage should engender the use of all ADR forms during a pre-dispute stage, including *negotiation, mediation, conciliation*, and in the case of communities, the use of the ADR forms by the *traditional or cultural institutions and leaders.*

This pillar is most critical where at parties have a relationship that may give rise to a dispute. The approach is to consider the *relationship*, instead of, say, an agreement or contract. If the relationship is contractual, the parties would still be within the scope. Where the scenario lacks a contract or agreement as a basis, e.g., family dispute over inheritance/boundary dispute between communities, the interventions would still be applicable and relevant. Unlike other forms of ADR, the disagreement is contextualized to the relationship, and the parties are seeking to try to keep the relationship (and, hopefully, a contract). A mediator will come into the picture to facilitate a mutually accepted agreement, allowing the parties to continue their relationship (and contract) with minimal delay and cost (if they agree).

Certain forms of *pre-dispute mediation* can be unlocked at this stage, including:

(a) *Evaluative mediation*: this allows a potential dispute to be placed before a third party to evaluate viability of the dispute proceeding to litigation in court. However, evaluative mediation may also arise under pillar III (active dispute stage) as a court-mandated or court-referred mediation. The Commercial Division has expressed a keenness on use of this ADR form in as an early pre-litigation intervention.

(b) *Transformative mediation:* this is based on the values of empowerment of each of the parties in a dispute as much as possible, and recognition by each of the parties of the other parties' needs, interests, values and points of view.

Community mediation is a key pre-dispute ADR form. Its importance lies in the fact that it potentially builds on synergies between formal and informal justice systems. Communities across the country have unique, established mechanisms for handling disputes that arise in their communities. The methods employed in community mediation are coordinated, and can be regulated and well defined. Community justice institutions (and elders) will oversee community mediation while applying legally as well as communally accepted norms and standards. At the dispute stage (pillar II), the courts can leverage community mediation to handle specific disputes within communities on issues such as land, livestock, etc.

State of pre-dispute resolution approaches

The relevant data, in 2019, shows that:

- 34% of people who took action to resolve their disputes used negotiation (that is both with and without a trained negotiator).
- 40% of land cases were solved using negotiation while only 11% used formal courts.
- 40% used negotiation in employment cases, 1% used formal courts.
- 40% used negotiation to resolve domestic violence cases, 1% used formal courts.
- 9% used negotiation for criminal cases, 2% used formal courts.
- 45% used negotiation for disputes with neighbours, 2% used formal courts.

Strategies

The pre-dispute pillar can be harnessed by the following strategies:

(a) Promotion of *autonomous* or *third-party* AJS institutions as forums of first instance for appropriate pre-dispute matters.

(b) Judiciary partnerships with private dispute resolution centres/institutions to offer pre-dispute ADR:

- ❖ More institutions allow provide early intervention services, and it is likely that more people will use the service more solely due to availability.
- ❖ By establishing a mechanism to recognize decisions from the informal and religious institutions in situations where the parties have willingly submitted to these institutions.
- ❖ Leveraging the role of retired judicial officers, by providing office space at the courts and positioning them to offer *evaluative* and *transformative mediation services*.

(c) Train AJS practitioners to embrace pre-dispute resolution of disputes or conflicts.

- ❖ Trained mediators and negotiators are more inclined not to have biases and will be more prepared to uphold standard practice of early intervention conductors.
- ❖ Majority of 'neutral' third party is often a family member or a member of the community where a dispute arose. Training would equip pre-dispute resolution skills.

(d) Public sensitization: produce and disseminate information on *autonomous* or *third-party* AJS mandates (many people are unaware of nature of pre-dispute negotiation and mediation largely because they have no exposure to it).

(e) Embrace the Singapore Convention (on mediation) once ratified by Uganda, as it provides the framework for, among other, pre-dispute mediation.

(f) Consider emerging consensus on *autonomous* or *third-party* AJS approaches with a view of determining, if any, an appropriate legislative or regulatory framework.

(g) Identify cultural and social practices in conflict with the Constitution and human rights in order to ensure substantive and procedural justice by *autonomous* AJS institutions.

(h) Develop and adopt user guidelines on *autonomous* or *third-party* AJS approaches.

4.2. Pillar II: dispute stage

This AJS pillar is premised on the appearance of an actual dispute (or conflict), that is, the stage is set for a dispute (or conflict) that needs to be managed. Like the pre-dispute pillar, this stage should engender the use of traditional *third-party AJS* forms, including *mediation, conciliation,* and, importantly, *arbitration*.

This pillar calls for the courts to be *pro-AJS*, that is, in getting parties to agreed AJS forms as the premise for resolution of disputes. Taking the example of arbitration, the *pro-AJS approach* in this pillar requires that:

(a) If arbitration is an AJS forum of choice, the court should be *pro-arbitration*.

(b) Even in absence of such choice, courts should foster and encourage *court-annexed arbitration* as provided by law, where the court, on its own motion or at the behest of the parties, appoints or acts an arbiter for the parties in a disputes that it deems suitable for arbitration.

Strategies

The dispute stage pillar is underpinned by the following strategies:

(a) Promotion of *third-party* institutions as the forum of first instance for appropriate cases.

(b) Judiciary partnerships with private dispute resolution centres/institutions to offer dispute-related ADR. This should allow:

- ❖ For establishment of the ADR Registry within the Judiciary to support ADR initiatives.
- ❖ courts to inquire in every dispute whether the parties have attempted ADR with any ADR service provider including traditional and faith based institutions.
- ❖ Partnerships will allow courts to refer more cases (those that are appropriate) to centre/institutions for pre-dispute resolution as early intervention mechanism.
- ❖ courts to engage and collaborate with ADR centre/institutions to resolve certain disputes.
- ❖ increased usage of conciliation as a third-party AJS form owing to accessibility where partnerships subsist with centers/institutions with presence (in form of branches or offices) outside Kampala and up-country.

(c) Train judges, advocates and other non-legal practitioners on ADR forms to manage and resolve disputes at this stage. The Judiciary and private centres should design and deliver courses that enable pool of ADR practitioners to grow proportionally to the interest in, and use of, ADR in dispute resolution.

(d) As with the pre-dispute pillar, there is need to embrace the Singapore Convention in regards to mediation as an ADR form during the dispute stage. The exploration of international mediation is crucial for commercial disputes before they reach court litigation stage (in pillar III). This would come with confidence of enforceability of such settlements and make mediation more appealing to national and international litigants for dispute resolution.

(e) As with the pre-dispute pillar, consider any emerging consensus on *third-party* AJS approaches to determine, if required, appropriate legislative or regulatory frame-work and develop and adopt user guidelines on *third-party* approaches.

(f) Develop a system to facilitate the linkages and synergies between the Judiciary and *third-party* AJS institutions.

4.3. Pillar III: Active dispute stage

This pillar relates to the stage of an active dispute, that is, a fully-fledged dispute filed before the court.

The ADR forms in this pillar include:

(a) Court-annexed mediation

This has been the mainstay of mediation in Uganda. Since the initial court annexed mediation pilot scheme in 2003, progress was noted with the enactment of the *Judicature (Commercial Court Division) (Mediation) Rules, 2007* that introduced court annexed mediation to the Commercial Court. The *Judicature (Mediation) Rules, 2013* were enacted to extend mediation to all other courts of Judicature. The *Civil Procedure (Amendments) Rules*, 2019 have affected court-annexed mediation in not requiring it to be a perquisite to disposal of civil matters.

The success of mediation in Uganda is notable. According to *Annual Report of Commercial Court Division*, mediation registration in 2013 had an overall work load of 623, constituting 468 filed cases in the same year and 155 cases brought forward from 2012. Out of these, 383 cases were finalized which is a disposal rate of 60.7 per cent.[11]

(b) Appellate mediation

The Court of Appeal recently introduced mediation at the appellate level. This new and voluntary innovation is meant to prevent further backlog at the appellate court to address any arising issues that can be resolved through mediation. The key take-aways from appellate mediation is in reporting on its usage:

- ❖ out of the 40 cases in sessions held in April and June 2022, 21 cases (53%) were fully mediated and settled with consent withdrawals and consent agreements filed by parties, endorsed and sealed by court.
- ❖ following the pilot sessions, over at least Shs3 billion has been released into the economy.[12]
- ❖ as at August 2022, the court had 97 cases pending appellate mediation, and this showcases the interest in the ADR form.

Notably, the new innovation of *appellate mediation* is not provided for under any legal instrument. It is therefore largely dependent on good faith and voluntariness of litigants.

Strategies

(a) Promotion of *court-annexed* AJS institutions as forum of first instance for the bulk of disputes and in appropriate cases.

(b) As with the dispute stage pillar, courts should provide *leadership in court-annexed AJS* forms—that is, to be *pro-AJS* in terms of the *court-annexed mediation* and *appellate mediation*.

(c) Build capacity and empower AJS practitioners. The continuous training of existing mediators to the courts is required to ensure their skills are up to current standards. The appellate court judges should likewise be trained. Further, the Judiciary should look into grassroots' programs to train mediators at such levels to handle any court-referred disputes, including in community or Loal Council courts.

(d) Consider emerging consensus on *court-annexed* AJS approaches to determine, if any, legislative/regulatory framework is required, e.g. appellate mediation.

(e) Develop and adopt user guidelines on *court-annexed* AJS approaches.

(f) Establish a quality assurance framework and code of conduct for AJS practitioners, especially in relation to *court-annexed* AJS forms (including a regime of sanctions for frustrating or un-willingness to utilize an agreed AJS forum).

[11] Daily Monitor, "All civil disputes set for mediation- judiciary",2021 accessed on August 30,2022 at https://www.monitor.co.ug/uganda/news/national/all-civil-disputes-set-for-mediation-judiciary--1567478

[12] The Judiciary, The Republic of Uganda, accessed on August 29, 2022 at http://judiciary.go.ug/data/incourt/162/Shs3bn%20Released%20Back%20into%20Economy%20Following%20Appellate%20Mediation%20Session.html

4.4. Pillar IV: AJS in criminal matters

This pillar relates a specific areas of disputes, that is, criminal matters. Over the past decade, the AJS forms in this pillar have evolved and been harnessed to include:

(a) Plea bargaining in criminal cases (under the *Judicature (Plea Bargain) Rules* 2016).
(b) Compensation and restitution.
This has been evident in the use of community traditional systems, e.g., *mato put*.[13]

Strategies

The AJS in criminal matters pillar is underpinned by the following strategies that require the Judiciary and courts to:

(a) Continue to be *pro-AJS* in criminal matters, e.g., plea-bargain camps, fast-tracking plea-bargain in daily hearings, etc.
(b) Be receptive to AJS forms in handling criminal matters (e.g., compensation for victims (and families)), without taking an eye off the aims and purposes of criminal justice.
(c) Provide sensitization to criminal justice stakeholders (accused, victims, advocates, State attorneys, etc.) on the ADR forms in criminal justice system.
(d) Offer training and capacity building for judicial officers.
(e) Consider emerging consensus on *autonomous* or *third-party* AJS approaches with a view of determining, if any, appropriate AJS forums for the resolution of criminal cases.
(f) Consider and deisgn appropriate processes and standards to ensure the inclusion of women, youths, and persons with disabilities in AJS measures and forums.

5. IMPLEMENTING THE AJS: INSTITUTIONAL ARRANGEMENTS AND FINANCING FRAMEWORK

To ensure and guide the implementation of the AJS strategy, state actors in liaison with non-state stakeholders shall develop the institutional framework. This framework shall detail the strategies, activities, target communities, timeframes, among other key framework issues. This implementation will require close participation of both government and communities in establishing a people based traditional justice system.

To ensure proper functionality, the Judiciary should form and appoint a committee on ADR with the core mandate to—

(a) Lead the key legislative and related measures envisaged in the strategy in order to implement AJS.
(b) Consolidate the emerging ideas on various aspects of AJS as contained herein with a goal of recommending the best approaches to reform, strengthen, and innovate AJS mechanisms in Uganda.
(c) Lead, shape and frame conversations on the progress and/or retrogressions of AJS as well as assist various stakeholders in meeting their obligations under AJS.
(d) Mobilize resources for the tasks above.

[13] E.g. *Kanyamunyu Mathew v Uganda* [2020] UGHCCRD 144.

5.1. Capacity-building—trainings and awareness-creation

The AJS practitioners' capacity will be improved through capacity building trainings such as: Continuing Legal Education (CLE), Continuing Judicial Education (CJE), Continuous Professional Development (CPD), targeting lawyers, judges and professionals respectively. The CPD would be tailored and aimed at non-lawyer ADR practitioners.

The AJS strategic capacity-building should call for early interventions in the law school and legal training curricula at universities and institutions, such as the Law Development Centre.

There should also efforts geared towards creation of awareness of the AJS pathways among the end-users, e.g. business-persons, communities, etc.

5.2. Accreditation and empowerment of AJS practitioners.

There is a need to empower AJS practitioners, in terms of authority to employ AJS pathways to resolve disputes. This is likely to be by way of formal trainings and certifications. The key legal training institutions (e.g. LDC, JTI) may not have the capacity to do this. In that case, the accrediting of other legal training providers to conduct approved AJS curriculum may be required In light of existing guidelines concerning accreditation. AJS practitioners, especially arbitrators and mediators, shall additionally be certified and subscribed to existing or emerging professional bodies.

5.3. Piloting specific interventions

The experience with appellate mediation at the Court of Appeal showcases the value of form of piloting an AJS pathway. This offers opportunities to learn on what works and what needs to be changed or adjusted. The piloting of an AJS intervention such as *community mediation* has been mooted and proposed by judges of High Courts circuits in Gulu and Lira in the Acholi sub-region.

5.4. Resource materials

In order to enhance capacity in terms of knowledge and skills, it shall be necessary to develop and build up resource materials concerning the AJS, and these can be in form of—

(a) Benchbooks.
(b) Pocket guides.
(c) Legislative resources.
(d) Comparative e-learning materials

5.5. AJS case management

There shall be the AJS case data base which will largely be the central place for the storage of cases resolved informally through Information Management System (IMS). The database will principally assist in capturing AJS-related cases; file-management, monitoring progress and success of the AJS, as well as facilitate the recourse to formal courts where parties to a dispute fail to agree.

5.6. M&E framework

A monitoring and evaluation (M&E) framework shall be developed with approval of the Judiciary to provide a periodic and continuous assessment of the performance and progress of the AJS. The M&E framework will use evaluation tools outlining the particular area aspect of the AJS being assessed. The M&E will feed into reporting to the Judiciary, broader justice sector, and relevant stakeholders.

5.7. Costing the AJS—Budget

The AJS shall be costed as per the Judiciary's budgetary requirements.

5.8. Action Plan

The AJS action plan on the implementation of the AJS shall be developed on the final AJS Strategy is approved and validated by the Judiciary.