# UTILIZING ALTERNATIVE DISPUTE RESOLUTION TO DETERMINE INTERGOVERNMENTAL CONFLICTS IN KENYA

A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M) OF THE UNIVERSITY OF NAIROBI

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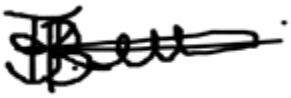
**DECLARATION**

I declare that this research paper which I hereby submit for the award of a Master of Laws (LLM), is my original work and has not been submitted to any other institution of higher learning except to the University of Nairobi, Faculty of Law.

…….

KIBAARA JUNE MUKAMI

This research paper has been submitted for an award of a Master of Laws (LLM) with my approval as the student supervisor.



…….

DR. JACKSON BETT

**DEDICATION**

I dedicate this research paper to my late grandfather, Bernard M'Marete Kibua who, despite being born during a time where people did not believe in educating the girl child, he ensured that his daughters, nieces, granddaughters and great granddaughters received an education. A man who walked and toiled to ensure that the women in his family went to good schools. A man willing to pay school fees for 4 generations to ensure that every descendant received a good education. Thank you for instilling the love for reading and the gift of education to us. This one is for you Juuju.

I also dedicate this to my family and friends. Thank you for your support through this journey.

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All glory and honour belongs to the Almighty for sustaining me and enabling me to complete this research.

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I thank my family for loving and supporting me in this undertaking.

**ABBREVIATIONS AND ACRONYMS**

| | |
|---|---|
| ADR | Alternative Dispute Resolution |
| ASAL | Arid and Semi-Arid lands |
| IGRA | Intergovernmental Relations Act |
| IGRTC | Intergovernmental Relations Technical |
| JMC | Joint Ministerial Committee |
| KEPSA | Kenya Private Sector Alliance |
| KLR | Kenya Law Reports |
| MOU | Memorandum of Understanding |
| UK | United Kingdom |
| USA | United States of America |

## TABLE OF LEGISLATIONS

### Ethiopia

The Constitution of the Federal Republic of Ethiopia, Adopted 8 December 1994.

### Japan

Local Autonomy Act, 1947.

Local Autonomy Act, 1999.

Omnibus Decentralization Act, 1999.

The Constitution of Japan, promulgated on November 3, 1946, Took effect on May 3, 1947.

### Kenyan laws

Intergovernmental Relations Act No. 2 of 2012.

Public Finance Management Act No. 18 of 2012.

The Constitution of Kenya, 2010.

The Intergovernmental Relations (Alternative Dispute Resolution) Regulations, 2018.

Intergovernmental Relations Technical Committee Status Report as at February 2020, Unreported.

IGRTC, 'Intergovernmental Disputes Matrix' Unreported.

### South African

Intergovernmental Dispute Prevention and Settlement Practice Guide: Guidelines for Effective Conflict Management, Gazette Notice No. 491 of 2007, dated 27 April 2007.

Intergovernmental Relations Framework Act No. 13 of 2005.

The Constitution of South Africa, as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly.

### United Kingdom

Protocol for Avoidance and Resolution of Disputes, Agreed upon in 2010.

## TABLE OF CASES

### Kenyan cases

1. *Council of Governors v Attorney General & 5 others,* [2018] eKLR (High Court Petition No. 252 of 2016).
2. *Council of Governors & 47 others v Attorney General & 6 others,* [2019] eKLR (Reference 3 of 2019).
3. *Council of County Governors v Cabinet Secretary Land, Housing & Urban Development & another*, [2017] eKLR (Environment and Suit 598 of 2016.
4. *Council of County Governors v Lake Basin Development Authority & 6 others*, [2017] eKLR, Constitutional Petition number 280 of 2017.
5. *County Government of Isiolo & 10 others v Cabinet Secretary, Ministry of Interior and Coordination of National Government& 3 others,* [2017] eKLR (Constitutional Petition 511 of 2015).
6. *County Government of Migori & 4 others v Privatization Commission of Kenya & another,* [2017] eKLR (High Court Petition No. 187 of 2016).
7. *County Government of Mombasa v National Treasury & another; Inter Governmental Relations & Technical Committee (Interested Party),* [2020] eKLR (Constitutional Petition 4 of 2020).
8. *County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & Another,* [2014] eKLR. (Petition 3 of 2014).
9. *County Government of Uasin Gishu v Attorney General & 20 others*, [2019] eKLR (Environment and Land Case 246 of 2016).
10. *International Legal Consultancy Group & another v Ministry of Health & 9 others,* [2016] eKLR (High Court Petition no. 99 of 2015).
11. *Isiolo County Assembly Service Board & another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another,* [2016] eKLR.
12. *Murang'a County Public Service Board v. Grace N Makori & 178 others*, (2015) eKLR (Civil Appeal No. 37 of 2015).

13. T*he International Legal Consultancy Group &Another v Ministry of Health & 9 Others,* [2016] eKLR, Constitutional Petition 99 of 2015.

14. *Okiya Omtatah Okoiti & another vs. Attorney General, Transition Authority, Council of County Governors & others,* 2014 eKLR, Nairobi High Court Petition No. 593 of 2013.

**South African cases**

1 *Minister of Health and Others v Treatment Action Campaign and Others and KwaZulu-Natal v Premier*, Kwazulu-Natal: In re (CCT15/02) [2002] ZACC 14; 2002 (10) BCLR 1028 (5 July 2002).

2 *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others* [2014] 4 All SA 67 (GP) (19 June 2014).

3 *National Gambling Board v Premier of KwaZulu-Natal*, 2002 (2) BCLR 156 (CC).

4 *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others* [2014] ZACC 31.

5 *Re Certification of the Constitution of the Republic of South*, 1996 4 SA 744 (CC).

# CHAPTER ONE

# INTRODUCTION

## 1.0 **Background of the Study**

While decentralisation is a global phenomenon, it has been embraced in the African continent in search for effective governance reforms.[1]. Decentralisation can be categorized into three; deconcentration, delegation and devolution. Kenya is one of the African countries that has adopted decentralisation Under deconcentration, functions are transferred from the central authority to branch offices, with decision making remaining a reserve of the central authority. Delegation refers to a principal-agent arrangement between the Government and non-governmental actors or the private sector. On the other hand, devolution refers to the statutory delegation of political and economic power from the central Government to regional Governments.[2]

Pursuant to the Constitution of Kenya, Kenya adopted a devolved system of governance which came into place after the General Elections held in March 2013. Devolution is enshrined in the Constitution as an aspect of transformative constitutionalism, which refers to "a long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction; and it connotes an enterprise of inducing large scale social change through non-violent political processes grounded in law."[3] The Constitution introduced a two tier system of governance in Kenya made up of the National Government and County Governments. County Governments are forty-seven in number.[4] As per the Constitution, the National and County Governments are 'distinct and inter-dependent'.[5]

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[1]Collaborators, 'Decentralization and Local Development' <http://www.ciesin.columbia.edu/decentralization/> accessed 3 October 2019.

[2] Rajeev Goel, 'Different forms of Decentralization and their impact on Government Performance: Micro level evidence from 113 Countries' Department of Economics, University of Akron, OH 44325, USA.

[3]Kark E. Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal on Human Rights.

[4] The Constitution of Kenya, Article 6(1) & First Schedule.

[5] The Constitution of Kenya, Article 6(2); see also Kibaya Laibuta, 'The Place of ADR in Intergovernmental Disputes' <http://adrconsultants.law/2018/06/13/the-place-of-adr-in-intergovernmental-disputes/> accessed 5 August 2020.

The introduction of the devolved system of governance comes with its fair share of conflict in a bid to fully understand and implement devolution, particularly as it relates to the functions and powers of National and County Governments.[6] As has been the norm, in a system where there are two parties with competing or conflicting interests or responsibilities, disputes are prone to happen. In such instances laws or policies for resolution of any disputes that may arise is inevitable. While the Constitution of Kenya is clear on the objectives of devolution which are intended to address the development needs of its citizens, it is alive to the fact that the change from a highly centralized system to the devolved system of governance is likely to encounter implementation challenges leading to intergovernmental disputes. Such disputes can arise and have arisen between a County Government and the National Government or between County Governments. These forms of disputes were anticipated by the promulgators of the Constitution hence, the inclusion of provisions for resolution of any such dispute.[7] In express terms, the Constitution calls on both National and County Governments to 'conduct their mutual relations on the basis of consultation and cooperation'.[8]

The Constitution called for enactment of a national law to provide of resolution of intergovernmental disputes through Alternative Dispute Resolution (ADR) methods such as negotiation, mediation and arbitration.[9] It further called on both the National and County Governments to 'make every reasonable effort' to solve any disputes that may arise between them through ways provided for under national laws.[10] To give effect to these Constitutional requirements, the Kenyan Parliament in 2012 enacted the Intergovernmental Relations Act (IGRA),[11] which establishes a 'framework for consultation and cooperation between the National and County Governments and amongst County Governments '.[12] It further provides a mechanism for resolution of intergovernmental disputes.[13]

[6] The Constitution of Kenya, Article 186.
[7] The Constitution of Kenya, Article 189.
[8] The Constitution of Kenya, Article 6(2).
[9] Article 189(4).
[10] The Constitution of Kenya, 2010, Article 189(3).
[11] No. 2 of 2012 (Revised 2019).
[12] See the long title of the Act.
[13] ibid; see also The Star, 'Use of alternative dispute resolution mechanisms to implement devolution' <https://www.the-star.co.ke/news/2014/03/22/use-alternative-dispute-resolution-mechanisms-to-implement-devolution_c903309> accessed 27 December 2018.

While the spirit and letter of the Constitution is succinct that the two levels of Government must embrace cooperative relations, it is evident that some intergovernmental disputes emanate from the Constitution itself. This has been the case especially in regards to interpretation of the Constitution and functional distribution as provided in the Fourth Schedule of the Constitution. Despite this, the Constitution imposes a duty on the two levels of Governments to ensure cooperative rather than competitive relations between themselves. The Constitution of South Africa, which the Kenyan Constitution borrows heavily from, emphasizes the importance of organs of state consulting and coordinating in ensuring that they avoid litigation against one another.[14] Intergovernmental disputes have a negative impact on public service delivery, which negates the objectives of devolution as envisioned under the Constitution. Just like their Kenyan counterparts, Courts in South Africa continue to emphasize the importance of out of court resolution of intergovernmental disputes for the sake of uninterrupted public service delivery. In *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others,*[15] the South African Constitutional Court held that every measure possible should be considered to avert inter-governmental conflict or to resolve it without resorting to litigation. In addition to interruption of public service delivery, it was observed in *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others,*[16] that the cost of litigation on public resources is one of the main reasons as to why the law is insistent that intergovernmental disputes must exhaust all mechanism of ADR before resorting to judicial proceedings.

ADR is a combined term used for processes such as mediation, negotiation, arbitration, collaborative law and conciliation that parties can resolve disputes, with (or without) the help of an intermediary.[17] The main characteristics of ADR are voluntary participation in the negotiation process and the option of having a third party or no third party to facilitate the settlement process. In an ordinary Alternative Dispute Resolution process, the intermediary cannot impose a solution on the parties. Though the parties often reach a settlement with the aid of a neutral third party,

[14] *Minister of Health and Others v Treatment Action Campaign and Others and KwaZulu-Natal v Premier,* Kwazulu-Natal: In re (CCT15/02) [2002] ZACC 14; 2002 (10) BCLR 1028 (5 July 2002).
[15] [2014] ZACC 31.
[16] [2014] 4 All SA 67 (GP) (19 June 2014).
[17] J Lynch, 'ADR and Beyond: A Systems Approach to Conflict Management' (2011) 17(3) Negotiation Journal 213.

resolutions are not imposed on parties; yet the process is constitutive of the institutionalized court litigation structure. It must be acknowledged though, that the collaborative law procedure is a litigation variant that uses ADR practices and processes rather than collaborative being ADR methodology.[18]

The study employs the concept of ADR as its framework. ADR shares the same philosophy with the concept of peaceful resolution of conflicts. It is built upon the premise that conflicts are inevitable aspects of human interdependence however constituted or aspired.[19] It has a settled position that dysfunctional aspects of social conflicts are destructive and retrogressive. As such conflicts should be analysed, prevented, managed and resolved amicably through methods and processes that facilitate creative, peaceful and progressive outcomes of conflicts. Among others, it champions facilitation of communication, nonviolence, justice, trust, cooperation, problem-solving, absolute gains, empathy, reconciliation, avoidance policies, tolerance, multi-culturalism, and alternative lifestyles.[20] In order to fully understand the various mechanisms for resolution of intergovernmental disputes in Kenya, this study will explore the mechanisms employed in South Africa, Ethiopia, United Kingdom and Japan. The aim is to draw lessons that would aid in enhancing the framework that currently exist in Kenya.

### 1.1 Statement of Problem

Noteworthy, both the Constitution[21] and the Intergovernmental Relations Act[22] stipulate that intergovernmental disputes ought to be resolved through ADR mechanisms and only resort to judicial proceedings as a last option. This notwithstanding, the National Government and County Governments still opt for litigation which has resulted in a very high cost of litigation in time, monetary and relational terms. Court decisions on various intergovernmental disputes have reiterated the importance of adopting consultative and amicable processes in resolving these disputes as opposed to resorting to judicial procedures. Further, the Constitution calls on Governments at each level to make reasonable efforts to exhaust the alternative mechanisms before resorting to judicial processes. While this is the case, courts have established that the provision for

[18] ibid.
[19] Louis Kriesberg, '*Constructive Conflicts: From Escalation to Resolution'* (Lanham, MD: Rowman and Littlefield 1998).
[20] ibid.
[21] Article 189(3) & (4).
[22] Section 31.

dispute settlement mechanisms by National and County Governments does not oust the court jurisdiction to hear intergovernmental disputes or disproved any organ of Government powers vested in it under the Constitution, rather, gives the Governments an opportunity to resolve disputes amicably before turning to the court.

This study therefore seeks to examine the manner of resolution of intergovernmental disputes in Kenya. In so doing, it seeks to investigate the reasons behind the preference for litigation as opposed to ADR by National Government and County Governments in the resolution of intergovernmental disputes. While doing this, this paper will comprehensively examine intergovernmental cases that have so far been instituted in court in order to understand their nature and the manner in which they have been resolved. It will explore any challenges or successes that may result in litigation of intergovernmental disputes. It will compare this with the benefits or disadvantages of using ADR. Lessons from other jurisdictions will be employed for further analysis.

## 1.2 Statement of Objective

### 1.2.1 Overall Objective

The general objective of this study is to review the nature and causes of intergovernmental disputes, the dispute resolution mechanism favoured by both levels of Governments and the cost of dispute resolution in terms of money, relationships and time.

### 1.2.2 Specific objectives

Specifically, the study seeks to;

i) Assess the nature of intergovernmental disputes brought before the court in Kenya.
ii) Investigate the monetary cost of litigation of intergovernmental disputes in Kenya.
iii) Examine the effect litigation on the relationship between two governments after determination of a case.
iv) Investigate how much time it takes to determine an intergovernmental case in court.
v) Examine the proposed Alternative Dispute Resolution Regulations to determine their effectiveness once passed by Parliament.

### 1.3 Research Questions

This research will seek to answer the following questions;

i) What is the nature of intergovernmental disputes before Kenyan courts?
ii) What are the cost implications of using litigation to resolve intergovernmental disputes in Kenya?
iii) What kind of relationship do the two adversarial parties have once the dispute is resolved?
iv) How long, on average, does it take the court to pronounce itself on an intergovernmental case?
v) Will the proposed Alternative Dispute Resolution Regulations be effective in determining intergovernmental cases?

### 1.4 Hypotheses

This study is premised on the following hypotheses;

i) Utilizing Alternative Dispute Resolution as a means of conflict resolution between the two levels of Government significantly reduces the cost of litigation in relational, time and monetary terms.
ii) Litigation is not the ideal way for resolution of intergovernmental disputes since it is time wasting and costly.
iii) There is preference by County and National Governments for litigation over alternative means for resolving intergovernmental disputes in Kenya.

### 1.5 Justification of the Study

The formal legal system of Kenya is not restorative, rather punitive. The justice that it offers often leaves one party disgruntled with the outcome. Litigation has demonstrated to be costly and to waste a lot of time in resolution of intergovernmental disputes in Kenya. Litigation was not contemplated by the Constitution as the ideal means for resolving intergovernmental disputes in Kenya. It has however been widely employed, thus posing a threat to the constitutionally mandated way of resolving intergovernmental disputes, i.e. ADR. The usefulness or lack of ADR in resolution of intergovernmental disputes is examined in order to assess whether it is the ideal way for resolving such disputes. Particularly, this study will examine whether resolution of intergovernmental disputes through ADR will enable the National and County Governments to

improve their relational links, save on monetary costs and divert the same towards development of the nation and finally save on time.

## 1.6 Theoretical Framework

This study is premised on the utilitarian theory and the social contract theory. While both theories are pertinent to this research, the utilitarian theory is the most preferable one in guiding this particular paper. Pleasure, or happiness, is the only thing that has intrinsic value in this life as advocated by the philosophers of this theory. In Kenya, all sovereign power vests on the Kenyan people under the Constitution which they choose to delegate to their democratically elected representatives who they expect to have their best interest at heart and fight for their happiness.[23] It is therefore expected that the leadership at both the National and County Governments will act in the best interest of the Kenyan people, which in this instance is the adherence to the law and resolution of intergovernmental disputes in a cost effective manner. If this is accomplished then the greatest happiness of the biggest number of Kenyans, utilitarian theory, will be achieved. These theories are discussed further below.

### 1.6.1 Utilitarian theory

Utilitarian theory was propounded by philosophers such as David Hume, Jeremy Bentham and John Stuart Mill. Bentham propounds that an action is good if it promotes happiness for the greatest number.[24] The theory's three important principles are pleasure and happiness as having intrinsic value; actions are right if they promote happiness and wrong if the cause unhappiness; and the happiness of everyone counts equally.[25] It then follows in this particularly context that any action by the elected should be aimed at achieving the happiness of the electorate. County Governments were created by the Constitution of Kenya 2010, a document promulgated by the people of Kenya on 27th August 2010. The Kenyan people overwhelmingly voted for and decided that the Constitution is the supreme law in Kenya and therefore all persons and state organs are bound by it.[26] This very Constitution vest all sovereign power on the people of Kenya which can be exercised

[23] The Constitution of Kenya, Article 1(1) & (2).
[24] Jeremy Bentham, An Introduction to the Principles of Morals and Legislation' (1781) available at https://www.utilitarianism.com/jeremy-bentham/index.html; see also John Stuart Mill, 'Utilitarianism' (Jonathan Bennett 2017) available at https://www.earlymoderntexts.com/assets/pdfs/mill1863.pdf.
[25] ibid.
[26] The Constitution of Kenya, Article 2(1).

through 'democratically elected representatives'.[27] The County Governors are elected by the citizens and are given the mandate to act in the best interest of the Kenyan people. Upholding the Constitution is one of the key functions bestowed upon them. The Constitution expressly calls for resolution of intergovernmental disputes through ADR. This is the form that the Kenyan people consented to and expects Governors to abide by it. Any other form of dispute resolution deprives the Kenyan people of happiness. This is evident from the huge amounts of money that are spent in litigating these disputes. This robs the Kenyan citizens of the monies that were meant for development projects in other sectors of the economy that would further aid in the attainment of their happiness. It also adds to their tax burdens since tax is a major source of revenue in Kenya. Deciding on the form of resolution of intergovernmental disputes should therefore minimise any form of unhappiness that it is likely to cause to the Kenyan people.

### 1.6.2 Social Contract theory

The social contract theory is a form of agreement, hypothetical or actual, between the governed and rulers to act in accordance with the rights and duties assigned to each. Thomas Hobbes, John Locke and Jean-Jacques Rousseau were proponents of this theory.[28] Thomas Hobbes propounds that the citizenry surrenders their liberty to the sovereign who in return protects their lives. John Locke argued that protection by the sovereign extended to protection of private property. Where the sovereign failed to protect both the person and private property they would be overthrown. Rousseau argued that the sovereign obtains the consent to govern from the governed.[29] This theory therefore relates to this study as consent by both National and County leaders to lead and carry out their mandates is obtained, first, through the Kenyan people who vote them into power and second, through clearly set out laws for example the Constitution which is a document of the Kenyan people. The Kenyan leaders receive power from the Kenyan people on condition and as Locke says, that they protect the Kenyan people and their property. Property in this case extends to the money that is spent in litigation. Monies that would otherwise be protected in order to carry out other functions and to reduce the tax burden on the Kenyan people.

[27] The Constitution of Kenya, Article 1.
[28] The Editors of Encyclopedia Britannica, 'Social Contract' <https://www.britannica.com/topic/social-contract> accessed 6 August 2020.
[29] ibid.

## 1.7 Research Methodology

This study adopts a desk based form of research. This entails analysis of existing literature on intergovernmental disputes resolution. Particularly, this study will rely on Kenyan laws such as the Constitution of Kenya, 2010, the Intergovernmental Relations Act and proposed Alternative Dispute Resolution Regulations. The secondary sources of data that will be relied upon are books, journals, relevant articles, internet sources, magazines and newspapers, County and National Governments reports and other developments in the area. Kenyan case laws i.e. intergovernmental disputes that have been concluded and those on-going shall be explored since they are instrumental in this study. This study will further use legislation and case laws from other jurisdictions such as South Africa since it resolves intergovernmental disputes in a similar manner to Kenya. Any other relevant literature that sheds light on intergovernmental disputes resolution shall be used.

## 1.8 Literature Review

Conflict is an endemic phenomenon in human existence. At any particular time, Governments are involved in various forms and at different levels of conflictual interactions. Conflict can be defined as a state of affairs where two or more actors are involved in pursuit of what would appear to be incompatible interests. It is thus a struggle for scarce status, power and resources by adversaries who lay claim to these values.[30] While there exists diverse literature that distinctively speak to alternative dispute resolution mechanisms and decentralisation, hardly does the literature examine the relationship between them. Limited literature exists on resolution of intergovernmental disputes. Malan writes on 'intergovernmental relations in South Africa'.[31] Save for the jurisdictional differences, his study has many similarities with intergovernmental relations in Kenya. Noteworthy, Malan speaks more of the relations between the various Governments in South Africa and less of the manner of resolving any disputes between them. It briefly points out that South Africa has adopted alternative dispute resolution in the resolution of intergovernmental disputes as opposed to litigation. The relevance of Malan's paper to the case of Kenya will be pointed out in this study. Lessons can then be drawn from it in establishing best practices for resolution of intergovernmental disputes in Kenya.

[30] J Burton, *conflict resolution and prevention* (New York St Martins Press 1990).

[31] LP Malan, 'Intergovernmental Relations in South Africa' Paper submitted to the University of Pretoria, available at sea also LP Malan, 'Intergovernmental relations in South Africa: A revised policy approach to co-operative government' (2012) 5(3) School of Public Management and Administration, University of Pretoria 115-124.

Kibaya Laibuta writes on the place of ADR in intergovernmental disputes in Kenya.[32] His paper borders on the ADR framework for resolution of intergovernmental disputes in Kenya. He does not explore case laws. He also does not analyse the relationship between litigation and ADR in resolution of intergovernmental disputes in Kenya. His paper was also written in 2018, hence, it does not capture the most recent developments on the area. This study will therefore build on the discussions that Laibuta has put forth. In so doing, lessons from other jurisdictions shall be explored.

M.K Mbondenyi and J.O Ambani[33] examine the concept of conflict management in a devolved system of governance. Their research is premised on the ground that it is not uncommon for the National and County Governments to differ on the interpretation of laws, the extent of functions and powers or the use of natural resources. This argument is buttressed by Kauzya[34] who raises concerns on the issue of public participation, stating that devolution could result in entrenching disparities if the right policies are not implemented. This study contextualizes these pieces of literature to the case of Kenya. It will specifically examine the nature of intergovernmental disputes and the manner of their resolution.

Andrade's article on "Comparative Constitutional Law; Judicial Review" calls on Governments not to preoccupy themselves with litigation in their consideration of intergovernmental conflicts, except where such litigation is intended to get a clearer interpretation and understanding of legislation that will impact on the lives and well-being of the citizens.[35] This article informs the discussions on the effectiveness of litigation in the resolution of intergovernmental disputes in Kenya.

A report by KEPSA noted that intergovernmental ADR would be instrumental in enhancing the implementation of the 'BIG 4 Agenda'.[36] It notes that most intergovernmental disputes had been

[32] Kibaya Laibuta, 'The Place of ADR in Intergovernmental Disputes' Premier ADR Consultants (2018) <http://adrconsultants.law/2018/06/13/the-place-of-adr-in-intergovernmental-disputes/> accessed 5 August 2020.
[33]MK Mbondenyi & JO Ambani, 'The New Constitutional Law of Kenya: Principles, Government and Human Rights' (2013) 17 Law Africa.

[34]Kauzya John-Mary, 'Political Decentralization in Africa: Experiences of Uganda, Rwanda, And South Africa' (2007) Discussion Paper, New York.
[35] De Andrade, 'Comparative Constitutional Law: Judicial Review' (2001) available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/upjcl3&div=31&id=&page> accessed 10 October 2019.
[36] KEPSA, 'Intergovernmental Alternative Dispute Resolution Key in Enhancing Intergovernmental Relations for the Implementation of the "BIG 4" Agenda' (2018) <https://kepsa.or.ke/intergovernmental-alternative-dispute-

resolved through litigation, which process was costly and negatively affected the funding allocated to counties for development. It expressed its optimism of utilizing ADR in resolving intergovernmental disputes as being more advantageous. At the time the article was published, the Ministry of Devolution and ASAL were working on finalising the Intergovernmental Alternative Dispute Resolution Regulations.[37] This study will point out whether this regulation has been finalised and the impact, if any, it has had on intergovernmental resolution of disputes in Kenya. This study will also widen the scope to the benefits of ADR in resolution of intergovernmental disputes to both Governments and Kenyans.

Onyango's analyses of ADR in resolving intergovernmental disputes in Kenya is limited to ADR only and does not factor in litigation as a threat to ADR.[38] Since it is a 2017 paper, it does not take into account the most recent developments on the subject. This study builds on the arguments put forth in this paper. In conclusion, scholarly work heavily supports the use of ADR in resolution of intergovernmental disputes, with countries with devolved systems of governance asserting the importance of ADR in resolution of intergovernmental disputes. A comprehensive study has not been done in Kenya, this is the gap in literature which this study seeks to fill.

### 1.9 Scope of the Study

This study is limited in terms of scope to the manner of resolution of disputes between a County Government and National Government or between County Governments in Kenya. This specifically covers the National Government and 47 County Governments set out under the Constitution of Kenya. In relation to the County Governments, this study will not necessarily examine all the cases lodged by each of them, instead, it will focus only on those case laws that significantly relate or justify the hypotheses of this study. Where other jurisdictions are referred to, the same is done for purposes of drawing lessons only and not really as a comparative analysis.

### 1.10 Chapter Breakdown

*Chapter 1 – Introduction*

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resolution-key-in-enhancing-intergovernmental-relations-for-the-implementaiton-of-the-big-4-agenda/> accessed 5 August 2020.

[37] ibid.

[38] DK Onyango, ''Resolving Intergovernmental Disputes through Alternative Dispute Resolution in Kenya' <https://www.coursehero.com/file/44557969/APLLICATION-OF-ADR-IN-INTERGOVERNMENTAL-CONFLICT-RESOLUTIONdocx/> accessed 6 August 2020.

This chapter introduces the study by giving a background, problem statement and justification as to the importance of the study. It will set out the research objectives and questions, hypotheses, research methodology and limitations of the study. It will briefly identify and discuss applicable theories and literature that speak to intergovernmental resolution of disputes Kenya.

*Chapter 2 – Legal and Institutional Framework on Intergovernmental Relations Disputes*

This chapter will look at the legislative and institutional frameworks that govern intergovernmental disputes in Kenya. The discussions are necessary in order to understand their effectiveness and efficiency or lack of, to inform discussions in the subsequent chapters and importantly, to give recommendations on proper ways for resolution of any such disputes that might arise between and amongst them.

*Chapter 3 – Case review of the Current forms for Resolution of Intergovernmental Disputes in Kenya*

This chapter identifies and analyses specific intergovernmental disputes that have been resolved so far in Kenya. Be it by litigation or ADR. This is done so as to understand the nature and the decisions rendered. A review of the form of dispute resolution adopted is undertaken in order to decipher the best practice for resolution of intergovernmental disputes in Kenya.

*Chapter 4 –Lessons from other Jurisdictions on Intergovernmental Relations Dispute Resolution*

This chapter will examine the intergovernmental relations disputes resolutions mechanisms adopted in South Africa, Ethiopia, United Kingdom and Japan. It will then draw lessons from them, if any, for best practices in Kenya.

*Chapter 5 – Findings, Recommendations and Conclusion*

This chapter, gives the findings and recommendations on best practices for resolution of intergovernmental disputes in Kenya and concludes the paper.

# CHAPTER TWO

# LEGAL AND INSTITUTIONAL FRAMEWORK ON INTERGOVERNMENTAL RELATIONS DISPUTES IN KENYA

## 2.1 Introduction

What constitutes intergovernmental disputes is not expressly stated under either the Constitution of Kenya, 2010 (the Constitution), the Intergovernmental Relations Act or any other relevant law. It has however received judicial interpretations. The High Court in *County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & Another*,[39] defined an intergovernmental dispute as one that is "in relation to functions and exercise of powers between the different levels of Government". Such disputes arise from functions or powers assigned to the parties and agreements between parties. Onguto J. in *Isiolo County Assembly Service Board & another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another*,[40] held that intergovernmental disputes relate to the 'performance of functions and exercise of powers of each respective level of government'. He notes further that reference by the Intergovernmental Relations Act to 'agreement' gives an indication that commercial matters constitute intergovernmental disputes. Existing literature has also pointed out that such disputes include those relating to fiscal relations and fiscal resource allocation; relations relating to jurisdiction and legislation; intergovernmental service delivery of certain shared functions; investment programmes that are shared or guaranteed; intergovernmental administrative relations; County Government functions encroached by the National Government and public entities; undertakings jointly carried out between National and County Governments ; and emerging regional economic blocks related joint undertakings between County Governments .[41]

From the foregoing, and taking into consideration the National and County Government functions which are often competing and conflicting, a discussion on the manner of resolution of disputes that arise between them is necessary if not inevitable. This chapter therefore examines the legal and institutional frameworks for resolution of intergovernmental disputes in order to understand

[39] [2014] eKLR.
[40] [2016] eKLR.
[41] Kibaya Laibuta, 'The Place of ADR in Intergovernmental Disputes' Premier ADR Consultants (2018) <http://adrconsultants.law/2018/06/13/the-place-of-adr-in-intergovernmental-disputes/> accessed 5 August 2020.

their effectiveness and efficiency or lack of it, to inform discussions in the subsequent chapters and importantly, to give recommendations on proper ways for resolution of any such disputes that might arise between and amongst them. Generally, any such dispute resolution mechanism ought to be cost-effective, independent, and expeditious, protect the independence of the parties and its procedures and outcome ought to be of good quality.[42] To respond to these and other issues, this chapter is divided into two major sections, the first section examines the legal framework for resolution of intergovernmental relations disputes and the second sections explores the institutional framework for the same.

### 2.2 Legal framework for resolution of intergovernmental relations disputes

The devolved system of Government in Kenya is a creation of the Constitution.[43] It was created to see to it that national and local resources are shared equitably throughout Kenya, state organs and their functions and services are decentralised, the interest of minorities and marginalised communities are protected and promoted, allow for easy access of services throughout Kenya, foster National unity, enhance the participation of the Kenyan people in decisions affecting them and to enhance separation of powers and for check and balance.[44] Prior to their establishment under the Constitution of 2010, the devolved system of government was first negotiated in Kenya by the Kenya African National Union and the Kenyan African Democratic Union in the early 1960s following Kenya's attainment of independence. Devolution was at the time adopted to safeguard the interest of minority groups.[45] Soon thereafter however, the senate, regional governments and assemblies were dissolved. A centralised system of government was then re-adopted and retained until the current Constitution was promulgated on 27th August 2010. This chapter is therefore based on the legislation governing the disputes between the current 47 County Governments [46] and the National Government. The relevant laws under discussion in the subsequent subsections are the Constitution, the Intergovernmental Relations Act and the Public Finance Management Act.

[42] ibid.
[43] Article 6(1); see also Chapter 11.
[44] The Constitution of Kenya, 2010, Article 174.
[45] George Githinji, 'The History of Devolution in Kenya since Independence' (2020) <https://www.afrocave.com/history-of-devolution-in-kenya/> accessed 20 August, 2020.
[46] Outlined under the First Schedule of the Constitution of Kenya, 2010.

### 2.1.1 The Constitution of Kenya, 2010

The Constitution is the supreme law in Kenya.[47] It calls on the National and County Governments to resolve any intergovernmental disputes that may arise between and amongst them through alternative dispute resolution as provided for by a national legislation.[48] Alternative forms for resolution of intergovernmental disputes contemplated upon by the Constitution are negotiation, mediation and arbitration.[49] Other alternative forms of dispute resolution spelt out under the Constitution are reconciliation and traditional dispute resolution mechanism.[50]

The Constitution's call for amicable resolution of disputes was reaffirmed by Onguto J. in *Isiolo County Assembly Service Board & another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another,*[51] where he stated that "…the Constitution pursuant to Article 189(3) intended to have all disputes between the two levels of Government resolved in a less acrimonious or adversarial way. The Constitution has under this Article sought to promote the inter-dependence, consultation and cooperation between the two levels of government, rather than competition…"He goes further to say that "The Constitution clearly requires organs of State to avoid litigation and appears to empower courts to refer disputes back to the parties".[52]

The Constitution emphasises the importance of consultation and co-operation between the two levels of government. It specifically calls on the National and County Government to 'co-operate in the performance of functions and exercise of powers'.[53] They are also expected to be independent and to conduct any mutual relations through consultation and cooperation.[54]

### 2.1.2 The Intergovernmental Relations Act

To give effect to the constitutional imperative on formulation of a law to govern intergovernmental disputes in Kenya,[55] Parliament in 2012 enacted the Intergovernmental Relations Act (IGRA),[56] to set out a legal framework for "consultation and cooperation between the National and County

[47] Article 2(1).
[48] The Constitution of Kenya, 2010, Article 189(3) & (4).
[49] ibid specifically Article 4.
[50] Article 159(2)(c).
[51] [2016] eKLR.
[52] ibid.
[53] Article 189(2).
[54] The Constitution of Kenya, Article 6(2).
[55] The Constitution of Kenya, 2010, Article 200(1).
[56] No. 2 of 2012, assented on 27 February 2012.

Governments; amongst County Governments; and provides a mechanism for resolution of intergovernmental disputes".[57] It thus cover disputes arising between National and County Governments and amongst County Governments.[58] This Act took effect in 2013 when the final election results of the first general election conducted under the Constitution were announced.[59] This Act attempts to address the intractable and systemic disputes that often arise between and amongst different levels of government, arms of Government and other public institutions with a mandate to serve the people.[60] It expressly provides for a mechanism for the resolution of intergovernmental disputes that arise.[61] It outlines consultation and corporation between the National and County Governments and the need to minimize intergovernmental disputes as some of the principles of intergovernmental relations.[62] The IGRA expressly calls for resolution of intergovernmental disputes by judicial proceedings as a last resort mechanism which can only be employed where alternative forms for resolution of disputes have failed. Alternatively, a party can submit a dispute to arbitration.[63]

The IGRA calls on National and County Governments to amicably resolve any disputes that might arise between and amongst them.[64] They are further called upon to apply and exhaust alternative forms of disputes resolution before resorting to judicial proceedings.[65] The IGRA further calls on both National and County Governments to include, in any agreement entered into between or amongst them, a clause on the manner for resolution of disputes that might arise, which mechanism should be appropriate to the agreement.[66] In so doing, it is required to provide for judicial proceeding as the last resort while providing for an alternative form of resolution of the disputes.[67]

In the event that any agreement between National and County Governments or amongst County Governments fails to provide for a structure for resolution of disputes, the manner set out under

[57] See the Act, long title & section 3; See also The Star, 'Use of alternative dispute resolution mechanisms to implement devolution' <https://www.the-star.co.ke/news/2014/03/22/use-alternative-dispute-resolution-mechanisms-to-implement-devolution_c903309> accessed 27 December 2018.
[58] Intergovernmental Relations Act, section 30(1).
[59] See the requirement under the Intergovernmental Relations Act, section 1.
[60] ibid.
[61] Section 3(h) & (i).
[62] Section 4(h).
[63] Intergovernmental Relations Act, section 35.
[64] Intergovernmental Relations Act, section 31(a).
[65] ibid subsection b.
[66] Intergovernmental Relations Act, section 32(1)(a).
[67] ibid subsection b.

the IGRA applies.[68] Expressly, the IGRA calls on National and County Governments to 'make every reasonable effort and take all necessary steps to amicably resolve' disputes between them through direct negotiations with each other or by involving an intermediary prior to formally declaring the existence of a dispute.[69] It is only when negotiations fail that a party to a dispute is allowed to formally declare the existence of a dispute.[70] This is done by referring the dispute to the National and County Government Summit and Council of County Governors.[71] Laibuta however notes that these two institutions are not independent and impartial neutral third parties to resolve intergovernmental disputes because of the contractual relations that exist between the two systems of government.[72] It could as well be as a result of the structure of the two institutions.

Use of alternative forms of resolution of intergovernmental disputes was reiterated by the Hon. Learned Judges Mumbi and Onguto, JJ in t*he International Legal Consultancy Group &Another v Ministry of Health & 9 Others,*[73] where the court held that "after considering Article 189 (3) and (4) of the Constitution and Sections 10- 35 of the IGRA, 2012, it is apparent that all disputes between the two levels of government should be resolved through a clear process established specifically for the purpose by legislation, a process that emphasizes consultation and amicable resolution through processes such as arbitration rather than an adversarial court system." It was the view of the learned judges that the legislative intention was that judicial proceedings would only be resorted to once efforts at resolving the dispute in accordance with the IGR Act have failed.

In *Council of County Governors v Lake Basin Development Authority & 6 others,*[74] the learned Hon. Mativo J. noted that "it is by now trite that the Intergovernmental Relations Act, 2012, having been enacted pursuant to Article 189(4) of the Constitution, be understood purposively because it is umbilically linked to the Constitution. As such, an interpretation of the Constitution must promote the constitutional values, purposes and principles as it also seeks meaning for the provisions that promote devolution, access to services, good governance and amicable resolution of disputes between the levels of government".

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[68]Intergovernmental Relations Act, section 32(2).
[69] Section 33(1).
[70] Intergovernmental Relations Act, section 33(2)
[71] ibid.
[72] Kibaya Laibuta, 'The Place of ADR in Intergovernmental Disputes' Premier ADR Consultants (2018) <http://adrconsultants.law/2018/06/13/the-place-of-adr-in-intergovernmental-disputes/> accessed 5 August 2020.
[73] [2016] eKLR, Constitutional Petition 99 of 2015.
[74] [2017] eKLR, Constitutional Petition number 280 of 2017.

### 2.1.3 Public Finance Management Act

The Public Finance Management Act was enacted in 2012 to provide for 'effective management of public finances' by both the National and County Governments.[75] It provides for resolution of intergovernmental disputes relating to finances either under the supervision of the Joint Intergovernmental Technical Committee or the Intergovernmental Budget and Economic Council.[76]

### 2.1.4 The Intergovernmental Relations (Alternative Dispute Resolution) Regulations, 2018

The Intergovernmental Relations (Alternative Dispute Resolution) Regulations (ADR Regulations) was passed by the National and County Government Co-ordinating Summit (the Summit) in February, 2020. It applies to disputes between both National and County Governments, amongst County Governments and out of agreements between and amongst them.[77] It was agreed at the Summit that these ADR Regulations be introduced in parliament for deliberations and ultimate enactment as a legislation. This is yet to be actualised. As it currently exists, the ADR Regulations is a soft law, hence not binding. The ADR Regulations sets out the procedure for resolving intergovernmental disputes through ADR and the form of declaring intergovernmental disputes. Noteworthy, the overreaching aim of this ADR Regulations is to promote alternative forms for resolving intergovernmental disputes over judicial processes. The ADR Regulations are examined further below.

The objective of the ADR Regulations is to see to it that alternative forms of dispute resolution are first exhausted in intergovernmental disputes prior to instituting court proceedings.[78] It seeks to ensure that intergovernmental disputes are resolved effectively, efficiently and amicably. It further objectifies enhanced trust and good faith between the County and National Governments. It also promotes the constitutional mandate of cooperation and consultation between National and County Governments and amongst County Governments.[79] It calls on both National and County Governments to undertake all necessary measures to resolve an intergovernmental dispute through

[75] Act No. 18 of 2012.
[76] The Public Finance Management Act, sections 100 & 187.
[77] The Intergovernmental Relations (Alternative Dispute Resolution) Regulations, regulation 5.
[78] ibid regulation 3.
[79] ibid.

conciliation, consultation and negotiation prior to a declaration of a dispute.[80] Parties to an intergovernmental dispute can refer a dispute to mediation, arbitration and traditional dispute resolution mechanism.[81] The ADR Regulations calls on the National and County Governments to refer intergovernmental disputes that cannot be resolved through ADR to the Summit which shall attempt to resolve it in a meeting between the parties.[82] Thus, vide these Regulations, the procedural aspects for resolving intergovernmental disputes in Kenya are for the first time set out.

### 2.3 Institutional framework for intergovernmental relations disputes

The Intergovernmental Relations Act allows for the establishment the National and County Government Summit, the Council of County Governors and the Intergovernmental Relations Technical Committee which are responsible for facilitating the resolution of intergovernmental disputes between the National and County Governments and amongst the County Governments.[83] The courts are also mandated to hear and determine intergovernmental disputes but are only resorted to once alternative forms of resolution of disputes have been exhausted. The Public Finance Management Act allows for the creation of the Intergovernmental Budget and Economic Council which facilitate the resolution of intergovernmental disputes related to finance. Several sector working committees have also been set up which have amongst other mandates, resolution of intergovernmental disputes. These institutions form the basis for discussion in the subsequent sections of this chapter.

#### 2.3.1 The National and County Government Summit

The Intergovernmental Relations Act established the National and County Government Summit (the Summit) as the apex body in intergovernmental relations. [84] The president is the chairperson and in his absence the deputy president, and the forty-seven County Governors constitute its membership.[85] Among other mandates, the Summit provides for a forum for consultation and co-operation between National and County Governments.[86]

[80] The Intergovernmental Relations (Alternative Dispute Resolution) Regulations, regulation 6 & 7.
[81] ibid regulations 10, 11 & 12.
[82] ibid regulation 14.
[83] Section 3(c).
[84] Section 2 & 7.
[85] Intergovernmental Relations Act, section 7(2).
[86] ibid subsection 3.

The Summit is called upon to convene a meeting inviting the disputants to set out the exact issues in dispute and other material issues that are not necessarily in dispute within twenty-one days of receiving a formal communication of a dispute by any party to an intergovernmental dispute. Additionally, the disputants are necessitated to identify a mechanism for resolving disputes, other than judicial proceedings, which is most appropriate for their case. This entails mediation or arbitration.[87] Alternatively, the dispute resolution mechanism set out in an agreement or applicable law should be adopted.[88] The Summit further has powers to resolve any intergovernmental dispute that cannot be resolved by the Council of County Governors.[89] In so doing, it can recommend an appropriate course of action for the resolution of the dispute.[90]

### 2.3.2 The Council of County Governors

The Act further established the Council of County Governors (the Council) made up of governors from the forty-seven County Governments in Kenya. One of the Council's core mandate is to create a forum for resolution of disputes between the County Governments.[91] Like the Summit, the Council is mandated to convene a meeting between the disputants within twenty-one days of receiving a formal declaration of a dispute so as to understand the exact issues in disputes and other material facts that are not in dispute.[92] It is further mandated to guide the parties in identifying an alternative form of resolution of disputes, be it mediation, arbitration or other ADR form. Use of judicial proceedings to resolve such disputes is in express terms discouraged by the IGRA.[93] Any disputes that cannot be resolved by the Council are referred to the Summit.[94]

### 2.3.3 Intergovernmental Relations Technical Committee

The Intergovernmental Relations Technical Committee (IGRTC) was established by the Intergovernmental Relations Act[95] as a state corporation whose major function is to see to it that the functions of the Summit and the Council are carried out accordingly. It in the process facilitates

[87] Intergovernmental Relations Act, section 34(1).
[88] ibid subsection 2.
[89] Intergovernmental Relations Act, section 34(3).
[90] ibid.
[91] Intergovernmental Relations Act, section 20(1)(d).
[92] Intergovernmental Relations Act, section 34(1).
[93] ibid.
[94] ibid subsection 3.
[95] Sections 2 & 11.

the implementation of the decisions made by these bodies.[96] It further promotes consultation and co-operation between the National and County Governments. Importantly IGRTC facilitates amicable resolution of intergovernmental disputes.[97] It also implements all decisions by the Summit and Council including those relating to dispute resolution. Following a directive by H.E President Uhuru Kenyatta of July 2020 that all intergovernmental disputes pending in court be withdrawn, IGRTC offered to aid in their resolution outside court through alternative forms of dispute resolution.[98] As at July 2020, IGRTC had received seventeen intergovernmental disputes and had successfully facilitated friendly resolution of fifty-four disputes. It is further foreseeing the amicable resolution of thirteen on-going disputes through friendly mechanisms.[99] These demonstrates the important role played by IGRTC in resolution of intergovernmental disputes.

### 2.3.4 The Courts

While the Constitution and the Intergovernmental Relations Act do not oust the use of judicial proceedings in the resolution of intergovernmental disputes, it emphasizes that it should be used as a last resort.[100] This would then necessitate the exhaustion of alternative forms for resolution of disputes set out under the law, stipulated under an agreement or agreed upon by the disputants. This position was reaffirmed by the court in *Isiolo County Assembly Service Board & another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another*,[101] where the court observed that "there is no doubt that the Intergovernmental Relations Act provides an avenue as well as procedure for resolving disputes between the two levels of government. There is also no doubt that the Act does not oust the jurisdiction of the court. Indeed, and with a view to promoting the provisions of Article 189(3) of the Constitution, the Act expressly exhorts the two levels of Government to utilize and exhaust the avenues of dispute resolution provided under the Act before resorting to judicial proceedings. The court is deemed as the last resort."[102]

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[96] Intergovernmental Relations Technical Committee, 'About IGRTC' <https://igrtc.go.ke/about/> accessed 20 August 2020.
[97] The Mt. Kenya Times, 'Presidential Directive on Intergovernmental Disputes' <https://www.mtkenyatimes.co.ke/presidential-directive-on-intergovernmental-disputes/> accessed 20 August 2020.
[98] The Mt. Kenya Times, 'Presidential Directive on Intergovernmental Disputes' <https://www.mtkenyatimes.co.ke/presidential-directive-on-intergovernmental-disputes/> accessed 20 August 2020.
[99] ibid.
[100] Section 31.
[101] [2016] eKLR.
[102] ibid.

Use of courts in the resolution of intergovernmental disputes is highly discouraged for the reason that it is very costly and time consuming. This was set out by IGRTC in its 2017 report which showed the expenditure by various County Governments in the resolution of intergovernmental disputes in courts. These huge costs relates to court filing fees, advocates fees and party to party costs.[103] Such expenditures could be reduced through amicable resolution of disputes. Mativo J. in *Council of County Governors v Lake Basin Development Authority & 6 others*[104] on the jurisdiction of courts in intergovernmental disputes observed that:-

> I have no doubt that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of the Constitution, the Court is obligated to promote these modes of alternative dispute resolution. A Court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the Court and leave the parties to purse the alternative remedy. I have no doubt that the place of alternative dispute resolution is respected by the courts and this court is no exception.

Thus, parties to an intergovernmental dispute are mandated to exhaust all alternative mechanisms for resolution of disputes before resorting to judicial proceedings. This helps County Governments to minimize expenditure that would otherwise be used in litigation, which monies can be used to enhance other development projects within the County.

### 2.3.5 Intergovernmental Budget and Economic Council

The Public Finance Management Act allows for the creation of the Intergovernmental Budget and Economic Council which is chaired by the Deputy President.[105] One of its mandates includes the resolution of disputes that relates to finances between the National and County Governments. It also provides a forum for consultation and co-operation between the National and County Governments. The Public Finance Act calls on state organs and public entities to notify the Intergovernmental Budget and Economic Council of any financial problem that arise.[106]

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[103] The Mt. Kenya Times, 'Presidential Directive on Intergovernmental Disputes' <https://www.mtkenyatimes.co.ke/presidential-directive-on-intergovernmental-disputes/> accessed 20 August 2020.
[104] [2017] eKLR, Petition 280 of 2017.
[105] Section 187.
[106] Section 92(3).

### 2.3.6 Joint Intergovernmental Technical Committee

The Joint Intergovernmental Technical Committee is a creation of the Public Finance Management Act.[107] It is mandated to meet once in every three months to monitor the progress on resolution of County Governments finance related problems.[108]

## 2.4 Conclusion

In conclusion, this chapter has identified various legislative frameworks for resolution of intergovernmental disputes in Kenya, Notably, the provisions under the Constitution, the Intergovernmental Relations Act and the Public Finance Management Act have been extensively discussed. The ADR Regulations have also been explored. Several case laws that advance the arguments put forth have been selectively identified and discussed. This chapter has proceeded to identify and examine several institutions that are either directly or indirectly involved in the resolution of intergovernmental disputes. Noteworthy, institutions such as the National and County Government Summit, the Council of County Governors and the Intergovernmental Relations Technical Committee, the courts, the Intergovernmental Budget and Economic Council and Joint Intergovernmental Technical Committee have been examined. This chapter has extensively highlighted the emphasis by the law and courts on exhaustion of alternative forms of resolution of intergovernmental disputes and only use to judicial proceedings as a last resort.

The next chapter therefore proceeds to identify and analyse specific intergovernmental disputes that have been resolved so far in Kenya. Be it by litigation or ADR. This is done so as to understand the nature and the decisions rendered. A review of the form of dispute resolution adopted is undertaken in order to decipher the best practice for resolution of intergovernmental disputes in Kenya.

[107] Section 100(1).
[108] The Public Finance Management Act, section 100(3).

## CHAPTER THREE

## CASE REVIEW OF THE CURRENT FORMS FOR RESOLUTION OF INTERGOVERNMENTAL DISPUTES IN KENYA

### 3.1 Introduction

The first chapter introduced the various intergovernmental dispute resolution mechanisms in Kenya. Chapter two set out and comprehensively discussed the legal and institutional framework for resolution of intergovernmental disputes in Kenya. This chapter proceeds to examine some of the intergovernmental disputes that have been resolved so far in Kenya, both through litigation and alternative dispute mechanisms. Noteworthy, the Constitution of Kenya[109] (the Constitution) and the Intergovernmental Relations Act[110] call for resolution of intergovernmental disputes primarily through alternative disputes resolution and as a last resort, litigation. This notwithstanding, several intergovernmental disputes have in the first instance been instituted in courts. Many of such cases, as shall be espoused later in this chapter, have been referred by the courts to alternative forms of disputes resolution. There have also been calls in the recent past for Counties to resort to amicable ways of resolving disputes as opposed to going for litigation. This is deemed necessary in order to cut on litigation costs and time spent on litigation.

As has been stated previously, intergovernmental disputes arise between a National and County Governments or amongst County Governments. Such disputes relate to the functions and exercise of powers between them as set out under the Constitution and relevant Kenyan laws.[111] The Intergovernmental Relations Technical Committee (IGRTC) has successfully resolved fifty-four intergovernmental disputes through alternative dispute resolution mechanism.[112] There are about thirteen intergovernmental disputes that are currently being resolved through alternative forms of resolution of disputes.[113] IGRTC observed that as at February 2020, over twenty-three

[109] The Constitution of Kenya, 2010.
[110] No. 2 of 2012, Laws of Kenya.
[111] *County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & Another*, [2014] eKLR.
[112] The Mt. Kenya Times, 'Presidential Directive on Intergovernmental Disputes' <https://www.mtkenyatimes.co.ke/presidential-directive-on-intergovernmental-disputes/> accessed 13 September 2020.
[113] The Star, 'Counties urged to avoid courts, take up alternative disputes resolution' <https://www.the-star.co.ke/counties/nairobi/2020-09-02-counties-urged-to-avoid-courts-take-up-alternative-disputes-resolution/> accessed 13 September 2020.

intergovernmental disputes between National and County Governments and amongst County Governments in Kenya had been declared to it. Out of these, eight had been successfully mediated by the IGRTC and Memorandums of Understanding (MOU) signed to that effect; two were awaiting the signing of MOUs; eleven were in the resolution stage and two were pending in court.[114]

While the Constitution mentions resolution of intergovernmental disputes between Governments,[115] various individuals and institutions have instituted related cases in court, where they are either suing a County Government or are seeking the court's interpretation of the legislative functions of the National and County Governments. One such case is *Okiya Omtatah Okoiti & another v. Attorney General, Transition Authority, Council of County Governors & others.*[116] The case sought the interpretation of the words "National referral health facilities" and "County health facilities as set out under Section 23, Part 1 and Section 2, Part 2 of the Fourth Schedule to the Constitution. The Court was urged to specifically consider the significance of Article 189 of the Constitution to these provisions. Article 189 speaks of the National and County Governments' performance of their functions through cooperation and resolution of any dispute that might arise through ADR mechanism.[117] The Court observed that there was no dispute between the County and National Governments as regards these constitutional provisions.

While this chapter hopes to comprehensively address all intergovernmental disputes in Kenya, for want of space and time, it shall in identify specific cases that point to the various ways through which intergovernmental disputes have been resolved. This chapter will therefore be divided into five sections; first, intergovernmental disputes that have been resolved through ligation shall be identified and briefly discussed. Secondly, intergovernmental disputes that have been resolved through Alternative Dispute Resolution (ADR) mechanisms shall be identified and discussed. Thirdly, intergovernmental disputes that have been referred from court to ADR shall be explored. The fourth section will briefly analyse key issues discussed in this chapter. The fifth section shall then conclude chapter.

[114] Intergovernmental Relations Technical Committee Status Report as at February 2020, Unreported.
[115] See Article 189 (3).
[116] 2014 eKLR, Nairobi High Court Petition No. 593 of 2013.
[117] See The Constitution of Kenya, Article 189 (1), (3) & (4).

### 3.2 Intergovernmental disputes that have been or are being resolved through litigation in Kenya

This section identifies and examines specific intergovernmental disputes that have been resolved so far or are pending in Kenyan courts. The purpose is to understand how the courts have addressed each dispute raised before them. This section kicks off by exploring the Court of Appeal decision in *Murang'a County Public Service Board v. Grace N Makori & 178 others,*[118] where the court while taking note of the requirement for resolution of intergovernmental disputes through amicable means, adjudged that the County Government of Murang'a was bound by the National Government policy as it had adopted and implemented it with regards to other health workers. The case relates to health workers who were employed by the National Government and later seconded to Murang'a County. The County Government was thereafter required to absorb the health workers into permanent and pensionable employment terms but it failed to absorb two Respondents. The court observed that failure to absorb the two Respondents was discriminatory. The Appellant was therefore ordered to absorb the Respondents on permanent and pensionable terms. The Appeal was dismissed with costs.

The court has interpreted that intergovernmental disputes should exist between and amongst 'Governments'. It held that a dispute lodged by the individuals, though touching on County Governments, on violation of human rights would fall outside the scope on an intergovernmental dispute. This was the court's finding in *County Government of Isiolo & 10 others v Cabinet Secretary, Ministry of Interior and Coordination of National Government& 3 others*.[119] This case was lodged in court by residents of Isiolo County on a boundary dispute between Isiolo and Meru Counties. They specifically alleged encroachment by Meru residents on their grazing lands and exclusion on discussions affecting the land. They therefore sought for protection of their right to property. A notice of preliminary objection was raised on grounds of jurisdiction for want of resolution of the dispute through amicable mechanisms. The court observed that the dispute was not an intergovernmental dispute contemplated upon under Article 189(3) of the Constitution of Kenya and Sections 31-35 of the Intergovernmental Relations Act but was instead covered under Article 188 of the Constitution as it raised an issue on boundary delineation. Further, that though the disputes concern County Governments, the petition is based on Articles 22 and 47 of the

[118] (2015) eKLR (Civil Appeal No. 37 of 2015).
[119] [2017] eKLR (Constitutional Petition 511 of 2015).

Constitution. The court therefore disallowed the preliminary objection and held that it had jurisdiction to entertain the matter. The court further held that the dispute could not be subjected to mediation due to issues of illegality that had been raised. The acts of the National Government on the Meru/Isiolo boundary dispute was declared to be illegal, irregular and null and void. Parliament was ordered to set up an Independent Commission to hear and determine the boundary dispute.

It was held in *Isiolo County Assembly Service Board & another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another*,[120] that an intergovernmental dispute should concern the two levels of Government and not individuals on one hand and County or National Government on the other hand. Onguto J expressly noted: -

> The dispute must be between the two levels of government. It must not be between one or the other on the other hand and an individual or person on the other hand. A dispute between a person or state officer in his individual capacity seeking to achieve his own interest or rights would not equate an intergovernmental dispute. A dispute between two or more County Governments would however equate an intergovernmental dispute…

The court in *County Government of Uasin Gishu v Attorney General & 20 others*,[121] also dismissed a notice of preliminary objection on grounds that the orders sought were against individuals and not a National or County government. For this reason, the court held that the case did not satisfy all the elements of an intergovernmental dispute and could therefore not be referred to either of the forms of ADR for resolving disputes amicably.

The court has also observed that disputes that raise human rights issues, regardless of whether or not it pertains a National or County government, cannot be settled through amicable means. This was the finding of Wakiaga J in *County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & Another*.[122] The dispute related to contravention of Article 27 of the Constitution on form one selection by the County Government of Nyeri. On this basis therefore the court held that it had jurisdiction over the intergovernmental dispute.

[120] [2016] eKLR (Petition 370 of 2015).
[121] [2019] eKLR (Environment and Land Case 246 of 2016).
[122] [2014] eKLR (Petition 3 of 2014).

The Supreme Court in *Council of Governors & 47 others v Attorney General & 6 others*,[123] observed that it is vested with jurisdiction to give advisory opinions on a County Government related issue where it is in the interest of the public to do so. This dispute was largely on revenue sharing between the National and forty-seven County Governments.

It is against this background that this research finds that disputes that concern National and County Governments, provided that they are not instituted by or against individuals, do not raise human rights issues and those not seeking the courts advisory opinions, are characterised as intergovernmental disputes that are subject to determination primarily through amicable means.

### 3.3 Intergovernmental disputes that have been or are being resolved through alternative dispute resolution in Kenya

Alternative dispute resolution remains the primary means for resolving intergovernmental disputes in Kenya.[124] Alternative forms of resolution of intergovernmental disputes are important in saving on the costs that would otherwise be spent on litigation as well as save on time. It also helps in maintaining relationships between the National and County Governments.

The IGRTC has overseen and is overseeing amicable resolution of intergovernmental disputes in Kenya.[125] Notable cases that IGRTC has successfully mediated and overseen the execution of MOUs by the disputants are the disputes involving the County Government of West Pokot and the Ministry of Interior and National Coordination; County Government of Siaya (Agricultural Training Centre) and the Ministry of Interior and National Coordination; Ministry of Agriculture, Livestock and Fisheries (Food and Fisheries Authority) and County Governments ; County Government of Nairobi City and Ministry of Agriculture, Livestock and Fisheries; County Government of Baringo and the Ministry of Agriculture, Livestock and Fisheries; County Government of West Pokot and the Ministry of Agriculture, Livestock and Fisheries; County Government of Garissa and the Ministry of Devolution and Arid & Semi-Arid Lands on construction of masonry perimeter fence, double steel gate and a pedestrian gate at the Garissa Referral Hospital; and Ministry of Agriculture, Livestock and Fisheries and the following County

[123] [2019] eKLR (Reference 3 of 2019).
[124] The Constitution of Kenya, 2010, Article 189(3); see also the Intergovernmental Relations Act, sections 31-35.
[125] Intergovernmental Relations Technical Committee Status Report as at February 2020, Unreported.

Governments .[126] While a few other cases are awaiting execution of MOUs, amicable resolution of several others are currently ongoing.

Several other intergovernmental disputes are awaiting determination by IGRTC. Some of these cases were referred to IGRTC by County Governments, National Government and the courts.[127] A review of these cases demonstrated that a majority of them relate to land, be it on use of land by County Governments or issues relating to disputed ownership of land by National and County Governments. Many others also relate to revenue allocation. [128]There are instances where the IGRTC is called upon by the court to lodge a mediation report following an amicable resolution of an intergovernmental dispute. An example is the case involving the Council of Governors and the Attorney General and others where the petitioners were challenging the flow of grants as provided in the Division of Revenue Act of 2016. The parties could not reach a settlement and therefore agreed to refer the dispute to court. A mediation report to that effect was lodged with the court by IGRTC.

Through a directive dated 21st July 2020, the President of Kenya urged counties to avoid courts and instead resort to amicable ways for resolution of intergovernmental disputes.[129] He gave counties a seven day ultimatum to withdraw all intergovernmental disputes pending in court. Such a move is necessary in order to cut on court and advocates fees. It is also instrumental in maintaining good relationships between and amongst National and County Governments.

There are also several cases that are currently being resolved through amicable means. The case involving Nairobi City County is one such notable case that is being resolved through amicable means by the Intergovernmental Relations Technical Committee.[130] The dispute arose following transfer of city County functions by Governor Mike Mbuvi Sonko to the National government.[131]

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[126] ibid.
[127] IGRTC, 'Intergovernmental Disputes Matrix' Unreported.
[128] The IGRTC noted in September 2020 that a majority of the 17 ADR ongoing cases being handled by it relate to revenue.
[129] The Mt. Kenya Times, 'Presidential Directive on Intergovernmental Disputes' <https://www.mtkenyatimes.co.ke/presidential-directive-on-intergovernmental-disputes/> accessed 13 September 2020.
[130] The Star, 'Intergovernmental relations committee to resolve Sonko-Badi wrangles' <https://www.the-star.co.ke/counties/nairobi/2020-08-06-intergovernmental-relations-committee-to-resolve-sonko-badi-wrangles/> accessed 15 September 2020.
[131] Kenyans, 'Sonko Surrenders Duties to National Govt at State House' <https://www.kenyans.co.ke/news/50121-sonko-surrenders-duties-National -govt-state-house> accessed 13 September 2020.

The deed of transfer of functions saw a transfer of various County of Nairobi functions such as health services, transport services, County planning and development and public works, utilities and ancillary services. This transfer of functions was not peculiar as it is provided for under the Constitution of Kenya.[132] The transfer of functions deed created tension between the Governor and the Nairobi Metropolitan Service Director General, Major Mohamed Badi who is mandated to carry out the transferred County Government functions. Governor Sonko lodged a complaint with devolution Cabinet Secretary on the ground that he did not have a chance to read through the document prior to its execution. Consultations are currently ongoing.

The Nairobi City County Government has also been previously applauded for referring an intergovernmental dispute on road closure to IGRTC. In this instance, the Department of Defence had closed Mihango-Kayole road to the public resulting in protests. Following the successful amicable resolution of the dispute, the road was reopened.[133] An MOU has also been entered into between Nairobi City County and the National Government following a dispute over meat inspection revenue.[134]

It is against this backdrop that this chapter finds that amicable resolution of intergovernmental disputes has in many instances proved successful. Where parties could not agree, a report is lodged with the court for further directions on their determination. Amicable resolution of intergovernmental dispute is without doubt a better way for resolving such disputes which both the National and forty-seven County Governments should fully implement.

### 3.4 Intergovernmental disputes that have been referred to alternative dispute resolution from litigation in Kenya

While several intergovernmental disputes have been instituted in court by either County Governments or National government, the courts have in most instances ruled that the constitutionally mandated way for resolving such disputes have not been followed and hence,

[132] Article 187. Notably, Article 187 provides that "A function or power of Government at one level may be transferred to a Government at the other level by agreement between the Governments if— (a) the function or power would be more effectively performed or exercised by the receiving government; and (b) the transfer of the function or power is not prohibited by the legislation under which it is to be performed or exercised.

[133] The Star, 'Counties urged to avoid courts, take up alternative disputes resolution' <https://www.the-star.co.ke/counties/nairobi/2020-09-02-counties-urged-to-avoid-courts-take-up-alternative-disputes-resolution/> accessed 13 September 2020.

[134] ibid.

referred litigants to resolve the disputes through alternative forms of resolution of disputes. Notably, such cases fail for jurisdiction reasons since the court is only empowered to resolve intergovernmental disputes as a last resort. Parties to a dispute are therefore called upon to exhaust amicable mechanisms first prior to lodging a dispute in court. Such disputes inform the discussions in this section. Such specific notable cases are therefore discussed below.

In *International Legal Consultancy Group & another v Ministry of Health & 9 others*,[135] the court was urged to consider the constitutionality of a National Government decision to procure certain medical equipment to be used in health facilities throughout the country. The Petitioners specifically sought to know whether this act by the National Government usurped the functions of County Governments as set out under the Constitution. The court in its findings dismissed the petition for the reason that the petitioners had not given alternative forms of dispute resolution a chance.

In *Council of County Governors v Cabinet Secretary Land, Housing & Urban Development & another*,[136] the National Government did not consult the County Governments while dissolving and reconstituting the Land Controls Board. It was the contention of the Council of County Governors that County Government functions as set out under the Constitution of Kenya include the 'planning function which entails management of agricultural land transfers within the counties' and was therefore a devolved function. A notice of preliminary objection on grounds of jurisdiction was filed. The court while noting that an intergovernmental dispute existed, found that it ought to have been subjected to alternative dispute resolution mechanisms prior to institution of judicial proceedings. It therefore gave the parties one year to resolve the dispute amicably. The court went further to interpret what constitutes an intergovernmental dispute. In so doing, it observed that an intergovernmental dispute ought to be legal in nature, should concern a matter of law, fact or denial of another, it should involve various state organs on their exercise of constitutional functions or powers and lastly, the dispute should not be subject to exceptions. Borrowing from the Intergovernmental Relations Frameworks Act 2005 of South Africa, the court defined intergovernmental disputes as: -

[135] [2016] eKLR (High Court Petition no. 99 of 2015).
[136] [2017] eKLR (Environment and Suit 598 of 2016).

> …..a dispute between different Governments or between organs of state from different Governments concerning a matter (a.) arising from (i) Statutory powers or function assigned to any of the parties; (ii) an agreement between the parties regarding the implementation of a statutory power or function and (b.) which is justiciable in a court of law and include any dispute between parties regarding a related matter……[137]

While the Constitution and the Intergovernmental Regulations Act require that intergovernmental disputes be resolved through amicable means, it does not expressly set out the procedure for so doing. The court has observed that two consultative meetings are not adequate for an amicable resolution of a dispute. This was the case in *County Government of Migori & 4 others v Privatization Commission of Kenya & another*,[138] In this case, the parties sought to nullify Gazette Notice No. 8739 of 2009 on privatization of five sugar-milling companies. The National Government subsequently invited expression of interest for purchase of their shares. Two consultative meetings had been conducted in which it was agreed that the matter be referred to the Intergovernmental Relations Technical Committee. It was further agreed that a Multi-Agency Committee be established to facilitate consultations on identified issues. On this basis, the court opined that the two consultative meetings did not exhaust amicable resolution mechanism for the dispute and hence, the court proceedings were premature.

There are instances where the court has referred the parties to an intergovernmental dispute to amicable mechanisms with the requirement that a report be lodged with the court. Where amicable mechanisms have been partially implemented the court has referred back the parties to conclude amicable means for resolving disputes prior to instituting judicial proceedings. In *Council of Governors v Attorney General & 5 others*,[139] the court referred the parties to alternative forms of resolutions of disputes following a notice of preliminary objection lodged by the 2nd Respondent on grounds of jurisdiction. The dispute was referred to mediation where eighteen meetings were convened by the mediator, the Intergovernmental Relations Technical Committee, in efforts to resolve the issues raised. A mediation report was thereafter lodged with the court which showed that some but not all of the issues had been resolved. The Mediation Report was however unsatisfactory as there was consensus on some of the issues to be referred to the Intergovernmental

[137] ibid.
[138] [2017] eKLR (High Court Petition No. 187 of 2016).
[139] [2018] eKLR (High Court Petition No. 252 of 2016).

Budget and Economic Council or the Summit for determination. The court therefore made an order referring the unresolved issues to these bodies.

While the High court is vested with unlimited original jurisdiction in civil matters and jurisdiction to hear questions on interpretation of any constitutional provision, it lacks power to entertain intergovernmental disputes of whichever nature.[140] This was the finding of the High Court in *County Government of Mombasa v National Treasury & another; Intergovernmental Relations & Technical Committee (Interested Party)*.[141] The court observed that ……. "Although, there appears to be substantive questions presented to the High Court for interpretation of the Constitution, the Constitution itself prescribes for harmonious resolution of any disputes that may arise between the Governments ……"

Therefore, intergovernmental disputes ought to be referred to ADR in the first instance and to litigation as a last resort. Discussions in this Chapter have demonstrated that courts down their tools the moment they are faced with an intergovernmental dispute that has not been referred to ADR in the first instance.

### 3.5 Analysis

As you have observed from the discussions put forth in this chapter, resolution of intergovernmental disputes is entirely through amicable mechanisms in the first instance. It has been pointed out severally that the Constitution and the Intergovernmental Relations Act, as the relevant laws on intergovernmental disputes, require that such disputes be resolved through amicable means. The courts take judicial notice of this once a case is instituted. As you have noted, most of the intergovernmental disputes that have been lodged in court have failed for jurisdiction reasons. The courts have also been called upon to define what constitutes an 'intergovernmental dispute' in order to understand the mandate of the court and relevance of amicable resolution of dispute mechanisms to it. Notably, the courts have insisted that disputes that concern the National and County Governments and not individuals on one hand and National or County Government on the other hand constitute an intergovernmental dispute. The courts have further noted that any constitutional interpretation that forms part of an intergovernmental dispute is outside the powers

[140] The Constitution of Kenya, 2010, Article 165(3).
[141] [2020] eKLR (Constitutional Petition 4 of 2020).

of the court to determine. Hence they are, like other issues raised, subject to amicable mechanisms for resolution of such disputes first prior to being lodged in court.

The Court has however ruled that an intergovernmental dispute that raises issues that relate to human rights violations falls outside the scope of intergovernmental disputes and could thus be determined by the court. Though not clearly set out, parties are mandated to exhaust all forms of amicable resolution of disputes. Two consultative meetings were for example considered non-exhaustive since all the issues were not fully discussed. Courts have played a critical role in overseeing amicable resolution of disputes where judicial proceedings have been instituted. This is majorly through giving parties timelines for amicable resolution of disputes and for requiring them to lodge the outcomes arrived at with the court.

It has been shown that the Supreme Court has power to give an advisory opinion on an intergovernmental related issue where it is in the best interest of the public to do so. In all other instances the provisions of the Constitution take precedence. Notably, alternative dispute resolution mechanism is the primary means for resolution of intergovernmental disputes in Kenya. Judicial proceedings are only employed as a last resort.

### 3.6 Conclusion

This chapter has identified and explored specific intergovernmental disputes that have been or are currently being resolved through litigation, alternative disputes resolution mechanisms and disputes that have been referred from litigation to amicable mechanisms. This chapter has demonstrated that alternative forms for resolution of intergovernmental disputes ranks higher than judicial proceedings. This chapter has discussed that intergovernmental disputes concern National and County Governments and does not include disputes brought by or against County Governments by individuals. The courts also take judicial notice of the provisions of the Constitution of Kenya and the Intergovernmental Relations Act on resolution of intergovernmental disputes in the first instance through amicable means. This chapter has shown instances where intergovernmental disputes have failed in court for want of jurisdiction. It has discussed various intergovernmental disputes that have been successfully resolved through amicable means. Lastly, emphasis has been made on the need to adhere to the legal provisions calling on National and County Governments to resolve intergovernmental disputes through amicable mechanisms.

The next chapter will examine the intergovernmental relations disputes resolutions mechanisms adopted in South Africa, Ethiopia, United Kingdom and Japan. It will then draw lessons from them, if any, for best practices in Kenya.

# CHAPTER FOUR

# LESSONS FROM OTHER JURISDICTIONS ON INTERGOVERNMENTAL RELATIONS DISPUTE RESOLUTION

## 4.1 Introduction

The previous chapter has identified and extensively discussed specific intergovernmental disputes that have been resolved either through judicial processes, amicable process or through transfer of the disputes from litigation to judicial processes in Kenya. The legal and institutional framework, as well as the overall structure for resolution of intergovernmental disputes in Kenya has also been extensively explored. This chapter therefore proceeds to explore the structures for resolution of intergovernmental disputes in other countries with the intention of drawing lessons for Kenya. Particularly jurisdictions that would be explored are South Africa, Ethiopia, United Kingdom and Japan. These countries are specifically explored due to their advancement in intergovernmental dispute resolution processes, their geography as they represent three different continents and due to their devolved or federal systems of governance. South Africa's structure for resolving intergovernmental disputes is very relevant in Kenya. In many instances, it appears that Kenya borrowed this particular practice from South Africa. The only notable difference is on the structures of government, where in Kenya it is between the National and County Governments while in South Africa it is between the national, provisional and local governments. Ethiopia, United Kingdom and Japan equally offer very good lessons for resolution of intergovernmental disputes. The United Kingdom has had a devolved structure of governance for decades, while Japan has 47 Prefectures that mirror the 47 County Governments of Kenya. It is important to note that Kenya is at its infancy stage in resolution of intergovernmental dispute following the constitution of County Governments in 2013 after the first general election under the Constitution of Kenya, 2010 (the Constitution). It therefore has a lot to learn from these jurisdictions.

It is against this backdrop that this chapter proceeds to examine the intergovernmental dispute resolution mechanisms of the identified jurisdictions in three parts. The second section explores the intergovernmental relations disputes resolution mechanisms in South Africa, Ethiopia, United Kingdom and Japan. The third section analyses and draws lessons for Kenya. The fourth and final section concludes the chapter.

## 4.2 Intergovernmental relations dispute resolution mechanisms in South Africa, Ethiopia, United Kingdom and Japan

### 4.2.1 South Africa

South Africa is at an advanced stage in intergovernmental disputes resolution. It was formally recognised in 1996 under the Constitution of South Africa.[142] Notably, the Government of South Africa is composed of the National, provincial and local Governments (organs of government).[143] The South African Constitution calls all organs of Governments to respect each other's functions and to 'in mutual trust and good faith interact and co-operate with one another.'[144] Intergovernmental dispute resolution mechanisms are addressed under Chapter 3 of the South African Constitution. The Constitution of South Africa calls on state organs involved in intergovernmental disputes to resolve them through the provided means and procedures and to only resort to judicial proceedings upon exhausting all other remedies.[145] This constitutional requirement was reaffirmed by the court in *National Gambling Board v Premier of KwaZulu-Natal*,[146] which particularly called on state organs to amicably resolve disputes between them. In *Re Certification of the Constitution of the Republic of South*,[147] the court urged state organs to resolve intergovernmental disputes through political mechanisms and not adversarial mechanisms. Where such procedures and mechanisms are not exhausted prior to instituting the dispute in court, the court is mandated to refer the parties back to exhaust them.[148] It can be inferred that intergovernmental disputes that are referred to mediation would be heard by the Mediation Committee.[149] The South African Constitution called for enactment of a law to provide for the

[142] As adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly.
[143] See The Constitution of the Republic of South Africa, 1996, section 238; see also the South Africa Intergovernmental Relations Framework Act, Preamble & Section 1.
[144] LP Malan, 'Intergovernmental Relations in South Africa' Paper submitted to the University of Pretoria, available at https://repository.up.ac.za/bitstream/handle/2263/26679/01chapter1-2.pdf?sequence=2.
[145] The Constitution of the Republic of South Africa, 1996, section 41(3).
[146] 2002 (2) BCLR 156 (CC).
[147] 1996 4 SA 744 (CC).
[148] ibid, section 41(4).
[149] The Constitution of the Republic of South Africa, 1996, section 78; see LP Malan, 'Intergovernmental Relations in South Africa' Paper submitted to the University of Pretoria, available at https://repository.up.ac.za/bitstream/handle/2263/26679/01chapter1-2.pdf?sequence=2.

structures, institutions, processes and mechanisms for resolution of intergovernmental disputes.[150] This saw the formulation of the Intergovernmental Relations Framework Act in 2005.[151]

The Intergovernmental Relations Framework Act was enacted to 'provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes'. Whereas the Kenyan Intergovernmental Relations Act does not define what constitutes an intergovernmental dispute, the South African Act expressly defines it as a dispute between the three governments or their organs of state which arise out of a function assigned to it by law or agreement entered into between the parties. Such disputes ought to be justified in a court of law.[152] This definition has through case law been incorporated in Kenya.[153] Chapter four of the Act sets out the procedure for settling intergovernmental disputes in South Africa. Notably, the procedure set out excludes specific intergovernmental disputes whose procedure for resettlement is set out in other national legislation.[154] This is not the case in Kenya since the Kenyan Intergovernmental Relations Act applies to intergovernmental disputes between the National Government and County Governments and amongst County Governments.[155]

The South African Act calls on all state organs to avoid intergovernmental disputes while performing their functions.[156] It further expressly calls on them to amicably settle any disputes that may arise between them.[157] It mandates states organs who are entering formal agreements between themselves to include a clause on dispute settlement.[158] Intergovernmental institutions are also called upon to adopt rules that govern their internal operations which have procedures for resolving intergovernmental disputes.[159] The Act calls on state organs to, with the assistance of an intermediary, attempt to negotiate intergovernmental disputes that may arise between them.[160] Once an intergovernmental dispute has been declared, parties are called upon to consider any other

[150] Section 41(2).
[151] Act No. 13 of 2005, Republic of South Africa Government Gazette No. 27898, Available at: https://www.gov.za/sites/default/files/gcis_document/201409/a13-051.pdf
[152] South Africa Intergovernmental Relations Framework Act, section 1(1).
[153] See the case of *Council of County Governors v Cabinet Secretary Land, Housing & Urban Development & another*, [2017] eKLR (Environment and Suit 598 of 2016).
[154] South Africa Intergovernmental Relations Framework Act, section 39(1)(a).
[155] Kenya Intergovernmental Relations Act, section 30.
[156] Section 40(1)(a).
[157] Section 40(1)(b).
[158] Section 40(2).
[159] Section 33(1)(g).
[160] Section 41(2).

mechanism other than by way of judicial proceedings to resolve the disputes. The mechanism could either be set out under the law or by agreement between the parties.[161] This is equally the case in the Kenyan context.[162] The South African Minister for Provisional and Local Government is also empowered to convene a meeting for resolution of intergovernmental dispute involving a national organ of state, provinces or provincial organs and between organs of state from the different governments.[163] Importantly, intergovernmental disputes cannot be settled by judicial means unless it is declared as a formal intergovernmental dispute and cannot be settled through any other means resorted to or agreed upon.[164] This would basically mean that, as in the Kenyan context, judicial mechanism for resolution of intergovernmental disputes in South Africa can only be resorted to as a last resort. Noteworthy, negotiation reports are privileged and cannot be relied upon in judicial proceedings.[165]

South Africa also has in place guidelines for effective management of intergovernmental disputes (the Guidelines).[166] These Guidelines assist the three Governments in appropriate management of conflicts between them.[167] It further gives effect to the constitutional requirement that resolution of intergovernmental disputes through litigation be avoided and instead resolved amicably.[168] The Guidelines speaks of mediation, conciliation and arbitration as alternative forms to litigation for resolving intergovernmental disputes.[169] In addition to this, the Guidelines set out a comprehensive structure for avoidance of intergovernmental disputes[170] and the best practices for conflict management.[171] It calls on organs of state to include dispute resolution clauses in agreements, contracts, understandings and protocols between them.[172]

[161] South Africa Intergovernmental Relations Framework Act, section 42(1)(b).
[162] Kenya Intergovernmental Relations Act, section 34.
[163] South Africa Intergovernmental Relations Framework Act, section 42(3).
[164] ibid, section 45(1)
[165] ibid, subsection 2.
[166] Intergovernmental Dispute Prevention and Settlement Practice Guide: Guidelines for Effective Conflict Management, Gazette Notice No. 491 of 2007, dated 27 April 2007, available at https://www.gov.za/sites/default/files/gcis_document/201409/29845.pdf.
[167] The Guidelines, Part 1, paragraph 1.
[168] The Guidelines, Part 1, paragraph 2.
[169] The Guidelines, Part 2, paragraph 2.
[170] Part 3.
[171] The Guidelines, Part 2, paragraph 3.
[172] The Guidelines, Part 4, paragraph 1.1.

The Guidelines set out the steps for resolution of intergovernmental disputes as follows: [173] first identify the dispute; secondly, negotiate the dispute in good faith either directly or through an intermediary; thirdly, where negotiations fail, formally declare the dispute; fourthly, convene a meeting between the parties. Where a meeting is not convened, parties are asked to approach the Minister for Provisional and Local Government to assist in convening the meeting; fifthly, parties ought to identify issues and a dispute settlement mechanism. The mechanism could either be set out by law or by agreement. At this stage, preliminary decisions are made. Where no dispute settlement mechanism exists, parties are asked to identify ADR processes like conciliation, mediation and arbitration; sixth, parties to an intergovernmental dispute are called upon to identify and designate the role of a facilitator. The facilitator's mandate is to identify the issues in dispute and to aid in resolving them. The terms of reference of the facilitator can be determined by the parties; seventh, parties are called upon to participate in the dispute resolution process in good faith; eight, if need be, parties can request for the assistance of the Minister for Provisional and Local Government in the dispute resolution process; nine, is the implementation of agreement. The Dispute Settlement Manager is mandated to oversee the implementation process.[174] Where these processes fail, parties can then move to court. State organs are in the process mandated to substantiate that the dispute settlement requirements have been complied with.[175] These processes ought to be considered in the case of Kenya since they do not exist in the current intergovernmental dispute resolution framework.

From the foregoing, it is evident that South Africa has a comprehensive structure for resolution of intergovernmental disputes which Kenya can borrow from as shall be espoused further in the subsequent section of this chapter.

### 4.2.2 Ethiopia

Ethiopia is yet another African country whose structure of governance is federated. The Constitution of the Federal Republic of Ethiopia (the Constitution of Ethiopia)[176] creates a federal and democratic structure of state.[177] This structure of state is composed of states 'delimited based

[173] The Guidelines, Part 5.
[174] ibid.
[175] The Guidelines, Part 6.
[176] Adopted 8 December 1994, available at https://www.wipo.int/edocs/lexdocs/laws/en/et/et007en.pdf.
[177] Article 1.

on language, settlement patterns, identity and consent of the people'.[178] Specifically, nine member states are recognised by the Constitution of Ethiopia.[179] The organs of states in Ethiopia are composed of organs within the federal government and member states.[180] Intergovernmental relations regulates the performance of functions by the federal Government and member state. It takes into consideration the manner in which they cooperate and communicate with each other. It speaks of the need by these organs of state to consult, collaborate and coordinate with each other.[181]

With the existence of the two levels of government in Ethiopia, intergovernmental disputes are inevitable.[182] There are no elaborate institutional and legislative framework for resolution of intergovernmental disputes that might arise. The Constitution of Ethiopia however contemplated cross border disputes. It expressly provides for settlement of state border disputes by way of agreement by the affected member states.[183] Where no agreement is arrived at by the member states, the House of the Federation is tasked with resolving the dispute in accordance with the dispute settlement mechanism and procedures identified by the concerned member states.[184] Any such decision ought to be made within a period of two years.[185] It is therefore the mandate of the House of Federation to resolve disputes that might arise between member states.[186] The House of Federation is constituted by representatives of nations, Nationalities and peoples who are elected by state councils.[187] The structure for resolving intergovernmental disputes in Ethiopia is thus political in nature. The mandate of the House of Federation extends to organizing forums that allow parties to an intergovernmental dispute to "negotiate and resolve the disputes amicably".[188]

[178] The Constitution of Ethiopia, Article 46.
[179] ibid, Article 47(1).
[180] The Constitution of Ethiopia, Article 50(1).
[181] Nigussie Afesha, 'The Federal-state Intergovernmental Relationship in Ethiopia: Institutional Framework and its Implication on State Autonomy' DOI http://dx.doi.org/10.4314/mlr.v9i2; see generally Assefa Fiseha, 'The System of Intergovernmental Relations (IGR) in Ethiopia: In Search of Institutions and Guidelines' Intergovernmental Relations (2009).
[182] Habtamu Birhanu & Zelalem Kebu, 'Inter-Federal-Regional Conflict Resolution Mechanisms in Ethiopian Federacy: A Comparative Appraisal on the Legal and Institutional Frameworks' 2019 (10(5) Beijing Law Review 1374-1393, DOI: 10.4236/blr.2019.105074.
[183] Article 48(1).
[184] ibid; see also Article 62(6).
[185] The Constitution of Ethiopia, Article 48(2).
[186] Nigussie Afesha, 'The Federal-state Intergovernmental Relationship in Ethiopia: Institutional Framework and its Implication on State Autonomy' DOI http://dx.doi.org/10.4314/mlr.v9i2.4.
[187] The Constitution of Ethiopia, Article 61.
[188] Nigussie Afesha, 'The Federal-state Intergovernmental Relationship in Ethiopia: Institutional Framework and its Implication on State Autonomy' DOI http://dx.doi.org/10.4314/mlr.v9i2.4.

Ethiopia's Ministry of Federal Affairs is also in charge of intergovernmental relations. It is considered to be the 'focal point in organizing intergovernmental relations'. It is empowered to oversee the resolution of disputes that might arise between regional states.[189] These structures for resolution of intergovernmental disputes in Ethiopia are considered to be weak. There are no provisions under the Constitution of Ethiopia or any other law that provides for the mechanisms for resolving federal government related disputes. Thus federal-regional disputes are not legislated on.[190] That notwithstanding, the House of Federation is tasked with resolving constitutional disputes that may arise between federal and regional states. This power has been interpreted to include intergovernmental disputes between them. It is further believed to extend to non-constitutional disputes.[191] On this basis, the House of Federation can mediate and arbitrate constitutional and non-constitutional intergovernmental disputes in Ethiopia.

Resolution of intergovernmental disputes in Ethiopia is not as elaborate as that of South Africa but its emphasis of determination of disputes in accordance with the agreement of the parties is indicative of resolution of the disputes through friendly means. Nowhere is it mentioned under the Constitution or any other law that such disputes could be resolved by way of judicial proceedings. One key take home point in the case of Ethiopia is that a dispute resolution mechanism agreed upon by the parties takes precedence over any other means for resolving such disputes. Ethiopia's case is therefore ideal in demonstrating the great steps that Kenya has made towards establishing an elaborate framework for resolution of intergovernmental disputes.

### 4.2.3 United Kingdom

In the United Kingdom (UK) the system of Government is devolved by the central Government to County Governments consisting of Wales, Scotland and Northern Ireland. In 2001, a Memorandum of Understanding (MOU) was entered into between the UK central Government and devolved administrations setting out the manner in which they could work together on central

[189] Proclamation No. 691/2010, Article 14(1)(b).
[190] Habtamu Birhanu & Zelalem Kebu, 'Inter-Federal-Regional Conflict Resolution Mechanisms in Ethiopian Federacy: A Comparative Appraisal on the Legal and Institutional Frameworks' 2019 (10(5) Beijing Law Review 1374-1393, DOI: 10.4236/blr.2019.105074.
[191] Habtamu Birhanu & Zelalem Kebu, 'Inter-Federal-Regional Conflict Resolution Mechanisms in Ethiopian Federacy: A Comparative Appraisal on the Legal and Institutional Frameworks' 2019 (10(5) Beijing Law Review 1374-1393, DOI: 10.4236/blr.2019.105074.

issues, dispute resolution mechanisms and established the Joint Ministerial Committee (JMC).[192] The MOU further set out the procedures for avoiding intergovernmental disputes.[193] The JMC was tasked to handle devolved government matters that intrude on the central government matters, and vice versa. It is also responsible for considering disputes that may arise between the two levels of government.[194] Under the Protocol for Avoidance and Resolution of Disputes,[195] both the central and devolved governments committed to work together and in consultation with each other and other relevant bodies in case of a disagreement. The 2001 MOU was revised in 2009 through the introduction of provisions on 'dispute avoidance and resolution'.[196] It called on the two levels of government to resolve any differences that might arise between them 'informally and at a working level'. Where this was not possible, the JMC was to be notified of the dispute. During the resolution of the disputes the parties were asked to formally commit towards reaching a settlement. The JMC intergovernmental dispute resolution process would entail convening a meeting between officials from the administrators involved in the dispute who would then identify the issues to be resolved. Other administrators would also be informed of the dispute.

The current MOU in place was agreed upon in 2012.[197] It is not a legal document and is therefore not binding between the parties.[198] The MOU speaks to the commitment to good communication, consultation and to cooperate with each other by the two levels of government.[199] The MOU reiterates JMC's role to determine disputes that might arise between the two levels of government.[200] The MOU encourages the disputing parties to resolve disputes through bilateral means and good offices.[201] Where this cannot be achieved the dispute is to be referred to JMC.[202]

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[192] See 'Protocol for Avoidance and Resolution of Disputes' The 2001 Memorandum of Understanding, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/62121/avoidance-resolution.pdf.
[193] ibid.
[194] ibid.
[195] Agreed upon in 2010.
[196] Protocol for Avoidance and Resolution of Disputes, Preamble and Context.
[197] Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee, Presented to Parliament by Command of Her Majesty and presented to the Scottish Parliament and the Northern Ireland Assembly and laid before the National Assembly for Wales (October 2013), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf.
[198] ibid, Part 1, paragraph 2.
[199] ibid, paragraphs 4 & 8.
[200] Paragraph 24.
[201] Paragraph 26.
[202] ibid.

An agreement arrived at will be recorded in "an agreement resolving the dispute" or "agreement that no resolution was reached".[203] The JMC is the final deciding body of intergovernmental disputes referred to it, unless it is decided through a plenary meeting for the dispute to be remitted to the ministerial-level for consideration.[204] Part A3 of the MOU outlines the procedures for avoiding and resolving disputes. The Territorial Secretary of State is also tasked with facilitating good working relations between the two Governments and foreseeing amicable resolution of disputes that might arise.[205] Officials in Departments in question between the two levels of Government are called upon to settle matters covered under the Concordat on Financial Assistance to Industry of the MOU.[206] The decision making processes of the JMC has been criticised by the devolved governments for the reason that a UK Government minister chairs the disputes panel thus raising doubt on the fairness of the entire process.[207]

Thus in the UK, intergovernmental disputes are first resolved through bilateral means by the officials of the concerned Governments. Where no settlement is arrived at, the parties can in the second instance refer the dispute to the 'First Minister and the Secretary of State for Foreign and Commonwealth' who will resolve the dispute under JMC framework.[208] The JMC is then the final deciding body. This is a lesson which Kenya can draw from, for instance, by making the Intergovernmental Relations Technical Committee the final deciding body of intergovernmental disputes in order to minimize the number of cases that are being referred to judicial processes. It is also necessary to come up with a political mechanism for their resolution as most of the disputes are political in nature. The courts can then be given limited powers to either review or appeal the decision in exceptional circumstances.

### 4.2.4 Japan

Local Government authorities in Japan were established in 1947 pursuant to the Constitution.[209] It gives local public entities autonomy as well as the right to manage their affairs, property, and

[203] Part A3.14.
[204] Part A3.14e.
[205] Part A3.7.
[206] Part C18.
[207] Nicola McEwen, Michael Kenny, Jack Sheldon & Coree Brown Swan, 'Intergovernmental Relations in the UK: Time for a Radical Overhaul?' (2020) 91(3) The Political Quarterly 632-640.
[208] Part D1.7 of the MOU.
[209] The Constitution of Japan, promulgated on November 3, 1946, Took effect on May 3, 1947.

administration and to formulate law applicable to them.[210] The local Government is recognised as part of Japan's system of governance. In 1947, the Local Autonomy Act of Japan was also adopted. The Act speaks of prefectural and municipal tiers of local authorities. Local authorities have the authority to reject laws applicable exclusively that are passed by the central government.[211] Local Governments participate in the affairs of National Government and in some instances challenges the decisions of National Governments. They participate for example through comments on matters of National policy, being heard before implementation of policies, and comment on National advisory councils.[212] The Local Autonomy Act was amended in 1999. The amended Act allowed for the creation of the Committee for Settling National-Local Disputes whose key mandate was to resolve disputes that would arise between the National and local Governments. In 2000, the Omnibus Decentralization Act was implemented following its establishment in 1999. It allowed for the creation of the Central and Local Government Dispute Management Council whose mandate is to arbitrate disputes between National and Local Governments. These institutions are therefore instrumental in the resolution of intergovernmental disputes in Japan. Evidently, existing legislation does not adequately provide for the mechanisms and processes for resolution of intergovernmental disputes in Japan.

### 4.3 Analysis and lessons for Kenya

The preceding section of this chapter has identified and explored the intergovernmental dispute resolution mechanisms in South Africa, Ethiopia, United Kingdom and Japan. Evidently, South Africa has an elaborate structure for resolution of intergovernmental disputes. Under its structure, emphasis is placed on processes and mechanisms for resolving intergovernmental disputes based on the agreement between the parties, provision by law, protocol or other understanding between the parties. Resolution of intergovernmental disputes by means alternative to the courts is recognised under the Constitution of South Africa and other relevant laws in almost similar terms as those of Kenya. South Africa does not, as is the case in Kenya, expressly provide for resolution

[210] See Chapter VII, Articles 92-95; see also Ken Victor Leonard Hijino, 'Intergovernmental Relations in Japan: Local Government Participation in National Policy-Making' in: Farazmand A. (eds) Global Encyclopedia of Public Administration, Public Policy, and Governance. Springer, Cham. https://doi.org/10.1007/978-3-319-31816-5_3508-1.

[211] The Constitution of Japan, Article 95.

[212] Ken Victor Leonard Hijino, 'Intergovernmental Relations in Japan: Local Government Participation in National Policy-Making' in: Farazmand A. (eds) Global Encyclopedia of Public Administration, Public Policy, and Governance. Springer, Cham. https://doi.org/10.1007/978-3-319-31816-5_3508-1.

of disputes through amicable means and litigation as a last resort. An inference can however be made. South Africa has comprehensively outlined the procedure for resolving intergovernmental disputes. This is certainly one lesson which Kenya ought to learn from the South African system. The comprehensive structure for avoiding disputes can also be borrowed by Kenya.

In the case of Ethiopia, the fact that a dispute resolution mechanism agreed upon by the parties takes precedence over any other mechanism is worth consideration. The emphasis on parties to always provide for a dispute resolution mechanism in any agreement between them is also important.

In the United Kingdom, one great lesson is the finality of JMC decisions. This aids in limiting the number of cases that end up in court. Kenya could therefore empower already existing institutions such as the Intergovernmental Relations Technical Committee with this mandate.

Lessons that Kenya can draw from the Japanese context is the need to create institutions mandated specifically to resolve intergovernmental disputes. While the Intergovernmental Relations Technical Committee exists, parties are not compelled to submit disputes to it. Its mandate is also not limited to intergovernmental dispute resolution.

### 4.4 Conclusion

In conclusion, this chapter has explored the structures for resolving intergovernmental disputes in South Africa, Ethiopia, United Kingdom and Japan. Of all these countries examined, it is evident that South Africa has the most comprehensive structure for resolving intergovernmental disputes. While Kenya has borrowed some techniques from the South African structure, more lessons need to be drawn, particularly, on the procedures for resolving the disputes and on the ways for avoiding and resolving disputes. This chapter has also discussed the various procedures and mechanisms for resolving intergovernmental dispute as is the case in Ethiopia that the various levels of Governments ought to agree on. It has established that decisions made by JMC in the UK are final and institutions need to be empowered to decide intergovernmental disputes as is the case in Japan.

The next chapter, which is the final chapter, gives the findings and recommendations on best practices for resolution of intergovernmental disputes in Kenya and concludes the paper.

# CHAPTER FIVE

# FINDINGS, CONCLUSION AND RECOMMENDATIONS

## 5.1 Findings

This research paper has extensively examined the procedures and mechanisms for resolution of intergovernmental disputes in Kenya. It has examined the nature of intergovernmental disputes in Kenya, the legal and institutional framework for resolving these disputes, various specific cases that have been either resolved or are undergoing resolutions in Kenya and has examined the structures employed by other countries in order to draw lessons from Kenya. Chapter One introduced the paper by briefly analysing intergovernmental disputes in Kenya and the various methods for resolving them. It hypothesised that litigation is not the ideal way for resolving intergovernmental disputes in Kenya. It explored the utilitarian and social contract theories as the being relevant to the study. It proceeded to analyse various existing literatures on the subject and concluded by giving a road map of the study.

Chapter two identified various legislative frameworks for resolution of intergovernmental disputes in Kenya. Notably, the provisions under the Constitution, the Intergovernmental Relations Act and the Public Finance Management Act have been extensively discussed. The proposed ADR Regulations were also reviewed. Several case laws that advanced the arguments put forth were selectively identified and discussed. This chapter proceeded to identify and examine several institutions that are either directly or indirectly involved in the resolution of intergovernmental disputes. Noteworthy, institutions such as the National and County Government Co-ordinating Summit, the Council of County Governors, the Intergovernmental Relations Technical Committee, the courts, the Intergovernmental Budget and Economic Council and Joint Intergovernmental Technical Committee were reviewed extensively. This chapter extensively highlighted the emphasis by the law and courts on exhaustion of alternative forms of resolution of intergovernmental disputes and only use to judicial proceedings as a last resort.

Chapter three identified and explored specific intergovernmental disputes that have been or are currently being resolved through litigation, alternative disputes resolution mechanisms and disputes that have been referred from litigation to amicable mechanisms. This chapter demonstrated that alternative forms for resolution of intergovernmental disputes rank higher than

judicial proceedings. This chapter further discussed the intergovernmental disputes concern National and County Governments and does not include disputes brought by or against County Governments by individuals. The courts also take judicial notice of the provisions of the Constitution of Kenya and the Intergovernmental Relations Act on resolution of intergovernmental disputes in the first instance through amicable means. This chapter showed instances where intergovernmental disputes have failed in court for want of jurisdiction. It discussed various intergovernmental disputes that have been successfully resolved through amicable means. Lastly, emphasis has been placed on the need to adhere to the legal provisions calling on National and County Governments to resolve intergovernmental disputes through cordial mechanisms.

Chapter four explored the structures for resolving intergovernmental disputes in South Africa, Ethiopia, United Kingdom and Japan. Out of the countries examined, it is evident that South Africa has the most comprehensive structure for resolving intergovernmental disputes. While Kenya has borrowed some of the techniques from the South African structure, more lessons need to be drawn, particularly, on the procedures for resolving the disputes, which are very elaborate in the case of South Africa, and on the ways for avoiding and resolving intergovernmental disputes. This chapter also discussed how the various levels of governments ought to agree on the procedure and mechanism for resolving intergovernmental dispute as is the case in Ethiopia. It looked at the fact that decisions made by the Joint Ministerial Committee in the United Kingdom are final. It has pointed out that Kenya could borrow from this by empowering and building the capacity of an already existing institution to hear and determine intergovernmental disputes with finality. This is also in line with the procedures and mechanisms employed in Japan. This chapter gives recommendations and concludes the study.

Arising from the foregoing, it is evident that the questions of this research have been adequately answered. Noteworthy, the research has extensively examined the nature of intergovernmental disputes before Kenyan courts and described these disputes as those that are legal in nature, concern a matter of law, fact or denial of another, should involve various state organs on their exercise of constitutional functions or powers and should not be subject to exceptions. The paper has discussed that due to reference of intergovernmental disputes to litigation instead of ADR, a lot of tax payers' money have been lost. The study has observed that as opposed to ADR which preserves good relations between the national and county governments, litigation creates tense

relationships between the two levels of governments. Moreover, unlike ADR mechanisms that are time conscious in the resolution of intergovernmental disputes, litigation takes longer to resolve the disputes. Lastly, there is no doubt that the proposed Alternative Dispute Resolution Regulations will be effective in determining intergovernmental cases. Thus, this research has satisfactorily met its research objectives.

This study further proved its hypotheses that utilizing ADR as a means of conflict resolution between the two levels of Government significantly reduces the cost of litigation in relational, time and monetary terms. It also proved that litigation is not the ideal way for resolution of intergovernmental disputes since they are time wasting and costly. Lastly, this research demonstrated that there is preference by County and National Governments for litigation over alternative means for resolving intergovernmental disputes in Kenya.

## 5.2 Recommendations

Following the extensive discussions that have been put forth in the previous chapters of this study, this chapter has several recommendations to give: namely, need to set out elaborate procedures for resolution of intergovernmental disputes; need to empower an institution to hear and determine intergovernmental disputes; and the need for a clear provision of the law as to what constitute intergovernmental disputes. These recommendations can be accomplished in the short term, medium term and long term. These are discussed further below.

### 5.2.1 Medium and Long Term Recommendations

#### 5.2.1.1 Administrative Reforms by the Legislature

In the Kenyan context, there are no elaborate procedures for resolving intergovernmental disputes. The Constitution and the Intergovernmental Relations Act only call on parties to an intergovernmental dispute to resolve them through amicable means and to formally declare a dispute to either the National and County Government Coordinating Summit, Council of County Governors or any other intergovernmental structure where no amicable settlement is reached.[213] Parties to a dispute are also called upon to settle intergovernmental disputes through means agreed

[213] See Intergovernmental Relations Act No. 2 of 2012, section 33(2); see also The Constitution of Kenya, 2010, Article 189.

upon under an Agreement or as set out by law.[214] There are no clear processes for complying with these legal requirements. Kenya has a lot to learn from other jurisdictions like South Africa which has clearly set out a step by step process for resolving intergovernmental disputes. This is briefly provided for under the Intergovernmental Relations Framework Act of South Africa[215] and extensively under the Intergovernmental Dispute Prevention and Settlement Practice Guide: Guidelines for Effective Conflict Management[216] (discussed extensively under Chapter four of this study). The Constitution of Ethiopia mandates the House of the Federation to resolve intergovernmental disputes within a period of two years.[217] No such time limitation is provided for in Kenya. A subsidiary legislation or an amendment to the Intergovernmental Relations Act in order to reflect this recommendation would suffice in filling the gaps on processes that currently exist in Kenya. This is a mandate of parliament which can be achieved in the medium or long term.

#### 5.2.1.2 Legislative Reforms by Parliament

Both the Constitution of Kenya and the Intergovernmental Relations Act do not define what constitute 'intergovernmental disputes'. Though Kenya has incorporated the South African definition under case law, it is yet to be legislated upon.[218] There is therefore need to contextualise the South African definition in order to reflect the actual intergovernmental disputes applicable to Kenya. This is a mandate that ought to be carried out by the Kenyan Parliament. The Judiciary can also play a key role in formulating this definition should Parliament be hesitant to do so.

### 5.2.2 Short Term Recommendations

#### 5.2.2.1 Institutional Reforms

While the Intergovernmental Relations Act allows for the creation of the National and County Government Coordinating Summit,[219] the Council of County Governors[220] and the Intergovernmental Relations Technical Committee,[221] the mandates of these institutions are

[214] ibid.
[215] Long title of the Act.
[216] Gazette Notice No. 491 of 2007, dated 27 April 2007.
[217] Article 48(2).
[218] See the case of *Isiolo County Assembly Service Board & another v Principal Secretary (Devolution) Ministry of Devolution and Planning & another,* [2016] eKLR.
[219] Section 2 & 7.
[220] Section 20(1)(d).
[221] Sections 2 & 11.

limited to providing forums for consultation and co-operation between the National and County Governments, overseeing the implementations made and facilitating amicable resolution of intergovernmental disputes.[222] There is no elaborate procedure for the performance of these functions by the aforementioned institutions, hence, parties to a dispute are not compelled to submit their disputes to them. In Ethiopia, the House of the Federation is empowered to resolve intergovernmental disputes that might arise.[223] In the United Kingdom, the Joint Ministerial Committee is tasked with overseeing the resolution of intergovernmental disputes and the decisions arrived at by the Committee are final. In Japan, the Central and Local Government Dispute Management Council and the Committee for Settling National-Local Disputes are responsible for resolving intergovernmental disputes. Drawing from these, Kenya ought to empower an institution to aid parties in determining intergovernmental disputes with finality. The institution can then formulate laws setting out the procedures and available mechanisms for resolving intergovernmental disputes. The courts or any other institution can then be given limited powers to hear appeals or to review the decisions made. This is the mandate of parliament which can be carried out in a short term.

### 5.3 Conclusion

In conclusion, this research paper has extensively discussed the procedures and mechanisms for resolving intergovernmental disputes in Kenya. It has been pointed out that alternative dispute resolution is the recommended mechanism for resolving intergovernmental disputes in Kenya. The Constitution of Kenya and the Intergovernmental Relations Act emphasise that resolution of intergovernmental disputes through judicial proceedings can only be used as a last resort. Where parties have instituted intergovernmental disputes with the court in the first instance, the courts have referred the parties to exhaust available amicable mechanisms. This study has shown that intergovernmental disputes cover those that are instituted either by the National and County Governments or their representatives in their official capacities. Courts have construed that disputes lodged by or against individuals on the one hand and a County Government on the other do not constitute an intergovernmental dispute. This paper has identified and drawn lessons from

[222] See generally the Intergovernmental Relations Act of Kenya.
[223] Constitution of Ethiopia, Article 62(6).

other jurisdictions for Kenya to emulate in order to improve on its current legislative and institutional framework for resolving intergovernmental disputes.

Thus, this paper has justified the hypothesis that alternative dispute resolution mechanism is the ideal way for resolving intergovernmental disputes in the first instance in Kenya. This is because alternative dispute resolution mechanism reduces the cost of litigation in relational, time and monetary terms. It has been justified that litigation is not the ideal way for resolution of intergovernmental disputes since they are time wasting and costly. Where disputes have in the first instance been instituted in court, the courts have referred the parties to resolve them through amicable means. Lastly, it has been justified that though alternative dispute resolution is the ideal way for resolving intergovernmental disputes, there have over the years, been preference by County and National Governments for litigation. This is evident by the number of such disputes that have been instituted in court.

**BIBLIOGRAPHY**


Books

Bercovitch J, *Resolving international conflict: the theory and practice of international mediation* (Lynne Rienner. Boulder 2006).

Burton J, *Conflict resolution and prevention* (New York St Martin's Press 1990).

Bentham J, An Introduction to the Principles of Morals and Legislation' (1781) available at https://www.utilitarianism.com/jeremy-bentham/index.html.

Mill JS, 'Utilitarianism' (Jonathan Bennett 2017) available at https://www.earlymoderntexts.com/assets/pdfs/mill1863.pdf.

Kriesberg L, *Constructive Conflicts: From Escalation to Resolution* (Lanham, MD: Rowman and Littlefield 1998).

Book Chapter

Hijino KVL, 'Intergovernmental Relations in Japan: Local Government Participation in National Policy-Making' in: Farazmand A. (eds) Global Encyclopedia of Public Administration, Public Policy, and Governance. Springer, Cham. https://doi.org/10.1007/978-3-319-31816-5_3508-1.

Journal Articles

Afesha N, 'The Federal-state Intergovernmental Relationship in Ethiopia: Institutional Framework and its Implication on State Autonomy' DOI http://dx.doi.org/10.4314/mlr.v9i2.

Birhanu H & Kebu Z, 'Inter-Federal-Regional Conflict Resolution Mechanisms in Ethiopian Federacy: A Comparative Appraisal on the Legal and Institutional Frameworks' 2019 (10(5) Beijing Law Review 1374-1393, DOI: 10.4236/blr.2019.105074.

De Andrade GF, 'Comparative Constitutional Law: Judicial Review' (2001) available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/upjcl3&div=31&id=&page> accessed 10 October 2019.

Fiseha A, 'The System of Intergovernmental Relations (IGR) in Ethiopia: In Search of Institutions and Guidelines' Intergovernmental Relations (2009).

Klare EK, 'Legal Culture and Transformative Constitutionalism' (1998) 14 South African Journal on Human Rights.

Laibuta K, 'The Place of ADR in Intergovernmental Disputes' Premier ADR Consultants (2018) <http://adrconsultants.law/2018/06/13/the-place-of-adr-in-intergovernmental-disputes/> accessed 5 August 2020.

Lynch J, 'ADR and Beyond: A Systems Approach to Conflict Management' (2011) 17(3) Negotiation Journal 213.

Malan LP, 'Intergovernmental relations in South Africa: A revised policy approach to co-operative government' (2012) 5(3) School of Public Management and Administration, University of Pretoria 115-124.

Mbondenyi MK & Ambani JO, 'The New Constitutional Law of Kenya: Principles, Government and Human Rights' (2013) 17 Law Africa.

McEwen N, Kenny M, Sheldon J & Swan CB, 'Intergovernmental Relations in the UK: Time for a Radical Overhaul?' (2020) 91(3) The Political Quarterly 632-640.

Rajeev G, 'Different forms of Decentralization and their impact on Government Performance: Micro level evidence from 113 Countries' Department of Economics, University of Akron, OH 44325, USA.

Discussion Paper

Kauzya JM, 'Political Decentralization in Africa: Experiences of Uganda, Rwanda, And South Africa' (2007) Discussion Paper, New York.

Research Paper

LP Malan, 'Intergovernmental Relations in South Africa' Paper submitted to the University of Pretoria, available at https://repository.up.ac.za/bitstream/handle/2263/26679/01chapter1-2.pdf?sequence=2;

Websites and Hyperlink

Collaborators, 'Decentralization and Local Development' <http://www.ciesin.columbia.edu/decentralization/> accessed 3 October 2019.

Githinji G, 'The History of Devolution in Kenya since Independence' (2020) <https://www.afrocave.com/history-of-devolution-in-kenya/> accessed 20 August, 2020.

Kenyans, 'Sonko Surrenders Duties to National Govt at State House' <https://www.kenyans.co.ke/news/50121-sonko-surrenders-duties-National -govt-state-house> accessed 13 September 2020.

KEPSA, 'Intergovernmental Alternative Dispute Resolution Key in Enhancing Intergovernmental Relations for the Implementation of the "BIG 4" Agenda' (2018) <https://kepsa.or.ke/intergovernmental-alternative-dispute-resolution-key-in-enhancing-intergovernmental-relations-for-the-implementaiton-of-the-big-4-agenda/> accessed 5 August 2020.

Onyango DK, ''Resolving Intergovernmental Disputes through Alternative Dispute Resolution in Kenya' <https://www.coursehero.com/file/44557969/APLLICATION-OF-ADR-IN-INTERGOVERNMENTAL-CONFLICT-RESOLUTIONdocx/> accessed 6 August 2020.

The Editors of Encyclopedia Britannica, 'Social Contract' <https://www.britannica.com/topic/social-contract> accessed 6 August 2020.

The Mt. Kenya Times, 'Presidential Directive on Intergovernmental Disputes' <https://www.mtkenyatimes.co.ke/presidential-directive-on-intergovernmental-disputes/> accessed 20 August 2020.

The Star, 'Counties urged to avoid courts, take up alternative disputes resolution' <https://www.the-star.co.ke/counties/nairobi/2020-09-02-counties-urged-to-avoid-courts-take-up-alternative-disputes-resolution/> accessed 13 September 2020.

The Star, 'Intergovernmental relations committee to resolve Sonko-Badi wrangles' <https://www.the-star.co.ke/counties/nairobi/2020-08-06-intergovernmental-relations-committee-to-resolve-sonko-badi-wrangles/> accessed 15 September 2020.

The Star, 'Use of alternative dispute resolution mechanisms to implement devolution' <https://www.the-star.co.ke/news/2014/03/22/use-alternative-dispute-resolution-mechanisms-to-implement-devolution_c903309> accessed 27 December 2018.