Republic of kenya

# THE PRESIDENCY
# MINISTRY OF DEVOLUTION AND PLANNING
# STATE DEPARTMENT OF DEVOLUTION

PRESENTATION ON

FACILITATION OF A CONSULTATIVE FORUM ON THE DEVELOPMENT OF THE PROPOSED INTERGOVERNMENTAL DISPUTE RESOLUTION MECHANISM

BY

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## 1 Introduction

The Constitution of Kenya, 2010 establishes a devolved system of government comprised of the national and forty-seven county governments. According to article 6(2) of the Constitution, The governments at the national and county levels are distinct and inter-dependent. They are mandated to conduct their mutual relations on the basis of consultation and cooperation in discharge of their exclusive and shared functions as assigned pursuant to the Fourth Schedule to the Constitution.

The conduct of mutual relations between the two levels of government have been characterised by recurrent conflicts which often escalate into disputes resulting in the erosion of the spirit of consultation and cooperation. This calls for effective conflict management and dispute resolution strategies that guarantee good governance and conducive environment for effective service delivery at both levels of government in the spirit of consultation and cooperation. However, the prevailing constitutional order and the extant statutory framework are not well suited to facilitate effective conflict management and expeditious dispute resolution among the key players in our devolved system of government, not to mention the gaping lacunar in the extant mechanisms for the resolution of contractual disputes.

Even though article 159(2) (c) of the Constitution provides firm foundation for ADR by mandating courts and national tribunals to promote "alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism", the Constitution contemplates submission to such ADR mechanisms in the context of judicial proceedings in exercise of judicial authority vested in the Judiciary. Litigation in the conventional judicial system is not the proper forum for the resolution of intergovernmental disputes. In effect, the entrenchment of ADR in our judicial system under and by virtue of article 159(2) (c) of the Constitution does not of itself guarantee effective conflict management or expeditious intergovernmental dispute resolution as contemplated in article 189(3) and (4) in the absence of an apposite legal framework and administrative procedures outside the adversarial realm of the conventional judicial system to which Chapter Ten of the Constitution relates.

In view of the foregoing, there is need for a defined inter-governmental dispute resolution framework. Such legislative framework would "… provide [more effective] procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration" to meet the mandatory requirements of article 189(4) of the Constitution. The proposed legal framework would lend efficacy to the sustained efforts by the two levels of government and by various county governments *inter se* to resolve their disputes amicably as mandated by article 189(3).

Finally, the proposed legal framework and procedures would, in relation to inter-governmental disputes - (a) lend practical meaning to the mandatory requirements of articles 159(2) (c) and 189(3) and (4) of the Constitution; (b) effectively address the inadequacies of sections 32, 33, 35 and 36 of the Inter-governmental Relations Act, 2012; and (c) provide a ready mechanism for intergovernmental dispute resolution in place of the *ad hoc* processes sanctioned by section 34 of the 2012 Act. In any event, the Summit and the Council of Governors do not constitute independent and impartial third party neutrals suited to facilitate the effective resolution of intergovernmental disputes in accordance with ADR principles, practice and procedure. Neither are they well suited to determine or resolve disputes arising from purely contractual relationships between the two levels of government or between county governments *inter se*.

It is no wonder that Justice Onguto declined to sanction judicial intervention before the parties had exhausted all administrative procedures and statutory prescriptions for ADR. The Constitutional and Human Rights Division Petition Case Number 370 of 2015 between *Isiolo*

*County Assembly Service Board and Another v The Ministry of Devolution and Another* is a case in point. Many more cases of this nature continue to find their way into the conventional judicial system leading to strained intergovernmental relations and needless costs in litigation with the overall effect of undermining good governance, the rule of law and optimal service delivery to the people of Kenya.

## 2 Nature of Disputants

Despite the much-cherished spirit of consultation and co-operation among state organs, the intergovernmental relations in the context of our devolved system of government cannot escape recurrent conflicts and disputes between (a) national and county governments; (b) county governments *inter se*; (c) county governments and public entities established by the national government; (d) public entities *inter se*; and (e) individuals and interest groups (or communities) on matters relating to service delivery by both levels of government.

## 3 Nature of Disputes

While it is not possible to present an exhaustive catalogue of possible disputes between the two levels of government, or between county governments *inter se*, examples of such disputes include those arising from (a) intergovernmental fiscal relations and fiscal resource allocation; (b) intergovernmental administrative relations; (c) intergovernmental service delivery in the context of certain shared functions; (d) jurisdictional and legislative relations; (e) shared or guaranteed investment programmes; (f) encroachment by the national government and public entities on functions assigned to county governments; (g) joint undertakings between national and county governments; and (h) joint undertakings between county governments in the context of the emerging regional economic blocks.

## 4 Conflict Management and Dispute Resolution Strategies

It should be appreciated that different intergovernmental conflicts and disputes call for different interventions. There are (a) conflicts and disputes that require political intervention and diplomatic engagement at the summit; (b) technical issues that are the prerogative of the Intergovernmental Relations Technical Committee; (c) disputes over want of clarity in law that call for the advisory opinion of the Supreme Court; (d) disputes that call for constitutional reference for interpretation; (e) those that have been the subject of litigation in ordinary courts; and (f) disputes best suited for market mechanisms, such as ADR, which guarantee party control, expedition, proportionality of costs in time and money, and consumer satisfaction.

## 5 The Place of ADR in Intergovernmental Dispute Resolution

Efficient service delivery by the two levels of government with competing, and often conflicting, interests can only be attained if there is in place an effective and efficient dispute resolution mechanism to resolve relational disputes (other than political or administrative conflicts). Such a mechanism must be

characterized by (a) expedition; (b) cost-effectiveness; (c) party autonomy (where both levels of government have an equal voice in the process); (d) complete independence from the parties; (e) quality procedures; (f) quality outcomes; and (g) party satisfaction.

Regretably, our judicial system is not reputed for delivering a justice system that can be identified with all of the foregoing characteristics. It is painstakingly slow, costly and inappropriate for parties who are bound under the Constitution to undertake service delivery in the spirit of consultation and cooperation. Litigation is inappropriate to resolve disputes between state organs that are in reality the aggregate of one whole, but for the governance model of devolution of power and the decentralization of service delivery.

Wy ADR? ADR is a set of market mechanisms that maximize (a) proportionality; (b) party control; (c) expedition; (d) quality procedures and outcomes; and (e) consumer satisfaction. Even though ADR is not the panacea for all conflicts and disputes, it nonetheless presents our state organs with practical solutions to disputes that plague our service delivery models. ADR Strategies include (i) negotiation; (ii) conciliation; (iii) adjudication; (iv) mediation; and (v) arbitration. These mechanisms are voluntary (i.e., contractual). With the exception of arbitration that culminates in an award, the others result in mutually generated outcomes.

## 6 The Institutional Framework of ADR in Intergovernmental Disputes

We are now faced with the critical decision as to the legislative and institutional structure of these mechanisms. No doubt, a legal framework is imperative. The question is what shape these will take. To my mind, the proposed regulations must necessarily be anchored on statute law, unless they are in the nature of guidelines, agreement or protocols that do not have the force of law. Such instruments would have little binding effect on Kenya's vibrant political environment. For this reason, I would recommend the enactment of an "Intergovernmental Dispute Resolution Act" backed by rules or regulations to guide procedure and practice.

Finally, a decision has to be made as to the nature of the dispute resolution institutions. Would this be a permanent or *ad hoc* tribunal? Would it be a standing tribunal of (say five) independent ADR practitioners drawn from registered ADR institutions? Should it be an independent court of arbitration with which ADR practitioners are required to be registered? What role would the MAC panel of mediators, the NCIA and the Chartered Institute of Arbitrators play in the process? How would mediators be appointed? These and many more questions beg for answers as we plot the roadmap to the proposed dispute resolution framework.

In constituting the framework, we must be cautious not to take the face value of the solitary provision in the Intergovernmental Relations Act that empowers the Cabinet Secretary to make regulations to this end. It should be borne in mind that regulations, which are in the nature of subsidiary legislation, cannot be formulated so as to add to, limit, modify or contradict substantive law. Notably, the 2012 Act contains no foundational substance to back such regulations, which should be suitably designed to give effect to statute law. As it is, we have no statute law that establishes an ADR framework for resolution of intergovernmental disputes. The legislative principle is that we begin with the statutory framework before going into rules or regulations that should only address themselves to the regulatory mechanisms of

carrying that statute law into effect. But is this the case with our draft regulations? No. It is not. We need to rethink our approach. For more information on the nature of subsidiary legislation, please read my

"Quality Control Guidelines for Drafting Subsidiary Legislation" available at http//:www.adrconsultants.law