

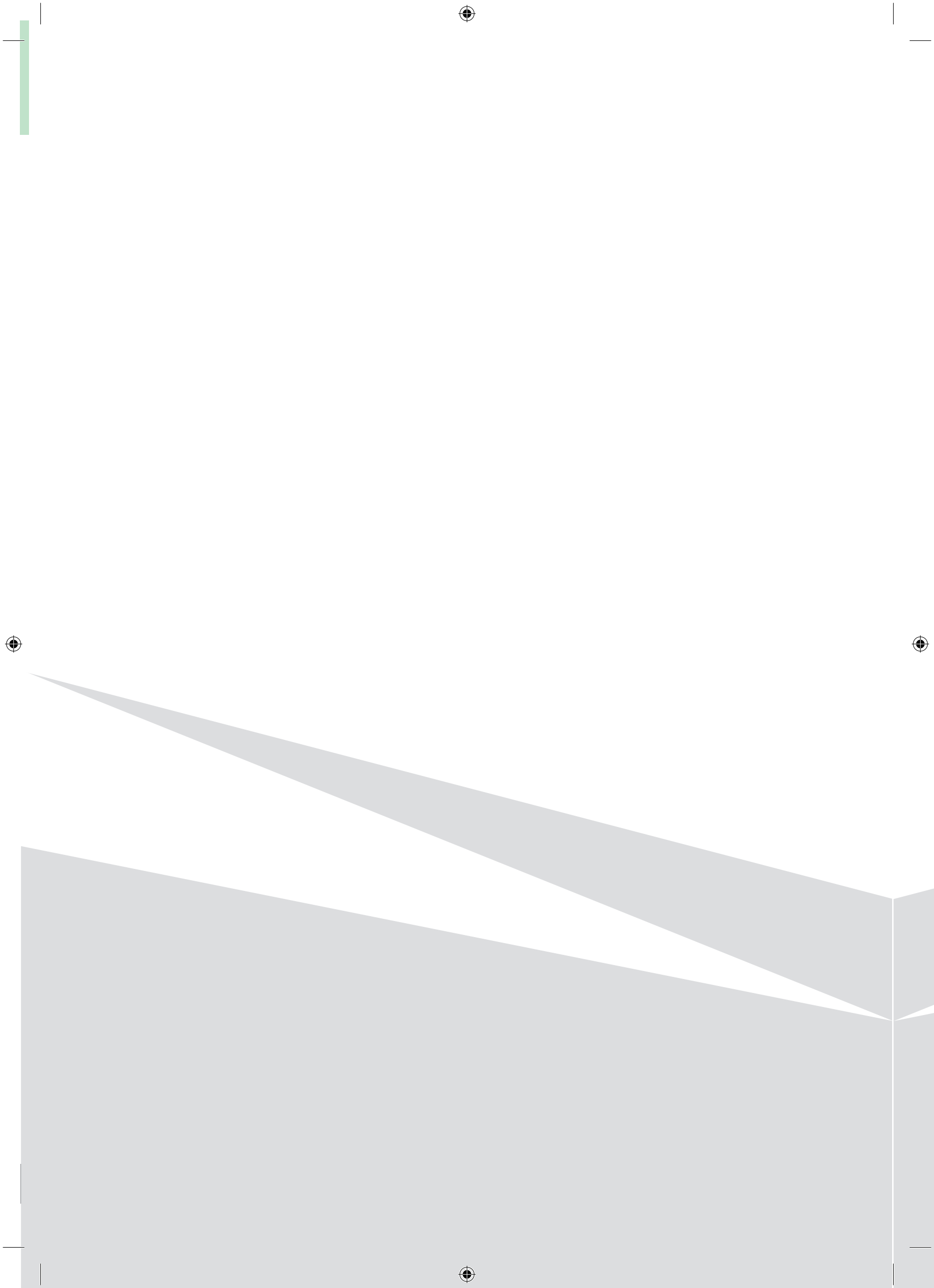


IGRTC
INTERGOVERNMENTAL
RELATIONS TECHNICAL
COMMITTEE

Consultation, Cooperation & Coordination in Devolution

COST OF LITIGATION IN INTER/INTRA- GOVERNMENTAL LITIGATION IN KENYA

MAY 2017



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LIST OF ABBREVIATIONS

AG	Attorney General
ADR	Alternative Dispute Resolution
COG	Council of Governors
CPD	Continuous Professional Development
CRA	Commission on Revenue Allocation
CS	Cabinet Secretary
DPP	Director of Public Prosecution
EACC	Ethics and Anti-Corruption Commission
E & L	Environment and Labour Courts
ELRC	Employment and Labour Relations Court
GJLOS	Governance, Justice and Law and Order Sector
HC	High Court
IBEC	Intergovernmental Budget and Economic Council
ICT	Information, Communication and Technology
IGR	Inter-Governmental Relations
IGRA	Inter-Governmental Relations Act
IGRTC	Inter-Governmental Relations Technical Committee
IDLO	International Development Law Organisation
JR	Judicial Review
JTI	Judicial Training Institute
KALRO	Kenya Agricultural and Livestock Research Organization
KDF	Kenya Defence Forces
KPLC	Kenya Power and Lighting Company
KRA	Kenya Revenue Authority
KTDA	Kenya Tea Development Agency
KURA	Kenya Urban Roads Authority
LSK	Law Society of Kenya
MODP	Ministry of Devolution and Planning
MTEF	Medium Term Expenditure Framework
NCCG	Nairobi City County Government
NEMA	National Environment Management Authority
NGCDF	National Government Constituency Development Fund
PO	Proclaimed Offender

EXECUTIVE SUMMARY

This report comprises four main parts.

Part one discusses the background, objectives and methodology of the study. The study was initiated by the Intergovernmental Government Relations Technical Committee (IGRTC) on the directive of the 5th Summit¹ meeting held on February 10 to 11, 2016 in which concern was raised on the increasing tendency of the two levels of government to refer all their disputes to court, despite the clear intentions of the Constitution of Kenya, 2010 that as far as possible intergovernmental disputes should be resolved through alternative dispute resolution (ADR) processes.

The primary objective of the study was to review the nature of inter and intra-governmental disputes, their causes, costs of litigation, mechanisms for dispute resolution and make proposals on the development of an effective ADR framework for inter and intra-governmental disputes resolution. It was conducted through participatory methodology involving: a comprehensive literature review, key informant interviews, a stakeholder consultative forum, focus group discussion and a validation workshop.

Part two discusses the findings of the study. The key findings include that: disputes are overpowered and mandates of the various state institutions, transfer of functions and legislation; most parties to intra-/inter-disputes resort to courts as a first option; they involve issues that should have been handled through ADR mechanisms in the first instance; some disputes have been successfully resolved through ADR by COG Intergovernmental Budget and Economic Council (IBEC) and IGRTC; systems and processes for ADR are underdeveloped; policy and regulations for intergovernmental ADR mechanisms have not been developed; the judiciary is committed to protecting devolution and constitutionalism and is also willing to promote the resolution of intergovernmental disputes through ADR. The cases are not very many but they involve major issues that substantially affect service delivery and governance.

The study also found that the costs of litigation are high and a major constraint to development, particularly in the county governments. The costs include both direct financial expenditure and opportunity costs due to delayed, frustrated or abandoned projects as a result of court cases. In one county, the budget of the county could not be approved due to litigation while in another, staff could not be recruited for six months due to a court order. Advocates fees for cases at the High Court ranged between Ksh.20-

¹ *The National and County Government Coordinating Summit is the apex body of intergovernmental relations bringing together the president and the all the Governors.*

30 million Kenyan shillings per case. There were many instances of advocates charging as much as Kshs. 75 million and with one case of Kshs. 200 million. A major challenge for the counties is the reliance on external counsel as they do not have established legal departments, unlike the national government which does most of its cases through the Office of the Attorney General/State Law Office.

Part three has the key recommendations arising from the study. These include: The policy and legislative framework for ADR should be strengthened to give effect to the constitutional provisions which require intergovernmental disputes to, as far as possible, be resolved through ADR mechanisms; Public awareness should be created in the counties to educate the public on the avenues and benefits of ADR; Public officers in both levels of government should be trained on how to use ADR in dispute resolution; Judicial officials should be sensitized on the importance of ADR as an alternative to litigation; Advocates should also be sensitized on ADR as part of their training and Continuing Professional Development; Intergovernmental relations institutions including the Summit, COG, IBEC, Senate, IGRTC, and CRA should be strengthened for effective conflict management and ADR; Regulations to operationalize the Intergovernmental Relations Act should be developed and gazetted urgently; The County Attorney's Bill should be enacted urgently to enable counties establish fully-fledged legal departments capable of handling most of the litigation internally to reduce on external advocates costs; Traditional dispute resolution mechanisms should also be recognized through legislation subject to Article 159 of the Constitution. The recognition would allow for the implementation of the awards or orders of elders.

Part four is the conclusion where it is noted that it is undesirable to continue using courts as the first forum for the resolution of intergovernmental disputes due to the universally acknowledged shortcomings including high costs of litigation, complex rules and procedures, delays in determination and the adversarial nature of the court system in this regard. There is, therefore, an urgent need to develop the necessary policy, legal and institutional framework for effective ADR. The Ministry of Devolution and Planning is in the process of developing the regulations to facilitate ADR.

CONTENTS

LIST OF ABBREVIATIONS	ii
EXECUTIVE SUMMARY	iii
1.1 Introduction and Background	1
1.2 Objectives and Methodology	2
1.2.1 Objectives	4
1.2.2 Methodology	4
1.3 Limitations	4
CHAPTER TWO: CONSTITUTIONAL, POLICY, LEGAL AND INSTITUTIONAL FRAMEWORK FOR INTERGOVERNMENTAL DISPUTE RESOLUTION	6
2.1 Constitutional provisions on Intergovernmental Dispute Resolution	6
2.2 Legal Provisions	7
i. The Intergovernmental Relations Act 2012	7
ii. Urban Areas and Cities Act of 2011	8
iii. Public Finance Management Act, 2012	8
iv. County Governments Act	9
2.3 Institutional Framework for the Resolution of Intergovernmental Disputes	10
CHAPTER THREE: COMPARATIVE EXPERIENCES IN INTERGOVERNMENTAL DISPUTE MANAGEMENT	11
CHAPTER FOUR: TYPES, NATURE AND VOLUME OF CASES	12
4.1 Types and Nature of Intra and Intergovernmental Cases	12
4.1.1 Types of cases	12
4.1.2 Nature of cases	12
4.2 Cases solved through Litigation	13
4.3 Resolution of cases through ADR	15
Council of Governors	15
Inter-Governmental Relations Technical Committee (IGRTC)	16
CHAPTER FIVE: ACTUAL COSTS OF LITIGATION IN KENYA	18
5.1 Budgetary Allocation on Legal services	18
5.2 Types of costs incurred in Litigation	21
5.2.1 Direct costs	22
5.2.2 Indirect costs	25
5.3 Costs incurred in ADR mechanisms	27

CHAPTER SIX:ALTERNATIVE DISPUTE RESOLUTION	27
6.1 Policy and Legal Framework	27
6.2 Legal Provisions	28
6.3 Key ADR Mechanisms	29
6.3.1 Negotiation	29
6.3.2 Mediation	29
6.3.3 Arbitration	30
6.3.4 Conciliation	31
6.3.5 Convening	31
6.3.6 Early neutral Evaluation	31
6.3.7 Adjudication	31
6.3.8 Facilitation	31
6.3.9 Fact-finding/Neutral fact-finding	32
6.3.10 Mediation-Arbitration (MED-Arb)	32
6.4 Challenges facing ADR in Kenya	32
CHAPTER 7: CONCLUSIONS AND RECOMMENDATIONS	34
7.1 Conclusion	34
7.2 Key Recommendations	34
ANNEXES	36
ANNEXE 1: Comparative Provisions of law in terms of intergovernmental relations/ Disputes Resolution	36
ANNEXE 2:Total number of Cases by County Governments	43
ANNEXE 3:Total number of Cases by parties	47
ANNEXE 4:Types, Nature,Volume and Costs of Intergovernmental Disputes	48
Inter-governmental disputes involving the National Assembly	51
Inter-governmental disputes involving the Attorney General's Office	52
Inter and Intra-Governmental disputes involving County Governments since 2013	61
ANNEXE 5: Chartered Institute of Arbitrators Fees Schedule	72
ANNEXE 6: List of the Interviewees and Sampled County Governments	74
Sample Questionnaire on the Cost of Litigation	75
ANNEXE 7: List of Participants of the Stakeholder Consultative Forum	76
ANNEXE 8: List of Participants of the Experts Focus Group Discussion	77

INTRODUCTION

1.1 Introduction and Background

The 5th meeting of the National and County Government Coordinating Summit (the Summit) last year was concerned about emerging and growing preference of settling intra- and inter-governmental disputes through costly court processes. To address the concern the Summit directed the IGRTC, in collaboration with the Ministry of Devolution and Planning (MODP), to undertake a study to determine the cost of litigation of inter-governmental and intra-governmental disputes.

Article 189 (3) of the Constitution of Kenya, 2010 states that in any dispute between the two levels of governments, they shall make every reasonable effort to settle the dispute employing procedures provided under national legislation. The Constitution further stipulates under Art 189 (4) that national legislation shall provide a procedure for settling intergovernmental disputes through ADR mechanism, including negotiation, mediation and arbitration. The Intergovernmental Relations Act (IGRA) 2012 elaborates on these constitutional provisions. Thus, the law emphasizes that seeking court intervention in inter-government disputes should be an option of last resort.

It is critical to appreciate what intergovernmental relations (IGR) are before discussing intergovernmental disputes and how they can be resolved. Inter-governmental relations may be defined as the interaction between different governments within a devolved system of governance. They are the processes, channels, structures and institutional arrangements for bilateral and multilateral interaction. The Intergovernmental Relation Act Kenya does not define intergovernmental relations but the Intergovernmental Relations Framework Act, 2005 of South Africa defines intergovernmental relations (IGR) as the “relationships that arise between different governments or between organs of state from different governments in the conduct of their affair”². Kangu in his seminal publication on the constitutional law of devolution defines intergovernmental relations as ‘the processes of interactions between different governments and between organs of state from different governments in the course of the discharge of their functions’³.

The interactions are both vertical and horizontal. Vertical IGR is the interactions between county governments and national government as stipulated by the Constitution and legislation while horizontal IGR is the interactions of different county governments in the implementation of the functions assigned to them by the Constitution of Kenya, 2010.

² Republic of South Africa, *Intergovernmental Relations Framework Act (No.13 of 2005)*

³ Kangu JM (2015), *Constitutional Law of Kenya on Devolution*, Strathmore University Press, p.318.

The Constitution of Kenya, 2010 establishes a cooperative devolved government rather than a competitive one⁴. The national and county governments are therefore expected to carry out their functions through cooperation and consultation. The Constitutional foundation of IGR is Articles 6 and 189 of the Constitution which provide that 'the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations based on consultation and mutual cooperation' (Art.6) and that 'government at either level shall perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of the government at the other level, and respects the constitutional status and institutions of government at the other level and in the case of the county government, within the county level' (Art.189). Unfortunately, over the last four years (of devolved governance) inter-government relations have been largely characterized by conflict, suspicion and unnecessary competition. This approach to intergovernmental relations has resulted in many disputes.

1.2 Objectives and methodology

1.2.1 Objectives

The primary object of the assignment was to review the nature of inter and intra-governmental disputes, their causes, costs of litigation, mechanisms for dispute resolution and make proposals on the development of an effective ADR framework for inter and intra-governmental disputes resolution. The specific objectives were to:

- a) Assess the nature, volume and indicative costs of court cases involving inter and intra-governmental disputes.
- b) Examine the existing disputes resolution mechanisms and their efficacy for inter and intra-governmental disputes.
- c) Examine the requirements for an effective ADR framework for inter-governmental and intra-governmental disputes.
- d) Make recommendations on the development of a national framework for alternative dispute resolution for inter and intragovernmental disputes.

1.2.2 Methodology

Based on the nature of the assignment, a participatory methodology was employed to undertake the assignment which included a comprehensive literature review, key

⁴ *Ibid*

informant interviews, a stakeholder consultative forum, focus group discussions and a validation workshop.

1.2.2.1 Literature Review

A literature review was undertaken to understand the context, gaps and challenges, including the policy, legislative and institutional frameworks, for handling intergovernmental relations and disputes. The literature on local, regional and international practices concerning intergovernmental dispute resolution was also reviewed. This was useful in the making of recommendations based on best practices in intergovernmental dispute resolution around the world.

1.2.2.2 Key Informant Interviews

Questionnaire guided interviews were conducted between 30th January 2017 and 24th March 2017. The interviews involved respondents drawn from sampled state and non-state institutions, based on prior understanding of their relation to intergovernmental relations and ADR. The interviews were conducted on pre-selected stakeholders to elicit their views on dispute resolution and on sampled county governments to collect data on the indicative costs of litigation. The interviews took the form of both face to face interviews and phone interviews. Mailed Questionnaires were sent to all the counties requesting for data on all the inter-government/intra-governmental cases the county or its agencies have been involved in since 2013.

The list of the interviewees and sampled county governments as well the questionnaire is attached as Annex 6.

1.2.2.3 Stakeholder Consultative Forum

A stakeholder consultative forum was held on 1st March 2017 to share the preliminary findings from the literature review and the key informant interviews and initiate an in-depth discussion on the costs associated with litigation, understanding the use of ADR in diverse settings, its impact on dispute resolution, the challenges encountered and recommendations towards the development of an effective ADR framework for both inter and intra-governmental disputes among others. The participants identified key recommendations and proposals that should be considered in the development of a national ADR framework.

The list of participants of the consultative forum is attached as Annex 7.

1.2.2.4 Focus Group Discussion

A focus group discussion was held on 30th March 2017 bringing together experts from the relevant state and non-state institutions to discuss among other issues: the type of costs associated with court disputes, the assessment of ADR in intergovernmental relations, the challenges and gaps to the adoption of ADR in intergovernmental relations and recommendations on the way forward on the operationalization of ADR in intergovernmental relations. The focus group discussion presented an opportunity for the experts to discuss emerging issues in intergovernmental dispute resolution.

The list of participants' present is attached as Annex 8.

1.3 Limitations

Limitations include:

- ♦ unavailability of interviewees with some postponing the scheduled dates resulting in delays and loss of time,
- ♦ cases/disputes involving the different levels of government were not easily available/accessible leading to little documentation of cases as required,
- ♦ lack of disaggregated data on the budgets allocated to legal services in counties,
- ♦ lack of support from the Council of County Governors (COG). Despite being a major stakeholder to the study, COG has not been interviewed, sent any data for the study nor participated in the stakeholder consultative forum and the focus group discussion,
- ♦ unavailability of county secretaries/attorneys for phone interviews,
- ♦ despite having received data from 17 county governments, there was a general lack of commitment and delay in sending data by the counties,
- ♦ lack of disaggregated data from the counties, into inter and intra intergovernmental cases. Data sent had numerous cases that were not intergovernmental, and
- ♦ lack of information on the costs of some of the cases as well non- specification of the costs received into either filing fees, advocate fees or party or party costs.

Although the study encountered the above-mentioned challenges, the literature reviewed and the data received present a fair picture of the indicative costs associated with

inter/intra-governmental dispute resolution. The challenges were mitigated by making strenuous follow-ups and cross-checking on available information. The persistent follow-ups made it possible, eventually, to interview most of the key informants. Triangulation was also used to yield reliable information.

Cost of litigation for the counties that were reluctant to present them was thus derived from various sources including county program based budgets and reports of the Controller of Budget. The challenges, however, meant that a comprehensive review of the costs incurred by the two levels of government was not possible. Nevertheless, the study provides sufficient insight into the issue of the costs of inter/intra-governmental disputes resolution.

2

CONSTITUTIONAL, POLICY, LEGAL AND INSTITUTIONAL FRAMEWORK FOR INTERGOVERNMENTAL DISPUTE RESOLUTION

2.1 Constitutional provisions on Intergovernmental Dispute Resolution

The Constitution of Kenya, 2010 anticipates inter-government disputes and provides for how they should be addressed. It further directs that legislation be developed to provide for the resolution of the disputes through ADR.

Article	Provisions
Article 189: Cooperation between national and county government	189 (1) <ul style="list-style-type: none"> a) Perform its functions, and exercise its powers, in a manner that respects the functions and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of the county government, within the county level; b) Assist, support and consult and, as appropriate, implement the legislation of the other level of government; and c) Liaise with government at the other level to exchange information, coordinate policies and administration and enhancing capacity.
	189 (2) Government at each level and different governments at the county level shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities’.
	189 (3) In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including employing procedures provided under national legislation
	189 (4) National legislation shall provide procedures for settling inter-governmental disputes by ADR including negotiation, mediation and arbitration
Article 190: Support for County governments	190 (1) Parliament shall by legislation ensure county governments have adequate support to enable them to perform their functions.
	190 (3) Parliament shall provide legislation for intervention by the national government if a county government is unable to perform its functions or does not operate a financial system that complies with national legislation
Article 191: Conflict of Laws	191 (5) In considering an apparent conflict between the legislation of different levels of government, a court shall prefer a reasonable interpretation of the legislation that avoids conflict to an alternative interpretation that results in conflict.
	191 (6) A decision by a court that a provision of legislation of one level of government prevails over a provision of legislation of another level of government does not invalidate the other provision, but the other provision is inoperative to the extent of the inconsistency.

2.2 Legal provisions

Intergovernmental relations are primarily governed by the provisions of: The Intergovernmental Relations Act, 2012, Urban Areas and Cities Act, 2011, County Governments Act, 2012 and Public Finance Management Act, 2012. Some of the relevant provisions in these Acts are:

i. The Intergovernmental Relations Act 2012

This Act provides the structures for interaction between the national and county governments and between different county governments. Among the objects of the Act is to 'provide mechanisms for the resolution of intergovernmental disputes' and among the principles of the act is 'the need to minimize intergovernmental disputes while cooperating'. The Act sets out the objects of inter-government structures as to; facilitate the realisation of the constitutional objects of devolution in Article 174 and 175 of the Constitution; facilitating co-operation and consultation between the two levels of government and among county governments; providing a forum for coordination of government policies, legislation and functions and providing a forum for sharing and promoting accountability between the two levels of government or among county government. The Act establishes institutions to facilitate inter-governmental consultations to ensure harmony between the two levels of government and between different county governments. These institutions include the Summit, the COG and the IGRTC.

The Act also provides that parties shall take all reasonable measures to resolve disputes amicably and apply and exhaust ADR mechanisms provided in the Act or other legislation before resorting to judicial proceedings under Article 189(3) and (4). It provides for the transfer and delegation of powers, functions and competencies from either level of government to the other by agreement as provided by Article 186/7(s.24-28). It also provides that all agreements between the national and county governments and among county government shall have a dispute resolution mechanism, appropriate for the nature of the agreement, for disputes that may arise in implementation (s.32). Dispute resolution mechanisms are provided in sections 30-36. These provisions apply to disputes between the national and county governments and disputes among county governments. Disputes should as far as possible be resolved through ADR⁵. After efforts to negotiate either directly or through an intermediary have failed, then a party may declare a dispute by referring the matter to the Summit, Council or any other intergovernmental structure

5 Mugambi Laibuta, *Judicial Adjudication of Intergovernmental Disputes in Kenya: Defining Judicial Boundaries and Appropriate Remedies in Conrad Bosire and Wanjiru Gikonyo (Eds), Animating the Role of the Judiciary:*

established under the Act. Once the dispute is declared the organ responsible is required to convene a meeting of the parties or their representatives within 21 days to determine the nature of the dispute and the material issues which are not in dispute and identify the mechanisms and procedures for settling the dispute. Such a mechanism may be provided in the act, another legislation or an agreement. Where efforts to resolve the disputes under the act fail the matter may be taken to court. The minister is empowered to make regulations for dispute resolution under the Act. So far the regulations have not been made.

ii. Urban Areas and Cities Act of 2011

The Act provides for the governance of urban areas and cities. It seeks to operationalize the provisions of Art. 184 and has the following relevant sections:

- i. In Section 33. (1) A board may, in consultation with the county governor and with the approval of the county assembly, enter into a partnership with a utility company either within or outside the county or internationally for the provision of social infrastructural services. Section (2) provides that for efficient service delivery, cities and municipalities may jointly provide cross-city and cross-municipality services and in that regard, jointly finance the services.
- ii. Under section 37 (1) a city's or urban area's integrated development plan is required to be aligned to the development plans and strategies of the county government.

iii. Public Finance Management Act, 2012

This Act provides for the management of public finances in both levels of government according to Chapter twelve of the Constitution. Section 187 of the Act establishes the Intergovernmental Budget and Economic Council (IBEC) for consultation on policy and financial management issues across the two levels of government.

The Council comprises of:

- i. Deputy President who is the Chairperson
- ii. Cabinet Secretary responsible for finance
- iii. A representative of the Parliamentary Service Commission;
- iv. A representative of the Judicial Service Commission;
- v. Chairperson of the Commission on Revenue Allocation or a person designated by the Chairperson;

Commentaries on Kenya's emerging Devolution Jurisprudence under the New Constitution, IDLO, JTI & Katiba Institute, 2015.

- vi. Chairperson of the Council of County Governors;
- vii. Every County Executive Committee member for finance; and
- viii. The Cabinet Secretary responsible for intergovernmental relations.

The purpose of the Council is to provide a forum for consultation and cooperation between the national government and county governments on:

- ♦ the contents of the Budget Policy Statement, the Budget Review and Outlook Paper and the Medium-Term Debt Management Strategy,
- ♦ matters relating to budgeting, the economy and financial management and integrated development at the national and county level,
- ♦ matters relating to borrowing and the framework for national government loan guarantees, criteria for guarantees and eligibility for guarantees,
- ♦ agree on the schedule for the disbursement of available cash from the Consolidated Fund based on cash flow projections,
- ♦ any proposed legislation or policy which has a financial implication for the counties, or any specific county or counties,
- ♦ any proposed regulations to this Act,
- ♦ recommendations on the equitable distribution of revenue between the national and county governments and amongst the county governments as provided in section 190, and
- ♦ Any other matter which the Deputy President in consultation with other Council members may decide.

IBEC has facilitated the resolution of many disputes over the allocation of funds to county governments.

iv. County Governments Act

To ensure effective field implementation of the functions assigned under Schedule Four, the County Governments Act 2012, in Section 54 (1), has established the County Intergovernmental Forum chaired by the governor. The Forum brings together heads of all national government departments rendering services in the county and county executive committee members. County Governments Act 2012 in Section 54 (5) empowers the governor to chair other intergovernmental committees that are established at the county level, under Articles 6 (2), 189 (2) and 239 (5). It also empowers the governor to receive reports from intergovernmental (vertical) committees established under legislation. This forum is expected to ease communication and coordination between the two levels of government, facilitate cooperation, harmonise the delivery of services and prevent and resolve disputes.

2.3 Institutional framework for the resolution of intergovernmental disputes

The Constitution provides for the establishment of a framework for resolution of intergovernmental disputes through the enactment of legislation. According to the constitutional directive, the Inter-Governmental Relations Act 2012 has been enacted. It establishes institutions for IGR both for vertical and horizontal relations. They include:

- i. **The National and County Government Coordination Summit** (the Summit) which is the apex body of intergovernmental relations bringing together the president and all the governors (s.7). The Summit is empowered to evaluate the performance of both levels of government, coordinate and harmonise the development of national and county policies, facilitate and coordinate the transfer of functions, powers and competencies to either level of government and to resolve disputes (s.8) and (s.34). The Summit has addressed some disputes between the two levels of government through ad hoc committees but has not developed a formal structure or process for resolution of disputes on an ongoing basis.
- ii. **The Council of County Governors** bringing together all governors for consultations among county governments, dispute resolution, capacity building and other critical functions (s.19). The COG has an Intergovernmental Relations Committee to resolve disputes between counties.
- iii. **Intergovernmental Relations Technical Committee (IGRTC)** established by IGRA, 2012 (s.11) is responsible for the day to day administration of the Summit and the COG (s.12). The committee is responsible for the day to day administration of the Summit and has assumed the residual functions of the defunct Transition Authority
- iv. **The Intergovernmental Budget and Economic Council (IBEC)** (s.187 Public Finance Act) which brings together the national and county government leaders to discuss matters of budgeting, borrowing, disbursements from consolidated fund and equitable distribution of revenue between the two levels of government.
- v. **Intergovernmental Consultative Sectoral Forums** (s.13) have been established to facilitate national government ministries to interact with their counterparts in the counties. The Act also provides for the creation of joint committees (s.23) by the national or county governments to facilitate the achievement of the objects and principles of devolution.

COMPARATIVE EXPERIENCES IN INTERGOVERNMENTAL DISPUTE MANAGEMENT

Kenya has a lot to learn from the experiences of other democracies, federal/ devolved systems which have had a long experience with the management of intergovernmental conflicts/disputes. Switzerland, for example, has had a long history of successful decentralized governance. In the continent, South Africa which shares many similarities with Kenya offers some invaluable lessons in the management of intergovernmental disputes. In a publication comparing the experiences of Kenya and South Africa, in terms of intergovernmental relations, Ghai notes that:

Both prescribe the general principle that each level of government must exercise its function to respect the functions and institutions of government at other levels and that there must be a consultation on policies and laws that might impact on other governments. Disputes must be resolved through discussions and mediation and for that purpose, special institutions must be established. In South Africa, the emphasis on negotiations is so strong, including the avoidance of adverse judicial process, that the constitution prohibits recourse to courts before exhausting all other remedies (s.41(3)). This is perhaps a lesson for Kenya, where the skills for negotiation are singularly lacking and there is a tendency to rush to court as a first resort⁶.

Comparative provisions of the law in terms of intergovernmental relations/ disputes resolution of Switzerland, India, Ethiopia, Ghana and South Africa were reviewed. In all these countries there are clear provisions for the resolution of disputes through alternative disputes resolution mechanisms established by law. The mechanisms primarily emphasize political and administrative processes and discourage resort to the judicial process. In Ethiopia for instance, the disputes between the states are resolved through the House of Federation an institution similar to Kenya's Senate. The executive in South Africa, Ghana and India is empowered to take initiatives to resolve disputes.

The comparative provisions of the law in terms of intergovernmental relations/ disputes resolution regarding these countries is attached as Annex I.

⁶ Ghai YP, *South African and Kenyan Systems of Devolution: A Comparison in Kenyan-South African Dialogue on Devolution, JUTA and Company (PTY) Ltd, 2015*, p.25/26

4

TYPES, NATURE AND VOLUME OF CASES

From the findings, disputes referred to the courts by both levels of government and their agencies since the launch of the devolved system of government in 2013 related to:

1. National government and county government(s)
2. County government(s) and national government agencies
3. County government and county government
4. A county organ and another organ within the same county
5. The National Assembly and the Senate
6. Between State agencies.

4.1 Types and nature of intra and intergovernmental cases

4.1.1 Types of cases

A preliminary review of inter-governmental cases filed in court indicates that most of them involve constitutional interpretation, civil cases and judicial review of administrative decisions. Many involve disputes are over the powers and mandate of the various state institutions, legislation, transfer of functions, employment relations and political disputes. The disputes involve major issues that substantially affect service delivery, economic development and governance. They also involve issues that should have been handled through ADR in the first instance.

4.1.2 Nature of cases

The nature of cases was categorized as administrative, functional, financial or employment/labour dispute⁷. Below is a representation of the cases as per the categories stated:

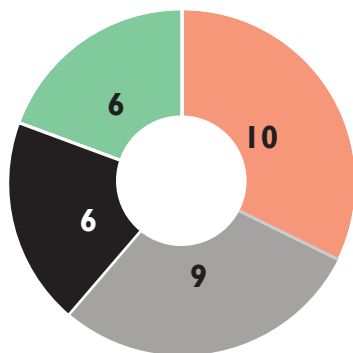
⁷ Nature of dispute:

Administrative- relating to the management or operationalization of activities

Functional- relating to devolved functions of County Governments

Financial- relating to allocation and/or misappropriation of funds and debt settlements

Labour- relating to employment matters including wrongful dismissal, payment of salaries, disputes over qualifications



County Governments-Nature of Cases (Number of cases)

- 10 - Administrative
- 9 - Functional
- 6 - Financial
- 6 - Labour

4.2 Cases resolved through Litigation

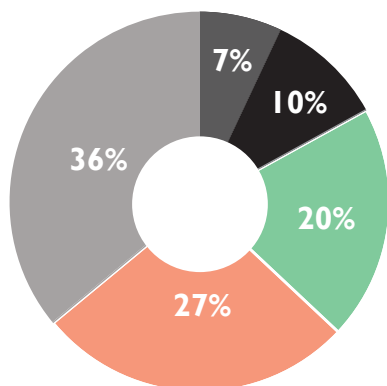
Unfortunately, data on all the cases filed involving intergovernmental disputes is not easy to access due to the absence of disaggregated data. Data was sought from all counties through a mailed detailed questionnaire where 17 counties responded. It was also sought from the COG who declined to participate in the study. Office of the AG was the primary source of data on national government litigation as it represents the national government and its agencies in court cases. At the national level, data was sought from the Judiciary, Senate, and National Assembly. The Judiciary does not maintain disaggregated data and was only able to give data on a limited number.

From the county governments, a total of 17 counties responded including Baringo, Mombasa, Kericho, Kiambu, Kilifi, Kisumu, Kwale, Machakos, Marsabit, Nairobi, Nyandarua, Nyeri, Tana River, Tharaka Nithi, Uasin Gishu, Vihiga and West Pokot. Other counties gave various reasons for not providing data. A total of 337 cases were received from the county governments with only 31 being inter and intragovernmental cases.

Kericho and Tana River Counties reported not filing or being involved in intergovernmental cases since 2013. Nyandarua County declined to provide any information regarding the study.

A list of the number of cases from each county government is attached as annexe 2.

The parties to the cases are as represented below:



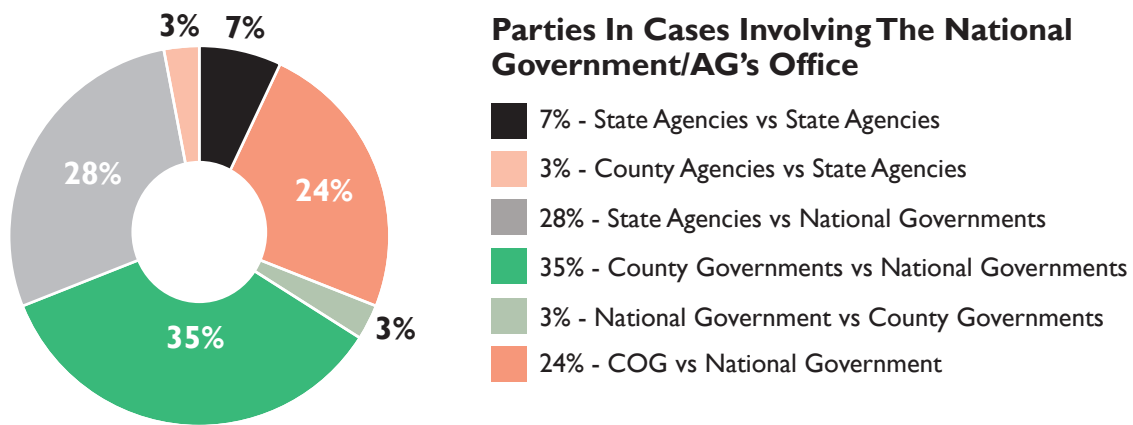
Parties In Cases Involving County Governments

- 27% - State Agencies vs. County Government
- 36% - County Government vs. State Agencies
- 20% - County Organ vs. County organ
- 10% - County Government vs. Senate/National Assembly
- 36% - County Government vs National Government

From the above, 63 per cent of the cases involve county governments and State Agencies with 20 per cent being intragovernmental.

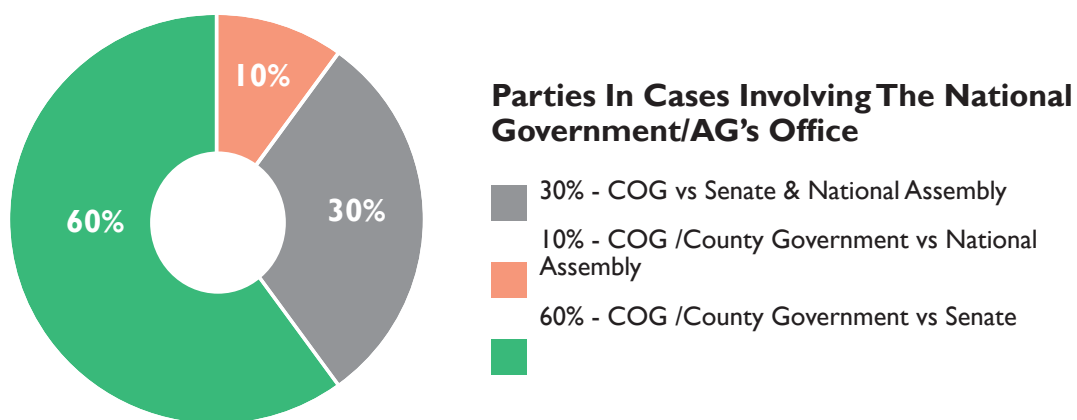
Only one case between a county government and another county government was provided. This was between the County Government of Turkana vs. The Attorney General and the County Governments of West Pokot and Baringo over the demarcation of boundaries and the preservation of territorial integrity of Turkana County.

The Office of the Attorney General has provided a total of 29 cases. The following is a representation of the cases, by parties.



Cases involving the national government and county governments and/or COG are more (62 per cent) compared to cases by State Agencies against the national government at 28 per cent.

The National Assembly and Senate gave a total of 14 intergovernmental cases with 10 of these cases filed by the COG. The intergovernmental disputes involving the National Assembly and the Senate are represented below:



The majority of the cases are filed by the COG against the Senate with 10 per cent of the cases being between the COG and the National Assembly.

There were four impeachment cases involving the County Governments of Embu, Kericho, Murang'a, Makueni and Nyeri also reported by the Senate. Cases against the Governors of Embu and Makueni County Governments are pending at the Supreme Court and High Court respectively⁸. The impeachment case against the Governor of County Government of Murang'a was dismissed at the High Court, appealed and withdrawn at the Court of Appeal⁹. County Governors of Kericho and Nyeri were cleared by the Senate Committee of the allegations made against them¹⁰. Motion on the debate of impeachment of the Governor County Government of Nairobi is yet to be heard.¹¹

Although COG did not respond to requests for data, records from other institutions show that COG has filed a total of 17 cases against the national government and various agencies. This is as per the cases received from the Office of the Attorney General, the Senate and National Assembly. However, according to the COG Statutory Annual Report 2014-2015¹², COG has sued in many instances but has also been drawn into disputes by being enjoined as an "interested party". The Council was directly or indirectly involved in a total of thirty (30) judicial and quasi-judicial matters (including a commission of inquiry for the dissolution of Makueni County), commenced nine (9) of the thirty (30) suits and had been sued (as a respondent) in eight (8) matters. The COG had also been sued or enjoined as an interested party in eleven (11) other court matters. Additional data on the cases the COG has been involved for the consequent years is not available since the statutory reports are not available.

4.3 Resolution of cases through ADR

Council of County Governors

According to the Statutory Annual report¹³, the COG has procedures and systems for handling and processing conflicts between counties. Conflicts between county governments are supposed to be referred to the COG Committee in charge of Intergovernmental Relations. The Committee is mandated to hear the parties and make

⁸ Data received from the Senate and National Assembly

⁹ Data received from the Senate and National Assembly

¹⁰ http://www.the-star.co.ke/news/2016/09/14/senators-reject-impeachment-bid-against-nyeri-governor-gachagua_c1420672
www.standardmedia.co.ke/article/2000123586/senate-team-saves-chepkwony-from-impeachment

¹¹ <http://nairobi.news.nation.co.ke/news/kidero-impeachment-motion-revived-fight-office-space-mcas-escalates/>

¹² The COG, Statutory Annual Report, 2014-2015

¹³ The COG, Statutory Annual Report, 2014-2015

a preliminary assessment of the matter before a referral to the full Council. In 2014/15, two matters were referred to the Council (County boundary disputes and where there is experienced misplaced allocation of funds to two counties). The Council can use any form of dispute resolution including conciliation, negotiation and mediation.

Inter-Governmental Relations Technical Committee

- i. The dispute over office block between West Pokot County Government and County Commissioner.

The offices occupied by the county government belonged to the national government but were allocated to them by the Transition Authority in January 2013 to facilitate effective settling of the county government following the general elections of March 4, 2013. The offices were under construction and were nearing completion in readiness to accommodate the county commissioner whose offices were old, dilapidated and condemned as unfit for human habitation. The county commissioner and the governor were unable to agree on an amicable solution so the commissioner declared a dispute.

Following consultative negotiations spearheaded by IGRTC, an agreement was reached between the governor and county commissioner to the effect that the county government would put up a replica of the office block for the county commissioner's use. The county government would immediately allocate funds to put up the offices in the current year but not later than 2017/2018 Financial Year. An agreement in the form of a Memorandum of Understanding was entered into between the county government and the Office of the county commissioner with the Chairperson of IGRTC witnessing the agreement.

- ii. The dispute over land ownership between the County Government of Tharaka Nithi and the Prisons Department.

The County Government of Tharaka Nithi declared a dispute with the Prisons Department. Initially, the matter was in court but was later withdrawn and referred to IGRTC where the following was achieved:

- i. Consultative meetings were held with the two parties to have the matter resolved amicably.
- ii. Both parties ceased confrontation and hostility.
- iii. Both parties agreed to dialogue.
- iv. The ongoing developments to the disputed plot of land were halted.

- v. Both parties gave proposals to resolve the problem and the proposals will be tabled at a roundtable to be convened by IGRTC for consideration, agreement and adoption.
- iii. The dispute over Meat Inspection for Export between Nairobi City County and the Ministry of Agriculture, Livestock and Fisheries

The dispute was between Nairobi City County and the Ministry of Agriculture, Livestock and Fisheries regarding the entity mandated to conduct meat inspection in slaughterhouses that export meat products and was reported to IGRTC by the City-County. The City-County contended that county abattoirs/slaughterhouses services are a devolved function and hence a mandate of the county while the Veterinary Department's position was that export house should fall under the national government. After intensive consultation, IGRTC advised that both the national and county governments deploy officers to fulfil their constitutional mandates until a policy and regulations are developed and approved. The Parties agreed and they are complying.

These cases indicate that it is possible to resolve intergovernmental disputes quickly and in a less costly way through ADR. They also demonstrate that IGRTC can effectively facilitate the resolution of disputes. It is, however, necessary to provide clear responsibility and resources for the disputes resolution role of IGRTC to be institutionalized as part of its support to the Summit. This can be done in regulations which would also provide for the ADR procedures.

A list of all the cases collected is attached as Annex 4.

5

ACTUAL COSTS OF LITIGATION IN KENYA

A comprehensive assessment of costs of litigation requires an examination of the budgetary allocation to legal fees and the actual audit of expenditure incurred by both national and county governments. It would also require a financial and socio-economic assessment of indirect costs such as disruption or loss of services, development failure when projects cannot be implemented, damaged relationships between state agencies and loss of investor confidence due to frequent and lengthy litigation. The cost of undertaking litigation is therefore not only in monetary terms but also in terms of opportunity costs. A comprehensive assessment of the actual costs of litigation is however outside the scope of this study. The study seeks to provide indicative costs to inform policy/legislation on intergovernmental dispute resolution. In the circumstances, only illustrative examples of budgetary provisions and actual expenditure are provided below.

5.1 Budgetary Allocation on Legal services

With regards to budgetary allocation for legal fees, many counties have not published their program based budgets as required by the law with the few available covering one specific financial year without projected estimates for the next three financial years as required. Program based budgets give specific details on the recurrent and development expenditure for each department/program to be undertaken by the county.

Concerning legal fees, the national government, under the Office of the Attorney General and Department of Justice, allocated Kshs. 1,567,059,470, Kshs. 1,629,508,767 and Kshs. 1,768,098,285 for legal services for the financial years 2015/2016, 2016/2017 and 2017/2018¹⁴ respectively. The allocation for legal services for the financial year 2017/2018 in the recently presented budget is Kshs. 2,115,020,498¹⁵.

According to the Governance, Law, Order and Justice Sector (GJLOS) Reports¹⁶, the table below show how much was spent by the State Law Office and Department of Justice in the programme Civil Litigation and Promotion of Legal Ethical Standards compared to the approved budget: *(table to follow)*

¹⁴ Programme based budget, National Government of Kenya, for the year ending 30th June 2016

¹⁵ Programme based budget, National Government of Kenya, for the year ending 30th June 2018

¹⁶ Governance, Justice, Law and Order Sector (GJLOS) Report for Medium Term Expenditure Framework (MTEF) Periods 2016/17- 2018/19 and 2017/18-2019/20

Table 2: Total Expenditure, Civil Litigation and Promotion of Legal Ethical Standards

Financial Year	Approved Budget Kshs. (Million)	Actual Expenditure Kshs. (Million)
2012/2013	982.80	922.60
2013/2014	282.00	266.38
2014/2015	312.00	256.00
2015/2016	594.93	352.20

While the figures do not represent litigation involving intergovernmental disputes, it can be inferred that huge amounts of public expenditures are directed to civil litigation.

Legal services functions in several counties are subsumed in departments with other functions making it difficult to establish the exact amounts that are budgeted for legal services and payments. Legal services were included in departments such as Public Service, Information, Communication and Technology (ICT) and Office of the Governor.¹⁷ The legal services include transaction costs not just litigation. This is especially so in the city counties where there are more transactions. It is important to note is that the legal establishments are fairly small in terms of the number of advocates employed.

Table 3: County Program Based Budget on Legal Services

COUNTY	PROGRAMME ¹⁸	TOTAL EXPENDITURE (Kshs.)				
		Estimates 2014/15	Estimates 2015/16	Projected Estimates		
				2016/17	2017/18	2018/19
Baringo	Legal Services		2,200,000	1,000,000	10,500,000	
Bomet	County Executive			9,000,000	6,380,000	6,930,000
Elgeyo Marakwet	County Attorney Services		1,281,284	1,486,289	1,724,096	
Kiambu	General Administration and Support Services		5,000,000	5,338,500	5,669,916	
Kisumu	County Attorney			20,000,000	21,200,000	22,472,000
Laikipia	County Executive Committee Support Services		10,000,000	10,000,000	10,000,000	
Lamu	General administration and support services		2,100,000			

¹⁷ County Governments Program Based Budgets

¹⁸ Budgets for legal services are under different programmes in the program based budgets for County Governments.

Marsabit	County Legal Services			15,000,000	15,750,000	16,537,500
Nairobi	Legal Services	139,764,831	356,307,885	448,938,672	454,832,538	
Nyamira	General Administration Support services		6,374,350	7,001,785	7,712,964	
Nyandarua	County Legal Services		11,000,000	16,000,000	16,960,000	17,977,600
Tharaka Nithi	Road, transport, public works and legal affairs	6,803,633	7,143,815	7,501,006		
Turkana	Government Communication and media relations		40,000,000			

County governments implementation review reports¹⁹ indicate that one of the challenges facing most counties is the high cost incurred of legal services. Reports from the Controller of Budget indicate the expenditure on legal services for the counties is substantial.

Table 4: County Total Expenditure on Legal Services

County Government	Total expenditure		
	FY 2013/14	FY 2014/15	FY 2015/16
Bomet	6.8		
Busia	3.2		
Embu	8.9	33.78	
Garissa	42.6		
Isiolo	74.0	70.22	
Kajiado	25.5		
Kakamega	17.8		
Kiambu	43.9		
Kisii	9.5		
Kisumu		25.53	
Kitui	10.5		
Kwale	6.0	13.49	25.38
Laikipia	11.3		15.12
Lamu	1.2		

19-Office of the Controller of Budget County Governments Budget Implementation Review Reports FY 2014-2016

County Government	Total expenditure		
	FY 2013/14	FY 2014/15	FY 2015/16
Machakos	14.1	126.57	
Makueni	11.7	29.07	164.91
Mandera		120.65	55.58
Meru	5.2		
Migori	HY- 0.2 ²⁰ Q3- 19.0 ²¹		
Mombasa	170.9		
Murang'a		9.01	
Nairobi		577	
Nakuru	32.3		85.31
Nandi	7.0	5.16	
Narok	HY- 90.1	256.33	245.3
Nyandarua	7.3	39.37	
Samburu		7.70	13.05
Siaya	1.0		
Taita Taveta	0.1		
Tana River		5.30	
Tharaka Nithi			
Trans Nzoia	5.0		
Turkana	0.6		
Uasin Gishu	22.6		
Vihiga	14.0		
Wajir	4.6		

5.2 Types of costs incurred in Litigation

According to the Council of Governor's Audited reports, the Council spent a total of Kshs. 49,134,138 and Kshs. 87,153,900 on legal fees for the financial years 2013/14 and 2014/15 respectively²².

²⁰ HY- HalfYear results

²¹ Q3- Quarter three results

²² Report of the Auditor General on the Financial Statements of COG Secretariat for the year ended 30 June 2014 and year ended 30 June 2015

5.2.1 Direct costs

These include the monetary costs incurred, that is, filing fees, advocate fees, party and party costs, court awards, etc.

5.2.1.1 Filing fees

High Court filing fees are in the range of Kshs. 70,000-120,000 per case.²³

5.2.1.2 Court awards

For cases involving the Office of the Attorney General, the costs awarded to successful parties range between Kshs. 500,000-1,000,000 per case²⁴. The Attorney General, unfortunately, is rarely awarded costs.

5.2.1.3 Advocate fees

In two cases involving the Senate, case numbers 413 of 2014 and 381 of 2014, advocate fees paid by the Senate was Kshs. 3,320,000 at the High Court, Kshs. 2,160,000 at the Court of Appeal and Kshs. 2,160,000 at the Supreme Court.

Concerning advocate fees paid by county governments, the costs range from as low as Kshs. 60,000 to amounts as high as Kshs. 200 million. County governments do not have adequate internal advocates to defend them in the different disputes and thus incur huge advocate fees.

The over-reliance on external advocates also exposes the counties to the risk of collusion between county officers and advocates in fixing exorbitant fees. Many participants during the experts' forum were of the view that legal fees in most instances could not be considered worth the efforts expended in the conduct of the actual cases. It is important to note that advocates costs in Kenya are regulated by the provisions of the Remuneration Order, made under the Advocates Act.²⁵

The Remuneration Order provides guidelines on how lawyers should charge for their services. The Remuneration Order only sets the minimum amount that an advocate is allowed to charge. The Order prohibits an advocate from agreeing to remuneration that is below the scale provided in the Order.²⁶ Therefore, an advocate is allowed to charge any amount above the minimum provided it is not too exorbitant and subject to the

²³ Interview with the Registrar, Environment and Land Court Nairobi

²⁴ Interview with Legal Counsel, Office of the Attorney General

²⁵ Section 44

²⁶ Rule 3

agreement of the client.²⁷ The amount charged depends on the complexity of the case in question and varies from advocate to advocate.

The order in this regard provides that where any business requires and receives exceptional dispatch, or, at the request of the client, is attended to outside normal business hours the advocate shall be entitled to receive and shall be allowed such additional remuneration as is appropriate in the circumstances.²⁸ The circumstances that may warrant an additional fee are provided for in the order.²⁹ Thus, in assessing such special fee regard may be had to the following:

- ♦ the place at or the circumstances in which the business or part thereof is transacted,
- ♦ the nature and extent of the pecuniary or other interest involved,
- ♦ the labour and responsibility entailed, and
- ♦ the number, complexity and importance of the documents prepared or examined.

Lawyers, therefore, charge their fees in most cases based on the contract they enter into with their clients, so the amount varies as per the contract. The following are instances of the advocate fees charged in intergovernmental disputes:

- ♦ In a case (Judicial Review Application No. 109 of 2014) involving the national government and the County Government of Nairobi over land rates, subject matter valued at Kshs. 29 billion, the lawyer representing the county government demanded Kshs. 2 billion as instruction fees. However, the Court awarded Nairobi County Kshs. 724 million of which the lawyer taxed his bill at Kshs. 75 million.³⁰ In a case (No. 178 of 2016) involving the National Assembly and COG over the NGCDF Act, the average legal fees amounted to Kshs. 20-30 million.³¹
- ♦ In a dispute (E&L case No. 63 of 2015) involving the National Land Commission over grabbing of public land in Eldoret, the judgment was given as Kshs. 8 billion with the advocate fees amounting to Kshs. 200 million.³²
- ♦ In a dispute (Nyeri ELRC No. 6 of 2015) involving the County Secretary, County

²⁷ Section 45

²⁸ Rule 4

²⁹ Rule 5(2)

³⁰ Interview with Katiba Institute and an individual lawyer

³¹ Interview with Katiba Institute, an individual lawyer and expert in the Focus Group Discussion

³² Interview with an individual lawyer

Government of Tharaka Nithi and the county government, the advocate fee amounted to Kshs. 6,960,000.

- ♦ In a case (Nairobi ELRC No. 1571 of 2015) involving the County Government of Machakos and the Kenya Medical Practitioners, Pharmacists and Dentist Union, the advocate fees amounted to Kshs. 13,650,000.
- ♦ These advocate fees show the huge expenditures county governments have on legal services. It is also important to note that county governments are struggling with huge debts owed to external legal counsel inherited from the previous local authorities. Nairobi County, for instance, inherited close to 3,000 cases with 90 per cent of them handled by outsourced law firms incurring a debt of Kshs. 5 billion.³³

The need to reduce the outsourcing of counsel cannot be over-emphasized. To address the outsourcing of counsel to represent the county governments Senator Amos Wako presented to the Senate the County Attorney Bill 2014, which seeks to establish the office of the county attorney in all the 47 county governments. The Bill seeks to put in place a structured manner through which governors can deal with legal issues. The office shall consist of the county attorney, deputy county attorney and such other number of county legal counsel as the county attorney may, in consultation with the county public service, consider necessary.³⁴

Through the appointment of the county attorney and county legal counsel, county governments will reduce the cost of procuring external counsel who represents the county in legal matters. The Senate is yet to debate and approve the Bill due to delays in processing legislation. There is a need to fast track the enactment of this Bill since it will improve the representation of the counties in legal matters, service delivery and save taxpayers money spent on external lawyers. Counties are incurring relatively huge budgets on legal services compared to the budget allocation to these services. External counsel has in some cases demanded legal fees higher than the county's entire budget.³⁵

Given the very high advocates fees charged in intergovernmental cases, many stakeholders and experts who participated in the study were of the view that remuneration for public sector litigation should be provided for in law in a different manner from that of private litigation to put safeguards to avoid loss of public funds through collusion between

³³ <http://nairobi.news.nation.co.ke/news/sh5-b-debt-crippling-nairobi-countys-operations/>

³⁴ *Proposed Office of the County Attorney Bill, 2014*

³⁵ *Expert view in the Focus Group Discussion*

government officers and advocates. This may be in the form of a special remuneration order or under the Public Procurement and Disposal Act.

5.2.2 Indirect costs

These costs include delayed implementation of projects, opportunity costs when projects are delayed, stalled projects, strained relationships between parties, negative public image, and low investor confidence among others. The high costs of litigation to socio-economic development cannot be gainsaid. The wastage of scarce county resource in unnecessary litigation cannot be justified. Savings on litigation can be ploughed back into economic projects thus improving the development of infrastructure and the livelihoods of the people. The judiciary is also burdened with unnecessary cases.

The time and costs that the Judiciary spends on litigation cases that should not be there is another indirect cost.³⁶

The following are examples of the kind of indirect costs incurred in intergovernmental disputes. In Nyeri County, a dispute between the Public Service Board and the county assembly delayed approval of the county budget for 6 months thus affecting service delivery and the recruitment of legal officers in the county.

- ♦ The County Government of Nairobi in a dispute with Kenya Power over debt incurred for power consumption the previous local authority resulted to Kenya power shutting down power for the county government offices and in return Nairobi County clamping down entrances of Kenya Power premises. This power struggle strained service delivery for both parties.³⁷
- ♦ In another dispute involving the County Government of Nairobi and the national government over outstanding bills (Kshs. 69 billion in parking and license fees, Kshs. 11 billion in land rates and Kshs. 40 million for land allocation to Department of Defence), the county government claimed essential service delivery to Nairobi residents would be affected if these payments were not made.
- ♦ The impeachments that have been witnessed in several counties namely, Embu, Nyeri, Murang'a and Makueni have delayed services within the county governments.

³⁶ During the Experts forum Justice Visram of the Court of Appeal, who chairs the Judiciary mediation Committee, decried the many unnecessary cases that are causing a backlog in the Judiciary.

³⁷ Interview with County Attorney, Nairobi and http://www.the-star.co.ke/news/2016/10/14/cut-off-power-from-city-hall-and-well-clamp-your-buildings_c1437447

5.3 Costs incurred in ADR mechanisms

In Kenya, ADR mechanisms have no formal or standard rate of payments making it difficult to analyze the costs associated with solving intergovernmental disputes through ADR. Moreover, intergovernmental disputes that are resolved through the ADR mechanism are referred to these mechanisms only after court litigation has been pursued as the first option.

Currently, it is not possible to tell the exact number of arbitrations carried out annually since arbitral appointments are undertaken by different appointing authorities including the Law Society of Kenya, Institution of Engineers Kenya, and Architectural Association of Kenya among others under arbitration clauses in different contracts.

The Chartered Institute of Arbitrators as one of the three established branches in Africa, the other two being Nigeria and Mauritius, has in place a recommended scale of fees to guide the arbitrators. The scale is based on the level of a member's experience and the membership level. However, the cost of arbitration would also depend on the quantum of the dispute being brought for arbitration, the nature and complexity of the case, which in turn may dictate time and cost aspects. Therefore, in a strict sense, the costs are not regulated.

The average cost of solving an intra or intergovernmental dispute would depend on the nature and complexity of the case, hours are taken to resolve the matter and chosen mode of ADR. For conflicts based on non-commercial issues, parties agree on an hourly rate or such other payment to the third-party neutral and other costs would be administrative (venue, meals, secretariat costs) thus the earlier a dispute is resolved the cheaper the costs.

The cost of commercial ADR disputes would often be based on the Institute's recommended scale. A dispute with a quantum of Kshs. 100 million would on average cost the parties Kshs. 1 million in arbitrator fees and other costs.³⁸ The Institute's recommended fees schedule is attached as annexe 5.

38-Interview with the Chartered Institute of Arbitrators

ALTERNATIVE DISPUTE RESOLUTION

6.1 Policy and Legal Framework

Alternative dispute resolution (ADR) refers to dispute resolution through forums other than courts of law which have traditionally been the forums for hearing and determining conflicts. The universal recognition of courts having a shortcoming in providing an independent and authoritative determination of disputes has necessitated the search for alternative means of dispute resolution. The shortcomings include high costs of litigation, complex rules and procedures, delays in determination and the adversarial nature of the court system. ADR has many processes including, arbitration, mediation, conciliation, enquiry, negotiation and expert determination.³⁹ It is therefore resorted to complement the judiciary by facilitating easier access to justice, cost reduction, allowing parties to take charge of the dispute resolution process and ensuring the relationship between the parties is maintained as opposed to the confrontational nature of the court system. Wambua notes that ‘due to their consensual nature ADR processes are considered less adversarial and thereby tending to reconcile the parties at the end of the process thus preserving their relationships. It is this attribute of ADR which has prompted some commentators to refer to it as “Appropriate Dispute Resolution”’.⁴⁰

Alternative dispute resolution is internationally recognized and anchored by Article 33 of the Charter of the United Nations which sets out the conflict management mechanisms in disputes between parties, either States or individuals. It provides that the parties to any dispute should, resolve their disputes through negotiation, enquiry, mediation, conciliation, and arbitration... other peaceful means of their own choice.⁴¹ The Constitution of Kenya, 2010 in Article 159 has given force to ADR by putting an emphasis on the need for expeditious administration of justice and providing that justice shall be administered without undue regard to procedural technicalities. It further provides in 159(2) (c) that alternative forms of dispute resolution including ‘reconciliation, mediation, arbitration... shall be promoted’. ADR has been practised in one form or another in Kenya for some time in the recent past.

³⁹ Kariuki Muigua, *Alternative Dispute Resolution and Article 159 of the Constitution*

⁴⁰ Musili Wambua, *Broadening access to justice in Kenya through ADR; 30 years on in Alternative Dispute Resolution Vol. 3, No. 1, Chartered Institute of Arbitrators, Kenya, 2015*

⁴¹ Kariuki Muigua, *Managing Natural Resource Conflicts through Negotiation and Mediation in, Alternative Dispute Resolution Vol. 4, No. 2, Chartered Institute of Arbitrators, Kenya, 2016*

6.2 Legal provisions

The Legal framework for ADR in Kenya is primarily provided in the Constitution, the Arbitration Act (Cap 49 Laws of Kenya), the Civil Procedure Act (Cap 21 Laws of Kenya), the Civil Procedure Rules 2010, the Appellate Jurisdiction Act (Cap 9 Laws of Kenya) and the Nairobi Centre for International Arbitration Act 2013 Section IA & IB of the Civil Procedure Act.⁴²

Apart from Articles 159 and 189 of the Constitution which provide for the promotion and use of ADR, other ADR provisions of the Constitution are Article 67(2)(f) which empowers the National Land Commission to encourage the application of traditional dispute resolution mechanisms in land conflicts; Article 113 on the Mediation Committees between the Senate and the National Assembly on an impasse concerning ordinary Bills relating to county governments; Article 189(4) that emphasizes ADR in resolving inter-governmental conflicts by way of negotiation, mediation and arbitration among others; and Article 252(1)(b) on the general functions and powers of Constitutional Commissions and Independent Offices which include conciliation, mediation and negotiation.⁴³

The Civil Procedure Act and the attendant Rules of 2010 recognize ADR in the resolution of disputes. For instance, sections IA(1), IA(2), 59, 59A, 59B, 59C, 59D and 81, and Order 46 of the Civil Procedure Rules, 2010, comprehensively provide for ADR in civil matters about the Act. These provisions compel the courts to employ ADR mechanisms – beyond arbitration – in the resolution of disputes before them to facilitate a just, expeditious, affordable and proportionate resolution of disputes governed by the Act. Further, the Act recognizes court-annexed mediation and gives it prominence in the resolution of disputes before the court.

ADR is also anchored under the Environment and Land Courts Act whose section 20 provides that:

- (a) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms under Article 159(2) (c) of the Constitution.

⁴² Wambua Musili, *Broadening access to justice in Kenya through ADR; 30 years on in Alternative Dispute Resolution Vol. 3, No. 1, Chartered Institute of Arbitrators, Kenya, 2015*

⁴³ Otiende Amollo, *Constitutional And Statutory Regime Of Alternative Dispute Resolution In Kenya in Alternative Dispute Resolution Vol.2, No. 1, Chartered Institute of Arbitrators, Kenya, 2014*

- (b) Where an alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.

The Employment Act 209 Labour Institutions Act 210 and the Labour Relations Act 211 also provide for ADR through the use of conciliation in labour disputes.

The Commission on Administrative Justice is empowered under section 209 Section 47(2) of the Act, 210 Section 12(9) of the Act, 211 Sections 58& 65–71 of the Act 8(f) of the Commission on Administrative Justice Act 212 to ‘work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration’.⁴⁴

Section 19 of the National Government Co-ordination Act, 2013 also provides for the establishment of mediation teams in case of any disputes between the national government and county governments.⁴⁵

6.3 Key ADR mechanisms

Below, we examine the definitions and nature of the key ADR mechanisms:

6.3.1 Negotiation

This refers to the process of dispute resolution where parties identify and discuss issues to agree on a mutually acceptable solution without the intervention of a third party. The parties identify their interests and try to reach common ground on their shared or conflicting interests.⁴⁶

6.3.2 Mediation

This is defined as a voluntary, informal, consensual, confidential and non-binding dispute resolution process in which a third party helps the parties to reach a negotiated solution.⁴⁷ The Judiciary describes mediation as ‘an alternative dispute resolution (ADR) process where parties resolve their disputes with the assistance of a third party called a mediator’⁴⁸ It identifies the key advantages of mediation as:

⁴⁴ *Ibid*

⁴⁵ Otiende Amollo, *Constitutional And Statutory Regime Of Alternative Dispute Resolution In Kenya in Alternative Dispute Resolution Vol.2, No. 1, Chartered Institute of Arbitrators, Kenya, 2014*

⁴⁶ *Ibid*

⁴⁷ Kariuki Muigua, *Alternative Dispute Resolution and Article 159 of the Constitution*

⁴⁸ Judiciary, *Court Annexed Mediation FAQ, (website)*

- ♦ it is cheaper compared to solving dispute through the court process,
- ♦ it is a quicker way of solving dispute compared to court process thus saves time,
- ♦ disputing parties decide what their solution is, and customize that solution to their needs,
- ♦ parties easily comply with resolutions because it is their solution, and
- ♦ Because of its peaceful nature, parties in dispute that use the process can maintain their relationship after the dispute is settled.⁴⁹

Shako notes that “Mediation as an ADR mechanism is deemed advantageous because the timing of the process is within the control of the parties, it is informal, cost-effective, flexible, efficient, confidential, preserve relationships, provides a range of possible solutions and there is autonomy over the process and the outcome”⁵⁰.

A Court-Annexed Mediation was commenced in 2015 by the judiciary through a pilot programme. This involves identifying cases which can be resolved through mediation after screening by a mediation committee. The Court mediation pilot program is at the Commercial and Family Divisions of the High Court. The Mediation (Pilot Project) Rules 2015 were gazetted by the Chief Justice. The rules provide that, every civil action instituted in court is subject to mandatory screening by the mediation Deputy Registrar, and those found suitable are referred to the mediation process. For cases referred to mediation, the Registrar notifies the parties within seven days of completion of screening to enable them to file a case summary. The Deputy Registrar then nominates three qualified mediators and the parties are notified within a seven-day window to state their preferences of the nominees in order of priority. The parties do not pay the mediators under the pilot project and all mediation proceedings are required to be determined within 60 days from the date of commencement. The Deputy Registrar’s office only allows a maximum 10-day extension of the proceedings in exceptional cases where parties encounter complex issues.⁵¹

6.3.3 Arbitration

This is defined as a private process in which parties to a dispute agree to present their disputed issues for determination to another party.⁵² Just like the court system, arbitration is adversarial but has some advantages over litigation. These advantages include, parties

⁴⁹ Ibid Judiciary FAQ

⁵⁰ Florence Shako, *Mediation in the Courts Embrace: introduction of Court Annexed Mediation into the Justice System in Kenya in, Alternative Dispute Resolution Vol.4, No.2, Chartered Institute of Arbitrators, Kenya, 2016*

⁵¹ Ibid

⁵² Farook Khan, *Alternative Dispute Resolution, A Paper Presented at the Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi*

choose an arbitrator, they can be represented by a person of their choice, the arbitrator has expertise in the area, it is flexible, it is faster, confidentiality can be maintained and the process mostly involves lower costs. The arbitrator's award is binding on the parties and can be enforced through the judicial process.

6.3.4 Conciliation

This is where a third party referred to a Conciliator intervenes to repair or restore the relationship between the party to a dispute by bringing them together to clarify issues and iron out misunderstandings. This intervention 'reduces tension, opens channels of communication and facilitates continued negotiations'.⁵³

6.3.5 Convening

This mechanism brings interested parties together to identify the issues and persons interested in the dispute. It aims at facilitating the search for a solution through negotiations or the application of other ADR mechanisms. The neutral person bringing the parties together is called a convener.

6.3.6 Early neutral Evaluation

This involves the informal presentation of the matter in dispute to a neutral competent person by the parties for evaluation of their positions on the matter. This evaluation may be binding or non-binding. This approach is particularly useful in highly technical disputes.

6.3.7 Adjudication

This is an informal process where an impartial, third party called an adjudicator makes a quick decision on a dispute involving a construction contract. The decision reached at is binding unless the matter is referred to arbitration or court. This method is effective in simple construction disputes and is cheap and fast. The dispute has to be settled within 28 days (or as provided in the contract) as under the Chartered Institute of Arbitrators (K) adjudication Rules.

6.3.8 Facilitation

This involves the facilitation of more effective communication or flow of information between the parties in dispute by a facilitator who is a neutral person. The facilitator provides procedural support rather than support on the substantive issue.

53-Ibid

6.3.9 Fact-finding/Neutral fact-finding

The method involves the investigation and determination of the facts in dispute by a respectable neutral person to unlock the impasse and facilitate negotiation.

6.3.10 Mediation-Arbitration (MED-Arb)

This process combines mediation and arbitration where parties are initially assisted by a mediator to find a solution to the dispute until they get stuck and arbitration is necessary to break the impasse through a binding or non-binding decision by a neutral arbitrator on the unresolved issue.

While all the ADR mechanisms are more advantageous than court litigation, the most suitable for intergovernmental disputes are negotiation and mediation due to their consensual and informal nature. Arbitration is adversarial and tends to involve the same legal technicalities and costs as court litigation. The term arbitration is however often used as a generic term which applies to all ADR process.⁵⁴ Most of the mechanisms can be used in combination with each other as part of a progression, moving from the less formal to the more formal and the most simple to the least simple.

6.4 Challenges facing ADR in Kenya

Although the consensus among the administration of justice stakeholders that ADR is preferable to court litigation and the Constitution in Article 159 requires it to be promoted by the judiciary, ADR encounters many challenges.

These include:

- ♦ Lack of comprehensive national government policy on ADR;
- ♦ Lack of sound ADR mechanisms and the commitment to set the policies and regulations for the implementation of ADR within government and Judiciary,
- ♦ Lack of public awareness, support and acceptance of ADR as an effective means of solving disputes;
- ♦ Lack of ownership by the practising legal professionals. Advocates are generally trained and oriented to consider litigation as a first option and rarely consider ADR as the first option;

⁵⁴ Dr. Kariuki Muigua's contribution during the experts meeting

- ♦ This is compounded by the lack of clear legal provisions for the remuneration of Advocates for ADR work;
- ♦ The delay by Parliament in enacting crucial national legislation or amending existing laws to provide for dispute resolution through ADR;
- ♦ Capacity in terms of insufficiently trained professionals to handle disputes using ADR mechanism;
- ♦ Lack of institutional structures for dispute resolution through ADR mechanisms. If where structure such Summit, COG, IEBC and IGRTC exist, the procedures on how to access them and what to expect are not in place;
- ♦ Lack of public awareness on how to use some of the ADR mechanisms;
- ♦ Lack of regulations that govern dispute resolution through ADR mechanisms;
- ♦ The mistrust that is occasioned by charlatans engaged in ADR practice and instances of rogue ADR practitioners who have portrayed the practice in a bad light; and
- ♦ Some members of the bench see arbitrators/mediators as competitors. Most members of the bench initially perceived ADR as a threat to the court system and are still not comfortable with it. On the other hand, lawyers see it as a threat to their incomes.

7

CONCLUSIONS AND RECOMMENDATIONS

7.1 Conclusion

It is clear from the study that intergovernmental disputes should initially be sought to be resolved through ADR and court action should only be a last resort. The Constitution, the law and best practices all point to the fact that the judiciary is in fact, unsuitable for the resolution of inter/intra-governmental relations. The judicial process is expensive, slow and adversarial which is bad for continued relations between the two levels of government. There is however need to establish an effective intergovernmental dispute, ADR framework with appropriate policy, legal and institutional infrastructure.

7.2 Key Recommendations

1. The government should develop a policy and legislative framework that supports and encourages the application of ADR. This would involve a review of existing policies, legislation and institutional arrangements. It would include amending legislation or making new law to meet the demands of a devolved system of government including considering constitutional amendments to make ADR a mandatory precondition to court action.
2. Regulations to operationalize the Intergovernmental Relations Act should be developed and gazette urgently.
3. Intergovernmental relations institutions including IGRTC, COG, IBEC, Summit, Senate and National Assembly should be strengthened for effective conflict management and ADR.
4. Complementarity of Judicial processes and ADR while avoiding ADR being a judicial process. Legal reform to make ADR a prerequisite for judicial proceedings should be considered.
5. Public awareness should be created in the counties to educate the county government officers (especially the newly elected/appointed county leaders/officers) and the public on the benefits of ADR. This will help popularize and legitimize ADR.
6. Set minimum standards of conduct and conditions for the application of ADR within the dispute clauses in government contracts and inter/intragovernmental relations.

7. Conduct capacity-building: training of experts, the establishment of structures and institutions that support ADR; the development and implementation of programmes, plans and actions for the training of government officers on ADR; building capacity for conflict management and ADR.
8. Judicial officials should be sensitized on the importance of ADR as an alternative to litigation through the Judicial Training Institute. Advocates should also be sensitized on ADR as part of their training and Continuing Professional Development (CPD). State counsel should also be trained through the Attorney General's office.
9. The integrity of lawyers should be enforced to avoid a collision.
10. County governments should establish fully-fledged legal departments capable of handling most of the litigation internally to reduce external advocates' costs. The enactment of the Office of the County Attorney Bill 2014 should be fast-tracked.
11. Remuneration scales for the different ADR mechanisms should be reviewed and streamlined to encourage lawyers to take up ADR mechanisms. There is also a need to consider changing the approach to the remuneration of advocates for cases involving public sector institution including having a special remuneration order for public sector litigation.
12. Traditional disputes resolution mechanism should be recognized through legislation subject to Article 159 of the Constitution. The recognition would allow for the implementation of the awards or orders of elders.
13. Given the reluctance by public institutions to provide data on the costs of litigation, the Summit should consider directing the audit of legal costs in all public institutions

ANNEXES

ANNEXE I: Comparative Provisions of law in terms of intergovernmental relations/ disputes resolution

Country	Legal Instrument	Relevant Provision of Act	ADR Mechanism/Structure	Comment
South Africa	The Constitution	<p>Government of the Republic</p> <p>40. (1) In the Republic, the government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated.</p> <p>Principles of co-operative government and intergovernmental relations:</p> <p>41. (1) All spheres of government and all organs of state within each sphere must—</p> <p>(a) preserve the peace, national unity and the indivisibility of the Republic;</p> <p>(b) secure the well-being of the people of the Republic;</p> <p>(c) provide an effective, transparent, accountable and coherent government for the Republic as a whole;</p> <p>(d) be loyal to the Constitution, the Republic and its people;</p>	Negotiation	South Africa has three levels of government. The levels of government are distinctive, interdependent and interrelated -Similar to Kenya

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ANNEXE 2: Total number of cases by County Governments

County	Total number of intra and intergovernmental cases	Remarks
Baringo	1	
Bomet		County secretary promised to have the legal office working on the data but no data was received.
Bungoma		County secretary did not receive phone calls or respond to emails
Busia		County secretary promised to have the legal office working on the data but no data was received.
Elgeyo Marakwet		County secretary was unavailable on call and did not respond to emails.
Embu		County secretary did not receive phone calls or respond to emails
Garissa		County secretary stated that the Legal office was working on the data but no data was received.
Homabay		County secretary promised to have the Legal office working on the data but no data was received.
Isiolo		County secretary stated the legal office was working on the data but no data was received.
Kajiado		County secretary was unavailable on call on several occasions and did not respond to some calls and emails.
Kakamega		The County secretary only received the call once. No further contact through calls and emails was achieved.
Kericho	County has not filed/been involved in any intergovernmental cases	
Kiambu	2	
Kilifi	4	

County	Total number of intra and intergovernmental cases	Remarks
Kirinyaga		The legal officer had promised to send the data but was not able to since he was the only counsel representing the county thus was busy with other legal assignments.
Kisii		County secretary promised to have the Legal office working on the data but no data was received.
Kisumu	3	
Kitui		County secretary stated that the legal office was working on the data but no data was received.
Kwale	0	
Laikipia		The county secretary only received a call once. No further contact through calls and emails was made.
Lamu		County secretary did not receive phone calls or respond to emails
Machakos	5	
Makueni		County secretary stated that the legal office was working on the data but no data was received.
Mandera		County secretary stated that the legal office was working on the data but no data was received.
Marsabit	2	
Meru		County secretary was unavailable on call on several occasions and did not respond to some calls and emails.
Migori		County secretary promised to have the legal office working on the data but no data was received.
Mombasa	0	

County	Total number of intra and intergovernmental cases	Remarks
Murang'a		County secretary promised to have the legal office working on the data but this was halted by the party nominations thus no data was received.
Nairobi	4	
Nakuru		County secretary was unavailable on call on several occasions and did not respond to some calls and emails.
Nandi		County secretary was unavailable on call and did not respond emails.
Narok		County secretary promised to have the legal office working on the data but no data was received.
Nyamira		County secretary was unavailable on call on several occasions and did not respond to some calls and emails.
Nyandarua	The legal office has an issue with the study thus no data/information given	
Nyeri	7	
Samburu		County secretary was unavailable on call on several occasions and did not respond to some calls and emails.
Siaya		County secretary promised to have the legal office working on the data but no data was received.
Taita Taveta		The Head of Legal Department promised to work on the data but no data was received.
Tana River	County has not filed/been involved in any intergovernmental cases	
Tharaka Nithi	3	

County	Total number of intra and intergovernmental cases	Remarks
Trans Nzoia		County secretary was unavailable on call on several occasions and did not respond to some calls and emails.
Turkana		County secretary was unavailable on call on several occasions and did not respond to some calls and emails.
Uasin Gishu	0	
Vihiga	0	
Wajir		County secretary promised to have the legal office working on the data but no data was received.
West Pokot	2	

ANNEXE 3: Total number of cases by parties

PARTIES IN CASES INVOLVING THE NATIONAL GOVERNMENT/ATTORNEY GENERALS OFFICE	
PARTIES	NUMBER OF CASES
Council of Governors vs. National government	7
National government vs. County government	1
County governments vs. National government	10
State Agencies vs. National government	8
County government vs. State Agency	1
State Agencies vs. State Agencies	2
Total number of cases	29

PARTIES IN CASES INVOLVING THE SENATE AND THE NATIONAL ASSEMBLY	
PARTIES	TOTAL NUMBER OF CASES
Council of Governors/county government vs. Senate	6
Council of Governors vs. National Assembly	1
Council of Governors/county government vs. Senate, National Assembly and Attorney General	3
Impeachments	4
Total	14

PARTIES IN CASES INVOLVING COUNTY GOVERNMENTS	
PARTIES	TOTAL NUMBER OF CASES
County government vs. National government	2
County government vs. County government	1
County government vs. State Agencies	11
State Agencies vs. County government	8
County organ vs. County organ	6
County government vs. Senate/National Assembly	3
Total	31

ANNEXE 4: Types, nature, volume and costs of intergovernmental disputes

Case No.	Parties to the dispute	Nature of dispute	ADR Method used before litigation	Status of case/ decision made	Cost of litigation
1	Petition No. 413 of 2014 Council of Governors vs. Senate	Contesting the summoning of 4 governors to allegedly answer questions on County Financial Management	None	Suit dismissed at the High Court but the Council of Governors has appealed to the Court of Appeal.	High Court – Kshs. 3.32 million ; Court of Appeal – Kshs 2.16 million Supreme Court – Kshs. 2.16 million
2	Petition No. 7 & 8 (Consolidated) of 2014 Hon. Martin Wambora vs. Speaker Embu County Assembly and 3 others & Andrew Irere Njeru and 33 others vs. The Speaker of Embu County Assembly & 3 others (consolidated)	Impeachment of the Governor	None	Pending in the Supreme Court	
3	Petition No. 381 of 2014 Council of Governors vs. The Senate, The National Assembly and 47 Senators	Contesting Legislation	None	Pending in the Court of Appeal	High Court – Kshs 3.32 million ; Court of Appeal – Kshs 2.16 million Supreme Court – Kshs. 2.16 million

Case No.	Parties to the dispute	Nature of dispute	ADR Method used before litigation	Status of case/ decision made	Cost of litigation
4	Petition No. 271 of 2015 Council of Governors vs. The Senate & Others	Contesting Legislation	None	Withdrawn	
5	Petition No. 561 of 2015 Wycliffe Ambetsa Oparanya & another vs. DPP & Senate	Contesting the decision of the Senate to summon the governor to answer questions on the Auditor General's report without allowing the county assembly to examine the report first	None	Pending in the High Court	
6	Petition No. 458 of 2015 Mwangi wa Iria & 2 Others vs. Speaker Murang'a County Assembly & 3 others	Impeachment	None	Dismissed	
7	Court of Appeal Civil Application No. 64 of 2016 Mwangi wa Iria & 2 Others vs. Speaker Murang'a County Assembly & 3 others	Impeachment	None	Withdrawn	

Case No.	Parties to the dispute	Nature of dispute	ADR Method used before litigation	Status of case/ decision made	Cost of litigation
8	Petition No. 500 of 2014 Council of Governors & 2 others vs. Makueni County Assembly & 3 others	Impeachment	None	Pending in the High Court	
9	Petition No. 252 of 2016 Council of Governors vs. Attorney General & 4 others	Contesting Legislation	None	Stayed to allow ADR	
10	Petition No. 187 of 2015 Council of Governors vs. Senate	Contesting Legislation	None	Petition allowed	
11	Petition No. 272 of 2016 Council of Governors vs. Attorney General & 2 others and Senate (interested party) & others	Contesting Legislation	None	Pending in the High Court	
12	Petition No. 424 of 2015 Narok County Government vs. Senate and the Speaker of the Senate	Contesting Legislation	None	Dismissed	

Notes

Nature of Dispute:

- ❖ “Legislation” denotes a challenge to the constitutionality of an Act of Parliament.
- ❖ “Revenue Allocation” denotes a challenge to how revenue is allocated between the different levels of government and between the counties.

■ Inter-governmental disputes involving the National Assembly

Case No.	Parties to the Dispute	Nature of dispute	ADR Method used before litigation	Status of case/ Decision made	Cost of litigation
1	Council of Governors vs. Inspector General of Police, National Police Service & 3 others	Contesting Legislation	None	Pending judgment in the Court of Appeal	
2	County Government of Mandera & 2 others vs. The Commission on Revenue Allocation	Contesting Revenue allocation by the commission	None	Petition allowed	

Notes

Nature of Dispute:

- ❖ “Legislation” denotes a challenge to the constitutionality of an Act of Parliament.
- ❖ “Revenue Allocation” denotes a challenge to how revenue is allocated between the different levels of government and between the counties.

Inter-governmental disputes involving the Attorney General's Office						
Case No.	Parties to the Dispute	Nature of dispute	ADR Method used before litigation	Status of case/ Decision made	Cost of litigation	
1	Nairobi HC Petition no. 523 of 2016 Council of Governors vs. CS Ministry of Water	Functional (Constitutionality of the Water Act)	Yet to be conducted	P.O of inter-governmental Act, the petitioners have now filled a new Petition, Nairobi HC Petition No. 31 of 2017, Martin Guya VS CS water VS AG (to circumvent the ADR) No date	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million	
2	Nairobi HC Petition no. 252 of 2016 Council of Governors vs. CS Devolution	Devolved functions (Functional)	Matter referred for arbitration according to Section 31 of the Inter-Governmental Relation Act	Pending Mediation	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million	
3	370 of 2015 Isiolo County vs. CS Devolution	Devolved functions	Matter referred for arbitration under Section 31 of the Inter-Governmental Relation Act	Pending Mediation	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million	
4	Nairobi HC Petition no. 37 of 2017 Kenya Medical Laboratories Technicians and Technologist Board vs. Ministry of Education	Functional (the terms of the medical practitioners seconded to the counties)	Mediation	Matter finalized.	The matter settled after mediation	

Case No.	Parties to the Dispute	Nature of dispute	ADR Method used before litigation	Status of case/ Decision made	Cost of litigation
5	Nairobi HC Petition no. 49 of 2017 Council for Legal Education vs. AG & another	Administrative (Section 5 of the University Act)	None	Pending determination	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million
6	Nairobi HC Petition no. 544 of 2013 KUDHEIA vs. KRA and AG	Challenging Sections 19, 20, 21, 27, 33, & 36 of VAT Act	N/A	Judgment delivered and Petition dismissed	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million
7	Nairobi HC Petition no. 514 of 2016 Mandera County Government & 2 others vs. AG & 2 others	Challenging the CRA recommendation to the Senate to use adjusted census results as opposed to enumerated for purposes of FY 2017/2018	N/A	Petition allowed	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million
8	***-***-*** LSK vs. Ministry of Interior	Legal opinion on the removal of CS	N/A	Legal opinion rendered	
9	Nairobi H.C Petition No. 413 of 2015 KALRO vs. National Land Commission	Ownership of LR No. 12248 – Naivasha Municipality Block 5/289	N/A	Responses filed, awaiting a court date	The only order in monetary value is the cost of the suit estimated at Kshs. 500,000, damages or the cost of the land to be determined by the court

Case No.	Parties to the Dispute	Nature of dispute	ADR Method used before litigation	Status of case/ Decision made	Cost of litigation
10	Nairobi H.C Petition No.226 of 2015	National Gender & Equality Commission vs. Ministry of Labour	N/A	Dismissed but petitioner has filed a Notice of Appeal	
11	Nairobi H.C Petition No. 495 of 2015	Kenya National Human Rights Commission vs. AG	N/A	Pending determination	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million.
12	Nairobi HC Petition No. 12 of 2016	National Gender & Equality Commission vs. AG	N/A	Pending determination	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million.
13	Nairobi H.C Petition No. 208 of 2016	Bungoma County Government vs. AG	N/A	Pending determination	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million.

Case No.	Parties to the Dispute	Nature of dispute	ADR Method used before litigation	Status of case/ Decision made	Cost of litigation
14	Migori County Government vs. AG	Functional (Challenging that the sugar milling is a devolved function and in particular South Nyanza Sugar Company)	N/A	Pending determination	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million.
15	Nairobi H.C Petition No. 119 of 2016	Functional (Challenging that the sugar milling is a devolved function and in particular South Nyanza Sugar Company)	N/A	Pending determination	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million.
16	Nairobi H.C Petition No. 272 of 2016	Challenging the recommendation of CRA for Equalization Fund to give as an indirect conditional grant to marginalized counties	Mediation proposed but the same would set a bad precedent	Pending determination	

Case No.	Parties to the Dispute	Nature of dispute	ADR Method used before litigation	Status of case/ Decision made	Cost of litigation
17	Nairobi H.C Petition No. 91 of 2016 KPLC vs. AG	Orders for the Ministry of Energy to pay for the way leaves and electricity post fees imposed by the city government if the court doesn't annul the Gazette Notice that mandates for the fees	N/A	Pending determination	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million.
18	Kericho H.C Petition No. 552 of 2015 Governor of Kericho vs. KTDA	Representation of the smallholders in the tea Sector	N/A	Matter heard, pending judgment	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million.
19	Nairobi H.C Petition No. 552 of 2015 Council of County Governors vs. AG	Challenging the transfer function of agriculture from the various institutions of the national government to county government	N/A	Pending determination	

Case No.	Parties to the Dispute	Nature of dispute	ADR Method used before litigation	Status of case/ Decision made	Cost of litigation
20	Nairobi City County vs. AG	Claim that the Commissioner of Lands has no powers to allocate the alienated government land (a claim that the Embakasi township reserve was established by Gazette Notice by the colonial government in 1954 & 1958)	N/A	Pending determination No instructions	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million.
21	Council of County Governors vs. AG & KURA	Functional (Classification of roads, challenging the non-Gazettement of the roads by AG)	Mediation is done but the Gazetting of the roads not done hence the petition	Petition allowed. Matter Pending Appeal	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million.
22	Makueni County Assembly vs. AG	Administrative (Challenging the Senate proceeding on the ousting of the Governor of the Makueni)	N/A	Matter referred to the Chief Justice for the constitution of a three-judge bench	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million.

Case No.	Parties to the Dispute	Nature of dispute	ADR Method used before litigation	Status of case/ Decision made	Cost of litigation
23	Republic vs. Cabinet Secretary, Ministry of Agriculture, Livestock And Fisheries & 2 Others Ex Parte Council of County Governors	Administrative (The dispute, in this case, involves the implementation of the Coffee (General) Regulations, 2016 which the ex parte applicant allege were issued without conducting meaningful and qualitative public participation. The ex parte applicant also alleges that those Regulations were not tabled in Parliament for subsequent approval as required under the Statutory Instruments Act. The Respondents have disputed those allegations and a Replying Affidavit is on record.	Mediation is proposed for 10 th April 2017 at the AG's chambers. However, the case is scheduled for hearing in court on 16th May 2017	Pending mediation	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million.

Case No.	Parties to the Dispute	Nature of dispute	ADR Method used before litigation	Status of case/ Decision made	Cost of litigation
24 Nairobi H.C.J.R. No. 553 of 2016	Republic Vs Chief of Defence Forces, Cabinet Secretary Ministry of Defence, Hon AG, Ex-Parte Nairobi City County Government	Administrative (Dispute between Kenya Defence Forces (KDF) at Embakasi Garrison and The Nairobi County Government residents of Kayole-Mihango estate bordering the barracks. The Nairobi County Government alleges that the KDF has dug a trench across the "Mihang'o-Kayole" link road that borders the barracks and stationed armed soldiers to prevent the residents from accessing the road.)	On the 1 st March 2017 the court directed the applicant to take initiative to have the matter resolved before the Inter-Governmental Technical Relations Committee in line with the provisions of Article 189(3),(4) as well as section 31 of The Intergovernmental Relations Act	None	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million, plus damages estimated at Kshs. 2-10 million

Case No.	Parties to the Dispute	Nature of dispute	ADR Method used before litigation	Status of case/ Decision made	Cost of litigation
25	Nairobi HC Petition No. 28 of 2016 County of Makeni vs. A.G	Stopping prosecution of the speaker of Makeni County Assembly	N/A	Pending hearing	
26	Kitale E&L No. 112 of 2016 Director of Survey & AG vs. County Government of Turkana	Administrative	County Commander of Turkana tried to negotiate with the County Commissioner Turkana County	Pending Ruling of P.O	The only order in monetary value is the cost of the suit estimated at Kshs. 1 million.
27	Kitale E&L No. 71 of 2013 Kenya Industrial Estates vs. AG and 5 others	Functional	None	Judgment delivered	
28	Meru CMCC No. 74 of 2016 County Government of Meru vs. AG	Functional	None	In the process of complying	
29	Meru HC Petition No. 7 of 2017 County Government of Meru vs. AG	Functional	None	The new case, in the process of seeking instructions	

■ Inter and Intra-Governmental disputes involving County Governments since 2013

Devolved Function affected by Dispute	County	Case No.	Parties to the case	Nature of the dispute (e.g. functional, administrative, financial and any other dispute)	ADR Method used, if any, before litigation	Status of Case/Decision made	Cost of Litigation (Kshs)
Agriculture e.g. crop & animal husbandry, livestock sale yards, plant & animal disease control, fisheries etc.							
Health Services e.g. health facilities pharmacies, pre-primary health, veterinary services, ambulance services, waste disposal etc.	Marsabit	Petition No. 97 of 2016	The Chairman, Treasurer, Secretary General Kenya Pharmaceutical Association vs. The 47 county governments		N/A	Pending at the Milimani High Court Nairobi	
	Nyeri	Nyeri ELC No. 240 of 2016.	County Government of Nyeri vs. Kenya Medical Practitioners & Dentist Union National Centre Union Branch	Administrative-Contesting over promotions, allowances, salaries, study leaves among other issues	Negotiation	Before Court	Legal Fees Kshs. 928,000.00
	Tharaka Nithi	ELRC No. 47 2016	Tharaka Nithi County vs. Kenya National Union of Nurses	Functional	N/A	The matter settled in terms of Agreement dated 10/5/2016	Kshs. 2,348,830
	Machakos	Nairobi ELRC cause	The County Government of Machakos vs.	Labour dispute	Negotiation	Matter withdrawn vide consent order	Kshs. 13,650,000

Devolved Function affected by Dispute	County	Case No.	Parties to the case	Nature of the dispute (e.g. functional, administrative, financial and any other dispute)	ADR Method used, if any, before litigation	Status of Case/Decision made	Cost of Litigation (Kshs)
		No. 1571 of 2016	Kenya Medical Practitioners, Pharmacists & Dentist Union			recorded in court on 5 th October 2016	
	Kilifi	ELR 2015, Mombasa	County Government of Kilifi vs. Kenya National Union & Others	Promotions and resignations of the Health Department		No known position of the matter	
Control of air pollution, noise pollution, other public nuisances and outdoor advertising							
Cultural activities e.g. sports, betting, racing, liquor licensing, libraries, museums etc.							
Transport e.g. county roads, street lighting, traffic and parking, public road transport, ferries, harbours etc.							
Animal control and Welfare e.g. licensing of dogs, facilities for the accommodation, care and burial of animals etc.							

Devolved Function affected by Dispute	County	Case No.	Parties to the case	Nature of the dispute (e.g. functional, administrative, financial and any other dispute)	ADR Method used, if any, before litigation	Status of Case/Decision made	Cost of Litigation (Kshs)
Trade Development and Regulation e.g. markets, licenses, fair trading practices, local tourism, cooperative societies etc.	Kilifi	HC Petition No. 97 of 2016, Nairobi	Chairman, Treasurer, Hon. Secretary-General of Kenya Pharmaceuticals Assoc. vs. County Government of Kilifi & 46 others in the counties of the Republic of Kenya	Challenging all the county governments exempting the Petitioners from paying Business Permits	Highlighting written submission on 23/9/2016		
County Planning and Development e.g. statistics, land survey and mapping, boundaries & fencing, housing, electricity & gas reticulation, energy regulation etc.	West Pokot	Nairobi Constitutional Petition No. 113 of 2015	Turkana County Government and 20 Others vs. Attorney General & 2 others and The County Government of West Pokot being an interested party	Boundary disputes and hostility claims between the two counties	N/A	West Pokot County won the case	Kshs. 10,000,000/- paid to West Pokot County Advocates
	Nairobi	HC JR 533 of 2016	NCCG vs. The Chief of Defence Forces, KDF and ANOR	Dispute on access Embakasi-Mihang'o road	None	Stay of the decision by the respondents to dig a trench along Embakasi-Mihang'o road granted vide ruling dated 14 th November 2016	The matter is at inception. Cost of litigation yet to be determined.

Devolved Function affected by Dispute	County	Case No.	Parties to the case	Nature of the dispute (e.g. functional, administrative, financial and any other dispute)	ADR Method used, if any, before litigation	Status of Case/Decision made	Cost of Litigation (Kshs)
Pre-primary education, village polytechnics, home craft centres and child care facilities	Nyeri	Nyeri Petition No. 3 of 2014	County Government of Nyeri vs. Cabinet Secretary Ministry of Education Science & Technology Principal Secretary Ministry of Education Science and Technology	Administrative (Contesting the Form I selection bias. The county government argues that county schools had been allocated a few slots in the selection.)	Negotiation	Pending Before Court	Legal Fees Kshs. 1.5million.
Implementation of specific national government policies on natural resources and environmental conservation e.g. soil and water conservation, forestry	Tharaka Nithi	Meru HC Petition No. 9 of 2014	Law & social Dev. Trust (LASODET) & others vs. Hon. AG & 10 others	Functional	N/A	The case is partly heard	Kshs. 4,060,000
County public works and services e.g. stormwater management systems in built-up areas, water and sanitation services	Nyeri	Nyeri H.C ELC No. 243 of 2013	County Government vs. National Environment Management Authority	Administrative (NEMA wanted a dumpsite near residential areas relocated)	Public complains Committee	Before court	Legal Fees Kshs. 517,187.00
Fire fighting services and disaster management							
Control of drugs and pornography							

Devolved Function affected by Dispute	County	Case No.	Parties to the case	Nature of the dispute (e.g. functional, administrative, financial and any other dispute)	ADR Method used, if any, before litigation	Status of Case/Decision made	Cost of Litigation (Kshs)
Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level							
Any other cross-cutting issues e.g. administrative & political, general economic activities, financial resources management disputes etc.	Kiambu	Nairobi Constitutional Petition No. 229 of 2015	County Government of Kiambu & the Council of Governors vs. The Senate & others	Functional/Mandate of the Senate	N/A	Judgement entered in favour of the Petitioners	Kshs.2,000,000
	Kiambu	Nairobi Constitutional Petition No. 187 of 2015.	The Council of Governors & County Government of Kiambu vs. The Senate	Functional/Mandate of the Senate	N/A	Judgement entered in favour of the Petitioners	Kshs.2,000,000

Devolved Function affected by Dispute	County	Case No.	Parties to the case	Nature of the dispute (e.g. functional, administrative, financial and any other dispute)	ADR Method used, if any, before litigation	Status of Case/Decision made	Cost of Litigation (Kshs)
	Kisumu	*****	County Government of Kisumu & Council of Governors vs. Privatization Commission of Kenya	Administrative	N/A		
	Kisumu	Kisumu ELC No. 239 of 2014	LAPFUND Board vs. County Government of Kisumu & National Housing Cooperation	Financial (Application for a debt settlement of Kshs. 135,000,000)	N/A		
	Kisumu	Petition No. 270 of 2014	Kenya County Government Workers Union vs. Kisumu County Government & 95 others	Administrative/Functional Whether the CARPS programme is forced project of the national government without consideration of the needs of the county government. Whether in implementing the CARPS programme, the rights of the	N/A	Concluded. Ruled in favour of the petitioner	

Devolved Function affected by Dispute	County	Case No.	Parties to the case	Nature of the dispute (e.g. functional, administrative, financial and any other dispute)	ADR Method used, if any, before litigation	Status of Case/Decision made	Cost of Litigation (Kshs)
				<p>petitioners have been infringed upon.</p> <p>Whether the CARPS programme has usurped the powers of the county public service Boards.</p> <p>Whether the petitioners have been discriminated upon in deciding on the membership of the Committees handling the CARPS programme.</p> <p>Whether the CARPS programme discriminates upon certain members of the petitioners.</p>			
	Marsabit	No. 5 of 2017	EACC vs. County Government of Marsabit and 4 others	Financial	N/A	Pending at the court	

Devolved Function affected by Dispute	County	Case No.	Parties to the case	Nature of the dispute (e.g. functional, administrative, financial and any other dispute)	ADR Method used, if any, before litigation	Status of Case/Decision made	Cost of Litigation (Kshs)
	Nyeri	Nyeri H.C Industrial Cause No. 30 of 2014.	Kenya Government Workers Union vs. County Government of Nyeri	Administrative/Labour (Former local authorities employees sued the county government overpayment of salaries, leave payments and overtime)	N/A	N/A	
	Nyeri	Nyeri ELRC NO. 10 of 2016	Geoffrey Mahinda & 3 others vs. County Government of Nyeri, the Governor Nyeri County and AG. Chairperson Nyeri County Public Service Board.	Administrative/Labour dispute (Contesting the terms of engagement from full time to part-time basis)	Negotiation	Before court	
	Machakos	Nairobi ELRC Constitutional Petition	Dorothy M. Ngar'nga & four others (Board members of Machakos County	Employment and/or labour dispute	N/A	Pending in court	Kshs. 8,726,100

Devolved Function affected by Dispute	County	Case No.	Parties to the case	Nature of the dispute (e.g. functional, administrative, financial and any other dispute)	ADR Method used, if any, before litigation	Status of Case/Decision made	Cost of Litigation (Kshs)
		No. 79 of 2016	Public Service Board) vs. Machakos County Government, the Governor Machakos County, the County Assembly Machakos & Hon. A.G.				
	Machakos	Nairobi Constitutional Petition No. 413 of 2014	Council of Governors and Dr Alfred Mutua vs. Senate	Political dispute	N/A	Ongoing	Kshs. 2,550,000
	Kilifi	Nairobi Petition No. 368 of 2014	The Speaker, Nakuru County Assembly & 46 Speakers of other Counties vs. CRA & others	Case on the Revenue Allocation to Counties		on-going	
	Kilifi	HC Petition No. 270 of 2014 , Kisumu	Kenya County Government Workers Union vs. County Government of Kilifi & other 46 Counties & Kilifi County Public Service Board	Employment and labour relations		Judgement delivered in 12th Jan 2015	

Devolved Function affected by Dispute	County	Case No.	Parties to the case	Nature of the dispute (e.g. functional, administrative, financial and any other dispute)	ADR Method used, if any, before litigation	Status of Case/Decision made	Cost of Litigation (Kshs)
	Tharaka Nithi	Nyeri ELRC Petition No. 6 of 2015	Dr Fredrick Njeru Kamunde vs. Tharaka Nithi County	Administrative	N/A	Taxation or petitioner's bill of cost. Mention on 31/5/2017	Kshs. 6,960,000
	Machakos	Nairobi HCJR Misc. Application No. 47 of 2015	Bernard Kiata vs. Dr Alfred N. Mutua, County Government of Machakos and others	Political and/or labour dispute	N/A	Matter struck out and/or dismissed on 21 st September 2016	
	Machakos	Nairobi Civil Appeal No. 193 of 2014	Bernard Kiata vs. County Government of Machakos and others	Political dispute	N/A	Completed	Kshs. 6,737,049.35
	West Pokot	Kitale HC No. 42 of 2015	Republic vs. County Government of West Pokot & Richard Kakuri and others	Employment dispute where the public health officers were disputing the qualifications in an advertisement by West Pokot County	Withdrew the case after out of court discussions	Claimant withdrew the case	No order as to costs
	Nairobi	HC MISC APP No. 640 of 2016	Nairobi City County vs. Kenya Revenue Authority	Financial dispute: unfreezing of bank accounts in Equity and Cooperative Banks for non-payment of income tax	None	Leave to apply for judicial Review proceedings granted on 21 st December 2016	The matter is at inception. Cost of litigation yet to be determined.

Devolved Function affected by Dispute	County	Case No.	Parties to the case	Nature of the dispute (e.g. functional, administrative, financial and any other dispute)	ADR Method used, if any, before litigation	Status of Case/Decision made	Cost of Litigation (Kshs)
	Nairobi	HCC Petition No. 421 of 2016	Nairobi City County vs. Kenya Power and Lighting Company Ltd.	Demand for payment of Kshs. 732,017,002.20 unpaid electricity bills	None	Interim conservatory orders granted. Interparty hearing on 27 th October 2017	The matter is at inception. Cost of litigation yet to be determined.
	Nairobi	HC MISC No. 176 of 2017	Nairobi City County vs. Kenya Revenue Authority & Anor	Notice dated 27 th March 2017 to Principal Secretary, National Treasury transfer tax due of Kshs. 4,395,770,826.00	None	Enforcement of the Agency Notices issued by Kenya Revenue Authority temporary stayed.	The matter is at inception. Cost of litigation yet to be determined.
	Nairobi	HC Petition No. 91 of 2016	Kenya Power and Lighting Company vs. Nairobi City County	The demand for payment of waivers and other payments of Kshs. 605,636,600	None	Orders granted restraining the county from demanding payment	Counsel fees assessed at Kshs. 1,458,400

ANNEXE 5: Chartered Institute of Arbitrators Fees Schedule



Chartered
Institute of
Arbitrators

CIArb

KENYA

REMUNERATION, APPOINTMENT FEES AND OTHER CHARGES

The Branch maintains a register of qualified Arbitrators, Adjudicators, Dispute Adjudication Board members, Mediators and Expert Determiners of various grades, professions and areas of specialization. Parties are advised to consult the Branch for guidance on the appointment of suitable persons before making direct or bilateral appointments of dispute resolvers.

The hourly rates of fees indicated below are guidelines for arbitration, adjudication, DABs and mediation. Parties are free to agree with dispute resolver, at the appointment, or on rates outside the indicated range depending on the simplicity/complexity of the matter, the urgency of the matter, the amounts in dispute, fees charged by other members of the particular panel, whether the dispute is essentially local/domestic or international, the professional standing of the dispute resolver in the primary profession and any other relevant factors.

The experience shown below is experienced as a practising arbitrator, adjudicator or mediator and that must be disclosed to the Parties if they ask for it. The Branch, when making the appointment, considers the Continuous Professional Development (CPD) status of the appointee.

It is advisable to harmonise the fees and other terms concerning the individual members of a 2 or 3-person arbitration tribunal or dispute adjudication board and to pay the chair or umpire at an hourly rate up to 33 per cent more. Where a retainer is appropriate, we recommend a monthly rate equivalent to fees for up to 3 days depending on the circumstances.

ARBITRATION, ADJUDICATION & DISPUTE ADJUDICATION BOARD MEMBER:

	0 – 5 Years Experience	5 – 10 years Experience	10 years plus Experience
Chartered Arbitrator	-	15,000 – 20,000	20,000 – 25,000
Fellows	10,000 - 12,500	12,500 – 15,000	15,000 – 20,000
Members	7,500 – 10,000	10,000 – 12,500	12,500 – 15,000
Associates	4,000 – 5,000	5,000 – 7,500	7,500 – 10,000

MEDIATION/CONCILIATION:

	0 – 5 Years Experience	5 – 10 years Experience	10 years plus Experience
Chartered Arbitrator	-	10,000 - 12,500	15,000 or above
Fellows	7,500 – 8,500	8,500 – 10,000	10,000 or above
Members	6,000 – 7,500	7,500 – 8,500	8,500 – 10,000
Associates	4,000 – 5,000	5,000 – 6,000	6,000 – 7,500

CI Arb (K) Appointment Fees and Other Charges (Kshs):

- ♦ Arbitrator, Adjudicator or DAB Member – 15,000/=.
- ♦ Mediator/Conciliator - 10,000/= , Expert Determiner 10,000/=,
- ♦ List of up to 5 members for Consideration – 2,500/=,
- ♦ List of up to 5 members with CVs for Consideration – 5,000/=,
- ♦ Copy of printed Register of Members – 3,500/=
- ♦ Arbitration Rules: 800/= Adjudication Rules 1,000/=
- ♦ Library: Members Free, Non-Members 500/= per session/day

Arbitration Rooms are available for hire at reasonable rates.

Dated: 17th April 2013

ANNEXE 6: List of the Interviewees and Sampled County Governments

INSTITUTION	NAME	DESIGNATION
Commission on Administrative Justice	Vincent Chahale	Director, Legal Affairs
Chartered Institute of Arbitrators	Chebett Koske	Chief Executive Officer
Law Society of Kenya	Itoto Echakara	Programme Officer
Kenya Law Reform Commission	Peter Musyimi	Lawyer
Katiba Institute	Waikwa Wanyoike	Executive Director
The Senate	Dr Johnson Okello	Director, Legal Affairs
National Assembly	Anthony Njoroge	Director, Litigation and Compliance
Office of the Attorney General	Charles Mutinda	Head, State Counsel
Judiciary	Anne Amadi	Chief Registrar
Judiciary	Peter Mulwa	Registrar, Magistrate Courts
Judiciary	Rose Makungu	Registrar, Environment and Land Courts
Ministry of Interior and Coordination of National Government	Wanjiku Mbiu	Chief State Counsel
Ministry of Devolution and Planning	Jackson Mwangi	State Counsel
Ministry of Health	Betty Soi	Head, Legal Department
Ministry of Agriculture, Livestock and Fisheries	Hannah Nyokabi	Head, Legal Department
Individual lawyers	Dr Kariuki Muigua	

INSTITUTION	NAME	DESIGNATION
	Lucy Kambuni	
	Dr Mutakha Khangu	
	Prof. Tom Ojienda	
County Governments <ol style="list-style-type: none"> 1. Nairobi 2. Nyeri 3. Kisumu 4. Uasin Gishu 	Gad Awuonda	County Attorney
	Solomon Chengecha	Principal Administrator
	Kilinda Kilei	County Legal Counsel
	Kenneth Mutai	County Legal Counsel

Sample Questionnaire on the cost of litigation

General Questions

1. How many cases involving the two levels of government and/or between the organs of government have the Ministry/State Agency/County Government been involved in?
2. What were the main issues in the intergovernmental disputes?
3. What is the nature of these cases, concluded, ongoing or stalled?
4. How many of these cases were resolved through ADR mechanisms?
5. On average, how long does a constitutional/civil intergovernmental dispute take to resolve?
6. Do you think ADR is suitable to intergovernmental dispute resolution? If so, why? If not, why?
7. What are the main causes of intergovernmental disputes?
8. What are the main types of intergovernmental disputes?
9. What on average is the cost of inter and intra-governmental cases?

Requirements for an effective ADR framework

1. What should be the components of an effective ADR framework?
2. Are the current policies, legislative and institutional framework on ADR sufficient to deal with the intra/inter-governmental conflicts?
3. What changes/improvements in policy, legislative and institutional framework on ADR are required?

Recommendations on the development of a national framework for ADR

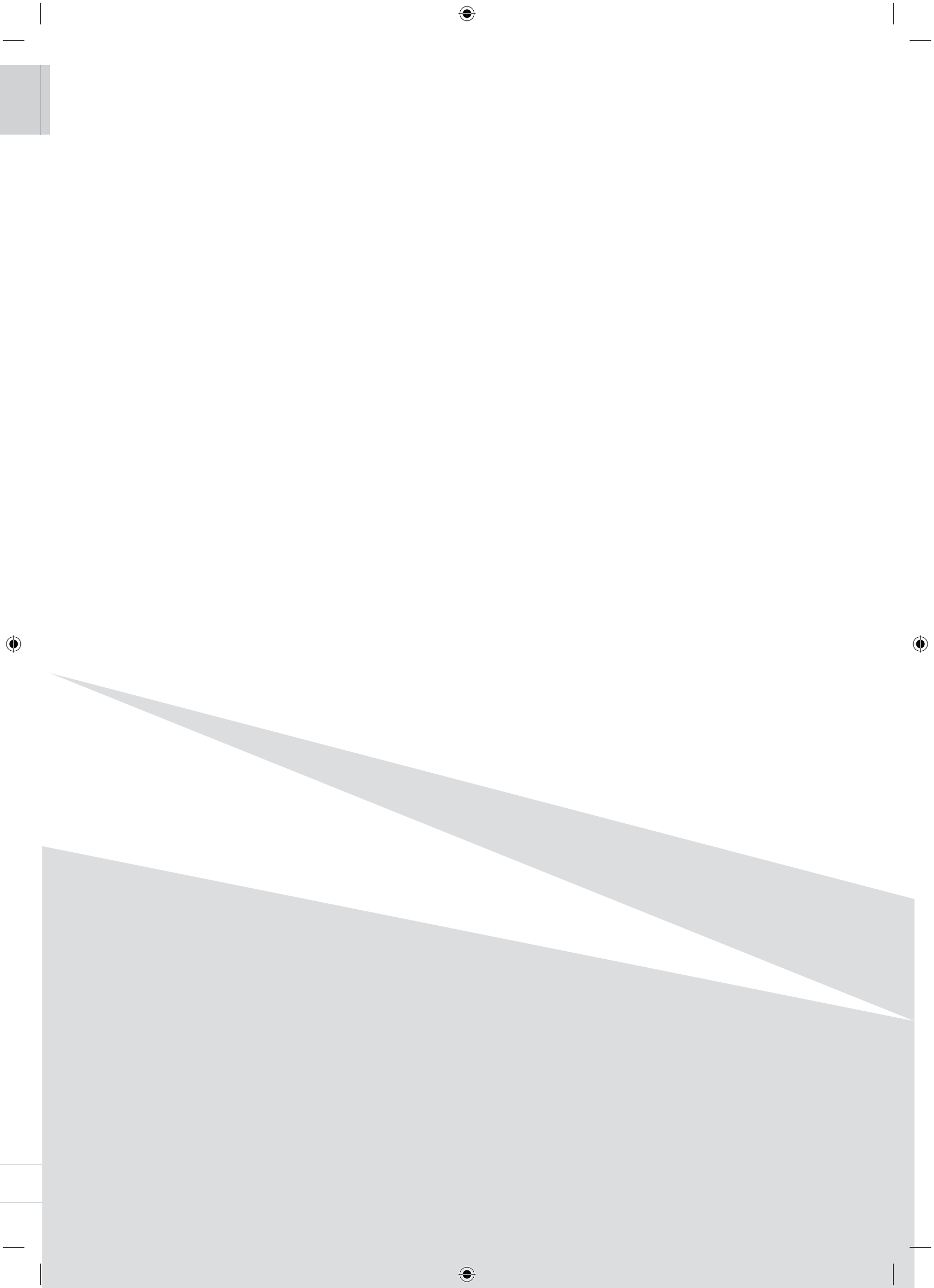
1. What challenges are hindering the full operationalization of ADR?
2. What do you think should be done to encourage government institutions to embrace ADR instead of litigation?
3. What recommendations would you make to improve the utilization of ADR?

ANNEXE 7: List of Participants of the Stakeholder Consultative Forum

1. Prof Karega Mutahi- Chairperson, IGRTC
2. Njambi Muchane- Member, IGRTC
3. Dr Joseph Kosure- Consultant,AHADI attached to IGRTC
4. Prof. Judith Miguda- Member, IGRTC
5. Gitonga Mbaka- Member, IGRTC
6. Fatuma Mohammed- Monitoring and Evaluation, IGRTC
7. Phylis Muturi- Rapporteur,AHADI
8. Allan Tyson- Regional Coordinator,AHADI
9. Rachel Kidenda- Program Officer,AHADI
10. Angeline Hongo- Member, IGRTC
11. Ruth Makanga, Consultant AHADI,Attached to MODP
12. Anne Songole- Assistant Secretary, MODP
13. Mbage Ng'ang'a- Chairman, Kenya Law Reform Commission
14. Nancy Gathungu- Director, Office of the Auditor General
15. Dr Lydia Muriuki- Director, State Department of Agriculture
16. Benard Awumo- Economist, National Treasury
17. Timothy Kihara- State Counsel,AG
18. Wanjiku Mbiu - Chief State Counsel, Ministry of Interior and Coordination of Government
19. Samuel Kaunda- State Counsel,AG
20. Lempaa Suyiaka- Litigation Counsel, Katiba Institute
21. Sheriffson Mwendwa- Deputy Director, Legal Services, Parliament
22. Eunice Lumallas- Member, Chartered Institute of Arbitrators
23. Paulette Achieng- Lawyer, Chartered Institute of Arbitrators
24. James Mangerere- Mediation Advocate, Law Society of Kenya
25. Jacquelyn Katee- Senior Legal officer, Commission on Administrative Justice
26. Mercy Kisanya- Legal officer, Kenya Law Reform Commission
27. Gichira Kibara- Consultant

ANNEXE 8: List of Participants of the Experts Focus Group Discussion

1. Prof Karega Mutahi- Chairperson, IGRTC
2. Allyce Kureiya- Deputy Chairperson, IGRTC
3. Dr Joseph Kosure- Consultant,AHADI attached to IGRTC
4. F.K. Fondo- Member, IGRTC
5. Dr Billow Khalid- Member, IGRTC
6. Elizabeth Ouma- Consultant,AHADI
7. Justice Alnashir Visram- Judge, Court of Appeal, Chairperson Mediation Accreditation Committee
8. Ruth Makanga- Consultant AHADI,Attached to MODP
9. Jackson Mwangi- State Counsel, MODP
10. Timothy Kihara- State Counsel,AG
11. Mbage Ng'ang'a- Chairman. Law Reform Commission
12. Waikwa Wanyoike- Executive Director, Katiba Institute
13. Cleve Chiro- Lawyer, Chartered Institute of Arbitrators
14. Itoto Echakara- Lawyer, Law Society of Kenya
15. Dr Kariuki Muigua- ADR Expert, former Chairman of Chartered Institute of Arbitrators
16. Gichira Kibara- Consultant



INTERGOVERNMENTAL GOVERNMENT RELATIONSTECHNICAL COMMITTEE

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