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Resolving Intergovernmental Disputes in Kenya through Alternative Dispute Resolution (ADR) mechanisms

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Abstract

Devolution is one of the transformative changes introduced by the Constitution of Kenya (hereinafter referred to as "Constitution"). Unlike pre-2010 where power was centralised, authority and power have been decentralised through two levels of government: namely, national government and county government. The universal support for devolution was anchored in its promise of bringing services closer to the 'wananchi'. Under Articles 6 and 189 of the Constitution, the two levels of government are required to work together through consultation and co-operation in performing their functions. Cognizant of potential intergovernmental disputes, the Constitution directs that such disputes be resolved through Alternative Dispute Resolution (ADR) mechanisms. Following this constitutional directive, the Intergovernmental Relations Act 2012 (IGRA hereinafter) was enacted to provide for procedures in resolving intergovernmental disputes. Pursuant to the IGRA, the Intergovernmental Relations (ADR) Regulations 2021 were gazetted to provide a detailed framework. This paper analyses the nature and causes of intergovernmental disputes by highlighting examples witnessed in the last thirteen years of devolution. It observes that contrary to the constitutional directive that intergovernmental disputes should be resolved through ADR mechanisms, majority of the disputes have been resolved through litigation. This has not only worsened relations between and within the two levels of government, but has also delayed projects as well as wastage of resources though high litigation fees. Consequently, this has negatively affected the provision of services to the people. Further, the paper critically examines the strengths

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and gaps in the ADR Regulations. Lastly, the paper offers recommendations on better resolution of intergovernmental disputes through ADR.

1.0 Introduction

On 27th August 2010, Kenyans promulgated a new Constitution which significantly transformed the system of governance in the country.[1] For a long time, political and economic power was centralised around 'an imperial' presidency causing many governance and economic problems such as bad governance, marginalisation, unequal distribution of power and resources.[2] The centralised system crippled democratic participation of the people and communities in their governance, development, and management of their own affairs.[3] In response to these problems, the people of Kenya overwhelmingly voted for devolution as a new system of governance. This was aimed at decentralising power, resources, and national prosperity from the centre to the people.[4] Under the devolved system of government, citizens participate in their governance by exercising their sovereignty either directly or indirectly through elected and appointed representatives.[5] Little wonder, the Constitution of Kenya Review Commission noted that there was no single person that opposed the principle of devolving and sharing power.[6]

Devolution is arguably the most transformative aspect of the Constitution as it promises a new Kenya.[7] It came with the hope that it would deliver massive

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[1] Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press 2015)1.

[2] Council of Governors, *Annual Report*, 2014 /2015, vii.

[3] Kangu (n 1)2.

[4] Council of Governors, 3rd Annual Devolution Conference Report held at Meru National Polytechnic, Meru County from 19th to 23rd April 2016. Under Article 10 of the Constitution, sharing and devolution of power is one of the core principles in Article 10 of the Constitution.

[5] Ministry of Devolution and Planning, *Policy on Devolved System of Government*, 2016,2.

[6] Council of Governors, *Annual Report, 2014/2015*, 4.

[7] Patrick Onyango, *Devolution Made Simple: A Popular Version of County Governance System* (Friedrich-Ebert-Stiftung 2013) 4.

gains and improve the lives of people if implemented properly.[8] While the Constitution brought other major changes like the recognition of the supremacy of the Constitution, separation of powers, robust bill of rights, and independence of the judiciary, these were also present in the repealed constitution, at least in theory.[9] However, devolution did not exist and this major change has changed the purpose and structure of the state from centralisation of power to effective participation of people as well as service delivery.[10] This is evident from the objectives of devolution outlined in the Constitution.[11]

The Constitution creates two distinct and interdependent levels of government, namely the national and county governments.[12] At the national level, there exists three arms of government which are the Parliament, Executive, and Judiciary. Parliament is empowered to make, amend, and repeal laws.[13] It is bicameral in nature comprising the National Assembly and the Senate. [14] The executive is tasked with enforcing laws and

[8] Mutakha Kangu 'Kenya's Model of Devolution' in Intergovernmental Relations Technical Committee (IGRTC) (ed) *Deepening Devolution and Constitutionalism in Kenya: A Policy Dialogue,*2021)3.
[9] Ibid 40.
[10] Intergovernmental Relations Technical Committee, *Strategic Plan 2021/2015*,1.
[11] Constitution of Kenya, Article 174. The objectives are: a) To promote democratic and accountable exercise of power; b) To foster national unity by recognising diversity; c) To give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; d) To recognise the right of communities to manage their own affairs and to further their development; e) To protect and promote interests and rights of minorities and marginalised communities; f) To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; g) To ensure equitable sharing of national and local resources throughout Kenya; h) To facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and, i) To enhance checks and balances and the separation of powers.
[12] See Article 1 of the Constitution which provides that the sovereign power of people is exercised at the national and county level.
[13] Constitution of Kenya, Article 94 (5).
[14] Ibid Article 93(1) and 93(2).

implementing policies while the judiciary interprets the law.[15] At the county level, county governments are divided into county assemblies and county executives.[16] Besides creating the two levels of government, the Constitution also creates geographic constituent units and fixes them in it.[17] For this reason, there are forty-seven counties entrenched and constitutionally protected under the Constitution. Their names can only be changed through a constitutional amendment.[18] Further, the Constitution stipulates that the relations among the two levels of government are distinct and interdependent. In addition, the two levels must conduct their mutual relations based on consultation and co-operation.[19] The co-operation envisaged by the Constitution is one which respects the functional and institutional integrity of each level of government.[20] To foster co-operation and consultation, the two levels of government may set up joint committees and authorities.[21]

The principle of cooperation and consultation stems from a phenomenon of intergovernmental dialogue where both levels of government share and exchange information with each other.[22] This is aimed at avoiding conflict of interests in performing their assigned duties which to some extent requires a compromise between them for the better good.[23] It discourages an adversarial approach to resolving disputes or conflicts between them and instead fosters a harmonious intergovernmental relationship.[24] The principle of consultation requires the making of conscious and deliberate efforts to

[15] Ibid Articles 129 and 159.
[16] Ibid 176.
[17] Ibid Article 6(1) and the First Schedule.
[18] Kangu (n 1)126.
[19] Constitution of Kenya, Article 6(2) and 189.
[20] Ibid Article 189(1).
[21] Ibid Article 189(2).
[22] Gabriel Gathumbi, 'Alternative Dispute Resolution Mechanisms as a tool for Dispute Settlement in the Devolved Governance System in Kenya' (Unpublished LLM Thesis, University of Nairobi 2018) 40.
[23] Report of the Intergovernmental Relations Workshop held at Royal Swiss Hotel Kisumu from 3rd to 5thDecember 2018,64. (Kisumu Workshop).
[24] Gathumbi (n 22).

seek out views of the other party and to consider them before arriving at a decision. This enhances the decision making of all the parties concerned.[25] Consultation requires that one level of government invites the other to present its views on the matter. The consulted government is then afforded an adequate opportunity and a reasonable opportunity to share its considered views.[26] Following this, the consulting government must consider the views of the consulted government in good faith before making a decision.[27] Notably, the other government should not be consulted as a mere formality, but with the commitment to consider the views shared where they add value to the decision being made.[28] Be that as it may, where the views are not accepted or considered, the consulting government should give reasons justifying non-acceptance.[29]

The principle of interdependence recognises that whereas the various levels of government are autonomous, they cannot operate in isolation.[30] Interdependence is necessary because both levels of government have a responsibility to serve the people of Kenya.[31] In addition, the national government is allocated certain functions by virtue of its role in national policy formulation and standard setting while the county government is assigned theimplementation of functions.[32] Therefore, interdependence demands that the two levels of government not only cooperate and consult

[25] *Commission for the Implementation of the Constitution* ***v*** *Attorney General and another* (2013) eKLR.
[26] Peter Wanyande & Gichira Kibara, 'Kenya's Devolution Journey: an Overview' in Intergovernmental Relations Technical Committee (IGRTC) (ed) *Deepening Devolution and Constitutionalism in Kenya: A Policy Dialogue* (IGRTC 2021) 68.
[27] Ibid
[28] Gathumbi (n 22) 41.
[29] Ibid.
[30] Faith Simiyu, 'Recasting Kenya's devolved Framework for Intergovernmental Relations: Lessons from South Africa' (2015) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2692607> accessed on 15 February 2023 10.
[31] Kisumu Workshop (n 23)18.
[32] Gathumbi (n 22) 41.

each other but also share information and build capacity.[33] This is because the performance of any function cannot be complete if one level of government fails to do its part.[34] While referring to the relationship between the two levels of government, the Supreme Court of Kenya in *the Matter of the Interim Independent Election Commission* recognised that there is a close connectivity between the functioning of national and county governments*".*[35]

The principle of distinctiveness requires that each level of government be autonomous from the other.[36] As a result, the two levels of government created are equal and neither is subordinate to the other.[37] Autonomy encompasses certain distinct features such as political economy, functional economy, financial autonomy, and administrative autonomy.[38] In addition, the principle of distinctiveness connotes a measure of flexibility on each level of government to make their own decisions pursuant to their constitutionally defined roles.[39] *In the case of Institute of Social Accountability v National Assembly and Others,* the High Court noted that the principle of distinctness means that each level of government must be free from interference in the performance of its function.[40]

From the foregoing, the seamless interdependence of the two levels of government is dependent on intergovernmental relations.[41] This paper critically examines the alternative dispute resolution of intergovernmental disputes. The overall structure takes the form of six parts. Part One is this brief introduction that sets the context of the study. Part Two discusses

[33] Kisumu Workshop (n 23) 42.
[34] Ibid 63.
[35] (2011) eKLR
[36] Kisumu Workshop (n 23),42.
[37] Simiyu (n 30).
[38] Kangu, (n 8) 64.
[39] Simiyu (n 30)10.
[40] (2015) eKLR.
[41] Kisumu Workshop (n 23) 7.

the legal framework governing intergovernmental relations. In Part Three, the paper discusses the nature, parties, and causes of intergovernmental disputes. It analyses the rationale and benefits of using ADR mechanisms in resolving intergovernmental disputes. This is achieved by highlighting the challenges associated with using litigation to resolve intergovernmental disputes. Part Four critically analyses the Intergovernmental Relations (ADR) Regulations 2021 passed to provide a framework to guide the resolution of intergovernmental disputes. Part Five makes recommendations while Part Six concludes the paper.

2.0 Legal Framework Governing Intergovernmental Relations in Kenya

The concept of intergovernmental relations refers to the processes of interactions between different governments, and between organs of state from different governments in the course of the discharge of their functions.[42] Such relations facilitate the attainment of common goals through cooperation.[43] Intergovernmental relations and interactions occur through law making, policy alignment, fiscal grants and transfers, planning and budgeting. [44] Co-operation and co-ordination are the pillars of intergovernmental relations. This is because no single level of government can deliver its mandate and vision of a nation on its own.[45] In this section, the paper extensively explores the various laws establishing the intergovernmental relations. The primary law is the Constitution and the Intergovernmental Relations Act. Nonetheless, other legislations with provisions on intergovernmental relations are briefly highlighted.

[42] IGRTC, *Strategic Plan 2021 – 2025*, 2. See also South African Intergovernmental Relations Framework Act 2005 which defines intergovernmental relations as the relationship that arise between different governments or between organs of state from different governments in the conduct of their affairs.

[43] Karega Mutahi, 'Intergovernmental Relations' A presentation during the induction of Governors, 14th December 2017,2.

[44] Winnie Mitullah, 'Intergovernmental Relations Act 2012: Reflection and Proposals on Principles, Opportunities and Gaps' FES Kenya Occasional Paper, No. 6, 2012,1.

[45] Ibid 2.

2.1 The Constitution of Kenya

As stated in the previous section, the Constitution provides that governments at national and county levels are distinct and interdependent. They are obliged to conduct their mutual relations based on cooperation and consultation.[46] This may be achieved through forming joint committees and joint authorities for co-operation in the performance of functions.[47] In addition, the Constitution outlines the national values such as sharing and devolution of power, good governance, and sustainable development. These national values are binding on all persons and offices in interpreting the Constitution, interpreting the law, and implementing public policy decisions.[48] Further, the Constitution provides for the transfer of functions and powers between levels of government where; a) the functions would be more effectively performed by the receiving government, and b) the transfer of functions or powers is not prohibited by the legislation under which it is to be performed.[49] This is aimed at fostering service delivery.

In addition, the Constitution addresses the anticipated disputes between the two levels of government.[50] It stipulates that in any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation. Besides, it provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle of promoting alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms provided they do not contravene the Bill of Rights.[51] Furthermore, the Constitution requires that the national legislation shall provide for procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms,

[46] Constitution of Kenya, Article 6(2).
[47] Ibid Article 189(2).
[48] Ibid Article 10.
[49] Ibid Article 187(a)(b).
[50] Ibid Article 189(3).
[51] Ibid Article 159(2)(c).

including negotiation, mediation and arbitration.[52] Pursuant to the constitutional imperative, the Intergovernmental Relations Act was enacted in 2012. It is the main statute that extensively deals with intergovernmental relations.

2.2 Intergovernmental Relations Act (IGRA) Act Number 2 of 2012

The IGRA provides structures for interaction between the national and county governments and also among county governments.[53] It establishes three institutions to facilitate intergovernmental consultations; namely, the National and County Government Co-ordinating Summit (Summit), which is designated as the apex body for intergovernmental relations, the Intergovernmental Relations Technical Committee (IGRTC) responsible for coordinating the activities of the Summit, and the Council of Governors. These institutions are discussed in detail below.

2.2.1 The Summit

The summit is the apex body of intergovernmental relations.[54] It comprises: the president or in the absence of the president, the deputy president, who shall be the Chairperson; and the governors of the forty-seven counties.[55] The chairperson of the Council of County Governors (CoG) is the Vice-Chairperson.[56] Given the composition of the summit, it facilitate vertical relations between national and county governments.[57] The Summit is empowered to evaluate the performance of both levels of government, coordinate and harmonise the development of national and county policies, facilitate and coordinate the transfer of functions, powers and competencies to either level of government, and to resolve disputes.[58]

[52] Ibid, Article 189(4).
[53] IGRTC, *Status of Sectoral and Intergovernmental Forums in Kenya*, 2018,2.
[54] IGRA, Section 7(1).
[55] IGRA, Section 7(2).
[56] IGRA, Section 7(3).
[57] IGRTC (n 53) 2.
[58] IGRA, Section 8 and 34.

2.2.2 The IGRTC

The IGRTC is the primary facilitator of intergovernmental relations.[59] It envisions harmonious and effective intergovernmental relations. IGRTC's mission is to support successful devolution through cooperative, consultative, and coordinated intergovernmental relations.[60] It comprises of a chairperson, a maximum of eight members competitively recruited, and the Principal Secretary of the State department responsible for devolution. The IGRTC is responsible for the day-to-day administration of the Summit and the Council of Governors.[61] This is through facilitating the activities and implementing the decisions of the summit and CoG.[62] As a result, the IGRTC serves as the secretariat between the summit and the CoG.[63] The Secretariat of the IGRTC is responsible for implementation and monitoring of the decisions of the Summit, CoG, and IGRTC.[64]

Second, the IGRTC is also responsible for the finalisation of the residual functions of the defunct Transition Authority (TA).[65] Prior to the formation of IGRTC, the TA was the institution mandated to oversee the functional changeover to the devolved governance system from the previous centralized authority.[66] Upon expiry of the TA's term on March 4, 2016, there were still a number of issues that had not been concluded.[67] Therefore, those residual functions are undertaken by the IGRTC.[68]

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[59] IGRTC (n 53)2.
[60]IGRTC, *Strategic Plan 2021-2025*,28.
[61] IGRA, Section 12(a).
[62] Ibid.
[63] Ibid Section 15 which establishes the Intergovernmental Relations Secretariat headed by the Secretariat of the IGRTC and consists of a secretary appointed by the IGRTC. The secretary is mainly responsible for the implementation of the decisions of the Summit, the Council and IGRTC and any other duties assigned by the said structures.
[64] Ibid.
[65] Ibid Section12(b).
[66] Transition to Devolved Government Act 2012, Section 4.
[67] Kisumu Workshop (n 23) 81.
[68] IGRA, Section 12(b).

Third, the IGRTC is mandated to convene a meeting of the forty-seven County Secretaries within thirty days preceding every Summit meeting.[69] In addition, the IGRTC can perform any other function conferred on it by the Summit, CoG, or any other legislation.[70] The IGRA empowers the IGRTC to establish sectorial working groups or committees for better execution of its functions.[71] Further, the IGRTC handles intergovernmental disputes reported to it by any of the parties through ADR mechanisms.[72] Furthermore, the IGRTC handles emerging issues on intergovernmental relations that are referred to it by the Summit and the CoG.[73] The IGRTC may establish sectoral working groups for the better carrying out of its functions.[74] However, the Cabinet Secretary is not precluded from convening a consultative for on sectoral issues of common interest to the national and county government.[75] Lastly, the IGTRC is accountable to and must submit quarterly reports to the Summit and CoG.[76]

2.2.3 The CoG

The CoG exists as the main avenue through which consultation and cooperation can be pursued among the forty-seven County Governments.[77] It provides a forum for consultation with the national government and other institutions that interact with the county governments.[78] The IGRA requires the governors to elect their own chairperson and vice-chairperson for a term of one year which may be renewed for another year.[79] The CoG facilitates

[69] Ibid Section 12(c).
[70] Ibid Section12(d).
[71] Ibid Section 13(1).
[72] Ibid Section 33(2).
[73]IGRTC, *Strategic Plan 2021-2025*,2.
[74] IGRA Section 13(1).
[75] Ibid Section 13(2).
[76] Ibid Section 14.
[77] Council of Governors, *Annual Report 2014/2015*,1.
[78] IGRA, Section 20(1).
[79] IGRA, Section 19(1) and 19(2).

horizontal relations by bringing together all county governors for consultations among county governments.[80]

The CoG is vested with the following responsibilities: sharing information on the performance of the counties in the execution of their functions with the objective of learning and promotion of best practice and where necessary, initiating preventive action; considering matters of common interest to County Governments; dispute resolution between counties within the framework provided under the IGRA; facilitating capacity building for Governors; receiving reports and monitoring implementation of inter-county agreements on inter-county projects; consideration of matters referred to the council by a member of the public; consideration of reports from other intergovernmental forums on matters affecting national and County interests or relating to the performance of counties; and performing any other function as may be conferred on it by the IGRA or any other legislation or that it may consider necessary or appropriate.[81]

In fulfilling its responsibilities, the CoG has powers to establish other intergovernmental forums, sectoral working groups, and committees including inter-city and municipality forums.[82] To this end, the CoG has established about 18 committees that focus on several issues and sectors.[83]

[80]IGRTC, Status of Sectoral and Intergovernmental Forums in Kenya, 2018,2.
[81] IGRA, Section 20(1).
[82] IGRA, Section 20(2) and 20(3).
[83] The Council of Governors Statutory, *Annual Report, 2015 – 2016*, page 17. The committees are: Health Committee; Agriculture Committee; Infrastructure and Energy Committee; Urban Development, Planning and Lands Committee; Tourism and Wildlife Committee ; Water, Forestry and Mining Committee ;Cooperatives and Enterprise Development Committee; Trade, Industry and Investment Committee; Education, Youth, Sports, Culture and Social Services Committee; Finance, Planning and Economic Affairs Committee; Human Resources, Labour and Social Welfare Committee; Legal and Human Rights Committee; Intergovernmental Relations Committee (which resolves disputes between counties); Security and Foreign Affairs Committee; Resource Mobilization Committee; Information, Technology and Communications (ICT) Committee; Rules and Business Committee

The CoG is the highest decision-making organ and provides overall direction, leadership, and guidance to the committees.[84] In addition, it established a secretariat to implement and coordinate its activities. The secretariat is responsible for administrative and technical support to the activities of the CoG.[85] It also implements secretariat activities under the guidance and direction of the CoG and the respective committees. The Secretariat staff is composed of the Chief Executive Officer who reports to the CoG, and directorates as well as departments in charge of programmes, administration and finance, corporate communications, sectoral issues, resource mobilisation, and legal affairs.[86]

2.2.4 Dispute Resolution Provisions Under the IGRA

Besides establishing intergovernmental institutions, the IGRA makes provision for dispute resolution. It provides that parties shall take all reasonable measures to resolve disputes amicably and apply and exhaust ADR mechanisms provided thereunder or other legislation before resorting to judicial proceedings under Article 189(3) and (4) of the Constitution.[87] It provides for the transfer and delegation of powers, functions, and competencies from either level of government to the other by agreement as provided by Article 186 and 187 of the Constitution.[88] The IGRA also provides that all agreements between the national and county governments and among county government shall have a dispute resolution mechanism, appropriate for the nature of the agreement, for disputes that may arise in implementation.[89]

(oversees the operations of the Secretariat), and Arid and Semi-Arid Land (ASAL) Committee.

[84] The Council of Governors, *Annual Report 2015/2016*,17.

[85] Ibid.

[86] Ibid.

[87] IGRA, Section 31.

[88] Ibid Section 24-28.

[89] Ibid Section 32.

Dispute resolution mechanisms are provided in Sections 30-36 of the IGRA. These provisions apply to disputes between the national and county governments and disputes among county governments.[90] Disputes should as far as possible be resolved through ADR.[91] After efforts to negotiate either directly or through an intermediary have failed, then a party may declare a dispute by referring the matter to the Summit, Council of Governor (CoG) or any other intergovernmental structure established under the IGRA.[92] Once the dispute is declared, the organ responsible is required to convene a meeting of the parties or their representatives within 21 days.[93] The aim of the meeting is to determine the nature of the dispute and the material issues which are not in dispute and identify the mechanisms and procedures for settling the dispute.[94] Such a mechanism may be provided in the IGRA, another legislation or an agreement.[95] Where efforts to resolve the disputes under the Act fail the matter may be taken to court.[96] The minister of devolution and planning is empowered to make regulations to provide a framework for dispute resolution under the IGRA.[97] Pursuant to this authority, the Intergovernmental Relations (ADR) Regulations were gazetted in 2021. These regulations are analysed in part three of this paper.

2.3 National Government and Co-ordination Act, Act No. 1 of 2013

This Act seeks establish an administrative and institutional framework for co-ordination of national government functions at the national and county levels of governance.[98] It also provides for an extensive mediation procedure of resolving disputes that arise between powers of officers of the county government and the national government.[99] The mediation team shall

[90] Ibid Section 30.
[91] Ibid Section 31.
[92] Ibid Section 33(1)
[93] Ibid Section 34(1).
[94] Ibid Section 34(1)(a).
[95] Ibid Section 34(2).
[96] Ibid Section 35.
[97] Ibid Section 38(2)(c).
[98] *National Government and Co-ordination Act*, Preamble.
[99] Ibid Section 19.

consist of two eminent persons appointed by the governor and two eminent persons appointed by the Cabinet Secretary for the time being responsible for national government co-ordination.[100] In addition, the mediation team shall be guided by the constitutional principles and the respective constitutional mandates of each respective government.[101] The mediation must be finalized within a period of fourteen days.[102] Where the mediation team fails to resolve the dispute within the stipulated time, the matter may be referred to the Summit under the IGRA for resolution.[103]

2.4 County Governments Act, Act No. 17 of 2012

The County Government Act creates citizen forums to facilitate citizen participation in their governance at the county level.[104] The avenues for the participation of people's representatives including but not limited to members of the National Assembly and Senate.[105] In addition, the County Government Act establishes a county intergovernmental forum in each county. It is chaired by the governor or in his absence, the deputy governor, or county executive committee (where both the governor and deputy governor are absent).[106] The forum comprises: the heads of all departments of the national government rendering services in the county; and county executive committee members.[107] The intergovernmental forum is responsible for among other things coordination of intergovernmental functions and harmonisation of services rendered in the county.[108]

2.5 Public Finance Management Act, Act Number 18 of 2012

The Public Finance Management Act creates the Intergovernmental Budget and Economic Council (IBEC) which brings together the national and county

[100] Ibid 19(2).
[101] Ibid 19(3).
[102] Ibid 19(4).
[103] Ibid 19(5).
[104] *County Governments Act*, Section 91.
[105] Ibid Section 91(f).
[106] Ibid Section 54(2).
[107] Ibid Section 54(3).
[108] Ibid Section 54(4).

government leaders to discuss matters of budgeting, borrowing, disbursements from consolidated fund and equitable distribution of revenue between the two levels of government.[109] The IBEC is composed of the deputy president, cabinet secretary in charge of intergovernmental relations, every county executive committee member of finance, chairperson of the CoG, a representative of the Public Service Commission, a representative of the Judicial Service Commission, and the Cabinet Secretary in charge of finance.[110] The National Treasury provides secretariat services to the IBEC. The IBEC meets at least twice a year, and the agenda as well as time are set by the deputy president in consultation with other council members.[111] In addition, the National Treasury is obligated to enter into an agreement with the respective county government for the transfer of the respective conditional allocations made to the county government.[112] The agreement sets out the conditions that may attached to conditional allocation.[113]

2.6 Urban Areas and Cities, Act Number 13 of 2011

Under the Urban Areas and Cities Act, the two levels of government are required to enter into an agreement regarding the performance of functions and delivery of services by Nairobi, the capital city.[114] The agreement may provide for administrative structure of the capital city, funding operations, and activities, joint projects to be undertaken by both governments in the capital city, and dispute resolution mechanisms.[115]

2.7 Health Act, Act Number 21 of 2017

Under the Health Act, both levels of government are obligated to cooperate to ensure the provision of free and compulsory vaccination of children under

[109] *Public Finance Management Act*, Section 187
[110] Ibid.
[111] Ibid Section 187(3) and (5).
[112] Ibid Section 191.
[113] Ibid.
[114] Section 6(5).
[115] *Urban Areas and Cities Act*, Section 6(6).

5 years and maternity care.[116] To actualise this, the national government is required to consult with respective county governments and provide funds.[117]

2.8 Agriculture, Fisheries, and Food Authority Act Number 13 of 2013

Under the Agriculture and Food Authority Act, the national government is responsible for agricultural matters. On the other hand, county governments are responsible for agricultural matters.[118] These matters are outlined in Part 2 of the Fourth Schedule of the Constitution.[119]

2.9 National Cohesion and Integration Act, Act Number 12 of 2008

This statue establishes the National Cohesion and Integration Commission which is tasked among other functions to promote arbitration, conciliation, and mediation to secure and enhance racial harmony and peace.[120]

2.10 National Police Service Act (NPSA), Act Number 11A of 2021

The NPSA establishes the County Policing Authority in each county. It comprises the governor (the chairperson), county representatives appointed by the Inspector General, two elected members nominated by the County Assembly, the chairperson of the County Security Committee, and at least six members appointed by the governors.[121] The County Policing Authority provides a platform through which the public participates on all aspects to do with county policy and the National Police Service at the county level.[122]

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[116] *Health Act,* Section 5(4).
[117] Ibid.
[118] *Agriculture and Food Authority Act*, Section 29(2).
[119] Crop and animal husbandry, livestock sale yards, county abattoirs, plant and animal disease control, and fisheries.
[120] *National Cohesion and Integration Act*, Sections 15 and 25.
[121] *National Police Service Act*, Section 41. These people may come from the business sector, religious organisations, youth, community-based organisations, and persons with special needs.
[122] Ibid Section 41(9)(g).

3.0 Intergovernmental Disputes and ADR mechanisms

3.1 Definition and Parties to Intergovernmental disputes

Conflicts arise when people pursue irreconcilable goals and end up compromising or opposing the interests of another.[123] Disputes are a product of unresolved conflicts, they arise when conflicts are not adequately managed.[124] The conduct of mutual relations between the two levels of government has been characterised by recurrent conflicts which often escalate into disputes.[125] For a dispute to qualify as an intergovernmental dispute under the IGRA, it must meet the certain criteria. First, the dispute must involve a specific disagreement concerning a matter of fact, law, or denial of another.[126] Second, it must be of a legal nature which means that the dispute is capable of being the subject of judicial proceedings.[127] Third and most importantly, the dispute must be an intergovernmental one.[128] This essentially means that such a dispute must involve various organs of state and arises from the exercise of powers of function assigned by the Constitution, a statute or an agreement or instrument entered into pursuant to the Constitution or a statute.[129] The inclusion of an agreement implies that even a commercial agreement between the national and county government qualifies as an intergovernmental dispute.[130] Therefore, intergovernmental disputes are not limited to the exercise of powers of the two governments as

[123] Kariuki Muigua, 'Dealing with Conflicts in Project Management' [2018] *Alternative Dispute Resolution*,4.
[124] Kariuki Muigua, Accessing Justice through ADR (Glenwood Publishers Limited, Nairobi 2022) 76.
[125] Kibaya Imaana Laibuta, 'Facilitation of a Consultative Forum on the Development of the Proposed Intergovernmental Dispute Resolution Mechanisms' available at < https://ciarbkenya.org/wp-content/uploads/2021/03/the-place-of-adr-in-intergovernmental-disputes.pdf> 3 accessed on 25 February 2023.
[126] *County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & another (2014) eKLR, para 10.*
[127] Ibid.
[128] Ibid.
[129] Ibid. See Section 32 of the IGRA.
[130] Ibid,

specified in the Constitution.[131] Fourth, the dispute may not be subject to any of the previously enumerated exceptions.[132] In *Kenya Ports Authority v William Odhiambo Ramogi & Others*, the COA considered that the test of determining the matter as an intergovernmental dispute was simply not to look at the parties to the dispute but the nature of the claim in question.[133]

In view of the above, intergovernmental disputes can only arise between the national government and a county government, or amongst county governments.[134] Therefore, a dispute between a person or state officer in his individual capacity seeking to achieve his own interest or rights would not equate an intergovernmental dispute.[135] However, where a state officer seeks through any means to advance the interest of a government, whether county or national, against another government whether county or national.[136] Then such a dispute would rank as an intergovernmental dispute.[137] Interestingly, in another court decision, the Environment and Land Court held that there can be no intergovernmental dispute between an individual and the county government or vice versa.[138] Intergovernmental disputes can also arise

[131] *Isiolo County Assembly Service Board & another vs Principal Secretary (Devolution) Ministry of Devolution and Planning & another (2016) eKLR.*
[132] *County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & another* (2014) eKLR, *para 10.*
[133] [2019] eKLR.
[134] Section 30(2)(b) of the IGRA.
[135] *Isiolo County Assembly Service Board & another vs Principal Secretary (Devolution) Ministry of Devolution and Planning & another (2016) eKLR.*
[136] Ibid.
[137] Ibid.
[138] *Okoiti v Parliament of Kenya & 2 Others; County Government of Taita Taveta & 3 Others* (Interested Parties) (Petition 33 of 2021)[2022] KEELC 33 (KLR)(23 March 2022)(Ruling). In this case, the petitioner and 178 other residents petitioned Parliament to set up an independent commission to resolve the boundary dispute between the counties of Taita Taveta and Kwale and between the counties of Taita-Taveta and Makeuni to survey and erect beacons to clearly demarcate the boundaries. See also *Daniel Muthama v Ministry of Health: Shenzhen Mindray Bio-Medical Electronics Co. Ltd* [2015] eKLR.

between county governments and state agencies established by the national government, and between state agencies.[139]

3.2. Nature and Examples of Intergovernmental Disputes

According to the IGTRC, intergovernmental disputes can be categorised as administrative, financial, functional, legislative, and jurisdictional relations.[140] The administrative category relates to intergovernmental relations.[141] Financial is concerned with intergovernmental fiscal relations and fiscal resource allocation.[142] Functional relates to the encroachment by the national government and state agencies on the functions of county governments, joint undertakings between the national and county governments, and intergovernmental service delivery in the contest of shared functions.[143] The implementation of the devolved governance system commenced in March 2013. Since then, disputes have emerged between the two levels of government and various organs of state which threaten the implementation of the devolved governance system if not checked and addressed.[144] There are many areas and issues around which tensions between the two levels of government and between county governments are likely to arise. Tensions are also likely to arise within institutions and structures of the same level of government. While most of these conflicts are likely to revolve around functional areas, others are of a purely political or ideological nature. It must also be noted that some disputes may have their origins in history and therefore not necessarily caused by the adoption of a devolved system of governance. Some of these conflicts that have their origins in history may have been exacerbated by the adoption of devolution.[145] Below are some of the intergovernmental disputes witnessed in the last ten years of devolution.

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[139] IGRTC, Cost of Litigation in Inter/Intragovernmental Litigation in Kenya, May 2017, 47.
[140] Ibid 12.
[141] Ibid.
[142] Ibid.
[143] Laibuta (n 125) 3.
[144] Gathumbi (n 22) 47.
[145] Kisumu Workshop (n 23).

a) Supremacy wars between the Senate and National Assembly

Prior to the establishment of a devolved governance system, Kenya had a unicameral Parliament. However, the Constitution provides for a bicameral Parliament comprising two Houses, the Senate, and National Assembly.[146] The two Houses have had bitter disagreements which at times spill over in the public arena. This has played out in conflicts arising in the operations of the two Houses of Parliament. Soon after the establishment of the two Houses, supremacy battles emerged as to which of the Houses was superior to the other. The Constitution of Kenya is silent on this matter.[147] The most contentious one arose on the exclusion of the Senate in the consideration of the Division of Revenue Bill deemed to be affecting the county governments.[148] The Senate objected to the exclusion by way of preference to the Supreme Court seeking for an Advisory Opinion on the matter. In its Advisory, the Supreme Court held that the consideration of Bills to be passed was not a unilateral exercise exclusive to either of the two Houses; rather, the Speaker of both houses had to engage and consult.[149] The Supreme Court observed that the two Houses had an obligation to work together in the spirit of consultation and cooperation in the discharge of their constitutional mandate. [150]The Court further observed that this was a case where the two Speakers of the Senate and National Assembly had an obligation, in case of disagreement between themselves to engage the ADR mechanism of mediation.[151]

[146] Constitution of Kenya, Article 93(1).
[147] Oseko Louis, Denzel Obure and Kihiko Rosemary Wambui, 'Intergovernmental Dispute Resolution: Analysing the Application and Future of ADR' [2021] *Journal of Conflict Management and Sustainable Development*,148.
[148] *In the Matter of the Speaker of the Senate & Another v Attorney General & 4 Others* (2013) eKLR.
[149] Ibid para 197.
[150] Ibid para 125.
[151] Ibid, Para 143. See Also the Court of Appeal decision in *Speaker of the National Assembly & another v Senate & 12 others* (Civil Appeal E084 of 2021) [2021] KECA 282 (KLR) (19 November 2021) (Judgment**)** and Council *of Governors & 4 Others v Attorney General & 3 Others* (2020) eKLR.

A similar dispute on the division of revenue arose in the financial year 2019/2020. The Commissioner on Revenue Allocation (CRA) had recommended the equitable shareable revenue for the counties for KES. 335.7 billion.[152] However, the Cabinet Secretary in charge of National Treasury on his part published the Budgetary Policy Statement in which he set the equitable sharing revenue for counties at KES. 310 billion.[153] The statement was tabled in the National Assembly. The CoG rejected the proposal and urged the two houses to go with the CRA's recommendation.[154] The senate fully agreed with the CoG's position, but the National Assembly and Treasury disagreed.[155] There were failed negotiation attempts prompting a request to the Supreme Court to render an advisory opinion on the matter.[156]

b) Disputes over Allocation of Resources

Despite their effort to live within the letter and spirit of the Constitution, the two levels of government have not always agreed with each other. There have been disputes caused by perceived or real interference in the county government mandates by the national government including competition for power, resources and relevance. The issues have involved a number of devolved functions such as health, agriculture, roads, water, gaming, gambling and betting, among others. National government is accused of holding the bigger portion of resources allocated to these functions thus going against the principle of resources follow functions.[157] There have been disputes conflicts as to the erroneous allocation of funds. In *Council of Governors v Attorney General & 4 Others*, the High Court declared , inter alia, that the National government cannot allocate itself funds for and

[152] *Council of Governors & 47 Others v Attorney General & 3 Others* (interested parties); *Katiba Institute & 2 Others* (2020) eKLR.
[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] IGRTC, *Strategic Plan 2021 – 2025*,10.

undertake devolved functions without first executing inter-government agreements as required under Article 187 of the Constitution.[158]

c) Disputes Resulting from Transfer of Functions and powers

The Constitution recognizes that the functions and powers assigned to the national and county governments fall into the two categories of exclusive and concurrent functions and powers.[159] It, however, creates a lot of uncertainty since it does not specify which of the assigned functions and powers are exclusive and which are concurrent.[160] This results into duplication of efforts, roles and expenditure by the levels of government; wasteful use of financial resources as both levels of government may invest money in the same activity.[161] In view of the uncertainties, disputes have arisen as to which level of government is responsible for what task. For instance**,** the dispute between the county government and national government over sugar milling and privatisation of South Nyanza Sugar Company.[162] The contention was that sugar milling was a devolved function, therefore, the national government could not privatise sugar milling as it was not within its powers.[163] In response, the national government maintained that sugar milling companies were public investments thus were to be dealt with by the national government.[164]

Another source of contention is that many functions that belong to county governments have been retained by the national government through state

[158] (2020) eKLR. The national government had been allocated KES. 4121 billion for maternity health care, KES. 45 billion for leasing medical equipment, and KES 4.5 billion for level 5 hospitals in the Division of Revenue Act 2016. Yet, the above are devolved functions.
[159] *Constitution of Kenya,* Article 186(2).
[160] Kisumu Workshop (n 23) 42.
[161] Ibid.
[162] *County Government of Migori & 4 Others v Privatisation Commission of Kenya* (2017) eKLR.
[163] Ibid.
[164] Ibid.

corporations.[165] An example is in the agricultural sector where the national government retains the functions on the basis that it oversees international trade.[166] Therefore, since most of the agricultural products are intended for export, such matters are within hence within its mandate. This position has resulted from the failure to delineate the roles and boundaries by the national government in respect to the international trade function.[167] Furthermore, the Supreme Court has held that a county government cannot levy a charge for a road service that is vested in the National Government.[168]

In the health sector, disputes have also arisen because of the failure by the national government to consult the county governments. In *International Legal Consultancy Group & another v Ministry of Health & 9 others*, the national government leased modern medical equipment and instructed county governments to accept them and install them in hospitals managed by county governments.[169] This agitated the county governments because the health function has been devolved to county governments and therefore the national government did not have jurisdiction over the function and consequently could lease the medical equipment for counties. Although counties eventually accepted the equipment, tensions remain over the procurement.[170] The CoG has formally raised concerns on the use of the

[165] *Council of County Governors v Attorney General & 4 Others* (2015) eKLR and *Council of Governors v Attorney General & 12 Others* (2018) eKLR. Some of these parastatals include Kenya Leather Development Council, Directorate of Fisheries, Nyayo Tea Zones Development Authority, Agricultural Finance, National Irrigation Board, National Cereals and Produce Board, Kenya Dairy Board, and Agricultural Development Corporation.
[166] Part One, Fourth Schedule to the Constitution.
[167] Page 92. See *Lake Naivasha Grower Group & another v County Government of Nakuru* (2019) eKLR where the high court held that the county government cannot levy, import, and export tax on horticultural products as the said mandate is a preserve of the national government.
[168] *Base Titanium Limited v County Government of Mombasa & another* (Petition 22 of 2018) [2021] KESC 33 (KLR) (16 July 2021) (Judgment).
[169] (2016) eKLR.
[170] Wanyande and Kibara (n 26) 11.

newly introduced e-procurement system.[171] The system has not only made the procurement system overly bureaucratic but has also excluded sections of the society that are unable to access Internet services.[172] Counties in regions with low Internet activity have also been affected, as they are unable to access the system to enable the respective Counties to carry out procurement processes.[173]

d) Disputes between County Assemblies and Controller of Budget

These disputes stem from the delayed release of the Exchequer to the counties and conflicts over revenue sharing.[174] For example, in the financial year 2019/2020, there was disagreement on the division of revenue where the counties had stuck with the estimates by the Commission on Revenue Allocation of KES. 335 billion, as opposed to KES. 314 billion allocated by the National Assembly. The stalemate grounded service delivery in some counties thus affecting service delivery to the public.[175] In another dispute, the Controller of Budget set mandatory ceilings for financial allocations to County Assemblies forcing the latter to object through a petition before the High Court.[176] Apart from County Assemblies, the CoG has raised concerns on the manner the lack of consultation and involvement by the National Treasury in the negotiation and management of loans and donor grants for functions that belong to Counties.[177] This is also coupled with the perennial delay of disbursements of the equitable share to County Governments.[178] Recently, the Controller of Budget declined to grant KES. 3.2 billion sought by counties. The counties had sought KES. 187 billion but the office

[171] Ibid.
[172] Ibid.
[173] The Council of Governors, *Annual Report 2014 /2015*, 22.
[174] IGRTC, *Strategic Plan 2021 – 2025*, 11.
[175] Ibid.
[176] *Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others* [2015] eKLR. Article 216(2), Constitution of Kenya.
[177] The Council of Governors, *Annual Report, 2014 /2015*, 22.
[178] Ibid.

approved KES.179.5 billion.[179] In justifying its declination, the Controller of Budget stated that the counties had breached fiscal laws including imprudent use of funds and exceeding the threshold of administrative costs.[180] Narok had the largest sum of declined approvals. The rest of the counties included Kiisi County, Nakuru County, and Nairobi County.[181]

e) Disputes between County Assemblies and Governors

Tensions were also bound to arise between the county-level institutions, namely the governors and the county assembly. This, however, does not appear to have been contemplated by the framers of the Constitution as it was thought that threats to county governments would emerge from the national government.[182] These conflicts undermined the functioning of the county governments and therefore the smooth and effective implementation of the Constitution.[183]Some of these as was the case of Makueni County threaten the viability of these counties and therefore service delivery.[184]

The last thirteen years of the devolved system of government have seen some of the governors impeached.[185] For example, the governors of Embu, Kericho, Nairobi, Kirinyaga, Makueni, Murang'a, and most recently Meru were affected.[186] In the case of Makueni County, the conflict was so serious that a Commission, in accordance with the constitution, was set up to advice the president on whether or not the county government should be

[179] Serfine Achieng, 'Controller of Budget Declines Kshs. 3.2 billion sought by counties' Citizen digital on 21 February 2023 < *https://www.citizen.digital/news/controller-of-budget-declines-ksh32-billion-sought-by-counties-n314847*> accessed on 25 February 2023.
[180] Ibid.
[181] Ibid.
[182] IGRTC, *Strategic Plan 2021 – 2025*,10,
[183] Wanyande and Gichira Kibara (n 26)11.
[184] Kisumu Workshop (n 23) 66. The tensions between former Makueni Governor Kivutha Kibwana and the MCAs,
[185] *Martin Nyaga Wambora and County Government of Embu v The Speaker of the County Assembly ofEmbu and 4 Others* (2015) eKLR.
[186] Paul Chepkwony-Kericho County, Ferdinard Waititu – Kiambu County,

dissolved.[187] The commission led by Honourable Mohamed Nyaoga recommended for the resolution of the county government.[188] Notably, all the impeachment proceedings were thrown out by the Senate except: Nairobi City County, Mike Sonko; Kiambu County, Ferdinard Waitutu; Wajir County, Mohamed Abdi Mohamoud; and the one concerning the Embu County Governor, Martin Nyaga Wambora, which the Senate confirmed.[189] However, the High Court overturned the impeachment of Martin Wambora by the Senate and reinstated the Governor who went ahead to complete his five-year term in August 2017. He was re-elected Governor of Embu in the general elections held on 8th August 2017.[190] In 2022, the Supreme Court confirmed the impeachment of Mike Sonko by the Nairobi County Assembly on grounds of gross violation of the Constitution, abuse of office, violation of national laws, and a lack of mental capacity to run the county government. The Supreme Court found that the impeachment had been properly conducted in accordance with the Constitution.[191]

f) Disputes between Governors and Senators over accountability of public funds

The tension in this regard has been over whether the Senate has authority to summon governors to appear before a Senate committee. On 8 Febuary 2014, the Senate Committee on County Public Accounts and Investment summoned 15 county governors to appear before it and answer questions on county finance management. Several governors appeared save for four,

[187] Francis Gachuri, 'Commission Report shows Makueni County headed for dissolution' published on 3 September 2015, Citizenship http://www.citizen.digital/news/commision-report-shows-makueni-county-headed-for-a-dissolution-99778 accessed on 5 January 2023.
[188] Ibid.
[189] Governor Martin Nyaga Wambora was impeached by the County Assembly of Embu and confirmed by theSenate. The impeachment was reversed by the Court after a successful appeal. See *Martin Nyaga Wambora and County Government of Embu v The Speaker of the County Assembly ofEmbu and 4 Others, Petition No. 7 and 8 of 2014 (consolidated*) (2015) eKLR.
[190] Ibid.
[191] *Sonko v Clerk, County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022) [2022] KESC 26 (KLR) (15 July 2022) (Judgment).

namely, Bomet, Kiambu, Kisumu, and Murang'a even after they were personally summoned. In protest, the four governors filed a petition in the High Court challenging the summons. The governors took the position that it is the county assemblies that can oversight the county executive. In addition, they asserted that being subjected to oversight by the amounts to double oversight.[192] They were unsuccessful at the High Court as it found that that the Senate were within their constitutional mandate. Their appeal at the Court of Appeal was unsuccessful for lack of merit prompting a further appeal to the Supreme Court.[193] In affirming the decisions of the High Court and Court of Appeal, the Supreme Court held that without the powers to summon governors, the Senate would not be able to exercise oversight over the national revenue allocated to counties.[194] As a result, the Senate was within its constitutional mandate of ensuring that county governments operated at optimal and within accountability standards.[195]

h) Boundary Disputes

The introduction of a devolved system of government in Kenya's political arena has brought to the fore simmering boundary disputes. The affected counties have disagreed over the location of boundaries, and this has sparked conflicts. Some of the counties with boundary disputes are Nandi and Kisumu, Meru and Isiolo, Makueni and Taita Taveta, Baringo and Turkana. To illustrate, in *County Government of Tana River v County Government of Kitui & 2 others*, the High Court was faced with a boundary dispute between Tana River County and Kitui County over Kalalani and Ddiddale areas. In dismissing the petition, the court found that the dispute was an intergovernmental dispute and referred the parties to the ADR frameworks under the IGRA.[196] Second, there have been boundary disputes between the counties of Taita Taveta and Kwale and between the counties of Taita-Taveta

[192] IGRTC, *Strategic Plan 2021 – 2025*, 15.
[193] *International Legal Consultancy Group v Senate & another* (2014) eKLR
[194] *Senate v Council of Governors & 6 Others* [2022] KESC 57(KLR), para 64.
[195] Ibid. See also Constitution, Articles 96,110, and 112.
[196] *County Government of Tana River v County Government of Kitui* (2022) eKLR.

and Makeuni over Mackinnon town and Mtito Andei town.[197] The Environment and Land Court directed the National Land Commission to investigate the historical boundaries and the county boundary dispute involving the three counties, and prepare a detailed report with practical recommendations on the appropriate redress to resolve the county boundary dispute.[198] There have also been boundary disputes between Meru and Isiolo , Nairobi city and Machakos, Kisumu and Vihiga, and Kisii and Nyamira counties.[199] Closely related to boundary disputes, intergovernmental disputes are also likely to arise from natural resource management. Such disputes concern the access and use of natural resources such as pasture, agriculture, forests, sharing agreements with national government, and cattle rustling.[200]

3.3 Impact of Litigation on Intergovernmental relations

During the first ten years of devolution, intergovernmental disputes have been largely resolved through litigation in courts.[201] A 2017 study by the IGRTC found that the litigation was mainly between national government and county government, among county governments, county governments and state agencies, county organ and another organ within the same county, National Assembly and Senate, and between state agencies.[202] The disputes were mainly resulting from the interpretation and implementation of powers transferred and implementation of functions as provided in the Fourth Schedule to the Constitution; transfer of functions and policies, impeachments, county boundaries, and employment relations.[203]

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[197] *Okoiti v Parliament of Kenya & 2 Others; County Government of Taita Taveta & 3 Others* (Interested Parties) (Petition 33 of 2021) [2022] KEELC 33 (KLR) (23 March 2022) (Ruling).
[198] Ibid, para 102.
[199] Senate standing committee on Justice, Legal Affairs, Human Affairs, and Human Rights, *Report on the County Boundaries Bill* (Senate No 11 of 2021).
[200] Kisumu Workshop (n 23)66.
[201] Ibid 10.
[202] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017, 47.
[203] IGRTC Members, *End Term Report 2015* – 2020, 111.

The study further revealed that the recurrent inter- and intra-governmental disputes being filed in courts for judicial resolution had had a great impact on the budgetary allocation, in terms of legal fees, to both levels of government. Furthermore, the study found out that the costs of litigation were high and a major constraint to development particularly in the county governments. These costs included both direct financial expenditure and opportunity costs due to delayed, frustrated or abandoned projects as a result of court cases.[204] Consequently, this has a negative impact on the resources allocated for development and service delivery.[205] Moreover, it was found that the major challenge for the counties was the reliance on external counsel as they did not have established legal departments unlike in the national government where cases are handled through the Office of the Attorney General/State Law Office.[206] This exposed the counties to the risk of collusion between county officers and advocates in fixing exorbitant fees.[207] To illustrate the high legal fees incurred in some of the intergovernmental disputes, the first case is one involving the National government and County government over land rates. The advocates who represented the Nairobi County government demanded for Kshs 2 billion as legal fees. Subsequently, they were paid Kshs. 724 million.[208] In another case involving the National Assembly and the CoG on the constitutional validity of the provisions of the National Government Constituencies Development Fund Act (NGCDF) in the High Court.[209] The average legal fees amounted to Kshs

[204] Ibid.
[205] Kisumu Workshop (n 23)16.
[206] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017, IGRTC, 48. This is no longer the case as there is now the County Attorney Act 2020 (Act Number 14 of 2020). The County Attorney is the principal legal adviser to the county government. The Act establishes the office of the county attorney in all the 47 county governments. The office consist of the county attorney, county solicitor and such other number of county legal counsel as the county attorney may, in consultation with the county public service bard, consider necessary. The County Attorney is the principal legal adviser to the county government.
[207]Ibid 21.
[208] Judicial Review Application No. 109 of 2014.
[209] *Wanjiru Gikonyo v National Assembly & 8 Others* (2016) eKLR.

20 to 30 million.[210] Third, in a case contesting the summoning of four governors to answer questions on county financial management.[211] The litigation of cost was about 3.32 million in the High Court and Kshs. 2.16 million in the Court of Appeal.[212] Most recently, in *KTK Advocates v Nairobi City County Government*, the Applicant's bill of costs was taxed by the Deputy Registrar of the Environment and Land Court as against the Respondent in the sum of about Kshs.1.3 billion, and a certificate of costs issued in June 2022.[213] The case involved the dispute between the Kenya Defence Forces and the Nairobi County government over the 3000-acre land where Embakasi Barracks sits.[214] Furthermore, according to the Council of Governor's Audited reports, the Council spent a total of Kshs. 49,134,138 and Kshs. 87,153,900 on legal fees for the financial years 2013/14 and 2014/15 respectively.[215]

Besides high legal fees, litigation has led to other costs that have negatively impacted service delivery and intergovernmental relations. To begin, it has delayed implementation of projects, opportunity costs when projects are delayed, and stalled projects. For example, in Nyeri County, a dispute between the Public Service Board and the county assembly delayed approval of the county budget for 6 months thus affecting service delivery and the recruitment of chief officers in the county.[216] It has also strained intergovernmental relations. This was seen in the dispute between the

[210] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017,47.
[211] *Council of Governors & 6 Others v Senate* (2015) eKLR.
[212] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017,47.
[213] Miscellaneous Application No. 56 of 2020. See also *KTK Advocates v Baringo County Government* (2017) eKLR wherein Donald Kipkorir sued Baringo county over KSh. 17.570,907 million owed for services offered. The judgement was entered by the High Court in favour of KTK Advocates.
[214] IGRTC Members, *End Term Report 2015* – 2020,114.
[215] Report of the Auditor General on the Financial Statements of COG Secretariat for the year ended 30 June 2014 and year ended 30 June 2015.
[216] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017,24.

County Government of Nairobi and Kenya Power over debt incurred for power consumption by the previous local authority. This resulted to Kenya power shutting down power for the county government offices and in return Nairobi County clamped down entrances of Kenya Power premises.[217]

3.4 A Case for ADR in Resolving Intergovernmental Disputes

Given the high legal costs associated with litigation as discussed above, ADR mechanisms such as negotiation, conciliation, mediation, and arbitration should be used in resolving intergovernmental disputes.[218] With the exception of arbitration that culminates in an arbitral award, the other ADR mechanisms result in mutually generated outcomes.[219] ADR seeks to find non-confrontational ways of resolving disputes and promoting harmony, tolerance and peaceful coexistence between concerned parties thus fostering parties' satisfaction.[220] By promoting dialogue, ADR mechanisms avoid the winner-loser scenario that characterize conventional court processes by promoting a win-win, give-and-take approach to resolving dispute. The adversarial nature of litigation pits parties against each other which injures the relationship between parties.[221] As a result, it would worsen the relationship between the levels of government which are expected to work together through consultation and corporation as provided for by the Constitution.[222] Closely related to this, ADR mechanisms would enhance confidentiality in intergovernmental disputes and reduce embarrassment occasioned by exposure of such disputes in public through litigation.[223]

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[217] Ibid.
[218] 2nd Annual Devolution Conference Held at Tom Mboya Labour College Kisumu County, 2015 21st April To 23rd April, 14.
[219] Laibuta (n 125) 4.
[220] Council of Governors, *2nd Annual Devolution Conference held at Tom Mboya Labour College Kisumu County*, from 21st April to 23rd April 2015, 14. See also NCIA, *Research Report on Awareness, Perception and Uptake of Alternative Dispute Resolution in Kenya*, 2021, 9.
[221] David Ngwira, '(Re) Configuring 'ADR' as Appropriate Dispute Resolution? Some Wayside Reflections'
[2018] *Alternative Dispute Resolution*, 194.
[222] Oseko, Obure, and Wambui (n 147),155.
[223] Muigua (n 124) 601. Kisumu Workshop (n 23) 80.

Also, ADR mechanisms except for arbitration are less formal than litigation. In most cases, the rules of procedure are flexible, without formal pleadings, extensive written documentation, or strict rules of evidence.[224] This leads to expeditious and cost-effective resolution of intergovernmental disputes. As a result, this ensures that there are no delays in implementation of policies and service delivery.[225] A critical examination of Articles 159 and 189(4) of the Constitution read together with Section 81(b) of the IGRA reveals that ADR mechanisms are complementary, and not alternative to judicial processes.[226] In fact, those provisions dictate that ADR mechanisms are appropriate as the first option for resolving intergovernmental disputes.

3.5 Intergovernmental Disputes Resolved through ADR Mechanisms

Between 2015-2020, the IGRTC received a total of twenty-one (21) cases for resolution through ADR mechanisms. Eight (8) of the cases were successfully resolved; one (1) case was referred to the courts for determination; and twelve (12) were still undergoing dispute resolution processes as at the time of preparing this report.[227] The IGTRC also successfully mediated and oversaw the execution of MOUs by the disputants in the disputes involving the County Government of West Pokot and theMinistry of Interior and National Coordination; County Government of Siaya (Agricultural Training Centre) and the Ministry of Interior and National Coordination; Ministry of Agriculture,Livestock and Fisheries (Food and Fisheries Authority) and County Governments ; County Government of Baringo and the Ministry of Agriculture, Livestock and Fisheries; County Government of West Pokot and the Ministry of Agriculture, Livestock and Fisheries; County Government of Garissa and the Ministry of Devolution and Arid & Semi-Arid Lands on construction of masonry perimeter fence, double steel gate and a pedestrian gate at the

[224] Scott Brown, Christine Cervenak, and David Fairman, Alternative Dispute Resolution Practitioners Guide (Conflict Management Group 1998) 6.
[225] Muigua (n 124) 602.
[226] Henry Murigi, 'Institutionalization of Alternative Dispute Resolution' [2020] Journal of Conflict Management and Sustainable Development,246.
[227] IGRTC Members, *End Term Report 2015* – 2020,109.

Garissa Referral Hospital.[228] Furthermore, the IGRTC also facilitated consultative negotiations between West Pokot County Government and County Commissioner over office blocks. The offices occupied by the county government belonged to the national government but were allocated to them by the Transition Authority in January 2013 to facilitate effective settling of the county government following the general elections in 2013. The offices were under construction and were nearing completion in readiness to accommodate the county commissioner whose offices were old and condemned as unfit for human habitation. The county commissioner and the governor were unable to agree on an amicable solution, so the commissioner declared a dispute. The negotiations led to the signing of an MoU and the chairperson of the IGRTC witnessed the agreement.

The dispute over land ownership between the County Government of Tharaka Nithi and the Prisons Department was another dispute resolved by the IGRTC. Initially, the matter was in court but was later withdrawn and referred to IGRTC which successfully facilitated negotiations to have the matter resolved amicably.[229] Lastly, the IGRTC resolved the dispute between Nairobi City County and the Ministry of Agriculture, Livestock and Fisheries regarding the entity mandated to conduct meat inspection in slaughterhouses that export meat products.[230] The dispute was reported to the IGRTC by Nairobi City County. It contended that county abattoirs/slaughterhouses services are a devolved function and hence a mandate of the county while the Veterinary Department's position was that export house should fall under the national government. After intensive consultation, IGRTC advised that both the national and county governments deploy officers to fulfil their constitutional mandates until a policy and regulations are developed and approved. The Parties agreed and they are complying.

[228] IGRTC, Unreported Status Report as at February 2020,28.
[229] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, May 2017,16.
[230] Ibid 17.

The above cases indicated that it was possible to resolve intergovernmental disputes quickly and in a less costly way through ADR. They also demonstrated that IGRTC can effectively facilitate the resolution of disputes.[231] The CoG also provides a forum for dispute resolution mechanisms between counties within the framework of the IGRA.[232] Such disputes are referred to the COG Committee in charge of Intergovernmental Relations.[233] The Committee is mandated to hear the parties and make a preliminary assessment of the matter before a referral to the full Council.[234]

4.0 The Intergovernmental Relations (ADR) Regulations 2021

For a long time, there was no detailed framework on the resolution of intergovernmental disputes. Intergovernmental relations bodies such as the CoG and the IGRTC had to use their internal procedures in resolving such disputes. This led to uncertainty and inconsistencies in how intergovernmental disputes were resolved. With the gazettement of the Intergovernmental Relations (ADR) Regulations 2021, there is predictability, certainty, and clarity in the resolution of intergovernmental disputes through ADR in conformity with the IGRA and the Constitution. This next section assesses the strengths and gaps in the regulations.

4.1 Strengths of the ADR Regulations

Firstly, the regulations provide for a range of ADR mechanisms that can be chosen by the parties. These include dispute avoidance strategies such as providing for negotiation and consultations between the parties and other constitutional commissions and offices, line ministries, and intergovernmental forums.[235] The inclusion of such strategies will ensure that conflicts are resolved before they escalate to disputes. Away from dispute avoidance strategies, the regulations provide for detailed provisions of resolving intergovernmental disputes through conciliation, mediation,

[231] Ibid.
[232] IGRA, Section 20(d).
[233] Council of Governors, *Annual Report 2019/2020*,5.
[234] Ibid 11.
[235] *The Intergovernmental Relations (ADR) Regulations 2021*, Regulation 6(2)(a).

traditional dispute resolution mechanisms (TDRMs), and arbitration.[236] Notably, the inclusion of TDRMs is commendable and reflect an inclusive and broad appreciation of the role played by elders in impacting country politics and resolution of disputes. TDRM principles such as social cohesion, harmony, peaceful co-existence, respect, and tolerance are in tandem with the constitutional principles of consultation and co-operation.[237] TDRMs will be very instrumental in the resolution of natural resource intergovernmental disputes where communities are involved, for instance, oil and pasture disputes as well as those on the access and use of natural resources.[238]

Secondly, the objects and purpose of the regulations align with the dictates of Articles 6(2), 189, 159(2)(c) of the Constitution. To begin, the regulations reinforce the constitutional principles of consultation and co-operation. This is evident in various consultation procedures. For instance, parties are obligated to take all necessary measures to amicably resolve disputes through negotiations, conciliation, and consultations before declaring a dispute.[239] Should the parties fail, either party must issue a notice to the other party showing intention to declare an intergovernmental dispute.[240] After seven days of the expiry of the notice, a party may then formally declare a dispute by filling form in the Schedule and serving the other party, line ministry, and Cabinet Secretary.[241] Even when a dispute is formally declared, parties are required to consult with each other in an initial meeting and agree on the nature of the dispute, and the most appropriate ADR forum for resolution.[242] Furthermore, where the dispute remains unresolved within the ADR mechanisms in the regulations, the parties are required to notify the Summit which then convenes another consultative meeting in an effort to resolve the

[236] Ibid Regulations 10-12.
[237] Francis Kariuki, 'African Traditional Justice Systems' [2017] *Journal for Conflict Management and Sustainable Development*, 165.
[238] Kisumu Workshop (n 23), page 66.
[239] ADR Regulations (n 235) Regulations 3(b), (c), (d), and Regulation 6(2).
[240] Ibid Regulation 6(7)
[241] Ibid Regulation 7(1).
[242] Ibid Regulation 8.

dispute.[243] The Regulations are alive to the constitutional dictate that courts be the last resort in the resolution of intergovernmental disputes.[244]

Still on the objects and purpose, the regulations seek to promote and ensure the effective, efficient, expeditious, and amicable resolution of intergovernmental disputes. This is achieved by stipulating timelines within which disputes must be resolved through the various ADR mechanisms. For instance, where the parties choose mediation, the dispute must be resolved within 14 days from the date of the commencement of the mediation proceedings.[245] Regarding TDRMS, the dispute must be determined within 21 days from the date of commencement of the proceedings.[246] For arbitration, the dispute must be determined within 30 days from the date of commencement of the arbitration proceedings.[247] These timelines are welcome and workable. They must have been motivated by the long durations previously experienced in attempts to resolve intergovernmental disputes through litigation.

Closely related to the objects and purpose, the regulations are guided by critical principles. The first significant principle is the prudent use of public funds in the resolution of intergovernmental disputes.[248] This is a welcome acknowledgement of the high litigation costs incurred in the resolution of such disputes through the courts. In part three of this paper, it was demonstrated that legal fees were high and caused strains on budgets of the two levels of government thus affecting service delivery. Another significant principle is the compliance with the procedures, decisions, and outcomes made through ADR mechanisms in the regulations.[249] This is important because without compliance with the outcomes of the ADR fora, this would

[243] Ibid Regulation 14(2).
[244] Ibid Regulation 15.
[245] Ibid Regulation 10(4). However, the parties may extend the mediation for a period not exceeding 7 days.
[246] Ibid Regulation 11(4). The parties can extend the proceedings for a period not exceeding 7 days.
[247] Ibid Regulation 12(4). Parties may extend for a period not exceeding 15 days.
[248] Ibid Regulation 4(b).
[249] Ibid Regulation 4(d).

frustrate the successful resolution of intergovernmental disputes.

Fourthly, the regulations provide clear provisions on the parties to intergovernmental disputes. The regulations enshrine that they apply to disputes between the national government and county government, and amongst county governments. They also apply to state organs and public offices in the two levels of government; namely, ministries, departments, agencies within the national government, and county departments as well as agencies. In doing so, the regulations provide clarity on parties to intergovernmental disputes. This aligns with case law where there have been prevalent disputes among organs within the same government. They also cater for disputes between county governments and agencies of the national government. Further, the regulations reflect the position enunciated by recent case law on determining the party to an intergovernmental dispute.[250] Courts have determined that one has to look beyond the parties and examine the subject matter.[251] Therefore, an intergovernmental dispute can actually arise between a public officer seeking to enforce an interest of either level of government, and an organ of the other government.[252]

Furthermore, the Regulations outlines an extensive list of intergovernmental disputes. These reflect the tensions and controversies witnessed in the last couple of devolution years. Intergovernmental disputes may relate to the assignment or implementation of functions, a financial matter, written agreement between the parties, boundary disputes, natural resource management, and any other intergovernmental dispute. [253] Regarding boundary disputes, the regulations require parties to consult with the relevant statutory and constitutional bodies in accordance with the existing laws. This obligation implicitly appreciates that there is the County Boundaries Bill

[250] *See County Government of Nyeri v Cabinet Secretary of Education, Science, and Technology* [2014] eKLR, *Board of Management, Frere Town Primary School v County Government of Mombasa* [2022] eKLR.
[251] See Part two.
[252] Ibid.
[253] Regulations 6(5)(b), 8(c).

2021 which seeks to provide for the resolution of county boundary disputes through establishing *ad hoc* county boundary mediation committees.[254] The Bill also creates the independent county boundaries commission tasked with making recommendations to the alteration of county boundaries as dictated by the Article 188 of the Constitution.[255] Relevant to this, the Environment and Land Court has held that the National Land commission has powers to investigate disputes arising from intercounty boundaries.[256] The court noted that county boundary disputes are examples of historical injustices.[257]

Regarding TDRMs, the regulations recognise that decisions from TDRMs may not be in writing. They instead require that where the dispute is resolved, the traditional body submits an outcome of the dispute, and any document that may be necessary.[258] For other ADR mechanisms, reports, and an arbitral award must be submitted.[259]

Lastly, the regulations enhance party autonomy and flexibility which are central to ADR mechanisms. Parties have the right to choose and agree on the ADR forum and practitioner to resolve their dispute.[260] However, where they fail to agree on the ADR practitioner, the Summit, CoG, or an intergovernmental structure can appoint or request a recognised ADR institution to make the appointment.[261] In addition, the parties and the ADR practitioner determine the procedure of the proceedings. Moreover, the parties can extend the period of the proceedings.

[254] Preamble, the *County Boundaries Bill* (Senate Bills Number 20 of 2021).
[255] Ibid Clauses 23, 24, and 26 (Senate Bills Number 20 of 2021).
[256] *Okoiti v Parliament of Kenya & 2 Others; County Government of Taita Taveta & 3 Others* (Interested Parties) (Petition 33 of 2021) [2022] KEELC 33 (KLR)(23 March 2022)(Ruling).
[257] Ibid.
[258] ADR Regulations (n 235) Regulation 11(8).
[259] Ibid Regulations 10(8) and 12(7)
[260] Ibid Regulations 10, 11,12.
[261] Ibid Regulations 10(2),11(2), and 12(2).

4.2 Gaps in the ADR Regulations

a) Incomplete definition of an ADR practitioner. The Regulations defines an ADR practitioner as an individual appointed to assist, guide, or determine an intergovernmental dispute. This definition seems incomplete as it omits individuals or groups of people such as elders who play a role in resolving intergovernmental disputes in the regulations. The omission can be resolved by revising the definition to include individuals or groups. Similarly, the definition of a traditional body is wanting. A traditional body is defined as an institution recognized by the parties or registered within Kenya as an authority with respect to traditional knowledge and cultural practices. 'Recognition by the parties' assumes that traditional institutions lose their authority and validity when they are not recognised by the parties. Also, what traditional institution is being referred to by the regulations? Is it council of elders? If that is the case, it should be expressly clear 'Registered within Kenya' presupposes that all traditional institutions or elders are registered by the Registrar of Societies. This is not the case on the ground because elders get their legitimacy from being custodians of customary law in their communities, it does not depend on registration.

b) Absence of the definition of an intergovernmental dispute. The Regulations do not provide a clear definition of an intergovernmental dispute. It only stipulates that an intergovernmental dispute is one defined under Section 30 of the IGRA. However, looking at the IGRA, there is no definition of an intergovernmental dispute. The regulations could be amended to reflect the definition that has been developed by courts.[262]

c) Limited scope of ADR mechanisms. The regulations define and provide procedures for negotiation, mediation, TRDRMs, and arbitration. Conciliation is mentioned as one of the ADR mechanisms but there are inadequate procedures on how the process will be conducted. The regulations only stipulate that before a dispute is formally declared, the

[262] See discussion in part 3.1 on the definition of an intergovernmental dispute.

parties may resolve the issues in controversy through an intermediary agreed upon by the parties. The question that arises is that who is an intermediary in this context? This is because an intermediary generally means a mediator. The regulations should have just indicated 'conciliator'. In addition, the regulations do not cover other ADR mechanisms such as adjudication, dispute review boards, dispute adjudication boards, and Early Neutral Evaluation. Perhaps, it was assumed that the CoG, Summit, and IGRTC can work as the boards. In the recent past and current regime, religious leaders play a significant role in resolution of intergovernmental disputes. The Cabinet Secretary may consider their inclusion in the regulations during the revision of the current ones.

d) Lack of clarity as to whether parties can appear with their advocates. The regulations are silent on the question as to whether parties must appear in person or can be represented by their lawyers. There is no doubt that parties appearing in person would safeguard the ADR processes from legalities and litigation technicalities. However, one wonders about the place of county attorneys in these ADR mechanisms. County Attorneys are the principal legal advisor of the County Executive in legal proceedings.[263] They have a right of audience in all proceedings in matters to be of public interest and those that involve public property within the county.[264] There is a need to harmonise the provisions of the County Attorney's Act and the regulations. The County Attorney and Attorney General may come in after the ADR mechanisms have failed and parties have resorted to judicial proceedings. However, lawyers are likely to be needed in arbitration under the regulations.

e) Lack of provisions on the revocation of appointment of ADR practitioners. The regulations are silent on the removal of ADR practitioners. There is a danger of the processes where either of the parties feels that there are elements of bias and partiality of the ADR practitioner to

[263] County Attorney Act (Act Number 14 of 2020), Section 7.
[264] Ibid Section 9.

any of the parties. In intergovernmental disputes, there is a lot of tension and political interests at play. Where an ADR practitioner is not ethical, they can end being influenced through corruption and bribery. Save for arbitration where the provisions of the Arbitration Act 1995 on removal of an arbitrator may apply, the regulations do not provide for procedures of challenging the appointment of mediator, conciliator, or Traditional body. This could be remedied by providing such procedures for removal and substitution of an ADR practitioner in cases of gross misconduct, bribery, and bias.

f) Lack of provisions on immunity of ADR practitioners. Save for arbitration where an arbitrator is not liable for anything done or omitted to be done in good faith in discharging their function, the regulations do not provide for immunity of other ADR practitioners.[265] Given the high tensions involved in intergovernmental disputes, some of the ADR practitioners may be intimidated with civil suits and threats. It is important to have them insulated from any act or omission in the performance of their roles unless it can be proved that they acted in bad faith, negligently, or fraudulently.

f) Vague and restrictive provisions on the use of TDRMs. While the inclusion of TDRMs in the regulation is welcome, there are provisions that restrict the application of TDRMs. To begin, the definition of TDRMs as the resolution of an intergovernmental dispute by a traditional body, is vague. As earlier discussed, the definition of a traditional body is inadequate. The regulations could be revised to consider the following amendments on TDRMs. First, 'traditional dispute resolver' should be used instead of the 'traditional body'. This is because the implication of 'body' presupposes that there are no individuals who possess extensive knowledge in customary law and skills. Borrowing from the ADR Bill 2021, a traditional dispute resolver can be defined as a person or group of persons who are by the traditional custom of their community recognised and accepted as possessing skills and traditional knowledge required to resolve the dispute. Second, the definition of TDRM can be revised to read as follows: 'traditional dispute resolution

[265] See Section 16B of the Arbitration Act 1995 and Regulation 12(6).

mechanism means a process in which parties attempt to reach a mutually acceptable settlement outcome or agreement to resolve their dispute through the application of customary law of the community concerned with the assistance of a third party called a traditional dispute resolver'.

The Regulations reinforce the repugnancy clause on TDRMs from the Constitution.[266] This trend continues to subjugate and undermine TDRMs against other form of ADR mechanisms. In TDRMs, there is high regard for truth and belief in ancestral powers, superstitions, and sorcery which are a great part of the dispute resolution.[267] However, in *Dancan Ouma Ojenge v P.N*, the Employment and Labour Relations court found that the use of superstitions and witchcraft was repugnant to justice and morality, therefore, inconsistent with the Constitution. [268] While the limitations in the Constitution are clear, the Constitution does not define the standards of morality and justice in the context used, leaving it open for courts to decide.[269] This presents inconsistencies and cripples the role of TDRMs in dispute resolution as religious leaders and elders in Kenya often use oaths and ritual ceremonies in resolving political disputes.

5.0 Recommendations

In addition to the above recommendations concerning the ADR Regulations, this paper makes more recommendations to entrench the resolution of intergovernmental disputes through ADR, and generally on intergovernmental relations.

First, there is a need for comprehensive training to the two levels of government and their respective organs on ADR mechanisms. This will create awareness about the benefits of such mechanisms in resolving

[266] Regulation 11(5). See also Art 159(3) of the Constitution.
[267] Francis Kariuki, 'Conflict Resolution by elders in Africa: Successes, Challenges and Opportunities' [2015] *Alternative Dispute Resolution*, 162-165.
[268] [2017] eKLR.
[269] Joseph Segona and Omandi Scholastica, 'An Analysis of the Weaknesses of TDRMs as an avenue of dispute resolution in Kenya' [2019] *Journal of Humanities and Social Science*, 5.

intergovernmental disputes over litigation. The awareness will equip state officers with knowledge about ADR mechanisms and ensure that they do not file cases in courts in the first instance. While it is clear from the jurisprudence that courts will refer them back to ADR, resolving intergovernmental disputes in the first instance will save them costs and long delays. In addition, there is need for capacity building by the intergovernmental organs and ADR institutions to strengthen their effective conflict management and ADR.[270]

Second, given that there are still legal certainties about the functions and powers of the two levels of government. This may be resolved through a legislation clarifying the functions and powers. The legislation could be entitled "The Functions and Powers of the National Government and County Government Act".[271] The Act can provide for the (i) clarification of powers and functions, specify the exclusive functions and powers of both levels of government, and outline the concurrent functions and powers. In addition, the Act can provide for guidelines that can guide the national government in the assignment of additional functions and powers to the county governments in accordance with Articles 18693) and 183(1)(b) of the Constitution.[272] The legislation should also address legal inconsistencies and gaps on functions of the two governments. In doing so, the legislation will reduce duplication of efforts, role, and expenditure as well as wastage of resources. It will minimise the likelihood of a total failure in the delivery of services to the public where each level of government may take no action in the functional area hoping that the other will provide the services.[273]

Third, the judiciary is encouraged to continue promoting ADR mechanisms in accordance with the dictates of Article 159(2)(c). Courts have been supportive of ADR mechanisms by staying intergovernmental dispute

[270] IGRTC, *End Term Report 2015-2020*,117.
[271] Kisumu Workshop (n 23)10.
[272] Ibid 63.
[273] Ibid 43.

proceedings and referring parties to ADR.[274] The doctrines of exhaustion and constitutional avoidance have been endorsed by the Supreme Court and the superior courts.[275] This pro-ADR stance should continue, and members of the bench should not view ADR as a threat to the court system. The outcomes of the ADR mechanisms resulting from the resolution of intergovernmental disputes in the ADR regulations should be enforced. Nonetheless, courts can play a limited role in interpreting the Constitution and providing clarity on novel areas affecting the functions of the two levels of government through advisory opinions to the Supreme Court.[276] The ADR regulations also allow parties to seek interim measures from courts.[277]

There may also be a need to review the renumeration of advocates for cases involving the public sector.[278] As discussed in the paper, many counties have incurred huge budgetary costs in terms of legal fees. While advocates are entitled to legal fees for legal services offered, the huge legal fees have an impact on service delivery to people. This is because a lot of public funds have been diverted to legal representation by agencies within the national government and county government.[279] The Law Society of Kenya and the Attorney General may work together to come up with a special renumeration order applicable for public sector litigation. In same spirit, there may be a

[274] See *County Government of Migori & 4 Others v Privatisation Commission of Kenya* [2017] eKLR, *International Legal Consultancy Group & another v Ministry of Health* [2016] eKLR, *Daniel Muthama v Ministry of Health; Shenzhen Mindray Bio-Medical Electronics Co. Ltd* [2015] eKLR; *Council of Governors v Lake Basin Development Authority & 6 Others* [2017] ekKLR*; Silas v County Government of Baringo* [2014] eKLR; *Turkana County Government v Attorney General* [2015] eKLR.

[275] *Speaker of the Senate and another v Attorney General* [2015] eKLR. See also *Communication Commission of Kenya v Royal Media Services* [2014] eKLR.

[276] In para 18 of the In *re Matter of the Principle of Gender Representation in the National Assembly* [2011] eKLR, the Supreme Court observed that advisory opinions are an important avenue for resolving matters of great public importance which may not be suitable for conventional mechanisms of justiciability. This arises in novel situation especially those affecting county government.

[277] Regulation 9.

[278] IGRTC, *End Term Report 2015-2020*,118.

[279] IGRTC, *Cost of Litigation in Inter/Intragovernmental Litigation in Kenya*, 2017,33.

need to come up with standard rates of renumeration or guidelines for resolution of intergovernmental disputes through ADR mechanisms especially arbitration. There have been valid concerns about the rising costs of arbitration fees in the country. Nonetheless, the average cost of resolving an intergovernmental dispute through ADR will depend on the complexity of the case and hours taken to resolve the dispute.[280]

There is a need to protect the neutrality and autonomy of the IGRTC. Under the IGRA, the principal secretary of the ministry of devolution affairs is a member of the IGRTC. However, other intergovernmental organs like the CoG does not have a representative. There have been tensions and perceptions about neutrality of the IGRTC. For example, in a meeting with the Senate, the principal secretary declared that the IGRTC was part of the ministry.[281] In another meeting, the principal secretary told the committee that it was disrespectful when it attended a meeting convened by the National Assembly Committee on the implementation of the Constitution without his approval.[282] In addition, the IGRTC's budget is part of the ministry's budget.[283] This undermines the neutrality of the IGRTC and the interference in its affairs could undermine the compliance and enforcement of ADR processes, outcomes, and agreements in the ADR Regulations. The funding model of the defunct Commission for the Implementation of the Constitution may be adopted, its funding was not directly anchored on a ministry or state agency thus enhancing its full neutrality.[284] The IGRA may be amended to remove the ministry of devolution from its membership or include representatives from the CoG and other intergovernmental organs so that it remains truly neutral.[285]

Lastly, the regulations stipulate that the Cabinet Secretary in charge of devolution may in consultation with the IGRTC and CoG issue guidelines for better carrying out of the provisions of the regulations.[286] The CS is called upon to address some of the issues raised in this paper to address the gaps in

[280] Ibid 26.
[281] IGRTC, *End Term Report 2015-2020*,132.
[282] Ibid
[283] Kisumu Workshop (n 23) 80.
[284] IGRTC, *End Term Report 2015-2020*,132
[285] Kisumu Workshop (n 23) 92.
[286] Regulation 21.

the regulations. The guidelines should also consider the possibility of waiving confidentiality in some of the matters that may need to be open to the public because of public interest and right to access to information.[287]

6.0 Conclusion

We are all interdependent and must co-exist with each other. This does not mean that it will always be peaceful. On the contrary, conflicts and differences will always be there. However, peace and harmonious co-existence requires that we work together to resolve such differences through dialogue, mutual respect, and tolerance – all principles inherent in ADR mechanisms. Similarly, this is required for the two levels of government. Being co-operative and consultative does not ignore differences of approach and viewpoints but encourages healthy debate to address the needs of people and resolve disputes that arise amicably.[288] Strictly speaking, there are no intergovernmental relations, there are only relations among officials in different levels of government. Individual interactions among state and public officers are at the core of intergovernmental relations.[289] In order for those officers to satisfactorily serve the people of Kenya, they need to co-operate and work together because if one level does not function well, the whole government will not function optimally. This extends to the resolution of their disputes through ADR mechanisms. To paraphrase the words of *Dalai Lama*, a Nobel Prize winner, the two levels of government should not let litigation injure the great relationship they ought to have for the betterment of the lives of Kenyans. There is willingness in the current regime to resolve intergovernmental disputes through ADR. In the Official communique from the 9th ordinary session of the Summit organised by the IGRTC 2023, the government has committed to achieve the following. First, all existing intergovernmental legal cases by one level of government against the other level of government shall be subjected to ADR as provided under the IGRA. Second, through the IGRTC, Kenya Revenue Authority shall withdrawal all matters against county governments from courts and seek

[287] Regulation 18(1).
[288] Kisumu Workshop (n 23) 39.
[289] Ibid 33.

ADR. Third, Summit has committed to empowering the IGRTC to enable it adjudicate intergovernmental disputes. All in all, this paper has extensively discussed the resolution of intergovernmental disputes through ADR mechanisms. In view of the recommendations given in part three and four and commitments by the summit, the paper hopes that intergovernmental relations will be improved and promote the gains of devolution.

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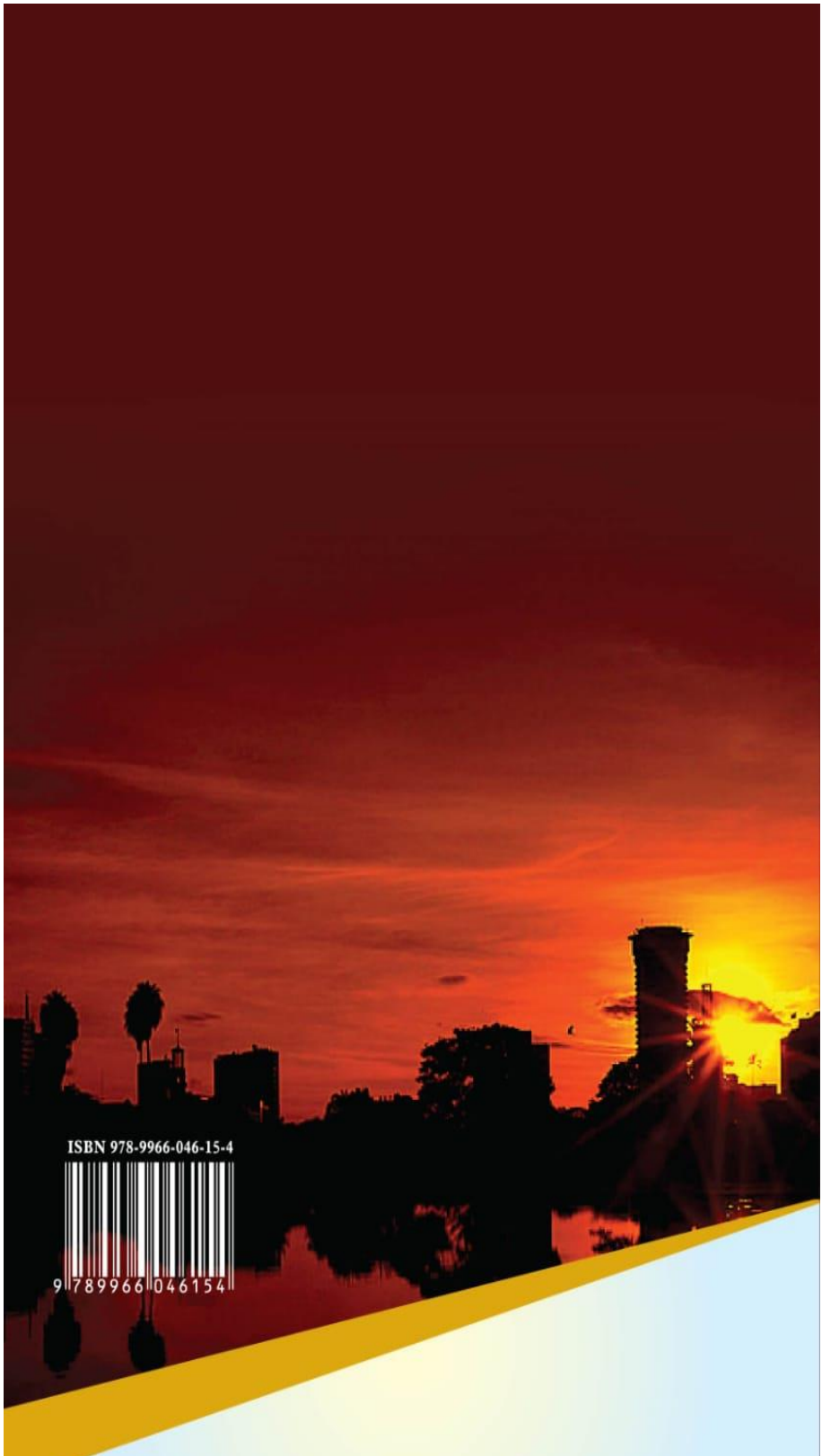
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