

## **Intergovernmental Dispute Resolution: Analysing the Application and Future of ADR**

**By: Oseko Louis Denzel Obure\* & Kihiko Rosemary Wambui\*\***

### **Abstract**

*The government of Kenya, post-2010, is composed of different levels of government. These levels are the national and devolved government composed of various organs. Devolution has led to the transfer of functions, powers, and services from the national government to the county governments and its organs. Inevitably, the management and exercise of these powers and functions have created friction. The Constitution of Kenya, 2010 envisioned this friction. Consequently, it provided for the application of Alternative Dispute Resolution (ADR) to facilitate an out-of-court process that would resolve these disputes while maintaining the harmonious relationship between these governments, seeing as they are interdependent. Consequently, parliament enacted the Intergovernmental Relations Act, 2012 (IGRA) to bolster the provisions of the Constitution. However, this statute has weaknesses that have made it ineffective in resolving intergovernmental disputes. Arguably, ADR remains to be the appropriate mechanism for resolving intergovernmental disputes for it protects the relationship existing between these codependent levels of government which must work through consultation and cooperation. Through an analysis of the place of ADR in the resolution of intergovernmental disputes, this paper demonstrates the gaps that must be filled to improve the efficiency of ADR in intergovernmental dispute resolution (IGDR).*

### **1.0 Introduction**

The Republic of Kenya is governed through a devolved system comprising of both national and county governments.<sup>1</sup> The Constitution of Kenya 2010

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\* Student, University of Nairobi School of Law. Email: osekolouis1@gmail.com  
Phone: +254 796 467 738

\*\* Student, University of Nairobi School of Law. Email:

established a devolved system<sup>2</sup> in a bid to enhance the quality of governance through the decentralisation of power.<sup>3</sup> To achieve this end, it is imperative that all levels of government work cooperatively. This working relationship was envisioned by Article 189 of the Constitution, which stipulates that national and county governments ought to support and consult with each other. The provision, additionally, obliges both levels of government to respect each other's functional and institutional integrity.<sup>4</sup> The position of the Constitution on the ideal nature of relationships between the national and county governments is reiterated in the Intergovernmental Relations Act of 2012. Section 4 of the Act, stipulates that governments ought to discharge their duties and carry out their mandate with respect for other governments' sovereignty, cooperation and collaborative consultation. Despite the ideals put forth by both the Constitution and the Intergovernmental Relations Act, conflicts arise between governments for a variety of reasons. The digression from the ideal is, however, not unanticipated. Both the Constitution and the Intergovernmental Relations Act contemplated the possibility of disputes. The Constitution places a duty upon different governments to make every reasonable effort to resolve disputes,<sup>5</sup> indicating appreciation of the fact that disputes are bound to occur. Likewise, the IGA sets out that governments ought to minimise disputes and foster cooperation.<sup>6</sup> Where disputes cannot be avoided or minimised, there are avenues that can be explored for their resolution. Championed for by the Constitution through Article 159, Alternative Dispute Resolution methods find application in resolving disputes between governments.<sup>7</sup> The forms of ADR that may be used are mediation, arbitration and negotiation. These methods of dispute resolution ought to be applied and exhausted before litigation is considered,<sup>8</sup> as it

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**kihikorosemary@gmail.com Phone: +254 706 382 029**

<sup>1</sup> Article 1(4), Constitution of Kenya, 2010.

<sup>2</sup> Article 6, Constitution of Kenya, 2010.

<sup>3</sup> Jepchumba Cheserek, *An Appraisal of the Bicameral Legislature under the Kenyan Constitution*, 2010. (2015) <[https://www.academia.edu/21712072/AN\\_APPRAISAL\\_OF\\_THE\\_BICAMERAL\\_LEGISLATURE\\_UNDER\\_THE\\_KENYAN\\_CONSTITUTION\\_2010?email\\_work\\_card=view-paper](https://www.academia.edu/21712072/AN_APPRAISAL_OF_THE_BICAMERAL_LEGISLATURE_UNDER_THE_KENYAN_CONSTITUTION_2010?email_work_card=view-paper)> Accessed 15<sup>th</sup> June 2021.

<sup>4</sup> Article 189, Constitution of Kenya, 2010.

<sup>5</sup> *Ibid*, n 3

<sup>6</sup> Section 4, Intergovernmental Relations Act, 2012.

<sup>7</sup> *Ibid*, n 3

<sup>8</sup> Section 31, Intergovernmental Relations Act, 2012.

should be the last resort.<sup>9</sup> The central role that ADR mechanisms ought to play gives rise to the need for a comprehensive framework through which they operate. By evaluating the existing legal and institutional framework governing the application of Alternative Dispute Resolution methods in the resolution of intergovernmental disputes, this paper shall propose recommendations whose implementation should enhance the efficacy of ADR.

## **2.0 Parties to Intergovernmental Disputes**

As the term ‘intergovernmental’ suggests, intergovernmental disputes occur between different levels of government. The Constitution of Kenya establishes two separate levels of governments, namely the national and county governments.<sup>10</sup> At the national level, there exists three arms of government. The legislative arm upon which the power to make, amend and repeal laws is vested is the parliament.<sup>11</sup> The parliament is bicameral in nature, which means that it consists of two chambers, namely, the National Assembly and the Senate. The executive is established by the Constitution,<sup>12</sup> and its role is to implement policies. Finally, the judiciary is responsible for the interpretation of the law.<sup>13</sup> Owing to devolution, Kenya is divided into counties, each having its own government, which is distinct.<sup>14</sup> County governments are divided into county assemblies and county executives.<sup>15</sup> Conflicts occurring between the levels of government as described herein may be termed as intergovernmental disputes. The Intergovernmental Relations Act sets aside a Part dealing with the resolution of disputes and provides that the Part shall apply to the resolution of disputes between the national government and county governments or amongst county governments.<sup>16</sup> It so follows that the

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<sup>9</sup> *County Government Of Nyeri v Cabinet Secretary, Ministry Of Education Science & Technology & Another* [2014] eKLR

<sup>10</sup> *Ibid*, n 1

<sup>11</sup> Article 94, Constitution of Kenya, 2010

<sup>12</sup> Article 129, Constitution of Kenya, 2010

<sup>13</sup> Article 1(3), Constitution of Kenya, 2010

<sup>14</sup> Article 6, Constitution of Kenya, 2010

<sup>15</sup> Article 176, Constitution of Kenya, 2010

<sup>16</sup> Section 30(2), Intergovernmental Relations Act, 2012

parties to these conflicts are the national government and county governments.

### **3.0 Nature of Intergovernmental Disputes**

The implementation of a devolved system of government, which vests power in different actors, has been met with considerable hardship due to the emergence of disputes between different governments. These disputes have emerged in the course of discharging duties, which then impede the attainment of the goals of the devolved system of government. The causes and nature of these disputes vary, a few of which are as follows;

#### **3.1 Supremacy wars between the National Assembly and the Senate**

The National Assembly and the Senate are established by the Constitution of Kenya at Article 93. On the one hand, the roles of the National Assembly pertain to deliberating and making decisions that affect the interests of the people.<sup>17</sup> On the other hand, the Senate is charged with the duty to protect and safeguard the interests of counties and their governments.<sup>18</sup> The Constitution is silent on whether the National Assembly and the Senate are equal or whether one has a higher status than the other. This position leads to a rivalry between the National Assembly and the Senate, which then escalates to a total disregard of functional integrity between the two parties. This can be exemplified by the exclusion of the Senate from matters pertaining to County Governments by the National Assembly. This matter was tabled before the Supreme Court for an advisory opinion, *In the Matter of the Speaker of the Senate & another*,<sup>19</sup> where it was averred that the different levels of government ought to work collaboratively and in consultation with each other. It was also contended that the two levels of government ought to exhaust Alternative Resolution methods before turning to the court system. In her dissenting opinion, Ndungu Njoki SCJ pronounced herself on the matter of the court's jurisdiction

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<sup>17</sup> Article 95, Constitution of Kenya, 2010

<sup>18</sup> Article 96, Constitution of Kenya, 2010

<sup>19</sup> [2013] eKLR

stating that seeking an advisory opinion from the Supreme Court was misguided. This is due to the fact that the parties to the matter had not exhausted both the informal and formal mechanisms set in place to resolve intergovernmental disputes.<sup>20</sup> The position of Ndungu Njoki goes to show that before escalating intergovernmental disputes to the court, parties to these conflicts ought to utilize ADR mechanisms exhaustively.

### **3.2 Disputes Resulting from Transfer of Functions and powers**

With the advent of the devolved system of government came the transfer of powers and functions from one level of government to another.<sup>21</sup> These transfers would be done where they would enhance the efficacy of the government since some levels could put some powers to better use and discharge some duties more effectively than others. Distribution and transfer of powers and functions between the national and county governments have been outlined in the Fourth Schedule of the Constitution of Kenya. In the course of discharging their duties, the national government and county government have had conflict over which level may perform which duties. In the matter of *County Government of Migori & 4 others v Privatisation Commission of Kenya & another*<sup>22</sup>, there was a dispute between the national government and county governments over the milling of sugar. It was maintained by the latter that sugar milling was a devolved function;<sup>23</sup> hence, the former could not rightfully privatise sugar milling as it was not within its powers. The national government averred that while crop and animal husbandry were within the purview of county governments, sugar milling companies were public investments, which ought to be dealt with by the national government. The court acknowledged the nature of the dispute to be intergovernmental and maintained the position of the Constitution and the Intergovernmental Relations Act that all such disputes should be resolved through

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<sup>20</sup> *In the Matter of the Speaker of the Senate & another*, [2013] eKLR

<sup>21</sup> Article 187, Constitution of Kenya, 2010

<sup>22</sup> [2017] eKLR

<sup>23</sup> Part 2, Fourth Schedule of the Constitution of Kenya.

Alternative Dispute Resolution mechanisms and that the courts are the last resort.<sup>24</sup>

### **3.3 Disputes over Allocation of Funds and Resources**

The distribution of powers and functions establishes the powers that are vested in different levels of government and the functions that they may carry out. In order to carry out these functions and exercise their mandate, governments are allocated funds and resources. With the transfer of certain powers, there have been conflicts as to the erroneous allocation of funds. In such instances, governments are allocated funds for functions that are not within their purview. Such conflict arose between the Council of County Governors and the Attorney General, where the national government had allocated itself resources for the performance of functions within the scope of county governments.<sup>25</sup> Conflicts also arise as to the jurisdiction of national and county governments in legislating on money matters. *In the Matter of the Speaker of the Senate & another*,<sup>26</sup> there arose between the national government and the Senate an issue over whether the Senate ought to have been involved in the enactment of the Division of Revenue Bill. The Senate was of the position that it had an interest in the subject matter of the Bill, so it ought to have been involved. The conflict arose when the National Assembly maintained that it had exclusive legislative authority.

### **4.0 Legal and Institutional Framework for ADR in IGDR**

Kenya has made some strides in establishing a legal and institutional framework best suited for resolving disputes, particularly intergovernmental dispute resolution. However, these institutions and legal frameworks have not proven to be effective in managing these disputes. For instance, these disputes often escalate and end up in courts and the media - with each party threatening the other with dire

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<sup>24</sup> Section 35, Intergovernmental Relations Act, 2012

<sup>25</sup> *Council of County Governors v Attorney General & 4 others; Controller of Budget (Interested Party)* [2020] eKLR

<sup>26</sup> [2013] eKLR

consequences because of their positions. This was particularly so when the council of Governors threatened to shut down counties should the national treasury fail to pay the sum of Kshs. 102Billion owed to the counties by 18<sup>th</sup> June 2021.<sup>27</sup> This section seeks to critically examine the existing legal and institutional framework in the settling of intergovernmental disputes.

#### **4.1 The Constitution of Kenya and Intergovernmental Relations Act**

The Kenyan Constitution provides for a mandatory settlement of intergovernmental disputes. This is particularly so per article 189(3) and (4) of this constitution. The constitution places a positive duty on the county and national government to make "reasonable efforts" in settling disputes.<sup>28</sup> Also, the constitution provides for the ADR mechanism for the settling of these disputes, notably mediation, negotiation, and arbitration.<sup>29</sup> Similarly, Article 6(2) of the constitution provides that owing to the interdependence of these levels of government, their mutual relationships must be conducted in a manner characterised by consultation and cooperation. A constructive interpretation of this provision makes it applicable in instances where there is friction between these levels of governments or their organs. These provisions of the constitution have been bolstered by section 33 of the Intergovernmental Relations Act.<sup>30</sup> This provision provides for the ADR mechanisms and procedures to be followed before and after the declaration of a dispute. However, per section 35 of this statute, the courts have been granted the powers to intervene should all reasonable efforts fail. Arguably, this section is against the spirit of Article 189 of the constitution. Although the provision provides that the parties may seek to resolve the matter through arbitration or court intervention, it is this paper's claim that arbitration ought to have been

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<sup>27</sup>Citizen TV, 'Governors Threaten to Shut down Counties Due to Cash Crisis' (14 June 2021) <<https://www.youtube.com/watch?v=9kQB817pw3c>> accessed 18 June 2021

<sup>28</sup> Article 189(3), Constitution of Kenya, 2010.

<sup>29</sup> Article 189(4), Constitution of Kenya, 2010.

<sup>30</sup> Act No. 2 of 2012.

the ultimate mechanism for settlement of disputes. Besides, this provision eroded the very objective of keeping intergovernmental disputes out of the court. It can be seen as counterproductive which is exemplified by the fact that despite the conditions under section 35 of IGRA, the courts have been hesitant in settling these types of disputes, for many are referred to ADR. For instance, in *Council of County Governors v Lake Basin Development Authority & 6 Others*,<sup>31</sup> the court dismissed the matter while urging the parties to seek alternative dispute resolution mechanism.

It is worth noting that there are other legislations that provide for the resolution of intergovernmental disputes. These are statutes with clauses that mandate parties to resolve their disputes through alternative dispute resolution. For instance, matters regarding functions and the delivery of service between the national government and the city of Nairobi are to be resolved through ADR.<sup>32</sup> Although the Intergovernmental relations Act outlines the procedure for settling these disputes, in instances such as a matter arising from the Urban Areas and Cities Act, the relevant Act will take precedence over IGRA unless the Act provides for the invocation of the Act provisions of IGRA.

#### **4.2 The National and County Governments Coordinating Summit and Council of Governors**

This Act establishes the summit, which comprises the President, governors, forty-seven counties, a secretariat among others.<sup>33</sup> The primary role of this summit is to resolve disputes between the national and county government,<sup>34</sup> while the leading role of the Council of Governors is to resolve disputes between the county governments.<sup>35</sup> Although these institutions bear the potential of resolving these disputes owing to the enabling legal framework, they have been caught

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<sup>31</sup> Petition No. 280 of 2017

<sup>32</sup> Section 6(6)(d), Urban Areas and Cities Act No. 13 of 2011

<sup>33</sup> Section 7, Intergovernmental Relations Act No 2 of 2012.

<sup>34</sup> *Ibid*, Section 8.

<sup>35</sup> *Ibid*, Section 20(1)(d).



in the jaws of politics primarily characterised by party interests and political alliances. Scholars such as Mitulla posit that the realisation of the objectives of these institutions lies in cushioning them from political party interests.<sup>36</sup> However, this seems nearly impossible, seeing as the members are politically elected and have their political interests to advance. Also, this shortcoming was reported by the Intergovernmental Relations Technical Committee report of 2015.<sup>37</sup> Consequently, these weaknesses contribute largely to these disputes finding their ways in courts – a process that strains intergovernmental relations.

## **5.0 The Place of ADR in Intergovernmental Dispute Resolution**

### **5.1 Intergovernmental Dispute Resolution Globally**

The concept of a devolved system of government is not unique to Kenya. Globally, countries like the United Kingdom are characterised by a devolved system of government. As discussed earlier, this system of government has a penchant for conflicts in the course of service delivery. In the United Kingdom these levels of government have signed a Memorandum of Understanding (MoU) entailing the principles of co-existence among these governments. This principle enhances consultation, open communication, and cooperation that serve to minimise instances of disputes. Also, the United Kingdom has protocols signed in 2001 by the Joint Ministerial Committee on the avoidance of conflicts.<sup>38</sup>

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<sup>36</sup>Winnie M, 'Intergovernmental Relations Act 2012: Reflection And Proposals On Principles, Opportunities And Gaps' <[https://profiles.uonbi.ac.ke/mitulla/files/web\\_pdf\\_mitullah\\_intergovernmental\\_relations\\_act\\_2012\\_review\\_edited.pdf](https://profiles.uonbi.ac.ke/mitulla/files/web_pdf_mitullah_intergovernmental_relations_act_2012_review_edited.pdf)> accessed 18 June 2021

<sup>37</sup> 'Status of Intergovernmental Institutions; After Two Years of Devolution' (Intergovernmental Relations Technical Report Committee (IGRTC) 2015)

<sup>38</sup>United Kingdom Publishing Services, Protocol for Avoidance and Resolution of Disputes (2001) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/62121/avoidance-resolution.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/62121/avoidance-resolution.pdf)> accessed 20 June 2021.

Regionally, South Africa boasts of a comprehensive statutory instruments and judicial precedent in the area of intergovernmental dispute resolution. For instance, the courts have continued to appreciate the fact that state organs have a negative duty of avoiding litigation. Although the courts are actively involved in intergovernmental dispute resolution, their role is limited to promoting the resolution of intergovernmental disputes amicably. This is evidenced by the consistency in judicial orders on Intergovernmental disputes. To begin with, in *National Gambling Board* case<sup>39</sup> the constitutional court declared that “organs of the state must try and solve their disputes amicably.” Additionally, the courts have found that settling of disputes amicably is essential for the cooperative aspect of government between the different levels and organs; thus, resolution ought to be an obligation between the parties.<sup>40</sup> It is worth noting that these matters were determined before the enactment of the Intergovernmental Relations Framework<sup>41</sup> in 2005.

## **5.2 Intergovernmental Dispute Resolution in Kenya**

In a devolved system of governance, service delivery is characterised by competing and conflicting interests that risk impeding efficiency in the delivery. Consequently, ensuring efficient service delivery between these levels of government and their organs requires an effective mechanism to resolve the disputes borne of these competing and conflicting interests. Laibuta posits that such a mechanism must be efficient, cost-effective, and with quality outcomes.<sup>42</sup> Although Kenya has a functioning judiciary that can resolve disputes, the nature of intergovernmental disputes is such that litigation shall not be an

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<sup>39</sup> *National Gambling Board versus Premier of Kwazulu Natal and others* [2002] 2 BCLR156 (CC)

<sup>40</sup> *Uthekele District Municipality and Others vs. President of the Republic and Others* [2003] 1 S.A. 678(CC)

<sup>41</sup> Act No 13 of 2005

<sup>42</sup> Kibaya Laibuta, ‘The Place of ADR in Intergovernmental Disputes’ (2021) <<https://lc-adr.net/blog/the-place-of-adr-in-intergovernmental-disputes>> accessed 19 June 2021

effective way of settlement. ADR serves to provide a platform through which these governments and their organs can resolve their disputes. ADR serves to protect the relationship between these national and county governments and amongst county governments by ensuring parties' satisfaction. Litigation is famous for its winner-takes-all norm; when a matter is settled, there is a loser and a winner. The danger presented by litigation is that it injures the relationship that exists between the parties. This is something that one would not wish between these levels of government which must work together through consultation and corporation as provided for by the constitution.<sup>43</sup> Besides, since these are political organs, as discussed before in this paper, it is essential to encourage a culture of solving society's problems by political compromises at the political level.<sup>44</sup>

This compromise is only achievable through ADR mechanisms such as mediation and negotiations. Compromise and a mutually accepted settlement through mediation, conciliation, and negotiation serve to safeguard the relationship between these parties.

Alternative Dispute Resolution offers a cost-effective and efficient method of dispute resolution.<sup>45</sup> Saving cost involves saving both time and money. However, this statement has often fallen victim to overstatement, some mechanisms such as arbitration have grown to be costly. Undoubtedly, litigation has often been expensive and time-consuming, which is as a result of recurrent adjournments and hefty legal fees, among other things.<sup>46,47</sup> As such, the implementation of

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<sup>43</sup>Article 6(2), Constitution of Kenya 2010.

<sup>44</sup> John M Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press 2015) pg. 131 -133.

<sup>45</sup> Kariuki Muigua, *Alternative Dispute and Access to Justice in Kenya* (Glenwood Publishers Limited 2015) 40

<sup>46</sup>Mbuthi G, 'Implementation Of Alternative Dispute Resolution (ADR) In The Devolved System In Kenya: Challenges And Perspectives' <[https://www.academia.edu/39403819/implementation\\_of\\_alternative\\_dispute\\_resolution\\_adr\\_in\\_the\\_devolved\\_system\\_in\\_kenya\\_challenges\\_and\\_perspectives](https://www.academia.edu/39403819/implementation_of_alternative_dispute_resolution_adr_in_the_devolved_system_in_kenya_challenges_and_perspectives)> accessed 15 June 2021

<sup>47</sup> John M Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press 2015) pg. 131 -133.

decisions or policies is delayed. If the same were to happen to an intergovernmental dispute, it would delay service delivery, particularly essential services, which would occasion great harm on the people of the Republic. The costly nature of litigation is evidenced by intergovernmental disputes that have been filed in courts. For instance, the county government of Bomet was sued by renowned advocate Prof Ojienda for legal fees amounting to Kshs. 75Million<sup>48</sup> after representing them in a land dispute. Also, Baringo county was sued by Donald Kipkorir over KSh. 17.5Million owed for services offered.<sup>49</sup> Arguably, the costs would have been lesser had the matters been referred to the Summit or Council of Governors, which are mandated to resolve these disputes in accordance with the Intergovernmental Relations Act, 2012.

Politically charged disputes ought to be subjected to a process best suited for their determination. More often than not, these disputes arise in the course of exercising sovereignty over territories; that is, when a county government wants to exploit the resources occurring naturally within its boundaries, but is disputed by a neighbouring county. These powers are exercised by the politically elected and appointed. Consequently, the dispute arising should be subjected to ADR as they revolve around policy choices and administrative judgements, as posited by Kangu.<sup>50</sup> Besides, through resolution, the parties reach a solution that best serves their present and future interests while saving them the agony of the delays, seeing as the judiciary is riddled with many matters causing a backlog. The likelihood of destructive escalation in such matters also creates the need for the utilization of a more conciliatory than adversarial system; thus, the application of ADR would be more appropriate.

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<sup>48</sup> *Ibid* n 40. p24.

<sup>49</sup> *KTK Advocates vs. Baringo County Government* [2018] eKLR.

<sup>50</sup> *Ibid* n.39.

Essentially, ADR plays a critical role in intergovernmental dispute resolution seeing as litigation may be counterproductive. For instance, from the above, ADR promotes the parties' satisfaction, produces quality outcomes that appreciate the present and future interests of the parties and saves on cost and time. Its apparent benefits notwithstanding, ADR is not the key to the creation of a utopian dispute-solving framework, a position that was asserted by Laibuta in writing that, "ADR is not the panacea for all conflicts and disputes but a practical solution to disputes that plague service delivery."<sup>51</sup>

## **6.0 Gaps in the Current Framework**

While there exists a legal and institutional framework for the application of Alternative Dispute Resolution Methods in tackling intergovernmental disputes, there are gaps and ambiguities which impede the efficacy of these mechanisms. These gaps may interfere with the independence and impartiality of the process, the expedition with which matters are resolved, and the quality of outcomes achieved.

### **6.1 Lack of Limitations of Time**

Procedural time limits, where imposed, function to control the period over which a matter may be in issue.<sup>52</sup> In the resolution of intergovernmental disputes, these limitations would be necessary to govern the amount of time that a matter may be dealt with through negotiation, mediation or arbitration. The matters dealt with as a result of these conflicts are varied, with some being of an urgent nature. Thus, there is a need for proper definitions of the limitations of time in the context of intergovernmental disputes in order to avoid unnecessary delays, which would cause irreparable damage.

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<sup>51</sup> Kibaya Laibuta, 'The Place of ADR in Intergovernmental Disputes' (2021) <<https://lc-adr.net/blog/the-place-of-adr-in-intergovernmental-disputes>> accessed 19 June 2021.

<sup>52</sup> Dalia Averkienė, 'The Meaning of Procedural Time Limits in Civil Procedure', (2012) 4 SS 4

## **6.2 Lack of Definite Procedure for Selecting Neutral Third Party**

In the application of mechanisms of Alternative Dispute Resolution, a third party is involved. The role of the third party is to facilitate constructive discussion and consultation, and the reaching of a workable solution.<sup>53</sup> It is crucial that the relevant third party be neutral. A lack of bias enhances the quality of the proceedings since all parties are given equal chance to participate, and matters are considered without partiality. Currently, there are no definite procedures or guidelines for the selection of a neutral third party in the case of intergovernmental disputes. This may be problematic since it may lead to the selection of a prejudiced third party, which would defeat the essence of Alternative Dispute Resolution.

## **6.3 Uncertainty as to the Best Applicable ADR Method**

The nature of disputes between governments is varied, and the outcomes that are desired from dispute resolution are also different. It then follows that there are forms of ADR that may suit some circumstances better than others. Granted, Section 34 of the Intergovernmental Relations Act provides for the selection of an appropriate mechanism. However, this provision is riddled with ambiguity since it leaves the decision to any intergovernmental structure or legislation on the off-chance that a statute dealing with a particular matter exists. There ought to be definite and comprehensive guidelines that stipulate which matters may be resolved through mediation, negotiation or arbitration. This would ensure that matters are resolved through the most suitable ADR mechanism; hence, the most appropriate outcome would be achieved.

## **7.0 Conclusion**

ADR provides promising mechanisms in resolving intergovernmental disputes despite substantial ineffectiveness brought by its inherent and institutional weaknesses. Besides, ADR has not been applied as was

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<sup>53</sup>Harpole Sally A, 'The Role of The Third Party Neutral when Arbitration and Conciliation Procedures are Combined'. Asian Leading Arbitrators' Guide To International Arbitration (2007).

anticipated by the constitution and the Intergovernmental Relations Act. Additionally, the established institutions have not realised their potential as they are riddled with political agendas and self-interests. The lack of competence and independence is a hurdle to ADR application.

One must note that these challenges are not limited to competence and independence, but extend to the attitude many have adopted towards ADR. For instance, litigation is far more popular than ADR, hence the continued filing of disputes in courts, including intergovernmental disputes. However, not much has been done to change this perception by creating awareness amongst the masses, including the levels of government and their organs which are deeply seated in the litigation mania.

## **8.0 Recommendations**

This paper recommends that the existing legal and institutional framework be reformed in a manner that bolsters the application of ADR in intergovernmental dispute resolution. To begin with, although the Intergovernmental Relations Act provides for the procedure under section 33 and creates the institutional bodies, the same has been eroded with the clawbacks under section 35 that allows for courts intervention. This is a contravention of the spirit of Article 189(4)<sup>54</sup>, which advocates for ADR in these disputes. Therefore, there is the need to harmonise these provisions to enhance the existing framework and make ADR mandatory in resolving disputes arising from intergovernmental relations. Also, the reforms must speak firmly on the timeframe for resolving these disputes or delays in the process slow down the delivery of resources. Besides, ADR ought to mitigate the delays that characterise litigation.<sup>55</sup> Seeing as the importance of a neutral third party cannot be gainsaid, it is crucial that a procedure be

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<sup>54</sup> The Constitution of Kenya, 2010.

<sup>55</sup> John M Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press 2015) pg. 131 -133.

outlined for the choosing of the said third party, so as to ensure a prejudice-free process.

Awareness should be created amongst the public on ADR. Sadly, even in the levels of government that have legal advisors among other experts, the matters are still filed in courts, and when the matters are not filed in court, they are politically debated in public with parties taking strong positions. For instance, in the matter of the national treasury owing the county governments Kshs. 102 Billion, instead of the parties resolving the dispute, the first step by the council of governors was to threaten to shutdown counties' delivery of essential services.<sup>56</sup> This indicates a total disregard of the ADR mechanisms in place and spirit of Article 6(2) of the constitution on cooperation. Therefore, there is the need to promote ADR through affirmative action like creating awareness amongst the relevant parties and the public at large.

The summit and Council of Governors should undertake comprehensive training on the application of ADR mechanisms. This is essential since the summit and council are composed of persons who may not possess sufficient knowledge of ADR mechanisms. Additionally, tools and systems should be put in place that simplifies the referral procedures, declaration of disputes and aids the stakeholders in managing the conflicts. This training should incorporate emerging trends; therefore, there should be revenue that facilitates research within and outside Kenya on effective ways of addressing these disputes.

Finally, the varied nature of intergovernmental disputes suggests that there are disputes that are more sensitive than others. The lack of a proper framework on how to deal with the different disputes is

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<sup>56</sup>Citizen TV, 'Governors Threaten to Shut down Counties Due to Cash Crisis' (14 June 2021) <<https://www.youtube.com/watch?v=9kQB817pw3c>> accessed 18 June 2021



problematic since it may result in irreparable harm. One such sensitive conflict is boundary disputes; hence, caution ought to be observed and special attention given to them. First, their resolution should encourage cultural tolerance and not a political approach. This should be particularly so in instances where there are impasses on which border a natural resource is located. An appropriate method of resolving such a conflict would be adopting the establishment of regional blocks where both parties can benefit under a mutual agreement. This initiative has proven effective looking at the Regional Approach for Sustainable Conflict Management Integration which involves border communities in Ethiopia and Somalia.<sup>57</sup> These initiatives promote cultural tolerance and peaceful existence between the neighbouring counties.

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<sup>57</sup> *Ibid* n.40. pg 41.

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