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Alternative Dispute Resolution: A Case Study of its Application to
Intergovernmental Disputes in Kenya

A Thesis

By

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DECLARATION

I, the undersigned, declare that this thesis, submitted to Hekima Institute of Peace Studies and International Relations Nairobi, for the partial fulfilment of a Master's degree in Peace Studies and International Relations, is my original work and has not been presented to any University for academic credit.

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DEDICATION

This work is dedicated to:

All those who advocate for Alternative Dispute Resolution in Kenya, Africa and the whole world at large, to bring a more amicable way of resolving disputes.

My wife Hannah Wangari Gathenji for her great contribution to the achievement of my work, and for her continuous support in my academic work as well as my family obligations.

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ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
AG	Attorney General
AU	African Union
CAM	Court Annexed Mediation
CBOs	Community Based Organizations
CEO	Chief Executive Officer
CIArb	Chartered Institute of Arbitrators
COG	Council of Governors
CRC	Constitution Review Commission
DC	Development Committees
DFRD	District Focus for Rural Development
eKLR	Kenya Law Reports (electronic)
HIPSIR	Hekima Institute of Peace Studies and International Relations
IGRA	Intergovernmental Relations Act
IGRTC	Inter-Governmental Relations Technical Committee
JMC	Joint Ministerial Committee
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KENHA	Kenya National Highway Authority

KMPDU	Kenya Medical Practitioners, Pharmacists & Dentists Union
KTDA	Kenya Tea Development Authority
KURA	Kenya Urban Roads Authority
MCA	Member of County Assembly
NACOSTI	National Commission for Science, Technology and Innovation
NGOs	Non-Governmental Organizations
ODM	Orange Democratic Movement
SPSS	Statistical Package for Social Science
UN	United Nations

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ABSTRACT

The Kenya Constitution (2010) and Intergovernmental Relation Act 2012, in conformity with the policy of devolution based on non-competitive governments through mutual co-operation and consultation, requires that ADR should be applied in the management of intergovernmental disputes. This study looked at the Intergovernmental Relation legal infrastructure, its implementation, challenges and made appropriate recommendations. The Kiambu-Muranga, Isiolo-Meru and Turkana-Baringo boundary and resource disputes were used as case studies. The respondents included County and National Government officials, community leaders, judicial officers, experts in ADR and members of the public. The research adopted an exploratory research design, using both qualitative and quantitative methods of data collection from a sample population of 60 respondents selected through purposive sampling method. The findings show that the Intergovernmental Relation Act 2012 is sparingly followed by both levels of governments. ADR is informally applied mainly in community-based inter-county conflicts while disputes between national and county governments are referred to as litigation. The main challenges facing the devolved governments include poor legal and institutional frameworks. The research recommended, *inter alia*, legal and institutional reform through amendment of the Constitution, IGRA and the related legislation. This reform should include the formulation of a national policy on ADR to give guidelines on its application in dispute management. The research is valuable to all stakeholders and policymakers.

CHAPTER ONE: INTRODUCTION

Globally the systems of governance are undergoing changes to being more democratic and inclusive. Devolution of power from central governments to lower units is one of these systems that ensure peaceful co-existence, equity and fair distribution of resources. South African 1996 Constitution provides for a three-tier level of governments namely, national, provincial and local. The New Constitution of Kenya 2010 created a devolution system with two levels of governments, the National and County Governments (Article 1(4)). The two levels of governments including the Senate are mandated to operate through co-operation and consultation (Articles 6(2)). The Kenyan devolution policy incorporated an Alternative Dispute Resolution (ADR) methods grounded on a statute that has been largely borrowed from the Intergovernmental Relations Framework Act 2005 of South Africa. The disputes involving the national and county governments in Kenya are subject to the provisions of Article 189(3) and 189(4) of the Constitution and the Intergovernmental Relations Act 2012 (IGRA) of Kenya. The Constitution and the IGRA require that the two levels of governments apply ADR methods (primarily negotiation and mediation, but also open to arbitration) and only go to court as a last resort (IGRA, Section 31). The rationale behind it is to have a cost-effective, transformative system that will ensure harmony, avoid protracted conflicts, disruption of the delivery of services, and ensure good governance (Waiganjo, 2012). Since the establishment of the devolution system of government, serious conflicts between the devolved governments have emerged and recourse to ADR mechanism has not been visible. In breach of the Constitutional and statutory requirements, cases have been filed in court by the counties against the national government. Moreover, various counties have also filed cases against the Senate, without first referring them to ADR.

Among other things, the cases concern the transfer of services and resources, boundaries, and interpretation of responsibilities. In other situations, disputes between the governments have remained unresolved or misdirected to wrong authorities or escalated by politicians precipitating violence and serious threat to peace.

Against this backdrop, the central task of this study is to establish the challenges facing devolved governments in the use of ADR in their dispute management. In particular, this study seeks to investigate why devolved governments are using litigation instead of constitutional and statutory mandated ADR mechanism prescribed by Article 189(3) of the Constitution and section 31 of the Inter-Governmental Relation Act in their intergovernmental dispute management. To be able to address this, the study is divided into five chapters.

Chapter one is the general introduction and sets out the context of the study, outlining the objectives of the study, the theoretical framework that guided the study and a definition of key terms employed in the study. The second chapter is a review of the literature on alternative dispute resolution methods and the management of inter-governmental disputes with a particular focus on the national and county governments of Kenya. Chapter three sets out the methodology of the study. The fourth chapter is a presentation, analysis, and interpretation of the data collected from research subjects. Chapter five provides a summary of the findings, conclusion, and recommendations.

1.1 Background of the Study

After coming into operation of the devolved governments on 4 March, 2013 a number of cases have been filed in Court by County governments against the national government and between counties. These include cases on inter-county border disputes, such as Turkana County Government and 20 others v. Attorney General and seven others (eKLR, 2016) where the County sought orders to evict other Kenyans from its “territory”, Isiolo, Meru, Tharaka Nithi boundary and resource disputes (www.star.co.ke, news, 2016 August15) to name a few. The Counties also filed cases against the national government entities like the parastatals. A good example is a suit filed by Kwale County against the Kenya Airport Authority for the recovery of rates for the use of Ukunda airstrip in Kwale (eKLR, 2017). Other entities that have also filed cases against Governments include the controversial transfer of health services dispute filed by medical practitioners (*Republic vs. Transition Authority* and *another Ex parte Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU)* and two *others* in 2013) to protest the devolution of health function. The Senate has also been a subject of litigation especially concerning the interpretation of its responsibilities. One of the early cases was *The Speaker of the Senate, The Senate of the Republic of Kenya versus Attorney General and four others* (eKLR, 2013). Advisory Opinion Reference No 2 of 2013 on the division of revenue bill. More serious cases involve injunctions and conservatory orders seeking to restrain Senate from exercising its oversight duties over governors such as *Kerugoya High Court (Constitutional Petition No. 8 of 2014, International Legal Consultancy Group v. Senate and Clerk of the Senate, 2014)*.

The filing of suits by Counties against the national government and other counties is contrary to the express provisions of the Constitution and the law. This may be a ground for the impeachment and removal of the concerned governor under Article 181 of the Constitution and Section 33 of the County Governments Act for gross violation of the Constitution and law. These grounds for impeachment were confirmed by The Senate Report of Special Committee on the Proposed Removal from the Office of Professor Paul Kiprono Chepkwony, the Governor of Kericho County (3rd June 2014). Furthermore, any resources utilized in paying for litigation contrary to the IGRA would be illegal expenditure and subject to surcharge among other penalties. The Report of the Auditor General on the Financial Operation of Kiambu County Executive for 1st July 2013 to 30th June 2014 showed a pending legal bill of Kshs. 99,015,662 (Report of Auditor-General on the Financial Operation of Kiambu County Executive for the period 1st July to 30th June 2014). A task force commissioned by the Nairobi County Government in November 2015 reported that the county did not have an out of court settlement policy and lawyers did not explore ADR mechanisms as a means of mitigating costs on contentious matters. The legal bill for the period between January 2014 to June 2015 was over Kshs.750 million (Kibet, 2015, p. 12). Simon Kirgotty (2015) the Secretary of State for Devolution and Intergovernmental Relation stated that "litigation was walloping Kshs. 20 to 30 million per case, funds that would otherwise go to development" (Alternative Dispute Framework, kenyanewsagency.go.ke, 2018, February 14) accessed on the 18/6/2018.) Although some of the costs arise from intra-county suits, there is a likelihood this trend will continue and involve all intergovernmental disputes. Apart from the cost of litigation and delay the effects of escalation of conflict in court defeat the very purpose of devolution which is to create a harmonious relationship between all levels of governments.

1.2 The Statement of the Problem

Since the establishment of the counties in 2013, the two levels of governments have been experiencing serious disputes that have precipitated court litigation contrary to the Constitution and IGRA. In addition to this breach of the constitution and the law, litigation is costly, disruptive and often fails to restore the good working relationship as intended by the devolution policy (Waiganjo, 2012).

The concern of this study is to investigate why devolved governments are using litigation instead of constitutional and statutory mandated ADR prescribed by Article 189(3) of the Constitution and section 31 of the Inter-Governmental Act in their intergovernmental dispute management. Given that very scanty research has been done investigating litigation and other ADR methods in relation to inter-governmental disputes, this study is crucial as it will help examine the challenges facing the devolved governments, both the national and the county governments, in their application of ADR methods of resolving disputes.

1.3 Purpose of the Study

The purpose of the study is to find out why the devolved governments and the national government are using litigation instead of the ADR in the management of their inter-governmental disputes.

1.4 Objectives of the Study

The Study aims to address the following objectives:

- (i) To establish the use of ADR in the resolution of intergovernmental disputes in Kenya since 2013.
- (ii) To investigate whether the ADR as prescribed in the Constitution and the Intergovernmental Relations Act 2012 in Kenya is appropriate in the resolution of intergovernmental disputes.
- (iii) To find out the challenges faced by the national and county governments in the implementation of ADR.

1.5 Justification and Significance of the Study

The findings of this study will help in explaining the kinds of challenges faced by the governments in complying with the requirements of the Constitution articles 189(3) and S. 31 of the Intergovernmental Relations Act 2012 which require them to refer their disputes to ADR before resorting to Court litigation. Furthermore, the study exposes the level of understanding and appreciation of ADR methods by the devolved governments with the aim of making appropriate recommendations. There has not been any research done to this effect since the commencement of the Act on 27 February 2012 and operationalization of devolved government on 4 March 2013. Findings from the research will assist in establishing an effective legal and institutional framework which could save the country from expensive litigation and consequent escalation of conflicts. From an academic dimension, the findings would contribute also to academic literature by establishing whether the ADR can work better than litigation in intergovernmental dispute resolution within federal and devolved countries.

1.6 Scope of the Study

The study was confined to the period between 2013 and 2017. The study focused on selected disputes between National and County Governments and inter-county conflicts. The research specifically covered the three Inter-County boundary and resource disputes: Isiolo versus Meru; Turkana versus Baringo and Kiambu versus Murang'a.

The study was also limited to three types of disputes: transfer of services between National Governments and Counties, boundary and resources between counties, construction, and interpretation of responsibilities between National and County Governments and the Senate. For purposes of data collection, the study focused on the major areas of dispute as exposed by the media and reported court cases.

1.7 Limitations of the Study

The period covered by the study was between 2013 and 2017. The subject matter of research was political and sensitive, and more time was needed to understand the origin and nature of disputes. The researcher adopted a non-partisan and professional position in his interviews and questionnaires.

Most of County offices were based in the rural areas and far from Nairobi. The respondents included government officers and political leaders who were frequently inaccessible or suspicious of the research which they may have construed as a threat to their interests. The research fell within the 2017 election period when the Governors and Senators were preparing to leave their offices. They had little time or incentive to answer questions. The researcher endeavoured to consult the primary data through government offices. For County Governments' information, the researcher used the executive and legal officers

especially the Deputy Governors, Clerks to the Counties and their legal officers. For the national government, the researcher consulted the staff of the office of the Attorney General and the Intergovernmental Technical Committee (IGRTC). With respect to research in the field, the researcher visited the counties of Baringo, Isiolo, Meru, Murang'a and Kiambu which had long-standing and protracted disputes. The researcher was unable to visit Turkana due to the violence at the time of the field research. The research avoided the peak period of the election campaign and hence most of the field work was completed early in 2017.

The research required the input of ADR experts and the judicial officers. The access to judicial officers was a serious challenge because of their busy court schedules and the nature of their work. It was imperative to obtain views of a cross-section of judicial officers in the three main levels of the judiciary, i.e., the subordinate courts (magistrates), high court and the court of appeal. The input of the Supreme Court was obtained through the reported cases.

The other professionals such as mediators and advocates had serious time constraints despite their willingness to participate. Some were within Nairobi as well as outside towns.

1.8 Ethical Issues

The researcher is a legal practitioner dealing mostly with both litigation and ADR on daily basis. He has also been exposed to county dispute involving impeachment of governors by the Senate. However, he was objective and avoided any bias on matters under research. When preparing research instruments, he was not biased in his choice of questions or respondents. The samples were fairly distributed. He maintained

independence and integrity in the research. He was not dictated by the political, professional or social status

of the respondents and recorded and reported the data as provided reserving his findings to be dictated by their analysis. The information was obtained voluntarily from respondents and treated with confidentiality. There was no bribery and/or coercion and steps were taken to ensure the respondents were not exposed to any danger or embarrassment. The researcher obtained the consent of respondents before any interview or submission of the questionnaire.

1.9 Theoretical Framework

1.9.1 Theory of Conflict Resolution

This study has used the Theory of Conflict Resolution as proposed by Burton (1996). Conflict resolution is the whole process used with different methods depending on different context with the aim of bringing positive peace or what Lederach terms "conflict transformation" (p. 11). It involves different types of methods and mechanisms in addressing conflicts. Among these is Alternative Dispute Resolution (ADR), which is a process undertaken outside the traditional method, i.e., the court. ADR consists of dialogue, negotiation, mediation, and arbitration. This work relies more on mediation, i.e., assisted negotiation by a third party.

Mediation is a non-violent soft approach that involves dialogue/discussion, caucusing, confidentiality, and negotiation (Burton, 1996, p. 45). It helps in transforming the relationships, the issues, and attitudes, and brings positive peace. Burton defines conflicts as problems resulting from threats to or deprivations of basic human needs of people of all ages and cultures (p. 47).

His notion of problem-solving involves leaving the decision making in the hands of the parties until the agreement is reached that satisfies the needs and interests of all concerned.

It also involves the separate conceptualization of needs and interests. It is also based on the theory that the common or universal needs of both sides can be met and in this sense a win-win outcome is possible. The theory will help this research in the identification of the real problems faced in the counties and in the national government and distinguish conflicts from disputes. This will help to explain whether the ADR as a dispute resolution mechanism is appropriate in addressing the social issues arising in the devolved system of government.

This theory will, therefore, help this study to analyze the challenges faced by devolved governments in conflict management by looking at their patterns, communication, and interaction. This theory will also be helpful in making appropriate recommendations to minimize the negative effects of social conflict and in suggesting measures to avoid disputes. Since the theory inquires into the origin of conflicts, addresses cultural and economic inequality and power-sharing, it will be invaluable in helping find out whether the ADR mechanism meets the fundamental threshold required to resolve disputes within the principles of consultation and co-operation in devolution system of government.

Burton (1996) posits that Problem-Solving Conflict Resolution is a more reliable theory of behavior which deduces the means of resolving and avoiding problems. He observes "the traditional and conventional wisdom have held that dissent and antisocial behavior are to be controlled and prevented by education backed by punitive action" (p. 1). However, empirical evidence suggests that a great deal of conflicts and violence is provoked by such circumstances as childhood environments, the absence of job opportunities, insecurities experienced because of a minority status, resource deprivations

and postcolonial boundaries that cut through ethnic communities. He recommends that "to the extent this is so the remedy must be to deal with these problems at their source by whatever structural changes required, thereby resolving specific problems and preventing others from occurring. Such problem solving and problem resolving would have to take into account all behavioral, cultural and environmental circumstances" (p. 1). He cautions that there must be a "realistic analysis of situation and assessment of policies that were based on false assumptions and perceptions" (p. 4) and recognition of inherent shared needs and goals that cannot be compromised as shared common human aspirations (p. 5). He confirms that the settlements of disputes can be achieved through, adjudication, arbitration, mediation and a combination of these (p. 7). He distinguishes between conflicts and disputes. He argues that "conflicts are struggles between opposing forces implying that issues are more serious than those relating to disputes possibly stimulating physical confrontation" (p. 7). He holds that a dispute settlement process includes bargaining and negotiations and some degrees of persuasion and coercion. He observes that parties may feel that they have no option but to accept outcomes, perhaps because of the stronger bargaining power of the other side, perhaps because of legal norms being applied within the mediation process, perhaps because of costs of taking the matter further by court action. He contends that the outcome of arbitration and mediation is likely to be one that merely suppresses resentments for the time being. He identifies the difference between "disputes" that can be settled by compromise and "conflicts" which involves issues on which there cannot be compromised. Conflicts must be resolved rather than settled which require an analytical process to uncover the sources of the problem and deal with them accordingly (p. 8).

He states that societies continue to operate within systems governed by power and characterized by adversarial institutions, adversarial party politics, and adversarial legal

systems adversarial workplace relationships between sovereign authorities. He observes that collaborative problem-solving processes are frequently resisted by those holding power in so far as they might pose the threat of social and international change. The failure to define disputes and conflicts, and the treatment of conflicts as though all issues in human relationships are negotiable and subject to compromise lead to attempts at “forced settlement” within the institutional and social norms (Burton, 1996, p. 9).

He explains that prevention signifies getting to the source of the conflicts and taking measures to avoid conflicts including alteration in institutions and social policies, rather than just preventing conflict by deterrent threat or suppression (Burton, 1996, p. 11). He emphasizes that "in conflict resolution, we are dealing with a fundamental paradigm shift in thinking and therefore in practice. It is a total shift from various procedures with a power frame to processes by which there can be a thorough analysis of a sources of a situation, leading to means of determining whether the situation is a dispute or a conflict, to means of resolving it if it is a conflict and of preventing its occurrence in the future" (Burton, 1996, p. 11). He concludes that such a fundamental shift comes about through education at all levels from small children to the postgraduate, the industrial manager, the civil servant, and statesman. It is a study that intellectually belongs to any social science concerned with decision-making be its international relations, management studies, politics, sociology or psychology (Burton, 1996, p. 12). It is apparent from Burton's (1996) approach that though ADR may be one of the mechanisms for resolving disputes a clear distinction has to be made between conflicts and disputes. A legal framework that gives an ambiguous approach does not find favor with this theory. The specific problem must be identified for an appropriate remedy to be prescribed.

1.10 Definition of Terms

Alternative Dispute Resolution (ADR): The author adopts Muigua's definition of ADR:

"a broad term used to refer to the use of negotiation, mediation, conciliation or arbitration in dispute management". In this definition is included Traditional Dispute Resolution Mechanism (TDRM) (p. 49).

Arbitration: "when two or more persons agree that a dispute or potential dispute shall be decided in a legally binding way by one or more impartial persons in a judicial manner, which is upon evidence put before him or them, the agreement is called an arbitration agreement or a submission to arbitration." (Bernstein, 1987, p. 9).

Certiorari: is a "special proceeding where a superior court requires some inferior tribunal, board or judicial officer to transmit the record of his proceedings for review for the excess of jurisdiction" (Garner, 2009, p. 258).

Conciliation: Means "winning over an opposition by making friendly overtures" (Burton, 1996, p. 21).

Conflict: means "struggles between opposing forces over resources, ideas, values, wishes and deep-seated needs" (Burton, 1996, p. 21).

County government: means the county government provided for under Article 176 of the Constitution

Dispute: This thesis uses dispute in line with Black's Law Dictionary (2009). It is a conflict or controversy especially one that has given rise to a particular lawsuit (p. 540).

Level of government: means national and county levels of government.

Mandamus: “it is a writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usually to correct a prior action or failure to act” (Garner, 2009, p. 1046).

Mediation: is “an extension or elaboration of the negotiation process that involves the intervention of an acceptable third party who has limited (or no) authoritative decision-making power” (Moore, 2003, p. 8).

Secretariat: means the Intergovernmental Relations Secretariat established under section 15.

The whole process of the theory of conflict resolution is not just preventing conflict through institutional alteration, social policies, and deterrence mechanisms, but transforming the conflict by restoring the estranged human relationships through the transformation of parties, structures, conflict contexts, and providing a common vision of an imagined society. In all the processes, the methods of the Alternative Dispute Resolution (ADR) particularly dialogue, negotiation and mediation form key methods of a cooperative strategy to bring restoration to broken social and human relations. How are these ADR methods of a collaborative strategy used in the world and in Kenya in particular? Such is the interest of this thesis with a specific focus on the use of ADR methods in addressing conflicts in intergovernmental relations in Kenya.

This review begins with the conceptualization of various forms of government, with a particular focus on the devolved system of government and then goes on to explain the situation and issues within Kenya's devolved system of government. From then, an understanding of the global approach of intergovernmental dispute resolution and its challenges are reviewed before attention is turned to the Kenyan approach to intergovernmental dispute resolution and its challenges. Thereafter, there is a review of the literature on alternative dispute resolution, its challenges and its application within the framework of the Intergovernmental Relations Act (IGRA) of Kenya.

2.1 Concept of Governments

2.1.1 Forms of governments

The main types of governments in the world today include monarchy, constitutional governments, democracy, and dictatorships. The critical issue in these systems of governments is the distribution of authority or power. There are unitary systems where power is centralized; federal and confederations where power is distributed and shared amongst defined units. Kenya is a republic and a multi-party democratic state with two levels of government and specific devolved functions and limited powers [Fourth Schedule] (Article 4(2) of the New Constitution 2010 of Kenya).

2.1.2 The Devolved System of Government

In a devolved system of government political, administrative and fiscal authority is decentralized and transferred from the national level to autonomous subnational constitutional or statutory agencies. “Decentralization is the process of redistributing or dispersing functions, powers, people or things away from a central location or authority” (Githinji, 2018, p. 3). Githinji gives examples of countries where devolved governments are applied to include France, Italy, Papua New Guinea, Peru, Solomon’s Islands, Spain, and the United Kingdom. These states are unitary states where devolution is simply administrative devolution and the unitary state still has power, where necessary, to intervene. Kenya is also a country of devolved Counties. Unlike devolution, another form of decentralized state system includes federalism where each unit of the federation is sovereign over its territory and form of government. It cannot be interfered at will by the federal state. It is a constitutionally ingrained covenant in which there are exclusive and

shared sovereignty under clearly agreed principles. Examples of federal countries include the USA, Canada, and India. In the African region, the devolved governments include Cameroon, South Africa, Uganda, Rwanda and Kenya; and federal governments include Nigeria and Ethiopia. All these countries have embraced devolution for one reason or another. However, the common rationale of devolution is to resolve political conflicts based on, among other things, ethnicity, resources, and power sharing. The first concern of this study is to explore whether devolution has managed to resolve these conflicts and the second and most critical is to find out whether the mechanism for resolving disputes between the central authority and devolved units has met the overall objective.

Nigeria which is the most highly populated country in Africa is a good example for analysis. The Constitution of Nigeria provides for a federal state with two main levels of governments. Dent (1995) discusses the doctrine of federal character of co-operative federalism in Nigeria. Nigeria is subdivided into 30 states and the creation of federalism is itself a mechanism to resolve ethnic conflicts. The writer observes that "there is an attempt to create a Nigeria of states of equal population and size." The objective is "to impose fair shares upon the states in the allocation of jobs and benefits through the doctrine of federal character" (Dent, 1995, pp. 128-129). He observes that ethnic heterogeneity is a pervasive feature of the contemporary world. The problem it poses, especially in deeply divided or plural societies, is one of reconciling ethnic diversity with overarching loyalty to the state. This is the more problematic because the state is not a neutral force in mediating political conflicts. It can be captured and used to further the interests of the leadership of an ethnic group or a combination of such groups. A plural society is thus one in which politics is ethnicized, in which political competition is overtly drawn along ethnic lines. Ethnicity, as an aspect of political processes, should be viewed dynamically. It is within such a context that its salience in Nigerian federalism

should be situated. The concept refers to identity relationships which are based on a common language, religion, culture, caste, or race, what are sometimes referred to as primordial attachments. Ethnicity *per se* need not generate conflict; but once it is situated in a particular type of social or plural diversity, it assumes potential conflict significance (pp. 72-73).

The Kenyan devolution model involves the national government transferring powers, functions, and responsibilities by legal and constitutional provisions to independently elected county governments ([www.devolutionplanning/go.ke](http://www.devolutionplanning.go.ke)).

2.1.3 Evolution of Devolution in Kenya

Chitere and Ireri (2013) give a historical background of devolution in Kenya. They trace it from the concept and policy of District Focus for Rural Development (DFRD) which became officially operational in Kenya on July 1st, 1983, following Presidential Directive of October 20th, 1982, as a “tactical means of promoting economic advancement”. Each district was a basic operational unit and became the major instrument of rural development (see Government of Kenya Presidential Speech, Kenyatta Day, 1982: 21). Chitere and Ireri (2013) describe DFRD strategy as a form of decentralization known as “deconcentration”. Moreover, decentralization concept in Kenya evolved from the short-lived majimbo system adopted at the independence which collapsed after KADU crossed over on November 10th, 1964 to form a unitary government under KANU (Ghai & McAuslan, 1970, p. 212). The Majimbo System was based on the devolution of responsibilities from Central Government to the regions (majimbo). Under KANU government, the regions became provinces. Sessional Paper No 10 of 1965 on African Socialism and its Application to Planning stated that planning was to be extended to provinces, districts, and municipalities so as to ensure that there was progress in each administrative unit (p. 9).

Other reforms in 1966-70 were to ensure co-operation and people's participation in development. Each province, district, and municipality were to establish Development Committees (DC) and Development Advisory Committees (DDA). One of the functions of the DDA was to resolve conflicts and find proper solutions. Chitere and Ileri (2013) however, do not explain the methods used by the DDA to resolve conflicts. Projects or activities that covered more than one districts or that served national purposes (Multi-district) and national projects were planned and managed by relevant ministries (p. 10).

Makokha (as cited in Kibua and Mwabu (2008) observed that the DFRD was based on the bottom-up approach that permitted lower levels of decision-making and autonomy in setting their objectives and priorities. He further saw the strategy as having had the potential for ensuring participation of rural inhabitants in starting priority projects and meeting more needs of a district rather than a single project. He, however, noted that for the strategy to succeed there was a need to establish a mechanism for resolution of conflicts between different goals and disparities in resources between districts and raise awareness of the rural people about the strategy.

It is apparent the attempts to devolve services and economic development did not resolve the ethnicity and marginalization issues. The clamour for decentralization (*majimbo*) continued and episodes of violent ethnic conflicts in 1992 , (Kiliku Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other parts of Kenya, 1992); 1997-1998, Akiwumi Commission, 1999 and 2007-2008 Waki Commission (CIPEV) 2008) precipitated a constitutional reforms that brought in the devolution.

The question still lingers whether the devolution *per se* resolved the ethnic and resource conflicts. The conflicts in Nigeria continue to get worse and as Dent (1995) observes the unit states continued to mutate from the original 19 to 30 (p. 13). The objectives of the devolution as stated in article 174 of Kenya Constitution were to promote the democratic and accountable exercise of power, give powers of self-government to the people and enhance participation of the people in the exercise of the power of the state in making decisions affecting them. At the heart of the devolution was the protection of the rights and interests of "minorities and marginalized communities", equitable sharing of national and local resources, decentralization of state organs their functions and services from the capital of Kenya. Heckner and Chatterjee (2015) expressed their faith that devolution would achieve these objectives. They postulate that "a major reason for optimism is that devolved governments give all Kenyans a chance to be close to politics, revolving not around ethnic loyalty but concrete issues that concern them directly. Additionally, devolution creates opportunities for local indigenous conflict detection, prevention and mediation mechanism to flourish." They, however, warned of "tackling local social economic and environmental challenges by local governments" advising that this must "be an interaction between national, local governments, U.N. development partners, NGOs, and the private sector." The Annual Report on Devolution, The Council of Governors Devolution Report submitted to Devolution Conference held on March 3rd, 2014 to March 4th, 2014, noted that "a critical institution under the IGRA, that is, the Summit had not been formally convened." It also observed that "default strategy of National and County Governments should be to pursue honest dialogues and negotiations in dealing with contentious issues. Hasty confrontations or adversarial stance is likely to be met with the disproportionate impulse for resistance which would be counterproductive to the desired change" (pp. 36-37).

2.1.4 Global Mechanisms for Resolution of Disputes in the Devolution System

The devolution infrastructure in all countries is supposed to incorporate a mechanism for resolving various disputes that arise from the decentralization. A number of the devolved governments in the world adopt various types of alternative dispute resolution methods that seek to resolve their disputes outside the adversarial forums. The United Kingdom has a Protocol for Avoidance and Dispute Resolution. A 2001 Memorandum of Understanding covers dispute resolution and the role of Joint Ministerial Committee (JMC) consisting of UK Government, Scottish, Welsh, and Northern Ireland Ministers. Although this protocol does not specifically refer to ADR, all disputes are resolved through out-of-court negotiations save for those that require statutory interpretation or involve government policy decisions ([www.government.U.K/government avoidance-resolution-pdf](http://www.government.U.K/government%20avoidance-resolution-pdf)) (2001). The emphasis on all procedures for resolution of a dispute is "principles of good communication and co-operation as set out in the Memorandum of Understanding' and facilitation of an agreement between parties in dispute not the imposition of any solution (UK Protocol, 2001).

The Canadian Government, on the other hand, has a comprehensive policy on the prevention and resolution of disputes resolution. It has formulated a Dispute Resolution Guide through its Canada Department of Justice (www.justice.gc.ca). According to the Canadian system dispute resolution involves all possible processes for resolving conflicts from consensual to adjudicative, and from negotiation to litigation. According to the policy, the appropriate method to resolve any given dispute can only be chosen after careful assessment of facts and circumstances of the case. In making this evaluation one must consider the interests of the parties, the nature of the dispute and any statutory or policy restriction governing the use of a particular ADR process. The restriction stated in the guide clearly state litigation is preferred where a legal precedent is anticipated, or

where statutory interpretation or, government policy is involved. Other limitations are where the government requires a full record of proceedings and where the dispute involves a public law matter such as the Charter or Constitution. Canada has to deal with disputes arising from federal to devolved units namely provincial, territorial and Aboriginal governments. The emphasis in the Canadian system is basically a dialogue between the parties.

South Africa has a comprehensive machinery for resolving intergovernmental disputes through Alternative Dispute Mechanism. The Intergovernmental Relations Framework Act 2005 of South Africa is based on Section 41 of the Constitution of South Africa. Section 41(2) provides for the establishment of or provision of "structures and institutions to promote and facilitate intergovernmental relations and appropriate mechanisms and procedures to facilitate settlement of governmental disputes." This is done at two levels; the first one is through a network of consultative organs covering the three tiers of National, Provincial and local governments. The underpinning principle is to build a hierarchy of organs that are all inclusive and consultative. This is stated in the preamble to the Act that "cooperation and integration of actions in governments depend on a stable and effective system of governance for regulating the conduct of relations and settlement of disputes between the national government, provincial government, and local governments." The Act provides for inter-governmental structure headed at the apex by President's Co-ordinating Council (Section 6), National Intergovernmental Forums (section 9), Provincial Inter-governmental Forums (S.16), Municipal Inter-governmental Forums and lastly Inter-governmental technical support structures. The composition and the role of each structure is specifically provided and an accountability procedure and report to Parliament of their performance is provided in Section 46. It states that the

“minister may from time to time when necessary, table a report in both houses of Parliament with regard to (a) the general conduct of intergovernmental relations in the Republic (b) the incidence and settlement of intergovernmental disputes and (c) any other relevant matters”

The Act in Chapter 4 has a detailed and comprehensive machinery and procedures for the settlement of intergovernmental disputes. The salient features include the scope of application of the Act. It exempts interpretation of Bill of rights in S.46 of the Constitution and matters concerning the intervention of the national government in the provincial governments in the event of the later failure to adhere to its constitutional mandate etc. under S.100 of the Constitution. Also exempted are disputes which are specifically provided in other legislation. The chapter provides that it is the duty of organs of the state to avoid intergovernmental disputes (S.40) and a formal declaration of a dispute is required under S.41 of the Act. An elaborate procedure for dealing with the dispute once declared is set out in S. 42. A facilitator and his role in the assisting the parties is detailed in (S.43). The parties can also seek the assistance of the Minister (the Cabinet Secretary responsible for the provincial and local government) or the MEC (member of a provincial Executive Council) who is responsible for local government matters in the province. as provided in (S.44) of the Act.

The Act outlaws any judicial proceedings unless a formal declaration of the intergovernmental dispute has been made. In very clear language S.46 states that "no government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this Chapter were unsuccessful". The Act has also been generous in its definition of intergovernmental dispute as "to mean a dispute between governments or between

different governments concerning a matter arising from (a) a statutory power or function assigned to any of the parties or (b) an agreement between the parties regarding the implementation of power or function and which is justiciable in a court of law." The Act does not apply to "Parliament, the provincial legislatures, the courts and judicial officers, any independent and impartial tribunal or forum contemplated by section 34 of the Constitution and any officer conducting proceedings in such tribunal or forum, any institution established by Chapter 9 of the Constitution, any other constitutionally established independent institution and any public institution that does not fall within the national, provincial or local sphere of government" (Section 2(2) of the Act).

In addition to the Constitution and the Act, the South African Government issued a comprehensive guideline as mandated by section 47 of the Act, clarifying and simplifying the provision of the Act. The aim of the South African approach of adopting ADR in inter-governmental disputes is to avoid litigation, (Guidelines to Effective Conflict Management, Government Gazette, 26 April 2007, p. 6). Courts are supposed to give effect to the constitutional requirement that all organs of the state must, in complying with their duty to co-operate with one another in mutual trust and good faith avoid filing suits against one another section 41(1) (h) (vi) of the Constitution.

The Constitutional Court in South Africa has ruled that organs of the state must try and resolve their dispute amicably (National Gambling Board v. Premier of KwaZulu-Natal 2002 (2) BCLR 156(CC) para 33. (p. 6). "The Constitution of South Africa embodies principles for co-operative government. The principles are based on the belief that government is more effective, efficient and responsive to the community when individuals and organs responsible for exercising state power act in collaborative and cooperative ways." They hold that intergovernmental collaboration and cooperation requires procedures, institutions, and expertise to deal with disputes first through a

political process. For South Africa, the avoidance of litigation is an intrinsic part of the cooperative government and constructive conflict management (p. 9).

2.1.5 The Kenyan Approach to Intergovernmental Dispute Resolution and Challenges

The Constitution of Kenya 2010 was promulgated on August 27th 2010 and established the devolution system based on two levels of governments, the national and county (articles 1(4) and 6). There are 47 counties as stated in the First Schedule which is headed by Governors. The County Assembly has a legislative power on matters touching on the County Government (Article 185) and County Executive Committees that implements county legislation (Article 183) (see Appendix V). The Senate represents the counties and protects their interests including exercising oversight on County Governors and also legislate on County Bills in Parliament (article 93 and 96). The devolution system is based on mutual cooperation and consultation between the two governments. Disputes arising from the two governments are obliged to be referred to ADR by both the Constitution and the Intergovernmental Relations Act 2012. The Kenyan approach is therefore based on the constitution and the legislative framework.

2.2 The Intergovernmental Relation Act (IGRA) 2012

The Act was passed on February 23rd, 2012 and assented on February 27th, 2012 as one of the legislation to implement the policy of devolution (Waiganjo, 2012). It defines the two levels of governments, namely the national and county governments, and states the principles of intergovernmental relations. It provides for the framework of dispute resolution between the national government and a county government and between the county governments (Section 30). The national and county governments are obliged to take all reasonable measures to resolve their disputes amicably and exhaust the mechanisms provided under the Act or any other legislation before resorting to judicial

proceedings as stipulated by article 189(3) and (4) of the Constitution. Article 189(3) is a mandatory provision that states that any dispute between governments shall be resolved by mutual efforts between the governments and, if this is not possible, by means of procedures provided for under national legislation (article 189) (3). The Constitution in mandatory terms also prescribes the types of procedures that should be contained in the legislation which should include negotiation, mediation, and arbitration (189(4)). The Intergovernmental Relations Act provides the procedures for resolution of these disputes (sections 30-35) including the organs to carry out the exercise that is, *inter alia*, the Intergovernmental Relation Technical Committee (IGRTC), (Section 11) the National and County Governments Coordinating Summit (section 7), the Council of Governors (Section 19) and Intergovernmental Relations Secretariat (Section 15)(IGRS). The IGRTC is empowered by the Act to establish sectoral working groups or committees (Section 13).

The various stages of dispute management culminating with the authorization to resort to a judicial proceeding are set out in Part IV of the Act. The disputes between counties are referred to the Council of Governors and those between the national government and County government to the Summit. As pre-condition "all efforts must be made to settle the dispute amicably" and the time frame adhered to before approaching either the Council or Summit. That is twenty one days after declaration of a dispute (Section 34). The Summit is composed of the Chairperson who is the President sitting with the 47 Governors. The Council of Governors is made up of all 47 governors. They appoint a chairman and deputy chairman from their membership. The IGRA provides for a legal structure for avoidance and resolution of disputes. All agreements entered between counties and central government must include a provision that the disputes shall be settled amicably through ADR. Ideally, the intergovernmental structures are expected to provide a framework for consultation and cooperation (Section 3).

The C.O.G has established two important committees relevant to this research: the Committee on Intergovernmental Relation Committee (IGRC) and the Committee on Legal and Human Rights (CLHR).

The IGRC deals with matters relating to

- (i) The relationship between the County Government and another County government and the national Government and county government.
- (ii) Dispute resolution between the two levels of government amongst the counties and national.
- (iii) Provide linkage between counties and national on consultation and cooperation, County government and international associations.
- (iv) Provide a platform for dispute resolution between counties.
- (iv) Monitor the implementation of Council resolution through the IGRTC.

The committee functions through inter-county (county and county) and inter-governmental (national to county government) forums and engagement with international associations.

The current sector challenges include lack of a policy and legal framework for ADR and for intergovernmental coordination. The Legal and Human Rights Committee is charged with matters concerning constitutional rights, administration of justice and the implementation of the constitution on human rights.

2.3 Other Devolution Legislation Connected with Dispute Management

There are other legislations that deal with matters of financial management and transfer of assets between national and county government and invariably incorporate provisions

for non-adversarial resolution of disputes. The National Government Coordination Act 2012 provides for collaboration and dispute resolution between national and county governments on issues of apparent concurrent mandate. S.19 of the Act provides that “where a dispute arises as to powers or roles of the county governments and those of the national government, a mediation team shall be constituted to deal with the dispute”. It further provides for the composition, the membership, the guiding principles and the time frame. A team which is composed of two eminent persons appointed by the Governor and two by the Cabinet Secretary responsible for national government coordination is required to undertake and finalize its task within 14 days (S.19 (4)). In the event of failure to resolve the dispute within the stipulated time, it is obliged to refer the matter to the Summit under the Intergovernmental Relations Act (IGRA) for resolution. Other related legislation includes County Governments Act 2012, Urban and Cities Act 2011, and Public Finance and Finance Management Act 2012. In all these legislations there was a predominant theme to capture the spirit of the constitution i.e. consultation and co-operation. (Intergovernmental Relations Technical Committee Report 2015: Status of Intergovernmental Institutions; Two Years of Devolution p, xi). For the purpose of this study, the researcher has confined himself to IGRA because it is the single Act that emanates from Article 189(3) and (4) of the Constitution which provides for the resolution of intergovernmental disputes. Moreover, it is enough to give answers to my study because it is of general application. The other Acts are very specific to certain objectives and functions.

Although the IGRA followed the South African Constitution and its legal model, it failed to provide comprehensive structures and details to support the objectives of devolution. There may have been an expectation that the related Acts would be supplemental in ensuring a non-adversarial system of resolution of disputes.

2.4 Alternative Dispute Resolution

Burton (1996) describes "ADR as a phrase that emerged in the 1970s to describe mediated out-of-court or before-court interactions between parties to a dispute or conflict" (p. 15). Muigua (2015) defines ADR as "a set of mechanisms a society utilizes to resolve disputes without resort to costly adversarial litigation." He further states that the most commonly used ADR methods by traditional Kenyan communities include mediation, arbitration, negotiation, reconciliation and adjudication among others (p. 7).

He has graded them starting from negotiation through third-party intervention which is mediation to adjudication and reconciliation (p. 8). These processes are outside the court though for enforcement the parties may utilize the enforcement machinery offered by the court through execution of awards in arbitration or consents judgements through agreements signed after successful mediation (p. 10). ADR has been recognized by the constitution of Kenya 2010 Article 159, that provides judicial authority is derived from the people and is to be exercised by the courts and tribunals established by or under the constitution with regards to the principles of, *inter alia*, promoting the use of ADR methods in conflict management (Muigua, 2015, p. 11).

2.4.1 Limitations of Alternative Dispute Resolution (ADR)

The assumption that ADR is the panacea for intergovernmental or any other dispute has been put to question just like devolution itself. Brown and Marriott (2011) give what may be a wide and comprehensive definition of ADR and its important components. They concede that ADR developed for the last 40 years and is now part of mainstream thinking and practice perhaps more significantly than might have been anticipated. Brown and Marriott (2011) also observe that in many Countries courts and government agencies have supported its use. Mediation and conflict resolution organizations have been established; Bar Associations and Law Societies have embraced its principles; practitioners from a wide range of professional disciplines including law, mental health, and many others have trained in its use (p. 1). They also caution that this is not to say that ADR has yet been universally adopted. They distinguish between disputes and conflicts and define the word “resolution”. Brown and Marriot (2011) argue that:

If there is a distinction between conflict and dispute. However, inter-related these concepts may be, there are surely differences in the way conflict and disputes can be addressed. Options for dealing with conflicts and disputes may include resolution, settlements, prevention, management, transformation, analysis, and intervention. For ADR practitioners the primary call is likely to be for resolution or settlement. (p. 9)

They hold that a fundamental principle that runs through all views on ADR is the proposition that with limited and specific exceptions, for example, where matters of public policy need to be heard and decided or where urgent injunctive relief is needed and is unlikely to be obtained by agreement, it is more beneficial for parties to resolve their disputes by negotiated agreement rather than through contentious proceedings (p. 30). It is important to note that they hold that public policy matters and injunctions reliefs should be excluded from ADR.

Chatterjee and Lefcovitch (2008) seem to exclude arbitration from ADR altogether. They posit that:

The alternative dispute resolution system stands for a system which offers an alternative to court proceedings. Strictly speaking, any non-court method of settling disputes will come under the ADR system of dispute settlement, namely, mediation, conciliation, negotiation, enquiry, etc. From this standpoint, ADR does not represent any novel system of dispute settlement. Arbitration is expensive and time-consuming, the commercial world placed emphasis on ADR system of settling disputes. (p. 4)

Alternative Dispute Resolution seems to be primarily concerned with how best an informal environment can be created for attaining justice, but the rules of justice cannot be changed in the alternative dispute resolution process (p. 4). Chatterjee and Lefcovitch (2008) argue that "it is to be re-emphasized that popular perception in most parts of the world favours settlement of disputes by litigation because of certainty of enforcement of judgment rather than the settlement of disputes by any alternative methods" (p. 6). They hold that "to say that an alternative dispute resolution entails empowerment of an individual seems to be a misnomer. It is not a question of empowering an individual. It is rather an issue of employing the expertise of an individual in settling the dispute but always creating and maintaining a friendly environment" (p. 8).

Chatterjee and Lefcovitch (2008) also challenge the notion that courts are oppressive or coercive by stating that today they have greatly improved (e.g., family-related cases and small claims-courts (p. 9)). They argue that there should not be any blank assumption that the alternative dispute resolution system is necessarily by nature friendlier and more informal than court proceedings. The friendly environment very much depends on the negotiation capacity of the conciliator and how he manages cases (p. 9). Lulofs and Cahn (2000) express their reservation on the same issue when they discuss the limitation of mediation. They observe that:

Because both parties are supposed to receive equal protection under the law and have their own attorneys defend them, adjudication serves as a power-balancing mechanism. Perhaps, for this reason, a complementary conflict in which one of the parties is considerably more dominant, threatening or abusive is often best resolved through court decision because the court empowers the weaker party. (p. 343)

This may directly have relevance when considering that national government control the resources and have more power than the county government. Not all services were devolved, and this has been a bone of contention. Some counties may be more economically endowed than others. In the end, the modern ADR experts expose ambiguity in both the definition and scope of the mechanism that needs further interrogation.

Lulofs and Cahn (2000) further point out other limitations of mediation concerning the interaction between parties. They posit that “sometimes people do not want to sit down with the enemy to work things out. This happens when conflict has become so entrenched and the relationship so full of enmity that the thought of trying to negotiate in a give-and-take situation is too much for those involved” (p. 343). This is evident from the historical enmity between certain ethnic communities and political differences exhibited by governors from various parties. The national government may also wish to exercise its hegemony on counties where it has little political support. A further and important observation by Lulofs and Cahn (2000) which is shared by Brown and Marriot (2011) and Chatterjee and Lefcovitch (2008) is on the personality of the mediator. They observe that “the mere presence of a third party is likely to profoundly change the relationship between disputants. Such a change is likely to be beneficial. However, there are times when inclusion of a third party may have a detrimental effect such as when it occurs in the midst of efforts by disputants to work directly toward settlement. A third party's involvement in a conflictual relationship that is characterized by genuine and effective

movements towards the settlement of differences may have the costly effect of breaking a newly established and possibly fragile momentum towards an agreement." They conclude that third-party intervention is not a panacea in conflict resolutions (p. 358).

Another school of thought feels that ADR being a private process would deny the public their right to participate and interrogate its transparency. Reuben (2000) while expounding on the theory of unitary ADR argues that ADR may be an affront to the due process (p. 953).

2.4.2 ADR at Various Governments' Levels in Kenya

Currently, there are forty-seven counties in Kenya managed by elected Governors, Members of County Assembly, and an appointed Executive Committee (see a map of the counties, Appendix IV). The Senate has an oversight role in the County and legislative duties on bills touching on the Counties. The current county government made up of predominantly Orange Democratic Movement (ODM), Jubilee Governors and other parties are predicated on the principle of cooperation and consultation with national government (Article 189(1) and 189(2) of the Constitution). The current problems in the devolution system include interpretation of various legislations, transfer of services, accountability and inter-county boundary and resource disputes (Amollo, 2016) and resource distribution. The issue of corruption and misappropriation of resources within the counties is highlighted by annual auditor's reports (Odhiambo, 2014).

2.5 ADR within the Framework of IGRA

Bernstein (1987) observes that while ADR is generally voluntary, a statute may make provision for arbitrations in which event the law must be followed. That means the submission instead of being voluntary is imposed by statute (statutory submission) (p. 9). Walton and Vitoria (1982) acknowledge that “an arbitrator may be appointed in pursuance of a general or special Act of Parliament in which case his appointment in accordance with the terms of the statute must be deposited with the arbitrator.” They further state that “in case of an appointment in a submission to arbitration under a statute, the powers and procedure under the statute in question must be followed by the arbitrator” (p. 251). The Kenyan Constitution and the IGRA give the governments no option and even criminalise failure to adhere to the statutory framework (S. 36 IGRA). Kerrow (2016) Senator for Mandera among other Senators even felt strongly that any Governor who overlooked preconditions for reference of the dispute to ADR and files suits in Court should be surcharged.

The incorporation of ADR in the Constitution and IGRA may be explained by many factors such as the successful mediation of post-election conflict in Kenya by Kofi Annan (Linden Mayer & Kaye, 2009). This may have influenced its inclusion in the Constitution as a mechanism to resolve disputes in a politically charged devolution system. Mediation between Sudan and South Sudan in Machakos was another success story which showed that ADR can even resolve more complex regional issues (Nyuon, 2011). Ileri (2012) discusses the case of a confrontation between the informal sector and Service Providers in Nairobi. In her thesis, she deals with conflict resolution mechanisms and found ADR had a positive impact on resolving conflicts between the two parties in Nairobi and possibly other urban centres in Kenya (p. 6). The area of her study involves intra-county

conflicts. This is not directly relevant to this research which is the Intergovernmental Relations Act disputes resolution mechanisms since the commencement of the Act. Kangu (2015) emphasizes IGRA does not apply to disputes from private citizens but only between governments (p. 334).

The 2010 Kenya Constitution passed after the 2007 Post-Election Violence (PEV) brought out serious ethnic differences and was essentially based on one of the pillars of National Reconciliation Accord between proponents of Majimbo (federalism) and moderates who favoured a more moderated devolution system. The Constitution expressly provided that the Courts shall be guided by ADR including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms (article 159(3)).

Kangu (2015) has examined the intergovernmental dispute mechanism prescribed by the Kenyan Constitution and IGRA. He gives “four major reasons why governments must avoid adversarial litigation when dealing with intergovernmental disputes (pp. 331-333). First is to encourage a culture of solving society’s problems by building political compromises at political level which affirms the process of co-operative devolved government.” Secondly, the nature of some intergovernmental disputes is such that they are suited for resolution politically through non-judicial mechanisms since they involve ‘policy choices and administrative judgments’. “Thirdly, while adversarial adjudication often focuses on past acts and facts and finds favour of one of the parties to the disputes, alternative dispute resolution mechanism focus on the present and future interests of both parties. This addresses how they relate to each other and how their relationship could be structured in the future, a matter that is critical for co-operative intergovernmental relations”. “Fourthly, alternative dispute resolution mechanism is more cost effective and efficient methods of resolving disputes. Litigation is often very costly and time-consuming as decisions can be delayed for long, subjecting the implementation of

policies and decisions to unnecessary delays.” Kangu (2015) does not go into detail to examine the definition, interpretation, and application of ADR as a method of resolving disputes. His general proposition that ADR applies to policy matters seems to be contested by Lulofs and Cahn (2000) and Brown and Marriot (2011). Chatterjee and Lefcovitch (2008) qualify the justification that ADR especially arbitration is cost-effective or faster than litigation in view of recent constructive judicial reform. Arbitration, as stated earlier, seems to have been altogether excluded as part of ADR by Brown and Marriot (2011). Kangu (2015) has also not addressed real possibility that the provisions of IGRA allowing reference of an intergovernmental dispute to Court as a last resort may be unconstitutional in so far as Articles 189(3) and (4) of the constitution does not create such a window. The Act has no comprehensive definition of what amounts to "all reasonable efforts" or mandatory timetable for the sitting of the Council or the Summit and dispute resolution seems to be just one of the agenda when such meetings are convened. The two organs may only be convened at the discretion of the respective chairmen. The Courts, on the other hand, have regular sitting and a clear statutory calendar guided by the Judicature Act Cap 3 and High Court Practice Rules.

2.5.1 Observation on South African Intergovernmental Relations Legislation

Schoeman who in his (undated thesis) has examined ADR in context of a comparable intergovernmental relations legislation is of the opinion that before parties select and adopt a method of ADR they must examine all benefits forwarded by a particular method. An appropriate method must be selected which best suits the needs of the parties. He argues that in intergovernmental environmental disputes the selection will arguably have been made against the background of, *inter alia*, sustainable development, provisions of various environmental sectoral statutes, framework legislation as well as constitutional provisions. He furthermore proposes that the selected ADR method should contribute to

the fundamental principles pertaining to co-operative governance. He recommends that application of ADR should be guided by policy, legislation, and preferences of the parties.

It seems he did not carry an empirical research to find out what the South African government's units would consider applicable. He does not present statistics of disputes resolved within the framework of Intergovernmental legislation. He confirms however that guiding constitutional and legislative principles must be applied. The principles may guide the choice of a particular method of ADR, negotiation, mediation or arbitration. The sectoral legislation may provide the specific method to be applied by the department. He does not dwell on whether these restrictions have affected the willingness and/or ability of parties to apply ADR.

2.6 The Role of Traditional Dispute Resolution Mechanisms

In Kenya, the use of traditional mediation in Isiolo County has brought peace and harmony between warring communities (Mutisya, 2014). There is a school of thought that strongly advocate for the use of traditional dispute mechanism and its extensions to all forms of disputes (Muigua, 2015) including criminal jurisdiction (Mwimali, 2015). They, however, agree that no comprehensive research has been done to define, appraise and document these traditional mechanisms of dispute resolution. Muigua (2015) laments the lack of policy and legal framework on ADR. Although the Constitution guarantees the right to access to justice and go further to recognize ADR and TDRM there is no legal or policy framework for their effective application. Currently, the legal framework does not provide comprehensive guidelines of TDR within the formal court process. This has further frustrated the utilization of TDRM in Kenya. He concluded by saying that "it is only through putting such legal and policy measures that we can fully legitimize the ADR and TDR mechanisms and tap their advantages" (p. 21).

The proponents of traditional mechanisms appreciate their benefits but also acknowledge their serious shortcomings and challenges. Kariuki (2015) looks at the theoretical foundations for the traditional conflict resolutions by elders, the social capital theory, the social solidarity theory and optimal psychological theory (pp. 2-3). He opines that "the social capital theory can explain the restorative nature of dispute resolution by elders in African Societies. He concludes that in most of Africa, elders aimed at restoring the social ties or social capital that has been broken by wrongs done, committed or omitted" (p. 2). In reference to Social Solidarity Theory citing Durkheim (Division of Labour), he states that "individuals in the society are social actors who are restrained by the social facts in the society to stay in the society. That social facts are functionalist in nature. They exist only if society can derive utility or benefits". Kariuki (2015) uses this theory to explain that dispute resolution by elders is viewed as a social fact from which society derives benefits. Elders resolve disputes due to their long experience, wisdom and the respect accorded in the society.

On the Optimal Psychology Theory, Kariuki (2015) holds that it uses culture to explain how people view reality, live and resolve disputes. He opines that dispute resolution and other real-life conditions are sub-optimal when done through a foreign culture. He concludes that "while dispute resolution in African Societies is aimed at repairing social ties and restoring harmony, "received" justice systems are mainly retributive with winner-loser ideology." He concurs that the theory is important in understanding the resilience of traditional dispute resolution in modernized and westernized African societies (p 3). Kariuki (2015) analyses the application of these theories to other African tribes such as the Pokot, Turkana, Marakwet and the Samburu of Kenya. He confirms that "traditional justice system played a key role in managing conflicts and maintaining social order in the

communities. Elders prevented and resolved disputes among the societies" (p. 9). Ruto et al., (2004) confirm that "it can be emphatically be concluded that customary indigenous governance mechanisms can provide a solid framework for building a community's conflict resilience through strengthening traditional conflict resolution mechanism, enhancing local peoples potential for rediscovering elders' wisdom, knowledge, and other resources" (p. 93). Mburugu and Macharia (2016) conclude that "Njuri Ncheke Council of Elders of Ameru plays a significant role in conflict resolution among its members and neighbouring communities. Its role in this regard is a useful supplement to the judiciary and other related national organs in resolving the local level especially land, family and inter-community boundary disputes." He acknowledged that this brings cheap, faster benefits to the dispute resolution as well as bridging relations "by promoting restorative justice and ensuring sustainable peace among the parties." However, he cautions that Njuri Ncheke's effectiveness has been compromised by the difficult circumstances under which it operates that included lack of recognition by the law, the politicization of its activities by some key members that leads to divisions within and also limited financial resources on which to operate" (p. 6). Ruto et al., (2004) complain of the same problems with respect to Turkana and the Pokots. They posit that "the role and efficacy of the Turkana traditional conflict resolution mechanism have been generally eroded, marginalized, eroded, marginalized, and diminished by modern civilization and development thinking. The system is regarded as archaic, barbaric and outdated mode of arbitration" (p. 58). Other weaknesses of dispute resolution mechanisms include lack of proper and effective enforcement instruments and machinery apart from the use of curses especially among the Pokots (p. 40).

Ruto et al., (2004) also note other shortcomings and challenges of the traditional dispute resolution mechanism. They observe:

Among the pastoralist communities, elders have traditional jurisdiction in facilitation, arbitration and monitoring outcomes. Local conflict mediators typically possess moral status, seniority, neutrality, and respect of the communities. They are acceptable to all parties and demonstrate capable leadership capacity. Resolutions are generally accepted by all concerned parties. However, experience from the Pokot, Samburu, Marakwet and to a lesser extent Turkana has shown that customary courts often bring important social influence but lack powers and means to enforce the resolutions adopted. Advice is only accepted if both parties agree to it. Both parties must feel that their concerns were properly addressed. Traditional power structures to prevent the occurrence of violence is limited (p. 95).

They recommend that the government support through police and provincial administration to assist the council of elders in enforcing their resolutions, documentation and dissemination of the traditional conflict resolution mechanisms, incorporation of customary law into formal education and engagement of civil society, faith-based organization in taking lead in revitalizing marginalized traditional conflict resolution structure and link them with modern judiciary (Ruto, Adan., & Masinde, 2004, pp. 90-91).

Gitau (2013) applies systems theory approach to explain the Turkana and Pokot conflicts through identifying the actors, the issues, the historical dimensions of the conflict and the contextual factors ie., (political, economic, social factors, and external dimensions) and how they impact on conflict resolution options and frame long-term conflict management solutions. He posits that “long-standing dispute between the two communities should be resolved once and for all. In doing so the government should use the old colonial maps of which the two communities are aware of, the two communities should be fully involved in the exercise so that there is ownership. There should be wide consultation. The community should be empowered to participate in all levels of development. Devolution of power to the communities should be used to enhance the active participation of

pastoralists in development planning to ensure projects and programmes are supportive and relevant to their livelihood.”

Not all scholars agree that the council of elder has a positive role in resolving societal conflicts. Makau (*The Standard*, 2017, April 9) (p. 15) while making reference to Kaya Elders of Miji-Kenda, Merus Njuri Ncheke, Luo Council of Elders, Akamba Clan Governing Council of elders, Kikuyu Council of Elders, Luhya Council of Elders, and Masai Council of Elders cast doubt on their current legitimacy and integrity. He states that "my quarrel with these Council of elders is that they are a perversion of African Heritage. They have unscrupulously misappropriated culture and traditions to serve the myopic interest of the thieving elite. The Tribal Council of Elders is packed with charlatans and self-seekers. In fact, they have nothing to do with the ethnic group." He further stated that "the Tribal Council of Elders today are nothing but cartels which traffic in name of ethnic heritage to hawk for subnational elites. They are an anvil that is hypocritically employed by clever elites to hoodwink their kin." This indictment though not backed by research may have some element of truth and hence even the established organs of justice have been hesitant in bringing in the traditional justice system without a validation process as demanded by the constitution (Article 159(3) on criteria of repugnancy to justice, morality, contravention of the bill of rights and written law).

In March, 2016 the Judiciary established a Task Force on Traditional, Informal and Other Mechanisms used to Access Justice in Kenya (AJS Taskforce). The terms of reference were, *inter alia*, convene stakeholders and practitioners to map out and understand the prevalence of use of AJS, undertake situational analysis of any existing reports, manuals, guidelines, practice notes, legal provisions on mainstream AJS; study and consolidate best practices from selected traditional justice systems of selected communities; develop a strategic plan to implement the policy; and develop a National Model for Court-

Annexed traditional justice resolution mechanism for possible adoption (State of the Judiciary and the Administration of Justice Annual Report, 2016-2017 p. 11). The researcher was not able to confirm whether the Task Force completed its work or see its report and recommendations.

2.7 The Role of the Judiciary

The judiciary is the gatekeeper to ensure ADR is exhausted before litigation is invoked. According to the Constitution, ADR is mandatory (article 189(3)) and the court has a constitutional duty to ensure compliance by all levels of governments. South African courts have virtually excluded intergovernmental disputes from their jurisdiction. Despite the Kenyan constitutional and legal provisions, the Counties have been filing cases in court. Laibutta (2015) opines that Kenya Courts, unlike South African ones, are reluctant to oust their jurisdiction to pave way for ADR in intergovernmental disputes. The High Court of Kenya seems to be obsessed with its unlimited jurisdiction powers in opposition to the dispersion of mandates to other constitutional bodies in the justice system.

Attempts by the judiciary to apply ADR has mixed success and failures. Article 159(2)

- (c) of the Constitution provides that the Courts and other tribunals shall promote the use of Alternative Dispute Resolution mechanism. The first two, reconciliation and mediation are non-adversarial but arbitration is considered adversarial. Article 159(2) further mandates the Courts to promote the use of traditional dispute resolution mechanism subject to three limitations, that is, contravention of the bill of rights, repugnancy to justice and morality and/ or inconsistency with the constitution or written law. Some of the judges have interpreted these provisions to be permissive and too discretionary. There is a valid argument that their liberty to promote ADR exist as long as another provision of the same constitution does not make ADR mandatory. Article 189(3) and (4) can be

interpreted as having removed such discretion. As far as S. 31 of IGRA is concerned the judges are obliged to confirm whether the national government and the county governments have "applied and exhausted the mechanisms for ADR provided in the Act or any other legislation before proceeding on with cases filed by them respectively." The Court is also supposed to check and inquire whether the governments have existing agreements incorporating a referral clause. If they do, it must stay the proceedings until the parties comply with part IV of the Act. The absence of the clause, however, does not excuse them and a similar order of stay and compliance must be made.

In *Law Society of Kenya v. Transition Authority and two Others* (eKLR, 2013) an issue arose whether the Court had jurisdiction to determine a dispute between national and county government where there was a dispute mechanism in place. Honourable Justice Majanja held "granting the declaration sought in the petition would undermine that objective and process of implementation of the constitution, devolution, and restructuring of the provincial administration". He stated that Section 19 of IGRA established the Summit which was obliged to resolve the disputes between national and county governments and according to section 35 court was as a last resort. Six months later the same High Court sitting in Nyeri took a different turn and entertained a dispute between the national government and the county of Nyeri (eKLR, 2014). These inconsistencies have put the Counties and national governments in a collision course and distorted the management of intergovernmental disputes. In 2015 the Parliament passed The Constitution and High Court (Organization and Administration) Act 2015 (Act 27 of 2015) which reiterated that "in civil proceedings before the court, the court may promote reconciliation amongst the parties thereto and shall encourage and permit amicable settlement" (Section 26(1)). It provided that the court shall in relation to ADR be guided by the rules developed for that purpose. In Section 26(4) the Act is more emphatic "where

the ADR is a condition precedent to any proceedings before the court, the court shall by order stay the proceedings until the condition is fulfilled.” The intergovernmental cases decided after 2015 do not show that these provisions were complied with or reference was made to the relevant provisions of IGRA or this new Act.

2.8 Court-Annexed Mediation

The judiciary in its constitutional mandate to promote ADR started a Court-Annexed Mediation (Pilot) Project on 4/4/016. According to CAM (Pilot Project) Rules 2015, the project is limited to Milimani High Court at Nairobi and to the Commercial and Family Divisions. The mediation in the Commercial division has resolved disputes worth Kshs. 615,554,226/= up to the date of the report (Status of the Judiciary and Administration of Justice Report 2015-2017 p. 55). However, this pilot scheme was not extended to intergovernmental disputes. The significance of the Court-Annexed Mediation is that it is mandatory and give parties a mandate to come up with a final agreement. However, as long as the parties complied with directions of the mediator and attend meetings, they are not bound to reach an agreement and he could certify that the case should proceed to a hearing in the normal way if it fails. In case of non-compliance with the directions of the mediator, he could recommend striking out of the pleadings of the offending party [Rule 12 of The Mediation (Pilot Project) Rules 2015) and Status of Judiciary and Administration of Justice Annual Report 2016-2017].

Miguna (2014) notes that "60 percent of disputes in North America are resolved out of Court. In Canada, compulsory court-annexed mediation procedures are mandatory for virtually all civil matters." In his view "interlocutory injunction orders should have never been issued by courts on matters that the constitution itself states should only be taken to Court as a last resort" (p. 118). He argues that "the Chief Justice must immediately

institute an administrative process of weeding out such cases at the Registry before they are filed (Use of Alternative Dispute Resolution www.the-star.co.ke).

Although Chief Justice has also established a devolution registry (The Standard, March 8th, 2017) and waived fees for cases emanating from the Counties he does not seem prepared to interfere with devolved governments. It may be argued with merit that he has created an environment for litigation which may encourage the counties opting to file suits instead of referring disputes to ADR.

In conclusion, the judiciary as an important organ in preventing the filing of inter-governmental disputes by pushing them back to ADR seems to be playing a negative role through judicial inconsistency and lack of policy. There is also a possibility that this environment was only intended to facilitate cases relating to the interpretation of devolution laws and powers between governments but has been abused by the counties.

2.9 Example of Cases Filed by Respective Governments

The researcher examined a number of disputes between the Counties and the national government. As observed, a majority of the disputes between the Counties and national government were caused by the transfer of functions, funds, and exercise of powers between both levels of governments. The disputes between Counties and the Senate were mainly on interpretation of their respective duties, powers, and relationships. The Council of the Governors was the main complainant on behalf of the Counties. The Members of County Assemblies (MCA's) used their national forums to file cases. A few of these cases have been discussed here below:

A. County vs. National Government

(i) The County of Nyeri versus The Cabinet Secretary of the Ministry of Education Science and Technology, The Principal Secretary, Ministry of Education Science and Technology. Petition No.3 of 2014. [2014] eKLR

In the above case, the judge held that an allegation of violation of fundamental rights is not a dispute between County and National Government and the court had jurisdiction to hear the matter. He also observed that it cannot be mediated or settled through the alternative dispute resolution mechanism. He concluded that "the petition shall proceed for hearing and determination on its merits unless the parties herein are on their own willing to engage in settlement of the matters herein for which the Court has no objection in light of the provisions of Article 159(a) of the Constitution." Another important observation by the judge was that the intergovernmental dispute is not defined unlike the South African Intergovernmental Relations Framework Act 2005 (p. 6).

(ii) Council of Governors versus Attorney General, KENHA, KURA, and Transition Authority. Petition No. 472 of 2014. [2015] eKLR

In this case, the Court ordered the Attorney General to “within 90 days gazette transfer of functions to the County Governments.” It further granted prohibition orders against Kenya National High Authority, Kenya Urban Road Authority and Kenya Rural Roads Authority from proceeding with further procurements or re-advertising, tendering, awarding or inviting bids respectively.

(iii) The Council of Governors versus the Inspector General of National Police Service, Director of Public Prosecutions, The National Assembly and the Attorney General. Petition No. 298 of 2014. [2015] eKLR

In this matter, the suit was dismissed as devoid of merit and the Court holding that it was frivolous. It is apparent there was no attempt to engage the relevant organ, the Summit or its committees in negotiations as provided in the IGRA. The Court did not interrogate whether ADR had been explored.

(iv) Isiolo County Assembly Service Board and Another versus Principal Secretary Ministry of Devolution and Planning and Another. Petition No. 370 of 2015. [2016] eKLR

In this case, the judge observed that “my view is that there is a clear process established under the Act for resolving disputes between County governments or between national on one hand and a County government on the other. The process must be followed before parties resort to court. There has to be an attempt, firstly to resolve the dispute amicably and when this fails the parties must seek to convene before the Summit or the Council of Governors, which are both bodies established under Sections 7 and 19 of the Act to assist in resolving disputes. An elaborate process is provided for in Part IV of the Act. Judicial proceedings are only to be resorted to when all efforts at resolving the disputes under the Act fails so states section 35.”

The judge made an observation that "the Act seeks not only to provide dispute resolution mechanism but to promote and foster a better relationship between two levels of government pursuant to article 6(2) of the Constitution. A less acrimonious process is prescribed. It ought to be followed and in these respect the petitioners must be faulted for not having made an attempt to resolve the dispute in a more amicable manner.” He proceeded to order for stay of proceedings to enable

the parties to pursue a resolution of the dispute under the Intergovernmental Relation Act (Cap 5G).

- (v) **Turkana County and twenty others versus Attorney General, Cabinet Secretary Ministry Interior and Coordination of National Government (Respondents): Turkana Professionals vs. County of West Pokot, Baringo County, Hon Asman Kamama, Hon Joseph Lotodo, Victor Mengich, Joshua Akeno on behalf of the Residents Tiaty Constituency, East Pokot Sub-County, and others. Petition 113 of 2016. [2016] eKLR**

The case involved both county and county governments and national government at the same time. Although the Court observed that Article 189(3) provided a clause that “in any dispute between governments, the governments shall make every reasonable effort to settle disputes, including by means of procedures provided under national legislation” it failed to discuss the objection raised by the Attorney General that such mechanism existed or decide whether such mechanism met the threshold of ‘being sufficient and adequate’ It heard the case on merit and dismissed it as without legal foundation.

- (v) **County of Kirinyaga versus The Cabinet Secretary (Ministry of Land and Housing and Urban Development), The National Land Commission, The Attorney General, and ten others. Petition No. 1 of 2017. [2018] eKLR**

In the above case, independent constitutional bodies were sued together with the National government raising the issue of who are the legitimate parties to intergovernmental disputes. In some cases, agencies of the national governments

were either enjoined together with government or on their own right. In the latter situation, the National Government would be inevitably dragged into the dispute.

Other cases were brought by individuals and private organizations which were outside the jurisdiction of intergovernmental disputes but had an impact on the relations between the Counties or between the Counties and national government. According to the Devolution Case Digest Vol.1 (2015), about 15 cases were brought by individuals and institutions on issues of transition to devolved government, transfer of powers and functions between 2013 and 2015. Central to this litigation was the Transition Authority which generated a substantial number of cases especially on the liabilities and assets of defunct local authorities.

(vi)The County Government of Migori and four Others versus the Privatization Commission and others. Petition No. 187 of 2016. [2017] eKLR

In the above case, two Counties, Migori and Bungoma, together with the Council of Governors and Anyang Nyong'o, filed a petition against Privatization Commission, Attorney General, and the National Land Commission, alleging a violation of the constitution. The petitions had a common grievance arising from the proposed privatization of Sugar factories in their respective Counties (South Nyanza, Nzoia, Chemelil, Muhoroni, and Miwani). They based their arguments on a number of issues but the most important was the constitutional devolution of agriculture and lack of public participation by the stakeholders. They sought orders of judicial review declarations, permanent injunctions, *certiorari* with respect to the privatization decision, calling for expression of interest and the advertisement. They acknowledged that the dispute touched on the mandate of the two levels of government but argued

there were matters of legal interpretation of the constitution in the conferment of functions between them. The petitioners later withdrew the petition and referred the matter to ADR.

B. The Senate Cases

(i) The Council of Governors, Dr. Alfred Mutua, Patrick Khaemba, Ahmed Abdullahi Mohamed, Wycliffe Oparanya and James Omariba vs The Senate. Petition 413 of 2014. [2015] eKLR

In the above case, the judge felt the matter was of public importance and clarified the roles and powers of both the Senate and the Governors. However, he failed to consider whether the dispute should not have been resolved by negotiation to save time and costs especially considering the governors were divided in their opinions.

(ii) The Supreme Court Advisory Opinion No. 2, Speaker of Senate and Another versus Attorney General; Speaker of National Assembly versus Attorney General and three others [2013]; Kerugoya High Court Petition No 3 of 2014 Martin Nyaga Wambora and four others versus The Speaker of the Senate and six others, [2013] eKLR

Although the above cases concerned the removal of governors, they illustrate the complex nature of the disputes, especially on the multiplicity of parties. The County of Embu and Council of Governors were among the petitioners while respondents included The Speaker of Senate, Attorney General, and others. These cases did not follow the constitutional and legal mandate to refer disputes to ADR. This was because the law arguably provided a specific remedy for the removal of governors.

However, disputes may involve issues that should go to ADR because they are inter-governmental in nature.

(iii) Narok County Government versus Senate & Another [2015] eKLR

The judge observed that the dispute resolution forum has been laid out under article 189 of the Constitution and sections 31-35 of the Intergovernmental Act 2012. The Constitution, as well as the statute, encouraged a more reliable but less acrimonious way of resolving disputes between governments or government entities. Litigation is ranked last.

(iv) The County Government of Kiambu and the Council of County Governors versus The Senate and Others. Nairobi High Court Constitutional and Human Rights Division Petition No. 229 of 2015. [2017] eKLR

This case concerned the interpretation of powers of the Senate to probe the Kiambu County Supplementary Appropriation Bill. The Court held that the decision of the Speaker of Senate was unconstitutional and the legislative power of the County governments is vested in County Assemblies. The issue of article 189 or ADR was not raised or considered.

(v) The Council of Governors versus The Senate [2017] eKLR

The case involved the interpretation of the role of the Senate on County Assemblies. The petition was triggered by a letter dated 6 May 2015 to Kiambu County Government purporting to investigate the legality of the Kiambu County Finance Act 2014. Adopting the holdings in the above case the Court gave a declaration that the Senate cannot scrutinize the process and legality of a County legislation. It issued a permanent

injunction restraining the Senate from considering the process and legality of County legislation. The judgement was delivered on 20 February 2017.

While the South African Act expressly exempted Parliament and legislative organs of the provincial and local governments from its application, it is not the case with IGRA of Kenya and has precipitated the confusion demonstrated by the cases discussed above.

C. Inter-County Disputes

The County Government of Isiolo and Ten others versus Cabinet Secretary, Ministry of Interior and Coordination of National Government & 3 others. [2017] eKLR,

The Isiolo-Meru boundary dispute was preceded by a Court case filed by Isiolo County which was stayed to allow negotiation. On implementation of the recommendations of boundary committee, the national government administration imposed what was described as "forced arbitration" by the then Cabinet Secretary in charge of Interior and Coordination of National Government General (Rtd) Nkissery. The County of Isiolo challenged the legality of the Committee appointed by the Cabinet Secretary to oversee the demarcation of the boundary. The Court declared it illegal and a nullity. The Court further gave guidelines on the mechanisms and institutions that should have been used to resolve the dispute: as per the judgement of Hon. Justice Lenaola, the National Land Commission was responsible for historical injustice under Article 67 of the Constitution, and the Commission on Boundaries for the County boundaries (Article 188).

The traditional ADR Mechanisms, though applied through elders and religious leaders, was not effective. The enforcement of the dispute was challenged successfully in Court. The limitation of ADR in this situation was explained by the Court where there is another legislation on the issue in dispute.

2.10 Public understanding of ADR

The Task Force on Judicial Reforms 2010 confirmed ADR had limited application in Kenya (p. 54). In a further research by done by Cheboror (2013) on the extent of application of ADR mechanism in settling disputes in Kenya, he postulates that there is a general ignorance of ADR forms and procedures by the public. He comments "the fact that the respondents do not know where to go or where to start the process makes them find themselves in court seeking justice. There is also lack of knowledge of ADR by the provincial administration officials especially the chiefs" (p. 58). The bulk of public information is passed to the civilian in Kenya through the two organs and hence, if they are ignorant of ADR, the public is equally affected. Muigua (2016) commenting on the role of lawyers in mediation has confirmed few Kenyan lawyers are attracted to it on the assumption that there is no financial reward.

2.11 Conclusion

ADR mainly involves negotiation, mediation, and arbitration. The latter two are forms of third-party intervention in handling disputes at the level of individuals, groups, and governments. According to Muigua (2015), these categories have never been properly defined or agreed upon at least in Kenya. There is no consensus that litigation is less beneficial than ADR.

The review of the literature above reveals that there are many variables that need consideration and investigation to explain why ADR, as prescribed by the Constitution and IGRA, may not be readily applied in inter-governmental dispute resolutions. The intergovernmental disputes are not private conflicts and require public scrutiny which is

not available in ADR as it is essentially a mutually consensual process. There may also be structural problems related to implementation and logistics due to factors, such as bureaucracy, diversity of political parties forming the national government and the County governments. The trends in the devolution show indifference and apathy between the Central government and devolved units in terms of resource management and decision-making. The application of the principle of “co-operative government” as opposed to “competitive government” (Kangu, 2015) may be a major challenge. The legislative deficiency such as lack of procedures for the settlement of disputes by the prescribed organs (e.g., the Summit) has created major handicaps (p. 313).

The Constitution appears not to define the Alternative Dispute Resolution mechanism but just gives guidelines of what it includes. However, useful guidelines can be inferred from the spirit of the Constitution Article 189(1) (2) and (3) that emphasizes on "respect, assistance, support, consultation, liaising and co-operation between governments". The setting of the environment for resolution of the dispute may be argued to exclude litigation or adversarial system.

It is important to review the Intergovernmental Relations Act (Act 2 of 2012) itself and find out whether it is constitutionally capable of being implemented in its current form and whether it conforms to general principles of ADR. The principles of intergovernmental relations are set out in Section (4) (a) to (k) and their main thrust is consultation and co-operation between governments as provided for in Article 6(2) of the Constitution, “the need to minimize intergovernmental disputes while co-operating in exercising their functions.”

The Act establishes the National and County Government Co-ordinating Summit (the Summit) and Council of Governors (COG) as main drivers of intergovernmental dispute resolution mechanisms. It is important to note that the Summit has not been given

specific powers to deal with disputes under section 8 of the Act. Section 11 establishes the Intergovernmental Relations Technical Committee (IGRTC) which is vested with powers to facilitate ADR. Section 19 establishes the Council of Governors (COG) made up of 47 Governors, Chairperson, and Vice-Chairperson. The functions of the Council include dispute resolution between the counties within the framework provided under the Act. The Act specifically gives Council power to resolve disputes between counties. However, the Council is not given powers to resolve disputes between national and county governments. The Summit is the final organ in the dispute resolution mechanism. It certifies where ADR has failed to yield a solution, but the parties can refer matters to arbitration without the authorization of the Summit. The Constitution does not allow the recourse to Court but arbitration as part of ADR.

The Cabinet Secretary in charge of Devolution is obliged under Section 38 to make regulations and S. 38 (2) (c) makes specific reference with respect to dispute resolutions mechanisms under the Act which, as stated above, have not been promulgated.

The upshot of this analysis of the IGRA is that it may also have flaws that militate against its application and implementation in terms of powers of various organs and procedures. It may be unconstitutional to the extent of its inconsistency in allowing recourse to Court. It is important, therefore, to see what actually happens on the ground, how the implementors and users of the ADR experience terms of using and addressing the intergovernmental conflicts and the challenges they face. This marks the central interest of the study. The following chapter provides the methodology used for this study to collect, present and analyze the field research data.

CHAPTER THREE: METHODOLOGY

This Chapter concerns the research methodology to address the overall research objective namely, to examine the application of Alternative Dispute Resolution (ADR) in the devolved system of Government in Kenya.

3.1. Research Design, Methods, and Instruments

3.1.1 Research Design

The study used an exploratory design. The primary goal of the exploratory design was to help gain a better understanding of an issue or situation. It was an appropriate way to provide the groundwork for more vigorous studies at a later date (Davis, 2000; Zikmund 2003; Cooper and Schindler 2006). The exploratory design was most useful in situations where limited information was available, and the researcher wished to have the flexibility for future exploration areas of research (Polonsky & Waller 2005; Cooper & Schindler 2006). The subject of study, i.e., devolution, was introduced in Kenya in 2013 and was to complete its first five-year electoral term in August, 2017. The information on its implementation is scanty and a flexible research design was appropriate as it enabled the researcher to obtain data and make recommendations for future research. The design helped in the analysis of the existing studies in the subject area. The interviews and the questionnaires provided useful information about the informants understanding and interpretation of the constitution and the dispute resolution legal framework.

3.1.2 Research Method

The researcher employed quantitative and qualitative methods. This enabled the researcher to capture data showing the level of use of ADR in general and prescribed

legislative methods. In particular, it also helped to explain why respondents made specific choices of either litigation or ADR. The quantitative method helped to capture the views of the respondents in the counties concerning their preferences for one method or the other. The qualitative approach helped the researcher to describe the choices of the informants.

3.1.3 Research instruments

In appropriate cases, self-administered questionnaires were used. Interviews were a significant part of the data collection instruments. The recording of the interviews was done by taping which was later transcribed.

Each item in the questionnaire addressed a specific objective, research question or hypothesis of the study (Mugenda & Mugenda, 2003, p. 71). Structured or closed-ended questions and unstructured or open-ended questions were used where appropriate. With respect to professional respondents, the researcher used open-ended questions to elicit more extensive opinion on the constitution, and understanding of ADR and its legal framework. The closed-ended questions were administered to the non-specified respondents to ensure saving time and money. This assisted in getting more relevant responses and easier analysis. In appropriate cases, contingency questions were used to probe for more information as a follow-up. The justification for contingency questions was to seek clarity and more information especially from the professional respondents who used technical terms and precedents.

3.2 Population and Sampling

The target population included the following informants: Four governors or deputy governors, four Senators, four Clerks and Members of the County Assembly in the Counties under review, one member of the technical committee in the Ministry of Devolution, the Registrar of the High Court, three judges from the High Court, Court of Appeal and the Supreme Court respectively, two legal practitioners, one professional mediator, one arbitrator and Chief Litigation Counsel from office of Attorney General Chambers. The researcher interviewed three scholars who have written on devolution, a former member of Constitutional Review Committee, a former member of Task Force on Devolution, Former Chairman of Chartered Institute of Arbitrators (Kenyan Chapter), and the Chairman of the Court Mandated Mediation Committee. Each one of these respondents represented the key players in the management of inter-governmental disputes. Governors made key decisions in how the disputes were to be resolved. The judiciary interpreted the law and especially on whether cases involved in inter-governmental disputes should be received and resolved in the court system. The professional groups of legal practitioners, mediators, and arbitrators are basically the consultants in litigation in general on behalf of the counties and national governments. It was also important to get an overview of the scholars who have written or critiqued the devolution system of government, and hence their inclusion in the category of interviewed respondents. Finally, the people who caused and/or affected by the disputes constituted the public and were represented by the lay people.

The study was carried out in six Counties namely; Kiambu, Muranga, Turkana, Baringo, Isiolo, and Meru. The three County disputes were picked for research because they are

typical of disputes emanating from devolution and would be representative of the whole country. The Researcher interviewed two religious leaders, two traditional leaders, two women leaders and two youth, and four deputy governors from Muranga, Kiambu, Isiolo, and Meru Two Senators and 4 Members of Parliament. The initial number of respondents for the study was sixty-four (64): forty-four (44) respondents for interviews and twenty (20) for the questionnaire. However, due to the nature of the research which involved senior officials from the government, it was difficult to interview all of them. The researcher managed to have twenty-three (23) interviews and thirty-seven (37) questionnaire copies. The total number of respondents was sixty (60).

Purposive sampling was used in the study. According to Mugenda and Mugenda (2003) "purposive sampling technique allows a researcher to have the required information with respect to the objectives of his or her study. Cases of subjects are, therefore, picked because they have information, or they possess the required characteristics" (p. 50). The objective of this study was to establish reasons for decisions made by, among others, governors, policymakers and professionals in the devolved governments. The target group was identifiable as having relevant information on the subject matter of study. The data generated through purposive sampling strategy (non-probability sampling design) permitted selection of target groups. Expert sampling was also used which involved interviewing individuals who are generally viewed as experts or consultants in their area of expertise. Snowballing (chain referral) was also used where key informants and target respondents bring subjects, who display the qualities the study is interested in investigating. The informants suggested other persons who share similar expertise and would be willing to provide information concerning the subject of inquiry.

3.3 Data Collection

The researcher collected data from two major sources, namely primary and secondary sources. The primary source consisted of information gathered directly from respondents. This was done through questionnaires, interviews, and discussions. Secondary information sources, which is also referred to as desk research, were data neither collected directly by the researcher nor specifically for him. It involved gathering data that has been already collected by someone else. This involved collection and analysis of published materials and information from internal sources. Secondary data was collected from diverse documents or electronically stored information. The researcher defined the target population by identifying the respondents and their accessibility. The researcher conformed to the research design and selected samples in such a way that he obtained results that had acceptable precision and accuracy. The researcher ensured that the questionnaires had the correct number of questions, and the tape recorders were in the working condition. The researcher relied on his assistant researcher's expertise and skills in operating the system.

The researcher explained the data to be collected and made sure that he and the assistant researcher were clear on the information that was sought. He requested permission to collect data from relevant authorities such as the National Commission for Science, Technology, and Innovation (NACOSTI). He complied with the mandatory requirement of the authorities. The researcher carried pretesting of the research instruments before collecting data and piloted the questionnaire with a small representative sample to ensure that the instruments work. The pre-testing enabled the researcher to find out if the selected questions were measuring what they were supposed to measure. The pre-testing also helped to find out if the wording was clear and that all questions were interpreted in the same way by the respondents. It also helped the researcher to detect what kind of

response was provoked and if there was any research bias. Pre-testing also enabled the researcher to monitor the context in which the data was collected, and the topic areas addressed.

As for the questionnaires, the respondents were advised to fill in answers in written form and the researcher collected the form with the completed information. The instrument was distributed to the respondents by the researcher and the research assistant. The respondents were given adequate time to complete answering the questionnaires. All the questionnaires were collected after the given response time was over. In some cases, questionnaires were mailed to the respondents and they were advised to re-mail them in accordance with prepaid and stamped envelope.

In other cases, internet was used to send questionnaires and get them back. In the interviews, the researcher chose the respondents and requested them to answer the identified questions. The researcher and the research assistant noted down the answers given and recorded the responses. In some cases, the interviews were carried out through the telephone and the responses received were recorded by the researcher. The respondents were advised to respond in accordance with the instructions given by the researcher.

The researcher adhered to the following rules:

1. He collected only the data needed for the purpose of the study.
2. Informed each potential respondent about the general nature of the study and the intended use of the data.
3. Protected the confidentiality of the information collected from the respondent and ensured that the means used in the data collection were adequate in protecting confidentiality as intended.

4. Ensured that the processing and the use of data conformed to the pledges made.
5. Applied appropriate techniques to control statistical disclosure. The researcher ensured that whenever data was transferred to other persons or organizations, this transfer conformed to the established confidentiality pledges and required written assurance from the recipients of the data.

The respondents mentioned in 3.2 above were provided with the questionnaires and were personally interviewed. The interviews were divided into thematic areas already identified according to the research objectives of the study. It is the researcher's believe that the respondents gave honest answers and the ones who answered in Kiswahili were given interpreters.

3.4 Research Site and Time Frame

The study was carried out in six Counties, namely Kiambu, Murang'a, Turkana, Baringo, Isiolo, and Meru. It extended to the relevant Court registries in Nairobi and in the jurisdiction in the Counties. The research included offices of the line Ministries, Office of the Attorney General and the Secretariat of the Council of Governors in Nairobi. The research was done from February 15th to April 24th, 2017.

3.5 Reliability and Validity of the Instrument

Reliability and validity have been defined as how social scientists determine the extent to which a particular empirical indicator (or a set of empirical indicators) represents a given theoretical concept. Reliability concern the extent to which an experiment, test, or any measuring procedure yields the same result on repeated trials (Carmines & Zeller, 1979, p. 11). Validity is defined as the extent to which any measuring instrument measures what it is intended to measure (p. 17). On validity, the researcher provided supporting evidence

that a measuring instrument does in fact measures what it appears to measure in line with what Nachmias and Nachmias (1996) have stressed.

On reliability, the researcher endeavoured to ensure that the instrument used eliminated errors arising from the following factors that are mentioned in Nachmias & Nachmias (1996):

- a. Respondents' momentary distractions when completing questionnaires (such as telephones, third-parties, faulty instruments such as pencils, recorder, ensure respondent's sobriety, stress-free conditions, and proper checklist is done to eliminate the possibility of errors, etc.).
- b. Ambiguous Instructions
- c. Technical Difficulties

Both the open-ended and close-ended questionnaires were made clear and concise. They contained adequate, clear and concise questions. The accuracy of the questionnaires was guaranteed. A pre-test of the questionnaires was done in order to determine its reliability and validity. This was useful in reducing the errors that occurred when using the instrument.

3.6 Data Analysis

The data collected from the field was sorted, coded, keyed in a computer and analyzed. The collected raw data were systematically organized to facilitate qualitative and quantitative analysis.

Quantitative data were analyzed using the Statistical Package for the Social Sciences (SPSS) version 20 and so generated charts, frequency distributions and percentages that assisted the researcher in answering the research questions. This captured the numerical

data collected through primary and secondary sources. Qualitative data were analyzed in a descriptive manner and interviews were summarized. The qualitative research captured the perception of the respondents. Questionnaires and interviews were used to collect primary data. Questionnaires contained open-ended, close and ranking questions that ensured appropriate feedback.

The qualitative data were analyzed in order to obtain a useful conclusion and recommendations. The researcher endeavoured to obtain detailed information about the phenomena being studied and tried to establish patterns, trends and relations from the information gathered. Quantitative data were described and summarized using descriptive statistics.

CHAPTER FOUR: DATA ANALYSIS

The conflict resolution theory, while it allows different mechanisms and methods depending on contexts, promotes more the use of soft and non-violent methods (e.g., ADR) in preventing violence and bringing positive peace. This research focused on the use of ADR in Kenya as a primary preferred way of addressing inter-governmental disputes, and the data are gathered to find out why there exists more the phenomenon of litigation than the constitutionally required ADR methods among the devolved governments and also between them and national government.

This chapter presents the analysis of the primary data collected from the questionnaire and interviews. The first set of data relates to study areas Meru-Isiolo, Kiambu-Muranga, and Baringo-Turkana boundary disputes. The data were sourced from deputy governors of Meru, Isiolo, Kiambu and Muranga, senators from Muranga and Meru, member of county assemblies from Meru, Clerk to the County of Muranga and the legal officer from the County of Kiambu. Other respondents with direct relation to the Counties included the advocates in private practice who advised the county officials. The second category of respondents came from the national government and included the staff of the Intergovernmental Relation Technical Committee (IGRTC). The third source included members of the public, youth, elders, religious and opinion leaders. The final source of data came from experts in the areas of ADR, devolution, Intergovernmental disputes, and judiciary. For purposes of my analysis, the data is classified into six categories namely county and national officials, judiciary, non-professionals, legal experts and scholars.

4.1 Demographic Data

The information captured in the demographic data includes the respondents' location, sex, age group and level of education. The purpose of presenting demographic data pertains simply to state that the data are gathered from the sample coming from the population that has been directly or indirectly involved in the mediation cases or have sufficient knowledge of the process in addressing the inter-governmental disputes. This guarantees representability or generalisability of the findings.

4.1.1 Location of the Respondents

The participants were mainly from Meru, Isiolo, Kiambu, Murang'a, Baringo, Turkana, Nairobi and Mombasa as shown in Table 1 below.

Table 1: Location

		Frequency	Percent
1.	Meru	10	16.7
2.	Isiolo	4	6.7
3.	Murang'a	6	10.0
4.	Kiambu	10	16.7
5.	Baringo	4	6.7
6.	Turkana	4	6.7
7.	Nairobi	21	35.0
8.	Mombasa	1	1.7
	Total	60	100.0

Source: Researcher, 2017-2018

Table 1 shows that 63.3 % of the participants come from the areas under study. The 21 respondents in Nairobi and 1 in Mombasa constituted experts and judicial officers and are part of the group constituting 36.7% of the total number of respondents.

The minority respondents, about 20.1%, were from Baringo, Turkana and Isiolo counties. These counties were involved in violent internal and inter-county conflicts at the time of research and, hence, impenetrable for wider data collection.

4.1.2 Gender of the respondents

Out of the 60 participants in the study, 48 were male and 12 were female representing 80% and 20% respectively as shown in table 2 below.

Table 2: Gender

		Frequency	Percent
1.	Male	48	80.0
2.	Female	12	20.0
	Total	60	100.0

Source: Researcher, 2017-2018

The disparity between the two genders was mainly because a number of the women contacted to answer the questionnaire or interview were reluctant or unavailable. Serious attempts were made by the researcher to get a response from Women Parliamentary Representatives from counties of Kiambu, Meru, Isiolo, Baringo and Turkana without success. However, the women in relevant positions such as legal officers, mediators, and judicial officers responded to the questionnaires.

4.1.3 Age of Respondents

The study also determined the different age groups to which the respondents belonged. Respondents were categorized by age according to the following age brackets: 18-30; 31-40; 41-50; 51-60, and 61 and above. Table 3 below shows the age group distribution of the sample population.

Table 3: Age

		Frequency	Percent
1.	18-30	5	8.3
2.	31-40	12	20.0
3.	41-50	12	20.0
4.	51-60	16	26.7
5.	61 and above	15	25.0
	Total	60	100.0

Source: Researcher, 2017-2018

The results indicate that respondents aged between 51-60 years were the most represented, representing 26.7% of the sample population. These were closely followed by those aged between 61 years and above (representing 25% of the sample). Those aged 31-40 and 41-50 had a 20% representation each, while those aged 18-30 constituted 8.3% of the entire sample population. This is because the experience both in community and professional training offers more relevance and credibility to conflict resolution and societal affairs. The active leadership group which brings on board more knowledge and

experience in matters of public affairs is 50 years and above which is also the retirement age.

4.1.4 Level of Education

The respondents were drawn from different educational backgrounds.

Table 4: Level of Education

		Frequency	Percent
1.	Primary	2	3.3
2.	Tertiary	58	96.7
	Total	60	100.0

Source: Researcher, 2017-2018

Table 4 above indicates that 96.7% of the respondents had attained tertiary education. Some 3.3% of the respondents had a low level of education. The paradox, however, was that despite the high level of education within the 96.7% of the sample, most of them were not aware of the provisions of ADR in the Constitution, IGRA or the principles governing devolution. The latter may have had a very general understanding of ADR mechanism. However, a high level of education *per se* did not mean the respondent read the constitution and the laws of Kenya or understands the instruments of governance. One of the graduate Deputy Governor stated that he had not read the provisions in the Constitution and IGRA on ADR though his County had a long outstanding inter-county boundary dispute. This partly explains reasons for more litigation cases despite the Constitutions' demand for the use of the ADR methods first. Again the 3.3% of the respondents understood the existence of traditional ADR and applied as a matter of

convenience/routine especially in the community-based disputes (DK, personal interview, 03.03.017; AS, personal interview, 10.03.017).

4.1.5 Respondents' Profession

The respondents for this study were drawn not only from different genders, age groups, and education backgrounds but also from different professional backgrounds.

Table 5: Profession

	Profession	Frequency	Percent
1.	Consultant	1	1.7
2.	Legal practitioners	13	21.7
3.	Banker	1	1.7
4.	Priests	2	3.3
5.	Scholars	5	6.7
6.	Mediators and Arbitrators	11	18.3
7.	Judicial Officers	6	10.0
8.	Insurance	1	1.7
9.	Doctor	1	1.7
10.	Secretary	1	1.7
11.	Development officer	1	1.7
12.	Strategist	1	1.7
13.	Farmers	2	3.3
14.	Deputy Governors	3	5.0
15.	Senators	2	3.3
16.	Financial analyst	1	1.7
17.	Businessmen	1	3.3
18.	Administrator	1	1.7
19.	Teacher	1	1.7
20.	Accountant	1	1.7
21.	Members of Parliament	4	6.7
	Total	60	100.0

Source; Researcher, 2017-2018

Table 5 above confirms that the highest number of the respondents interviewed was from the legal profession. This group constitutes both legal practitioners (21.7%) and judicial officers (10.0%) which in total is (31.7%) of the total number of respondents. This percentage does not include other categories with legal training, for example,

professional mediators and arbitrators (18.3%) who of necessity must have legal training. This group is significant because it constitutes a sector that advises the counties and national governments on law and type of actions to take in case of disputes. For example, what type of remedy to adopt in facing inter-governmental disputes (ENM, personal interview, 07.04.017). A legal practitioner said that the advice to clients varied from one situation to another, and in some cases, he advised them against the ADR and in favour of litigation (personal interview, 07.04.017). Questions put to the deputy governors confirmed this, that they relied on the advice either of their internal or external legal counsels (GGG, personal interview, 24.3.017; MG, personal interview, 18.3.017). This group was expected to be conversant with the legal requirements and institutional framework governing the intergovernmental relations. However, it was the researcher's findings that only a few of the interviewed legal practitioners were consulted by the Counties on the intergovernmental disputes. 2 out of 13 legal practitioners were consulted (15.3%).

The next group of professions engaged in ADR is the mediators and arbitrators (11) which constituted 18.3% of the total respondents. Only a few (2 out of 11 mediators and arbitrators [18.1%]) were engaged by the Counties, which reflects the negligible use of professional mediators by both levels of governments. Again, only 4 out of 24 (16.7%) combined legal practitioners and mediators interviewed were generally involved in intergovernmental disputes. This excludes internal legal advisers and counsels.

4.2 The Rate of Use of ADR in the Resolution of Intergovernmental Disputes in

Kenya since 2013

The main objective of this study was to establish the extent of the use of ADR in the resolution of intergovernmental disputes since the inception of devolved government in 2013.

The respondents were questioned first whether they were aware of intergovernmental disputes in their respective counties. Their response is shown in table 6 below:

Table 6: Awareness of Disputes between National and County Governments

		Frequency	Percent
1.	Yes	60	100.0
2.	No	0	0.0
	Total	60	100.0

Source: Researcher, 2017-2018

There was a unanimous consensus by all respondents that since 2013 intergovernmental disputes of one form or another existed in their respective counties. The respondents were not limited to the three areas of the case study. They included county officials, professionals, experts, scholars, judicial officers, opinion leaders, and the general public. According to the respondents, the sources of those disputes were in three major areas as shown in Table 7 below.

Table 7: Types of intergovernmental disputes

		Frequency	Percent
1.	Performance of devolved functions (e.g., health, pre-primary education etc.)	18	30.0
2.	The exercise of powers by respective governments, e.g., in administration, governance, and accountability on the use of resources	14	23.3
3.	Boundaries	28	46.7
	Total	60	100.0

Source: Researcher, 2017-2018.

The research showed that the majority of respondents attributed the disputes to boundaries at 46.7%, devolved functions at 30% and administration of resources at 23.3%. The boundary disputes had varied reasons: historical, ethnic distribution and migration of people including sharing of contiguous natural resources. The problem with respect to devolved functions was primarily due to the reluctance of the national government to release funds and services promptly (PT, personal interview, 14.03.017; MG, personal interview, 18.03.017 and DK, personal interview, 03.03.017) or devolving the functions without corresponding funding. The exercise of power was the least at 23.3%. The disputes mainly involved accountability and governance. For example, questions were raised by the national government on the behaviour of Members of County Assemblies on the use of money and allowances (CKK, personal interview 10.03.017).

The reasons given for the high percentage of boundaries disputes were, *inter alia*, the inherited problems of pre-colonial arbitrary boundaries (MT, personal interview, 16.03.017), post-colonial political interferences (AGM, personal interview, 13.03.017) and the new social and economic developments especially in areas bordering Counties, e.g., LAPSETT in Isiolo-Meru (MG, personal interview, 18.03.017; AS, personal interview, 10.03.017), oil discovery in Kapedo on Turkana-Baringo border, and hydroelectric and irrigation projects at Turkwel between Baringo and West Pokot (ENM, personal interview, 07.04.017; MC, personal interview, 15.03.017). The overlapping of services and irredentism were other factors in Meru, Tharaka Nithi, Muranga and Kiambu (RM, personal interview, 03 .03.017; HKN, personal interview, 10.04.017).

The reasons for disputes on devolved functions were partly based on the misconception by the national government that the counties were not adequately prepared to receive the services in the transitional period (PT, personal interview, 14.03.017). Others were resistance from some of staff and agencies, such as Health Sector Kenya Medical Practitioners and Dentists Union (KMPDU) case, challenging devolution of health services. In disputes involving administration of resources, the allegation of corruption and abuse of the laydown procedures by county governments were made by the national government (CKK, personal interview, 10.03.017).

Apparently, use of ADR was dictated by the nature of the disputes. In case of boundary disputes, the research showed preference mostly to community-based solutions. In Turkana-Baringo, Meru -Isiolo and, Kiambu-Muranga boundary disputes were inherited from the previous administrations (MC, personal interview, 15.03.017; MG, personal interview, 18.03.017; RM, personal interview, 03.03.017; AS, personal interview,

10.03.017; AGM, personal interview, 13.03.017; and HKN, personal interview, 10.04.017).

The mechanism readily available was the use of ADR through traditional systems of the Council of Elders. The two case study areas Meru-Isiolo and Turkana-Baringo used elders in the first instance. These were inter-county conflicts and involved mostly different communities on each side of the border, or migrants whose population shared the two counties. In some counties, boundary disputes were caused by greed and grandstanding, for example, the collection of cess in Muranga by county of Kiambu and Meru in Isiolo. Irredentism was cited as the cause of conflicts when some ethnic groups settled in boundary areas and felt they preferred to pay their rates and other county revenue where they originally came from, e.g., Tharaka Nithi and Meru (RM, personal interview, 03.02.017). The services offered by counties in some boundary areas were shared, e.g., health services and this encouraged trans-county migration. Most serious disputes concerned pastures and water resources. Typical of these disputes were in pastoralist areas of Meru-Isiolo and Turkana–Baringo counties.

With respect to the devolved functions, the research found that these were national government versus counties. They were mostly grievances arising from the transfer of functions as provided by the Fourth Schedule of the Constitution of Kenya, 2010 (PT, personal interview, 14.03.017; C.K.K. personal interview 10.03.017).

The last category concerning the exercise of powers was equally related to the question of the administration of resources transferred by the national government to the counties, and the method of governance adopted by the counties. The national government felt obliged to control the behaviour of, *inter alia*, the members of county assemblies in their use of money, allowances etc., (CKK, personal interview, 10.03.017; PT, personal

interview, 14.03.017). The issues raised included interpretation of the law and regulations governing the relation of the two levels of government as well as the hierarchy of power, oversight, and accountability (CKK, personal interview, 10.03.017).

The statistics from reported cases for the period 2013-2015 showed that suits filed between national government and counties were the majority in the first years of devolved governments (Devolution Case Digest 2013-2015). The type of disputes dictated the mechanism employed for their resolution, litigation being mostly adopted in the transfer of resources, interpretation of the law or, powers of respective governments including the Senate. The orders sought in these cases included conservatory orders, declaration of rights and powers under the constitution and devolution legislations. A few of these cases are discussed in pages 45-53 in this thesis.

Table 8 below indicates the mechanism generally used for the resolution of intergovernmental disputes.

Table 8: Types of mechanism for resolution of disputes

		Frequency	Percent
1.	Courts	40	66.7
2.	Negotiations	10	16.7
3.	Elders Intervention	8	13.3
4.	Multilevel Approach	2	3.3
	Total	60	100.0

Source: Research 2017-2018.

Table 8 above shows the types of mechanism generally used for the resolution of disputes as narrated by the Respondents. These figures do not specifically reflect the mechanism used by the counties or national government. However, the sample of county officials interrogated did not indicate any dispute that followed the procedures provided by IGRA.

4.2.1 Litigation versus ADR

It was imperative to conduct a research and establish the relation between litigation and ADR in intergovernmental disputes resolution mechanism. Why was either of them preferable? The research revealed important factors in three phases of IGRA's implementation. The first phase was from the assenting of IGRA Act by the President on 27/2/2012 to its commencement on March 4th, 2013. The establishment of a legal framework under the Act was, however, to await the election of Governors and Members of the County Assemblies for the Counties. There was anticipation that the proposed counties would enter into comprehensive intergovernmental and inter-County agreements which would make ADR mandatory and a pre-condition to litigation. A Lady judge observed the importance of agreements incorporating express clauses referencing disputes to ADR (NJNK, 01.11.017). The researcher did not find that such agreements were immediately signed on the establishment of the Counties. This could mean that an essential safeguard against unilateral action and digression from ADR was overlooked.

The second phase was from establishment of the Counties in March, 2013 to the formation of Intergovernmental Relation Technical Committee (IGRTC) in 2015. Between these dates, there was no institutional framework since the Intergovernmental Relation Technical Committee had not been put in place. Here, the statutory role of the IGRTC was to facilitate ADR and to ensure that there was coordination of the devolved governments.

The third phase was after the putting in place of the institutional framework of IGRTC and other related organs since 2015. The IGRTC was, then, expected to facilitate the intergovernmental relations including the management of dispute.

In the first phase, no intergovernmental disputes were generated as the counties did not exist. However, the drafters of the Act provided that ADR would be incorporated first by way of agreement between the proposed Counties. Sample agreements should have been prescribed in the Act. There was no evidence to show that when the Counties were formed they executed these agreements. There was an expectation that the agreements between the Counties and between national governments would exclude litigation by incorporating a referral clause barring the courts from entertaining cases before exhaustion of ADR mechanisms.

It was during the second phase that many disputes between National and County governments arose and cases were filed in court because there was no institutional framework as explained by the current CEO of IGRTC:

What happened is that the Intergovernmental Relation Technical Committee should have been established immediately after the new constitution so that it becomes like a referee, but it came far much later, so already the two levels of governments had already established a *modus operandi* between themselves. Hence, when the County governments requested for something they believed was genuinely theirs, the national government either procrastinated or decided not to give. The County governments decided to do or act in the only way they knew how by going to Court. So, most of these cases that have already gone to Court have done so before the establishment of intergovernmental relation technical committee. There have been a Council of Governors as an institution representing the County Governments. They have not consulted us. The matters in court are those that were there earlier back in 2013 and 2014. There was a lot of acrimonies which was to be expected when this new system was being established and so that was the only way they knew. (PT, personal interview, 14/03/2017)

The Council of Governors (COG) and the Forum for The Members of County Assembly assigned themselves the role of complainants or plaintiffs, filed cases against the national

government especially on its perceived inertia or reluctance to transfer the devolved functions, services, and resource including the funds allocated to them. A majority of the respondents to questionnaires and interviewees attested to this rush to court especially by the Counties (PT, personal interview, 14.03.017; CKK, personal interview, 10.03.017). A clerk to the Murang'a County Assembly, for instance, gives an example of two of some of the disputes referred to court:

The County Assembly was accused of giving allowances left, right and centre. So a ceiling was imposed by the national government without consultations with the County government. The figures were too low resulting to a dispute. We sued the director of the revenue allocation. The court decided that it was within the Public Finance Management Act for the director of the revenue allocation to give a recommendation but it should be given life by a sitting of the Senate. This ensures that the County Assembly works together with the Senate before the director of revenue allocation implements.

There was another case where the Transition Authority issued a letter that the County Assembly cannot hire staff to serve the office of the County Assembly. The County assembly went ahead and hired staff. We went to court and the decision by the Transition Authority was overturned. It was unfortunate that the Transition Authority did not consult before coming up with that decision. (CKK, personal interview, 10/03/2017)

The COG took the cases to court on behalf of the Counties singularly and collectively especially where there were common issues. It should be noted that suits were not only against the government ministries but also the many governmental entities, e.g., Kenya Tea Development Authority (KTDA), Water Services Board, Kenya National Highway Authority (KeNHA), Kenya Urban Roads Authority (KURA), Kenya Civil Aviation (KCA) etc.

In the third phase, which is after the establishment of the IGRTC, the study also confirms that the situation did not improve, partly because of the inadequacies in the IGRA legal framework and capacity within the institution such as lack of trained personnel in devolution and ADR (PT, personal interview, 14.03.017). Some of the cases taken to court even after the putting in place of IGRTC included the Turkana County and seven

others versus Attorney General and 23 others [2015]; electronic Kenya Law Report (eKLR), Isiolo County Assembly Service Board and the Clerk of Isiolo County Assembly versus the Principal Secretary (Devolution), Ministry of Devolution and The Attorney General [2016] eKLR. The significance of the first case is explained by the legal counsel who filed and argued it before the Constitutional Court (ENM, personal interview, 07.04.017) and one of the Turkana professionals who supported the constitutional petition (EA, personal interview, 13.04.017). They both confirmed they had no faith in ADR and felt their cause of action was exempted from ADR, as it was based on the violation of their client's constitutional rights.

Out of the 11 professional mediators and arbitrators interviewed, nine were not involved in inter-County disputes for the relevant period of 2013-2017. Only two were involved in the training of County officials namely (JM, personal interview, 28.03.017) and (EL, personal interview, 10.03.017), that is 18.2% of this category of professional respondents.

It is apparent that disputes between national and Counties on devolved functions and administration of resources went to litigation. A few went to negotiation out of sheer necessity (PT, personal interview, 14.03.017). On the other hand boundary disputes first went for negotiation before the elders. There were, however, no clear statistics to show how many disputes were referred to ADR and litigation. Table 8 shows a general preference by the respondents: 66.7 % preferring Courts and 33.3 % other ADR mechanisms.

4.2.2 Negotiations between Parties

According to the data, the frequency of the use of negotiation between the primary parties to dispute stands at 16.7%. This ADR method is used only in a few cases. Most of the negotiations came mainly after the establishment of IGTRC which assisted the parties to use dialogue instead of going to court (PT, personal interviews, 14.03.017).

The study revealed that the parties resorted to negotiation as a consequence of the confusion caused by the lack of institutional framework and legal deficiencies; the parties tried to self-help themselves and make devolution work. The new system of government presented challenges (PT, personal interview, 14.03.017; JM, personal interview, 28.03.017 and DMK, personal interview, 03 .03.017) and the parties were forced to sit down to talk and find their own solutions. PT explains some of those early initiatives such as the dialogue between Tharaka-Nithi County and Prisons Department, West Pokot County and County Commissioner of West Pokot which related to use of available office accommodations. The Sugar Privatization Commission negotiated with Members of Sugar Growing Belt with respect to the privatization of sugar factories (personal interview, 14.03.017). In these cases, IGRTC organised and facilitated dialogues. This could be classified as the use of “reasonable effort and all necessary steps” to resolve their disputes provided for and recognised under S. 33 of the IGRA. The provisions in this section expected parties to take "all necessary steps, have direct negotiations or use an intermediary.” These provisions appeared vague and parties were left to interpret them as it suited their particular circumstances. The procedure for appointment of intermediary was not provided for as observed by several respondents such as (JO, 03.03.017).

Table 8 shows that negotiation with 16.7% of respondents is the second preference followed by Elders' interventions. It can be argued with merit that what the elders also do is mediate with the warring parties. A clear distinction, however, should be made in the context of this research that elders adopted special practices which were derived from the community beliefs and cultural practices. As explained by interviewees, the elders of Njuri Ncheke of the Ameru (DK, personal interview, 03.03.017) and the traditional practice known as kwokwo of the Kalenjin tribes (MC, personal interview, 15.03.017) were involved in resolving community disputes.

4.2.3 Traditional ADR Mechanisms (Elders Interventions)

There is a low rate (13.3%) of the use of the traditional mechanisms in resolving inter-governmental disputes. In the absence of a working legal and institutional framework, the inter-County disputes that arose from boundaries and resources were subjected to traditional methods of dispute resolution mechanisms. The case study conducted by this researcher in Isiolo, Meru, Baringo, and Turkana Counties revealed that traditional ADR was used to settle boundary and resources disputes or at least there was such an attempt to do so. The Isiolo-Meru boundary dispute was initially settled using Njuri Ncheke in conjunction with the Borana Council of elders to prevent escalation of violence. They were assisted by the religious leaders from the mainstream denominations, the Christians and Muslim within the area. They used negotiations and mediations methods to reach the warring communities (VKN, personal interview, 03.03.017; DK, personal interview, 03.03.017; TMI, personal interview, 03.03.017; JGK, personal interview, 03.03.017; AS, personal interview, 10.03.017 and MG, personal interview, 18.03.017).

In Turkana, Baringo and West Pokot Counties the respondents confirmed that there was a well-organized Elder's justice system. However, the Counties tried to settle their boundaries and resource disputes with limited success. The existence of a long traditional Elder's intervention in Baringo is explained by (KC, personal interview, 10.03.017; MC, personal interview, 15.03.017). They confirm these practices were applicable to all Kalenjin sub-tribes. They, however, noted that the limitations of the elders would be mainly in inter-County disputes which are long-standing community-based conflicts, involving grazing rights or the sharing of water resources. They escalated into violent boundary and resource conflicts. The Turkana-Baringo dispute was exacerbated by the discovery of oil and the development of electric power generation resources between the two Turkana and Baringo Counties. It degenerated into a violent conflict partly because of the lack of effective national government intervention (ENM, personal interview, 07.04.017). The traditional dispute resolution mechanisms have a limitation as observed. Some disputes have serious structural problems that require government intervention by providing resources such as national security and an enforcement machinery. This could include also dispute entrenched in cultures such as cross-border raids and cattle rustling in Turkana and West Pokot.

4.2.4 Multilevel Approach

A multilevel approach is the least considered (3.3%) item by the disputants. This approach may include administrative interventions by the governments and Non-Governmental Organizations (NGOs). These interventions came immediately as soon as the dispute erupted. Their essence is to prevent serious violations of human, environmental or community rights as other measures were being put in place either to mediate, litigate or finding other administrative solutions. Normally these initial interventions were by national government necessitated by security considerations such

as the Isiolo-Meru boundary dispute which left several people dead, displaced and damage to property. The national government had to intervene to prevent inter-communal fighting by the deployment of administration and security agencies. It then called upon the Council of Elders to initiate talks with the communities (MG, personal interview, 18.03.017). The other alternative approach is to take over the agreement reached by the warring communities and help in its implementation. In Isiolo, the government took over the implementation of the terms of settlement on the boundary dispute by bringing the government surveyors to complete the work (MG, personal interview, 18.03.017). A multi-level approach is the one that is mostly used in violent conflicts. It is advised by the fact that when the violent conflict starts, the national government through its administration must move in to restore order. The humanitarian organizations follow to provide shelter and medical treatment, especially where there are serious cases of displacement. Examples include Isiolo-Meru boundary disputes.

In other cases organization like Red Cross and faith-based organizations took the initiative to bring peace and sanity pending the other more permanent initiatives and solutions (VNK, personal interview, 03.03.017; DK, personal interview, 03.03.017; BIH, personal interview, 22.03.017 and MK, personal interview, 16.03.017). The methods used in this multi-level approach is, therefore, a combination of humanitarian assistance, peace initiative through negotiation and mediation. Use of coercive force is a last resort to restore peace and give room to negotiation (JWW, personal interview, 11.04.017).

The research on the mechanisms and methods used in addressing the inter-governmental disputes showed the single most used mechanism at (66.7%) being legal means (e.g., going to court), followed by negotiation (16%). Some serious inter-County conflicts were resolved by use of the traditional system of justice (13.3%) and others through the multilevel approach. For Lederach (2014), conflicts of this nature are best resolved

through existing community-based approaches and structures (p. 57). However, a majority of the national and County disputes in Kenya have been taken to court in violation of the Constitution and IGRA. Formal procedures provided for in the IGRA were not followed by any of the parties. The researcher was unable to find any formal declaration of dispute or the decision of the Summit or Council of Governors authorising resort to a judicial proceeding. It was confirmed by IGRTC that most of the decisions of the Summit were informal.

(i) Isiolo-Meru Boundary Dispute Analysis of the Respondents

One of the respondents from Meru felt that the resolution of community-based disputes should be through the use of retired judges and advocates. He opined that "old men are concerned with integrity and not earning money. They are more prone to render justice" (MMK, personal interview, 04.03.017). A deputy governor from Isiolo was of the view that the national government should act honestly and with clarity, without ambiguity. There should be no political involvement and the office of the Attorney General should be involved. He further felt a tribunal would be more appropriate to resolve intergovernmental disputes. IGRA should give clear guidance on ADR including the enforcement machinery (MG, personal interview, 18.03.017). A religious leader and elder from Isiolo speaking on organs established by IGRA stated that "proper mechanisms should be put in place instead of Summit and Council of Governors; a committee should be appointed to resolve disputes. A strong committee comprising of elders and religious leaders should lead the mediation of these disputes not the Council of Governors." He was convinced that the "Council of Elders has done a good job in Isiolo disputes" (AS, personal interview, 10.03.017).

An Elder from Meru was categorical that “people should settle the dispute out of Court” (TMI, personal interview, 03.03.017) which reflects a general consensus between the communities in both Isiolo and Meru. Other areas though not included in the research like Tharaka- Nithi, Samburu and Garissa largely used the non-adversarial mechanism to resolve community-based disputes. The position held by religious leaders from Catholic Peace and Justice in Meru and Isiolo concurred with these views. “There should be no involvement of politicians. We feel that if the religious leaders would talk by themselves in the absence of the politicians, the problem would be resolved” (DK, personal interview, 03.03.017).

The Deputy Governor of Meru County, on the other hand, took a middle position. “Both litigation and ADR should be applied where necessary and applicable. For me, I will rather be free and not tied to ADR. I know some traditional Elders. Their integrity is not as high as you would expect” (RN, 03.03.017). Another respondent attributed the failure of ADR to the poor level of literacy. She stated that “education of population should be enhanced. About 70% of Isiolo [population] is illiterate and hence they may not be aware of ADR” (VNK, personal interview, 03.03.017). This puts to question whether elders and religious leaders needed to have the required a higher level of education and whether the skills acquired through cultural interaction and experience suffices.

It was confirmed that the judiciary through the former Chief Justice Hon Justice Mutunga had put in place a training project for the elders and traditional dispute resolution stakeholders to acquire basic skills (AS, personal interview, 10.03.017). As for the integrity of the elders, questions have also been raised with respect to the Njuri Ncheke which has been accused of being politically manipulated and engaging young people without experience (MMK, personal interview, 4.03.017). This seems to be an issue that needs to be addressed by the communities to ensure standards are maintained.

VNK was of the view that there should be “a consultative body between the Counties. There should be more co-operation between national government and Counties and only resort to judicial arbitration as a final stage.” (Personal interview, 03.03.017). Her view on the importance of education was also supported by a prominent lawyer and scholar from Meru who was categorical that the citizens should be educated on the importance of ADR (BMN, 21.03.017). A youth from Meru also emphasized “peoples’ rights should be secured and their resources protected. This should be done through negotiation and or mediation to resolve disputes (MKI, 09.03.017).

(ii) Turkana–Baringo Boundary Dispute

The cause of Turkana Baringo dispute was boundaries and resources. Again, this was essentially a community based “conflict” and the respondents confirmed there were attempts to resolve conflict through ADR involving negotiation between elders from both sides (ENM, personal interview, 7.04.017). The matter was subject of a constitutional petition by Turkana against Baringo, West Pokot Counties and the National government among others. ENM, the counsel for Turkana confirmed that he advised the County that ADR was not the appropriate mechanism for resolution of the conflict and opined that it was because it was based on the violation of human and constitutional rights. The case was dismissed on merit without any reference to ADR and the conflict remains unresolved. The other respondents, especially from Baringo, deplored the lack of use of ADR. They were of the view that it would have resolved the deep-seated problems affecting these Counties (MC, personal interview, 15.03.017).

Observation from Turkana Baringo Case Study Area

The counsel representing Turkana was of the view that a lot of attention should be put in the law governing intergovernmental disputes. He recommended amendment “to the effect that there is a clear elaboration of the nature of disputes that should be referred to ADR.” On the question of the composition of the standing bodies, the Council of Governors and The Summit, he posited that they should be addressed to ensure neutrality (ENM, personal interview, 07.04.017). Another respondent from Turkana felt that the Courts should encourage ADR. In his view “the dispute resolution should be taken away from the rigours of the Court process. People should be made aware of the constitution, rule of law, customs and party politics” (EA, 13.04.017). Another resident of Turkana stated that “mediation and reconciliation mechanisms should be enhanced to resolve issues facing each community. We must uphold conciliation between the two arms of Government to sustain devolution as a means of distributing resources down to the lower levels thus elevating social standards of common person” (D.A.15.03.017). A Catholic priest from the same area also held that there should be “dialogue and involvement of all parties” (BIH, 22.03.017).

The respondents from Baringo were of the similar view that the mechanisms in the Constitution and IGRA should be followed. However, they observed that traditional ADR was not being effectively employed in the dispute resolution. The traditional ADR should be applied and where documented should be respected. They confirmed that they have documented “*kokwo*”, a traditional mechanism used by Tugen, a Kalenjin sub-tribe, which is applicable to other communities as well. Unlike other traditional dispute mechanisms, the *kokwo* had been documented that “there are many writers on this Traditional Alternative Dispute Resolution Mechanism (TADRM)” (KC, personal interview, 15.03.017).

A Pokot elder and professional mediator complained that traditional justice system was not applied in resolving the boundary dispute at Kapedo. He stated that “personally, I would recommend we go for mediation which would involve a third party to bring them together because there is oil. We should go for ADR which is traditional. Basically, the tradition is that you get Elders from the communities which is all-inclusive. Traditional systems included women in their system unlike the current ADR one. Traditional ADR should be the norm and the Court should be the alternative. ADR is in the system; it is in the culture.” (MC, personal interview, 15.03.017). He was of the strong view that Section 35 of IGRA which create a window to resort to Court should be removed and ADR made mandatory. People should be educated in ADR including from school syllabus through to University. He opined that structures created in IGRA, that is, the Summit and the Council of Governors should be re-looked at. For instance, he stated “summit has no proper delegation and no hierarchy. The President is inappropriate to adjudicate disputes between the national and County governments because of a possible conflict of interest. He was of the view that the Senate should be part of the intergovernmental infrastructure.

MK, a religious leader from Baringo held that ADR should be acknowledged at the community and at the village level. He argued that “we must strengthen and empower available mechanism for ADR. We must work closely and map out potential means at the community level. Embrace networking and collaboration: strengthen and acknowledge ADR at the boundary areas. We must build the capacity of elders across the region, create referrals and linkages within the County.” (16.03.017). He emphasized the need to enact a bill that will strengthen ADR, lobby for recognition of ADR, and empower youth and capacity on ADR.

All the respondents in Kiambu and Muranga Counties were not in agreement that there was a dispute. However, they were all aware of conflict over the collection of cess (revenue) by County of Kiambu. This had resulted to a violent confrontation between their respective members of staffs (AGM, personal interview, 13.03.017; GGG, personal interview, 24.03.017). The uncertainty of the location of the boundary and the overlapping of services affected revenue collection. The County of Kiambu was accused of encroaching into Muranga County while Kiambu insisted that it rendered services to the disputed area between the two Counties marked by the Chania River. The dispute was precipitated by administrative and political decisions made by the past regime. It can be concluded that the two Governors decided to stop the disagreement on cess collection through negotiation. They decided to leave the determination of the boundary to the Independent Boundary Review Commission in 2019. Negotiation is part of ADR and, hence, it has worked on part of this dispute if only as a temporary appeasement. It can equally be argued that IGRA has a wide definition of non-adversarial mechanisms included in the words “all efforts”. The fact that their agreement left the actual fixing of the boundary to the relevant sectoral laws in 2019 may be seen in this light as well.

Observations from Kiambu–Muranga Boundary Dispute Case Study Area

Among the observations from the respondents from Muranga was that the term “dispute” should be clearly defined. AGM, who is a Deputy Governor observed that the word “dispute” in the IGRA should have been clearly defined and clear guiding parameters given (personal interview, 13.03.017). His counterpart, GGG, from Kiambu maintained that there is a need for training from legal experts on ADR mechanism (personal interview, 24.03.017).

CKK, a clerk to the County, argued that there should be adequate institutional policy and legal framework. He posits that “perhaps a County-National Governments Tribunal should be established.” (personal interview, 10.03.017). He pointed out the shortcomings in the Act in that it made no provision for County and national government entities which are equally involved in disputes on their own right. He opined a clear provision should be made in IGR to include them in the ADR system. He also urged that the Senate should be incorporated in IGR dispute resolution infrastructure. On the boundary dispute, he recommended that there should be clear boundary marking using technology Global Positioning System (G.P.S) and Counties should adhere to the boundaries as fixed by District and Provinces Boundaries Act of 1992. Finally, he agreed that elders should be involved in dispute resolution.

A Member of Parliament for Gatanga, (the area under dispute) was aggrieved that Members of National Assembly are locked out of intergovernmental relation. He maintained they should be involved in dispute resolution. He suggested constitutional amendments to incorporate Members of Senate too in the dispute resolution mechanism (HKN, personal interview, 10.04.017).

PKN, an advocate and external legal adviser to County Assembly of Muranga, felt that County officials should be educated on devolution. He argued that “there is a need to strongly educate top and middle-level leaders in devolution system of Government especially on role, responsibilities, and power of each level of government.” As between Counties, formal structures to carry out ADR should be defined in law, given specific mandates and legal effect, so that parties can abide by them. With respect to national and County governments, the Summit, the Council of Governors, the County Assemblies and other related organs, he recommended that they should have their roles re-defined towards delimiting what specific subjects be referred to ADR, timeframes and their legal

effects (24.04.017). JCM, a resident of Muranga and a human right activist, supported the idea that the Senate should be involved in intergovernmental dispute management infrastructure (24.04.017). TM, an advocate and an elder from Muranga supported the position that the Intergovernmental disputes should be resolved within an intergovernmental regulatory agency framework (14.03.017). JWWM, a youth from Muranga, recommended that National and County Government should use procedures in IGRA. Mediation should take precedence in resolving disputes and Senate should give guidance on disputes involving Counties. Litigation should only be used when different parties do not agree on the conclusion. The parties should have full control of the ADR process (20.4.017).

MMM, another youth from Kiambu, recommended that the inter-County disputes should be resolved through arbitration and those between national government and Counties should be resolved through negotiations (20.04.017).

AKN, an advocate of High Court of Kenya and a legal counsel for Kiambu County, also held that ADR should be encouraged but it should not be made mandatory. The provisions in IGRA should be advisory. The Judiciary should also advise parties to go for ADR. The Counties should have teams to deal with dispute before any court action lead by experts. The Summit should come up with a binding framework on reports on ADR. The Senate and Counties should have mediation committees with regular meeting (14.03.017).

NR, an advocate from Kiambu, opined that education of parties and sensitization on benefits of ADR would encourage professional participation. He also felt Senate should be part of IGR framework (26.04.017). KT, an eminent scholar from Kiambu, supported the education of the parties to disputes on ADR by way of informal discussions. At the same time, think-tanks of knowledgeable elders should help the disputing parties to focus

on major objectives.” (04.11.017). A lady and member of Presbyterian Church of East Africa (PCEA) from the same area also thought the use of community elders would play a key role in providing historical background while the professional would help advice (depending on the matter at hand) the best approach. Opinion leaders and professionals recommended a focus groups approach on a specific area in question and then subject it to a localized referendum. This would take the concern of issues affecting parties guided by the constitution (JWW, 4.11.017).

In sum, the Constitution requires that in resolving disputes the first procedure is to use the ADR methods (e.g., negotiation, mediation, arbitration). On the basis of this, the first research question set out to find out whether the ADR methods have been used, in accordance with the Constitutional procedural requirement, in the resolution of intergovernmental disputes in Kenya since 2013. The research concluded that ADR methods, in one form or another, were applied in the three case study areas with limited success. However, IGRA provisions do not seem to have been considered in either application of ADR or on the decision to resort to litigation. The Counties made no reference to procedures in part IV of the Act. No reports were made to the Summit before filing suits as required by the Act. The Council of Governors seems to have moved to Court unilaterally where common issues between Counties and national government were involved. The Counties were hampered by lack of clear guidelines and skilled manpower. Other factors that impeded application of ADR included lack of institutional and legal framework, poor civic education on ADR and political interference.

4.3. Whether the ADR as Prescribed in the Constitution and the Intergovernmental Relations Act 2012 in Kenya is Appropriate in the Resolution of Intergovernmental Disputes

The research's second interest was to investigate the appropriateness of ADR for handling intergovernmental disputes. The Constitutional and legal framework for the intergovernmental relation was supposed to capture the benefits, real or perceived, of the Alternative Dispute Resolution Mechanism. The questions were put to the respondents on the impact or effect of either litigation or ADR in terms of time, costs and restoration of relationship. The tables below reflect the responses of the participants in the study. The participants were asked to rate on 1-5 scale, which the researcher translates the numbers here as follows: 1 = not effective; 2 = least effective; 3 = partially effective; 4 = effective; and 5 = most effective.

The researcher in the questionnaire rated the effectiveness of ADR as compared to litigation in the following categories 1-5, which the researcher translated the numbers as follows: 1 = not effective; 2 = least effective; 3 = partially effective; 4 = effective; and 5 = most effective as discussed in tables 9, 10, 11 and 12 below.

To analyze this question, the researcher used specific groups of respondents in the questionnaire namely: Chairman of Council of Governors, Governors, Clerks to the County and Senate, Legal Committees of the Counties (in question 6). Attorney General Chambers, Cabinet and Principal Secretaries, For Legal Practitioners (in question 5). The Chairman of The Chartered Institute of Arbitrators Kenya Chapter (in question 16) and Professional Mediators (in question 11).

One of the measurements of the effectiveness of the methods used in addressing disputes is the time the process takes to resolve the dispute. This is captured in Table 9 below.

Table 9: Duration of Resolution of Disputes by Way of Litigation through the Courts

		Frequency	Percent
1.	Days (1-30)	2	3.3
2.	Months (1-12)	12	20.0
3.	Years (1-4)	45	75.0
4.	Others	1	1.7
	Total	60	100.0

Source: Researcher, 2017-2018

Majority of the respondents (75%) indicate the time the court process takes to complete case is about (1 to 4 years), while 20% stated (1 to 12 months). Only 3.3% expressed that litigation is completed within a month. Perhaps the completion of cases within days, weeks and months are dependent on the weight of the cases.

NJNK, a Lady Judge in the High Court Commercial Division, said that the resolution of disputes generally took a maximum period of 24 months in the High Court (01.11.017). It was confirmed that in the Court of Appeal it generally took a minimum of 30 months (JGK, 30.10.017). This period does not include the time the case was in the High Court. One judicial respondent confirmed that he handled an appeal from the decision of the High Court relating to the liability of a County government to assume the responsibility of the debts of the national governments. He confirmed it took one and a half years during 2015-2016. He is the only judicial officer who handled intergovernmental disputes out of the six judicial respondents making 16.6% of the total (JGK, 30.10.017). It may also indicate few cases on intergovernmental disputes went to Court of Appeal and hence there was no useful judicial guiding precedent to resolve the conflicting decisions of the High Court.

The effectiveness of ADR is measured by the following variables, namely time, cost and amicability in the respective tables: Table 10 (time), Table 11 (cost) and Table 12 (amicability). Table 10 below reflects a comparison of time taken between litigation and ADR in the resolution of disputes.

Table 10: Effectiveness of ADR in terms of time in comparison to litigation

		Frequency	Percent
1.	Not effective	8	13.3
2.	Least effective	14	23.3
3.	Partially effective	10	16.7
4.	Effective	13	21.7
5.	Most effective	15	25.0
	Total	60	100.0

Source: Researcher, 2017-2018

In Table 10 above, regarding time management, the respondents stated that ADR was most effective (25%) and effective (21.7%), i.e., in total 46.7% appreciate its efficiency while 16.7% think it is partially effective. In total, about 36.6% see litigation more effective than ADR.

Table 11: Effectiveness of ADR in terms of cost vis-a-vis litigation

		Frequency	Percent
1.	Not effective	11	18.3
2.	Least effective	9	15.0
3.	Partially effective	12	20.0
4.	Effective	13	21.7
5.	Most effective	15	25.0
	Total	60	100.0

Source; Researcher 2017-2018

A combined 33.3% of the respondents stated that ADR was not effective (not effective [18.3%] and least effective [15%]). A combined 46.7% of the respondents stated that ADR was effective (effective [21.7%] and most effective [25.0%]).

This indicates that there is no huge disparity between those who hold the view that the use of ADR lowers the cost and those who hold a contrary opinion. Thus, the cost of ADR is no better than that of litigation.

Another measuring tool for the effectiveness of ADR vis-à-vis litigation includes restoration of relationship. Table 12 below presents the data on amicability of parties (restoration of disputants' relationship) after the ADR process in comparison to litigation.

Table 12: Effectiveness of ADR in restoring amicability in comparison to litigation

		Frequency	Percent
1.	Not effective	6	10.0
2	Least effective	8	13.3
3.	Partially effective	12	20.0
4.	Effective	13	21.7
5.	Most effective	21	35.0
	Total	60	100.0

Source: Researcher, 2017-2018

On amicability, a bigger number of respondents (35%) agreed that ADR was most effective, followed by 21% who said “effective”. Therefore, a total of 56% see ADR to be more effective than litigation, while 20% viewed it as “partially effective”, and 23.3% “less effective” in restoring amicable relationship in comparison to litigation.

The data that we have thus far analyzed shows that there are more advantages in ADR than litigation. This is an indication that ADR can be a more appropriate method of resolving disputes than litigation in the majority cases; in a few cases, going to court appears to be more appropriate. Several interviewees including experts expressed their dissatisfaction because of deficiencies in the provisions in the IGRA and felt that this was a major impediment to the use of ADR mechanism by the devolved governments. The consideration of this question is analysed below by examining the responses of various stakeholders and affected parties to various sections of the law (IGRA).

The first group was led by DMK, who was the chairman of the task force that drafted the devolution policy and who confirmed that “the devolved governments are using ADR but to a very minimal extent.” In his comments on the provisions of the IGRA allowing the resort to the judicial process, he stated that “it may be argued that the statute is unconstitutional.” (personal interview, 03 .03.017). The wording of the constitution was that ADR “shall” be used in intergovernmental disputes and left no room for resort to Court. The IGRA incorporates a provision for court proceedings.

In the second group is MTM, a lawyer from the office of the Attorney General Chambers who assisted in the drafting of IGRA who argued that if ADR failed, parties should go to court and if this provision was not made it would be unconstitutional (personal interview, 19.04.017). She, however, accepted that the language used in drafting Article 189(3) of the Constitution was in mandatory terms and “it could be interpreted that the parties go for ADR and matters end there.” It is important to note that if there was no window created by Section 35 of the IGRA all intergovernmental disputes would have gone to ADR.

The third group was composed of the members appointed in the IGRTC to implement the IGRA (PT, personal interview, 14.03.017; ES, 20.03.017 and NM, 10.03.017). On what

appeared to be a conflict between IGRA and Constitution PT stated he had not considered that “the constitution restricted the ADR to negotiation, mediation and arbitration without recourse to judicial process” (personal interview, 14 .03.017). The significance of S.35 of IGRA is seen in terms of inconsistency with the constitution which would not only mean that a decision of the court is null and void, but also the Governor invoking court process would be liable to impeachment and surcharge for costs incurred.

On the issue of lack of regulations, rules or any statutory guidelines he accepted it created a problem for the devolved governments. All the seven members of this group who were interviewed were in agreement that IGRA was not only ambiguous and inadequate but was also lacking machinery to operationalize it.

The fourth group was made of stakeholders, professional, arbitrators, mediators, and legal practitioners. SMN, a mediator raised the issue of lack of timelines. He stated that courts should have invoked articles 159(2) of the constitution and send intergovernmental litigants to ADR (personal interview, 10.3.017). JM, a mediator observed that the “law was not clear on procedures to be followed in the application of ADR by the County, national governments and Senate. It has not codified ADR.” (personal interview, 28.03.017). LS, a mediator was of the view that there were no clear procedures and regulations (10.03.017). JO, a lawyer pointed out there was ambiguity in the law, for example, S. 33 was not explicit on the appointment of intermediary, (03 .03.017). NR, a legal scholar believed that mandatory provisions were in order but the window to go to court was necessary under article 159(2) of the constitution (26.04.017). PNK, an advocate concurred and observed “this in my view is necessary to avoid the growing culture of over-litigation overtaking our courts and country” (24.4.017). AKN, a legal advisor to Kiambu County to the contrary, thought the mandatory provisions were not necessary and “should be advisory.” He felt that “every dispute is unique, and parties

should be at liberty to litigate at the first instance” (14.03.017). BMN, an advocate was satisfied with the provisions of IGRA that makes it mandatory to refer disputes to mediation. He finds support from the opinion of Deputy Chief Justice in the Supreme Court Advisory No. 2 of 2013 that devolution is hinged on cooperation and interdependence. He was emphatic that “there should be no litigation” and that “S. 4 of IGRA which sets out the principles of intergovernmental relations obligate Counties and national governments to minimize intergovernmental disputes and must co-operate in their functions.” (21.03.017). It is clear 3 out of 9 (33.3%) of these respondents had no issues with the adequacy and language used in the provisions of the Constitution or the IGRA. However, a majority of respondents 6 out of 9 (66.7%) had serious issues with the legal framework for varying reasons as explained here above.

The fifth group comprised the affected parties and main actors in intergovernmental relation, the officials of the County and national governments. MG, a Deputy Governor of Isiolo was of the view that “IGRA does not give guidance and lack enforcement mechanism.” (personal interview, 18.03.017). RM, Deputy Governor of Meru admitted that “I have not read these laws. For me I would rather be free and not be tied to ADR, I know some of the traditional elders, their integrity is not as high as you would expect.” (personal interview, 03.03.017). AGM, Deputy Governor of Murang’a raised the question of definition and interpretation of the provisions of the Act with reference to Kiambu-Murang’a dispute. He asked that “Is misunderstanding on the collection of cess between Counties a dispute?” (personal interview, 13.03.017). GGG, Deputy Governor of Kiambu raised the same issue (personal interview, 24.03.017). CKK, a lawyer and a clerk to Murang’a County answered this question in the affirmative (personal interview, 10.03.017). However, it was apparent that the real issue in Kiambu-Murang’a dispute was

whether part of Gatanga constituency is in Muranga or Kiambu County. This is an illustration of a lack of clarity on what may appear to be an obvious matter but is complicated by ambiguity in the law. CKK also questioned the appropriateness of institutions created under the Act and felt they should be replaced by a tribunal similar to the Political Parties Tribunal (personal interview, 10.03.017).

EA, a professional from Turkana, agreed with provisions of IGRA and the Constitution but also felt ADR procedures should be simplified “away from the rigours of court process” (13.04.017). ENM, a legal counsel for Turkana County in “Turkana case against Baringo County and 23 others” contended that “the procedure in IGRA was slow, more political than neutral”. He opined that ADR under article 189 of the constitution does not apply to violations of human rights. He further argued that the procedure in IGRA was more bureaucratic than that in the court. He concurred with CKK (personal interview, 10.03.017) that the institutions established by the IGRA were inappropriate. The Summit and Council of Governors “lacked neutrality and are biased” (personal interview, 07.04.017). Instead, he recommended there should be ad hoc tribunal chaired and made of independent persons preferably retired judges of High Court of Kenya. He relied on the holding of the Constitutional Court in the Turkana case where the court said that such a mechanism must meet the criteria of being sufficient and adequate to justify ousting of the jurisdiction of the Court and reference to the ADR mechanism.

KC, a youth and professional from Baringo felt that the provisions of Constitution and IGRA were adequate and should be followed (personal interview, 10.03.017). MC, a professional mediator and elder from Baringo County, was categorical that "the mandatory provisions in the Constitution gave no room for the judicial process and the Act was inconsistent with the constitution and defeated the purpose of the ADR mechanism. According to him, "Section 35 of the IGRA is illegal and inconsistent with

article 189 of the Constitution” in so far as it allowed resort to judicial process (personal interview, 15.03.017).

The Senators and Members of Parliament represented the interests of the Counties and the constituencies. Although not specifically included in the intergovernmental infrastructure they had a role to play in bringing communities together. They also faced challenges with the County Governors. A substantial number of cases in the early devolution litigation concerned the powers of Senators over the Governors. Two respondents who were senators from Meru and Muranga (KM, personal interview, 15.11.017; KG, 15.03.017) felt Governors did not involve them and were not part of the intergovernmental infrastructure.

On the other hand, JKC and JN, Members of Parliament from Kiambu County made complaints like the senators that governors did not involve them in intergovernmental disputes (04.11.017). This view was also made by KM, an MP from Isiolo County (15.11.017). HKN, from Muranga, was categorical that failure to include the MPs in the dispute management was a big mistake (personal interview, 10.04.017). A large number of respondents in this group had an issue with the IGRA and the institutions established by it as expressed above. Out of 15 respondents, only 2 (13.3%) did not raise issues with the Act. The rest (constituting 86.6%) faulted the provisions of IGRA, the Senators and Members of Parliament raised the issue of lack of inclusiveness.

The sixth group was made up of the judiciary lead by AV, a judge of the Court of Appeal (personal interview, 20.03.017), a judge of the Court of Appeal (SGK, 30.10.017), MWM, a judge of the High Court Family Division (16.03.017), and FO, a judge of the High Court Commercial Division (30.10.017) and NJNK, a judge of the High Court

Commercial Division (01.11.017). This group included a Magistrate who is also a Deputy Registrar in the mediation division (MW, personal interview, 21.03.017).

On the appropriateness of ADR, NJNK, a judge said that ADR was in her view appropriate in resolving intergovernmental disputes (01.11.017). AV, a judge of the Court of Appeal in agreement gave an example of Canada where 50% of all the cases go to mediation. He gave examples of other countries where ADR was widely used as Australia, Singapore, Ghana, South Africa, Tanzania, and Uganda. He said that ADR is the future and confirmed there was a pilot project in Kenya where commercial cases worth over Kshs 600 million have been resolved. In his view, “procedure should not impede one’s rights but only imposes a step towards the realization of the said rights.” (personal interview, 20.03.017).

SGK raised an issue with the wordings of the provisions of IGRA saying they were not clear. He recommended that there should be clear terms in the Act making ADR a condition precedent to any intergovernmental litigation (30.10.017). FO, a judge postulated that on the other hand IGRA is “clear and unambiguous” (30.10.017).

On the issues raised by the respondents on IGRA 2 out of 6 (33.3%) of the respondents did not find any specific problems with its language or application. Other 66.7% had varying reasons as expressed above on adequacy and competence of IGRA. It can be reasonably argued that if such a large number of judicial officers whose duty is to interpret the law had a problem with IGRA the legal framework for ADR was largely inadequate.

The Seventh group comprised of scholars. PMM, a history, and international relations lecturer was of the view that ADR is not adequately understood by the people of Kenya. He opined that very little effort has been made to inform the people. In his view,

mandatory provisions in the constitution on ADR were consistent with practice in ADR. The idea is to arrest growing dispute at early stages before it blows to unmanageable magnitude. He saw main challenges as ignorance, lack of political will and failure to internalize devolution. He recommended training of officials of national and County governments and attitudinal change. He considered the Senate as an important link between the two levels of governments (05.19.017).

The Eighth group consisted of religious leaders, elders, peace, and justice project officer. All had no serious objections to the provisions in the Constitution and the Act. They had either not read the relevant provisions or not aware that they exist (AS, personal interview, 10.03.017; DK, personal interview, 03.03.017; JWW, 4.11.017; BIH, 22.03.017 and VNK, personal interview, 03.03.017). The last group of who would be classified as community opinion leaders from Muranga and Baringo Counties respectively shared the same view as the eighth group (JCM, 23.03.017; MK 4.03.017 and KT, 04.11.017). KT, an elder in Kiambu County was in favour of “informal discussions through think-tanks of experienced knowledgeable elders who would help the disputing parties to focus on major objectives, respective offices vis a vis citizens welfare” (04.11.017).

The upshot of these divergent views was that the IGRA looked from the professional and layman view had serious issues and could not facilitate ADR as expected by the policymakers. In summary, although the majority agreed on ADR as an appropriate mechanism in intergovernmental dispute management, they faulted IGRA and the institutions; i.e., the Summit and COG. Among the faults with IGRA were its doubtful constitutionality, ambiguity, lack of mandatory provisions and regulations, lack of enforcement machinery, and biased and inadequate institutions.

4.4 The Challenges Faced by the National and County Governments in the

Implementation of ADR

The third research objective of this study was to find out the challenges faced by the national and County governments in the implementation of ADR in handling intergovernmental disputes. In addressing this objective, first, the researcher wanted to ascertain whether those research participants from the non-legal professions know something about ADR mechanism of dispute resolution. Table 13 below reflects their responses.

Table 13: Awareness of ADR

		Frequency	Percent
1.	Yes	18	90.0
2.	No	12	10.0
	Total	20	100.0

Source; Researcher 2017-2018

Almost all (90.0%) of the respondents were aware of ADR. Only 10.0% were not aware of ADR. Awareness of ADR in this context was the public understanding of methods of resolution of disputes outside the court. However, the understanding of the systems to resolve disputes out of court did not translate in to use of the said system. Again, this was informed by the influence of the western culture of resulting to court. Hence table 14 below illustrates the use of ADR. Table 14 below shows the use of ADR.

Table 14: Use of ADR Methods

		Frequency	Percent
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1.	Yes	12	60.0
2.	No	8	40.0
	Total	20	100.0

Source: Researcher, 2017-2018

About 60% of the respondents used one form of ADR or another. Only 40% of the respondents did not use ADR. Among the 60% of the respondents could be classified as those who use very informal methods of ADR such as domestic, land litigation, and religious interventions such as in divorce and probate cases.

Despite the use of ADR methods, there is a remarkable difference in their satisfaction which can be explained by the lack of enforcement machinery and the fact that the ADR is based on consensus. Although the most important quality of ADR is a win-win result, a majority of the respondents felt that the court had better and more superior remedy. The main issue in quantifying the level of satisfaction is the lack of certainty of the individual. Whereas a court judgement has a quantitative value in terms of money and physical restitution, the level of satisfaction through amicability is through emotions which may be based on the restoration of friendship or business environment. One of the achievements through ADR on the issue of satisfaction may just be forgiveness and sacrifice within the warring communities.

Table 15 below indicates the level of satisfaction

Table 15: Level of Satisfaction

		Frequency	Percent
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1.	Yes	12	60.0
2.	No	8	40.0
	Total	20	100.0

Source: Researcher, 2017-2018.

Respondents who were satisfied with the methods used were 60.0%, while 40.0% of the respondents were not satisfied. The researcher found out that there was not a huge disparity between the respondents who used ADR and satisfaction.

After having established the level of satisfaction with the use of ADR methods, the researcher enquired from the respondents what they would consider as the challenges facing the implementation of ADR.

4.4.1 A Summary of Challenges Identified

This question was posed to the group representing the direct stakeholders in the implementation of ADR between National and County governments. Among them were: the County officials, the National government officials, judicial officers, legal practitioners, Chairman, Chartered Institute of arbitrators and professional mediators.

Challenges in order of Importance:

(i) Organs of IGRA

Firstly, the institutions created for purposes of facilitation of ADR and certification for judicial processes have been found seriously wanting. The Summit that should handle disputes between national and County government has a serious issue with neutrality and lack of hierarchy (CKK, personal interview, 10.03.017; AS, personal interview, 10.03.017; MG, personal interview and MC, personal interview, 15.03 017). The

President chairs the meeting of the Summit and he is supposed to determine disputes that affect national government and hence the executive. He would be seen to favour the national as opposed to County governments. His availability and ability to delegate his responsibility in the Summit has been put in question (MC, personal interview, 15.03.017; CKK, personal interview, 10.03.017). There is no appellate jurisdiction after his decision which is an affront to fair administrative justice (CKK, personal interview, 10.03.017).

On the other hand, the Council of Governors which is obliged to settle disputes between the Counties has been accused of lacking inclusiveness in terms of involving stakeholders such as members of parliament in the affected areas and other interested parties (HKN, personal interview, 10.04.017; JKC, 04.11.017 and JN, 04.11.017). It is seen as not truly representative of the disputing parties, an essential element in conflict resolution. Its decision on ADR is subject to Summit which eventually issues the direction to Counties to proceed to court if the matter is not otherwise resolved (S.34 IGRA).

Political manipulations and interference hindered the implementation of ADR mechanism under the IGRA. A great number of respondents felt politicians in the Counties would prefer litigation purely on the ground of selfishness, grandstanding and possibly to corruptly influence court decisions (LS, 10.03.017; NR, 26.04.017).

(ii) Lack of Professional Consultation

From the interviews and questionnaires, it was evident that there was either no involvement or there was the poor use of professionals by the Counties and national government in intergovernmental dispute management. A significant number of interviewed mediators and arbitrators confirmed they had not been directly involved as mediators in IGR disputes. Two respected and experienced mediators confirmed that they

were consulted. EL was consulted by Laikipia, Nyandarua, Vihiga and Makueni Counties (10.03.017) and JM was consulted by Marsabit County but did not undertake mediation (28.03.017). This constitute (20%) of experts interviewed and refer only to consultation and training. Only 10% of the respondents interviewed were directly involved in the settlement of IGR dispute. JO, a legal practitioner and experienced mediator, was engaged through Law Society of Kenya to mediate in a dispute between Doctors Union (KMPDU), Ministry of Health and Council of Governors. The KMPDU, representing staff, had a dispute with the Ministry of Health and this brought in the Counties as health was a devolved function (03.03.017).

KM, a former Chairman of the Chartered Institute of Arbitrators confirmed that “few cases have been referred to ADR by devolved governments. While there have been a few reported cases of use of ADR, other cases have found their way to court due to the litigious nature of the current Kenyan society. Counties have not sought the assistance of the institute in interpretation or implementation of IGRA with respect to the reference of disputes to ADR.” (10.03.017).

JM, a consultant and trainer in ADR at Mediation Training Institute (MIT) agreed that “ADR is not being used to resolve inter-County and County vs. national government, Senate disputes because they have not embraced it. Both governments are not sensitized about ADR especially mediation.” (28.03.017).

On the challenges facing devolved governments, he posited that Counties do not have personnel adequately trained in ADR: The law is not clear on the application of ADR and there is need to "unpack and define ADR.” He concludes that the organs created by IGRA to enforce ADR are unsatisfactory.

SMN, a Court Accredited Mediator, also felt ADR is not well understood by Kenyans. He deplored lack of rules in the IGRA to guide the ADR (10.3.017). EL, a consultant in ADR also confirm lack of institutions, structures, and clear procedures. Other challenges cited by her include "potential corruption and collusion in the billing of fees between staff and external counsel". On corruption, she attributed it to lack of a mechanism for selection and use of a panel of ADR practitioners. She agreed there is lack of capacity in ADR and understanding of ADR by the public (10.03.017).

(iii) Lack of ADR Documentation

Thirdly, ADR has not been defined or “unpacked” (KM, 10.03.17; ENM, personal interview, 07.04.017). There is no proper appreciation and documentation of traditional mechanisms, such as the use of elders (VNK, 03.03.017; AS, personal interview, 10.03.017; MC, personal interview, 15.03 017; DK, personal interview, 03.03 017 and MMK, personal interview, 04.03.017).

(iv) Lack of Clear Legal Framework

Fourthly, as stated above the disputes covered by the IGRA are not defined. There should have been an exemption list, a clear guide to the devolved governments on which disputes should be referred to ADR.

The Act does not give proper guidelines and timelines (JO, 26.04.017). The regulations required under Section 38 of the IGRA had not been promulgated and gazetted (PT, personal interview, 14.03.017; AFG, 14.09.017). The purpose of regulations is to give effect to the legislation. The regulations being “rules made by governments or other authority in order to control the way people behave” (Collins English Dictionary, 1989, p.

1060) are essential to facilitate IGRA. The absence of regulations was cited by a majority of the respondents as a major handicap to the implementation of the Act.

(v) Lack of National Policy in ADR

Fifthly, the IGRTC was operated without a clear national policy on ADR as a method of resolution of disputes (PT, personal interview, 14.03.017). About 20% of the Respondents confirmed that ADR is not a preferred method for resolution of disputes. On the other hand, there is a significant number of respondents who blamed this on the “mindset on litigation and adversarial processes” (MC, personal interview, 15.03 017; AS, personal interview, 10.03.017).

(vi) Lack of Enforcement Machinery

Sixthly, the ADR itself has its own short-comings, it is voluntary and lacks an enforcement machinery (MG, personal interview, 18.03.017; JO, 03.03.017 and ENM, personal interview, 07.04.017). Although the Constitution and the IGRA make ADR mandatory, there are exceptions, i.e., a category of disputes that cannot be taken to ADR. These include injunctive reliefs, violations of human rights, matters that concern policy etc. There is a great number of disputes affecting the Counties that are outside the ADR mechanism (ENM, personal interview, 07.04.017) as stated in judgement in the Turkana Case (*supra*).

(vii) Lack of Institutional Framework

Seventhly, there was lack of institutional framework from the commencement of the IGRA to 2015. The delay in establishing IGRTC perpetuated the preferred culture of litigation by the Counties as already explained by PT, a Chief Executive Officer (CEO) of IGRTC, thus undermining the objects of the Constitution and the Act. He also posited that

instead of litigation coming as a last resort, the filing of suits became the *modus operandi* (personal interview, 14.03.017).

(viii) Weakness in the Institutional Framework

Finally, PT confirmed IGRTC had serious institutional weakness in that it lacked experienced and skilled manpower in ADR. Even after its establishment, IGTRC found it hard to give the necessary facilitation to the Counties on matters involving ADR (personal interview, 4.03.017).

In conclusion, the County officials and the National government officials explained some of the challenges which include:

- (i) Lack of a clear legal framework (ambiguity in the Constitution and the law) (6 out of 11 [54.5%])
- (ii) Lack of inclusiveness (Senate and the Parliament) (6 out of 11 [54.5 %])
- (iii) Lack of awareness on ADR (including IGRA) (6 out of 11 [54.5%])
- (iv) Lack of regulations/guidelines (5 out of 11 [45.4%])
- (v) Intergovernmental disputes are highly political (3 out of 11 [27.2 %])
- (vi) The inadequacy of the structures/organs established by IGRA (Summit) (3 out of 11 [27.2%])
- (vii) Lack of institutional capacity (human resource and lack of skills) (1 out of 11 [9.1%])
- (viii) Lack of national policy on ADR (1 out of 11 [9.1%])
- (ix) Mindset on litigation on the part of the Kenyan population (1 out of 11 [9.1%])
- (x) Lack of enforcement machinery (1 out of 11 [9.1 %])

According to the above statistics, the major challenges faced by the County and national governments in the implementation of ADR were the: lack of a clear legal framework (ambiguity in the Constitution and the law), lack of inclusiveness (Senate and the Parliament) and lack of awareness on ADR (including IGRA).

4.4.2 Suggestions from the Expert Group Respondents

The main recommendations from the expert group were generally in agreement with respondents from the case study areas. Various respondents recommended the raising of awareness on ADR through training of County personnel (KM, 10.03.017; EL, 10.03.017; JO, 03.03.017; JWM, 22.11.017; KL, 05.09.017; JM, 28.03.017; and AK, 08.09.017).

Other respondents recommended the amendment of the Constitution and IGRA and review of the structures and processes (KM, 10.03.017; SMN, 10.3.017; EL, 10.03.017; AK, 08.09.017; JM, 28.03.017; AFG, 14.09.017; JO, 03.03.017; and JWM, 22.11.017). Some of the structures recommended included: the inclusion of the Senate in the IGR infrastructure, and clear provisions on the role of the judiciary (SMN, 10.3.017). Other respondents recommended the establishment of a special tribunal (AFG, 14.09.017; KL, 05.09.017).

One respondent recommended the training of officials (SMN, 10.3.017) and some respondents stressed that the Counties should seek services of professionals (SMN, 10.3.017; JO, 03.03.017). There should be a judicial policy on ADR (EL, 10.03.017) and the establishment of a clear appellate process from Summit or other IGRA organs (JO, 03.03.017). The use of Court-Annexed Mediation programme should be extended to intergovernmental disputes (JWM, 22.11.017).

A curriculum for ADR should be introduced through Teacher Service Commission for teachers to teach ADR in school and Kenya Human Rights Commission and Law Society of Kenya should intervene in guiding the process (JWM, 22.11.017).

Making of appropriate rules and regulations (AFG, 14.09.017) including provisions for the appointment of Arbitrators (AK, 08.09.017) and the establishment of a comprehensive legal framework was recommended (KL, 05.09.017).

In conclusion, the professional group of mediators and arbitrators explained some of the reasons for the failure of the use of ADR to include the following:

- (i) Lack of understanding or awareness of ADR by public and governments (9 out of 13 [69.2%])
- (ii) Poor use of professionals by the Counties and national government (8 out of 13 [61.5 %])
- (iii) Poor legal and institutional framework (6 out of 13 [46.1%])
- (iv) The problem of litigation culture of Kenya (3 out of 13 [23.0%])
- (v) Lack of trained/skilled personnel to manage ADR (3 out of 13 [23.0%])

4.4.3 Observations by Judicial Officers

AV, a Judge of Court of Appeal and Chairman of the Court Annexed Mandated Mediation Committee, stated that the pilot project on mediation organised by the judiciary has been successful and have resolved commercial cases worth over Kshs.600 million through mediation. In his view, there is a need to have a national policy on ADR (personal interview, 20.03.017).

SGK, another Judge of the Court of Appeal, was of the view that the role of Court is to encourage ADR. He felt IGRA was not clear. He recommends that “ADR should be made a condition precedent in clear terms.” (30.10.017).

MWM, a High Court Lady Judge in the Family Division, held that Articles 189(3) and 189(4) of the Constitution does not exclude the jurisdiction of the Court and s.35 of IGRA is not unconstitutional. She felt court retained the power to hear a matter filed by any of the governments. The constitutional provisions, although mandatory, do not exclude court. The role of the judiciary is to facilitate in the resolution of intergovernmental disputes where ADR has failed. She identified the challenges with implementation of ADR is lack of clarity in IGRA. “The provisions are not clear. ADR is not well understood by parties to the disputes. The Court lacks guidelines to explain to the parties the benefits of ADR. There is no any training of judicial officers in intergovernmental dispute resolution. There is no record of cases on intergovernmental disputes.” She recommended “sensitization and training of all stakeholders on substantive and procedural aspects of ADR.” (16.03.017).

FO, a High Court Judge in the Commercial Division and in Charge of Court-Annexed Mediation, Commercial Division, also stated that Articles 189(3) and 189(4) does not exclude the jurisdiction of the court and Section 35 is not unconstitutional “on the failure of ADR parties must enforce rights through the courts. The role of the Court is to encourage ADR.” He broke ranks with his colleagues and thought “IGRA is clear and unambiguous.” He, however, agreed there are no timelines given in the Act after the conclusion of ADR. He saw other challenges in ADR as delay, frustration, and corruption (30.10.017).

NJNK, a Lady Judge in the High Court Commercial Division, also opined that the jurisdiction of the court is not excluded by Constitution. The role of judiciary comes after

all where ADR methods fail. Articles 189(3) and (4) are satisfactory, but IGRA is not clear.

On the challenges facing ADR, she agreed that it is “not well understood. There is more trust in adversarial and Court process. The Court lacks guidelines in the application of ADR. Article 159(2) only talks of promotion of ADR, not compulsion. There has been no training by the judiciary on IGR mechanism." (01.11.017).

MW, a Magistrate and Deputy Registrar of High Court in Charge of Mediation, confirmed that Intergovernmental and intra-governmental disputes were exempted from paying court fees by the Chief Justice in 2016. In the researchers view there is a valid argument this may be one-factor encouraging litigation by Counties. The high cost of litigation, on the other hand, would slow down litigation. The Deputy Registrar opined that the Advocate taxed Costs for inter-governmental cases would be on average not be less than Kshs.300,000/= and the Counties are not exempted from paying these bills (21.03.017).

He was satisfied with mandatory provisions in IGRA for reference of the dispute to ADR. He confirmed the role of the court is to encourage ADR. In his view, the Court mandated mediation pilot programme is on course in family and commercial courts. It has proved very effective in expediency and maintaining relations between parties. The time lines for completing the mediation is 60 days with an extension period of only 10 days. He felt that "after the declaration of a dispute under section 33(2) of IGRA there should be a clear framework on who the dispute should be referred to as the section is wide and vague. The entity referred to should have the requisite professionalism, training, experience, and power to resolve the disputes. Referring the dispute either to the Summit or Council or any other Intergovernmental structure does not lay clear structures for the resolution of disputes.”

The variable identified by the judicial officers can be summarised as follows;

- (i) Lack of mandatory provisions to refer litigation to ADR (6 out of 6 [100%])
- (ii) The role of court limited only to facilitate ADR 6 out of 6 (100%)
- (iii) Ambiguity in the law (IGRA) (4 out of 6 [66.7%])
- (iv) Lack of training of judicial officers (2 out of 6 [33.3%])
- (v) Lack of ADR policy (1 out of 6 [16.7%])

The theory of Conflict Resolution is about creating an environment for discussion, dialogue, negotiation, arbitration, and problem-solving. On the analysis of the above data, it is the researcher's view that the constitutional and legal framework guiding the ADR in the intergovernmental disputes has not met the threshold prescribed by the theory.

The other aspect of this theory is the distinction between conflicts and disputes as expounded by Burton (1996). The statutory instrument which is the tool for ADR has not clearly distinguished these two major areas of intergovernmental disputes, and consequently, the national and county governments which are faced with both boundary and resource disputes have not been able to apply the proper tools, thereby resulting to litigation. On the other hand, the actors in ADR including the judiciary as stated above, confirm the law does not oblige them to apply ADR in the resolution of inter-governmental disputes.

CHAPTER FIVE: SUMMARY OF FINDINGS, CONCLUSION, AND RECOMMENDATIONS

The theory of conflict resolution advances cooperation/collaboration as a central strategy in engaging in conflicts. This strategy favours methods of Alternative Dispute Resolution (ADR), e.g., dialogue, negotiation, mediation, and arbitration. Since Kenya adopted this strategy requiring all disputes and conflicts pass through ADR methods, litigation being only for the last resort, this research was interested to find out the experiences of implementing and using the ADR in handling intergovernmental disputes within the country. The study followed exploratory research design under three key research questions enquiring: whether the ADR methods have been used in the resolution of intergovernmental disputes in Kenya since 2013; whether the practitioners in the field consider its appropriateness in handling intergovernmental disputes in Kenya; and the challenges faced in the implementation of the ADR methods. It was aimed at finding out why devolved governments and the national government tend to use more litigation than the ADR methods. The findings of this study were intended to help in reviewing the use of the ADR methods and their viability in handling intergovernmental disputes.

The data for the study were gathered in respect of Isiolo-Meru boundary dispute, Baringo-Turkana boundary and resources dispute, Kiambu-Murang'a boundary disputes, and the data come from County officials, residents, experts, and other relevant institutions. The data of this study was gathered by means of questionnaires and interviews.

The first part of this chapter provides a summary of the findings of this research, followed by the conclusion and recommendations. The research summary focuses on presenting the findings of the analysis in the previous chapter following the key research

questions while the conclusion brings the closure of the study with recommendations. The recommendations suggested at the end of the chapter are intended to help improve the use of ADR mechanism in the resolution of intergovernmental disputes in Kenya.

5.1 Summary of Findings and Discussion

The main concern of this study was to investigate why both levels of the governments (the national and devolved governments) have been using litigation instead of constitutional and statutory mandated ADR prescribed by Article (189(3) of the Constitution and section 31 of the Inter-Governmental Relations Act in their intergovernmental dispute management. In order to get an answer to this concern, the data were analysed in the order of the three research objectives. The following is a summary of findings and discussion in the order of the three research objectives.

5.1.1 Use of ADR

The first objective enquired whether the ADR methods have been used in the resolution of intergovernmental disputes in Kenya since 2013. This objective was asked at the background of the researcher's assumption that the ADR was less used in the country despite the constitutional requirement. The research established that there was a minimal use of ADR in the resolution of intergovernmental disputes. This is due to several reasons: first, lack of institutional infrastructure at the commencement of the Intergovernmental Relations Act (IGRA) on March 4th, 2013. The Intergovernmental Relation Technical Committee (IGRTC) which was supposed to facilitate ADR was not established until February, 2015 and officially launched on March 4th, 2015 (Mutahi, Chairman of IGRTC, 2015, p. v.) This created an institutional vacuum and hence resort to litigation by devolved governments. He acknowledged that "it appeared that the leaders

at County and National level were settling their disagreements through the Courts and the media” (p. vi).

Secondly, even after the establishment of the IGRTC, it lacked the institutional capacity to handle ADR. There were no skilled manpower and was poorly funded. The Chairman of IGRTC further confirmed that IGRTC received only 10% of its budget and was only able to start working in July 2015.

Thirdly, the devolved governments themselves lacked legal understanding of both the Constitution and the provisions of IGRA. There was a poor induction of the governors and the Members of Assembly into the devolution system of governments. There was scanty understanding of the constitution and IGRA. All the deputy governors interviewed had not read the relevant provisions of the law. They expected to be guided either by their in-house or external legal advisers on all matters concerning dispute management.

Fourthly, at the inception of the County governments there were many teething problems brought about by the new systems of governments, and lack of understanding of the Constitutional mandate with respect to resources, devolved functions, and services. They also inherited serious ethnic, boundary and resources conflicts which were compounded by intra-County disputes. The latter included suits by private individuals owed money by previous authorities and employment disputes by the staff. Majority of these cases were either pending in court or were filed on coming of the Counties. The Counties used the only means available to solve their disputes and filed cases which continued even after the IGRTC was established.

Fifthly, although traditional ADR was initially applied in Isiolo-Meru and Turkana-Baringo disputes, there was a lack of appreciation and codification of these traditional methods. In Turkana, there was an attempt to use ADR but it failed, and consequently, a

case was filed by the Turkana County against the national government and other Counties. It was dismissed and the dispute remains unresolved. The Meru-Isiolo boundary dispute was partly solved through traditional ADR by Elders of Njuri Ncheke, the Borana Elders and the religious leaders. A court intervention prevented full implementation of elders' resolution.

Sixthly, the Constitutional provisions making the ADR compulsory were confirmed as appropriate by the majority of the respondents. However, a minority felt that there should be discretion on the choice of method of dispute resolution, i.e., between ADR and the court. But with respect to IGRA, the provisions were found wanting for lack of clarity, definitions, and the implementing regulations. The Summit and COG were considered inadequate and inappropriate. Majority of the respondents were of the view that the President was not capable of resolving County disputes impartially. The COG, on the other hand, was not inclusive of all stakeholders especially the Senators and Members of Parliament.

Seventhly, together with lack of clear institutional and legal framework, there was a lack of sufficient public awareness about ADR. These were aggravated by the new systems of governments which was not well understood by the people due to inadequate civic education. The public input in the ADR implementation was unavailable as they were not educated in the ADR system generally.

Eighthly, political manipulation was another problem in the application of ADR. The politicians used litigation to corruptly influence the decision and advance their interests. The grandstanding and use of conflicts to earn political mileage amongst the warring communities posed a real threat to traditional dispute resolution. A number of respondents and scholars confirmed that there was the imposition of the protégé to the

council of elders by politicians thus interfering with the traditional structures such as Njuri Ncheke of the Ameru.

Ninthly, the Courts which were supposed to deter litigation and promote ADR compounded the problems by encouraging the full hearing of some intergovernmental disputes. Although some judicial officers issued stay orders and directed devolved governments to exhaust the ADR mechanism they lacked consistency.

Lastly, there is a lack of a national policy on ADR, appreciation, and codification of the traditional justice systems. The need for both a national policy on ADR and traditional justice system has been supported by the constitution. However, the national government has not initiated the process of establishing a comprehensive policy, hence the research also found a multiplicity of uncoordinated and conflicting legislation on the ADR.

5.1.2 The Appropriateness of the Constitutionally Prescribed ADR for Intergovernmental Dispute Resolution

The second research objective sought to investigate whether the ADR as prescribed in the Constitution and the Intergovernmental Relations Act 2012 in Kenya is appropriate in the resolution of intergovernmental disputes.

The research found the key factors necessary to facilitate ADR and hence to determine the appropriateness of the constitutional and statutory framework as time, costs and restoration of relationships.

Respondents who constituted 75% confirmed that it took 1-4 years to settle a dispute through litigation. Hence, litigation is not an appropriate method. Other respondents who constituted 46% confirmed that ADR was effective in the management of time. Only about 13.3% of the respondents were not satisfied with time management through ADR.

In terms of costs, the research found out that it was not a significant factor in choosing between ADR and litigation. One of the judicial officers confirmed that the Counties were exempted from filing fees but not from advocates' fees.

The majority of the respondents agreed that ADR is effective in the restoration of relationships that is amicability but stated that IGRA did not meet the threshold for creating an enabling environment for the application of ADR.

Although the language used in the Constitution showed that ADR was mandatory and IGRA created a window which was exploited by the Counties. There were significant inadequacies in the Act in terms of lack of timelines, clarity, regulations, and also the institutions it established namely, the Summit and the Council of Governors.

Concerning the creation of the organs, the majority of the respondents observed that it lacked inclusiveness in terms of intergovernmental infrastructure. It excluded the Senate and the Members of Parliament from the Summit. The Act also failed to prescribe the agreements between Counties and the national governments for purpose of binding them to refer disputes to ADR. The theory of Conflict Resolution is about inclusiveness and participation, and the key players in the restoration of relationships will include the people's representatives at the grassroots level. So the concept for the establishment of these organs was misconceived with respect to amicability. One of the Member of Parliament was very bitter for being excluded in the settlement of disputes between the two Counties which were in his constituency.

5.1.3 Challenges Faced by the National and County Governments in the Implementation of ADR

The third research objective intended to find out the challenges faced by the national and county governments in the implementation of ADR in the intergovernmental dispute management. The research found the following as challenges in the order of importance. The respondents from the National and County governments confirmed that the main challenges were:

Firstly, a majority of the respondents agreed that there was a lack of a clear legal framework (ambiguity in the Constitution and the law). On the formation of the Counties in 2013, there were no working institutions until up to 2015. Whereas the constitution was clear and provided a mandatory procedure of referring disputes to ADR, the IGRA created a window for filing proceedings in court.

Secondly, there was a lack of inclusiveness of the key players at the County level, that is, the Senate and the Parliament, in the structures created by IGRA.

Thirdly, there was lack of awareness on ADR including IGRA. Generally, the public had no proper understanding of ADR and there was no official program to educate both the people and the officials of the national and County governments.

Fourthly, although the act provided for the promulgation of regulations to guide the implementation of ADR, none had been gazetted at the time of the research. The importance of the regulations is to operationalize the act of the parliament and this constituted a major hindrance in putting in place the mechanisms for the resolution of intergovernmental disputes.

Fifthly, the creation of the Counties brought County nationalism where some people felt that they were in competition with their neighbouring counties for political space. Some of the governors had issues with the County boundaries and shared resources, for example, an ongoing case in Meru-Isiolo County dispute. The politicians directly interfered with the efforts of the council of elders and religious organizations to resolve disputes.

Sixthly, there were inadequacies of the structures/organs established by IGRA. There was a lack of skilled ADR manpower to manage their operations. Some respondents found the position of the President in the summit was not impartial and contrary to fair administration and due process. There was a lack of appeal to the decisions taken by the summit.

Eighthly, some respondents found out there was a lack of national policy on ADR to guide public institutions. For example, the guidelines in South Africa and Canada.

Ninthly, the culture and mindset of Kenyans on litigation clearly showed that the natural reaction of the disputants is to file cases in court. This also ties with the lack of policy on ADR to change the perception that the only effective method of resolving disputes is through litigation.

Finally, the inherent weakness of ADR in that it is voluntary and lacks an effective enforcement machinery forced most of the actors to result to litigation where there is a finality. It is also important to note that a number of disputes were exempted from the ADR. A good example is the conservatory orders which require an urgent remedy to preserve the properties and processes in disputes until a final determination. Again, under this category is the interpretation and construction of statutes.

Other stakeholders who included mediators, arbitrators, and judicial officers concurred on the existence of these challenges facing the national and County governments in the intergovernmental dispute management.

5.2 Conclusion

The objective of this study was to examine the use of ADR in the resolution of intergovernmental disputes in Kenya since 2013 and also to find out whether the ADR prescribed in the Constitution and IGRA is appropriate for that purpose. Lastly, it was to identify the challenges faced by the two levels of governments in the application of ADR.

On the basis of the findings, this study has answered its overall research objectives. It has shown that although intergovernmental disputes existed there was a minimal reference to ADR in resolving them in accordance with IGRA. The procedures prescribed in part IV of the Act were generally not used. In Isiolo-Meru boundary dispute there was an appreciation of the provisions of Articles 189(3) and 189(4) of the Constitution as shown by Report of Isiolo-Meru Boundary Sectoral Committee of Meru County. However, there was no evidence the procedure provided in the law was followed. This is not to say that another form of ADR was not applied. The two communities above used the traditional mechanism of elders to resolve the first wave of violence. The committee made of elders from Meru Njuri Ncheke and the Borana communities settled the dispute with the assistance of Religious leaders and the national government officials. From this case study area, it is the conclusion that ADR, as provided in the Act, was not well understood but traditional non-adversarial methods of settlement of disputes outside the court process had limited success.

In Turkana-Baringo and West Pokot boundary dispute, the County filed a case directly, against the national government and enjoined other Counties as interested parties. Many

more cases were filed by the Council of Governors and the Forum for members of the County Assemblies. Although the mechanism in the Constitution was largely appropriate, the Act was highly inadequate and devoid of regulations and guidelines to address such cases.

There are serious challenges facing the implementation of the Intergovernmental Relations Act due to institutional and legal framework deficiencies. In addition, lack of policy on ADR and awareness compounded by the culture of litigation have been serious impediments to the realization of the devolution policy of non-competitive governments. These account for the failure of using the ADR methods by both levels of governments in favour of litigation. Given such a lack of clear institutional policy, regulation and guidelines, it is not possible to establish confidently whether ADR methods are more effective than litigation in the intergovernmental dispute regulation. This necessitates providing the following recommendations.

5.3 Recommendations

Kenya has chosen a devolution system of government which in itself is aimed at resolving conflicts among its citizens by ensuring equity and equal distribution of power and resources. To achieve these objectives there is an urgent need to have a comprehensive system of dispute resolution mechanism as envisaged in the Constitution. The existing challenges have prevented the experience of the full benefits of what the ADR methods are intended to provide. This study recommends a holistic approach (from the community level to the highest institution of government) in the construction and implementation of the cooperative conflict resolution strategy in using the ADR methods.

5.3.1 Clear and Strong Legal Institutional Framework

5.3.1.1 National Policy on ADR

The Constitution requires that the intergovernmental disputes should be resolved through ADR. The first important precondition to the creation of the legal framework is a policy paper on ADR, as a mechanism for resolution of disputes. The policy paper should define ADR its parameters and institutions that should implement it and a legal framework in conformity with Article 159 of the Constitution. The policy paper should further address the issues of civic education, awareness, documentation, and codification of traditional dispute resolution mechanisms, and the creation of institutions to implement it nationally. The Canadian ADR policy on the prevention and resolution of disputes may provide a good starting point of reference.

5.3.1.2 Review of Constitution

The current constitutional provisions should be carefully examined in view of lessons learned and confirm whether they are facilitating the intended objectives. This includes providing a comprehensive definition of intergovernmental disputes, the institutions and their roles in ADR in the devolution system.

5.3.1.3 Amendments to IGRA and Related Legislations

The South African model of intergovernmental relation legislation was complemented by a detailed guideline and judicial pronouncements. This enabled the devolved governments to manage a three-tier system with minimal hitches. The IGRA should be amended to give clear definitions of intergovernmental disputes and clarify those that are exempted from ADR. There should be a clarification of the position of entities not directly involved in

intergovernmental disputes infrastructure but whose disputes affect national or County governments (e.g. health sector, water, and transport etc.). The position of the Senate has not been clearly defined in the intergovernmental infrastructure and has caused division whether the Senate should be part of the infrastructure of the intergovernmental relations. This is despite the fact that the Senate plays an important oversight role over Counties and in this context has generated a substantial number of litigations. Thus, the Senate should be included as an integral part of the intergovernmental structure.

The Courts have not given clear indication of the disputes exempted from ADR and specifically those that do not fall within the provisions of IGRA. The legislature should now take advantage of judicial precedents to provide an exemption list which should include those that are specifically referred to High Court and Supreme Court. This can be done through a joint workshop with the Ministry of Devolution. The Attorney General, the Council of Governors, the judiciary and other stakeholders should work in harmony in the resolution of disputes. Other devolution legislations should be harmonized with IGRA to ensure that there is no conflict or duplication.

5.3.1.4 Regulations and Rules of Procedure

One of the major complaints in the implementation of the IGRA was the lack of regulations provided under S.38 of the Act. The relevant Ministry is obliged under the law to make comprehensive regulations to operationalize the Act. In the said regulations the Minister should appoint the authority to make rules of procedure which should include forms, prescribed documents, timelines, processes and other details to make it easier for the Counties and the national government officers to implement the requirements of the Act. This lacuna of rules and regulations for the operationalization of IGRA should be addressed.

5.3.1.5 Institutions

A substantial number of the respondents were unhappy with the main organs created by the IGRA for resolution of intergovernmental disputes. They felt the Summit lacked neutrality, impartiality and that the President was not the proper authority to preside over disputes between National and County governments. They saw a palpable conflict of interest. They recommended an independent tribunal like Political Parties Tribunal headed by a person with a legal qualification such as a retired judge or an advocate of High Court of Kenya. The tribunal's decision would be subject to review by High Court or an appellate organ. There were also views that such a tribunal may fall into similar bureaucratic rigidity as the courts. The researcher concurs that such a tribunal must be carefully considered and debated to ensure it does not whittle down the benefits of ADR which include informality and flexibility.

5.3.1.6 Inter-Counties Consultative Committee

The Council of Governors is responsible for the resolution of inter-County disputes. A substantial number of respondents complained that it is ineffective in dealing with the community-based conflicts. They recommended it should be expanded to include the Senators, the area member of Parliament and MCA when boundary and resource-based disputes are involved. The researcher is in agreement with their views since this is a step in the right direction in the resolution of boundary and resource-based disputes. In so far as disputes common to the Counties against the national government are concerned, a consultative committee of all stakeholders is highly recommended before any suit is filed or compromised.

5.3.1.7 Judicial-Devolution Consultative Committee

The main complaints on the application of ADR involved the window created by S.35 of the IGRA to resort to judicial proceedings. On top of this was the argument that Article 50 of the Constitution gave an aggrieved person an automatic right to seek remedy in the Court. Most of the judicial officers interviewed strongly held the view that the mandatory provisions of Article 189(3) of the Constitution did not exclude the Court, and hence S.35 IGRA was not inconsistent with the constitution. This was also supported by a substantial number of legal practitioners and mediators. It is the researcher's recommendation that a consultative committee of the devolution stakeholders and the judiciary should be established to continuously monitor the disputes being referred to Court and come up with rules to guide litigants. Joint workshops and seminars would improve the working environment between the devolved Governments. It may be prudent to extend current Court-Annexed ADR to include Intergovernmental disputes.

5.3.1.8 Professional Institutions

The professional mediators and legal practitioners interviewed felt that their services and expertise was not adequately utilized by the Counties and the National government in promoting ADR in handling intergovernmental disputes. More engagement by the professional body is required through the professional institutions such as Chartered Institute of Arbitrators, the Law Society of Kenya and Mediation Accreditation Committee. A permanent panel of mediators, arbitrators and conciliators should be established in consultation with Intergovernmental agencies to facilitate the procurement of professional services. This panel should deal with rules on appointment, qualifications, and standards. It should also handle issues of professional fees, integrity, misconduct, and discipline of those appointed to manage intergovernmental disputes.

5.3.1.9 Training in ADR

As part of ADR policy, the national and County governments should undertake comprehensive training of their staff on ADR. This should include on-job training, induction and post-employment training in basic mediation, arbitration, and negotiation. On the national level, the citizens should undergo civic education through established institutions such as religious organizations, schools, and community-based organizations. An appropriate curriculum should be developed from early foundations through primary, secondary and tertiary education to create awareness and build necessary skills in dispute management. The beneficiaries of such training should include elders, religious leaders, and paralegals.

5.3.2 Political, Social and Economic Reforms

The majority of the community-based conflicts are as a result of political and ethnic problems, which have structural origins. The three case study areas revealed deep-seated political animosities between members of different ethnic groups, clans and even ideologies. Turkana–Baringo dispute had many facets including historical, ethnic and cultural problems. The discovery of oil escalated the conflict already ignited by cattle rustling. The same with Isiolo-Meru boundary problem now aggravated by the development brought in the region by Lamu, South Sudan, and Ethiopia (LAPSETT) Corridor Authority. The Kiambu-Muranga dispute, on the other hand, involves members of the same ethnic group but has a revenue-rich enclave between their borders. Political manipulation in the past ensured this area is in Kiambu for the revenue collection while voters are in Muranga. Majority of the respondents felt these problems can only be resolved administratively by political intervention. The issue of resources is the genesis of national and County government conflicts. It may involve budgetary support by the

national government to resolve such disputes. On the other hand, disputes precipitating violence are the preserve of national government as security is not a devolved function. The improvement in the economic and social well-being of the residents of the Counties will contribute to reducing conflicts and make it easier to apply ADR when a dispute arises since the serious structural conflict factors would have been resolved. The starting point is to draw an inclusive strategy to review the last five years of devolution and build on lessons learned. The proper engagement of the institutions charged with fixing the boundaries, preservation, and management of natural resources would avoid conflict. The review of County boundaries by the Independent Commission in 2019 should be professionally carried out in accordance with the constitution. The sharing of revenue should also be done after careful consultation and public participation.

5.3.3 Incentives and Penalties

The Court litigation has proved to be expensive and time-consuming. The respondents recommended that a conducive environment should be created to promote ADR. Counties should be rewarded for adopting ADR in their resolution of disputes. In the same vein, the officers who engage in litigation without reference to ADR should be surcharged or have their County budget cut. The Courts should discourage litigation by staying proceedings until parties seek ADR. In appropriate situations, cases that infringe on the S. 35 of the IGRA and have not exhausted ADR mechanism should be dismissed with punitive costs.

5.3.4 Further Research

To know clearly the viability and clear benefits of the ADR methods in handling intergovernmental disputes require the above recommendations being implemented first and then assessed after a period of time. Meanwhile, the researcher recommends further

research covering the performance of the devolved governments over the last five years (2013-2017). This would involve the main organs of dispute resolution: the Summit, the Council of Governors and the Intergovernmental Technical Committee.

The areas not comprehensively covered in this research include the statistics of cases filed by the respective government from 2013 to 2017 due to poor reporting procedures. Other important data to be captured should include disputes processed through the IGTRC. A field study of cases resolved through traditional methods of dispute resolution from all Counties would guide in assessing the performance of the elders and religious leaders in resolving conflicts. Finally, an assessment of the competence of the laws governing devolution may conclusively be solved by a national Task Force which should visit all Counties and national government entities. The recommendation of the Task Force will be useful in harmonizing the legislation and also advising on the formation of an ADR policy. The research should be extended to the impact of intra-County disputes on the intergovernmental relation.

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APPENDICES

Appendix 1: Introduction Letter

Dear Respondent,

My name is Mbuthi Gathenji, currently a student pursuing an M.A Degree in Peace Studies and International Relations at Hekima College, a Constituent College of the Catholic University of Eastern Africa, Nairobi, Kenya.

I am conducting a study on “Alternative Dispute Resolution Mechanism and the Management of Intergovernmental Disputes: A case study of National and County Governments in Kenya” The study aims at fulfilling the requirements of a Master’s Thesis. Given the importance of this study, you have been identified to provide critical information to make this study a success. There are no risks to your participation. All responses will be acknowledged, credited and strictly used only for academic purposes. Information obtained will be treated with confidentiality. Your cooperation is highly appreciated.

Thank you.

Mbuthi Gathenji

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Appendix II: Schedule for Interviews and Questionnaire

A: Research Schedule for Interviews: A total of 44 respondents (11 per county)

1. For the Counties of Baringo, Isiolo, Meru, Murang'a, Turkana and Kiambu:
 - a. Governor or Deputy Governor [1]
 - b. Senator [1]
 - c. Clerk [1]
 - d. County Commissioner [1]
 - e. Member of the County Assembly [1]
 - f. Women [2]
 - g. Youth [2]
 - h. Religious leader [1]
 - i. Traditional leader [1]

B: Research Schedule for Questionnaire: A total of 20 respondents

2. For the Judiciary
 - a. Supreme Court [1]
 - b. Court of Appeal [1]
 - c. High Court [1]
 - d. Registrar [1]
3. For Practitioners
 - a. Legal practitioners [2]
 - b. Professional mediator [1]
 - c. Arbitrator [1]
 - d. Chief Litigation Counsel [1]
 - e. Transition Authority Chairperson [1]
 - f. Scholars [4]

- g. Ombudsman [1]
- h. Political Scientists [2]
- i. Chairman of the Law Society of Kenya [1]
- j. Former member of Kenya Constitutional Review [1]
- k. Chairperson of the Chartered Institute of Arbitrators [1]

Appendix III: Questionnaire

**For Chairman of Council of Governors, Governors, Clerks to the
County and Senate, Legal Committees of the Counties**

SECTION A: Bio data. Please tick as appropriate

Indicate your answer by ticking [] in the space provided

1. What is your gender?

Male

Female

2. What is your age?

18-30

31-40

41-50

60 and above

3. What is the level of your education?

Primary

Secondary

Tertiary

None

4. What is your marital status?

Married

Single

Other
(specify).....

5. What is your profession?.....

SECTION B

Research Objective 1: Establishing the use of ADR in the resolution of intergovernmental disputes in Kenya

1. Have you had disputes with other county government or with the central government?

☐ Yes ☐ No

2. If “Yes” to question 1 above, what was/were the source/s of dispute(s)?

.....
.....

3. How many times have you had the intergovernmental disputes?.....

4. How have you handled the
disputes? Litigation

Mediation

Negotiation

Conciliation

Arbitration

Others:

please

specify.....

5. If your county has used ADR methods (negotiation or mediation), how many times in each of the following financial years?

a). 2013-2014.....

b). 2014-2015.....

c). 2015-2016.....

d). 2016-2017.....

6. a. Please rate the following, the lowest being 1, and the highest being 5.

Measuring the effectiveness of ADR (negotiation, mediation)	1	2	3	4	5
Compared to litigation, ADR takes shorter time					
ADR methods cost less than litigation					
Resolution of the disputes is more amicable than litigation					

b. If you have used ADR, how long did it take to settle your disputes?.....

7. Does your county file cases
in court? Yes
No

If the answer is Yes, how many times in each of the following financial year?

- a). 2013-2014.....
b). 2014-2015.....
c). 2015-2016.....
d). 2016-2017.....

8. Approximately, how long does litigation take to end the case (from filing to judgment)?.....

Research Objective 2: Whether the ADR as prescribed in the Constitution and the intergovernmental Relations Act 2012 in Kenya is appropriate in the resolution of intergovernmental disputes

9. Who makes the final decision on the method or the course of action to be adopted in dealing with the disputes?

Governor

Legal Committee

County Assembly

Others; specify please.....

10. How do you make decision on which mechanism to use to resolve the dispute between your and other governments?

Legal advice

Vote by Members of County Assembly (MCA)

Others

(specify please).....

11. How long does a case take in Court?

Days

Months

Years

Research Objective 3: Challenges faced by the national and county governments in the implementation of ADR

12. What inconveniences do you find in going to ADR under the current structure provided by the constitutional Act 2012?

.....

.....

.....

.....

13. Do you know the provisions of Article 189(3) of the Constitution?

Yes

No

If yes, state.....

14. Do you know the requirement of S. 31 of Inter-Governmental Relations Act?

Yes

No

If yes, state.....

15. Have you used any of the following ADR mechanism in dispute resolution? Please tick (✓) the appropriate ones below.

a. Mediation []

b. Negotiation []

c. Arbitration []

d. Traditional Dispute Resolution Mechanism []

e. Others []; please specify.....

12. How many cases have you resolved using ADR during the following periods? a).

2013-2014

b). 2014-2015

c). 2015-2016.....

d). 2017.....

If none, explain briefly why not.....

For Attorney General Chambers, Cabinet and Principal Secretaries

SECTION A: Bio data. Please tick as appropriate

Indicate your answer by ticking [] in the space provided

1. What is your gender?

Male

Female

2. What is your age?

18-30

31-40

41-50

60 and above

3. What is the level of your education?

Primary

Secondary

Tertiary

None

4. What is your marital status?

Married

Single

Other

(specify).....

4. What is your profession?.....

SECTION B

Research Objective 1: Establishing the use of ADR in the resolution of intergovernmental disputes in Kenya

1. Are you satisfied with the provisions of IGRA in so far as it relates to ADR?

Yes

No

If No, what improvements do you suggest?.....

.....

2. How many cases have been filed against

a). the national government by the counties.....

b).the counties by the national government.....

c). the counties by other counties

3. Have you raised any objections to proceedings in court that have not obtained permission of the summit?

Yes

No

3. Have the counties or their legal officers sought your opinion on the provisions of IGRA?

Yes

No

4. Have the regulations to operationalized IGRA been gazetted? Yes

No

5. Please rate the following, the lowest being 1, and the highest being 5.

Measuring the effectiveness of ADR (negotiation, mediation)	1	2	3	4	5
---	---	---	---	---	---

Compared to litigation, ADR takes shorter time					
ADR methods cost less than litigation					
Resolution of the disputes is more amicable than litigation					

b. If you have participated in the ADR process, how long did it take to settle the disputes?.....

Research Objective 2: Whether the ADR as prescribed in the Constitution and the intergovernmental Relations Act 2012 in Kenya is appropriate in the resolution of intergovernmental disputes

6. Have you had any occasion to interpret the provisions of IGRA?

Yes

No

If yes specify.....

.....

7. In your view is ADR defined in

a). the Constitution []Yes; [] NO

b). in IGRA []Yes; [] NO

8. What is your view on the costs incurred by the counties in litigation?

.....

.....

Research Objective 3: Challenges faced by the national and county governments in the implementation of ADR

9. Do you know of any problems in the application of ADR provisions?

Yes

No

If yes, explain.....

.....

10. What recommendations would you make concerning the application of ADR?.....

.....

.....

.....

11. What is the policy of the national government with respect to dispute resolution in the devolved system?.....

.....

.....

12. What challenges do you see in the implementation of IGRA?

.....

.....

.....

.....

For Judiciary (Registrar of the High Court)

SECTION A: Bio data. Please tick as appropriate

Indicate your answer by ticking [] in the space provided

1. What is your gender?

Male

Female

2. What is your age?

18-30

31-40

41-50

60 and above

3. What is the level of your education?

Primary

Secondary

Tertiary

None

4. What is your marital status?

Married

Single

Other

(specify).....

.

5. What is your profession?.....

SECTION B

Research Objective 1: Establishing the the use of ADR in the resolution of intergovernmental disputes in Kenya

1. What is the role of a judge in inter-county or intergovernmental disputes?.....

.....
.....

2. How may such cases have been filed during the following

periods? a). 2013-2014 []

b). 2014-2015 []

c). 2015 -2016 []

3. What is the average court filing fee for cases involving inter-county and inter-governmental disputes?.....

4. What is the average advocates taxed costs of the cases in (3) above?.....

.....

Research Objective 2: Whether the ADR as prescribed in the Constitution and the intergovernmental Relations Act 2012 in Kenya is appropriate in the resolution of intergovernmental disputes

5. Are you satisfied with the provisions of IGRA that make it mandatory to refer disputes to mediation?

Yes

No

6. List the common orders issued in the cases mentioned in (3) and (4) above.....

.....

Research Objective 3: Challenges faced by the national and county governments in the implementation of ADR

7. Do you have court mandated mediations?

Yes

No

If yes, how effective have they been in resolving disputes?.....

.....

8. What is the duration of the hearing of the cases referred for mediation by the courts?.....

.....

9. What recommendations can you make on any provisions of IGRA?.....

.....

.....

.....

10. How many cases have been rejected for reasons of non-compliance with IGRA since 2013?.....

General questions for lay respondents (youth, women, religious leaders and traditional leaders)

SECTION A: Bio data. Please tick as appropriate

Indicate your answer by ticking [] in the space provided

1. What is your gender?

Male

Female

2. What is your age?

18-30

31-40

41-50

60 and above

3. What is the level of your education?

Primary

Secondary

Tertiary

None

4. What is your marital

status? Married

Single

Other

(specify).....

.

5. What is your profession?.....

Research Objective 1: Establishing the use of ADR in the resolution of intergovernmental disputes in Kenya

1. Have you heard of problems between your County and the Central government? Yes

No

2. What kind of problems?

- a) Involving services such as health, security, education.
- b) Administration of resources e.g. minerals
- c) Others. Explain briefly.....

.....

3. How was the problem (s) resolved? Please tick the appropriate.

- a. Through court []
- b. Discussions between parties []
- c. By elders interventions []
- d. By other means []

Explain briefly.....

.....

4. How long did this problem(s) last? Tick as appropriate Days (1-30)
Months (1-12)
Years (1-4)
Others

5. Were you satisfied with the way the dispute(s) resolved?

Yes

No

Explain your reasons.....
.....

6. Are you aware of any disputes between your county and neighbouring counties concerning the matter? Tick as appropriate.

a). Boundary [Yes] [No]

b). Resources [Yes] [No]

c). Security [Yes] [No]

d). Others.....

7. Are you aware of Alternative Dispute Resolution? Tick as appropriate

Yes

No

If yes, how did you come to know about it.

Explain?.....
.....

8. Have you used ADR in resolving disputes in any areas? Yes

No

9. Where did you use it?.....
10. What were the result?.....
-
11. What recommendations would you make for resolving dispute(s) between the following institutions:
- a. County and Central government
-
-
-
-
- b. County and County
-
-
-
-
- c. Senate and County
-
-

SECTION A: Bio data. Please tick as appropriate

(Indicate your answer by ticking [] in the space provided)

1. What is your gender?

Male

Female

2. What is your age?

18-30

31-40

41-50

60 and above

3. What is the level of your education?

Primary

Secondary

Tertiary

None

4. What is your marital

status? Married

Single

Other

(specify).....

5. What is your profession?.....

Research Objective No. 1

To establish the use of ADR in the resolution of intergovernmental disputes in Kenya.

(1) Are you aware of the Intergovernmental Relations Act 2012?

Tick as appropriate.

[] Yes [] No

(2) Have you been involved in issues relating to intergovernmental disputes (i.e. between counties and national government or the counties themselves) ?

Tick as appropriate.

[] Yes [] No.

(3) In your view are the devolved governments using the ADR to resolve their disputes?

[] Yes [] No

In either cases explain your reasons.....

.....
.....
.....

Research Objective No 2.

To investigate whether ADR as prescribed by the Constitution and the Intergovernmental Act 2012 is appropriate in the resolution of intergovernmental disputes.

(4) In your view is the ADR adequately understood by the people in Kenya?

.....
.....
.....

(5) Is the mandatory provision for reference of disputes to ADR consistent with the practice of alternative dispute resolution principles?

.....
.....
.....
.....

- (6) Is the intergovernmental Relation Act inconsistent with the Constitution in so far as it provides judicial process as a last resort?

.....
.....
.....

Research Objective No 3.

Challenges faced by national and county governments in the implementation of ADR Mechanism.

7. In your view what are the challenges faced by county and government in the implementation of the ADR in resolution of intergovernmental disputes.

.....
.....
.....

8. What are your recommendations for resolving those challenges?

.....
.....
.....
.....

9. Is Senate part of the intergovernmental relations infrastructure? I have taken note of several suits against Senate by the counties and position taken by some Senators such as Hon Birrow Kerrow that such disputes should be referred to ADR.

.....
.....

.....

.....

For Legal Practitioners

SECTION A: Bio data. Please tick as appropriate

Indicate your answer by ticking [] in the space provided

1. What is your gender?

Male

Female

2. What is your age group?

18-30

31-40

41-50

51-60

61 and above

3. What is the level of your education?

Primary

Secondary

Tertiary

None

4. What is your marital status?

Married

Single

Other

(specify).....

5. What is your profession?

.....

Research Objective 1: Establishing the use of ADR in the resolution of Intergovernmental disputes in Kenya

1. Do you act for any County Government in Kenya? (Tick as appropriate)

Yes

No

If yes, explain.....

.....

2. Have you dealt with a dispute involving one County versus another otherwise known as Intergovernmental dispute? (Tick as appropriate)

Yes

No

If Yes, what was the nature of the dispute?.....

.....

.....

3. What mechanism did your client use in the resolution of the dispute?.....

.....

.....

4. Explain briefly the reasons for the option to use the method applied.....

.....

.....

.....

Research Objective 2: Investigating whether the ADR as prescribed by the Constitution and Intergovernmental Relations Act 2012 in Kenya is appropriate in the resolution of Intergovernmental disputes

5. Are you aware of Article 189(3) and (4) of the New Constitution of Kenya that requires that Inter-governmental dispute should be referred to Alternative Dispute Resolution?

(Tick as appropriate)

Yes

No

If yes, what is your opinion on the application of these provisions of Constitution to the resolution of Intergovernmental disputes?

i). Between Counties.....

.....
.....

ii). Between National Government and Counties.....

.....
.....

iii). Between Counties and Senate.....

.....
.....

6. Are you satisfied with the provisions of Intergovernmental Relations Act that makes it mandatory to refer disputes to mediation? (Tick as appropriate)

Yes

No

In either case, explain your reasons.....

.....
.....

7. Do you think the Constitutional article 189(3) and 189(4) exclude jurisdiction of the court? (*the copy of the Constitution article 189 is annexed at the back of the questionnaire*)

(Tick as appropriate)

Yes

No

8. In your view is S. 35 of the Intergovernmental Relations Act 2012 unconstitutional in so far as it makes reference of intergovernmental disputes to judicial process? *(the copy of the Intergovernmental Relations Act 2012 is annexed at the back of the questionnaire)*

(Tick as appropriate)

Yes

No

If either case, explain.....

.....

9. In your view, what role can the judiciary play in the resolution of the Intergovernmental disputes? (explain briefly).....

.....

.....

10. What recommendations if any would you wish to make to improve the resolution of disputes?

i). Between Counties.....

.....

.....

ii). Between National Government and Counties.....

.....

.....

iii). Between Counties and Senate.....

.....

.....

Research Objective 3: To find out the challenges faced by the National and County Governments in the implementation of ADR

11. Do you think ADR is generally understood by the citizens of Kenya? (Tick as appropriate)

Yes

No

In either case, explain your reasons.....

.....

.....

12. Do the clients raise any concerns with ADR? (Tick as appropriate)

Yes

No

In either case, explain your reasons.....

.....

.....

13. Are you aware of any challenges facing County in the application of ADR? (Tick as appropriate)

Yes

No

If Yes, what are challenges?.....

.....

.....

14. Please rate the following, the lowest being 1, and the highest being 5.

	1	2	3	4	5
Measuring the effectiveness of ADR (negotiation, mediation)					
Compared to litigation, ADR takes shorter time					

ADR methods cost less than litigation					
Resolution of the disputes is more amicable					

For The Chairman of The Chartered Institute of Arbitrators Kenya Chapter

SECTION A: Bio data. Please tick as appropriate

Indicate your answer by ticking [] in the space provided

1. What is your gender?

Male

Female

2. What is your age group?

18-30

31-40

41-50

51-60

61 and above

3. What is the level of your education?

Primary

Secondary

Tertiary

None

4. What is your marital status?

Married

Single

Other (specify).....

5. What is your profession?

To establish the use of ADR in the resolution of Intergovernmental disputes in Kenya

1. Are the benefits of ADR understood by the public in general? (Tick as appropriate)

Yes

No

In either case, explain your reasons.....

.....

.....

2. Is the ADR being used to resolve

a). The Inter-County disputes

b). Disputes between National Government and the Counties

c). Between Senate and the Counties

(Tick as appropriate)

Yes

No

In either case, explain your reasons.....

.....

.....

To investigate whether the ADR as prescribed by the Constitution and Intergovernmental Relations Act 2012 in Kenya is appropriate in the resolution of Intergovernmental disputes

3. Are you satisfied with the mandatory provisions of the Constitution and IGRA in so far as they relate to application of ADR by devolved governments? (Tick as appropriate)

Yes

No

If no, what areas are unsatisfactory?.....

.....

.....

4. Has any County sought the assistance of the Institute in interpretation or implementation of IGRA with respect to reference of disputes to ADR? (Tick as appropriate)

Yes

No

If Yes, what are the common problems? Explain.....

.....

.....

.....

5. Do you think the Constitutional article 189(3) and 189(4) exclude jurisdiction of the court?

(the copy of the Constitution article 189 is annexed at the back of the questionnaire)

(Tick as appropriate)

Yes

No

6. In your view is S. 35 of the Intergovernmental Relations Act 2012 unconstitutional in so far as it makes reference of intergovernmental disputes to judicial process? *(the copy of the Intergovernmental Relations Act 2012 is annexed at the back of the questionnaire)*

(Tick as appropriate)

Yes

No

If either case, explain.....
.....
.....

7. In your view, what role can the judiciary play in the resolution of the Intergovernmental disputes? (explain briefly).....
.....
.....

To find out the challenges faced by the National and County Governments in the implementation of ADR

8. In your view, do the Counties have personnel trained in ADR? (Tick as appropriate)

Yes

No

9. Have your Institute been consulted to train such personnel in ADR (Tick as appropriate)

Yes

No

In either case, explain your reasons.....
.....
.....

10. Is the law clear on the procedures to be followed in application of ADR by Counties, National Government and Senate? (Tick as appropriate)

Yes

No

If no, what areas are not clear?.....

.....

.....

11. Are the organs created by IGRA to enforce the ADR satisfactory? (Tick as appropriate)

Yes

No

Not sure

12. Is ADR in general properly defined? (Tick as appropriate)

Yes

No

If not, what are the missing elements?.....

.....

.....

13. In your view, what is the role of the judiciary in Intergovernmental dispute resolution? Explain briefly.....

.....

.....

14. What recommendations would you make in making ADR well understood?

.....

.....

15. What recommendations would you make with respect to the dispute resolution legal framework in devolved governments in:

a). the Constitution.....

.....

.....

b). the IGRA.....

.....

.....

16. Please rate the following, the lowest being 1, and the highest being 5.

Measuring the effectiveness of ADR (negotiation, mediation)	1	2	3	4	5
Compared to litigation, ADR takes shorter time					
ADR methods cost less than litigation					
Resolution of the disputes is more amicable than litigation					

For Professional Mediators

SECTION A: Bio data. Please tick as appropriate

Indicate your answer by ticking [] in the space provided

1. What is your gender?

Male

Female

2. What is your age group?

18-30

31-40

41-50

51-60

61 and above

3. What is the level of your education?

Primary

Secondary

Tertiary

None

4. What is your marital status?

Married

Single

Other (specify).....

5. What is your profession?

To establish the use of ADR in the resolution of Intergovernmental disputes in Kenya

1. Have you been involved in the resolution of disputes emanating from any of the following?

a). County to County Government's disputes

b). National and County Governments

c). County Government and Senate

(Tick as appropriate)

Yes

No

If yes, briefly explain the nature of dispute and the result.....

.....

.....

To investigate whether the ADR as prescribed by the Constitution and Intergovernmental Relations Act 2012 in Kenya is appropriate in the resolution of Intergovernmental disputes

2. Are you familiar with the provisions of Article 189(3) and 189(4) of the Constitution which make it mandatory to refer Intergovernmental disputes to ADR? (Tick as appropriate)

Yes

No

3. What is your opinion on applicability of these provisions by the devolved governments?.....

.....

.....

4. Do you think the Constitutional article 189(3) and 189(4) exclude jurisdiction of the court?

(the copy of the Constitution article 189 is annexed at the back of the questionnaire)

(Tick as appropriate)

Yes

No

5. In your view is S. 35 of the Intergovernmental Relations Act 2012 unconstitutional in so far as it makes reference of intergovernmental disputes to judicial process? *(the copy of the Intergovernmental Relations Act 2012 is annexed at the back of the questionnaire)*

(Tick as appropriate)

Yes

No

If either case, explain.....

.....

.....

6. In your view, what role can the judiciary play in the resolution of the Intergovernmental disputes? (explain briefly).....

.....

.....

To find out the challenges faced by the National and County Governments in the implementation of ADR

7. What in your view are the challenges faced by National and County government in the implementation of ADR? Explain briefly.....

.....

.....

.....

8. Is ADR generally well understood by general public? (Tick as appropriate)

Yes

No

In either case, explain your reasons.....

.....

.....

9. What recommendations, if any would offer to make the application of ADR effective?.....

.....

10. What amendments, if any would make to the Constitution and Intergovernmental Act 2012?.....

.....

.....

.....

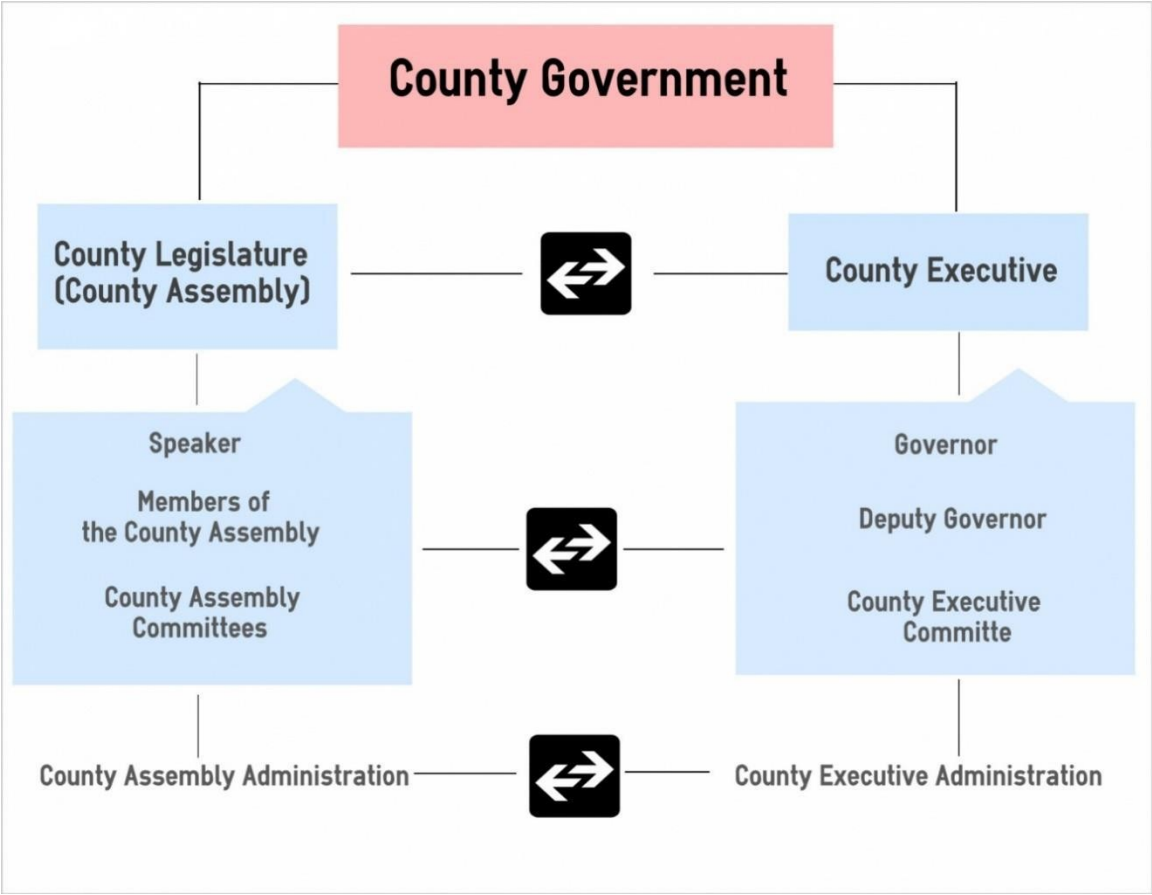
11. Please rate the following, the lowest being 1, and the highest being 5.

Measuring the effectiveness of ADR (negotiation, mediation)	1	2	3	4	5
Compared to litigation, ADR takes shorter time					
ADR methods cost less than litigation					
Resolution of the disputes is more amicable than litigation					

APPENDIX IV: Map of the 47 Counties of Kenya



APPENDIX V: Structure of County Government



Appendix VI: Research Consent Form

Name of Researcher: Mbuti Gathenji

Research Title: Alternative Dispute Resolution: A Case Study of its Application to
Intergovernmental Disputes in Kenya

Purpose of Research: This study seeks to find out why devolved governments are using court litigation instead of the mandatory Alternative Dispute Resolution mechanism prescribed by Inter-governmental Relations Act 2012 in the management of the intergovernmental disputes.

Please Tick where appropriate

YES NO

1. I confirm that I have read and understood the purpose for the above study
2. I understand that my participation is voluntary and that I am free to withdraw at any time
3. I agree to take part in the above study
4. I agree to the interview and focus group discussion being audio recorded
5. I agree to the interview and focus group discussion being video recorded
6. I agree to the use of anonymized quotes in publications

☐	☐
☐	☐
☐	☐
☐	☐
☐	☐
☐	☐

Name of the participant

Date

Signature

Kindly contact the Supervisor of this research if ethical boundaries are breached by the researcher in the course of this research.

Dr. Elias Opongo, SJ;
Director
HIPSIR – Riara Road
Tel: +254729755905
Email: elias.opongo@hekima.ac.ke

Appendix VI: Research Authorization



NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY AND INNOVATION

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Email: dg@nacosti.go.ke
Website: www.nacosti.go.ke
when replying please quote

9th Floor, Utalii House
Uhuru Highway
P.O. Box 30623-00100
NAIROBI-KENYA

Ref. No.

NACOSTI/P/17/96901/15620

Date:

10th March, 2017

Mbuthi Gathenji
Hekima Institute of Peace Studies
And International Relations
P.O. Box 21215 - 00505
NAIROBI.

RE: RESEARCH AUTHORIZATION

Following your application for authority to carry out research on "*Alternative dispute resolution mechanisms and the management of inter-governmental disputes: A case of National and County Governments in Kenya*," I am pleased to inform you that you have been authorized to undertake research in **Baringo, Isiolo, Kiambu and Meru Counties** for the period ending **9th March, 2018**.

You are advised to report to **the County Commissioners and the County Directors of Education of the selected Counties** before embarking on the research project.

On completion of the research, you are expected to submit **two hard copies and one soft copy in pdf** of the research report/thesis to our office.


BONIFACE WANYAMA
FOR: DIRECTOR-GENERAL/CEO

Copy to:

The County Commissioners
Selected Counties.

The County Directors of Education
Selected Counties.

National Commission for Science, Technology and Innovation is ISO 9001:2008 Certified

Appendix VIII: Research Permit

CONDITIONS

1. You must report to the County Commissioner and the County Education Officer of the area before embarking on your research. Failure to do that may lead to the cancellation of your permit.
2. Government Officer will not be interviewed without prior appointment.
3. No questionnaire will be used unless it has been approved.
4. Excavation, filming and collection of biological specimens are subject to further permission from the relevant Government Ministries.
5. You are required to submit at least two(2) hard copies and one (1) soft copy of your final report.
6. The Government of Kenya reserves the right to modify the conditions of this permit including its cancellation without notice



REPUBLIC OF KENYA



National Commission for Science,
Technology and Innovation

RESEARCH CLEARANCE
PERMIT

Serial No.A **13168**

CONDITIONS: see back page

THIS IS TO CERTIFY THAT:

MR. MBUTHI - GATHENJI
of HEKIMA INSTITUTE OF PEACE
STUDIES AND INTERNATIONAL STUDIES,
76122-508 Nairobi, has been permitted
to conduct research in Baringo , Isiolo ,
Kiambu , Meru Counties

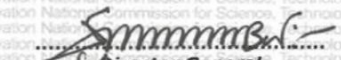
on the topic: ALTERNATIVE DISPUTE
RESOLUTION MECHANISMS AND THE
MANAGEMENT OF
INTER-GOVERNMENTAL DISPUTES: A
CASE OF NATIONAL AND COUNTY
GOVERNMENTS IN KENYA.

for the period ending:
9th March, 2018


Applicant's
Signature

Permit No : NACOSTI/P/17/96901/15620
Date Of Issue : 10th March, 2017
Fee Received :Ksh 1000




Director General
National Commission for Science,
Technology & Innovation

