ALTERNATIVE DISPUTE RESOLUTION MECHANISMS AS A TOOL FOR DISPUTE SETTLEMENT IN THE DEVOLVED GOVERNANCE SYSTEM IN KENYA

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2018

DECLARATION

I GATHUMBI, GABRIEL K. declare that this Research Project is my original work and has not been presented and is not currently being presented for a degree in any other University. Where the work of other people has been used, it has been duly acknowledged.

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DEDICATION

I dedicate this Research Project to my loving and caring mother, Lydiah Wanjiku Gathumbi, who constantly cheered me on, happily nodding in appreciation as I researched and compiled the same. Indeed, she has been my greatest source of inspiration, not only in this study but also in my entire academic journey thus far.

LIST OF ABBREVIATIONS

AG	Attorney General
ADR	Alternative Dispute Resolution
CAJ	Commission on Administrative Justice
CC	Constitutional Court
CHRD	Constitutional and Human Rights Division
CKRC	Constitution of Kenya Review Commission
CT	Court
DCJ	Deputy Chief Justice
DFRD	District Focus for Rural Development
eKLR	Kenya Law Reports
ELRC	Employment and Labour Relations Court
FES	Friedrich Ebert Stiftung
HC	High Court
IBEC	Intergovernmental Budget and Economic Council
IEA	Institute of Economic Affairs
IGR	Intergovernmental Relations
IGRF	Intergovernmental Relations Framework
JR	Judicial Review
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KMPDU	Kenya Medical Practitioners, Pharmacists and Dentists Union
NGC	National Government Coordination
SA	South Africa
SID	Society for International Development
SUP	Supreme
TA	Transition Authority

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ABSTRACT

The Constitution of Kenya, 2010 establishes a devolved governance system comprising two levels of government namely; the national and county governments which are distinct and interdependent and required to conduct their mutual relations on the basis of consultation and cooperation. Under the system, citizens participate in their governance by exercising their sovereignty, either directly or indirectly through elected and appointed representatives. To operationalize the new system of governance, the Constitution has set up institutions and has allocated responsibilities and powers respectively. However, due to the distinct and interdependent nature of the two levels of government and the manner of their institutional and functional assignment, the Constitution has provided a system of intergovernmental relations including alternative dispute resolution methods for resolving disputes that avoid litigation in the first instance.

The implementation of the devolved governance system has registered a number of achievements since March, 2013 among them being; enactment of relevant laws, the operationalization of county government structures, transfer of functions and responsibilities as well as the allocation of resources. Amidst these successes, a number of challenges have emerged which if not adequately addressed may undermine the implementation of devolution. However, the framework for the settlement of intergovernmental disputes envisaged in the constitutional and statutory provisions has not been put in place.

This study makes a case for the adoption and promotion of alternative dispute resolution methods to address intergovernmental disputes and prevent judicial intervention by riding on its advantages while acknowledging its inherent limitations. Hence, the formulation of a legal and policy framework to operationalize the constitutional provisions for promotion of ADR in intergovernmental dispute settlement, ensuring consistent respect for the principle of the rule of law as well as consultation and cooperation will foster the achievement of the objects of the devolved governance system in Kenya.

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CHAPTER ONE

1.0 Introduction

The Republic of Kenya has been described in the Constitution as one sovereign and democratic state[1] but the government is established at two levels namely; the national and county governments.[2] The two levels of government thus created are separate but interrelated and the modus operandi of their mutual interaction is through cooperation and consultation.[3] This implies that the two levels of government should work together in harmony to achieve a common objective, which is the hallmark of the cooperative devolved governance system adopted after the promulgation of the Constitution.[4]

The mutual interaction between the two levels of government is governed by the principles of cooperation and consultation which require functional and institutional integrity at each level.[5] However, due to the distinct and interdependent nature of the levels of government and the manner of their functional assignment, the Constitution has provided a system of intergovernmental relations including dispute resolution mechanisms.[6]

The devolved governance system came into force in March 2013 and since then remarkable progress in its implementation has been made which include; the making of relevant laws,[7] setting up structures in the counties,[8] transfer of powers and assignment of functions[9] together with equitable sharing of resources.[10] Despite these achievements, there have been a number of challenges in connection with institutional, resources and

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1 Article 4(1) and (2), Constitution of Kenya.
2 Article 6(2), Constitution of Kenya.
3 Ibid.
4 The Constitution of Kenya 2010 was promulgated on 27th August 2010.
5 Article 189(1)(a), Constitution of Kenya.
6 Ibid, Article 189(3) and (4).
7 The laws enacted to facilitate implementation of the devolved system of government include: County Government Act, 2012, Transition to Devolved Government Act, 2012, Urban Areas and Cities Act, 2012, Intergovernmental Relations Act, 2012 and Public Finance Management Act, 2012.'
8 The Constitution establishes various institutions to implement the devolved system of government at the County level namely; Office of the County Governor and Deputy Governor, County Executive Committees and County Assemblies.
9 Section 15 of the Sixth Schedule to the Constitution requires Parliament to enact legislation to make provisions for phased out transfer of functions assigned to the county governments from the national government. The envisaged law is the Transition to Devolved Government Act, 2012 which establishes a Transitional Authority.
10 The County Allocation of Revenue Act, 2013 was enacted to provide for a framework on the equitable allocation of revenue raised nationally in accordance with the sharing formula developed by the Commission on Revenue Allocation.

intergovernmental relations which require urgent redress. These challenges manifest themselves in the form of intergovernmental disputes that occur between the two levels of government or their respective state agents or organs.

There have been disputes between the two levels of government arising from the execution of concurrent functions and the government at either level encroaching on functions not assigned to it.[11] Further, the disputes pitting the Senate and National Assembly with respect to revenue allocation to the county governments,[12] the dispute pitting the Senate and Council of County Governors over the power to summon the Governors;[13] the stand-off between Council of County Governors and national government regarding the transfer of functions,[14] the conflict between Council of County Governors and County Assemblies leading to the impeachment of Governors,[15] boundary disputes between county governments and conflict on the use of shared resources by county governments[16] are cases in point.

The Constitution emphasizes the primacy of resolving intergovernmental disputes through the use of ADR mechanisms.[17] Besides the constitutional provisions, the Intergovernmental Relations Act ("the IGR Act")[18] provides for alternative dispute resolution mechanisms and the manner in which intergovernmental disputes are to be managed.[19] Undoubtedly, the Constitution and the IGR Act envisage that disputes between the two levels of government should be settled amicably and through alternative

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[11] The Council of County Governors **v** Attorney General and 4 Others, HC, CHRD Petition No. 472 of 2014 at Nairobi.

[12] Speaker of the Senate & Another **v** Attorney General & 4 Others, Sup Ct Advisory Opinion No. 2 of 2013'

[13] The International Legal Consultancy Group **v** The Senate & Another, HC. Constitutional Petition No 8 of 2014 eKLR.'

[14] HC Petition No. 472 of 2014 eKLR, [n 11].

[15] The first five (5) years of the devolved system of government implementation, 2013-2017 saw the impeachment of five (5) County Governors by the respective County Assemblies. Governors affected were from Embu, Kericho, Makueni, Murang'a and Nyeri Counties. See also; Martin Nyaga Wambora and County Government of Embu V The Speaker of the County Assembly of Embu and 4 Others, Petition No. 7 and 8 of 2014 (consolidated) [2015] eKLR.

[16] Turkana County Government and Others **v** Attorney General and Others. Petition No. 113 of 2015 eKLR.

[17] Article 159 of the Constitution enjoins Courts and Tribunals in the exercise of judicial authority to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms. To enhance and expand the scope of its application, the Constitution in Article 189 provides that intergovernmental disputes should where possible be resolved through ADR mechanisms including negotiations, mediation, and arbitration.'

[18] Intergovernmental Relations Act, Act No. 2 of 2012 ("IGR Act").

[19] Section 31(b), IGR Act.

methods. It is only after exhausting the ADR mechanisms can the parties resort to judicial intervention.[20]

However, in order to operationalize the constitutional provisions relating to intergovernmental disputes, the law requires that procedures and guidelines be formulated to facilitate their settlement through ADR mechanisms.[21]

1.1 Background to the Study

The struggle for a devolved governance system in Kenya dates back to the pre-independence period. During the negotiation for independence in the early 1960s, the minority political party[22] fearing the perceived domination by the big tribes, pushed for devolution and regional governments in order to promote, protect and pursue their people's interests.[23] On the other hand, the leaders of the majority ethnic communities[24] fronted by the Kenya African National Union (KANU) preferred a unitary state.[25]

At the dawn of independence in 1963, the competing political players agreed to the adoption of a Constitution ("the Independence Constitution"), which established regional governments[26] dubbed "majimbo", a constitutional term for a federal system with extensive political, economic and administrative powers distributed between the central and regional governments.[27]

However, in 1964, the regional governments were scrapped thereby re-concentrating power at the center and more specifically within the executive arm of government.[28] After years of sustained demands for decentralization of power from the center, a devolved governance

[20] This is succinctly captured in the case of *Isiolo County Assembly Service Board and Another v Principal Secretary Devolution Ministry of Devolution and Planning,* High Court Petition No. 370 of 2015, eKLR where Justice Onguto (as he then was) upheld the spirit and letter of the Constitution by holding that unless and until all alternative dispute resolution mechanisms provided in both the Constitution and the statute are fully applied and declared to have failed, any matter brought before Court for determination would be in contravention of the law.'

[21] Section 38(2), IGR Act.

[22] KADU had been formed by the minority ethnic and economically marginalized tribes, such as; the Maasai, Abaluhya, Kalenjins, and Mijikenda at the Coast among others.

[23] D M Anderson, '*Yours in Struggle for Majimbo;* Nationalism and the Party Politics of Decolonization in Kenya,' [2005], Journal of Contemporary History 40, 3: 547-64.

[24] KANU was formed mainly by the Luo and members of the GEMA community (Gikuyu, Embu and Meru communities) among others.

[25] Anderson, [n 23].

[26] Section 9 of The Independence Constitution of Kenya 1963 established the seven regions namely; Coast, Eastern, Central, Rift Valley, Nyanza, Western and North-Eastern Regions.

[27] The Constitution of Kenya Review Commission (CKRC): Main Report; [2005] pp 223-242.

[28] Ibid.

system was established under the new Constitution at two levels comprising the national and forty-seven county governments.[29]

The nature of the centralized governance system hitherto in place in Kenya since 1964 was that decisions were made at the center and pushed down to the lower administrative units without the people's inputs or contribution. This approach to governance creates unnecessary animosity and friction between the levels of government for want of decision-ownership at the lower levels. However, the devolved governance system embraced after the promulgation of the Constitution besides being concerned with service delivery has inbuilt mechanisms to resolve over-centralized misgovernance, defuse disaffection and tension by promoting harmonious resolution of intergovernmental disputes when they occur.[30]

This study, therefore, examines the alternative dispute resolution mechanisms as an instrument for dispute settlement in Kenya's devolved system of government. This study makes proposals for reforms in the law and the enactment of procedures and guidelines to operationalize the constitutional provisions for promoting ADR as a tool for intergovernmental dispute management and settlement.

1.2 Statement of the Problem

The devolved governance system is a new phenomenon in Kenya's constitutional and legal order. Prior to the promulgation of the Constitution on 27th August 2010, the country had no jurisprudential history of dealing with disputes emanating from devolved units as it had a centralized political and administrative structure. Since the establishment of the devolved governance system in March 2013, there have been instances where the two levels of government have openly differed on policy implementation, resource allocation and the functions to be devolved, such differences or disputes will require to be resolved in a manner satisfactory to both parties.

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[29] First Schedule of the Constitution lists the forty-seven (47) Counties by name. They are similar to those of the forty-one Districts provided in the Independence Constitution as amended and increased to forty-seven Districts by the Districts and Provinces Act, 1992.'

[30] A Mwendwa, 'Introduction of Devolution in Kenya: Prospects, Challenges and the Future,' [2010]; Research Paper Series No. 24. Institute of Economic Affairs (IEA) – Nairobi.

The Constitution[31] and IGR Act[32] both identify ADR mechanisms as a device for resolution of intergovernmental disputes. The Constitution demands that either government should make every reasonable effort to settle the disputes by means of procedures formulated under the national legislation.[33] The procedures formulated by the national legislation are meant to facilitate the settlement of intergovernmental disputes by alternative dispute resolution mechanisms.[34]

Nevertheless, despite the enactment of the IGR Act, the procedures, regulations and guidelines to operationalize the constitutional provisions relating to the use of ADR mechanisms in intergovernmental disputes have not been formulated or developed as required.[35]

1.3 Theoretical and Conceptual Framework

This study is based on the theory of Legal Positivism and the principle of the Rule of Law.

1.3.1 The Theory of Legal Positivism

The legal positivism theory refers to the development of the law as it is. The primary idea of legal positivism lies in the derivation of "positum" emphasizing that the law is something laid down or posited.

The legal positivists argue that; first, law is a social fact rather than a set of rules derived from natural law and secondly, there is a sharp distinction and separation of law from all impurities like morality. It posits that laws have to be traced to an objectively verifiable source. The theory hence propagates the notion that law is separate from the question of what the law should be.[36]

Some of the proponents of legal positivism include; Jeremy Bentham.[37] Bentham argued that one must look at the law as is posited in the codes and statute. He dismissed the concept of natural law and inalienable rights as mere fallacies. His opposition to the natural

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31 Article 189(4), Constitution of Kenya.
32 Section 31(b), IGR Act.
33 Article 189(3), Constitution of Kenya.
34 Article 189(4), Constitution of Kenya.
35 Section 38(2), IGR Act.
36 Brian Bix, 'Jurisprudence Theory and Context,' Sweet & Maxwell, 5th edn 2009 p 198.
37 M D A Freeman, 'Introduction to Jurisprudence,' 8th ed Sweet & Maxwell p 986.

rights was premised on the basis that they were distributive and individualistic. This is in contrast to his concept of Utilitarianism of "maximizing the total net sum of happiness."[38]

Further, to Bentham, all rights were the fruits of positive laws and therefore the dispute whether an individual has a right and what its scope is, is an objectively ascertainable fact to be rationally resolved by reference to the terms of the relevant positive law.[39]
Another leading legal positivist, John Austin, has argued that the existence of law is one thing, its merits or demerits is another.[40] Austin further argues that, the question of whether the law exists or not is one inquiry, and whether it is or not conformable to an assumed standard is another.[41] However, he asserts that law which actually exists is a law despite its inadequacy or though it defers from the way in which society manages its approbation and disapprobation.[42]

The proponents of this theory place emphasis on the fact that the law is "as is" and their view of the law is that the legislature prescribes and stresses the empirical and pragmatic aspect of the law.[43] The proponents of the theory have further argued and asserted that with all general rules, there will be a core of certainty-central-case where the application is clear and a penumbra of doubt, where the application of the rule is uncertain.[44] The proponents further aver that the legislature may not have considered all possible situations so that the legislative intent even if clearly known, will not answer all possible problems in applying rules.[45]

Hans Kelsen, another legal positivist espouses the doctrine of the grundnorm under his concept of the "Pure Theory of Law".[46] The grundnorm or basic norm is the most general norm which is hypothesized as the norm behind the final authority to which all particular valid norms can be traced back. This is the only norm which cannot itself be questioned or validated. It is in this sense that its validity is presupposed or tacitly assumed in any legal activity. All other norms in the legal system derive their validity from it. The

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[38] Ibid.
[39] Ibid.
[40] John Austin, 'The Province of Jurisprudence: Determined Lecture V,' (W.E. Rumble ed. Cambridge University Press, (first published in 1832) p 152.
[41] Ibid.
[42] Ibid.
[43] Freeman, [n37] p 986.
[44] Ibid, pp 375-391.
[45] Bix, [n 36] p 47.
[46] Freeman, [n 37] pp 326-332.

Constitution in a country is viewed as the basic law or grundnorm where all other legislations derive their validity.

In a nutshell, legal positivism contends that the law is a system of rules. More particularly, it posits that law is a "self-contained world" and that all answers lie within it. Flowing from the positivist outlook then, whenever one is faced with any question, their immediate response becomes: what does the law say? Their immediate response is further buttressed by the training lawyers receive. Legal scholars and practitioners, when faced with a legal problem or question, are always quick to make reference to the Constitution, statutes, law journals and articles. The assumption being that, there in the law, lies the answer to all legal questions.

In the context of this study, it is submitted that the Constitution of Kenya 2010 is the grundnorm or basic law in the country. All other laws, rules, regulations, and procedures derive their validity from the Constitution. Indeed, the Constitution provides that any laws and regulations, rules of procedure and guidelines which are not enacted or formulated (as the case may be) in conformity with it are null and void to the extent of the nonconformity.[47]

Furthermore, the legal positivism theory is given life by provisions of the Constitution which states that the national legislation shall provide a legal framework to operationalize the use of ADR mechanisms in intergovernmental disputes.[48] This means that, first, the national legislation shall provide a legal framework to operationalize the use of ADR in intergovernmental disputes. In this regard, the regulations, procedures, and guidelines to facilitate the use of ADR are to be formulated in conformity with the Constitution. Second, unless and until the prescribed legal framework is put in place in accordance with the constitutional provisions, the resolution of intergovernmental disputes will be at risk. Third, the failure to formulate the procedures, regulations, and guidelines will undermine the implementation of the devolved system of government as circumscribed by the grundnorm or Constitution.

In essence therefore, the theory of legal positivism obligates the national government to comply with the existing law by initiating the formulation of the regulations to

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[47] Article 2(4), Constitution of Kenya.

[48] Article 189 (4), Constitution of Kenya.

operationalise the constitutional provisions for the promotion of ADR in intergovernmental dispute settlement.

1.3.2 The Principle of the Rule of Law and Theory of Political Obligation

This study relies on the principle of the Rule of Law and theory of Political Obligation. The principle of the Rule of Law has been defined to mean a legal principle of general application, sanctioned by the recognition of authorities and usually expressed in the form of a maxim or logical proposition. It is sometimes known as the supremacy of the law, in that, it highlights that law must always be observed and respected by all in order to avoid the society degenerating into anarchy.[49]

It has been posited that, for there to be a Rule of Law, three conditions must exist. First, there has to be transparency where government decisions are to be measured against pre-determined standards, that is, the law. Secondly, there has to be widespread access to justice whereby the court assesses the consistency of the action complained of with the law and thirdly, judicial independence. This theory is obsessed with compliance and application. The theory of the Rule of Law, therefore, propagates that all actions in society are to be measured against, pre-determined standards, that is, the law.[50]

On the other hand, to have a political obligation is to have a moral duty to obey the laws of one's country or state. The obligation to hold up one's end of the bargain naturally arises when one has done something that engineers the obligation say by making a promise, signing a contract or representation. In the context of this study, the citizens of Kenya by virtue of signing a contract with the state resulting to the promulgation of the Constitution of Kenya 2010, have a duty to uphold the provisions therein.

Plato in his play 'Crito' hypothesizes the concept of political obligation in an attempt to unearth the underlying intricacies within the moral duty to obey the laws of the state.[51] He uses the analogy of a trial by death for Socrates[52], where he shows Socrates's internal conflicts on whether to obey the law or not.

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[49] Black's Law Dictionary, 9th edn Thompson Reuters 2009.

[50] William C Whilford, 'The Rule of Law: New Reflections on an Old Doctrine' [2000]; Vol 6 East African Journal of Peace and Human Rights.

[51] Plato, '*The Trial and Death of Socrates,*' (3rd edition, G. M. A. Grube (trans.); Indianapolis: Hackett Publishing Co.) 2000.

[52] Ibid p 54.

In this fictional play, he states that in 399 BCE an Athenian jury finds Socrates guilty of crimes to which he is given a death sentence. However, his friends on the outside come up with a plan and helps him escape from prison. He instead chooses to remain in prison than escape with his friends. He premises his decision on the argument that to escape would be to break his agreements and commitments, thereby mistreating his friends, family, country and most importantly the 'Athenian Law.'[53] From this archaic but very informative play, this study deduces the four pillars of political obligation theory.

First, when Socrates argues that seeing as he was born and raised in Athens, then his long stay in Athens means he has entered into an agreement with its laws and as such he has a natural duty to obey them. This argument satisfies the social contract or consent theory of political obligation which in turn is a satisfier of the doctrine of commitment.

Second, Socrates is apprehensive that he owes his all, to wit birth, nurture, and education, among other things to the Athenian laws, and he satisfies the obligation theory and acknowledges the same when he concludes that it would be wrong of him to disobey its laws at that stage after it has done it all for him. This satisfies the concept or doctrine of gratitude.

Third, when he asks Crito his interlocutor, '*...[if] we leave here without the city's permission, are we mistreating people whom we should least mistreat?*' he is acknowledging the concept of fairness when he trivializes and downplays the mistreatment of his fellow countrymen, and the laws in place. Fair play is the doctrine satisfied here.

Fourth and finally, when Socrates is faced with a challenge on whether to obey or disobey the law and asks, '*...[d]o you think it possible for a city not to be destroyed if the verdicts of its courts have no force but are nullified and set at naught by private individuals?*' he satisfies the principle of utilitarianism.

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[53] Stanford Encyclopedia of Philosophy, Political Obligation' (2014) https://plato.stanford.edu/entries/political-obligation/> Assessed 12 November 2018.

T H Green[54] made an attempt to discover the true ground or justification for obedience to the law. He argued that one ought to obey the law because he or she will suffer if they do not.

Harry Beran[55], on the doctrine of consent fortifies the argument by other philosophers by stating that only express consent can generate a political obligation. As such he calls for political societies to establish formal procedures for evoking such consent. This is to mean that, it should be a black and white affair, that once the state calls or requires for this obligation to obey the law, then the subjects should openly consent or decline. And in the event they decline, then they most certainly have the options of leaving the state, seceding to form a new state with like-minded people, or taking residence in a territory within the state reserved for dissenters.[56]

On fair play, H L A Hart in "Are There Any Natural Rights?" argues, '*…[w]hen a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission.*'[57] This therefore, means that in respecting the concept of fair play, subjects of the law should adhere to the restraints of the law which binds them.

This argument is shared by John Rawls who adopts the same in an influential essay of his own, referring to the duty derived from the principle as the "duty of fair play" [58]

Due to the distinct and interdependent nature of the two levels of government and the manner of their institutional and functional assignment, the Constitution has provided a system of intergovernmental relations including alternative dispute resolution methods for resolving disputes that may arise. This means that disputes that may occur are required to be resolved through pre-determined procedures or laws. This is succinctly

[54] T H Green, '*Lectures on the Principles of Political Obligation and Other Writings,*' (P. Harris and J. Morrow (eds.), Cambridge: Cambridge University Press, 1986).
[55] Harry Beran, '*The Consent Theory of Political Obligation*' (London: Croom Helm, 1997).
[56] Stanford Encyclopedia of Philosophy [n 53].
[57] H L A Hart, 'Are There Any Natural Rights?' (*Philosophical Review*, 64: 1955)185.
[58] John Rawls, 'Legal Obligation and the Duty of Fair Play in *Law and Philosophy*,' (S. Hook (ed.), New York: New York University Press 1964).

illustrated by the case of ***Isiolo County Assembly Service Board,***[59] where the Court held that the Petition was premature as there existed a clear process for resolving an intergovernmental dispute which must be followed before parties resort to Court. It is only when all efforts at resolving the dispute under the IGR Act fail that judicial intervention is resort to.[60]

In essence, the theory of the Rule of Law and political obligation here requires that the parties follow the laid down procedure of alternative dispute resolution method before judicial intervention.

Further, in the case of the *International Legal Consultancy Group*[61] Mumbi Ngugi, J while dealing with the matter relating to a dispute regarding the supply of health equipment sent to the County Governments by the National Government observed that before an intergovernmental dispute can be entertained by the Court, the parties must demonstrate that an attempt to resolve the dispute in accordance with the law was made. The Honourable Judge further observed that the parties in their pleadings did not demonstrate that an attempt was made at any point to resolve the dispute if there was a dispute in accordance with provisions of the Act.[62]

Under the Intergovernmental Relations Act, a clear process is established for resolving disputes between county governments or between the national government on the one hand and a county government on the other. The procedure entails a demonstration that an attempt was made to resolve the dispute if there was a dispute in accordance with the provisions of the IGR Act. The process must be followed before parties resort to court. Judicial proceedings are only to be resorted to when all efforts at resolving the dispute under the Act fail. The relevant section of the IGR Act provides that "Where all efforts of resolving a dispute under the Act fail, a party to the dispute may submit the matter for arbitration or institute judicial proceedings".[63] It is clear that disputes that may arise between the two levels of government may be adjudicated through an alternative dispute

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[59] Isiolo County Assembly Services Board & Another **v** The Ministry of Devolution Petition No. 370 of 2015 at Nairobi eKLR.
[60] Ibid, para 44.
[61] International Legal Consultancy Group & Another **v** The Ministry of Health & 5 Others, Petition No. 99 of 2015 eKLR.
[62] Ibid, para 66.
[63] Section 35, IGR Act.

resolution mechanism or a judicial process where the parties are required to follow a laid down procedure set out in the law.[64]

What this study deduces is that most philosophers argue that, the problem of political obligation is a moral problem, and the obligation in question is a kind of moral obligation. To have a political obligation, then, is to have a moral duty to obey the rule of law.

In this regard, these theories imply that the Constitution and the relevant laws apply in dealing with disputes that arise in society including between the national and county governments. It also implies that, where procedures are clearly set out for any dispute resolution within either the Constitution or an Act of Parliament or both, that procedure must be followed. Any deviation whatsoever without sound reason is going against the obligations binding each subject by virtue of having entered into a contract with the state and shows lack of commitment, gratitude, concept of utility and fair play.[65]

1.4 Literature Review

The devolved governance system (in Kenya known as "devolution") has been widely touted by scholars as the panacea to the shortcomings and deficiencies of a centralized system of government.[66] Success in implementing devolution minimizes the occurrence of intergovernmental disputes.[67] Furthermore, the Constitution has inbuilt safeguards and mechanisms like the notion of cooperative government and consultation which are designed to avert intergovernmental disputes. Needless to say, the nature of multi-level governance is such that there are occasions when disputes over power, functions and resources arise.

However, when disputes occur they are required to be resolved by the use of ADR and avoid judicial intervention. In fact, under the Constitution, intergovernmental disputes are required to be settled by use of ADR mechanisms rather than the adversarial method of litigation.[68]

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64 Isiolo County Assembly Services Board & Another [n 59] para 44.
65 Ibid.
66 J C Ribot, 'African Decentralization, Local Actors, Powers and Accountability: Programme on Democracy, Governance, and Human Rights,' [December 2001] UNRISD Paper Number 8, pp 1-76.
67 Ibid, pp 45 – 46.
68 L R Singer, 'Settling Disputes,' (2nd ed) Westview Press, United States of America 1994.

This part of the study seeks to critically examine and evaluate literature that has been authored by various scholars together with the Constitution and statutory provisions as appertain to disputes in a devolved system of government under the thematic areas discussed here below.

First, *the impact of the introduction of the devolved governance system*: The introduction of decentralization in countries such as the Republic of Kenya, which hitherto had a centralized governance system is bound to inevitably bring with it challenges because of the political power shift, competition for allocation of resources and transfer of functions.

This concern is succinctly articulated by *J B Ojwang,* who in his book asserts that due to the impact of devolution in several spheres of the society in Kenya, its implementation is bound to be contested as a result of intergovernmental disputes.[69] *Ojwang* further observes that the Counties as currently set up in the Constitution are destined to generate contentious matters for judicial determination in view of the competing interests therein and also in relation to present conflicts with the national government. In fact, the author predicts that the disputes will be highly litigated through judicial intervention.[70] He therefore elucidates that, the judiciary will play a key role in giving effect to devolution and settling the likely disputes especially between the two levels of government.

More importantly, while acknowledging that intergovernmental disputes are bound to occur in implementing the changed governance system, *Ojwang* further asserts that the manner in which the intergovernmental disputes or conflicts are managed will determine the success or failure of the devolved governance system in Kenya.[71] However, he fails to advert for other means of settling intergovernmental disputes as contemplated by the Constitution.

While this study appreciates the pivotal role that the judiciary will play in giving effect to devolution and settling likely intergovernmental disputes especially between the two levels of government, it is noted that judicial intervention in intergovernmental disputes is not the first port of call but one of the last resort after exhaustion of the ADR mechanisms.

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[69] J B Ojwang, 'Ascendant Judiciary in East Africa; Recovering the Balance of Power in a Democratizing Constitutional Order,' [2013], Nairobi Strathmore University Press p 54.
[70] Ibid, p 54.
[71] Ibid.

Additionally, the devolved governance structure embraced after the promulgation of the Constitution and whose implementation commenced after the 4th March 2013 general elections is reckoned to represent Kenya's biggest political transformation since independence.[72] This is informed by looking at the political antecedents that led to the devolved governance system in Counties headed by County Governors who are elected to defend county interests.[73] In fact, the Kenyan experience cannot be read as a case of "recentralization" by the national government or as one of the captures of sub-national units by "local elites" or "notables". Rather, decentralization in Kenya has generated a political system with more robust checks and balances, but at the expense of fostering a new set of local controversies that has the potential to exacerbate corruption and fuel local ethnic tension in some parts of the country.[74]

However, a lot of emphases has been placed on the role played by Governors within Kenya's devolved system and in particular the power shift, allocation of resources and transfer of functions to the Counties hitherto under the control of the national government.[75] The sudden change has, in fact, strained the relationship between the Council of County Governors and the national government which aspect threatens to undermine the implementation of devolution.

Needless to add, there has been no attempt to address the manner in which the fall-out between the national and county governments would be handled as a result of the transfer of powers, resources, and functions from the center to the devolve units which phenomenon has created intergovernmental conflicts and disputes. The failure to address the consequences of the disputes that may occur and in particular how they could be resolved may undermine the realization of the objects of devolution. This study, therefore, seeks to address this concern by examining the import of alternative dispute resolution mechanisms in intergovernmental disputes.

Second, *the intergovernmental dispute management*: The Constitution of Kenya 2010 has provided for two levels of government and has also provided for management of

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[72] N Cheeseman, G Lynch, and J Willis; 'Decentralisation in Kenya: The Governors of Governors,' (2016); Journal of Modern African Studies 54, Cambridge University Press, pp 1- 35.

[73] Ibid, p 1.

[74] Ibid, p 2.

[75] Ibid, p 6.

various resources for purposes of promoting the welfare of the citizens. Predictably, the sharing of the accruing benefits between and among the levels of government is bound to create conflicts and disagreements.[76] With the threat of the eruption of conflicts at various levels, the need for settlement of the conflicts thus becomes more critical than ever before. In order to realize harmony in the devolved governance system, there is need to harness the use of several mechanisms of conflict management at different levels.[77] The Constitution further states that the government at the national and county levels are distinct and interdependent and are to conduct their mutual relations on the basis of consultation and cooperation.[78] This impliedly means that when conflicts or disagreements arise, they must be handled in a way that promotes cooperation and consultation.[79]

Moreover, there have been disputes between the two levels of government on the interpretation of laws, the allocation of power and functions or the use of resources.[80] It is in its effort to address this concern that Parliament enacted the IGR Act with the sole purpose of regulating the relationship between the two levels of government by creating the National and County Government Coordinating Summit,[81] the Council of County Governors[82] and Intergovernmental Relations Technical Committee[83] as forums for consultation and coordination in intergovernmental relations and disputes resolution. However, there has been a failure to articulate the methods for intergovernmental disputes settlement in the devolved governance system.[84] This study will endeavor to fill in this gap.

Third, *the intergovernmental interactions*. Intergovernmental relations is a system of transactions between different governments and between organs of state from different governments in the course of the discharge of their functions.[85] The objectives are to inter alia promote peace and harmony among the levels of government in a devolved system of

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76 Kariuki Muigua and Francis Kariuki; 'ADR, Access to Justice and Development in Kenya,' p 20.
77 Ibid, p 20.
78 Article 6(2), Constitution of Kenya.
79 Ibid.
80 M K Mbondenyi and J O Ambani; 'The New Constitution of Kenya: Principles, Government and Human Rights, (2013),' Law Africa.
81 Section 8(a) IGR Act.
82 Ibid, Section 19(1).
83 Ibid, Section 11
84 Mbondenyi [n 80].
85 B R Opeskin, (2002) 'Mechanisms for Intergovernmental Relations in the Forum of Federations,' in Ademolekun L.

government. In so doing, intergovernmental relations will help to minimize intergovernmental conflicts between and among the levels of government.

Thus, intergovernmental relations in this role will act as a focal point for realizing synergy among different levels of government resulting in the stability of the entire governance structure.[86] This point is stressed by *Mitullah* when she further argues that in order for the government to function effectively, there has to be further decentralization with lower levels of government taking a central role in implementing policies.[87] However, due to the nature of the relationship between the two levels of government, the Constitution decrees that their mutual relations would be conducted on the basis of consultation and cooperation. The method for resolving disputes is the ADR mechanisms when they occur in the process of intergovernmental interactions.[88]

Nevertheless, while gaps and opportunities in the IGR Act that should be filled in order to effectively manage intergovernmental relations have been identified, there have been no attempts to advert for resolution of intergovernmental disputes as envisaged in the constitutional and statutory provisions.[89] The gap created by the omission is sought to be filled by this study.

On the other hand, intergovernmental relation is viewed as a necessary political tool for mutual intertwines among the levels of government for the realization and facilitation of government goals and objectives.[90] Hence, justice, fairness and equity in the allocation of economic resources that endure tolerance and cooperation are recognized as veritable weapons to mitigate intergovernmental relations.[91] The relevance of this assertion to this study cannot be gainsaid as it advocates for synergy between the two levels of government in order to create harmonious intergovernmental relations thereby reducing disputes.

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[86] W V Mitullah, 'Intergovernmental Relations Act, 2012: Reflection and Proposals on Principles, Opportunities, and Gaps' [Dec. 2012]; FES Kenya Occasional Paper No. 6 pp 1-9.

[87] Ibid, p 3.

[88] Ibid, p 3.

[89] Ibid, p 6.

[90] J S Ojo, 'An X-ray of intergovernmental Relation conflicts and resource control in the Fourth Republic in Nigeria,' (March 2014); International Journal of Educational Administration and Policy Studies Vol 6 (3); pp 43-52.

[91] Ibid.

The above concerns resonate well with the rationale for the devolved governance system in Kenya namely; promoting fairness, justice, equity and equal distribution of resources amongst the counties especially the marginalized.[92] Further, it advocates synergy between and among the levels of government in order to create harmonious intergovernmental relations thereby reducing intergovernmental disputes.

It is submitted that the failure to formulate procedures, regulations, and guidelines to operationalize the use of ADR mechanisms in intergovernmental disputes has created a lacuna in intergovernmental interactions and dispute settlement. This is the concern of this study.

Fourth, *cooperative devolved government*: Cooperative government could if well managed and operated avoid disputes arising among governments or organs of state. This is well illustrated through the purposive interpretation of the Constitution in a cooperative devolved system of government which includes intergovernmental relations and disputes resolution.[93] This is so because, despite the national and county governments being relatively distinct, they are also extremely interdependent and the nature of such an incongruous relationship is well clarified.[94] It is specifically urged that in order to minimize disputes, cooperative intergovernmental activities should be based on mutual respect. The finding *in the case of International Legal Consultancy Group*[95] to the effect that the Senate should act with restraint while exercising its oversight powers over county governments and particularly that it should not summon governors in an arbitrary and capricious manner underlines this point.

More importantly, this concern is elaborated by addressing the conduct of intergovernmental relations and identifying ways of dealing with intergovernmental disputes. Nevertheless, owing to the complex nature of intergovernmental relations, it is acknowledged that intergovernmental disputes will occur. When they do occur, however, as they should, there is the need for the parties involved to seek alternative dispute

[92] Ibid.
[93] J M Kangu, 'Constitutional Law of Kenya on Devolution,' (Nairobi, Strathmore University Press, 2015), pp 331- 343.
[94] Minister of Police and Others v Premier of the Western Cape and Others 2013 (12) BCLR 1365 (CC) para 19.
[95] Petition No. 8 of 2014 eKLR, [n 13] para 67.

resolution mechanisms, which promotes conciliation between the levels of government and avoids an adversarial process.[96]

This study also benefits from the concept of cooperative government borrowed from the Republic of South Africa, South African jurisprudence and scholarship which have provided very useful lessons in the interpretation of Kenya's provisions.[97] These have been relevant in respect to the notions of distinct and independent governments and the obligation to respect, consult and avoid resolution of disputes through litigation. They have also been useful in articulating the role of the courts in intergovernmental relations including when they can decline to deal with a dispute and refer it back to the parties and circumstances under which they can adjudicate before other means have been used.[98]

It is submitted that the reason why parties to intergovernmental disputes resort to judicial intervention is that the process to operationalize the ADR methods is yet to be finalized. The lacuna is created by lack of formulation of procedures to operationalize the constitutional provisions for the promotion of ADR mechanisms.

Fifth, *the alternative dispute resolution mechanisms in intergovernmental disputes*: The history and the relevant dimensions of the concept of decentralization in Africa have been largely seen from the perspective of actors, powers and the accountability objective of devolution.[99] The implementation scheme of the decentralization agenda is highlighted in terms of administration, political relations, oversight, planning processes, sustainability, conflict and negotiation, sequencing and the entire process of dispute settlement. This is manifested through inter alia; intergovernmental conflicts, negotiation, and the process of dispute settlement.[100] Nevertheless, despite this discourse on intergovernmental conflicts, negotiations and the process of dispute settlement, there is a failure to articulate the options or methods for intergovernmental dispute resolution in the implementation of devolution in Africa.

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[96] Kangu, [n 93].
[97] Ibid p 343.
[98] Ibid.
[99] Ribot, [n 66].
[100] Ibid.

However, the nature of multilevel governance is such that there are occasions where avoidance fails and disputes over functions, power, and resources arise.[101] In such an event the Constitution provides for how the disputes are to be resolved before resolving to adversarial litigation. The Constitution imposes an obligation relating to the settlement of intergovernmental disputes.

It provides for and emphasizes the need to settle intergovernmental disputes by alternative dispute resolution mechanisms. It requires that the governments to make every reasonable effort to settle the disputes by alternative methods to be provided for by national legislation without precluding adversarial litigation. These methods consists of alternative dispute resolution mechanisms including negotiations, mediation and arbitration. The South African Courts have interpreted similar provisions as embodying discretion for the Court to determine whether or not to hear a matter even where other means have not been used or exhausted.[102]

Undoubtedly, ADR prides itself for being a simple, quick, flexible and accessible dispute resolution system compared to litigation. It emphasizes win-win situations for both parties, increases access to justice, and improves efficiency and is expeditious.[103] It is also a cost-effective means for dispute resolution that fosters the parties' relationships. It is submitted that while the IGR Act was enacted in 2012, the procedures to operationalize the constitutional provisions for the promotion of ADR mechanisms in intergovernmental disputes have not been formulated thereby undermining the implementation of the devolved system of government.

Sixth, *the role of the Courts in intergovernmental disputes*. The Court's jurisdiction to hear and determine disputes emanates from either the Constitution or statutes. However, where the Constitution provides for an alternative mode of dispute resolution for specified disputes, then in the spirit of the Constitution, the Court should oblige and cede jurisdiction to such forum.[104] The adoption of alternative dispute resolution mechanisms is not intended to lock parties including the two levels of government from accessing

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[101] Kangu, [n 93] 343
[102] City of Cape Town **v** Premier of the Western Cape 2008(6) SA 345(c) para 17.
[103] Mishra S, 'Justice Dispensation through Alternate Dispute Resolution System in India', available at http://www.legalindia.in/justice-dispensation-through-alternate-dispute-resolution-system-in diab, (accessed on 19/04/2014.
[104] Opeskin, [n 85].

Court. Where it is clear that one party is definitely not ready or willing to adopt the mechanism availed for settling disputes then the last resort which is the Court process must be followed by the aggrieved party.[105]

It is submitted that Courts should play the role of facilitators of intergovernmental relations between the two levels of government by ensuring that they adopt a purposive interpretation of intergovernmental disputes to give effect to the values and principles of devolution which include the principle of the Rule of Law. Where the Constitution has clawed-back or held-back the jurisdiction, the constitutional claw-back must be respected in compliance with the principle of the Rule of Law.[106]

Finally, although a lot of literature has been penned down on devolution in Kenya,[107] little effort has been made to examine ADR as an instrument for intergovernmental dispute management to buttress its claim of delivering the tenets of true democracy.[108] The studies tend to be of a general nature and fail to recognize the gap created by the lack of procedures, regulations, and guidelines to operationalize the constitutional provisions for promoting ADR mechanisms in dispute resolution in the devolved governance system. Moreover, there has been no literature that has sought to examine whether the use of ADR mechanisms has been operationalized as a device for intergovernmental dispute management in conformity with the constitutional and statutory provisions.

The current study is therefore unique as it recommends the formulation of a framework to operationalize the constitutional provisions for promoting ADR mechanisms as a tool for intergovernmental dispute management within Kenya's devolved governance system. The study further identifies policy and legal reforms that may be undertaken to enhance intergovernmental relations.

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[105] County Government of Nyeri **v** Ministry of Education Science and Technology & Another at Nyeri HC. Petition No. 3 of 2014 (2014) eKLR.

[106] Jefferson Kalama Kengha **v** Republic (2015) eKLR.

[107] Otieno Nyanjom, 'Devolution in Kenya's New Constitution' (2011); Society for International Development (SID) Constitution Working Paper No .4; Sihanya B; 'Presidency and Public Authority in Kenya's New Constitution' [2011]; Society for International Development (*SID*), Constitution Working Paper No. 2. Kirira N; 'Public Finance Under Kenya's New Constitution' [2011]; Society for International Development (SID) Constitution Working Paper No. 5.

[108] 'The tenets referred to include; rule of law, separation of powers, democracy and participation of the people.'

1.5 Objectives of the Study

This study aims to;

1.5.1 Establish a legal framework to operationalize the constitutional provisions for promoting ADR as a tool for intergovernmental dispute management and settlement.

1.5.2 Evaluate and determine the nature of intergovernmental relations and disputes in the devolved governance system.

1.5.3 Identify the ADR methods to be embraced to avoid judicial intervention in intergovernmental dispute settlement.

1.5.4 Identify effective mechanisms that could be embraced to reduce intergovernmental conflicts over time, save the costs and maintain good intergovernmental relations.

1.5.5 Identify legal and policy reforms that could be undertaken for the promotion of ADR as a tool for settlement of intergovernmental disputes.

1.6 Hypothesis

If there was a clearer constitutional and legal framework for intergovernmental disputes management, there would have been a workable framework for use of alternative dispute resolution mechanisms.

1.7 Research Questions

The research questions include;

1.7.1.1 What is the legal framework that could operationalize the constitutional provisions for promoting ADR as a tool for intergovernmental dispute management and settlement?

1.7.1.2 What is the nature of intergovernmental relations and disputes in the devolved governance system?

1.7.1.3 What are the alternative methods for settlement of disputes that could be embraced in order to avoid judicial intervention in intergovernmental dispute settlement?

1.7.1.4 What are the effective mechanisms that could be embraced in order to reduce intergovernmental conflicts over time, costs and maintain good intergovernmental relations?

1.7.1.5 What are the legal and policy reforms that may be undertaken to promote ADR as a tool for intergovernmental dispute management and settlement?

1.8 Research Methodology

The study relies on doctrinal research and follows the analytical and descriptive research design. This involves a desk-based study and entails a critical evaluation and review of the Constitution of Kenya 2010, statutes, judicial decisions, policy documents, journal articles, books, and newspaper reports. The information obtained from these sources has been analyzed to determine the opportunities for the operationalization of the constitutional provisions for promoting ADR as a device for settlement of intergovernmental disputes.

In conducting the analysis, the study benefits from an evaluation of the intergovernmental dispute resolution mechanisms from the Republic of South Africa. The choice of the Republic of South Africa is informed by the fact that, the Kenyan Constitution and the IGR Act have borrowed heavily from the Constitution and the IGR Framework of South Africa. There will then be a need to observe how the devolved governance system has worked in the South Africa situation to inform the Kenyan experience.

The tools of research used in the study include; the Constitution of Kenya 2010, Constitution of Republic of South Africa 1996, statutes, law reform articles, case law, books, policy documents, the internet sources and newspaper reports. However, the research design through which the research questions are answered entail, a historical literature review of the devolved governance system in Kenya, a critical review of the provisions of the IGR Act relating to intergovernmental relations and disputes in light of the Constitution of Kenya 2010. Finally, the research design of the study is enhanced by the comparative analysis between the intergovernmental dispute resolution mechanisms with those of the Republic of South Africa where Kenya has borrowed heavily the devolution Chapter in the Constitution of Kenya 2010 and the provisions of the IGR Act where Kenya has almost borrowed word for word from the IGR Framework Act of 2006 from the same country.

The research design of the study is analytical and descriptive. In this connection, the information collected from the literature already available has been analyzed to make a critical evaluation. On the other hand, the data sampling has been done by a systematic literature review conducted in respect of studies that dealt with decentralized systems of governance. The rationale for this approach is that the complex nature of interactions in a decentralized system normally creates conflict and hence the need to develop mechanisms to settle disputes that may occur.

1.9 Justification of the study

Given the nature of a cooperative government, intergovernmental relations are key to making the system of devolved governance work. Indeed, the greatest failure of implementing devolution has been lack of understanding of the concept of cooperative government by the state organs or agents of the two levels of government. This failure has impeded implementation of the devolved system of government thereby precipitating intergovernmental conflicts and disputes. This *modus operandi* has resulted in intergovernmental disputes finding their way in courts even before exhaustion of the mechanisms established by law. Inevitably, this has led to strained relations between the two levels of government besides burdening the tax-payers with unnecessary legal costs paid for prosecuting and defending suits in court.

However, while ADR has been identified as a tool for intergovernmental dispute management and settlement, the procedures, regulations, and guidelines to operationalize and manage the process have not been developed.

This study is therefore necessary as it adverts for the processing of procedures and guidelines to operationalize the constitutional provisions for the promotion of ADR as a tool for intergovernmental dispute management and settlement. Furthermore, the use of ADR methods for resolution of disputes will promote intergovernmental relations thereby enhancing service delivery. It is principally addressed to the policy makers and implementers working in the devolved system of government.

1.10 Chapter Breakdown

The first Chapter gives a brief overview of the study to wit; Introduction, Background to the Study, Statement of the Problem, Theoretical and Conceptual Framework, Literature

Review, Objectives of the Study, Hypothesis, Research Questions, Research Methodology and the Justification of the Study. The second Chapter examines the conceptual exposition of devolution including its various forms and defines Kenya's model of devolution. It concludes by examining the basic features of the devolved governance system.

The third Chapter examines and analyses the concept of a devolved cooperative government and related principles. The Chapter further analyses the concept of cooperative intergovernmental relations and examines the emerging intergovernmental disputes and their impact on intergovernmental relations. The Chapter concludes by examining the statutory provisions relating to resolution of intergovernmental disputes. .

The fourth Chapter examines the ADR methods and judicial intervention in settlement of intergovernmental disputes. The Chapter concludes with a brief comparative analysis of intergovernmental dispute resolution in the Republic of South Africa from where Kenya has heavily borrowed the provisions on the devolution Chapter in the Constitution and IGR Act respectively.

The final Chapter gives a synopsis of the key findings of the study. The chapter further makes recommendations for a framework to operationalize the constitutional provisions for promoting the use of ADR mechanisms in intergovernmental disputes. Additionally, it further proposes amendments to certain provisions of the IGR Act to bring clarity in the grey areas with the overall objective of promoting the amicable settlement of disputes in the devolved governance system in Kenya.

CHAPTER TWO

2.0 Conceptual Exposition of Devolution

2.1 Introduction

This study analyses the ADR mechanisms as a tool for intergovernmental dispute management and settlement in the devolved system of government of Kenya. It is therefore imperative to give an overview of the concept of "devolution" and other related concepts for purposes of contextualizing the study. Hence, in this Chapter, devolution is viewed as a form of decentralization with the Kenyan model being defined. In addition, the basic features of a devolved governance system are identified and briefly discussed.

2.2 Conceptual Basis

The Constitution of Kenya 2010 ushered in a popular system of devolved government that represents the country's biggest socio-economic and political transformation since independence.[109] A Constitution is essentially a legal instrument that organizes and regulates governance and state power. In this sense, the Constitution designates, dispenses, defines, distributes and controls the use of power.

Broadly, there are two models of organizing and managing state power that have been identified namely; the single-dimensional and multi-dimensional models.[110] In the single-dimensional model, state power and governance revolve around the single horizontal path which leads to a centralized governance system. On the other hand, the multi-dimensional model combines both the vertical and horizontal dimensions in its approach to state power and governance, thereby giving rise to decentralization of power.[111]

Under the latter model, the Constitution establishes more than two levels of government which are separate but interrelated. Each level is a creature of the Constitution and none can be abolished by the other. Moreover, the functions performed and the power exercised by each level of government is allocated and assigned by the Constitution.[112]

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[109] Cheeseman, et al, [n 72].

[110] 'The Interim Report of the Task Force on Devolved Government: A Report on the Implementation of Devolved Government in Kenya' 11th April 2011 p 27.

[111] Ibid.

[112] Fourth Schedule to the Constitution encapsulates the distribution of functions between the national and county governments.

However, the defining feature of this model is its ability to combine self-rule at the local level and shared-rule at the national level. This means that the citizens at the local level are free to make decisions in respect of the matters that affect them.[113] This study is therefore concerned with the multi-dimensional model of organizing and managing state power and governance.

2.3 Defining Devolution and related concepts

In order to understand the devolved system of government, the domain within which the intergovernmental disputes reside, it is necessary to delve into the meaning and dynamic nature of decentralization in which devolution is underpinned.[114] Decentralization has been defined as the dispersion of decision-making power and governance closer to the people.[115]

In this section, devolution and other related terms are defined as working definitions. This is necessary for purposes of clarity and meaning of the concepts of federalism, deconcentration, delegation, and devolution wherever and whenever they appear in this study.

2.3.1 Federalism

Federalism as a form of decentralization refers to the division of government activities between the regional government and central government in which each level makes final decisions.[116] This means that there are two distinct governments with constitutional and legal sharing of power which ensures that there are no overlapping functions.[117] The regional units in federalism are defined by certain characteristics such as; common history, culture and economic, and political viability. The local unit may be a country on

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113 K Kibwana, 'Constitutional and Political Issues Surrounding Regionalism in Kenya.' [2002]; In Wanjala, S. Akivaga, S K and Kibwana (eds). 'Yearning for Democracy; Kenya at the Dawn of a New Century; Nimra Clari Press, pp 163-187.

114 Annette Omolo, 'Devolution in Kenya: A Critical Review of Past and Present Frameworks, In Devolution In Kenya: Prospects, Challenges, and the Future,' [2010]; IEA Research Paper, Series No. 24, p 15.

115 Ibid, p 15.

116 D P Kommers and Thomson W J; 'Fundamentals in the Liberal Constitutional Tradition.' [1995]. In Joachim Jens Hesse 7 nevil Johnson (eds) Constitutional Policy and Change in Europe.

117 Omolo, (n 114) p 18.

its own right with capacity for self-defense or could favor union status with others to reap on the benefits of economies of scale.[118]

A number of countries have a federal system of government. These include; the United States of America and the Federal Republic of Nigeria. Each of the counties has established the government at three levels namely; the national, state and local governments. Though the state in the respective countries operates autonomously, the national government is in charge of defense, external affairs, immigration, and citizenship among others.

Conflicts in this form of decentralization may arise on resource sharing.[119] There could also be a conflict between the national, state and local governments regarding the formula for revenue sharing.[120] Another area of conflict would be in the quest for more autonomy by the states or units created in a federal state.[121]

The mechanisms for dispute resolution in federal governments are mainly set out in a constitutional and legal framework for the respective country. Needless to say, when disputes occur amongst the spheres of government, ADR mechanisms of arbitration, negotiation, and mediation (as the case may be), would come in handy to resolve the dispute.

2.3.2 Delegation

This form of decentralization refers to the allocation of power and assignment of responsibilities from the central government to autonomous or semi-autonomous organizations for making specific decisions and service delivery but retains the residual power of control.[122] The transfer of power and responsibility is made to mitigate limitations on public administration and demands of service delivery from members of

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[118] Kibwana, (n 113).

[119] Ojo, (n 90). In the Federal Republic of Nigeria, the issue of sharing resources amongst the three levels of government has remained controversial due to lack of acceptable formula. It generates tension and bad blood among the three tiers of government.

[120] Ibid, p 48. There exists a conflict between the federal, state and local governments regarding the formula for revenue sharing in the Federal Republic of Nigeria.

[121] The Republic of Eritrea was once a Province of the Republic of Ethiopia which is a federal state. After a protracted secession war, it became independent on 24th May 1993 and became the 52nd independent African state.

[122] Dan Juma, 'Devolution of Power as Constitutionalism: The Constitutional Debate and Beyond,' International Commission of Jurists (Kenya-section) and Konrad Adenauer Stiftung.

the public. The organizations may include the county governments, parastatals, the private sector, and non-governmental organizations.[123]

In the Kenyan context, the national government can assign some of its legislative and executive powers and functions to county governments as provided for in Article 186(3) of the Constitution. Where such assignment or delegation is of a legislative nature, the county governments are given the discretion to determine policy and legislation and how to implement the legislation. They are not accountable to the national government on what to put on the legislation and how to implement it so long as they act within the assigned powers. The powers can, however, be repealed by the national government.

Additionally, under Article 183(1)(b), the national government can delegate powers and functions to the county executive committee requiring it to implement national legislation or aspects of it within the county. Also, the delegation of powers and functions may occur when under Article 187(1), the national government by agreement transfers some of its functions to county governments.

There are no intergovernmental disputes in this form of decentralization as the institutions created at the lower level enjoy powers or functions delegated to them by the central government. The disputes that occur are of administrative nature and are resolved in accordance with the adopted internal administrative mechanisms.

2.3.3 Deconcentration

This form of decentralization entails dispersion of power and responsibilities from the central government to the field officers at the lower levels of government.[124] The purpose of this form of decentralization is to off-load certain operational functions from the center to the various sub-national units of the state. This is purely administrative decentralization and it is important to note that the central government retains the residual power to make the decisions or exercise discretions.[125] This transfer of authority empowers the public or field officers to a certain extent be responsible for government policy in their areas of operation.[126]

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[123] Anderson, (n 23)
[124] Juma, [n 122]
[125] Ibid
[126] CKRC 2002; 'The Main Report of the Constitution of Kenya Review Commission,' Nairobi. p 223-242.

In the Kenyan context, the sub-national units may pursue the deconcentration strategy in the discharge of their functions in line with the requirement for "reasonable access to services" envisaged by the Constitution.[127] By and large, the defining feature of deconcentration is the lack of both self-rule and shared-rule. Kenya has practiced deconcentration for the most part of its administration prior to the promulgation of the Constitution. The District Focus for Rural Development (DFRD) strategy is a good example of deconcentration.[128]

However, since the field staff implements decisions made by the central government, and when they make decisions at the sub-national level, they do so at the discretion of the central government, there are no intergovernmental disputes.

2.3.4 Devolution

The term devolution has been defined variously by different countries depending on the form it takes. However, devolution may be defined as the practice through which the authority to make or implement decisions in selected areas of public policy is given to elected lower or sub-national levels of government by law.[129] The fundamental features include; independence from central authorities, separate legal status, and reciprocal governance.[130]

Instructively, the Constitution organizes and manages the transfer of power and functions from the center to the sub-national units which are not under the control of the center.[131] In essence, this means that while the sub-national governments exercise these powers with a degree of autonomy, the supervisory powers are vested in the central government. However, unlike deconcentration and delegation, the sub-national governments are not accountable to the central government but to their constituencies.

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127 Article 6(3), Constitution of Kenya.

128 J D Barkan and Chege M, (1989); 'Decentralising the State: District Focus and Reallocation in Kenya,' Journal of Modern African Studies 27, 3 pp 431 – 453: District Focus for Rural Development (DFRD) was a form of deconcentration framework initiated during the regime of President Daniel Arap Moi and was meant to provide for the equitable economic development, in the1980's.

129 C S Cheeman & D A Rondinelli, (eds) 'Decentralisation and Development Policy Implementation in Developing Countries' [1983]; p 18-19; D Conyers, "Decentralisation: The latest fashion in development administration?", (1983) 3 Public Administration and Development 97, pp 18-25.

130 Ibid

131 G. Hyden, 'No Shortcuts to Progress: African Development Management in Perspective.' [1983] p 85.

In this sense, therefore, devolution is broader than deconcentration as it encompasses more than the dispersion of functions and administrative powers. Besides, under devolution, the power of sub-national units to make policy decisions in administrative and fiscal spheres is statutorily conferred.[132] In effect, as much as deconcentration evinces limited authority to make decisions, devolution is characterized by constitutionally guaranteed power to make decisions affecting the sub-national units without reference to the central government although they operate under the laws made by it.[133]

The Republic of South Africa's Constitution establishes a cooperative devolved governance system comprising of three spheres of government namely; the national, provincial and local governments.[134] The relationship between the three spheres is governed by legislation that is underpinned by the Constitution. The country has an elaborate process for intergovernmental dispute facilitated by the enactment of the Intergovernmental Relations Framework Act (IGRF Act)[135] and the Guidelines for Effective Conflict Management.[136]

The South African Constitution further provides for settlement of intergovernmental disputes through procedures provided for that purpose after exhausting all other remedies before it approaches a court to resolve the dispute.[137] This imperative is also highlighted in the IGR Framework Act which requires state organs to make all reasonable efforts to settle disputes before approaching courts.[138] The mechanisms for resolution of intergovernmental disputes include negotiation, mediation, and arbitration. It is only after exhausting the alternative methods that a party may seek judicial intervention.

2.3.5 Kenya's Model of Devolution defined

As indicated in the preceding Chapter of this study, the promulgation of the Constitution of Kenya, 2010 brought with it drastic changes in Kenya's governance structure. It

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[132] Omollo,(n 114) pp 1-35
[133] Ibid, p 17
[134] Section 40(1), Republic of South Africa Constitution 1996.
[135] Intergovernmental Relations Framework Act No.13 of 2005 (Republic of South Africa Gazette Notice No. 491.
[136] Intergovernmental Dispute Prevention and Settlement Practice Guide. Guidelines for Effective Conflict Management General Notice 1770, Gazette Notice 2942 of 27th November 2006 (Republic of South Africa)
[137] Section 41(3), Republic of South Africa Constitution 1996.
[138] Section 40(2), Republic of South Africa, IGR Framework Act.

introduced the devolved governance system otherwise known as "devolution" which overhauled the centralized system of government that existed prior to the promulgation of the new Constitution. The implementation of the devolved governance system in Kenya commenced after the general elections of 4th March 2013.

The meaning of Kenya's model of devolution can only be drawn from the Constitution itself. The Constitution defines devolution as one consisting of two levels of government which are distinct but yet interdependent and are required to conduct their mutual relations on the basis of cooperation and consultation.[139] Each level of government has autonomy as is performs functions and exercises power derived from the Constitution. In fact, the two levels of government are functionally equal and none is superior to the other.

This assertion is fortified by the fact that, each level of government is a creature of the Constitution and therefore cannot be abolished by the government at the other level. Furthermore, under the constitution, each level of government is required to respect the functional and institutional integrity of the other while discharging its functions and exercising its powers.[140]

However, due to the distinct and interdependent nature of the level of government and the manner of their functional assignment, a constitutional system of intergovernmental relations including ADR mechanisms for resolution of disputes has been entrenched.[141]

2.4 Features of a devolved governance system

This study submits that a successful devolved governance system must embody certain basic characteristics[142] which harness harmony, cooperation, and consultation between the two levels of government. The characteristics that define a devolved governance system are briefly discussed here below.

2.4.1 Entrench two or more levels of government

The Constitution must provide for at least two levels of government each with autonomy and rights of citizens to participate in decision-making underpinned in the Constitution.

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[139] Article 6(2).
[140] Article 189 1(a).
[141] Article 159(2).
[142] Cheeman et al, [n 129] pp 18-19.

This means that the Constitution must set out the number of levels of government to be created. Instructively, the United States of America has three levels of government namely; federal, state and local levels. The federal state of Germany also three; federal, lander and local government levels; while the Republic of South Africa where Kenyan Constitution has heavily borrowed from boasts of the national, provincial and municipal, and local governments or spheres. The Kenyan Constitution, on the other hand, establishes a two-tier of government, national and county governments.[143]

Due to the institutional and functional nature of the levels of government, there is bound to be conflicts and, indeed there have been conflicts. The people of Kenya in the quest for a new Constitution foresaw the possibility of intergovernmental conflict and hence provided ADR mechanisms for settlement of intergovernmental conflicts in the first instance.[144] However, this has not been successful because there is a lacuna created by the failure to formulate procedures and guidelines to give effect to the dictates of the Constitution for the promotion of ADR as a tool for intergovernmental dispute management and settlement.[145]

2.4.2 Geographical governance units

Under a devolved system of government, the devolved units into which the country is divided must have geographical units of governance with clearly defined boundaries. Kenya is divided into forty-seven devolved units otherwise known as counties and are listed in the First Schedule to the Constitution.[146] They bear the names similar to those of the forty-one Districts provided for in the Independence Constitution as amended and increased to forty-seven by the 1992 Districts and Provinces Act.[147] The Constitution has not defined the county boundaries. However, by adopting the names of the forty-seven counties, the Constitution by necessary implication, adopted the boundaries of those counties as defined in the Independence Constitution, as amended by the 1992 Districts and Provinces Act[148] as the political units for the devolved governance system.

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[143] Article 6(2), Constitution of Kenya.

[144] Ibid, Article 189(3) and (4).

[145] Section 38(2), IGR Act.

[146] First Schedule to the Constitution lists the forty-seven Counties by name. They are similar to those of the forty-one Districts provided for in the Independent Constitution as amended and increased to forty-seven Districts by the 1992 District and Provinces Act.

[147] The Constitution of Kenya (Amendment), Act No. 5 of 1969.

[148] Ibid.

However, the introduction of the devolved system of government has brought into the fore simmering boundary disputes between the counties. The affected counties have disputes over the location of boundaries. Some of the counties with boundary disputes include; Nandi and Kisumu, Kisumu and Vihiga, Makueni and Taita Taveta, Meru and Isiolo, Baringo and Turkana.[149] It is submitted that where the dispute is on the location of the boundary, the ADR mechanism of mediation or negotiation should be applied.

2.4.3 Assignment and allocation of functions

The devolved system of governance in Kenya is circumscribed in the Constitution in Article 6(2). It assigns and allocates functions to the two levels of government and ensures some degree of autonomy for each. The authority of each level of government is derived from the Constitution while the functions are clearly allocated and defined.[150] Where there is an overlap or concurrent functions, a mechanism has been put in place to avoid conflict or resolve the conflict when it occurs.

2.4.4 Rules for allocation of resources

The rules for resource allocation to ensure each level of government has adequate resources to enable it to discharge its responsibilities are provided for in the Constitution. The guiding principle for resource allocation is that resources follow and march the functions. The Constitution requires that revenue raised nationally should be shared equitably between the national and county governments.[151] This provision is in tandem with the financial model adopted by the Constitution under Article 201(b)(ii) on equitable distribution of the national revenue collected. The equitable share is a right of each government and not a discretionary donation by the national government to the county governments.

[149] Tom Matoke and Wycliff Kipsang, 'CS warns inciters in border row' *Daily Nation Newspaper* (21st June 2018) p 9. The Nandi County is claiming parts of Kisumu County which it alleges were hived off after Kenya attained independence in 1963. See also; Vivian Jebet, 'Isiolo-Meru boundary row escalates' *Daily Nation Newspaper* of 21st June 2018, p 9.

[150] The functions of the national government and devolved units are set out in the Fourth Schedule in pursuance to Articles 186(1) and 187(2) of the Constitution.

[151] Article 202(1), Constitution of Kenya.

2.4.5 Representation at national policy-making processes

The devolved system of government established by the Constitution requires that the two levels of government conduct their mutual relations in consultation and cooperation. This means that governance institutions at each level of government must have representatives at the national policy-making processes and institutions. Notable in this area is the concept of shared decisions necessitating the creation of shared institutions. Sharing in this sense means a multi-level system of government which combines measures of autonomy anchored in self- rule at the county level and a measure of shared-rule at the national level. In the context of the shared rule, the two levels of government share in the exercise of power, decision making and performance of functions.[152]

2.4.6 Constitutional safeguards of a cooperative government

Under a devolved governance system, there must be an ingrained system of cooperative government with constitutional safeguards. There must also be institutions to facilitate intergovernmental cooperation and collaboration in the areas where government functions are shared or inevitably overlap. Pointedly, the constitutional device of a cooperative, as opposed to a competitive devolution system of government was a deliberate one aimed at intergovernmental relations that rely on cooperation and minimizes conflict.[153]

2.4.7 Provisions for intergovernmental relations and ADR mechanisms

The Constitution is required to provide for a system of intergovernmental relations with provisions of alternative dispute resolution mechanisms to determine any dispute between the two levels of government with the option of judicial intervention being the last resort.[154] This is the gist of Articles 159 and 189 of the Constitution and Sections 31 to 37 of the IGR Act which underpins the constitutional and legal framework for ADR mechanisms in intergovernmental disputes.[155]

[152] Article 10(2) (a), Constitution of Kenya.
[153] Ibid, Articles 6(2) and 189(1) (a).
[154] Ibid, Article 189(4).
[155] Articles 159(2) and 189(3), (4) and IGR Act, Sections 31, 32, 33, 34, 35, 36 and 37.

However, despite the existence of clear constitutional and statutory provisions, the national government has failed to formulate procedures and guidelines to operationalize the use of ADR mechanisms as a tool for intergovernmental dispute management. This default has created a lacuna in the manner intergovernmental disputes are resolved thereby undermining implementation of the devolution. This study seeks to fill in that gap by recommending the formulation of procedures and guidelines to use ADR mechanisms as an instrument to manage intergovernmental disputes when they occur.

2.5 Devolution and intergovernmental relations

The nature of a devolved governance system demands that the relationship between the units of governance created work together harmoniously. Hence, the intergovernmental relation is a necessary administrative, political and economic tool for mutual intertwines between the levels of governments in the resolution of disputes and formulation of government goals and objectives.[156] It is concerned with the link between the different levels of government in a cooperative devolved governance system. In essence, devolution automatically redefines relations between the governments created to a greater or lesser degree. How effectively it does may have profound consequences for its success for the simple reason that, despite the existence of regulations and procedures, unsuitable intergovernmental relations can engender tense relationships between the two levels of government.[157]

At the core of a devolved governance system is the aspiration to deliver quality and meaningful services to the citizens at the lowest local level.[158] To achieve this, the two levels of government are required to work together through cooperation and consultation.[159] The cooperative nature of the devolved government is also intended to foster harmony, reconciliation and reduce conflict areas.[160] When disputes occur, an ADR mechanism is adopted in the first instance to avoid adversity.

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156 Ojo, [n 90] p 44.
157 S Karingi, 'Fiscal Policy and Growth in Africa, [2003]; Fiscal Federation Declaration and Fiscal Devolution; A lesson from and for Kenya Ad-hoc Expert Group Meeting 7-9 October 2003 UNCC JESTFT.
158 Article 174(f), Constitution of Kenya.
159 Ibid, Article 6(2)
160 Ibid, Article 174(b).

2.6 Conclusion

The adoption of a devolved system of government in countries such as the Republic of South Africa and Kenya, in particular, has been as a result of over-centralization of power in the central government. The centralized system impedes democracy, the participation of people and communities in governance, development, and management of their own affairs. Besides, it encourages inequitable development, distribution of resources, opportunities, and access to services.

The study, therefore, adopts the term devolution as a process of transferring decision-making and implementation powers, functions, responsibilities and resources to legally constituted and popularly elected local governments known in Kenya aw counties. It also identifies bringing the government closer to the people and fostering cooperative intergovernmental relations.

CHAPTER THREE

3.0 Framework for Cooperative devolved government

3.1 Introduction

In the long journey to the new constitutional dispensation, Kenyans embraced a "cooperative devolved government" based on mutual respect, cooperation, and consultation.[161] The two levels of government set up by the Constitution are separate but interrelated and are required to cooperate and consult in discharging their respective mandates. They are similarly required to perform their functions in recognition of the principle of rule of law, mutual support, and assistance.[162] The Constitution also demands that government at each level must respect the functional and constitutional integrity of the government at either level.[163]

Furthermore, where there are disputes, the Constitution provides for their settlement through ADR and procedures that avoid litigation in the first instance. The IGR Act also gives priority to dispute resolution through intergovernmental relations platforms such as the Council of County Governors and the National and County Governments Coordinating Summit.[164]

This Chapter will, therefore, examine the concept of a cooperative devolved government and related principles. The Chapter will further interrogate the concept of intergovernmental relations and its interplay in the management of intergovernmental disputes. The Chapter will also examine some of the intergovernmental disputes that have emerged since the adoption of the devolved system of government and conclude by interrogating the legislative framework for intergovernmental disputes.

3.2 The Principles of Cooperative Devolved Government

There is no fixed or uniform form of a devolved governance system. Each country adopts a form that meets its socio-economic and political needs as well as geographical set-up.[165] Kenya's devolved system of government is entrenched in the Constitution which describes the two levels of government as distinct and interdependent. The two levels of

[161] Kangu, (n 93) pp 331-343.
[162] Article 189 (1) (b), Constitution of Kenya.
[163] Ibid, Article 189(1) (a).
[164] Section 33 (2), IGR Act.
[165] Yash P Ghai, 'Devolution: Restructuring the Kenyan State.' [July 2008]; Journal of East African Studies 2:2, pp 211-226.

government are required to conduct their mutual interaction on the basis of consultation and cooperation.[166] The system entails a certain level of autonomy on the part of each level of government on the one hand, with a measure of interdependence on the other, thereby giving rise to a cooperative devolved system of government. The cooperative system of government entrenched in the Constitution is founded upon the relational concepts of; distinctness, interdependence, consultation, and cooperation.[167]

3.2.1 The Principle of Distinctness

The devolved system of government established by the Constitution is required to operate mutually and respectfully. The two levels of government created are equal and neither is subordinate to the other.[168] This is so because, by virtue of Article 1(4), the people's sovereignty is exercisable at the two levels as the national and county governments are distinct. The term "distinct" relates to the autonomy of the discharge of the legal and constitutional mandate of the two levels of government. Notably, there is a degree of equality and autonomy between the two levels as each of them is a creature of the Constitution.[169] Furthermore, each level of government exercises power and performs functions assigned by the Constitution.[170]

Fundamentally, therefore, the two levels of government have the freedom and authority to make decisions in the functional areas assigned to them by the Constitution without undue interference from the other. In the context of the autonomy of the county governments, the principle of distinctness applies against the interference by the national government in their affairs.[171] *In the case of Institute of Social Accountability,* the High Court noted that Article 6 establishes the principle of distinctness which effectively means that each level of government must be free from interference in the performance of its function.[172] In this regard, the requirement by the Constitution that government at either level should perform its functions and exercise its powers in the manner that respects the functional and institutional integrity of government at the other level is

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[166] Article 6(2), Constitution of Kenya.
[167] R. Simeon D R Conway, 'Federalism and the Management of Conflict in Multinational Societies' in J Folly & A. Gagnon (eds) Multinational Democracies (2001) pgs 338-345.
[168] Article 6(2), Constitution of Kenya.
[169] Ibid, Articles 6(2) and 189(1).
[170] Fourth Schedule to the Constitution sets out the functions of each level of government.
[171] Institute of Social Accountability and Another **v** National Assembly & 4 Others, HC Petition No. 71 of 2013 eKLR para 108.
[172] Ibid.

embodied. Hence, the areas of conflict are minimized thereby enhancing good intergovernmental relations.

3.2.2 The Principle of Interdependence

The term "interdependent" connotes that the two levels of government are dependent, interconnected and are required to work together in the discharge of their constitutional mandate of governance.[173]

There are a number of factors that necessitate interdependence between the two levels of government. These include; first, the two levels of government deliver their goods and services to the same customer namely the people of Kenya wherever they are in the country. Secondly, some of the functions allocated are shared or concurrent. Thirdly, 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 the implementation of functions.[174]

Under the Constitution, interdependence demands that the two levels of government cooperate and consult each other but also share information and build capacity.[175] Additionally, the national government is conferred with the role of oversight as it makes laws for the whole country while counties are expected to operate within the framework of the national legislation. However, this allows the county governments to participate in the formulation of national policies.[176] While referring to the relationship between the two levels of government, *in the Matter of the Interim Independent Election Commission*, the Supreme Court of Kenya expressed itself thus; *"…There is therefore in reality, a close connectivity between the functioning of national and county governments".*[177]

In fact, Rawal DCJ, (as she then was), on the other hand, while dealing with the issue of interdependence observed that; *".... the core value of devolution is hinged upon the twin principles of cooperation and interdependence. The beads in a chain may have different appearances, however, when joined by a thread they all become part of one ring; one*

[173] Article 6(2), Constitution of Kenya.
[174] Ibid, Article 186.
[175] Ibid, Article 189(1)(c).
[176] Ibid, Article 189(1)(b).
[177] Constitutional Application No 2 of 2011 Sup Ct Advisory Opinion.

cannot stand without the other."[178] However, the role of oversight does not oust the jurisdiction of interdependence.

3.2.3 The Principle of Cooperation and Consultation

3.2.3.1 Cooperation

The principle of cooperation and consultation results from a phenomenon of intergovernmental dialogue where both levels of government share and exchange information with each other to avoid conflict of interests in performing their assigned duties which to some extent requires a compromise between them for the better good. It discourages an adversarial approach to resolving disputes or conflicts between them and instead fosters a harmonious intergovernmental relationship.[179]

3.2.3.2 Consultation

The principle of consultation requires the making of conscious and deliberate efforts to seek out views of the other party and to consider them before arriving at a decision. It is arguably, a tool for improving decision-making for the benefit of all concerned. In the case of the *Commission of Implementation of the Constitution **v** Attorney General and Another*[180], the High Court of Kenya sitting in Nairobi cited with approval the definition of consultation as enunciated by the South African Courts *to* wit that, consultation in its normal sense without reference to the context in which it is used, defines a deliberate getting together of more than one person or party in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. Further, the word consultation in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is communication of ideas on a reciprocal basis.[181]

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178 Sup. Ct. Advisory Opinion No. 2 of 2013, (n 12)
179 Isiolo County Assembly Service Board and Another [n 59].
180 Civil Appeal No 351 of 2012 eKLR.
181 Ibid. , para 39

In the context of this study, consultation will encompass inter alia; first, the invitation to present views. This requirement entails that there must be an invitation to the other government to present its views on a matter under consideration.

Secondly, it is imperative that the consulted government should be afforded an adequate opportunity to present its considered views. The issue of opportunity to present views was considered in a South African case[182] where the Court observed that; *"As long as the line of communication is open and the parties are afforded a reasonable opportunity to put their case or points of views to one another, the forms of such consultation will usually not be of great import"*.[183]

Hence, it is critical that, a reasonable time for the other level of government to present its views should be given. An invitation to a county government to give a collective opinion on a matter will of necessity require that it be given adequate time to come together for a discussion with its members before coming up with a common position.

Thirdly, when presented, views should be considered in good faith. Consultation means an obligation to consider the views of the other government in good faith before making a decision.[184] The other government must not be consulted as a mere formality, but with the commitment to consider and take into account the views shared if they add value to the decision being made. This can be served through the requirement that the consulting government gives reasons why the views of the consulted government party were not accepted.[185]

Fourthly, failure to consult may lead to the invalidation of a decision on the grounds that the process of decision-making is tainted with unconstitutionality. The principle of the supremacy of the Constitution requires compliance with the substance and procedural prescriptions of the Constitution. Thus, where it is proved that the Constitution requires consultation before a decision is made, the absence of such consultation must lead to the invalidation of the resulting decision.

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182 Hayes and Another **v** Minister for Housing, Planning, and Administration, Western Capetown and Others 1999 (4) SA 1229(c).

183 Ibid, para 1242J – 1243A.

184 Article 218(2)(c), Constitution of Kenya.

185 Ibid.

3.3 Cooperative Intergovernmental Relations

3.3.1 Overview

Intergovernmental relations concerns itself with the interaction between the levels of government in course of discharging their functions.[186] However, at the core of a devolved governance system is the aspiration to deliver quality and meaningful services to the citizens at the lowest local level and this can only be achieved through consultation and cooperation.[187] The cooperative nature of the devolved government is also intended to foster harmony, reconciliation and reduce conflict areas.[188] When disputes occur, an ADR mechanism is adopted in the first instance to avoid adversity.

3.3.2 Conceptualizing intergovernmental relations

The concept of intergovernmental relations entails interaction between the levels of government to facilitate the achievement of planned objectives through cooperation and the participation of other players in government within the state.[189] Significantly, the relationship may be due to interaction on policy alignment, monetary transfers, budget planning and informed knowledge sharing among staff members.[190]

The principle of cooperation is core to intergovernmental relations. Cooperation is geared towards the promotion of meaningful sustainable development and integrated services by intergovernmental systems that guarantee mutual consultation and coordination. The adoption of a devolved system of government, therefore, means that each and every level of government must work coordinately for efficiency and viability otherwise the system will crash. This study submits that the two levels of government must work together to enable them to deliver on their mandates through the twin intergovernmental pillars of cooperation and coordination.[191]

3.3.3 Kenya's Model of Intergovernmental Relations

The Constitution describes the interaction between the two levels of government based on the cooperation and consultation and respect for each other. The form of

[186] Opeskin, [n 85].
[187] Article 174(f), Constitution of Kenya.
[188] Ibid, Article 174(b).
[189] B R Opeskin, [n 85].
[190] Fox & Mayer, 'Public Administration Dictionary' [1995]; Juta and Company Limited.
[191] Mitullah, (n 86) p 2.

intergovernmental relations is provided for in the IGR Act. The IGR Act sets up the framework for consultation, cooperation and dispute resolution mechanism between the governments at the national and county level.[192]

The aim of the IGR Act is to set up a structure that ensures that effective governance is achieved and emphasizes the requirement of cooperation in this regard. This aim is to be achieved through intergovernmental structures established under the IGR Act.[193]

3.3.4 Intergovernmental relations bodies under the IGR Act

The IGR Act first sets up structures or bodies through which the mutual relations and dispute resolution between the two levels of government are conducted. These bodies include the National and County Government Coordinating Summit ('the Summit"),[194] the Intergovernmental Relations Technical Committee,[195] the Council of County Governors[196] Intergovernmental Social Consultative Forums on consultation and cooperation between the national government and county governments. The intergovernmental bodies operate on the principles of among other things, respect for each level of government created and besides, they provide forums for coordinating government policies and transfer of power and functions to either level of government.[197]

Secondly, while government at either level is required to relate in a harmonious, collaborative and coordinated manner. The forums created by the intergovernmental bodies have facilitated fruitful interaction between the national and county governments in the quest for amicable resolution of intergovernmental disputes.

3.3.4.1 The National and County Government Coordination Summit

The National and County Government Coordination Summit ("the Summit") is the supreme organ for intergovernmental relations. Its main role is the promotion of cooperation and consultation between the national and county governments.[198] It is required to deal with disputes that may occur between the national and county

[192] Section 3, IGR Act.
[193] Ibid, Section 5
[194] Ibid, Section 7.
[195] Ibid, Section 11.
[196] Ibid, Section 19.
[197] Ibid, Section 23.
[198] Ibid, Section 8(a).

governments before they are referred to the formal ADR forum.[199] In fact, before an intergovernmental dispute is declared, the parties should ensure that all measures are taken to resolve the matter amicably through direct negotiation or intermediary. If the effort to resolve the dispute cordially fails, a party may refer the matter to the Summit.

During the first year of its existence, the Summit was fairly active in the settlement of disputes between the two levels of government. This was markedly so regarding revenue sharing and function transfers to the county governments. Instructively, vide Gazette Notice No. 116 of August 2013 the Transition Authority transferred most of the functions under the Fourth Schedule to the county governments at one go following a political decision reached by the Summit.[200]

The Summit is required to meet biannually to deliberate on matters of national concern to the two levels of government. However, in a Devolution Conference held in Kakamega Town in Kakamega County, the Chairman of the Council of County Governors lamented that the Summit had not been convened for a long time, yet there were many issues concerning the two levels of government which could only be discussed in the forum.[201] It is submitted that the Summit must always meet as provided for in the law and seize the opportunity to address the emerging intergovernmental challenges.

3.3.4.2 The Council of County Governors

The Council of County Governors ("The Council") is a consultative group of Governors of the forty-seven counties.[202] The Council is a forum to among others deal with disputes between the national and county governments when they occur.[203] It is only after such disputes are heard by either the Summit or Council of Governors should the dispute be referred to the formal ADR mechanisms.

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[199] Ibid, Section 8(i).

[200] Gazette Notice No. 116 of August 2013 in pursuance to Sections 23 and 24 of the Transition to Devolved Government Act, 2012.

[201] Ibrahim Oruko, 'State told to work with counties for "Big Four" success,': County Chiefs call for more meetings between the two levels of government to resolve issues. *Daily Nation Newspaper* (5th June, 2018) p 10. Report of the Devolution Conference held in Kakamega where the Chairman of the Council of County Governors, Joseph Nanok, announced that the President had agreed to hold a meeting (Summit) on 21st June 2018.

[202] Section 19(1), IGR Act

[203] Ibid, Section 20(2).

3.3.4.3 Intergovernmental Relations Technical Committee

The committee has been set up to deal with the day to day administration of the Summit and the Council of County Governors.[204] It has also assumed the residual functions of the defunct Transition Authority.

3.3.4.4 The Intergovernmental Budget and Economic Council

The Council is established under the Public Finance Management Act.[205] Its role is to mediate on issues arising from the County Allocation of Revenue Act such as budgeting, borrowing, disbursements from consolidated fund and equitable distribution of revenue between the two levels of government.

3.3.4.5 Intergovernmental Consultative Sectoral Forums

The consultative forums have been set up to facilitate the ministries and the national government interact with their counterparts in the counties. The IGR Act also provides for the establishment of joint committees by the two levels of government to promote the realization of the objects and principles of devolution.[206]

Some of the important consultative forums are found in the national government. The national government should decentralize the intergovernmental sectoral consultative forums at the national level to the counties. Take the forums at the grassroot level so that disputes between the two can be handled at the lower level before they escalate.

3.3.5 Limitation of powers and functions of a devolved governance system.

The powers and functions of each level of government are limited to the extent of its competency.[207] Where there is no relevant competency in the level of government, the powers, functions, and competencies may be transferred to the other level of government or to decentralized units. The objective of transferring powers, functions, and competencies is to ensure the availability of adequate resources and transfer in accordance with the set procedures, agreements and set criteria. However, the transfer

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[204] Section 11, IGR Act.
[205] Section 187, Public Financial Management Act.
[206] Section 13, IGR Act.
[207] Ibid, Section 24(a) and (b).

does not include the disposal of constitutional responsibilities assigned to the respective level of government.

3.4 Intergovernmental Disputes

A dispute may be defined as a specific disagreement over a matter of law, policy or fact where one party makes an assertion and the other refutes the same and it results to a stalemate where the parties cannot agree.[208] An intergovernmental dispute, on the other hand, means, "a dispute between organs of state which may arise from a statutory power or function assigned to an organ of state or an agreement that provides for the implementation of a statutory power or function."[209] The IGR Act in defining a dispute provides that *"In this part unless the context otherwise requires, 'dispute' means an intergovernmental dispute."*[210]

However, a dispute must meet four basic requirements for it to qualify as an intergovernmental dispute namely; One must involve a "specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with a refusal, counter-claim or denial by another".[211] Two, must be one capable of being determined by a court of law hence the cross-reference under Sections 31 and 32 of the IGR Act to judicial proceedings as the last resort.[212] This is to say that, any differences between the parties that have no legal dimension that can be litigated in court, is not a dispute. Three, it must be an intergovernmental one involving various organs of state and arises from the exercise of powers or functions assigned by the Constitution, a statute or an agreement or instrument entered into pursuant to the Constitution or a statute.[213] Four, the parties involved in a dispute must be organs of state in the two levels of government.[214] Notably, it has been affirmed that a contractual dispute, even of a commercial nature between the two levels of government would rank as an intergovernmental dispute.[215]

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[208] Kangu, [n 93] p 333.
[209] HC Petition No. 3 of 2014 (2014) eKLR [n 105].
[210] Section 30(1), IGR Act.
[211] Merills, J G; 'International Dispute Settlement,' (2nd Edn Cambridge; Grotius Publication Limited 1991).
[212] HC Petition No. 370 of 2015 eKLR, [n 59], para 38.
[213] HC Petition No. 3 of 2014 eKLR [n 105], Jurisdiction; para 10.
[214] Article 189 (3), Constitution of Kenya
[215] Section 32, IGR Act

Nevertheless, the definition of the intergovernmental dispute under the Act appears to be inadequate. There is a need to expand the meaning of intergovernmental dispute in order to bring meaning and clarity to the definition.

3.4.1 Parties to an intergovernmental dispute

Intergovernmental disputes are those disputes that may arise between the two levels of government. This is the gist of Article 189(3) of the Constitution which requires that the governments should take every measure to settle any dispute between the two levels of government. The governments referred to in the Article are the national and county governments. This provision is replicated in the IGR Act which provides as far as is relevant thus; *"This Part shall apply to the resolution of disputes arising; (a) between the national government and county government, or (b) amongst county governments."*[216]

Essentially therefore, parties to intergovernmental disputes will be the two levels of government while discharging their assigned constitutional and statutory powers and functions. Significantly, parties to the dispute must act on the realm of public law in the exercise of their constitutional and statutory mandate and not private law based on things done privately. As such, disputes involving private citizens do not fall under the ambit of the intergovernmental relations.[217]

3.4.2 Emerging intergovernmental disputes

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. The disputes take various forms and are briefly discussed here below.

3.4.2.1 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

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[216] Section 30(2), IGR Act.

[217] Republic **v** Transitional Authority and another Ex parte Kenya Medical Practitioners, Pharmacists, & Dentists Union (KMPDU) & 2 Others, JR No. 317 of 2013 eKLR where the Court held clearly that disputes by ordinary citizens do not apply to intergovernmental disputes.

two Houses, the Senate and National Assembly.[218] 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.

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.[219] 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 upheld the Senate's contention that it should be involved in all money bills affecting the counties. In fact, the Court emphasized that the relationship between the two Houses should be guided by the constitutional principles of "… checks and balances, mediation, dialogue, collaboration, consultation, and interdependence."[220] 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.[221] 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.[222]

3.4.2.2 Disputes between County Assemblies and Controller of Budget

Since the commencement of implementation of the devolved governance system, there have been disputes between the county assemblies and the Controller of Budget. In one such dispute, the Controller of Budget set mandatory ceilings for financial allocations to County Assemblies wherein the latter objected through a Court Petition.[223]

The Petition was filed in Court by the Speakers of the forty-seven counties. The Petition sought to challenge the circulars issued on various dates between 22nd April and 16th July 2015 by the Controller of Budget prescribing and putting financial allocation ceilings to any county budget, for the financial year 2014/2015. The circulars had been issued by

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218 Article 93(1), Constitution of Kenya.
219 Sup Ct. Advisory Opinion No. 2 of 2013, (n 12)
220 Ibid, para 197.
221 Ibid, para 125.
222 Ibid, para 143.
223 Speaker, Nakuru County Assembly, and 46 Others **v** Commission on Revenue Allocation & 3 Others HC Petition No. 368 of 2014 eKLR.

the Controller of Budget in the exercise of the powers conferred under the Constitution.[224] The Senate on its part had set fiscal limits as proposed by the Commission on Revenue Allocation. The Petitioners claimed such ceilings breached their constitutional rights. The Petition was however dismissed as the Petitioners had failed to use the available dispute resolution mechanisms.

3.4.2.3 Disputes between Controller of Budget and county government

In the early years of implementation of the devolved governance system, many counties were yet to appreciate or come to terms with the role that the Controller of Budget is assigned under the Constitution.[225] On many occasions, rifts emerged when counties failed to get approvals to move funds from their respective county revenue accounts. The most pronounced of these disputes happened in the first year of devolved governance system wherein the Controller of Budget refused to approve budgetary funds for counties that had unbalanced budgets. That move by the Controller of Budget was met with a lot of furies and it took the intervention of the Intergovernmental Budget and Economic Council (IBEC) to resolve the dispute through mediation.[226]

3.4.2.4 Disputes between Governors and Senators over accountability of public funds

The material matter brought to the fore in light of this dispute is whether the Governors have to personally appear before the Senate to account for the funds allocated to the counties or they can have their respective Officers in-charge of the various dockets wherein the alleged misappropriations are deemed to have occurred.[227] The Senators had sent personal summons to the Governors to appear whilst the Governors challenged the move arguing that the County Executive Committees concerned are good enough in terms of dealing with issues as raised. In fact, this particular issue saw the Senate give directives that funds under the 2014-2015 financial year not to be released to the Counties of Bomet, Kisumu, Kiambu, and Murang'a. The implication of such a directive in the

[224] Article 216(2), Constitution of Kenya.
[225] The Controller of Budget's role is to oversee the implementation of the budgets of the national and county governments by authorizing the withdrawal of public funds.
[226] Intergovernmental Budget and Economic Council (IBEC) is established under section 187 of the Public Finance Management Act to mediate between the national and county governments on issues arising from County Allocation of Revenue Act.
[227] HC. Constitutional Petition No. 8 of 2014 eKLR, [n 13].

event it was implemented is that it would have had a far-reaching impact on the counties listed especially in the context of service delivery.

However, the Court agreed with the Senate that it had the power to summon not only the Governors but also other county officers to answer questions on county government finances allocated from the national revenue. Further, the Court observed that the Senate's oversight power should not be exercised in an arbitrary and capricious manner.[228] In fact, the Court advised the Senate and county government to at all times cooperate and engage on a platform of mutual relations and consultations on any matter touching on devolution and only resort to Court process when all other avenues fail.[229]

3.4.2.5 Disputes over reporting, disciplinary and control of seconded staff

After the introduction of the devolved system of government, some employees of the national government were transferred to the county governments. The action gave rise to the crisis of reporting, control, and discipline of such staff. Instructively, in the case of *Silas v the County Government of Baringo,*[230] the Court held that the recruitment and secondment of the claimants were founded on the Constitution which provided that through legislation, the national government was mandated to assist county governments to build capacity to govern effectively and provide the services for which they are responsible.[231]

The Petition was dismissed by the Court as the ADR process had not been exhausted. In fact, there was no compelling reason why the matter was taken to Court before trying the ADR mechanism of negotiation. It is submitted that the disputes arising from reporting and disciplinary control of national government staff seconded to county governments should be handled through ADR mechanisms.

3.4.2.6 Disputes on the transfer of functions

The implementation of the devolved system of government has faced challenges relating to the transfer of functions. Functions such as maintenance of certain classes of roads,

[228] Ibid, para 67.
[229] Ibid, para 72.
[230] Silas **v** The County Government of Baringo ELRC Cause No. 30 of 2014 eKLR.
[231] Ibid.

electricity, forests, cultural activities and public amenities which were hitherto under the management of the national government are now required to be transferred to the county governments. This has caused conflicts between the two levels of government requiring ADR intervention by way of mediation and negotiation.

In the Petition by the *Council of County Governors v Attorney General & Others*[232] the Court excluded the dispute from the ambit of ADR mechanisms on the grounds that since it arose out of dissatisfaction on the part of the AG and the National Assembly Departmental Committee on Transport, Public Works and Housing with the decision of the Senate, there was no dispute for resolution under the Intergovernmental Relations Act.[233]

However, it is noted that some of the functions relating to rural roads are yet to be transferred to the county governments and continue to cause friction between the two levels of government.[234] It is submitted that where the national government is required to transfer functions to the county government, it should do so as decreed by the Constitution.[235]

3.4.2.7 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. Instructively, some of the disputes have already been subjected to litigation in Court even before exhausting the ADR process.

In the Petition between the county governments of Meru and Isiolo, the Petitioners objected to the argument by the Respondents that the dispute should have first been subjected to an alternative dispute resolution mechanism before being taken to Court.[236] First, the Petitioner submitted that the 1st Respondent committed an illegality by

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232 HC Petition No. 472 of 2014 eKLR, [n 11].
233 Ibid, para 156.
234 Jacqueline Inyanji, 'Transfer roads to counties, State told'. *The Standard Newspaper* of 20th August 2018 p 24. The Kakamega County Governor Wycliffe Oparanya was reported to have asked the national government to transfer rural roads to the counties as prescribed by the Constitution.
235 Ibid,
236 Section 31, IGR Act.

appointing a committee to adjudicate the boundary dispute, a decision which could not be subjected to an ADR mechanism. Second, the mechanism to challenge an illegality is through the Court to quash and not subject it to an ADR mechanism for resolution. They further contended that the Petition was about breach of fundamental freedoms and rights under the Bill of Rights and not about relations between two levels of government. In effect, the ADR was not an appropriate mechanism for resolving the dispute.[237]

The Court upheld this contention and Justice Isaac Lenaola (as he then was), summed it up as follows, '… [W]hile ***Article 159(2) (c)*** *of the* ***Constitution*** provides for *"alternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute resolution', I do not find that this constitutional provision in any way decrees that ADR must be first pursued. In fact, the language of the Constitution in this provision is 'promotional'. It urges parties to consider ADR. Hence having removed this dispute from the legal regime under the Intergovernmental Relations Act, I find no any other legal mandatory requirement to subject this matter to ADR.*"[238]

However, it is posited that where the dispute between county governments are purely on the location of the boundary, the ADR mechanism of mediation is appropriate to resolve such a dispute.

3.4.2.8 Disputes on clawing-back on county government functions

There are disputes that involve constitutional interpretation and more specifically review of legislation of certain laws affecting the operation of the national and county governments where referral to ADR may be inapplicable. An example is a case where the Senate, which is part of the national government, attempted to create County Development Boards and assigned them roles in planning and budgetary processes at the counties.[239] By so doing, the national government was clawing-back on county government functions in a quest to undertake the functions belonging to another level of government.[240] However, this was not an intergovernmental dispute where ADR needs to

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[237] County Government of Isiolo & 10 others **v** Cabinet Secretary, Ministry of Interior and Coordination of National Government & 3 Others, Petition No. 511 of 2015 [2017] eKLR.

[238] Ibid, para 77.

[239] The Council of Governors **v** The Senate and 2 Others, HC CHRD Petition No. 381 of 2014 eKLR. para 119.

[240] Ibid.

be applied. In fact, the dispute was one for breach of constitutional provisions and the dispute could only be handled through judicial intervention.

3.4.2.9 Disputes on shared resources

Since the adoption of the devolved governance system, conflicts have arisen between counties in competition for shared resources, especially in the pastoralist areas. Whereas the law requires that such disputes should be resolved by use of ADR mechanisms, they have found their way to the Courts.

In the Petition between the *Turkana County Government **v** Attorney General,*[241] the interested party on the Respondent's part averred that the dispute involved in the case was one between, firstly, County Governments (between Turkana County and Baringo and West Pokot County Governments) and, secondly, between Turkana County Government and the National Government. The thrust of their argument was that ***Articles 6** and **189(3)** of the **Constitution*** clearly set out the procedure for dispute resolution mechanisms that must be followed to resolve disputes at all levels of government which the Petitioners had failed to follow. The Petitioners had further failed to follow the alternative dispute resolution mechanisms provided in the IGR Act**.** Although the mechanisms prescribed in the IGR Act do not oust the jurisdiction of the Courts, such mechanisms must be exhausted first before resorting to court. The Court observed thus, *"...[i]t is certainly clear that this Court has a very wide jurisdictional reach spanning from the ordinary criminal and civil matters, to those of a constitutional nature. However, there are certain matters that have been specifically excluded from the Court's jurisdiction, either by legislation or the Constitution".*[242]

The Court further observed that where there is an alternative remedy or procedure established by an Act of Parliament, that remedy or procedure ought to be strictly followed. To drive the point home, the Court cited the Court of Appeal decision in ***Speaker of National Assembly v Njenga Karume,*** where it held that; *".....where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."*[243] In

[241] Turkana County Government and Others **v** Attorney General and Others. Petition No. 113 of 2015 eKLR.
[242] Ibid, para 60.
[243] Speaker of National Assembly **v** Njenga Karume, Application No. NAI 92 of 1992 eKLR.

the Petition, the Court held that the matter was improperly before it as the Petitioner ought to have submitted it for ADR before resorting to Court.

3.4.2.10 Disputes between County Assemblies and Governors

The first five years of the devolved system of government experienced strained relationships between the different levels of government and intergovernmental disputes between members of the County Assemblies and County Executive Committees. In the disputes, the county assemblies adopted a lynch-mob mentality as evidenced by the manner in which they moved and passed motions to impeach County Governors. During the period, five County Governors were subjected to impeachment processes.[244]

Notably, all the impeachment proceedings were thrown out by the Senate except the one concerning the Embu County Governor, Martin Nyaga Wambora, which the Senate confirmed.[245] However, the High Court overturned the impeachment 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.

In fact, in the *Wambora* case, the Court observed that since impeachment is a serious process seeking to overturn and substitute the popular will of the electorate in their choice of a leader, it ought to be exercised with caution and restraint. Hence, the basis for an impeachment process is required to be objective to the extent that it does not subject itself to contentious debate. Besides, the correct procedure must be followed before an impeachment motion is undertaken and in particular, the device of ADR should be explored in the dispute involving the Governor and members of County Assembly.[246]

It is therefore correct to state, that the majority of the intergovernmental disputes that have arisen since the adoption of the devolved governance system have ended up in courts and the majority of them have been dismissed for failure to exhaust the available remedies.

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244 Martin Nyaga Wambora and County Government of Embu **v** The Speaker of the County Assembly of Embu and 4 Others, Petition No. 7 and 8 of 2014 (consolidated) [2015] eKLR.

245 Governor Martin Nyaga Wambora was impeached by the County Assembly of Embu and confirmed by the Senate. The impeachment was reversed by the Court after a successful appeal.

246 Petition Nos. 7 and 8 of 2014 (consolidated) [n 244].

3.5 Statutory Framework for Intergovernmental Dispute Resolution

Dispute resolution mechanisms enable individuals and institutions to approach dispute resolution by way of formal or informal means. For the purposes of this study, these are provided for in the Constitution,[247] conventions, statutes and in particular in the *ejusdem generis* piece of legislation governing intergovernmental relations in an intergovernmental dispute.[248] This part of the study examines the constitutional and statutory framework for intergovernmental dispute resolution.

3.5.1 The Constitution of Kenya, 2010

The Constitution requires that the courts and tribunals, in exercising their judicial authority should seek to promote alternative forms of dispute resolution including; reconciliation, mediation, arbitration and traditional dispute resolution mechanisms amongst other principles, subject to restrictions as to deter contravention of the Bill of Rights, and inconsistencies with the Constitution or any written law and observation of principles of justice or morality.[249]

The Constitution further requires that disputes between the two levels of government and in the spirit of mutual cooperation, government at either level shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.[250] The national legislation is required to provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation, and arbitration.[251]

However, despite the enactment of the IGR Act as required by the Constitution, the procedures and guidelines for settling disputes by the use of ADR have not been processed.

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[247] Articles 159 and 189, Constitution of Kenya.
[248] Intergovernmental Relations Act No. 2 of 2012.
[249] Article 159(2)(c), Constitution of Kenya.
[250] Ibid, Article 189(3).
[251] Ibid, Article 189(4).

3.5.2 Intergovernmental Relations Act, 2012

The IGR Act provides the legal framework that governs relations between the two levels of government. There is no doubt that disputes have arisen and are bound to arise in relation to the two levels of government. However, IGR Act provides that such intergovernmental disputes should be resolved amicably. In doing so, the two levels of government should in the first instance, exhaust the mechanisms for alternative dispute resolution before resorting to judicial proceedings.[252] While the provisions of the IGR Act promote the use of ADR in intergovernmental disputes resolution, judicial intervention is not excluded in appropriate cases.

Furthermore, the IGR Act requires that any agreement between the two levels of government should incorporate a dispute resolution mechanism clause that is appropriate to the nature of the agreement. It should also provide for an alternative dispute resolution mechanism with judicial proceedings as the last resort.[253]

The IGR Act also provides for government at each level to take all necessary steps to amicably resolve any dispute by initiating direct negotiations with each other or through an intermediary. Where such negotiations fail, the parties can at that stage formally declare such dispute and refer it to the Summit or the Council of County Governors, which are the intergovernmental bodies established under the IGR Act to assist in resolving the dispute.[254] It is apparent that the legislative intent was to have all disputes arising between the two levels of government resolved in a clear process established specifically for that purpose by legislation, a process that emphasizes consultation and amicable resolution through means such as arbitration rather than the adversarial court system. In this sense, a distinct dispute resolution mechanism for dealing with any disputes arising between the national and county governments has been identified.

More importantly, before a dispute arising between these parties can be placed before the Courts, the Constitution and legislation require that a reasonable attempt at amicably resolving the matter be made. To be sure, the IGR Act specifically provides that *"where all efforts of resolving a dispute under the Act fail, a party to the dispute may submit the*

[252] Section 31, IGR Act.
[253] Ibid Section 32, IGR Act.
[254] Sections 17 and 19, IGR Act.

matter for arbitration or institute judicial proceedings".[255] It is clear from the above that the legislature's intention was therefore that all judicial proceedings would only be resorted to once efforts on resolving the dispute between the two levels of government failed.

3.5.3 The National Government Co-ordination Act, 2013

The National Government Coordination Act ('the NGC Act") makes reference to collaboration and dispute resolution between the national and county government on issues of an apparent concurrent mandate. It requires that disputes relating to the mandate and powers of any officers at the two levels of government should be resolved through a mediation team,[256] to deal with the dispute.[257]

The mediation team, when appointed, is to be guided by the constitutional principles and the respective constitutional mandates of each respective government.[258] If the mediation team is unable to resolve the dispute within the stipulated time, the matter may be referred to the Summit for resolution.[259] It is submitted that the provisions of the NGC Act entrench further the idea of resolving disputes between the two levels of government internally or through mediation before resorting to the judicial process.

3.5.4 Public Finance Management Act, 2012

The Act establishes the Intergovernmental Budget and Economic Council (IBEC).[260] IBEC is expected to provide an opportunity for negotiation between the national and county governments on diverse issues ranging from the Division of Revenue, borrowing by county governments and cash disbursements to county governments on the basis of revenue allocated under the County Allocation of Revenue Act.[261] It further acts as a platform through which the two levels of government can come together and iron-out possible differences as they are bound to arise in the context of revenue sharing and other fiscal relations.

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[255] Section 35, IGR Act.
[256] Section 19(2), National Government Co-ordination Act No. 1 of 2013.
[257] Section 19(1), National Government Co-ordination Act No. 1 of 2013.
[258] Section 19(3), IGR Act.
[259] Section 19(5), IGR Act.
[260] Section 187, Public Finance Management Act No. 18 of 2012.
[261] Section 4(1), County Allocation of Revenue Act, No. 23 of 2017.

In its role of negotiation, IBEC assisted in the resolution of the dispute between the Controller of Budget and County governments on the budget content during the first year of implementing the devolved governance structure.

3.5.5 The Commission on Administrative Justice Act, 2011

The Act establishes the *Commission on Administrative Justice (CAJ)* pursuant to Article 59(4) of the Constitution. The Commission's main function is the promotion of alternative dispute resolution methods in resolving disputes and complaints relating to the public administration which includes disputes within the devolved governance system.[262]

3.6 Limitation of powers and functions of a devolved governance system.

The powers and functions of each level of government is limited to the extent of its competency.[263] Where there is no relevant competency in the level of government, the powers, functions, and competencies may be transferred to the other level of government or to decentralized units. The objective of transferring powers, functions, and competencies is to ensure the availability of adequate resources and transfer in accordance with the set procedures, agreements and set criteria. However, the transfer does not include the disposal of constitutional responsibilities assigned to the respective level of government.

3.7 Intergovernmental dispute management

The relational interaction between the national and county government is governed by the Constitution and by legislation that is underpinned by the Constitution. The two levels of government though distinct are interdependent and are required to conduct their mutual interaction through consultation and cooperation.[264] Further, government at either level is required to perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of government at the other level.[265] Whenever a dispute occurs between the governments they are required to ensure that every effort to

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[262] Section 8(a), Commission of Administrative of Justice Act No. 23 of 2011.
[263] Section 24(a) and (b), IGR Act.
[264] Article 6(2), Constitution of Kenya.
[265] Ibid, Article 189(1).

settle the dispute is made through procedures formulated by the national legislation.[266] The national legislation is therefore enjoined to provide procedures for settling intergovernmental disputes through methods of negotiation, mediation, and arbitration.[267]

It is submitted that the Constitution intended to have all disputes between the two levels of government resolved in a less acrimonious or adversarial way.[268] The Constitution in this regard sought to promote ever present principles of interdependence, consultation, and cooperation between the two levels of government rather than competition, an aspect also propounded by Article 6(2) of the Constitution.

This is highlighted further by the provisions of the IGR Act where it also provides an alternative avenue and prescribes judicial proceedings as the avenue of last resort in intergovernmental disputes.[269] In fact, the IGR Act was enacted to establish an enabling forum for consultation, and cooperation between the two levels of government and also establish a mechanism for resolution of intergovernmental disputes.[270] The IGR Act requires that whenever a dispute occurs between the national and county governments, all reasonable measures should be taken to resolve it amicably and utilize the alternative dispute resolution methods before resorting to judicial intervention.[271]

Indeed, Section 35 of the IGR Act specifically provides that "where all efforts of resolving a dispute under the Act fail, a party to the dispute may submit the matter for arbitration or institute judicial proceedings". However, the alternative dispute resolution mechanisms are not intended to lock out parties including the two levels of government from accessing Courts.[272] Where it is clear that one party is definitely not ready and willing to adopt the mechanism created for settling a dispute then the "last resort" which is court process must be followed by the aggrieved party in that every reasonable effort to secure a less acrimonious way of resolving the dispute has failed. The legislative intention is therefore that judicial proceedings would only be resorted to once efforts of resolving the disputes between the two levels of government failed.[273]

[266] Ibid, Article 189(3).
[267] Ibid, Article 189(4).
[268] Ibid.
[269] Section 31(b), IGR Act.
[270] Articles 6(2) and 189(3), Constitution of Kenya.
[271] Section 33(1), IGR Act.
[272] HC Petition No. 370 of 2015 eKLR [n 59] para 39.
[273] HC Petition No. 99 of 2015 eKLR, [n 61].

It is submitted that the IGR Act seeks not only to provide a framework for dispute resolution mechanisms but also to promote and foster a better relationship between the two levels of government where a less acrimonious process is prescribed. It also allows organs of state to make provision for dispute resolution methods of ADR in intergovernmental disputes where a less acrimonious process is prescribed. However, procedures and guidelines to operationalize the constitutional provisions on intergovernmental disputes have not been processed thereby rendering the intergovernmental bodies ineffective in discharging their respective mandates. It is further submitted that the IGR Act may serve as a useful legislative tool for intergovernmental dispute resolution once the procedures and guidelines are processed.

3.8 Conclusion

It is urged that the two levels of government must learn to, and actually cooperate with each other to obviate unnecessary conflicts over matters that can be easily solved. The Constitution has set the minimum parameters for consultation and cooperation. Adherence to these parameters should help in resolving some of the disputes which have arisen since the establishment of the devolved system of government.

Furthermore, the institutions created under the law as platforms for the achievement of this quest must effectively carry out their functions. Intergovernmental institutions like the Summit and the other sectoral intergovernmental forums must be active in carrying out the mandate assigned to them under the law in order to enhance intergovernmental relations and reduce adversarial intergovernmental disputes.

The need for institutional cooperation and tolerance especially in the exercise of mandates that are assigned under the law cannot be gainsaid. This is because if these disputes were to persist, then the implementation of the devolved system of government would greatly be undermined.

CHAPTER FOUR

4.0 Alternative Dispute Resolution Mechanisms

4.1 Introduction

Alternative Dispute Resolution (ADR) mechanisms are decision-making processes other than litigation, including but not limited to, negotiation, inquiry, mediation, conciliation, expert determination, arbitration, or any combination thereof.[274] The phrase ADR mechanisms is, however, is a misnomer as it may give the impression that these methods are "second-best" to judicial processes which is fallacious.[275]

The statutory provision for alternative dispute resolution as contained in **section 31(b) of the IGR Act** implies that the method is inferior to court processes. The IGR Act, arguably reckon that both governments; *"shall take all reasonable measures to apply and exhaust the mechanisms of alternative dispute resolution provided under the IGR Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution"*.[276]

In construing this provision, the mischief occasioned by the wording is present in the sense that, resorting to the more superior form of dispute resolution, that is judicial proceedings, should follow upon exhaustion of the 'second best' resolution mechanism, in this case, the alternative means. This, however, is a false hypothesis since all forms of dispute resolutions, whether judicial or alternative dispute resolution mechanisms, lead towards the same desired effect that is, resolving disputes that may arise in the course of interplay of the day to day relations between individuals as well as institutions and for the purposes of this study, between the two levels of government.

4.2 Methods for Resolution of Intergovernmental Disputes

The Constitution and the IGR Act envisage a number of alternative methods for resolution of intergovernmental disputes[277]. These methods consist of alternative dispute resolution

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[274] Kariuki Muigua, 'Alternative Dispute Resolution and Article 159 of the Constitution (2012).' <http://www.kmco.co.ke/attachments/article/107/A%20PAPER%20ON%20ADR%20AND%20ARTICLE% 20159%20OF%20CONSTITUTION.pdf> Accessed 15 August 2017.

[275] P Fenn, 'Introduction to Civil and Commercial Mediation [2002]: In the Chartered Institute of Arbitrators,' *Workbook on Mediation*, (CIArb, London, 2002) pp 50-52.

[276] Section 31(b), IGR Act.

[277] Article 159(2)(c), Constitution of Kenya and Section 32(1), IGR Act respectively.

mechanisms (ADR) such as negotiation, mediation, conciliation, arbitration and also formal mechanisms namely, court adjudication.[278] ADR as a form of intergovernmental dispute resolution method is most preferred to litigation due to its informal nature, lack of technicalities, inexpensiveness, promptitude and its ability to foster harmony and reconciliation.[279] Hence, the choice or design of any method of ADR is intended to ensure that intergovernmental disputes are settled amicably with judicial intervention being avoided. Litigation, on the other hand, is clothed with the formalism that tends to be tedious and is characterized by a lot of technicalities making the process an expensive one, if not impracticable, a venture that a party would really want to avoid.[280]

However, in selecting and designing the appropriate method of dispute resolution, it is important for parties to be knowledgeable on the dispute resolution process and existing dispute resolution methods. This gives the parties an opportunity to compare and assess so as to settle on the most suitable method for each dispute, the main object being to enhance intergovernmental cooperation.

4.2.1 Dispute Prevention

This should be the initial and preliminary option for the two levels of government. This can be done by providing dispute resolution training. This training should provide the employees or members of staff with skills to prevent unnecessary disputes and mostly focus on maintaining healthy and cordial relationships between respective levels of government, based on mutual respect, cooperation and reciprocity in terms of respect and sovereignty.

4.2.2 Negotiation

Once dispute prevention has failed, negotiations between the parties themselves are necessary. Negotiation is "any form of communication between two or more parties for the purpose of arriving at a mutually agreeable solution."[281] Parties in this form of dispute settlement mechanism may either choose to act on their own or have agents

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[278] Kariuki Muigua and Kariuki Francis, 'ADR, Access to Justice and Development,' Strathmore University Law Journal, [June 2015] p 3.

[279] Xie Z, 'The Facilitative, Evaluative and Determinative Processes in ADR,' [2011-10-12]. In K. Muigua and Kariuki, F. ADR Access to Justice and Development,' Strathmore University Law Journal; [June 2015] p 3.

[280] Kariuki Muigua, [n 274].

[281] Ibid

represent them albeit, retaining control over the negotiation process.[282] Negotiation takes two forms: competitive bargaining style and co-operative bargaining style.

The hard negotiation style entails rigidity and extremism. The negotiators are concerned with substantive results and may go to any length to gain an advantage. They are not known to make concessions and may even intimidate and coerce another negotiator.[283] This will most likely lead to acrimony between the levels of government and as such the soft negotiation style is preferable.

The soft negotiation style, on the other hand, is characterized by a sense of consideration, empathy, and sensitivity to the issues culminating in a potential dispute. The negotiators are concerned about relationships based on trust and cooperation. More often than not, they prefer conceding so as to maintain a cordial relationship.[284]

The Constitution and the IGR Act recognize the use of the ADR mechanism of negotiation in the resolution of intergovernmental disputes.[285] The object for using the mechanism is to develop an interaction built on trust and working together while avoiding litigation which is by nature adversarial. This would in turn foster harmony and create a conducive environment for service delivery by the two levels of government.

4.2.3 Mediation

Mediation, according to Fenn, may be defined as "a voluntary, informal, consensual, strictly confidential and non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated solution."[286] As such, mediation is a process that is non-binding in which an impartial third party known as the mediator facilitates the negotiation process between the disputants. Normally, the mediators have no decision-making power and are guided by the parties' autonomy over the whole process and substantive outcome.[287]

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[282] Kenya Legal Resources: 'ADR; Hybrid of Mediation and Arbitration,' No. 4. www.kenyalawresourcecenter.org/search/label/AlternativeDisputeResolution accessed on 20/8/2018.

[283] Ibid.

[284] Ibid.

[285] Article 189(4), Constitution of Kenya and Section 32, IGR Act.

[286] Fenn, [n 275] p 10.

[287] Section 30 (2), IGR Act.

Recourse to mediation is well extrapolated in the case of the *Speaker of the Senate and Another --vs- Attorney General*[288] on the exclusion of the Senate in the Division of Revenue Bill where the Court found mediation as the most appropriate method of resolving disputes between the two Houses. Indeed, since the delivery of the Advisory, the two Houses have been resolving their money bills disputes through a mediation committee.

It is submitted that mediation if used in intergovernmental disputes, is likely to create a sense of equality and hence result in a more favorable outcome since both parties have voluntarily submitted to the process. It is also advantageous to the parties since; the process is faster, informal, cost-effective, flexible, efficient, confidential, preserves relationships, autonomy over the process and the outcome.[289]

4.2.4 Arbitration

In a broader sense, arbitration may be defined as "a voluntary process in which parties to a dispute agree to submit to a neutral third party whom they have chosen to decide for them."[290] The neutral third party of choice is for all intents and purposes a private judge appointed by the parties.[291] The Arbitration Act of Kenya, 1995, on the other hand, defines arbitration "as any arbitration whether or not administered by a permanent arbitral institution".[292]

Arbitration proceedings are essentially commenced or initiated by an agreement of parties. This agreement may be incorporated in a contract or separately in an agreement independent of the main contract. This is commonly known as the Scott Avery clause which has the effect of providing that no right of action will accrue to a party until any arising dispute has been adjudicated upon by an arbitrator.[293] Parties may either decide to refer their dispute to arbitration before the dispute has arisen or after the dispute has

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288. Reference No. 2 of 2013 (Sup Ct Advisory Opinion.) (n 12)
289 Muigua, [n 274]
290 Farooq Khan, 'Alternative Dispute Resolution.' A paper presented at Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.
291 Daniel Ngayo, 'The Process of Arbitration in Kenya.' A paper presented to the Chartered Institute of Arbitrators, Kenya Branch, Introduction to Arbitration & ADR course held on 28th-29th April 2016 at Strathmore University Nairobi. <https://www.academia.edu/27676193/THE_PROCESS_OF_ARBITRATION_IN_KENYA> Accessed 16 August 2017.
292 The Arbitration Act No.4, 1995, Section 3.
293 Scott **v** Avery, (1856) 5 HL case 811, United Kingdom.

already arisen.[294] This is predicated on the flexible nature of arbitral proceedings which are premised on the principle of party autonomy giving full recognition and effect to the agreement between the parties subject to rules of natural justice which is in accordance with international practice. The parties are also free to organize their proceedings and to appoint the arbitral tribunal directly or indirectly as long as they agree.[295]

Thereafter, the parties submit themselves to the jurisdiction of arbitration. Arbitration should be resorted to in complex cases as it resembles judicial litigation mechanisms. Though it is autonomous, it has elements of formalities in it and culminates to a winner-loser like situation. In fact, the successful party is required to file an application for enforcement of the Award with the High Court under a Miscellaneous Application, which is served on the Respondent, who then has the opportunity to defend the enforcement proceedings.[296]

In the context of intergovernmental relations as appertains to the devolved governance system in Kenya, constitutional as well as statutory provisions elucidated in the preceding paragraphs, allow for arbitration in intergovernmental disputes. The benefit of resorting to such is autonomy and privacy of the proceedings. To that extent, it enhances cooperation between the governments but on the negative side may result in an acrimonious situation where an award does not reflect the desired effect of one level of government.

4.2.5 Conciliation

Conciliation is "a process in which a third party, called a *conciliator*, restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions."[297] The distinction between mediation and conciliation is that the conciliator, unlike the mediator, has powers to recommend formal proposals to the parties enabling them to reach an agreement and resolve the dispute.[298]

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[294] Ngayo, [n 291].
[295] James Peter Tugee, 'Overview of the Arbitration in Kenya,' (September 2015). <https://www.academia.edu/3057430/OVERVIEW_OF_ARBITRATION_IN_KENYA> Accessed 16 August 2017.
[296] The Offices of Njeri Kariuki, 'Arbitration in Kenya'(28th July 2017) <https://www.lexology.com/library/detail.aspx?g=65f704c5-d59b-4f5b-ba27-e060132bbf09> Accessed 16 August 2017.
[297] Kariuki Muigua, [n 274].
[298] PJA Schoeman, 'Alternative Dispute Resolution Methods As A Tool For The Resolution Of Intergovernmental Environmental Disputes.' <http://dspace.nwu.ac.za/bitstream/handle/10394/498/schoeman_pja.pdf;sequence=1> accessed 17 August 2017.

Conciliation aims at restoring the *status quo*, after which other ADR techniques may be applied. Conciliation brings unwilling parties to the bargaining table.[299]

4.2.6 The role of the Courts in Intergovernmental Relations

The Court's jurisdiction to hear and determine disputes emanates from either the Constitution or statutes. [300] However, where the Constitution has clawed-back the jurisdiction or held-back the jurisdiction, then the constitutional claw-back must be respected.[301] Thus, where the Constitution or statute seeks to and indeed provides for an alternative mode of dispute resolution for specified disputes, then in the spirit of the Constitution, the Court should oblige and cede jurisdiction to such forums.

Admittedly, the alternative dispute resolution mechanism is not intended to lock parties, including the two levels of government from accessing the Courts. Where it is clear that one party is definitely not ready and willing to adopt the mechanism availed for settling disputes then the "last resort", which is the Court process, must be followed by the aggrieved party. *In the Nyeri County Government case*[302] the Court stated that: *"what these provisions of the Constitution and statute (Intergovernmental Relations Act) in respect of the dispute resolution between the national and county government do is not to oust the jurisdiction of the Court but to postpone the same until the alternative dispute mechanism has been attempted"*.[303]

However, an aggrieved party must demonstrate that every effort to secure a less acrimonious way of resolving the dispute has failed. Finally, the judiciary is the ultimate arbiter on constitutional matters and has supervisory powers of reviewing the non-judicial processes in case the parties are dissatisfied or if decisions arrived at are not in conformity with the law and procedure.[304]

It is clear that the Constitution, pursuant to Article 189(3) intended to have intergovernmental disputes resolved in less acrimonious or adversarial ways. The Constitution has under the Article sought to promote the interdependence and

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[299] Ibid.
[300] Article 164(3), Constitution of Kenya.
[301] Jefferson Kalama Kengha **v** Republic (2015) eKLR.
[302] HC. Petition No. 3 of 2014 (2014) eKLR [n 105].
[303] Ibid Jurisdiction, para 3.
[304] Kangu, [n 93].

consultation between the two levels of government and as also provided by the Constitution, cooperation rather than competition. The Constitution in Article 189(3) provides for "every reasonable effort to be made to settle the dispute". This is highlighted further by the provisions of the Act when it also provides alternative avenues for dispute resolution with the court being considered as a last resort.

4.2.7 Rationale for ADR mechanisms in intergovernmental disputes

Instructively, in a Conference held at the Tom Mboya Labour College in Kisumu in 2015,[305] the issue of dispute resolution by alternative means in the quest to build consensus in the devolved system of governance featured prominently. The Conference, while acknowledging that, disputes within the devolved system could not be avoided it nevertheless observed that they could be minimized. The Conference underscored the need to adopt the principle of cooperative government by embracing ADR mechanisms as the preferred method of dispute resolution due to its non-confrontational nature.[306]

The Conference further, recognized the benefits of ADR in Kenya in resolving disputes involving public interest but deplored the inadequate use of the mechanism and the over-reliance on expensive and time-consuming court processes that promote a winner-loser outcome that in turn culminates in acrimony. One of the panelists in the Conference, Dr. Otiende Amolo,[307] underscored the importance of the alternative dispute resolution mechanisms in intergovernmental dispute resolution which he referred to as complementary to and not second best to litigation mechanisms. In his own words, *'…[A]lternative dispute resolution mechanisms are complementary to the judicial system in Kenya. However, since they focus on dialogue, negotiation, and arbitration in conflict resolution they ought to be considered as the preferred method of dispute resolution*.'[308]

The above considerations have been fortified by the demand to develop a framework for ADR for effective management of disputes between the two levels of government. This is further fortified by the constitutional provisions on ADR mechanisms as complemented

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[305] Conference Report; 'Resolving Intergovernmental Disputes,' (held at Tom Mboya Labour College on 21st-23rd April 2015).

[306] Ibid.

[307] Dr Otiende Amolo was the Chairman of the Commission on Administrative Justice (CAJ) in Kenya until 2016 when he resigned. He contested the National Assembly seat for Rarienda Constituency in Siaya County of Kenya in the 8th August 2017 General Election and won.

[308] Conference Report; 'Resolving Intergovernmental Disputes', [n 305].

by Sections 32, 33, 35 and 36 of the IGR Act that deal with the manner in which intergovernmental disputes are to be managed with recourse to judicial intervention as the last resort.

Arguably, the justification for use of ADR in intergovernmental disputes is currently premised on the precedent-setting *Ruling* in the *Isiolo County Assembly Service Board*[309] *case where Justice Onguto* (as he then was), upheld the constitutional provisions by declaring that *unless and until all alternative dispute resolution methods provided for in the Constitution and relevant pieces of legislation are fully applied and declared to have failed, any dispute brought before court for determination would be in contravention of the law*.[310] The upshot of the Court's Ruling is that parties to disputes should submit themselves to the organs provided for dispute resolution by the law before resorting to judicial proceedings.

The Court also acknowledged the fact that despite the entrenchment of ADR principles in the Constitution and statutes, specific legal structures and procedures on how to actualize and manage the process have not been adequately provided for. This is the reason why Section 38 of the IGR Act demands the formulation of procedures and guidelines to facilitate the use of ADR mechanisms in intergovernmental disputes.[311]

However, this procedures, regulations, and guidelines to operationalize the constitutional provisions for the promotion of ADR is a device or a tool for intergovernmental disputes resolutions have not been formulated thereby rendering the intergovernmental bodies ineffective in discharging their respective mandates. It is submitted that the IGR Act may serve as a useful legislative tool for intergovernmental dispute resolution once the procedures and guidelines are processed.

4.3 Comparative Analysis: South Africa

4.3.1 Introduction

The apartheid (racial segregation) regime of South Africa was dismantled in 1994 after the first democratic elections were held in which people from all races represented in the country participated. The new government headed by the icon of the South African liberation

[309] High Court Petition No. 370 of 2015, eKLR [n 59].
[310] Ibid, para 44.
[311] Section 38(1) and (2)(c), IGR Act.

movement, Nelson Mandela, through a broad-based representation from all races, political parties, and other political actors developed the first South African democratic Constitution in 1996. The new Constitution completely overhauled and redesigned the then existing governance structure. The governance structure created by the Constitution was a unitary but decentralized state being a three-tier government: national, provincial and local governments.[312]

4.3.2 Intergovernmental Relations and Disputes

The Constitution entrenches cooperative government between the three spheres, within which the local government is supposed to be autonomous.[313] The principles of cooperative government are grounded in Chapter 3 of the Constitution.[314] These principles are the basis of intergovernmental relations.

The Constitution views the governments as distinct, interdependent and interrelated[315] similar to the Kenyan Constitution in Article 6(2) that describes the two levels of government or spheres in the same way and mandates them to operate on the basis of consultation and cooperation.[316]

The South African cooperative governance structure has a comprehensive legal framework for dealing with relationships between the three spheres of government. The key statute dealing with the intergovernmental relations between the three spheres of government is the Intergovernmental Relations Framework Act of 2005[317] which is enacted in accordance with Section 41(2) of the Republic of South Africa Constitution.

One of its policy considerations is the conflict management which demands the certainty of procedures before disputes erupt. It provides in Para 1.1 under Part 4 on *Organizational Requirements*, that certainty can be fostered by the inclusion of a clause providing for notification of a potential conflict among other policy considerations and

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[312] Andrew Feinstein, 'Decentralization: The South African Experience,' [2015] <http://www.gpgovernance.net/wp-content/uploads/2015/07/Decentralisaion-the-south-african-experience-feinstein1.pdf> Accessed 18 August 2017.
[313] Ibid.
[314] The Constitution of the Republic of South Africa, 1996.
[315] Section 40(1), Constitution of South Africa.
[316] Article 6(2), Constitution of Kenya.
[317] Gazette Notice 491 of 2007 to bring into force practice guidelines for Intergovernmental Dispute Prevention and Settlement Guidelines for Effective Management.

provides for the use of ADR mechanisms where the parties cannot negotiate their own settlement.[318]

In Para 1.2 it mandates the three spheres of government to include clauses providing for dispute settlement mechanisms friendly to the agreements entered into between them and the potential conflicts likely to arise as part of their legal obligations.[319] The process normally begins with negotiations between the parties whether directly or through intermediaries and when this fails then the parties proceed to the alternative dispute resolution mechanisms which are more or less the same processes for both jurisdictions only that the South African one is more detailed than its Kenyan counterpart. The South African intergovernmental dispute resolution regime further, like Kenya, emphasizes the need to exhaust all available remedies before an aggrieved party resorts to judicial mechanisms.

In fact, the Constitution provides that "an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all remedies before it approaches a Court to resolve the dispute".[320] This proposition was fortified in the South African Court where the Constitutional Court held that "the provision binds spheres of government and all departments of state and administrations in the national, provincial or local spheres of government".[321] Also in another case, the Court while dealing with the issue of organs of state making efforts to avoid judicial process noted that, since the obligation to settle disputes is an important aspect of cooperative government which lies at the heart of Chapter 3 of the Constitution, the Court will merely grant direct access to organs of state involved in litigation with one another it is not satisfied that the obligation has been fully performed.[322]

Further, the Court has similarly observed that, the organs of State's obligations to avoid litigation entails much more than an effort to settle a pending case. It requires the organ

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[318] Part 4, para 1.1, Intergovernmental Relations Framework Act of 2005.

[319] Part 4, para 1.2, Intergovernmental Relations Framework Act of 2005.

[320] Section 41(3), Constitution of South Africa.

[321] First Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC) at para 291- where the Constitutional Court held that the provision binds spheres of governments and "binds all departments of state and administrations in the national, provincial or local spheres of government.

[322] Uthukele District Municipality and Others V President of the Republic and Others 2003 I.S.A 678 (6C) para 33.

of State to re-evaluate the need to consider alternative possibilities and compromises and to do so with due regard to the expert advice the other organs of state have obtained.[323] Fundamentally, the intergovernmental dispute resolution regime demands that a party exhaust all available alternative remedies before resorting to a judicial process.[324]

Moreover, the best practice model adopted by South Africa for intergovernmental conflict management is what makes its legal framework effective in fostering good relations between the three spheres of government. However, what stands out in contrast between Kenya and South Africa is that the latter has a comprehensive legal framework and practice guide for dealing with dispute prevention at intergovernmental level whereas the former has only seven clauses to wit, Sections 30-36 of the Intergovernmental Relations Act Cap 5G which in fact, the former borrowed from the latter.

Kenya is yet to formulate procedures and guidelines to facilitate the use of ADR mechanisms for intergovernmental disputes resolution as required by the provisions of the IGR Act.[325] The next chapter of this study makes recommendations for the formulation of guidelines and policy reforms to facilitate resolving disputes at the intergovernmental level in Kenya.

4.3.3 The salient features of IGR Framework Act and the IGR Act

Kenya's legal framework for intergovernmental dispute resolution is modeled on the lines of the Republic of South African from where Kenya has heavily borrowed. However, there is a big gap in Kenya's intergovernmental dispute framework that requires to be filled to bring it closer to the Republic of South African one. The gaps identified include:

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[323] 2002 (2) SA 715 (CC) para 36.

[324] This was aptly put in the South African case of *Makhazi V African Products Retirement Benefit Provident Fund and Another and in Mhlarnbi v Matjhabeng Municipality and another* where the court held that "in circumstances where it is required that ADR be resorted to before a court can be approached, all procedures provided must be utilized before the court may intervene in the dispute".2003 1 SA 629 (W) 635A - 635 C and 2003 5 SA 89 (0) 93 E - 93 H respectively, are judgments based on the principles of labor law. The South Africa labor law requires disputes to be resolved through the Commission for Conciliation. Arbitration and Mediation before a court will be allowed to intervene.

[325] Section 38(2), IGR Act.

(i) Lack of Intergovernmental Dispute Manual and Guide. The Republic of South Africa has its own Manual and Guide to regulate intergovernmental disputes.[326]

(ii) Lack of a clear process for settlement of Disputes. There are no specific steps provided for in the IGR Act that either level of government would take to resolve a dispute. However, the South African IGR Framework Act has an elaborate process to determine the stages a dispute will pass through before it is resolved.

(iii) Lack of proper definition of intergovernmental dispute. The IGR Acts definition of a dispute to mean "intergovernmental dispute" is vague and may cause confusion. The IGR Framework Act of South Africa has a detailed definition of intergovernmental dispute which leaves no doubt as to what constitutes an intergovernmental dispute including who the parties.

(iv) Lack of manager to oversee intergovernmental disputes. The IGR Act has no clear provisions for management of intergovernmental disputes. The IGR Act refers to an intermediary to handle the dispute. However, no details have been given on how this is to be done. The South Africa IGR Framework Act has provided for a manager to handle intergovernmental disputes with a very clear roadmap and mandate underpinned in the Act.

(v) Lack of best practice policy in the conflict management under the IGR Act provisions. The best practice policy consideration ensures certainty of procedures before a dispute erupts. South Africa under its best practice policy provides for certainty by the inclusion of a dispute resolution clause and use of ADR mechanisms where parties cannot negotiate their own settlement.

The Republic of South Africa has an elaborate procedure for the resolution of intergovernmental disputes which Kenya should endeavour to embrace and adopt when dealing with disputes between the two levels of government.

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[326] The Intergovernmental Dispute Prevention and Settlement Practice Guide Guidelines for effective Conflict Management General Notice 1770 Gazette Notice No. 2942 of 27th November 2006 to facilitate the processing of intergovernmental disputes.

4.4 Conclusion

It is imperative that in order to advance an effective resolution of a dispute or potential dispute, the method of ADR chosen by the government conforms to certain aspects such as: be suitable to the dispute at hand, the governments' preferences and willingness to resolve the dispute, the competence, objectivity, and impartiality of the third parties.

In the backdrop of intergovernmental disputes, choice of a suitable method of dispute resolution method should be premised on considerations such as; sustainable development, provisions of sectoral statutes, existing legal framework and constitutional provisions. The implication of this, in the long run, is resultant cooperation, facilitation of access to justice, avoidance of the disadvantages occasioned by resorting to court processes and the maintenance of a cordial relationship between the levels of government thereby enhancing the principle of cooperative government for the sake of the citizenry. Instructively, the benefits of a devolved system of government can only be achieved in an environment of mutual trust and respect, amicable resolution of disputes when they occur and above all mutual cooperation between the two levels of government.

CHAPTER FIVE

5.0 Findings, Conclusion and Recommendations

5.1 Introduction

The study focuses on ADR as a tool for intergovernmental dispute management and settlement in the devolved governance system in Kenya. The study was motivated by the concern that despite the clear provisions of the Constitution to have intergovernmental disputes settled by means of procedures provided under national legislation through ADR mechanisms including negotiation, mediation and arbitration, parties continue to refer such disputes to Court for determination as the first option.

The aim of the study was therefore to set up a legal framework to operationalise the constitutional provisions for promoting ADR mechanisms as a tool for management and settlement of intergovernmental disputes, evaluate the nature of the intergovernmental relations and disputes, determine the methods for dispute resolution and make proposals for an effective legal and policy framework for intergovernmental dispute resolution. It was conducted through a descriptive and analytical research design involving a comprehensive review of the relevant constitutional and statutory provisions and literature on the subject.

5.2 Findings

The key findings of the study include:

First, the Constitution enjoins courts and tribunals in the exercise of judicial authority to promote alternative forms of dispute resolution including; reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms.[327] Further, in order to fortify and widen the scope of its application, the Constitution also provides for cooperation between the national and county governments and requires inter alia that, in any dispute between governments, governments must make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation, such national legislation must provide procedures for settling intergovernmental disputes by

[327] Article 159(2)(b), Constitution of Kenya.

alternative dispute resolution mechanisms including negotiation, mediation, and arbitration.[328]

The constitutional provisions[329] are buttressed by the IGR Act which was enacted to regulate the relationship between the two levels of government including the manner in which intergovernmental disputes are to be managed.[330] Both the Constitution and the IGR Act contemplated that disputes between the two levels of government would be settled amicably and only in exceptional circumstances would such disputes be subject of judicial intervention.

Second, the disputes involve issues that should be handled through ADR mechanisms in the first instance. However, most state organs resort to judicial intervention even before the mechanisms set up by law to resolve intergovernmental disputes are exhausted. This has led to strained relations between the national and county governments and unnecessary financial costs incurred by the two levels of government as legal fees paid to Advocates representing the parties.

Third, the disputes are over power and mandates of the various state institutions, transfer of functions and legislation. Some disputes have been successfully resolved through ADR by Council of Governors and Intergovernmental Budget and Economic Council (IBEC) and Parliament has formed a mediation committee to deal with disputes arising from the Division of Revenue Bill.

Fourth, the constitutional choice of a cooperative as opposed to a competitive devolved system of government, was a deliberate one aimed at providing intergovernmental relations that urge cooperation and avoidance of disputes. The cooperative government imposes obligations upon the two levels of government to cooperate, consult and respect each other.

Fifth, Courts being the guardians that patrol the territories of the Constitution and the interpreters of the laws are keen to preserve the relationship between the two levels of government and encourage them to settle any dispute through ADR before resorting to formal Court processes in conformity with the principle of the Rule of Law.

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[328] Ibid, Article 189(3) and (4), Constitution of Kenya.
[329] Ibid.
[330] Sections 32, 33, 34, 35 and 36, IGR Act.

Sixth, the concept of cooperative government under the Constitution borrowed from the South African Constitution, South African jurisprudence and scholarship which provided very useful lessons in the interpretation of the Kenyan provisions. Indeed these have been relevant pertaining to the notions of distinct and interdependent governments and the obligation to respect, consult and to avoid settlement of disputes through litigation.[331]

Seventh, ADR mechanisms are the most convenient methods for resolution of intergovernmental disputes because they are essentially cost-effective, faster and preserve cordial and healthy relationships between the two levels of government. This is contrasted with the judicial process which is patently adversarial, costly, time-consuming and strains relationships between the parties.

Eighth, the national policy together with the procedures, regulations, and guidelines on the use of ADR in intergovernmental disputes have not been developed. Unlike the situation in South Africa which has an Act[332] and a comprehensive Manual Guide for Dispute Prevention on dispute resolution at the intergovernmental level,[333] Kenya has only an Act of Parliament[334] which is deficient in detail and lacks regulations to operationalize the constitutional provisions relating to the promotion of ADR as a device for intergovernmental dispute settlement.

Ninth, there is an urgent need to formulate a legal framework to operationalize the constitutional provisions for the promotion of ADR mechanisms as a device for intergovernmental dispute management and settlement as required by the law.

The combination of these findings provides support for the conceptual premise that the Constitution defines, distributes and constrains state power. The Constitution demands that intergovernmental disputes be resolved by procedures formulated under the national legislation. Although the IGR Act was enacted in 2012 the procedures, regulations, and guidelines are yet to be formulated. In this respect, it is urged that the national government complies with the constitutional dictates in conformity with the principle of the Rule of Law by initiating the formulation of the legal framework.

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331 Kangu, [n 93]

332 Intergovernmental Relations Framework Act No. 5 of 2005 (Republic of South Africa Notice No. 491).

333 Intergovernmental Dispute Prevention and Settlement Practice Guide – Guidelines For Effective Conflict Management General Notice 1770, Gazette 2942 of 27th November 2006.

334 Intergovernmental Relations Act No. 2 of 2012.

5.3 Conclusion

This study at the beginning sought to examine the operationalization and implementation of constitutional provisions on the preference of ADR mechanisms to judicial intervention in intergovernmental dispute resolution.

It also sought to show the importance of following laid down laws, regulations, rules, policies, and procedures through the positivism and political obligation theories and the principle of the Rule of Law.

As such it evaluated the nature of intergovernmental relations in the devolved governance system. It did this by conducting a conceptual exposition of Kenya's devolved system by conducting a historical analysis of Kenya's political system from the former centralized system to the current decentralized system. It also conducted a critical analysis of the IGR Act in light of the Constitution of Kenya 2010.

This study showed the intricacies within the workings of the two levels of government and the importance of maintaining and preserving a healthy working relationship between them. It engaged the legal framework providing for the relationship between them and confines within which their disputes should be solved.

This study also identified the various resolution mechanisms that both levels of government are required to resort to prior to judicial intervention and showed their importance in the maintenance of a healthy working relationship between the two levels of government.

The hypothesis of the study was that "if there was a clearer constitutional and legal framework for intergovernmental disputes management, there would have been a workable framework for use of alternative dispute resolution mechanisms". The findings of this study have proved the hypothesis in that there is a lacuna or gap due to lack of a framework for operationalizing the constitutional provisions for promoting ADR mechanisms as a device for settlement of intergovernmental disputes.

The study attributed the failure to operationalize constitutional provisions on alternative dispute resolution mechanisms to the absence of a framework similar to that of South Africa's and demonstrated the need to formulate one.

This, the study did by conducting a historical analysis of Kenya's governance system, a critical analysis of the IGR Act in light of the Constitution of Kenya 2010 and a comparative analysis of the intergovernmental relations and disputes in South Africa and Kenya respectively.

The study finally demonstrated that the presence of these shortcomings in the law coupled with the lack of willingness to follow the Rule of Law laid down in the Constitution in respect to definition of limits on dispute resolution was the cause for the supremacy wars in and out of court, financial implications thereof, the straining and deterioration of the relationship between the two levels of government.

It is on this premise that this study proposes the following measures to address these shortcomings so identified.

5.4 Recommendations

This section of the study recommends formulation of a legal framework and policy reforms to operationalize the constitutional provisions for the promotion of ADR mechanisms in settlement of intergovernmental disputes. The proposed reforms shall provide opportunities for the expeditious, efficient, inexpensive, fair and constructive resolution of intergovernmental disputes when they arise. The recommendations are categorized as either immediate, short term, medium or long term.

5.4.1 Intergovernmental Alternative Dispute Regulations and Guidelines

The formulation of regulations and guidelines to facilitate the use of ADR methods in intergovernmental disputes is long overdue thereby making there processing immediate and urgent. Hence, the national government in consultation with other stakeholders should initiate the formulation of a legal framework to operationalize the constitutional provisions for promoting of ADR mechanisms as a device for settlement of intergovernmental disputes in pursuance to section 38 of the IGR Act. The guidelines should include:

First, make provisions that encapsulate the importance of ADR mechanisms and mandate the two levels of government to settle their disputes in the first instance, through mechanisms shepherded in the Constitution and national legislation.

Secondly, provide for intergovernmental dispute identification and resolution structures. This, in essence, means identification of the controversy between the two levels of government and the mechanism for dealing with the dispute. Each level of government should, therefore, put in place an appropriate organizational framework to identify and resolve intergovernmental disputes and appoint a dispute settlement manager to implement avoidance and prevention activities.

Thirdly, that only when the parties, in good faith, have made every reasonable effort and taken all necessary steps to amicably resolve the dispute shall there be declared a dispute by both parties. This should not necessarily resort to judicial proceedings but rather the consultative forums in place, like the Summit, for dispute resolution with equal representations from the two levels of government. However, if the consultative forums fail, then mediation should take effect. Should the latter also fail, the parties can resort to formal ADR mechanisms, being arbitration proceedings.

Fourthly, embrace a transparent approach in the form of a reporting mechanism to an oversight authority like Parliament where the Cabinet Secretary in charge of the Devolution Ministry will be required from time to time and when necessary to table reports in both Houses of Parliament with regard to the general conduct of alternative dispute resolution mechanisms in the country, the incidence and settlement of intergovernmental disputes and any other relevant matter.

Fifthly, the Cabinet Secretary in charge of Devolution should be obligated in consultation with the Summit to issue circulars, guidelines and a code of conduct for enhancing efficiency in intergovernmental dispute prevention and resolution mechanisms.

Sixthly, entrench respect for the constitutional provisions that premise the relationship of both levels of government on consultation and cooperation undergirded by mutual trust and good faith, impartiality, justice and constructive resolution of intergovernmental disputes when they arise.

Finally, the two levels of government should enact enabling regulations on laws relating to devolution to facilitate the smooth implementation of intergovernmental relations by the various actors at both levels of government.

The guidelines should be facilitated by the national government through the Cabinet Secretary in charge of Devolution. It is urged that the envisaged guidelines should be developed after a broad based consultative process by all stakeholders including but not limited to the two levels of government, civil society, legal experts on matters of devolution and ADR. The proposed guidelines and regulations should be developed and gazetted as a matter of priority by the national government.

5.4.2. Amendment to the IGR Act

The amendments to certain provisions of the IGR Act are also urgent and need to be enacted as a matter of priority to facilitate intergovernmental dispute resolution. The amendments include:

(i) Section 30 (1) to exclude state organs such as the judiciary, legislature and certain independent bodies from its application. The IGR Act focuses on the executive intergovernmental relation

(ii) Section 30 (2) in order to define the scope of the dispute resolution.

(iii) Section 30 (1) to define what constitutes an intergovernmental dispute.

(iv) Section 33 (1) to define an intermediary and his/her role in intergovernmental dispute.

(v) Section 34 to provide the specific steps to be taken for settlement of an intergovernmental dispute.

The amendments to the IGR Act are necessary to bring clarity to the areas identified. These amendments are to be amended through Parliament. The amendments may be initiated by the National Government through the majority leader.

5.4.3 Intergovernmental Policy Reforms

5.4.3.1 The Immediate Policy Reforms

(i) Promotion of ADR mechanisms for settlement of intergovernmental disputes by sensitizing the intergovernmental bodies and staff at the two levels of government on the use of ADR instead of rushing to court whenever a dispute arises.

(ii) Formulation of guidelines for management of concurrent and shared functions by delineating the mandate of each level of government in order to minimize disputes over the transfer of functions.

(iii) Entrench provisions of consultation and cooperation in respect of constitutional provisions that premise the relationship of both levels of government undergirded by mutual trust and good faith in resolving intergovernmental disputes whenever they arise.

5.4.3.2 The Short Term Policy Reforms

(i) Strengthen and improve the role of Judiciary. The judiciary has a special role in developing, building on and ensuring the respect of the Rule of Law. The Courts are required to refer intergovernmental disputes to ADR mechanisms in appropriate cases while being guided by the principle of promoting these mechanisms.

(ii) Enhance capacity building and civic education so that public officials and employees working in the various departments are aware of the advantages of healthy consultation and cooperation between the two levels of government.

(iii) Enhance transparency and accountability by dissemination of information, policy alignment, and administration. Healthy relationships between the two levels of government are based on mutual reciprocity. It is a give and take relationship. As such information at both levels of government should be made readily available as and when required by either party.

5.4.3.3 Medium Term Policy Reforms

(i) Bring the consultative forums closer to the people. Consultation and cooperation are key principles of enhancing intergovernmental relations to be crystallized at both levels of government. Some of the important consultative forums are found in the National government. The national government should take the forums closer to the grassroot level so that any dispute or any issues arising out of the interaction between the two be handled at the lowest level before they escalate.

(ii) Establish a monitoring, allocating and evaluation mechanism. The mechanism would be used to track intergovernmental disputes resolution mechanisms and assess progress and benchmark. This is critical because devolution is still in infancy and it is important to know where it has come from, the challenges it has encountered, what has been done to address these challenges and what needs to be done to stabilize matters arising.

5.4.3.4 The Long-Term Policy Reforms

(i) Entrench respect of the Rule of Law. The Rule of Law is said to be the fountain through which legal obligations flow. It is a national value and constraints the use of state power for the sake of citizens.

(ii) Provide criteria for the use of ADR in the dispute clauses on contracts involving the two levels of government.

(iii) Establish capacity building, training of experts in and set up structures and institutions that support ADR.

(iv) The judicial and ADR processes to compliment each other while avoiding judicial intervention. However, ADR to be made a prerequisite before any judicial intervention can be involved.

The policy reforms should be undertaken by the National Government through the Cabinet Secretary in charge of the Devolution Ministry in conjunction with the Summit, Council of County Governors and other stakeholders.

5.5 Concluding Remarks

The overarching rationale in the final Chapter of this Research Project is that, while the law has broadly set forth the principle of alternative dispute resolution, it is observed that specific legal structures and procedures on how to actualize and manage the process have not been provided for. It is for this reason that this study has recommended that the two levels of government and other stakeholders form an inclusive consultative forum facilitated by the Cabinet Secretary in charge of the Ministry of Devolution in consultation with the Summit invokes Section 38 of the IGR Act to make regulations and procedures for dispute resolution mechanisms. Once in place and implemented, the regulations will form the national government framework for ADR which can be replicated in the counties.

The establishment of this framework together with the proposed legal and policy reforms will yield a significant reduction in litigation resulting from the intergovernmental conflicts and enhance cooperation and consultation in the discharge of functions between the levels of government. Needless to say, good conflict management saves time and costs, reduces conflicts over time and maintains good relations between organs of state which interact regularly with one another and in our case the two levels of government which must conduct their mutual relationship on the basis of consultation and cooperation.

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