



IGRTC
INTERGOVERNMENTAL
RELATIONS TECHNICAL
COMMITTEE

Consultation, Cooperation & Coordination in Devolution

THE IGRTC INTERGOVERNMENTAL RELATIONS WORKSHOP

*Grand Royal Swiss Hotel, Kisumu County
December 3-5, 2018*

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RAPPORTEURS' REPORT

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ANNEXES

2018

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ABBREVIATIONS AND ACRONYMS

ADR	Alternative Dispute Resolution
ASALs	Arid and Semi-Arid Lands
CADR	Centre for Alternative Dispute Resolution
CAF	County Assemblies Forum
CAF	County Attorney's Forum
CASB	County Assembly Service Board
CE	Civic Education
CGA	County Government Act
CIC	Constitutional Implementation Committee
CIDP	County Integrated Development Plan
CIOC	Constitutional Implementation Oversight Committee
CoG	Council of County Governors
CoK	Constitution of Kenya
CoK 2010	Constitution of Kenya 2010
CRA	Commission on Revenue Allocation
DFID	Department for International Development
IBEC	Intergovernmental Budget and Economic Council
IDEAS	Instrument for Devolution Advice and Support
IGRA, 2012	Intergovernmental Relations Act, 2012
IGR	Intergovernmental Relations
IGRTC	Intergovernmental Relations Technical Committee
KURA	Kenya Urban Roads Authority
KeRRA	Kenya Rural Roads Authority
MCA	Member of the County Assembly
MDA	Ministries, Departments, and Agencies
MoDA	Ministry of Devolution and Arid and Semi-Arid lands
NCA	National Construction Authority
NG-CDF	National Government Constituency Development Fund
OAG	Office of the Auditor General
OAU	Organization of African Unity
PFMA	Public Finance Management Act
PP	Public Participation
SAPAC	South African Association of Public Accounts Committees
Summit	National and County Government Coordinating Summit
SUNY-AHADI	The State University of New York-Agile and Harmonized Assistance for Devolved Institutions
TA	Transition Authority
UNDP	United Nations Development Program
USAID	United States Agency for International Development

PART I

RAPPORTEURS' REPORT

REPORT OF THE INTERGOVERNMENTAL RELATIONS WORKSHOP

*Grand Royal Swiss Hotel, Kisumu County
December 3-5, 2018*

Theme:

*Intergovernmental Relations Moving Devolution Forward
for Quality Service Delivery*



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INTRODUCTION

The first Intergovernmental Relations Workshop was held on December 3-5, 2018, at the Grand Royal Swiss Hotel in Kisumu County. The theme of the workshop was “*Intergovernmental Relations Moving Devolution Forward for Quality Service Delivery*”.

The workshop focused on intergovernmental relations (IGR) as a key driver to the success of devolution. It was convened to provide a forum for open discourse on issues of IGR during the first phase of implementation of the Constitution of Kenya, 2010 (CoK, 2010).

It was expected to bring out the role of IGR in a devolved system of governance, determine the adequacy of IGR legislation, identify salient emerging issues and recommend ways of addressing the successful implementation of devolution.


The deliberations, therefore, provided participants with a deeper understanding of IGR while appreciating the systemic challenges and issues emerging in the process of implementing devolution.

Experts with a vast knowledge of intergovernmental relations facilitated the presentations and discussions at the workshop. The key discussion areas covered the unbundling and transfer of functions, and alternative dispute mechanisms. Other discussions included intra and intergovernmental relations in public service delivery and the role of county government in civic and public participation. The experts and participants thereafter had the opportunity to identify and discuss the challenges before airing views and recommendations.

The workshop observed that the provision of the CoK, 2010, on the distinctiveness, interdependence, consultation, and cooperation, had not been fully embraced by both levels of government. The inadequacy to appreciate the need for consultation and cooperation had resulted in conflicts, tensions, and threats, calling for intergovernmental institutional interventions. It was also acknowledged that cooperative governance was critical for devolution to succeed. Participants stressed the need to address issues of clarity of functional assignments.

The workshop also covered weaknesses in the application of principles of public participation and civic education; inadequate capacity building and double oversight





of county governments. The discussants expressed the need to resolve issues of the unsuitable policy framework, laws, regulations, lack of uniform norms and standards, and lack of express legal provisions to address intra-governmental relations. In conclusion, the workshop also identified lack of IGRTC visibility and independence, as a major concern.

1.1 Background

The year 2018 marks Kenya's sixth year as a devolved system of governance. However, IGR, as an important aspect of devolution, has not been fully entrenched despite being recognized in several intergovernmental bodies as established by the Intergovernmental Relations Act, 2012 (IGRA, 2012). The Act established three distinct IGR organs, namely, the National and County Government Coordinating Summit (the Summit), the Council of Governors (COG) and the Intergovernmental Relations Technical Committee (IGRTC).¹

Section 11 of the IGRA, 2012, establishes the IGRTC as the Secretariat to the Summit and the Council of Governors (COG). Its major function is to coordinate intergovernmental relations as directed by the Summit and COG. Within its mandate and responsibilities, the Committee is expected to liaise, consult and create a cooperative environment for both the national and county governments.

However, in the first phase of devolution, the role of IGR was quite limited. Some stakeholders did not understand the functions, roles and responsibilities of IGR organs because many players in devolution had not appreciated the need for the two levels of government to work together in a cooperative and coordinated manner. It is noteworthy that the spirit of IGR is truly found in the objectives of intergovernmental structures established under the IGRA, 2012, Section 5.

1.2 Objectives

The overall objective of the workshop was to allow the stakeholders to deliberate on issues of intergovernmental relations in the Kenyan devolved system of governance.

The specific objectives of the workshop were to

- a) introduce the theory and practice of IGR,
- b) emphasize the role of IGR in a devolved system of governance,
- c) determine the adequacy of legislation relating to IGR,

¹ *Intergovernmental Relations Act, 2012*

- d) identify the salient and emerging issues in IGR in the Kenyan situation, and
- e) make recommendations on how emerging issues could be addressed.

I.3 Workshop Attendance

Over 100 participants took part in the workshop. In attendance included His Excellency, Hon. Peter Anyang' Nyong'o, Governor of Kisumu County; Charles T. Sunkuli, Permanent Secretary (PS), State Department for Devolution, Ministry of Devolution and ASAL; Hon. Jeremiah Kioni, Chairperson, National Assembly Constitutional Implementation Oversight Committee (CIOC); Professor Karega Mutahi, Chairperson, IGRTC; and Peter Leley, Chief Executive Officer IGRTC. Other workshop attendees included representatives from national and county governments, IGR organs, development partners engaged in devolution such as Department for International Development (DFID); Agile and Harmonized Assistance for Devolved Institutions (AHADI); Constitutional Commissions and Independent Offices; Civil Society Organisations and Non-Governmental Organisations; and the Academia.

A list of the participants is provided in Annex I



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OPENING REMARKS

In his welcoming remarks, Peter Leley said that the workshop offered an opportunity to discuss issues of IGR during the first phase of implementation of CoK, 2010. He urged participants to address critical issues at the working group sessions they would participate in during the three-day workshop. Subsequently, he appreciated the presence of each participant and asked that they introduce themselves.


Leley invited Professor Judith Miguda-Attyang', IGRTC Member and chairperson of both the IGRTC Summit and the Council of Governor's Affairs, Planning, Budgeting, and Finance Thematic Area, to articulate the objectives of the workshop. Professor Miguda-Attyang' appreciated the fruits and challenges that Kenya had experienced in devolution but observed that intergovernmental relations had not been tackled decisively, therefore creating gaps, friction and tension between the two levels of government. She noted that the substance of the workshop was to review how the two levels of government-related with each other. She expressed hope that participants would use their experiences to identify gaps and make recommendations that would move devolution forward for quality service delivery.

After presenting the objectives of the workshop, Prof Miguda-Attyang' asked participants to express their expectations.

Following is a summary:

- a) To learn how to harmonise the tensions between national and county governments in terms of existing institutions, policy, and legislative frameworks;
- b) To know to what extent IGRTC had worked towards solving conflicts experienced between the two levels of government;
- c) To clearly understand the roles and functions of county and the national governments;
- d) To know what devolved institutions had achieved in matters of handling special interest groups, such as women, youth, and persons with disabilities (PWDs);
- e) To have discussions about the gaps hindering the effective working of IGR institutions and frameworks; and
- f) To know ways of strengthening IGR committees and sectoral forums.

Prof. Attyang' observed that the expectations were in tune with the objectives of the workshop. She, therefore, expressed her confidence in the outcome.



Waceke Wachira, Chief of Party, AHADI, stated that the organization had provided much technical assistance to various institutions that are involved in intergovernmental relations and worked very closely with IGRTC since its establishment. She emphasised that intergovernmental relations were critical in ensuring the success of devolution.

Wachira was hopeful that the workshop would provide meaningful discussions around gaps that hindered the effective working of the IGR institutions and framework. As an example, she asked the participants to consider tackling the Alternative Dispute Resolution (ADR) framework that had been developed and was awaiting approval. She noted that the operationalisation of ADR mechanisms would help in avoiding costs litigations as experienced in the past.

In concluding, Wachira said the participants, who represented various institutions from the government, had the authority and ability to discuss critical issues outlined in the program and produce a clear action plan on how IGR could be strengthened.

Hon. Jeremiah Kioni pointed out that the CIOC of the National Assembly had been keen on taking stock of the devolution implementation process. He shared some challenges that CIOC had encountered during implementation of the first phase of devolution, pointing out, for example, that not many legislators were willing to be members of CIOC.

Hon. Kioni reiterated that the CIOC was committed to pursuing its mandate as outlined in the Sixth Schedule of the CoK, 2010, and would ensure respect for, adherence to, and implementation of the devolved system of government for the benefit of all Kenyans. He expressed the readiness of CIOC to offer any support regarding the amendment of the Constitution and legislation, emphasising the importance of IGRTC as an intergovernmental body whose mandate needed to be strengthened.

Hon. Kioni concluded by pointing out the need for a further amendment to the existing laws, noting that it was the responsibility of CIOC to advise on alterations within the Constitution.

Professor Karega Mutahi, the IGRTC Chairperson, explained the role of IGRTC in facilitating harmonious consultations between the two levels of government. He noted that there was an inadequate understanding of devolution because it was rolled-out with minimal preparation. He observed that there was a need to deal with intergovernmental relations following the provisions of Article 6 and 189 of the CoK, 2010, which he said provided for cooperative and consultative intergovernmental relations.

Prof. Mutahi reminded participants that the interdependence of the two levels of government was intended to have the national government provide policy interventions,

while county governments were largely implementers. This, he said, was deliberately designed to facilitate the delivery of quality services to the public.

Prof. Mutahi informed the workshop about the importance of ADR, which he described as a critical approach to resolving intergovernmental disputes. He observed that applying ADR mechanisms would save litigants the long and costly lawsuits because they apply friendlier negotiations, mediation and arbitration methods. He disclosed that IGRTC had been involved in 15 cases, of which eight had been resolved, six were pending and one referred to court.

He appealed to IGR stakeholders to always uphold the importance of ADR as a means of resolving intergovernmental disputes. This will avoid delays in resolving differences so that the quality of service delivery is enhanced.


Prof Mutahi concluded his remarks by affirming the commitment of IGRTC to work with the two levels of government. He noted that they were ready to engage in the resolutions of issues affecting intergovernmental relations. Thereafter, he welcomed the PS, Charles Sunkuli to make the ministerial official opening remarks on behalf of Hon. Eugene Wamalwa, CS, Ministry of Devolution and the Arid and Semi-Arid Lands (ASALs).

Sunkuli said that the workshop would provide a forum to take stock of how much had been achieved during the implementation of devolution. He hoped the discussions would bring light to issues and recommend ways of improving service delivery in devolution.

In the official opening remarks read by Sunkuli, Hon. Wamalwa acknowledged that there had been commendable progress in implementing devolution and in particular, improving intergovernmental relations between the national and county governments. He informed the audience that the national government had prioritized the Big 4 Agenda as a guide to development during the third Medium-Term Plan period of 2018-2022.²

He listed the prioritized areas as affordable and decent housing, universal health coverage, food and nutritional security, and employment creation through manufacturing. These, he pointed out, were devolved functions and their effective implementation would, therefore, require close consultations and synergy between the national and county governments. Therefore, harmonious intergovernmental relations would play an important role in their realization. The CS subsequently announced that the Ministry would facilitate interactions between the two levels of government through convening various intergovernmental sector forums to enhance consultation and coordination.

² <http://www.mtp3.go.ke/portal/data/apis/uploads/site/downloads/CONCEPT%20NOTE%20MTP3.pdf>



Hon. Wamalwa shared challenges experienced during the first term of devolution and noted that resolving them would make county governments effective in discharging their constitutional mandates. He particularly pointed out pending transition matters, which had hindered county governments from exploiting their full potential. Residual functions were to be finalized during the transition period and the CS said that the Ministry would collaborate with the institutions involved to have them finalized. Of concern, he said, was the unbundling of all functions assigned to county governments. This notwithstanding, Hon. Wamalwa noted that success stories of county management needed to be documented, recognized and concretized as reference points for peer to peer learning and capacity building.

In his closing remarks, Hon. Wamalwa said the Ministry would continue to play the role of providing policy direction and the development of requisite legislative frameworks to support the performance of county governments through capacity building and technical assistance. Hon. Wamalwa expressed confidence that with the various strategies developed by the Ministry, guided by the Policy on Devolved Government, and with effective intergovernmental relations, the devolved system of government would continue to deliver services to Kenyans.

With these remarks, he declared the Intergovernmental Relations workshop officially opened.

Kisumu Governor Prof. Anyang' Nyong'o delivered the keynote address immediately after. He reminded the workshop of the provisions of the CoK, 2010 (Art. 2 and 3), that emphasized the sovereignty of the people of Kenya, who had delegated the authority of governance to the democratically elected leadership. Leaders, he said, were, therefore, expected to exercise the delegated authority to realize service delivery and good governance to the people of Kenya.

Prof. Nyong'o said the Constitution had introduced the two levels of government, which are distinct and interdependent, primarily to bring governance to the doorstep and improve service delivery by involving the public in decision-making. He explained that seamless interdependence of the two levels of government was dependent on intergovernmental relations and that all the responsible institutions had the enviable role of facilitating the alignment and coordination of both administrative and governmental systems. The attainment of a seamless interdependence between the two levels of government, the Governor stressed, would lay a strong foundation for building the economy.

Prof. Nyong'o said he was convinced that devolution was truly the next best thing that happened to Kenya after penicillin and probably the Internet. He noted that the early

years of devolution had provided a learning platform that must be embraced to propel devolution experience. He, therefore, observed that there was a need to take stock of the first phase of the devolved government as a learning curve and for laying out the foundation for taking off in the second phase.

The Kisumu Governor encouraged Kenyans to enumerate the successes of devolution and be cognizant of the challenges that had continued to stifle its progress. He urged them to confront the reality that devolution continues to be dogged by the impact of sceptics, whose behaviour affected societal responses.

He named some of the challenges, including deliberate efforts targeting resource suffocation to devolved services, and inadequacy of human capital, the latter of which he said accounted for about 60 per cent of the hiccups in devolution.

Prof Nyong'o observed that the workshop presented an opportunity to analyze and determine the efficacy and adequacy of the legislation relating to devolution. At the same time, he called on the actors in both levels of government to be more conversant with the whole concept of intergovernmental relations. He advocated that it was the humble duty of county governments to continuously offer support to intergovernmental relations institutions, particularly the IGRTC, which played a critical role as the secretariat of the CoG and the Summit.

In concluding, Prof Nyong'o stated that the role of IGRTC in making devolution a success could not be overemphasized and therefore, it was incumbent upon both levels of government to provide unequivocal support to its activities as envisaged in law. He welcomed the participants to indulge in the opportunities Kisumu County had to offer.

The full speeches during the opening ceremony are provided in Annexe 2

2.1 Resource Persons

The workshop was facilitated by experts in devolution, constitution and intergovernmental relations matters. The experts were in two categories, namely, paper presenters and panel discussants.

a) Presenters

The following papers were presented and discussed during the workshop:

- a. Dr Mutakha Kangu facilitated three topics on i) *International Relations – Concepts and International Best Practice: The Kenyan Experience*; ii) *Legal Gaps in Devolution in Kenya: Challenges and Legal Gaps posed by Emerging Issues in Devolution*; and iii) *The Role of County Governments in Civic Education and Public Participation*.

- b. Kamotho Waiganjo facilitated the topic of *Costing, Unbundling, and Transfer of Functions in the Kenyan Devolved System*.
- c. Andrew Waruhiu facilitated discussions under *Alternative Dispute Resolution: Effect of litigation on IGR in the Devolved System of Governance – Efforts towards Avoidance*.
- d. Prof. Peter Wanyande facilitated the topic: *Intra- and Inter-governmental Relations in Public Service Delivery – Legislative and Functional Interface between the Senate and the County Assembly in the Oversight Role*.

b) Panel Discussions

The panel discussions, which brought together key actors in the first phase of implementation of the devolved system of governance, were facilitated by the following personalities:

- i) Hon Ekwe Ethuro, former speaker of the Senate.
- ii) Kinuthia Wamwangi, who chaired the defunct TA.
- iii) Hon Albert Kochei, former Speaker, Elgeyo-Marakwet County Assembly.
- iv) Peter Leley, former County Secretary, County Government of Uasin Gishu and Chairperson, County Secretaries' Forum.
- v) Joseph Koech, former County Clerk, County Government of Baringo.
- vi) Prof Karega Mutahi, Chairman, IGRTC.

c) Overall facilitator

Prof Winnie Mitullah, Director of the Institute for Development Studies, University of Nairobi, was the overall workshop facilitator. She was assisted by Dr Joseph Kosure, a resident consultant with IGRTC

d) Rapporteurs

The rapporteur team members were

- a) Fiona Okwiri,
- b) Merculine Mancha,
- c) Paschaline Basil Bengé, and
- d) Phylis Muturi.



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EXPERT PRESENTATIONS

The presentations were done by four experts with vast knowledge and experience in the sessions they covered. Each session allowed the participants to identify challenges and gaps, and make recommendations.

Dr Kangu introduced his presentation by defining intergovernmental relations as interactions between governments within a non-centralized system of governance.

3.1 Intergovernmental Relations by Dr Mutakha Kangu

The IGRA, 2012, is Kenya's legislation for ensuring smooth operation between national and county governments, created by the Constitution. Whereas many provisions in the Constitution inform the IGR, the presenter emphasized that Article 6 (2) was particularly crucial. This article states that "the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations based on consultations and cooperation."

Dr Kangu stressed that in the first five years of implementing the new Constitution, Kenya experienced challenges in understanding the cooperative system of intergovernmental relations as opposed to a competitive one. These experiences indicated that an effective working system of intergovernmental relations would be critical in ensuring that devolution worked.

3.1.1 Concepts and International Best Practice

Dr Kangu discussed concepts and international best practices in intergovernmental relations.

He indicated that intergovernmental relations constituted one of the key structural features of a federal or devolved system of government and took a variety of forms, including vertical, horizontal, vertical and horizontal, formal, informal, and formal and informal interactions between and among levels of governance.

He discussed modalities of intergovernmental relations as cooperative, exhibiting processes such as consultation, information sharing, co-decision and coordination. However, these modalities were prone to tension, collusion, competition, control, and coercion. For example, instead of cooperating, Members of County Assembly (MCAs) and the Senate may seem to collude against the county governors and the county

executives. Dr Kangu, therefore, emphasized the need for a federal or devolved system that combined self-rule at the local level, with the shared rule at the national level.

Dr Kangu gave examples of some of the best practices in intergovernmental relations. These included several mechanisms, instruments, and processes for them to succeed. For example, the South African national speakers' forum and cooperation among legislative committees and the South African Association of Public Accounts Committees (SAPAC) follow a bicameral legislature mechanism that links the two levels of governmental relations. South Africa has a unique concept of an extended cabinet that includes heads of provincial governments, where both formal consultations among heads of government at both levels and sectoral consultations are common.

3.1.2 The Kenyan Experience

Dr Kangu said that the IGR was necessary for managing tensions, conflict and threats that affected interactions between the two levels of government. In the Kenyan experience, devolution was founded upon the concept of self and shared rule, which necessitated intergovernmental relations. In particular, Dr Kangu observed that the CoK, 2010, establishes a cooperative devolved government rather than a competitive one. The national and county governments are therefore required by the Constitution to carry out their functions through cooperation and consultation.

The Constitutional foundation of IGR is found in Articles 6(2) and 189(6) of the Constitution. Article 6(2) states that “the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations based on consultation and cooperation”. Article 189(6) states: “In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including using procedures provided under national legislation. Unfortunately, over the last years of implementation 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.

Dr Kangu observed that a key intergovernmental relations institution was the IGRTC, a body that was formed by an Act of Parliament to establish a framework for consultation and co-operation between the national and county governments and amongst county governments. He explained that IGRTC was mandated to take over the residual functions of the defunct TA as envisaged under section 12 (b) of the IGR Act. The core functions of the IGRTC are outlined in Section 12 of the IGRA, 2012.

3.1.3 Legal gaps in devolution in Kenya and other emerging issues

On legal gaps and emerging issues in devolution, Dr Kangu observed that during the process of implementing the new system of governance, several gaps and challenges had emerged.

He highlighted key recommendations for areas with legal gaps that required to be addressed through legislation as follows:

- a. Clarification of functions and powers, through national legislation. The legislation could be entitled “The Functions and Powers Act”, and could provide for
 - i) clarification of functions and powers,
 - ii) creation of three lists of functions and powers, namely national government exclusive functions and powers, county government exclusive functions and powers, and national and county governments’ concurrent functions and powers.
- b) A framework for national government assignment of additional functions to county governments. This would give effect to Article 186(3), 183(1) guided by principles in Article 201(d), and subsidiarity as provided in Articles 174 and 187.
- c) A structure that would give effect to the emerging regional economic blocs. Dr Kangu highlighted that according to Article 189(2), several counties pooled to form regional economic and development blocs as joint authorities and entities. The process of forming and operating such blocs could be structured and facilitated by national legislation.

In concluding the presentation, Dr Kangu gave views on the challenges faced in the unbundling and transfer of functions in the health, road, housing and water sectors. He noted that the management of the transition to the devolved governance was a complex process involving transition from an old to a new constitutional dispensation and transition from a highly centralized system to a devolved system of governance.

In the process of unbundling and transfer of functions, some senior government officers used the complexity of the process to claw back the gains that the people had made. Dr Kangu reminded the participants that the development of draft laws had in the past relied a lot on the very institutions that were supposed to be deconstructed or reformed. Thus, vested interests in the old order interfered and threatened the devolution implementation process. Dr Kangu gave several examples to this. First, the National Assembly reorganized the then Constituency Development Fund (CDF), which had been declared unconstitutional. The Assembly re-named the fund as National Government

Constituency Development Fund (NG-CDF) to make it relevant to the mandates of MPs. Secondly, national institutions like Kenya National Highway Authority (KENHA), Kenya Rural Roads Authority (KeRRA) and Kenya Urban Roads Authority (KURA) continued to perform functions that were devolved. Thirdly, several senators had conflicting roles, as they eyed the position of the governor in their respective counties.

3.1.4 Challenges, Recommendations and Way Forward

The session identified and discussed several challenges related to the topic and made recommendations.

Challenges

- Limited understanding of the various aspects of the devolved system of governance.
- Vested interests from political leadership that led to poor service delivery.
- Inappropriate procedures of transfer of functions and powers.
- Misuse of financial resources.
- Double oversight by the Senate and the county assemblies.
- Strained relations between the Senate and the county governments.
- Limited understanding of the role of the judiciary in the enforcement of county laws.

Recommendations

- Capacity building for legislators.
- The need to review and amend the old legislation to align it with the new constitutional order.
- The undertaking of any necessary constitutional amendments.
- Establishing government printers in the counties for easier accessibility of official government documents.
- The need to start a process of reviewing the various legislations touching on intergovernmental relations.
- Enforcement of laws that relate to the role of the judiciary in the enforcement of county laws.
- Enforcement of county laws that relate to prosecution powers and their role in the enforcement of county laws.
- The need to start a process of reviewing the various legislations touching on intergovernmental relations to strengthen IGR institutions such as the IGRTC.



In conclusion, the workshop felt that all the legal gaps that affected devolution could easily be addressed through intergovernmental relations and intergovernmental agreements if the system was embraced and properly understood.

3.2 Costing, Unbundling, and Transfer of Functions in the Kenyan Devolved System by Kamotho Waiganjo

In his presentation, Kamotho Waiganjo argued that one of the greatest highlights of the CoK, 2010, was the redefinition of the exercise of state power inter alia, through the creation of the system of devolved governance that had transformed the power landscape. He observed that the Constitution called for a progressive and asymmetrical transfer of function from the national level to the county governments.

Essentially, the transfer process would be informed by an analysis of the nature and content of the function to be transferred, an assessment of the resources necessary to implement the function and by a county's state of preparedness. Function unbundling, costing, capacity assessment and capacity building would ideally precede the function transfer process, said Waiganjo. He explained that function analysis involved an evaluation of the nature of the function while unbundling was the deliberate exercise aimed at unravelling the true components of these functions before their transfer from the national level to the county governments. Waiganjo described the process as critical because it enabled the effective allocation of the funding that was necessary to facilitate the performance of each component of the disaggregated functions. Costing of functions, therefore, involved determining the financial resources necessary to ensure effective implementation of the transferred function.

Waiganjo noted that the process of unbundling and the subsequent transfer was not effectively undertaken. As a consequent, the country witnessed friction, especially in financial resourcing of transferred functions. It had, therefore been the contention of the devolved units that historical allocation as a basis for revenue sharing did not truly reflect the true cost that enabled effective service delivery.

3.2.1 Status of Functions Transfer

Waiganjo explained that costing and transfer of functions from national or central governments to the sub-national units had always been undertaken through negotiated political processes as opposed to a proper analytical assessment of the true cost of the function. He stated that ideally, the costing of functions and subsequent release of funds for their performance should reflect the reality of the functions. In this case, Waiganjo said that the assigned funds for implementation of the function should be adequate for

the performance of that function to ensure continued service delivery by the receiving level of government.³

3.2.2 Challenges, Recommendations and Way Forward

The session identified and discussed several challenges and made recommendations related to the topic.

Challenges

- Some of the functions that had been transferred to county governments were still being performed by the national government.
- Cumbersome procurement processes.
- Functions were devolved to the counties without adhering to the “Principle of Resources Follow Functions”.
- Corruption.
- Lack of professionalism in the manner in which the legislators carried their duties.
- Limited use of ADR mechanisms and consequent high cost of judicial litigation.
- Limited application of norms and standards in service delivery.
- Over-reliance on historical data that may not reveal the true value of costs associated with implementation of the functions assigned to the county government.

Recommendations

- Intergovernmental institutions such as IGRTC, IBEC, CoG, and the Summit, should be adequately funded for them to deliver their IGR mandate effectively.
- All laws relevant to devolution should be aligned to the CoK.
- It is necessary to strengthen sectoral forums to enable the two levels of government to deliberate on issues of common interest.
- Prioritization of services, including the timely release of funds and required resources.
- Unbundling the functions of state-owned corporations that continue to perform emerging IGR issues.
- Review of Senate powers over laws affecting counties.
- Further analysis and unbundling, especially of concurrent functions and state corporation functions.

³ Articles 186, 187



Capacity building for function performance.

- ♦ Review of the current status to determine the scope for Article 187 of the Constitution.

3.3 Alternative Dispute Resolution by Andrew Waruhiu

Andrew Waruhiu presented a paper on Alternative Dispute Resolution (ADR) as a means of settling disputes through a consensual process. He explained the various aspects of ADR mechanisms that are used to settle disputes. The mechanisms include early neutral mediation, where both parties trust the expert called upon. Negotiation, conciliation, and mediation are considered to be formal processes where the parties involved reach an agreement, whereas, arbitration includes expert determination with proof of documentation. He defined mediation-arbitration as a hybrid of the two mechanisms.

Waruhiu named the legal provisions that to support ADR mechanisms and applications, as CoK, 2010; IGRA, 2012; Urban Areas and Cities Act 2011; County Governments Act, 2012 and Public Finance Management Act, 2012; Arbitration Act, 1995 (Kenyan); Arbitration Act, 1996 (English); and Civil Procedure Act.

3.3.1 Effect of litigation on IGR in the devolved system of governance

Emphasizing the importance of intergovernmental relations, Waruhiu stated that during the first phase of devolution, county governments and the national government mostly used litigation to settle their disputes, which was costly and negatively impacted on resources allocated for development and service delivery. He concluded his presentation by highlighting the types and volume of cases that had been witnessed in the devolved system of governance. The cases involved disputes between national and county governments, county governments and national government agencies. Others involved the National Assembly and the Senate, and state agencies. He noted that these cases could have been cost-effectively resolved through ADR mechanisms.

3.3.2 Challenges, Recommendations and Way Forward

The session identified and discussed several challenges and made recommendations related to the topic.

Challenges

- Inadequate application of constitutional and legal provisions on ADR, on dispute resolution mechanisms.
- Institutional conflicts and interests.
- Conflicts arising due to the transfer of power and assets.

- Political agenda with vested interests.
- Inadequate knowledge of the clarity of powers and procedures in intragovernmental disputes.
- Lack of data on cases filed by the various intergovernmental bodies.
- Increase of cases involving national and county governments.
- Intergovernmental cases involving the National Assembly and Senate, with a majority of these filed by the Council of Governors.
- Over-reliance on outside counsel.
- The cost of undertaking litigation is not only in monetary terms but also in terms of opportunity and indirect costs.

Recommendations

- IGRTC should create public awareness to demystify its role.
- Intergovernmental relations institutions, including IGRTC, COG, IBEC, Summit, Senate and National Assembly, should be strengthened for effective conflict management and ADR.
- Public awareness should be created in the counties to educate county government officers and the public on the benefits of ADR. This will help to popularize and legitimize ADR.
- Legal reforms to make ADR a prerequisite for judicial proceedings should be considered.
- IGRTC should promote the use of ADR mechanisms in resolving IGR disputes.
- IGRTC should engage in aggressive civic education to create awareness of its role and mandate.
- IGRTC should establish a resource and document management system to take stock of cases before the court and ADR mechanisms, to accurately advise on dispute avoidance and early intervention measures.
- IGRTC should support the development of national capacity, accreditation, and learning framework, for effective alternative disputes arbitration and orderly sector development.
- The integrity of lawyers should be enforced to avoid a collision.
- Capacity building through training of experts; establishment of structures and institutions that support ADR; the development and implementation of programs, plans and actions for the training of government officers on ADR; boosting knowledge for conflict management and ADR.

3.4 Inter and Intra-Governmental Relations in Public Service Delivery by Prof Peter Wanyande

Prof Peter Wanyande introduced his presentation by defining IGR as interactions occurring or existing between different branches or departments of government. It is an important interaction between governmental units of all types and levels. He also noted that IGR was an evolving system of institutional co-operation that sought to address the relations of equality and interdependence as defined by the Constitution. Prof. Wanyande observed that there were emerging issues and challenges that faced IGR. He stated that IGR was one of the least understood aspects in the devolved system of governance, and advised the participants on the need to sensitize Kenyans on what IGR entailed, and its significance in the implementation of the CoK, 2010, towards public service delivery.

Prof Wanyande explained that IGR required interdependent relations among various institutions of government as well as the coordination of public policies among different levels. The concept is commonly used to refer to relations between and within levels of government that facilitate the attainment of common goals through cooperation and the interactions between the different levels of government. The concept of cooperation is central in IGR.

Prof Wanyande observed that public service responsibilities were divided across governments and each level had to operate within its jurisdiction, taking into consideration the principles of cooperation and coordination. He noted that cooperation should be geared towards sustainable development and the integrated delivery of services by an inter-governmental system. This system should ensure mutual consultation, coordinated strategic planning, accountability for performance, and expenditure in terms of legislation.

He stated that no single level of government could deliver its mandate and vision of the nation on its own, and emphasized the importance of cooperation and coordination as the pillars of an effective IGR in public service delivery.

Prof. Wanyande argued that the inefficiency of institutions provided with the mandate to carry out IGR could be attributed to the lack of capacity in terms of human resources, equipment, office space and funding, which brought about negative attitude and poor work ethics. For instance, conflicts between the National Assembly and the Senate affected processing and passing of the bills. NG-CDF had also been identified as unconstitutional, hence its budget reduced. He noted that there was a need to understand these issues to find solutions in intra and inter-governmental relations.

Prof. Wanyande observed that delayed transfer of financial resources to counties also led to delayed service delivery. He recommended that constructive ways to release funds from the national treasury would be sought through

- enforcement of interdependence between the national government work on policy formulation and the counties as the implementers ;
- enforcement of policy interdependence;
- respect for the rule of law and the Constitution;
- sensitizing the public on matters of intergovernmental relations through forums; and
- enforcement of Article 6(2) CoK, through consultation, cooperation and coordination between the two levels of government.

He concluded his presentation by recommending that civil society organizations should take the lead in monitoring how the two levels of government-operated. This included identifying areas which could be improved to enhance service delivery.

3.4.1 Legislative and Functional Interface between the Senate and the County Assembly in their Oversight Role

Prof. Wanyande referenced Article 93(1) and (2) of the Constitution respectively, stating that “Parliament of Kenya consists of the National Assembly and the Senate. The National Assembly and the Senate shall perform their respective functions following the Constitution”. He further referenced that the Senate represented counties and served to protect the interests of the county governments as set out in Article 96(1) of the Constitution.

Prof. Wanyande pointed out the roles of the Senate and the County Assembly as set out in Articles 96 and 185 of the Constitution respectively. He noted that the Senate and the County Assembly played important roles. He described the roles of the Senate as representing counties, participating in the law-making function of the Parliament by considering, debating and approving Bills concerning counties, determining the allocation of national revenue among counties and participating in the oversight of State officers.

He described the roles of the County Assembly as making of laws that would be necessary for, or incidental to the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule. The County Assembly may exercise oversight over the County Executive Committee and any other executive organs. He also noted that the County Assembly may receive and approve plans and policies for management of the county’s resources and development and management of its infrastructure and institutions.

3.4.2 Challenges, Recommendations and Way Forward

The session identified and discussed several challenges and made recommendations relating to this topic.

Challenges

- The limited capacity of institutions provided with the mandate to carry out IGR roles.
- Numerous conflicts between the National Assembly and the Senate.
- Delayed transfer of financial resources to the counties.
- Double oversight role played by the Senate and the county assemblies.
- Misuse of national and county resources.
- Mistrust and tensions among members of the Senate and the County Assembly and others.
- Inadequate allocation of resources between national and county government.

Recommendations and Way Forward

- a) Build capacity of county staff in line with the Fourth Schedule of the Constitution for them to carry out their roles effectively.
 - b) Establish a joint oversight committee of Senate and County Assembly.
 - c) Inculcate a culture of constitutionalism and professionalism among the legislators.
 - d) Continuously promote intergovernmental relations as a major factor in the constitutional dispensation.
- ◆ Protect the CoK, 2010.

3.5 The Role of County Governments in Civic Education and Public Participation by Dr Mutakha Kangu

Dr Mutakha Kangu introduced his presentation by defining Civic Education (CE) and Public Participation (PP). He defined CE as all the processes that affect people's beliefs, commitments, actions and capabilities as members or prospective members of communities. He explained PP as the vision of democracy, in which citizens were active in public affairs, promoting their notion of justice and good policies. This would include engaging in dialogue with the legislature and the executive to enhance public deliberation and democracy.

3.5.1 Overview of Civic Education and Public Participation

In his presentation, Dr Kangu gave his views on civic education, in which he observed that it was not limited to schooling or educating the youth and children. He noted that it included family, governments and mass media, and was a process.

Dr Kangu quoted Jennifer Rieber McCracken, who defined civic education (also known as citizen education or democracy education), as the provision of information and learning experiences to equip and empower citizens to participate in democratic processes. He opined that education could take very different forms, including classroom-based learning, informal training, experiential learning, and mass media campaigns.

He further broadened his views on CE and observed it was an activity that employed different methods. Dr Kangu said that CE was often used in combination with other participatory governance tools, noting several benefits it carries, such as

- a) equipping citizens with civic values and virtues,
- b) creating awareness for disadvantaged groups such as the poor on their social and democratic rights,
- c) overall improvement of the democratic functioning of government at the local level,
- d) creating a positive disposition of interpersonal values to the public,
- e) community involvement,
- f) preserving and enhancing democracy by cultivating care and concern for the public, and
- g) equipping the public with knowledge and skills to actively participate in issues of devolved governance.

Dr Kangu further explained CE as a process through which PP could be achieved and stated that CE prepared and equipped citizens to participate in governance affairs. He referenced Jennifer Reiberstates, who averred: “The overall goal of CE is to promote civic engagement and support democratic and participatory governance”.

Dr Kangu opined that the idea behind CE was to promote the demand for good governance as an informed and engaged public, as a necessary complement to improve the practice of good governance. Section 99 (1) of the County Government Act, 2012 provides for CE and PP and stipulates: “The purpose of CE under this Act is to have an informed citizenry that actively participates in governmental affairs of the society based on enhanced knowledge, understanding, and ownership of the constitution.”

Dr Kangu observed that there were various mechanisms for PP, which included community forums, civic education, media, town hall meetings, public barazas, Bunge and mashinani. He emphasized that effective PP was based on good CE, and indicated several areas where PP was required, such as public finance management, performance management, development of policies and legislation, implementation of the Bill of Rights, and service delivery.

In conclusion, Dr Kangu recommended that the laws and regulations developed by the County Assembly should promote and facilitate CE and PP in development plans and policies, to achieve effective service delivery.

He observed that the result of a good and well-executed CE and PP would be increased participation in political processes by the public.

3.5.2 Challenges, Recommendations and Way Forward

The workshop identified and discussed the challenges and made recommendations relating to this topic as below.

Challenges

- Frustration is getting the right audience to participate and contribute to pertinent issues.
- Budgetary constraints to afford public participation forums.
- Conflict in the clarity of roles between the two levels of government.
- Inadequate regulations to guide civic education, which are conducted on an ad hoc basis.
- Weak leadership.
- Wrong attitude by the public, towards civic education and public participation.
- Poor coordination and collaboration between the County Executive and the County Assembly.
- Limited technical capacity.
- Poor feedback mechanisms.

Recommendations

- Develop legislation, norms, standards, and administrative procedures to guide CE and PP.
- Encourage political tolerance.
- Develop feedback mechanisms to give people confidence in the public participation processes.
- Undertake regular data collection, collation, and analysis to inform the status of both CE and PP and review them from time to time.
- Return of informal 'kamukunji' and ensure that they are not driven by allowances.
- Benchmark on best practices of public participation: For example Makueni County, where the deputy governor commissioned an 80-metre Kalimani drift and Ilikoni ECDE centre in Mtito-Andei ward, Kibwezi-East Sub-County. This was initiated through public participation. The drift marks a great milestone towards establishing linkages in different areas of the county.
- Establish e-platforms for PP.
- Establish affirmative action programs to ensure women, youth and marginalized communities are effectively involved.
- Develop sustainable government-public partnerships.
- The national and county governments' leadership should undertake stakeholder mapping throughout the counties to gain confidence from the citizens.



4

PANEL DISCUSSIONS

This session was facilitated by Prof. Winnie Mitullah, who led the six panellists to share their experiences and lessons learnt in IGR during the first phase of devolution.

The first panellist was Hon Ekwe Ethuro, former speaker of the Senate, who shared his experiences by pointing out that before the CoK, 2010, Kenya had a skewed development trajectory. It was clear that the country needed devolution. He noted that in his capacity as the first speaker of the Senate, his task was to promote intergovernmental relations, which at the time were contested, due to a lack of knowledge on devolution.

Hon. Ethuro further shared several issues that emerged during the first five years of implementing devolution and said one of the issues was on the life of the Commission for the Implementation of the Constitution (CIC).

In his view, he believed that the CIC needed more than five years and at the same time the Transition Authority (TA) needed more than three years in office. However, the politics of the day could not consider any additional period for the two constitution implementation agencies.


The other challenge was that the Senate did not get the required support to access adequate financial resources from the national government. There was also a failure by the national government to honour the mandate of the Senate. For example, Bills that were related to the counties would be sent to the National Assembly without consultation with the Senate. This negated the principle of separation of powers.

In conclusion, Hon. Ethuro recommended building synergies to create conducive working relations between IGRTC as the secretariat, the Summit and CoG.

The second panellist was Kinuthia Wamwangi, who had been the chairman of the TA. He narrated how TA had come into existence through section 4 of Transition to Devolved Government Act (TDGA), 2012. This was a statutory body with the mandate of facilitating and coordinating the transition to the devolved system of government.

Wamwangi further said that the Authority had started on a difficult note because citizens were not knowledgeable about what devolution was. He narrated what it took to sensitize the public and other stakeholders. The exercise was characterized by benchmarking and countrywide visits.

The Authority recruited a total of 650 Hansard resource persons and clerks countrywide,



among others. He disclosed that the other challenge the Authority faced included situations where functions would be transferred without consultation with the Authority.

In his conclusion, Wamwangi said there was a need to embrace consultation and cooperation among intergovernmental institutions.

The third panellist was Hon Albert Kochei, former Elgeyo Marakwet speaker. He too had a fair share of challenges as the speaker. He narrated the challenges of recognition and conflicts among members. For example, the County Assembly and the Senate did not agree on their functions and mandates. This strained service delivery to the public. Hon Kochei concluded by recommending that IGRTC should oversee and resolve effectively, disputes witnessed in intra and inter-governmental bodies, too protect the goodwill and deliver on the promise of devolution in Kenya. He further recommended that ADR culture should be cultivated to resolve issues before they escalated.

The fourth panellist was Peter Leley, who shared his experiences, issues, and challenges as a former County Secretary (CS) of Uasin Gishu and chairperson of the County Secretaries Forum.

He mentioned operational challenges, which included human resources, planning, budgeting, and finance. For example, employees lacked the relevant technical skills in matters of devolution, he said. Further, he informed the workshop that during the hiring process, there was no clarity or standards on issues of human resource. This was because there were only three categories of staff: Former local authorities employees, deployed staff by TA and newly recruited staff by the county governments. The Kenya School of Government (KSG) later addressed these challenges through training.

Another challenge that Mr Leley witnessed was the collapse of some projects in the counties due to misuse of funds. This had led to development partners withdrawing their funding due to suspicions, lack of trust and wrangles during project implementation. He concluded by observing that devolution had strengthened institutions by continuous capacity building and domesticating laws, therefore creating resilient agencies.

The fifth panellist was Mr Joseph Koech, who shared his experience as the first clerk of the County Assembly of Baringo. He discussed several challenges he faced, such as misuse of funds from the county to support expenses that were not approved in the budget by the County Assembly. Members were driven by allowances as opposed to a commitment to performing their responsibilities.

Mr Koech concluded by recommending that IGRTC should improve its communication

strategy and sensitize the public on its core functions for better service delivery. He further noted that IGRTC had not been vibrant, giving reasons why cases had been taken through the court system, rendering the process a costly affair.

The sixth and last panellist was Prof Karega Mutahi, who observed that the process of devolution was complex. Narrating his experiences from the central government side, he appreciated the support of the former head of public service, Mr Francis Muthaura, in making sure that the devolved system of governance was successfully introduced.

However, the system faced major challenges, as the public did not understand devolution. This required that the public be sensitized on devolution. Another challenge was the lack of consultation within levels of government. For example, governors were impatient and could not wait for structures to be put in place. Furthermore, there was a challenge of funding devolution activities. For example, there were cases where counties could not even afford to purchase the required equipment necessary for executing legislative traditions, such as the acquisition of flags and maces for county assemblies. Prof. Mutahi concluded his experience by appreciating that despite devolution having had teething problems, it had greatly improved.

4.1 Reactions from the Plenary

- a) There was a feeling that the panellists should not have personalized their experiences, but should have institutionalized them.
- b) A database should be created to reduce unnecessary repeat benchmarks in the same places and on the same issues.
- c) The county attorneys should coordinate with IGRTC and advise the counties on the use of ADR mechanisms.
- d) ADR mechanisms should be advocated as the first step of resolving disputes rather than litigation.
- e) Engagement with the National Treasury should be intensified to access finances for implementation of budgeted activities.
- f) It is necessary to sensitize leaders not to empower themselves at the expense of the public.
- g) There was a need to embrace regional economic blocs and the Big Four Agenda in the counties.



5

OFFICIAL CLOSING REMARKS

Ambassador Boaz Kidiga Mbaya, Commissioner with the Privatization Commission, officially closed the workshop. He appreciated the fact that participants were fully engaged and further recognized the good organization of the workshop. He thanked the participants for their contributions, observing that the workshop had achieved its objectives.

Amb. Mbaya encouraged IGRTC to actualize its action plan based on the resolutions made during the workshop. He noted that public policy had three components – consultation, representation and participation – and that consensus could not be achieved through hostility but through discussions and constructive engagement. He supported the proposal that IGRTC should be given independence and needed to be vibrant and visible.





PART 2

PRESENTATIONS



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THE CONCEPT AND COMPARATIVE BEST PRACTICES IN INTERGOVERNMENTAL RELATIONS: LESSONS FOR KENYA



INTRODUCTION

Kenya adopted a new Constitution with devolution of power, responsibilities and resources as one of the major changes it introduces. The experience of the past five years since the first elections under the new Constitution was held indicates that an effectively working system of intergovernmental relations will be critical in making devolution work for Kenyans. This paper examines the concept of and comparative best practices in intergovernmental relations, to provide lessons for Kenya as it implements and works with its devolved system of government. The paper examines the definition, nature and necessity of intergovernmental relations; the factors that necessitate and influence intergovernmental relations; comparative intergovernmental relations mechanics and processes; a framework for conducting intergovernmental relations; how to use such framework to address some of the emerging devolution issues. The examination of each of these issues will revolve around the consideration of the conceptual framework; the comparative best practices; and how Kenyans under the Constitution of Kenya, 2010 and other legislation have handled the issue.



2

DEFINITION OF INTERGOVERNMENTAL RELATIONS

Intergovernmental relations constitute one of the key structural features of federal or devolved systems of government. They are a dimension of every federal or devolved system that is often underappreciated (Poirier J and Saunders C, (2015, p. 1). Intergovernmental relations are defined as interactions between and among governments within a non-centralized system of government (Poirier J and Saunders C, (2015, p. 442). Anderson, W, (1960, p.3) refers to intergovernmental relations as “an important body of activities or interactions occurring between governmental units of all types and levels within the federal system”.

A definition of intergovernmental relations would be incomplete if attention is not paid to the role of people or government officials in these relations. In this regard, Anderson, (1960, p.4), notes that “it is human beings clothed with the office who are the real determiners of what the relations between governments will be. Consequently, the concept of intergovernmental relations has to be formulated largely in terms of human relations and human behaviour...” Wright, D.S., (1974 p.2) holds similar views on this subject and observes that “strictly speaking, then, there are no intergovernmental relations, there are only relations among officials in different governing units. Individual interactions among public officials are at the core of IGR.” This means that the success of intergovernmental relations is heavily dependent upon the commitment of the government officials in making the system work. Conversely, it is correct to observe that the failure of the system is largely due to a failure by the government officials to make the system work. This sometimes happens because of ignorance on the part of officials or deliberate lack of commitment on the part of the officials, which at times is actuated by vested interest.

Consistent with other federal or devolved systems, Article 6(2) of the Constitution of Kenya, 2010 has adopted a devolved system of government and recognized the need for intergovernmental relations as an integral aspect of the system. The Article requires the levels of government which are distinct and interdependent, “to conduct their mutual relations based on consultation and cooperation”.

3

THE NATURE OF INTERGOVERNMENTAL RELATIONS

In nature, intergovernmental relations can take a variety of forms which are informed by the differences in the architecture and design of the system as well as the cultural issues in each country.

3.1 Vertical Intergovernmental Relations

Most systems always have vertical interactions between two or more levels of government. Article 6(2) of the Constitution refers to above envisages vertical intergovernmental relations between the national and county levels of government. Article 189 of the Constitution which provides for details about how cooperative intergovernmental relations are to be conducted also envisages vertical intergovernmental relations. The National and County Government Coordinating Summit established by section 7 of the Kenyan Intergovernmental Relations Act of 2012, is a structure meant to provide infrastructure for vertical intergovernmental relations between the national and county levels of government. This is a forum for the president and the county governors as the chief executives of the governments to meet, consult, share information and negotiate on issues concerning the two levels of government. Similarly, the Intergovernmental Budget and Economic Council established by section 187 of the Public Finance Management Act is a structure aimed at providing infrastructure for vertical intergovernmental relations on financial matters.

3.2 Horizontal Intergovernmental Relations

Every system must also have room for horizontal interactions among two or more governments at the sub-national level of government. Once again Articles 6(2) and 189 of the Constitution of Kenya, 2010 envisage intergovernmental relations among the county governments to the exclusion of the national government. These could be relations involving all the 47 counties working on an issue that concerns all of them or just a few of them working on an issue that affects them but not others. The relations could be among a few counties not because the issue does not concern the rest but because only those few counties are willing to cooperate in respect of that issue. The Council of Governors is established by section 19 of the Intergovernmental Relations Act as a structure providing infrastructure for horizontal intergovernmental relations among the 47 county governments. The Council of Governors can also facilitate horizontal intergovernmental relations among a few of the counties on a matter that concerns them. The country has witnessed the emergence of regional development blocks established among groups

of counties to enable them to work together in addressing certain regional issues and development problems affecting those regions.


3.3 Combination of Vertical and Horizontal Intergovernmental

There are, however, cases in which intergovernmental relations take a combination of both horizontal and vertical interactions. In this case, there are first, horizontal interactions among several governments at the sub-national level of government; and second, vertical interactions between this group of governments at the sub-national level and the federal or national level of government. As noted, Articles 6(2) and 189 of the Constitution provide for both vertical and horizontal intergovernmental relations either separately or jointly. While the Council of Governors has been mentioned as a forum for horizontal intergovernmental relations, it may also be a preparatory forum for building consensus and common ground on issues that county governments may want to raise in the Summit as part of vertical intergovernmental relations. Sectoral working groups and consultative fora provided for by section 13 of the Intergovernmental Relations Act also envisage groups that combine vertical and horizontal intergovernmental relations.

3.4 Formal and Informal Intergovernmental Relations

While in some systems intergovernmental relations may be formal interactions in the sense that they are provided for and structured by the Constitution and/or legislation; in other countries, intergovernmental relations are informal in the sense that they are not provided for and structured by the constitution and/or legislation. However, most systems settle for a combination of both formal and informal interactions. Indeed, some systems begin with informal processes before formalizing them through legislation or constitutional provisions. Whether vertical or horizontal on the one hand; or informal or formal on the other hand, intergovernmental relations may involve both the legislative and the executive arms of government. In some cases, even independent organs of state and other agencies of the two arms of government may be involved. Apart from Articles 6 and 189, the Constitution has several other provisions that provide for and structure intergovernmental relations. For instance, the bicameral Parliament and the Commission on Revenue Allocation are provided for as integral structures for intergovernmental relations. Other constitutional structures that must view their roles as being critical to successful intergovernmental relations are the National Treasury, the Controller of Budget, the Auditor General, the National Land Commission, the Human Rights Commission and the Judiciary.

While these provisions of the constitution and legislation depict Kenya as a system of formal intergovernmental relations, the experience of the past five years discloses



that this has not stopped some informal intergovernmental relations processes from operating alongside these formal ones. For example, county assemblies have informally established the County Assemblies Forum (CAF); and County Attorneys have also informally established the County Attorneys' Forum (CAF), through which, they can consult each other and share experiences as well as learn best practices from each other. Informal meetings of county deputy governors and county chiefs of staff have been held in the past to enable the members to share their experiences. The annual devolution conferences organized by the Council of Governors in consultation with the national government as well as the Legislative Summit originated by the Senate in consultation with county assemblies may be regarded as informal forums and processes that are already contributing to intergovernmental relations in Kenya. Because of this Kenya may be best described as a system of highly formal intergovernmental relations combined with some limited measure of informal intergovernmental relations. These informal aspects should be encouraged as they can provide best practices that can eventually be formalized through legislation.

3.5 Modalities of Intergovernmental Relations

In terms of modalities of intergovernmental relations, comparative experience presents two types of intergovernmental relations. Constitutional designs that settle for co-operative federal or devolved systems of government, by implication must have intergovernmental relations that are co-operative. Cooperative intergovernmental relations exhibit co-operative institutions and processes such as consultation, co-decision making and coordination. On the other hand, constitutional systems that settle for competitive federal or devolved systems of government necessarily settle for intergovernmental relations that are competitive and exhibit conflictual processes such as tension, collusion, competition, control and even coercion. By Article 6(2) of the Constitution, Kenya has settled for cooperative intergovernmental relations as opposed to competitive ones. Article 189 elaborates on and emphasizes the cooperative nature of these relations.

An important point to note is that intergovernmental relations “are not one-time, occasional occurrences, formally ratified in agreements or rigidly fixed by statutes or court decisions. Rather, IGR is the continuous, day-to-day pattern of contacts, knowledge, and evaluations of government officials” (Wright. 1974 p. 2). Thus, successful intergovernmental relations draw from and rely on both formal and informal processes as well as practices and principles that are pursued in both competitive and cooperative inter-jurisdictional patterns.


4

THE NECESSITY OF INTERGOVERNMENTAL RELATIONS

Intergovernmental relations are a necessary consequence of any federal or devolved system of governance, sometimes referred to as a system of multi-level governance. First, federal or devolved systems of government involve the constitutional creation of two or more levels of government that combine the elements of self-rule at the local level with a shared rule at the national level. The combination leads to levels of government that have divided and separated functions and powers as well as a measure of relative autonomy combined with a degree of interdependence. Inherent in this combination are natural tensions; conflicts; and threats between the two levels of government which must be managed. Intergovernmental relations are thus necessary as mechanisms of managing these tensions, conflict and threats.

Secondly, it is said that the emergence of multi-level systems of governance has challenged much of our traditional understanding of how the state operates, what determines its capacities, what its contingencies are, and ultimately the organization of democratic and accountable government (Peters, B.G., and Pierre, J. (2001, p. 131). Thus, when a country adopts a multi-level system of governance, it signals its movement “from a model of the state in a liberal– democratic perspective towards a state model characterized by complex patterns of contingencies and dependencies” among the two or more levels of government (Peters and Pierre (2001, p. 131). This shift to a complex system of government necessitates intergovernmental relations. Indeed, multi-level governance is defined in a manner that makes intergovernmental relations an integral part of the system. Peters and Pierre (2001, p. 132) have observed in this regard that “a baseline definition of multi-level governance is that it refers to negotiated, non-hierarchical exchanges between institutions at the transnational, national, regional and local levels”. These scholars go a step further and add that “the definition could be slightly expanded to denote relationships between governance processes at these different levels. Thus, multi-level governance refers not just to negotiated relationships between institutions at different institutional levels but to a vertical ‘layering’ of governance processes at these different levels” (Peters and Pierre 2001, p. 131).

Thirdly, given that the two or more levels of government provide services to the same citizens, the notion of autonomy and interdependence produces governmental units that “are regarded as mutually complementary parts of a single governmental mechanism all of



whose powers are intended” to be used to serve the needs of the same people (Corwin, E S, 1950 p. 19). Intergovernmental relations are necessary as enablers of the necessary mutual complementarity of the levels of government. The daily running of a federal or devolved system of government relies heavily on intergovernmental relations which are the oil that lubricates the machinery of governments daily. The Kenyan devolution is founded upon a similar combination which necessitates intergovernmental relations.

Fourthly, by Articles 6(2) and 189 of the Constitution, Kenya has settled for a cooperative system of devolved government as opposed to a competitive system. The Kenyan devolved system borrowed heavily from the South African model of devolution which has a co-operative devolved system of government. South African scholars have held the view that the adoption of the concept of cooperative government necessarily makes intergovernmental relations a mandatory part of the system. Malan, L, (2005, p. 229) observes in this connection that “Co-operative government is a partnership among the three spheres of government requiring each government to fulfil a specific role. The co-operative government does not ignore differences of approach and viewpoint among the different spheres but encourages healthy debate to address the needs of the people they represent by making use of the resources available to the government.” He emphasizes that “co-operation applies to circumstances in which people decide or are instructed to work together”. It is his view that “no sphere of government can function effectively without co-operation with the other because of the interdependency and interrelatedness of some governmental functions, spill-overs in services, scarce resources and poor economic conditions and popular accountability as well as grassroots pressure” Malan, L, (2005, pp. 229-230). Consequently, intergovernmental relations are unavoidable once a country adopts the concept of cooperative government such as Kenya has done.

Finally, since the governments must share information; in cases of shared competencies determine who does, or should do, what; or clarify their respective roles in cases of exclusive functions and powers, it is impossible to avoid substantial interaction and interdependence between and among orders of government (Report of the Intergovernmental Relations Technical Committee on Emerging issues, p. 1). To effectively deliver services to their respective constituencies, the governments must coordinate policies, programs and expenditures; conclude formal agreements; and create joint institutions and agencies based on and through which they may discharge some of their functions.

5

FACTORS THAT NECESSITATE AND INFLUENCE INTERGOVERNMENTAL RELATIONS


There are two major architectural and design factors of a federal or devolved system that necessitate and influence intergovernmental relations which are discussed in this paper. These are the distribution of functions and powers between the two levels of government; and the constitutional financial arrangements and sharing among the two levels of government.

5.1 Distribution of Functions and Powers among the Levels of Government

Most federal or devolved systems of government are premised upon the concept of divided and separated functions and powers among the levels of government. Thus, a key issue which necessitates and influences intergovernmental relations is how the constitution assigns to or distributes functions and powers among the levels of government. Ordinarily, functions and powers are constitutionally assigned and distributed in a manner that makes it impossible for the levels of government to operate in total isolation of each other. Two broad approaches to the assignment of functions and powers can be identified and discussed—the integrated versus the dualist approach; and the exclusive versus concurrent functions and powers approach.

5.1.1 Integrated Versus Dualist Approach

Comparative experience indicates that the constitutional architecture and design of assignment of functions and powers to different levels of government may create a loose dichotomy between dualist and integrated devolved systems. In dualist systems such as Argentina, Australia, Brazil, Canada, Spain, and the United States of America, both the national government and the governments of sub-national units have a full set of institutions such as the legislative and executive arms and can enact and administer their legislative programs (Carnota, WF, (2015, p. 16). Contrasted with this are federal systems that are integrated into nature in the sense that the governments of sub-national units implement both their laws and many other laws enacted by the national level of government (Bussjager, P (2015, p.84). There is more legislation at the national level, while the sub-national governments do more implementation of national legislation. Countries with integrated systems include Austria, Germany, South Africa, and Switzerland. Kenya, whose devolved system enables county governments to implement not only their county legislation but also national legislation in several situations, may be correctly regarded as



an integrated system. However, when the whole system is fully analyzed, the conclusion is that it is best described as a hybrid of an integrated and dualist system. In dualist systems, competencies are assigned to levels of government by reference to subject matters such as agriculture, with the relevant level of government having both legislative and executive powers over the subject matter. In integrated systems, however, while some functions may be assigned by reference to the subject matter, many are assigned by reference to the powers a level of government has over the subject matter. Thus, while the national government may be assigned policy and/or legislative powers over agriculture, another level may be assigned execution or implementation powers over the same agriculture subject matter. As a result, the need for intergovernmental relations in an integrated system is higher than in a dualist and federal system.

The distinction between dualist and integrated federal systems has implications for intergovernmental relations. First, in integrated systems, there is normally need and provision for participation of constituent units in policy and law-making at the national level. This is necessary since ultimately, such policies and laws are to be administered or implemented by the constituent unit governments (Lhotta, R and Blumenthal, JV,(2015, p 211). Good examples in this respect are Germany and South Africa, where the second chambers of the national legislatures are constituted by representatives of the constituent units, whose consent is required for legislation with federal implications. The members of the second chambers are often delegates of the governments of the constituent units which can recall them, and on whose instructions, they make decisions in policy and law-making at the national level. This is contrasted with dualist systems in which, while the people of the constituent units are generally represented in the second chamber of the federal legislature, the federal function performed by that chamber is less important, and direct participation of the constituent units in federal lawmaking is not assured. Often, members of the second chamber are elected directly by voters and not indirectly by the governments of the constituent units. The result of this is that the influence exerted by the constituent units on federal policies is less institutionalized.


Second, integrated systems adhere to the principle of cooperation which requires the different levels of government to support each other and respect the functional domain of other governments. Powers must be exercised in good faith and concerning the competences of the other orders of government. Once again, Germany, South Africa and Austria offer the best examples in this regard. Kenya's devolved system has by and large taken this integrated approach. The difference in the dynamics between integrated and dualist systems in this respect is explained by the fact that integration requires mutual support to avoid the entire system coming to a halt, while dualism tends to encourage competition between more independent spheres of government.

5.1.2 Exclusive Versus Concurrent Functions and Powers

Many systems identify two broad categories of functions and powers—exclusive and concurrent functions and powers, which generate operational difficulties that necessitate intergovernmental relations. The Constitution of Kenya, 2010 falls into this category since Article 186(2) recognizes that the functions and powers assigned to the national and county governments fall into the two categories of exclusive and concurrent functions and powers. The Constitution, however, creates a lot of uncertainty since it does not specify which of the assigned functions and powers are exclusive and which are concurrent.

Lack of clarity in the sense that it is not clear which level of government has responsibility for doing what aspect or component of the function(s) is a common feature of concurrent functions and powers. This results into duplication of efforts, roles and expenditure by the levels of government; wasteful use of financial resources as both levels of government may invest money in the same activity; the likelihood of a total failure in the delivery of services to the public since each level of government may take no action in the functional area believing that the other will provide the services, and the undermining of democratic accountability since citizens may not know whom to hold accountable. To resolve these problems of concurrent functions and powers, the two levels of government may through intergovernmental relations negotiate and agree on how to share the various aspects of the concurrent function among themselves.

Even where a level of government is assigned exclusive functions, there are several reasons why intergovernmental relations may still be necessary. First, there is a need to recognize the concept of functional inter-dependence and inter-government functional impact. One level of government may depend on policies and laws developed and enacted by another level of government within its exclusive functional area. Under the Constitution of Kenya, 2010, for example, there are various circumstances in which national government is assigned the function of formulating national policy while the county governments implement such a policy. A failure by such level of government to discharge its exclusive function to make laws or policies may hurt the other level of government. This problem can be resolved through cooperation and intergovernmental relations since it has been found that the requirement of cooperative government and intergovernmental relations under Articles 6(2) and 189 of the Constitution imposes an obligation on a level of government that has exclusive functions and powers to perform and exercise them in a cooperative manner with the other level of government. Thus, the national government when formulating policies and making laws to be implemented by county governments, ought to consult the county governments at the stage of conceiving and developing



the policy since those who implement the policy better understand the difficulties of implementation on the ground.

Secondly, the concept of functional interdependence raises the reality of the fact that the performance of functions by one level of government may have an impact on the other level of government. The performance of functions by one level may hinder or facilitate another level in the performance of its exclusive functions. For example, the performance of the policing or security function by national government may impact upon the ability of county governments to discharge their agriculture or health function.

Thirdly, the impact of the Bill of Rights on the assignment of functions and powers may necessitate and influence intergovernmental relations. The intersection of powers and functions with the Bill of Rights provisions transforms some of the powers and functions of both levels of government into binding duties. Article 43(1) provides for economic and social rights which it identifies as including—the highest attainable standards of health; accessible and adequate housing and reasonable standards of sanitation; freedom from hunger and adequate food of acceptable quality; clean and safe water in adequate quantities; social security; and education. When these rights are examined against the assignment of functions and powers, it becomes clear that the rights impose obligations upon national and county governments. The rights cannot, therefore, be realized without engaging the services of intergovernmental relations between national and county governments. With this understanding in mind, it is imperative that how the national government is implementing its big four agenda of expansion of the manufacturing sector; affordable housing; affordable healthcare; and food security be interrogated from the perspective of intergovernmental relations. Has the national government paid any attention to the need for intergovernmental relations structures through which the big four have to be implemented? Did the national government even involve the county governments at the stage of conceiving the idea of the big four? Is the national government's commitment to the big four agenda reflected in the allocation of more money to counties for agriculture, health, and housing?

Fourthly, the allocation of secondary functions and powers to county governments has implications for intergovernmental relations. The Constitution envisages that in addition to the original functions and powers of county governments, county governments can be assigned additional functions and powers by the national government through legislation (Articles 186(3) and 183(1)(b)). The decision to assign such functions to county governments ought not to be unilateral but be preceded by consultations. The decision ought to proceed out of intergovernmental consultations, negotiations and agreement

between the two levels of government. Likewise, Article 187 which recognizes the transfer of functions from one level to another by agreement envisages intergovernmental consultations, negotiations and agreement.

5.2 Assignment of Financial Functions and Powers and Resource Sharing

A key factor that necessitates and influences intergovernmental relations is the constitutional architecture and design of the financial functions and powers both in terms of the power to raise revenue and the power to spend revenue. Many constitutions assign more power to raise revenue to the national government with the tax bases that raise more money put in the domain of the national government, while sub-national governments are assigned fewer powers to raise revenue. This often leads to fiscal imbalances that require intergovernmental financial transfers from one level of government to another. How these transfers are designed and managed becomes an important aspect of intergovernmental relations. In several systems such as Germany, Austria and South Africa, the Constitution recognizes and protects the constituent units' entitlement to revenue that is raised centrally. Constitutional entitlement preserves a measure of equality between the orders of government and inhibits the use of threats to withdraw funding as a lever in intergovernmental negotiations. Kenya has once again taken this direction in its approach to the design of fiscal and financial arrangements. The county governments have been assigned very limited powers for raising own revenue and have to rely a lot on entitlements to equitable shares from revenue raised nationally.

Article 209(3) of the Constitution empowers each county government to raise own revenue through the imposition of—property rates; entertainment taxes; and any other tax that it is authorised to impose by an Act of Parliament. The identification and authorization of any other tax by an Act of Parliament are a function national government ought to discharge in a cooperative manner requiring intergovernmental relations. In terms of Article 209(4), both the national and county governments may impose charges for services. This source of revenue is ordinarily directly linked to the discharge of the functions the governments are assigned by the Constitution. It empowers them to levy and recover fees, charges or tariffs in respect of any function or service they perform or provide. As sources linked to functional areas, these are exclusive to the level of government that has been assigned a function upon which the charge is to be imposed. This is a source of revenue that has potential for conflict, especially where charged in respect of concurrent functions and calls for cooperation and coordination among the two levels of government.

Article 209(1) of the Constitution empowers the national government to impose—income tax; value-added tax; customs duties and other duties on import and export goods; and excise tax. The proceeds from these sources are, however, equitably shared among the two levels of government in an objective manner that requires cooperative government and intergovernmental relations involving several entities such as the Commission on Revenue Allocation, the National Treasury, the Intergovernmental Budget and Economic Council, and the bicameral parliament. Given the financial design the Kenya devolution has adopted, intergovernmental relations is a mandatory integral part of the system.



6

COMPARATIVE INTERGOVERNMENTAL RELATIONS MECHANISMS AND PROCESSES

Several mechanisms, instruments, and processes are used for purposes of intergovernmental relations. These include legislative institutions and techniques; executive institutions and processes; institutions for logistics, management and facilitation of intergovernmental relations; joint institutions and specialized IGR agencies; and intergovernmental agreements.

6.1 Legislative Institutions

Legislative institutions are the first set of legislative mechanisms that are used in intergovernmental relations. Through the design and composition of the legislature at the national level; the use of parliamentary committees; and structured co-operation between legislative assemblies both vertically and horizontally, legislative institutions play a critical role in intergovernmental relations.

First, the concept of a bicameral legislature at the national level of government is an integral part of any federal or devolved system of government. The second chamber of such parliament provides an avenue of representation of constituent units in the federal law-making process. This is necessary to give effect to the concept of self-rule at the local level and shared-rule at the national level. The bicameral parliament becomes a key intergovernmental relations institution through which the sub-national units share with the federal or national level of government in the law-making functions, powers and processes. To ensure the achievement of this objective, countries that have well designed bicameral parliaments ensure that the members of the second chamber of parliament are true representatives or delegates of the sub-national governments, to which they are also answerable.

A good example in this regard is the German Bundesrat whose members are officials of the respective land governments and in most cases act on instructions of the land governments. The Austrian and South African second chambers are designed along the same lines and play an equally important role in intergovernmental relations. For success, a clear link and obligation between the members of the second chamber and the governments of their respective sub-national units must be maintained. The design must also reflect the equality of the sub-national units in terms of their voting power in the second chamber. The Kenyan Bicameral Parliament borrowed from the German and South African systems but settled for directly elected Senators, instead of delegates

appointed by the governments of their respective sub-national units. This has delinked the Senators from the governments of their counties and compromised the important role of a bicameral parliament in intergovernmental relations. The result has been conflictual relations between Senators and county governors, thereby compromising the ability of the county governments to share in legislative decision making at the national level.


Secondly, in integrated systems with bicameral parliaments, parliamentary mediation committees composed of members of both chambers play an important role in intergovernmental relations as they may be used to resolve disagreements between the two houses. Article 113 of the Constitution of Kenya, 2010 provides for a joint Mediation Committee of the two Houses of Parliament which may play an important role in intergovernmental relations.

Thirdly, general cooperation, collaboration and consultation between the various structures of the national legislature and those of legislatures of the sub-national units may play a critical role in intergovernmental relations. A good example is a South African experience where the Public Accounts Committees of the national parliament and the provincial legislatures have formed an Association of Public Accounts Committees (APAC). APAC provides these committees with a platform to share experiences and to develop their collective capacity for effective oversight to ensure good governance and fiscal discipline at both levels of government (Powell, D, 2015, p.319). A second example is again drawn from the South African experience where meetings of the Speakers of the two houses of parliament and the Speakers of the nine provincial legislatures have become useful informal forums for interaction and co-operation. They have even established a national speakers' forum which plays an important role in intergovernmental relations. A variety of issues including skills development, and improving communication between legislatures and the public, are dealt with through this forum (Powell, 2015, p.319). The emerging Annual Legislative Summit of the Senate and County Assemblies provides a good starting point for informal legislative intergovernmental relations in Kenya.

6.2 Legislative Techniques

Legislative techniques are the second set of legislative mechanisms that are used in intergovernmental relations. Legislatures play an important role in giving the force of law to policies initiated by the executive including giving effect to intergovernmental arrangements or agreements hammered out by central and sub-national executives (Opeskin, B.R., (2001, p. 133). Legislative techniques can be used for a variety of purposes.

First, legislative techniques can be used to legally alter the constitutional division of functions and powers. For instance, some constitutions contemplate a delegation of




functions and powers from the national to the sub-national level of government. Section 44 of the South African Constitution allows the National Assembly to assign any of its legislative powers to any legislative body in another sphere of government. Section 104 of the South African Constitution also allows a provincial legislature to assign any of its legislative powers to a Municipal Council in that province (Opeskin, B.R., (2001, p. 135). Similarly, Article 186(3) of the Constitution of Kenya, 2010 which envisages that national legislation may assign functions and powers to county governments, and Article 183(1)(b) which empowers a county executive committee to implement national legislation to the extent that such legislation provides, appear to recognize that national government can through legislation delegate some of its functions to county governments. Such legislation would best proceed out of intergovernmental negotiations and agreements.

Some constitutions allow the transfer of functions and powers between the levels of government. A good example is the Australian Constitution (s 51(37)) which “enables states to refer matters to the federal Parliament, and for the federal Parliament to then make laws on the referred topic for the benefit of the referring state. The purpose of the section is to facilitate the use of intergovernmental arrangements to overcome rigidities in the constitutional allocation of powers between the centre and the regions” (Opeskin, (2001, p. 134). Article 187 of the Kenyan Constitution allows the transfer of functions and powers from one level of government by agreement of the two levels, where such functions and powers “would be more effectively performed or exercised by the receiving government”. The envisaged agreement for the transfer of functions and powers presupposes intergovernmental negotiations leading to an intergovernmental agreement which could be given effect by the enactment of some of its terms into legislation.

Secondly, legislative techniques could be used to facilitate coordination between levels of government. It has been noted that formal intergovernmental relations may be provided for and structured by constitutional provisions or legislation. Such legislation then becomes a legislative technique for the facilitation and coordination of intergovernmental relations. South Africa’s Intergovernmental Relations Framework Act is such legislation. The Kenyan Intergovernmental Relations Act of 2012 is also such legislative technique for facilitation and coordination of IGR.

Thirdly, legislative techniques may be used to approve and give the force of law to intergovernmental agreements concluded by the executive branches of government. The correct path to intergovernmental relations is that governments must consult, negotiate and enter into intergovernmental agreements. The challenges of enforcement of such intergovernmental agreements can be mitigated by the reduction of some of the




terms of such intergovernmental agreements into legislation. Several scenarios present themselves. One, national legislation may give the force of law to an intergovernmental agreement concluded between the national government on the one hand and the sub-national governments or some of them on the other hand. Two, sub-national governments may request the national government to enact legislation to give the force of law to a horizontal intergovernmental agreement among the sub-national governments or some of them. Three, an intergovernmental agreement among the sub-national governments or some of them may be given the force of law by the enactment of similar legislation in each of the sub-national units (Opeskin, (2001, p. 134). There would be uniformity in such mirror legislation enacted in each of the sub-national units involved. Four, there may also be cases in which an intergovernmental agreement either between the national government and the sub-national governments; or among the sub-national governments themselves to the exclusion of the national government may agree on detailed policies but not the specific law. In this event, the IGR agreement may “be implemented by appropriate legislation in each region’s legislature’ (Opeskin, (2001, p. 134). This leads to sub-national legislation on the same subject matter that is not similar in every detail. Opeskin (2001, p. 134) holds the view that “this method of intergovernmental cooperation is less prescriptive than some other methods of cooperative harmonization since each jurisdiction maintains a “margin of appreciation” in selecting the precise manner in which the agreed policies are implemented”.

6.3 Executive Institutions and Processes

Executive institutions such as heads of government at both levels of government, ministers and public servants play a critical role in intergovernmental relations. Executive processes such as consultations and negotiations on matters such as the development of policies also play an important role. First, the federal cabinet may in its composition include members from constituent units, thereby becoming an important forum in which vertical co-operation and intergovernmental relations may be secured. South Africa offers an interesting innovative best practice of an “extended national cabinet” which comprises the normal national cabinet, the Premiers of the provinces, and representatives of organized local government. The extended cabinet meets twice a year to set out national priorities and assess progress (Powell, D 2015, p. 325).

Secondly, vertical and horizontal meetings between chief executives and other ministers constitute important forums for intergovernmental relations. The heads of the various executive branches meet more or less regularly to exchange ideas; negotiate constitutional reforms, financial arrangements, or national policy platforms. They may also meet to simply show that they are collaborating for the common good of the country (Adam,




M, Bergeron, J and Bonnard, M 2015, p 147). Vertical interactions between top-executive actors, through bodies that bring together the political leaders of government, are at the apex of intergovernmental relations networks. Canada has what is referred to as first ministers' conferences (Adam, M, Bergeron, J and Bonnard, M 2015, p 146); Australia has the Council of Australian Governments (COAG) (Phillimore, J and Harwood, J 2015 p. 46); India has the Inter-State Council (ISC) (Singh, P.M. and Saxena, R, 2015, p. 252); and South Africa has the Presidents Coordinating Council (Powell, D, 2015, p. 325). These are the equivalent of Kenya's National and County Governments Coordinating Summit.

Thirdly, horizontal interactions among the executive heads of the governments of the constituent units are also common. Various forums have been developed in different countries to serve as infrastructure for such interactions. These include the Canadian Council of the Federation that brings together the executive heads of the provincial governments (Adam, M, Bergeron, J and Bonnard, M., 2015, p 148); and the Council of the Australian Federation (Phillimore, J and Harwood, J., 2015, p. 46). These may be seen as the equivalent of the Kenya statutory Council of Governors (CoG) which brings together all the 47 county governors. Sectoral meetings of ministers in a particular sector are important forums for intergovernmental relations. In South Africa, such meetings are referred to as MINMECs as they bring together the national government minister for a specific docket and provincial Members of the Executive Committee responsible for a similar docket at the provincial level (Powell D, 2015, p. 324).

Fourthly, the civil service of both levels of government also plays an important role in executive intergovernmental relations. An effective public administration can play a critical role in intergovernmental relations. The public administration becomes even more important, especially in integrated federal systems since civil servants of constituent units implement policies and laws of not only their constituent units but also many of those of the federal level of government. The consequence in many integrated federations such as Austria, Germany, and Switzerland is that the federal levels of government have very small bureaucracies since the public services of the constituent units are more significant in the implementation of many federal policies and laws, and play an inherently important intergovernmental function.

6.4 Logistics, Management and Facilitation of IGR

Intergovernmental relations cannot propel themselves but must be aided, facilitated and assisted by institutions that ideally ought to be independent of the governments and or entities involved in the interactions. A key element of effective intergovernmental relations is a system of management and facilitation of the IGR processes. Comparative experience indicates that there is no single common approach used by all federal systems.



Instead, evidence points at different approaches used in different countries. However, the comparative experience discloses a dichotomy of two approaches.

On the one hand, there are some countries which allow one of the levels of government to manage and facilitate intergovernmental relations. In Australia, for example, the department of the Prime Minister and Cabinet provides the secretariat of the Council of Australian Governments (Phillimore, J. and Harwood, J., 2015, p. 58). Likewise, in Spain, vertical meetings are held in the Senate but are under the responsibility of the Minister for Territorial Policy (Morales, M.J.G. and Marin, X.A., 2015, p. 363). In Argentina, Australia, India, and Spain, sectoral meetings that involve ministers are convened and chaired by the federal minister who sets the agenda in consultation with the constituent units. In Canada, sectoral meetings are co-chaired by the federal and the provincial ministers in charge of the relevant policy area.

In Germany, some sectoral conferences have small secretariats linked to a relevant committee of the Bundesrat, though not formally part of the Bundesrat administration. At the federal level of government, the most sensitive and political dimensions of IGR are handled by the office of the president, prime minister, or cabinet. In some cases, a distinct department and/or minister is also responsible for relations with constituent units. Thus, Canada has a Secretariat for Intergovernmental Affairs within the Privy Council (Adam, M., Bergeron, J. and Bonnard, M., 2015, p. 151). In South Africa, responsibility for IGR is shared between four departments, namely, the presidency which is responsible for the overall coordination of government policy; the Ministry of Cooperative Governance and Traditional Affairs, which administers the IGR Act and Local Government legislation; the National Treasury which is responsible for intergovernmental fiscal relations and public finance policy; and the Ministry of Public Service and Administration which is responsible for the national and provincial public service (Powell, D., 2015, p. 330).

On the other hand, there are other countries which provide for independent bodies or secretariats to manage and facilitate intergovernmental relations. For example, between 1959 and 1996, the United States of America provided for an independent Advisory Commission on Intergovernmental Relations (ACIR) which provided technical assistance and recommendations. ACIR served as a forum for convening federal, state, and local officials to consider problems related to intergovernmental relations. It was created and funded mostly by Congress, but it lost its funding in 1996 after making politically unpopular recommendations to federal government officials (Smith, T.E., 2015, p. 427). Since 1973, Canada has maintained a multilateral intergovernmental relations institution known as the Intergovernmental Conference Secretariat, which is staffed and funded by both the federal government and the constituent units and is based in the federal capital.

It provides technical administrative services concerning intergovernmental conferences. Although it does not play any advisory or policy role, it has developed expertise in intergovernmental relations logistics that have proven very useful to the successful operation of IGR. The Intergovernmental Conference Secretariat reports to the federal Parliament through the prime minister (Adam, M, Bergeron, J and Bonnard, M. 2015 pp. 152-153).


Kenya has settled for an independent Intergovernmental Relations Technical Committee (IGRTC) which is established by section 11 of the Intergovernmental Relations Act of 2012. The IGRTC is independent of both levels of government and reports to both through the Summit. It has the responsibility of facilitating intergovernmental relations; serves as the secretariat of the Summit; and also plays an advisory role on intergovernmental relations matters.

6.5 Joint Institutions and Specialized IGR Agencies

Federal or devolved systems of government sometimes recognize or provide for joint institutions and specialized agencies that play a critical role in intergovernmental relations. These institutions and agencies may be jointly established and owned by the levels of government or several constituent units. Ideally, they are established by intergovernmental action to achieve shared goals in a designated policy area and are thus shared institutions. Joint institutions perform functions on behalf of participating governments and generally implement intergovernmental schemes. They may be service delivery institutions or advisory bodies and may even be entitled to pass mandatory regulations (Lhotta, R. and Blumenthal, J.V., 2015, p. 225). They frequently focus on natural resources, environmental programs, or infrastructure projects that cut across constituent unit borders (Singh, P.M. and Saxena, R., 2015, p. 252).

Joint institutions exist alongside the individual levels of government and are typically initiated by agreement of the governments involved. These institutions and agencies may be provided for by the constitution, legislation or intergovernmental agreements. When they are established by national legislation the legislation may be preceded by intergovernmental negotiations and agreement. When establishing joint institutions that genuinely are shared by the participating levels of government provisions must be made for appointments, funding, termination, and reporting; and decision-making procedures and processes of the joint institution.

Article 189(2) of the Constitution of Kenya, 2010 empowers the governments at both levels of government to establish either vertical or horizontal “joint committees or joint authorities”. The attempted establishment of the Nairobi Metropolitan Area Transport




Authority should be seen and evaluated from the perspective of joint entities envisaged by Article 189. The process of its establishment must thus be evaluated from this perspective. The lesson to be learnt is that many of the problems the governments are struggling with today could easily be addressed through the establishment of such joint entities.

Specialized IGR agencies, on the other hand, advise governments on aspects of IGR. They comprise technocrats and experts rather than serving politicians. Their functions are advisory, executive, or regulatory, often exercised within policy parameters set by the political executive. Unlike joint institutions, they derive their intergovernmental character from their functions rather than their Constitution. In practice, however, the two may shade into each other. Such executive agencies should be insulated from politics. They must be independent and shielded from the political influence of a single level of government. In Nigeria, the Federal Character Commission is a central executive organ officially responsible for ensuring a fair distribution of posts and services to reflect the ethnic diversity of the country (Eghosa E. Osaghae, E.E., 2015, p. 287). The various commissions that advise central governments about revenue sharing with and between constituent units are also specialized agencies. They perform highly significant intergovernmental functions but are not necessarily intergovernmental in their composition and constitution.

The Constitution of Kenya, 2010 establishes several institutions that would qualify as specialized agencies that play an intergovernmental relations role or provide services to both levels of government. These include the Commission on Revenue Allocation, the National Land Commission, the Human Rights Commission, the Auditor General and the Controller of Budget. Some institutions appear to be part of the national level of government but whose functions are intergovernmental. Such institutions must not regard themselves as instrumentalities of the national government but as specialized agencies that serve both levels of government and which must operate with a measure of independence from both levels of government. A good example is the National Treasury which currently operates as an instrumentality of the national government, instead of an independent entity playing a critical intergovernmental role. The second example is the National Assembly which has failed to realize that under its legislative functions it plays a critical intergovernmental role that may affect the success of devolution.

6.6 Intergovernmental Agreements

Intergovernmental agreements are another important instrument for managing intergovernmental relations. Such agreements can be vertical, horizontal, bilateral, multilateral, and even “omniunilateral” (concluded between all federal partners).



Intergovernmental agreements play the function of typically coordinating policy action by different levels of government. They may harmonize the exercise of exclusive competences, assign responsibilities in the case of concurrent functions, provide for co-financing, or create a framework for joint projects.

Constituent units may also conclude multilateral horizontal intergovernmental agreements to adopt uniform norms and programs to fend off the centralization of a particular policy area. In integrated systems, intergovernmental agreements may specify how constituent units are to implement federal policies and programs. Intergovernmental agreements may also set up joint bodies and institutions, with or without autonomous regulatory powers. Indirectly, intergovernmental agreements may play a role in restructuring the federal system including the adjustment of functional assignment on the margins of its formal federal architecture.

Articles 183(1)(b), 186(3), 187 and 189 of the Constitution of Kenya,²⁰¹ envisage intergovernmental agreements that can alter the constitutional functional assignment. Drawing lessons from these comparative experiences, the next section proposes and discusses a framework of a path to be followed in intergovernmental relations.

7

A FRAMEWORK FOR CONDUCTING INTERGOVERNMENTAL RELATIONS

The conduct of successful intergovernmental relations ought to follow a general framework with a path that has the following stages: the governments must cooperate, consult and negotiate; conclude intergovernmental agreements; establish joint institutions and agencies and reduce some of the terms of the intergovernmental agreements into legislation.

7.1 Cooperate, Consult and Negotiate


The devolved system adopted by Kenya settled for a cooperative system of government. Articles 6(2) and 189 of the Constitution of Kenya, 2010 establish the cooperative system and impose obligations on the governments to cooperate, consult and negotiate on issues. An effective process of intergovernmental relations must thus, begin with cooperation, consultation and negotiations among the governments involved. The IGRTC as a body charged with the responsibility of facilitating intergovernmental relations should encourage the governments to cooperate, consult and negotiate. IGRTC can even develop scenarios for them as negotiating positions, research and provide advisory opinions to guide informed positions by the governments, where necessary convene the parties to the negotiating table and record the proceedings of the negotiations.

7.2 Conclude Intergovernmental Agreements

The cooperation, consultation and negotiation processes may culminate into the settlement and conclusion of intergovernmental agreements among the cooperating and negotiating governments. Meaningful cooperation, consultation and negotiation ought to aim at and produce agreement among the governments on how the problematic issues should be resolved. The terms of the agreement could address issues such as who should do what, who should fund what, what conditions, if any, should be observed when doing what is agreed on, what procedures should be followed, and how the agreement should be implemented or made enforceable.

7.3 Establishment of Joint Entities and Institutions

Some of the terms of the intergovernmental relations agreements may focus on the establishment of joint institutions and entities in terms of Article 189(2) of the Constitution which empowers the governments to establish joint committees and joint authorities;



and section 23 of the Intergovernmental Relations Act which recognizes the concept of joint efforts and institutions. The joint institutions could be formed among either the national and county governments, or counties or groups of counties among themselves. The participating governments may agree to transfer some of their functions and powers to the joint entities or institutions. The agreements must provide for the members of the joint institutions and how they are to be appointed to office, their terms of office, and how they can be removed from office, the functions of the joint institutions, how they are to be financed, and their reporting structures and mechanisms. This strategy provides mechanisms for restructuring many institutions inherited from the old constitutional order such as

Reducing the Intergovernmental Agreements into Legislation

One of the major challenges of intergovernmental relations is how to enforce the intergovernmental agreements arising out of the cooperation and negotiations of the various governments. An important mechanism that can be employed is to give them the force of law by reducing certain aspects of the agreements into legislation. Most intergovernmental agreements are multilateral involving governments at both levels of government, which are then reduced into national legislation. However, where the agreement only involves the county governments, they may choose to either enact it into uniform legislations of the various counties involved or the counties may agree to have the terms of the agreement enacted into national legislation that binds all the county governments involved. As already observed, such legislation may also establish some joint institutions and mechanisms.

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USING THIS FRAMEWORK TO ADDRESS EMERGING DEVOLUTION ISSUES THAT REQUIRE IGR

This section identifies a few emerging devolution issues and uses them to demonstrate how the framework for intergovernmental relations can be deployed to address them. First, the success of the new constitution required a massive legislative program to review the old order laws and make them consistent with the new constitution and the enactment of new laws that are supportive of the new system. The past five years have witnessed acrimonious exchanges between the two levels of government regarding the origination and enactment of several laws. Many laws which undermine devolution have been enacted in total disregard of the demands of intergovernmental relations. Moreover, the transition period has also ended without many of the old order laws having been reviewed. It is proposed that future processes of lawmaking by the national government must involve cooperation, consultation and negotiation leading to intergovernmental agreements that must become the source of what should go into legislation.

Secondly, the past five years have witnessed acrimony about the unbundling and sharing of functions and powers. It is proposed that the framework discussed above to be used to enact a Functions and Powers Act that should clarify the functional areas of each government. Although the Fourth Schedule of the Constitution provides for only two lists of functions without isolating the exclusive from the concurrent functions and powers, the Act should be used to codify an intergovernmental agreement that establishes three lists of the national government exclusive functions and powers; the county government exclusive functions and powers; and the national and county governments concurrent functions and powers. Similarly, the Act should clarify how the concurrent functions are to be shared among the two levels of government. The Act should provide two lists indicating which level of government is responsible for which aspect of each concurrent function.

Thirdly, many of the provisions of the constitution may require a legislative framework to be used for operationalizing them. Such a framework should be negotiated and enacted in the manner set out above. The following are some of the constitutional provisions and areas that require such framework: national government assignment of additional functions to county governments in terms of Articles 183(3)(b) and 186(3); intergovernmental transfer of functions in terms of Article 187; borrowing by county governments in terms of 211; and expenditure of funds from the Equalization Fund in terms of Article 204.



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CONCLUSION

This paper has demonstrated that cooperative intergovernmental relations are essential to the success of devolution. However, co-operative government and intergovernmental relations is a very complex subject which many important players in the devolution sector do not understand. Many institutions such as the National Assembly and the National Treasury that make decisions of an intergovernmental nature do not appreciate their role. There is, therefore, need for the players to seek to understand the concept of intergovernmental relations and use the comparative lessons set out to make the Kenyan devolution work. There is a need to evaluate how the transition process was managed, especially regarding the enactment of new laws. There is a need to examine the legislation enacted during the transition period and review them using the framework discussed in this paper. This legislative process should include the examination and review of the entire set of old order legislation to make them consistent with the new Constitution. Overall, the paper has demonstrated that if the concept of intergovernmental relations is well understood and used, many of the problems so far experienced in our devolution system can easily be resolved.

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IGRTC SUPPORT ON INSTITUTIONAL DEVELOPMENT AND STRENGTHENING



INTRODUCTION


In August 2010, Kenya promulgated a new Constitution. This was a culmination of more than ten years of attempts by Kenyans to have a new constitutional dispensation. Kenyans wanted to replace the discredited independence constitution that was amended several times. It was blamed for many governance ills Kenya experienced over the years. The ills included economic marginalization of some regions and communities, disparities in regional economic development, and inefficient and poor service delivery. This new system of governance took effect on March 2011, with the swearing-in of governors of the 47 county governments. The Constitution of Kenya, 2010 was intended, to among other things, improve service delivery. Indeed, one of the major objects of the devolved system of government was to improve service delivery (Article 174 of the Constitution of Kenya, 2010).

This paper seeks to provide insights into the interactions between the national and county governments on the one hand, and among the county governments on the other. This interaction is facilitated by various institutions, committees' laws and policies established for this purpose. The discussion is held to interrogate the impact of this interaction on service delivery; one of the major objectives of introducing a devolved system of governance in 2010; (Article 174 of the Constitution of Kenya, 2010).

■ The Argument

The paper presents three main arguments. First, the argument is proper functioning of inter- and intra-governmental relations is critical for the success of Kenya's system of devolution and service delivery. Indeed, inter and intra-governmental relations are at the heart of Kenya's devolved system of governance hence their failure would adversely affect devolution and service delivery. The centrality of this interaction is attested to by the fact that no less than four articles, namely article 6, 174, 186 and 189, in the Constitution talk about inter- and intra-governmental relations. There are also several laws dealing with intergovernmental relations including the County Governments Act, 2012; the Intergovernmental Relations Act 2012; the Urban Areas and Cities Act, 2011; the Public Finance Management Act, 2012; and the Transition to Devolved Government Act, 2012 (now lapsed).





For inter- and intragovernmental relations to contribute to the success of devolution and service delivery, intra-governmental structures must operate optimally and following the Constitution and the relevant laws. Above all the actors in the process must appreciate and respect the cooperative and consultative nature of Kenya's devolved system of government. Failure to do this would undermine devolution and service delivery.

The second argument is that because governments exist to provide services of a public nature, conflicts and particularly protracted conflicts between levels of government and within institutions of the same level of government is bound to adversely affect service delivery. Governments and particularly in devolved systems in which different levels exist have to operate seamlessly if they are to provide services efficiently.

Thirdly, beyond the formal constitutional and legal institutions that facilitate inter- and intragovernmental relations, for purposes of improving service delivery, the role of citizens in their individual and group capacities in facilitating the proper and effective operation of inter- and intragovernmental relations is equally critical. Governance is ultimately about managing the affairs of an entity and providing quality service to the people. On this basis, it is imperative that citizens closely monitor the workings of the various inter- and intra-governmental institutions. In any event the Constitution of Kenya, 2010 requires the public to participate in their governance. This role would perhaps be more effectively played by civil society on behalf of the people.

■ **Defining Kenya's System of Devolution**

To address the above questions, we begin with a clarification of the nature of Kenya's devolved system of government. A clear understanding of this helps define the nature of inter-governmental and intra-governmental relations envisaged. We further highlight the significance of inter and intragovernmental relations for the successful implementation of the country's devolved system of governance and service delivery. This is followed by an examination of how the relevant governmental structures have worked including the nature and causes of tensions that have been witnessed between the national government and the county governments on the one hand and between institutions of each of the two levels of government on the other hand. The institutions being referred to, include the executive and the legislative bodies. The paper further discusses the implications of the tensions and conflicts in inter and intra-governmental relations on service delivery. The paper finally highlights the way forward in terms of dealing with the challenges that face the relations between the national and county governments on the one hand and between institutions of the national government and those among county governments on the other hand.

The Constitution of Kenya, 2010 has several key features, one is that it establishes a decentralized state structure to replace the hitherto centralized state structure. To operationalize this structure, the Constitution established 47 counties each with its distinct government (Article 6). The Constitution established one national-level government which is also distinct from the county level governments. The national-level government consists of the National Executive, the National Assembly, the Senate and the Judiciary. The county governments, on the other hand, consist of the county executive and the county assembly. It is this new system of organizing state power that is referred to in Kenya as devolution. There are however different ways of devolving state power or restructuring the state hence the need to clarify the system of devolution adopted by Kenya. In this regard, Ghai (2013) reminds us of the most objective way to define a country's system of devolution is to confine the definition to the provisions of the Constitution that establish the system. Based on this, the type of devolution adopted by Kenya is defined in article 6(1) of the Constitution of Kenya, 2010 in the following words:

- (1) The territory of Kenya is divided into the counties specified in the First Schedule.
- (2) The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations based on consultation and cooperation.
- (3) A national state organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.

The definition of Kenya's type of devolution is further provided in article 189 (1) (2) (3) and (4).

■ **Article 189 (1) states that Government at either level shall:**

- (a) Perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in case of 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.

Several things emerge from this definition. Firstly is that the two levels of government are established by the Constitution of Kenya, 2010. One level of government did not create

or establish the other. Secondly, the idea that the two levels of government are distinct means that the government at one level is not subordinate or superior to government at the other level. Indeed, even the county governments are distinct from one another.

Each is a government on its own. It is on this basis that Article 189 (1) (a) states that: Government at either level shall- (a), perform its functions and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in case of county government, within the county level;

The third thing worth emphasizing from this definition concerns the interdependence of the 47 governments. Stated simply all these governments need one another for the devolved system adopted by Kenya to operate fully, efficiently and effectively. This requirement is well articulated in the allocation of functions in the Fourth Schedule to the Constitution of Kenya, 2010. The functions allocated to the two levels of government are such that the implementation of most of them requires the involvement of each level of government. While the national government is generally responsible for policy functions and setting standards and norms that apply nationally, the county governments are generally responsible for the implementation of the policies relating to a function allocated to the county government. The performance of anyone function cannot be complete if one level of government fails to do its part. This is one way in which the two levels of government are inter-dependent.

The constitution further requires the two levels of government to consult and cooperate in carrying out their respective functions spelt out in the fourth schedule. This is important given the interdependence and the fact that the two levels of government are distinct. Cooperation, in this case, means that both levels are expected to cooperate and consult. It cannot mean that only one level consults the other. These constitutional provisions necessarily mean that the two levels of government must consult. Indeed, the Constitution recognizes this and establishes structures to facilitate this inter and intragovernmental relations, a subject to which we turn shortly. The two levels of governments must work as a system by recognizing that if one level or part of the system does not function well, the whole government will not function optimally. If one institution of the same level of government does not function then the entire government at that level will not function or provide services optimally.

■ **Structures and Mechanisms for Inter- and Intra-Governmental Relations**

The structures established to facilitate inter- and intra-governmental relations are the National and County Government Coordinating Summit-herein referred to as


the Summit and the Council of Governors (COG). Other structures are the TA (now defunct) established by the Transition to Devolved Government Act (2012) the Intergovernmental Relations Technical Committee (IGRTC), the successor of the TA and the Intergovernmental Budget and Economic Council (IBEC) established by the Public Finance Management Act (2012).

Other legal frameworks or provisions to facilitate the relationship between the national and county governments are:

- a) County intergovernmental Forum as provided for in section 54(2) of the County Governments Act, 2012.
- b) County Policing Authority as provided for in section 41 of the National Police Service Act, 2011.
- c) Citizen Forums as provided for in section 91 of the County Governments Act, 2012. These forums are established to facilitate citizen participation in their governance at the county level.
- d) County communication framework or Information centres.
- e) Joint committees between the county and national government as provided for in Article 189 of the Constitution of Kenya, 2010 and sections 6(5), 20(1) (j) and 18 of the Urban Areas and Cities Act, 2011
- f) Agreements to guide the relationships between the national and county governments concerning: guaranteeing of loans by the national government; management of concurrent functions; management of functions transferred from one level of government to another as provided for in article 187, of the Constitution; management of conditional grants from the national government to the county governments; and participation at the IBEC.

Other institutions that facilitate inter-governmental relations are the Office of the Controller of Budget, and the Commission on Revenue Allocation (CRA). County governments are also allowed to establish joint forums. All these institutions are established by the Constitution of Kenya, 2010.

It is expected that counties would develop inter-county projects or agreements as may be necessary for compliance with sections 118 of the County Governments Act, 2012 and form joint committees between county assemblies as may be necessary following section 14(5) of the County Governments Act (2012). The County Assemblies Forum (CAF) is another structure that is aimed at facilitating the working relationship and functioning of county assemblies.



It is imperative to note that some of these structures are not provided for in law or the Constitution but are within the mandate of county governments to establish if they feel it would improve service delivery. The recently created regional economic blocs by groups of counties are an example. The Constitution does not provide for these directly but counties have found it useful to have them for a variety of purposes including improving economies of scale.

The establishment of the Summit and indeed other intergovernmental relations structures was predicated on the understanding that frictions, tensions and conflicts between the national and county governments were bound to emerge in the course of these two levels of government undertaking their respective mandates. The Summit was therefore established to provide a forum through which matters affecting the two levels of government would be discussed and solutions found. That is why its membership is made up of the President as Chairman and the 47 governors. The IGRTC is the technical arm of the Summit.

Tensions were also bound to arise between the county-level institutions, namely the executive and the county assembly. This, however, does not appear to have been contemplated by the framers of the Constitution of Kenya, 2010. The focus on this regard was that threats to county governments would emerge from the national government. The experience thus far has been that counties have numerous internal issues that they need to address. Some of these as was the case of Makueni County threaten the viability of these counties and therefore service delivery.

Beyond these formal constitutional and legal institutions to facilitate inter- and intra-governmental relations, we must add the role of citizens in their individual and group capacities in facilitating the proper and effective operation inter and intragovernmental relations. Governance is ultimately about managing the affairs of a country in the service of the people-citizens. On this basis, it is imperative that citizens closely monitor the workings of the various inter and intragovernmental institutions. It is important in this regard to note that the Constitution requires the public to participate in their governance. This role would perhaps be more effectively played by civil society on behalf of the people.

■ **Areas of Potential Disputes in Inter- and Intra-governmental**

There are many areas and issues around which tensions between the two levels of government and between county governments are likely to arise. Tensions are also likely to arise within institutions and structures of the same level of government. While most of these conflicts are likely to revolve around functional areas, others are of a purely political or ideological nature. There are also some to do with boundary disputes as well

as those around resources. It must also be noted that some disputes may have their origins in history and therefore not necessarily caused by the adoption of a devolved system of governance. Some of these conflicts that have their origins in history may have been exacerbated by the adoption of devolution.


We discuss these issues in this section of the paper.

In one of its reports the now-defunct Commission for the Implementation of the Constitution (CIC), identified several potential sources of friction in intergovernmental relations. These are: Boundary disputes between counties in setting up villages; Resource access and use (oil, water, pasture agriculture and forests, unclear mining benefits, sharing agreements with national government, encroachment of agriculture areas by pastoralists from outside a particular county, livestock theft, settling in forests); Agreement and framework on what should be implemented by the county CDF and equalization Fund; Revenue collection: double taxation in hotel industry by both the national and county governments, relations between citizens and county revenue collection body; devolution of infrastructure; the national government has kept hold of the Kenya Ferries yet harbours and ferries were transferred to the county, classification of roads especially Class C; record management especially in land development on government land and business along road reserves; sharing of service delivery to and resources in towns and centers along the border; people working in one county and being paid from another county; schools management: schools and building repairs and maintenance conflicts with national government; county service board operations and appreciation; national government initiating projects without consulting county governments; Dispensaries in one county being supervised by officials from another county and offering services to people from different counties; unbundling and costing of transferred functions and matching them with funds.

■ **Assessing the working of Inter and Intra-governmental Relations**

This section of the paper examines whether or not the inter-governmental and intra-governmental relations are operating as envisaged in the constitution and relevant laws. The answer to this question is unfortunately in the negative. The assessment is based on the numerous reports about the challenges being experienced in this regard. As already indicated governors continue to complain about delays in disbursement of funds to the counties a challenge that adversely affects delivery of services by county governments.

There have also been complaints by governors that the national government does not respect the division of functions between the two levels of government. In particular, during the first phase of devolution, the governors took issue with the decision by the national government to purchase modern medical equipment and imposed on the counties.



They point out, and correctly so, that the national government had violated article 189 of the Constitution since the implementation of health care was a function allocated to county governments. This article requires the two levels of government to respect each other's functional jurisdiction. Article 6 further requires that the two levels of government conduct their affairs through consultation and cooperation. The role of the national government concerning health care is to develop national health policy, laws, regulations, norms and standards as well as capacity building. This development resulted in tensions between the two levels of government because the county governments were not consulted over the intended purchase of the equipment as would have been expected. It was, therefore, an imposition by the national government. County governments felt that they were being treated as mere appendages of the national government.

There have also been conflicts and tensions between the senate and the governors over whether the Senate has the authority and power to summon governors to account for how they spend money allocated to them. While some governors obeyed such summons, a number of them resisted. Those who resisted argued that they are over sighted by the county assemblies and not the Senate. Such disputes affect the working relations between the two institutions and by extension adversely affect service delivery.

The relations between the two levels of government and those between institutions of government within each level are complex and dynamic. They cover several issues. One such issue that has affected the relations between the two levels of government and subsequently service delivery is the issue of disbursement of funds from and by the National Treasury to the counties. The Constitution clearly states that the transfer of funds to the county governments shall be made without undue delay. However, this has not always been respected. County governments have year in - year out complained of delays in the disbursement of funds from the National Treasury. The governors have thus pointed out the practice had made it hard for county governments to procure materials and equipment in time and consequently the implementation of county development projects had been unduly delayed.


Inter-governmental relations in the context of service delivery also include issues of capacity building. The law requires the national government to build the capacity of county governments where this is required. Capacity is no doubt a complex issue. It covers financial, human resource and capacity to absorb resources allocated to an entity such as a county government. In several instances, it has been observed that some counties lack the capacity to absorb the resources disbursed to them. The other aspects include technical and technological capacities as well as the capacity to monitor and evaluate development projects. All these dimensions of capacity are critical as each affects service delivery. Issues of capacity must therefore not be defined narrowly to mean human resource capacity as is the tendency in the debates on this matter.

■ Explaining the Conflicts and Tensions in Inter-governmental Relations

There have been many conflicts between the national government and the county governments. Conflicts have also been witnessed between different institutions of the national government. These include conflicts between the executive and the national assembly as well as between the Senate and the National Assembly. The county governments have had their share of conflicts and tensions. County assemblies have had serious conflicts with the county executives. The inter- and intra-governmental conflicts and tensions that have been witnessed thus far have different causes. The following factors could explain some of the conflicts that the country has witnessed especially in the first five years of devolution. To begin with, one cannot rule out the possibility that many actors, especially in the national government, were reluctant to accept that power had been removed from them as a result of devolution. This resistance to change may explain why, for example, the national government was still holding on to some functions that the Constitution had devolved to county governments. The refusal to disband some parastatals whose functions have been devolved is a case in point. This may also explain why the national government does not feel obligated to consult the county governments on some issues and why the national government relates to county governments as if it is superior to the county governments, which should not be the case.

Related to the above is that some actors may not support devolution for ideological reasons and will, therefore, attempt to frustrate the system by refusing to accept that we no longer operate a centralized system of governance. It is interesting to observe that those who ideologically opposed devolution right from the days of the referendum include people in powerful leadership positions in the country. This group of actors may be suffering from fear of the unknown. They are not sure what will happen to them especially concerning the privileges they may have enjoyed under the previous system of government.


Another reason why conflicts and tensions arise in intergovernmental relations is the inadequate understanding of the type of devolution that the country has adopted. It is not farfetched to hypothesize that several Kenyans including leaders do not quite understand that Kenya adopted a cooperative and consultative model of devolution. Many do not understand that the two levels of government are distinct. To some, the national government is superior to the county governments. No wonder some refer to the national government as “Serikali Ya Juu” to suggest that there is a hierarchical relationship between the national and the county governments. Perhaps the more correct description of the national government concerning county governments and



in the context of the definition of devolution given above is to refer to the national government as “Serikali Ya Taifa” and the county governments as “Serikali ya Mashinani”

Some actors simply cannot accept that they have lost power as a result of devolution. Many of them are yet to come to terms with the fact that the new Constitution requires a new mindset and ways of looking at governance issues. These actors are in other words not in tandem with the new constitutional dispensation and requirements. These actors, therefore, are bent on trying to belittle the county governments by relating to them as if they are inferior. It is this context that during the first five years of devolution senators attempted to establish a forum at the county level to monitor the activities of governors and suggested that a senator would chair the forum. Some members of the National Assembly also expressed the view to this author that they were superior to the Senate. They argued that the Constitution provides that in case of a vacancy in the Presidency where the Deputy President cannot assume the office, then the Speaker of the National Assembly would serve as the President for a period specified in the Constitution. Indeed these politicians argued that the National Assembly is the Upper House while the Senate is the Lower House. By this, they meant that the National Assembly is superior to the Senate. The correct position, however, is that the Constitution which created both the National Assembly and the Senate does not talk about one house of Parliament being Upper and the other being Lower House. Politicians should, therefore, refrain from creating unnecessary concepts that do not reflect the letter and the spirit of the Constitution. The point being made is that the nature of Kenya’s system of devolution is defined by the Constitution and any attempt to introduce terms and ideas that are not reflected in the Constitution is misleading at best. What these legislators were engaged in was simply politics. The country should begin the national discussion over whether or not it is logically and legally right to keep referring to only members of the National Assembly as Members of Parliament (MPs). These are legally members of the National Assembly (MNAs). The parliament is a composite of both the National Assembly and the Senate. Both MNAs and senators are parliamentarians on equal measure. What should therefore happen is that each house of parliament should just perform those duties and functions assigned to them by the Constitution.

Political interests plus ignorance about the functional demarcations between the executive and the county assemblies also largely account for the incessant conflicts between the county executives and the county assemblies. In some cases, county assemblies have clearly shown that they do not quite understand the difference between oversight and implementation. For example, there was a case in Busia County where MCAs who served in the first five years of devolution told this author that as far as they were concerned the two are not different. In some cases, however, MCAs wanted to completely alter




the budget prepared by the executive and make it their budget. In yet other cases the MCAs wanted to blackmail the executive to approve allocations in the unlawful budget. In counties such as Makueni, the MCAs threatened not to approve the budget presented to the Assembly if their demands were not met. The conflict made the county government dysfunctional. The government could not deliver services to the residents of the county. It was so serious that a commission of inquiry into the matter was instituted to consider the dissolution of the county in line with Article 192 of the Constitution of Kenya, 2010.

The conflicts between the county executive and the county assemblies have been particularly bad for service delivery because counties are responsible for the implementation of projects and therefore directly in charge of delivery of services that have a direct impact on the livelihoods of people.

Several conflicts have arisen between national government institutions and between the national government and the county governments. There have also been conflicts between county governments. In this respect, the conflicts have mainly been between the county assemblies and the county executives. Another conflict that is likely to derail the efficient functioning of the county governments is the violence that has been witnessed in some county assemblies themselves. These have taken the form of MCAs physically fighting among themselves over attempts by MCAs to remove a speaker from office. MCAs have also been involved in fierce battles with the executive arm of various county governments. The conflict between the MCAs and the Governor of Makueni County is instructive in this regard.

The relations between the Senate and the National Assembly has been quite problematic. The problem between these two legislative bodies has revolved around functional issues. Article 95 of the Constitution sets out the role of the National Assembly while Article 96 sets out the role of the Senate.

The National Assembly has six functions. These are; representation of the people of the constituencies and special interests in the National Assembly, deliberation and resolution of issues concerning the people, enactment of legislation under the procedures for enactment of legislation spelt out in Part 4 of chapter eight, determination of allocation of national revenue between the levels of government as provided in Part 4 of Chapter Twelve of the Constitution, appropriation of funds for expenditure by the national government and other national state organs. It exercises oversight over national revenue and its expenditure; reviews the conduct in the office of the President, the Deputy President and other State officers and initiates the process of removing them from office. Finally, it exercises oversight over state organs; approves declarations of war, and extensions of states of emergency.



The Senate also has six roles. The senate represents and serves to protect the interests of counties and their governments; It participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113. The Senate determines the allocation of national revenue among counties as provided in the Constitution, Article 217, and exercises oversight over national revenue allocated to the county governments; and finally, the Senate participates in the oversight of state officers by considering and determining any resolution to remove the President or Deputy President from office following Article 145 of the Constitution.

It is clear from the above functions that the two houses of Parliament share two roles. First, they participate in the determination of allocation of national revenue between the levels of government. (Articles 109- 113) and secondly, they are involved in reviewing the conduct in the office of the President and the Deputy President with power to initiate the process of removing them from office (Article 195 (5) (a) and Article 96 (4)).

The country has witnessed conflicts between the two houses regarding Bills that affect counties. The National Assembly has at least on one occasion debated and passed a bill that affected counties and presented it to the President without referring it to the Senate. This was contested by the Senate arguing that it was a direct violation of article 96. The point is that the Senate is required by the Constitution to participate in any Bill concerning counties irrespective of where the Bill originates from. It is therefore difficult for the National Assembly to justify its refusal to refer the Bill to the Senate. In this case, the Court ruled in favour of the Senate.

The Senate has also had a problematic relationship with the county executive. The tension in this regard has been over whether the Senate has authority to summon governors to appear before a Senate committee. The governors took the position that it is the county assemblies that can oversight the county executive. Being subjected to oversight by the Senate they argue amounts to double oversight.

The Senate, on the other hand, maintains that in summoning governors they are simply complying with the provisions of Article 96 (3) of the Constitution which provides for the Senate to determine the allocation of national revenue among counties (Article 217), and to exercise oversight over national revenue allocated to the county governments. While it can be argued that the governors are right in saying that the current practice has the potential of subjecting them to double oversight, the Senate is also right in over sighting the county executive in line with Article 96(3). The problem with double oversight is that it could lead to situations in which governors are subjected to double standards. The Senate may have its standards that may differ from those of the county

assembly. It is also possible for the Senate to find the county executive guilty while the county assembly finds no wrongdoing on the part of the same governor on the same issue brought before it and vice versa.

The position on issues of oversight should be that the more oversight institutions used the better in young democracies such as Kenya. This is particularly necessary in the view of the long history of impunity that has characterized the governance realm in the country. However, notwithstanding the foregoing views, it may be suggested that guidelines be developed to help avoid double standards being applied. The guidelines should also state which matters the Senate has oversight in and which ones belong to the county assembly. It may, therefore, be helpful to suggest that the Senate and the county assemblies may consider establishing a joint committee of the two institutions to streamline the processes of oversight.

Members of the National Assembly have also been involved in fistfights when they disagree over some matter. Similar cases have also been reported in county assemblies. While these are not intergovernmental or even intragovernmental relations matters other than their negativity on the relations, the impact they have on the smooth functioning of the current system of governance is serious enough to warrant attention. In some instances, the fights have been occasioned by disagreements among MCAs on matters involving the executive. This kind of behaviour irrespective of the issues involved is also bound to negatively affect the functioning of the county governments and therefore service delivery.

■ **The Adversity of the Conflicts to Service Delivery**

These conflicts are significant for at least two reasons. First is that they have the potential to render county governments dysfunctional and therefore undermine service delivery. Secondly, they tell us something that the framers of the Constitution overlooked which is assuming that threats to county governments would emanate from outside the county government principally from the national government. It was based on this assumption that the framers of the Constitution mandated the Senate to protect counties and their governments. The framers of the Constitution did not envisage that major threats to county governments would come from the county governments themselves. What is being witnessed today is that a big threat to county governments is actually from within the county government itself. This is evidenced by the frequent disputes between the county assemblies and the executive arm of the county governments as well as among the MCAs within the counties.


■ In Lieu of a Conclusion

The debate about inter- and intra-governmental relations in Kenya is bound to continue for quite some time. Consequently, rather than conclude this discussion some proposals may be made on what needs to be done to improve:

- The relationship between the two levels of government,
- The relationship among the county governments,
- The relationship within each county of government, and
- The relationship between the institutions of the national government.

The first proposal is that Kenyans and particularly the leaders should make an effort to understand the Constitution to put into effect and defend it. Sustained sensitization of both the leaders and the citizenry on the requirements of the Constitution generally and inter-governmental relations, in particular, would help in this regard. Secondly, leaders should understand that the devolved system adopted by Kenya does not in any way threaten the unity and sovereignty of the State. There are sufficient safeguards in the Constitution that address such fears. Those who oppose devolution on grounds that it is expensive and therefore undermines its implementation should consider the benefits as well. In particular, they should consider the benefits associated with, for example, the inclusion of women, the youth and many other hitherto marginalized groups brought about by devolution.

Perhaps many of the challenges experienced concerning the smooth operationalization of intergovernmental relations have to do with what Mitullah (2016:2) calls a mismatch between the written law-read Constitution- and what people do or want to do. In other words, the absence of a culture of the rule of law upon which constitutionalism is based. The conspicuous disregard for constitutionalism has its origins in Kenya's political history. For most of the independence period, Kenya adopted a governance practice based on the personal rule. This is a kind of rule in which major decisions revolved around the head of state. Under these circumstances, the law was not a major determinant of political and other forms of public behaviour. Leaders simply ignored the law as they sought to have unlimited powers. This culture will take time to change. But deliberate efforts must be made to inculcate in the population, and particularly the leaders, a culture of respect for the law and the Constitution. In short, the country must begin to appreciate a culture of constitutionalism. This could be done through two approaches. One is through well thought out, structured and sustained civic education to be undertaken by all major



stakeholders including professional groups. Experience in Kenya has however shown that this role cannot be entrusted with politicians. They will either mislead or scuttle the process. This is because it is not necessarily in their interests to have a well informed and civic-minded population. Against this background, it is our view that civil society should lead in this process, even though the Constitution gives this role to the national government.

While a comprehensive understanding of the Constitution is important, a focus on issues such as intergovernmental relations would help in ensuring its success. Areas that have caused conflicts should be isolated and given pride of place in civic education. This proposal is driven by the fact that intergovernmental relations are at the centre of the devolved system of governance adopted by Kenya. The second approach is to impose sanctions on those who fail to respect the law and the Constitution. One of the weaknesses in our governance system is the failure to take action on those who violate the law. Under such circumstances, public servants including politicians develop a culture of impunity since they know that violation will not result in any consequences. The suggestion, therefore, is that disrespect of the law and the Constitution should be made too costly an act to commit. This would require that appropriate sanctions are imposed on those who fail to obey the law.

It has been suggested that the frictions, tensions and conflicts were perhaps severe during the first five years of devolution and that this has eased in the second phase of devolution which may be an indication of the growing level of maturity in devolution or a mere surrender. Whichever may be the case, the question is why? While some wish to explain it by reference to changes in party politics, we must also consider the possibility that it may do with actors especially at the county levels simply having given up the fight. The county actors may simply have decided that it is better to live and let live. Put differently, players at the county level may have adopted the attitude that, 'if you can't beat them then join them'. Whatever the explanation, this attitude is bound to undermine devolution and service delivery as it may be a plutonic truce which may erupt at will.

Finally, the IGRTC must be aware of the fact that it is dealing with issues that are not just technical. Its mandate touches on a very political matter. The Committee must, therefore, understand the political context in which it is operating or importantly it must be strategically prepared to speak the truth to power.

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ANNEXE I:

Break out Group Discussion

A. Discuss the role of institutions in monitoring government relations and CIC report

- The significance of a functioning intra and Intergovernmental relations
- The structures that facilitate intra and intergovernmental relations
- What needs to be done to promote effective intra and intergovernmental relations
- Challenges to effective inter and intragovernmental relations; experience thus far.


B. Issue of power politics as a cause of conflicts

- What are the causes of these tensions and conflicts? – We can only hypothesize as follow: appetite for more power, refusal to accept devolution, the deficit of devolutionists in leadership positions, lack of understanding of the nature of the county's devolved system- cooperative and consultative

Questions

1. (a) What challenges affect the smooth operation of the interactions of the different levels of government and how has this impacted on service delivery?
(b) What are the causes of these challenges?
 2. Inter and intragovernmental relations are complex and dynamic. What are the components of these inter and intragovernmental relations that affect service delivery?
 3. Oversight of the county executive has been riddled with controversy. In what ways can this function be improved?
- C. The issues and actors that IGRTC is dealing with is not just technical but perhaps more importantly political. You must, therefore, understand the political context and reality in which you are operating. This means that you must be ready to speak the truth to power. You must have the spine (CIC Experience). I am not suggesting that you constantly fight but that you must be strategic in the way you approach your work. (Wamalwa upper House VS lower house)



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- D. Majimbo was destroyed by the refusal to release the money to the regional governments. So when I hear that Treasury delays in releasing money to counties I get scared)
- E. National government holding on to some functions including roads. Duplication of functions, between departments administration, buys fire engine and urban development buys the same, Two fire engines but a waste of funds. Bomet County affected.
- F. Duplication of public participation. Some of these challenges are:
- historical,
 - political,
 - ideological,
 - attitudinal,
 - misunderstanding,
 - lack of capacity among the actors and institutions,
 - others revolve around interests,
 - lack of clarity of mandate,
 - resistance to change,
 - absence of devolutionists, and
 - lack of a culture of constitutionalism
- G. To fathom this issue, the paper attempts to answer the following questions; what are the inter- and intra-governmental structures, units' forums and legal frameworks established by the Constitution and relevant laws? What is the significance of these structures in the context of the devolved system of governance adopted by Kenya regarding service delivery? How are these structures expected to operate? What has been the experience concerning the actual operations of these structures? Put differently, what challenges have emerged in the course of the operationalization of the interactions between the two levels of government and among the county governments as indeed is the case within the national government institutions and how can we explain these challenges? My point is that unless we understand the causes of these challenges we can't provide realistic and effective solutions to them.

H. Why Devolution

The decentralization of the state and the establishment of county governments (devolution) were influenced by many considerations. Key among these was the need to improve service delivery and to facilitate self-governance. Article 174 states the objects of devolution as follows:

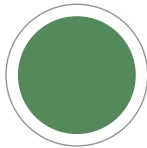
- (a) To promote the democratic and accountable exercise of power.
- (b) To foster national unity by recognizing diversity.
- (c) To give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the state and in making decisions affecting them.
- (d) To recognize the right of communities to manage their affairs and to further their development.
- (e) To protect and promote the interests and rights of minorities and marginalized communities.
- (f) To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya.
- (g) To ensure equitable sharing of national and local resources throughout Kenya.
- (h) To facilitate the decentralization of state organs, their functions and services, from the capital of Kenya.
- (i) To enhance checks and balances and the separation of powers.
- (j) Structures and Forums for Intergovernmental Relations

To facilitate the operations of county governments and their relationship with the national government, including the relations among the county governments themselves, the Constitution and relevant Acts of Parliament establish legal frameworks and structures that would, among other things, promote harmonious coexistence among these governance units and thereby improve service delivery. The Constitution has elaborate inter and intragovernmental relations which, if used, would make devolution work well.



ALTERNATIVE DISPUTE RESOLUTION IN INTERGOVERNMENTAL RELATIONS

*Presented at the Intergovernmental Relations Workshop, Kisumu
December 4, 2018*



INTRODUCTION

The devolved system of government in Kenya as established by the Constitution (CoK 2010) entails a combination of self-governance at the county level and shared leadership at the national level.¹ In this arrangement, intergovernmental relations (IGR) are a necessary mechanism of managing tensions, conflicts and threats to ensure a coherent governance system that delivers services to the nation through the two levels.²

The importance of IGR is recognized by the intergovernmental institutions established by the Intergovernmental Relations Act (IGRA 2012). The Act established the National and County Government Co-ordinating Summit (Summit), which is designated as the apex body for intergovernmental relations.³ The Summit is made up of the President or the Deputy President in the absence of the President, and the 47 governors. Then there is the Intergovernmental Relations Technical Committee (IGRTC), a state agency responsible for coordinating the activities of the Summit and of the Council of Governors (CoG) and implementing their decisions.⁴ Prior to the formation of IGRTC, the TA was the institution mandated under the Transition Act to oversee the functional changeover to the devolved governance system from the previous centralized authority. Upon expiry of the TA's term on March 4, 2016, there were still a number of issues that had not been concluded. The law required that those residual functions be undertaken by the IGRTC.


In the first two years of devolution, intergovernmental relations were greatly hampered

¹ See Chapter 11 of the Constitution of Kenya.

² Part 5, Article 189, Constitution of Kenya.

³ Sec. 7, Intergovernmental Relations Act, No. 2 of 2012, Laws of Kenya.

⁴ *Ibid*, Sec. 8.



by the fact that the Summit and CoG operated without administrative support. There had been limited understanding of the functions, roles and responsibilities of the IGR organs. As a result, issues between and within the two levels of government were not satisfactorily addressed and some matters ended up in court. Yet alternative dispute resolution (ADR) would have been the easier option of addressing some of the conflicts emerging in the process of devolution. This paper discusses ADR as an important component in enhancing the intergovernmental relations envisaged in the CoK 2010 under Article 189(3) and (4). It reviews and discusses alternative dispute resolution mechanisms as a means of resolving issues in inter-governmental relations without recourse to judicial processes. The discussion has been divided into four parts:

Part One discusses the background to the devolution policy, the Constitution of Kenya 2010, and subsequent enabling legislation. It outlines the use of ADR by various economic sectors that have embraced the approach. It also gives the legal position and foundation of ADR.

Part Two provides an analysis of the status of implementation of the devolved system of government. It discusses the policy issues and challenges in intergovernmental relations.

Part Three gives a general overview and highlights the basic principles of alternative dispute resolution and challenges.

Part Four provides recommendations and gives a way forward to the establishment of ADR in IGR and how the IGRTC could help implement ADR in the country.





BACKGROUND TO THE DEVOLUTION POLICY, THE CONSTITUTION OF KENYA 2010, AND SUBSEQUENT ENABLING LEGISLATION

The CoK 2010 was promulgated at a critical time in Kenya. It was a response to the call of many Kenyans for a constitution that would recognize and reflect their values and aspirations as a nation. Kenya wanted a supreme law that could safeguard their socio-economic, cultural and group rights. They wanted a constitution that would promote their effective participation in government.

As a transformative instrument, the CoK 2010 has changed the purpose and structure of the state and seeks to also transform the Kenyan society. It reflects the values that Kenyans would like to affirm. It is an authoritative document that emphasises social and economic transformation. It stipulates principles which guide the exercise of state power, requiring state organs to use its provisions and subsequent legislation for national renewal and transformation.

The Constitution promotes access to justice, which is a critical component of sustainable development.⁵ However, one of the areas where change is required is the overdependence on judicial processes. There is a need for conscious and deliberate application or use of alternative dispute resolution mechanisms.

The Policy on Devolved System of Government 2016⁶ calls for the promotion and strengthening of harmonious intergovernmental relations. The strategies highlighted in the policy include the need to

- a) develop regulations to operationalize the Intergovernmental Relations Act, 2012;
- b) develop a policy to promote the use of alternative dispute resolution mechanisms in the first instance;
- c) enact legislation to provide for alternative dispute resolution mechanisms pursuant to

Article 189(4) of the Constitution;

- d) review the legislation and regulations to improve intergovernmental relations by
 - i) strengthening the Intergovernmental Relations Technical Committee,
 - ii) gazetting the intergovernmental sector consultative forums,

⁵ This is well captured under the United Nations 2030 Agenda on Sustainable Development Goals (See SDG Goal 16: Promote just, peaceful and inclusive societies).

⁶ Policy on Devolved System of Government, Ministry of Devolution and Planning, 2016

- iii) establishing intergovernmental relations focal points at both levels of government to facilitate a cooperative government; and
- e) establish and support a platform and framework to facilitate dialogue among all elected

ADR is not new to Kenya. Traditionally, disputes were resolved through some form of ADR. The practice has grown progressively, culminating into its recognition in the supreme law of Kenya and several pieces of legislation.⁷ The promulgation of the CoK 2010 and the subsequent statutes has witnessed the entrenchment of ADR. It has now become a mainstay in our judicial system and should be rolled out to be the same in the society. For ADR to have efficacy, it must be understood and accepted. The President of the Republic of Kenya⁸ and the Attorney-General⁹ have both separately pronounced themselves on this. All ADR mechanisms need to be exhausted before any recourse to litigation.¹⁰

7 See generally, Muigua, K., "Institutionalizing Traditional Dispute Resolution Mechanisms and other Community Justice Systems", Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, 6(1):84-168.

8 *Business Daily*, "President Orders policy for county blocs in latest endorsement", Monday, October 22, 2018. Available at <https://www.businessdailyafrica.com/news/President-orders-policy-for-county-blocs/539546-4817696-p3t48mz/index.html>. Last accessed December 2nd, 2018.

9 Office of the Attorney General and Department of Justice, "Alternative Dispute Resolution for State Counsel", available at <http://www.statelaw.go.ke/1011-2/>. Last accessed December 2nd, 2018.

10 The issue of using ADR in management of intergovernmental relations disputes was also canvassed in the case of *County Government of Migori and 4 others v Privatization Commission of Kenya and another* [2017] eKLR, where the court partly stated as follows:

There is no suggestion that the structures of alternative dispute resolution under the Intergovernmental Relations Act, 2012 cannot remedy the situation manifested in the dispute about whose function between the national and county government is the business of milling of sugar, that is whether it is a public investment function for the national government or a crop husbandry function reserved for the county governments. Indeed, whether it were considered that the sugar milling is a public investment or an agricultural function, the organs of the Intergovernmental Relations Act are still capable of amicable settlement of the dispute in accordance with the Act and Article 189 of the Constitution by suitable transfer of functions as mandated under section 8 (f) of the Act. Only in the event of failure of reasonable efforts at settlement shall resort be had to judicial proceedings.

Although, there appears to be substantial questions presented to the High Court for interpretation of the Constitution as to the nature and extents of the County Government's agricultural function and the correlated agricultural policy function of national government and the latter's substantive public investment function with respect to the sugar milling factories which are the subject of the privatization program challenged in the suits before the Court, the Constitution itself prescribes for harmonious resolution of any disputes that may arise between the governments. For this reason, a course of avoidance by the Court is a constitutional imperative, at least until the alternative dispute resolution methods have reasonably been employed without success.

Such reasonable efforts towards resolution of the dispute have not been exhausted or failed.

The Court cannot, therefore, be asked to resolve the dispute anyhow now that the matter is before the Court. That would be usurping the prior jurisdiction of the organs of Intergovernmental Relations Act, through which **"the governments shall make every reasonable effort to settle the dispute."** To determine the dispute by constitutional interpretation of the constitutional court is unconstitutional to deprive the governments at the two levels their constitutional mandate to resolve the matter by means of respectful co-operation method of the Constitution, and thereby defeat one of the very objects of devolution under dictates of Article 6 (2) and 189 (2) the Constitution, that –

"Art. 6 (2) The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation."

"Art. 189 (2) Government at each level, and different governments at the county level, shall cooperate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities."

The High Court of Kenya has launched and now provides court-annexed dispute resolution facilities. The rationale behind this is the stifling backlog of cases being handled in the courts and the need to improve access to justice. The main challenge is to demystify dispute resolution to include traditional as well as other forms of resolving disputes and promoting peace, reconciliation, and cohesion.

The following sectors have embraced various forms of alternative dispute resolution:

■ **The Judiciary and the Tribunals**

In line with the constitutional provisions and the Civil Procedure Act and Rules, 2010, court-annexed mediation has since been officially launched and matters are being conducted to reduce the backlog in court cases.¹¹ The Mediation Accreditation Committee (MAC) has already been established as envisaged under the Civil Procedure Act (Chapter 21). In addition, the Mediation (Pilot Project) Rules, 2015, made under the Civil Procedure Act on April 4, 2016, marked the beginning of the Court Annexed Mediation project. Notably, after a successful pilot in Nairobi, the Judiciary rolled out Court Annexed Mediation as an ADR method, to other 10 counties, namely Mombasa, Eldoret, Kisumu, Nakuru, Nyeri, Machakos, Garissa, Embu, Kakamega and Kisii.¹²

The pilot phase that officially came to an end in 2017 was widely regarded as a success owing to the 55.7 per cent and 53.8 percent settlement rate in Family and Commercial divisions, respectively.¹³ It is hoped that this will not only enhance access to justice but also help in cultivating a positive attitude towards the use of ADR mechanisms before approaching courts and tribunals.

■ **Financial Services**

ADR is being embraced by the banking and financial services sector to resolve disputes and reduce the cost of doing business in Kenya. This should be supported by improving the compliance and enforcement mechanisms through national legislation and the existence of strong consumer protection laws that ensure respect for the rule of law and consumer rights.

11 Odongo, D.. "Judiciary launches Court Annexed Mediation to reduce backlog of cases", December 4, 2017. <https://www.capitalfm.co.ke/news/2017/12/judiciary-launches-court-annexed-mediation-reduce-backlog-cases/> Accessed on January 27, 2019.

12 Judiciary of Kenya, "Judiciary rolls out Court Annexed Mediation to other regions", October 23, 2018 <https://www.judiciary.go.ke/judiciary-rolls-out-court-annexed-mediation-to-other-regions/> Accessed on January 27, 2019.

13 Judiciary of Kenya, "Judiciary rolls out Court Annexed Mediation to other regions", October 23, 2018.

The need to entrench the use of ADR in the financial sector saw the Kenya Banking Association team up with the Strathmore Dispute Resolution Center to launch a pilot project for the use of mediation in resolving banking cases.¹⁴

The need to entrench the use of ADR in the financial sector saw the Kenya Banking Association team up with the Strathmore Dispute Resolution Center to launch a pilot project for the use of mediation in resolving banking cases.

■ **Environment and Natural Resources and Traditional Dispute Resolution**

Away from the Constitution, ADR is also anchored under the Environment and Land Court Act. The use of ADR mechanisms in resolving environmental conflicts is also recognized under the Community Land Act, 2016, which provides for the use of this approach in addressing community land disputes.¹⁵ The Environment and Land Courts are also under obligation to promote the use of ADR in environmental and land disputes.¹⁶

Safeguards are needed to protect community interests. Community capacities should be developed so that people can apply and participate in conflict resolution methodologies that promote peace, stability and equitable development. Over 70 percent of cases in Kenya fall under property disputes, which can be resolved by mainstreaming ADR¹⁷.

■ **ADR in the Construction Industry**

The construction industry is one of the drivers of economic development. However, it is also riddled with disputes during and after construction. In this sub-sector, the disputes are largely settled through adjudication as the most common form of ADR. Although at local level, there are institutional rules on adjudication provided by the Chartered Institute of Arbitrators Kenya Branch, the construction industry usually relies on the International Federation of Consulting Engineers (FIDIC), *Conditions of Contract for Construction*:

¹⁴ Strathmore University, "SLS's center to host Inter-bank disputes mediation center," <https://www.strathmore.edu/news/sls%C2%92s-centre-to-host-inter-bank-disputes-mediation-center/>, Accessed on January 27, 2019; See Kariuki, F., "Sustainability in the Financial Sector in Kenya," Kenya Bankers Association, Working Paper Series, Vol. 1, No. 1, 2015, pp. 1-52. <http://www.kba.co.ke/downloads/Working%20Paper%20WPS-01-15.pdf>, Accessed on January 27, 2019.

¹⁵ Sec. 39-41, Community Land Act, 2016, No. 27 of 2016, Laws of Kenya. Government Printer, Nairobi, 2016.

¹⁶ Sec. 20, Environment and Land Court Act, No. 19 of 2011, Laws of Kenya, Revised Edition 2015 [2012]. Government Printer, Nairobi, 2011.

¹⁷ Views taken from random telephone interviews with legal counsels of various counties.

*For Building and Engineering Works Designed by the Employer*¹⁸ and the *Conditions of Contract for Plant and Design Build: For Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor*¹⁹. These not only provide for the use of adjudication in construction disputes but also outline the general procedure to be followed. They are widely used and internationally accepted.

■ **ADR in the Public Sector**

Currently, there is an initiative to develop ADR mechanisms for intergovernmental disputes. The development of a national dispute resolution policy will strengthen these initiatives and signal government policy direction, transforming public service delivery and public participation at county level. In 2014, the Public Service Commission came up with the *Guidelines for Negotiation, Conciliation and Mediation*²⁰, pursuant to the provisions of Article 252(1) (b) of the Constitution. The article empowers the Commission to apply conciliation, mediation and negotiation in dispute resolution.

The guidelines are meant to provide ADR mechanisms, which afford an opportunity to create solutions that are uniquely tailored to address issues at hand and enable the Commission to conduct conciliations, mediation or negotiation in a structured manner that is understood by all stakeholders in the public service. The ADR procedures are meant to apply to all human resource management disputes in the public service, which can be resolved without litigation. The provisions of these guidelines should as far as possible be applied to all disputes before any other recourse is considered.

■ **The Legal Position and Foundations of ADR in Kenya**

Since the promulgation of the CoK 2010, Kenya has had a vibrant legal system which has adequately supported dispute resolution. Before 2010, alternative dispute resolution mechanisms were not mainstreamed in Kenya and the practice was a peripheral option. Article 159 of the CoK, 2010, provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution.

18 *International Federation of Consulting Engineers (FIDIC) Conditions of Contract for Construction: For Building and Engineering Works Designed by the Employer (First Edition, 1999, FIDIC).*

19 *International Federation of Consulting Engineers (FIDIC), Conditions of Contract for Plant and Design Build: For Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor, (First Edition, 1999, FIDIC).*

20 <http://www.health.go.ke/wp-content/uploads/2015/11/GUIDELINES%20FOR%20NEGOTIATION%20CONCILIATION%20AND%20MEDIATION.pdf>; For use of ADR in public sector, see also *Public Service Commission Regulations, 2018*, available at https://www.publicservice.go.ke/images/drafts/FINAL_PSC_REGULATIONS_AS__OCTOBER_2018.pdf.

Article 189(3) and (4) calls for the two levels of government to make every reasonable effort to settle disputes by means of procedures such as ADR, provided under national legislation. In addition, the IGRA emphasizes the importance of dispute resolution in the devolved system of government.

■ Legal Framework

The following statutes are part of the legal framework that governs ADR in Kenya:

a) Constitution of Kenya, 2010

The Constitution of Kenya, 2010, provides for principles in exercising judicial authority, and one of the principles stipulated is the use of ADR.²¹

b) Arbitration Act

This is the principal law governing arbitration in Kenya. The Act contains provisions relating to arbitral proceedings, recognition and enforcement of awards, irrespective of the state in which it was made, subject to certain limitations.

c) Civil Procedure Act and Rules

Section 1A of the Act gives provisions for the overriding objective of the Court. The Civil Procedure Act and Rules, 2010, have provisions that encourage settlement of disputes by arbitration and other forms of ADR, such as mediation and conciliation. It is provided that all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by the rules.

It also provides that any interested parties who are not under disability and agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference. It specifies that no appeal shall lie against a mediation agreement.²²

Order 46 Rule 20 gives provisions for the application of ADR. It is sufficiently comprehensive, since it complements the provisions of the Arbitration Act, 1995.

d) Environment and Land Court Act, 2011

This Act makes provision for the application of alternative dispute resolution mechanisms in environment and land disputes. It states that “nothing in the Act may be construed as precluding the court from adopting and implementing, on its own motion, with the

²¹ | Article 159 CoK, 2010.

²² Civil Procedure Act, 559 B (1) (a) (b) and (c).

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 in accordance with Article 159(2)(c) of the Constitution”. Furthermore, “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”.²³

e) Industrial Court Act, 2011

The Industrial Court Act²⁴ promotes the application of ADR and especially conciliation, in solving industrial disputes. It is provided that if at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.

f) Inter-Governmental Relations Act, 2012

The Inter-Governmental Relations Act gives provisions for utilization of ADR in settling disputes²⁵ between government entities. Through Section 38, the Cabinet Secretary, in consultation with the Summit, has developed ADR regulations that establish the procedure of applying appropriate alternative dispute resolution mechanisms.

g) Land Act, 2012

The Act provides that in the discharge of their functions and exercise of their powers, the National Land Commission and any state or public officer shall be guided by the values and principles that, inter alia, include alternative dispute resolution mechanisms in land dispute handling and management.²⁶

²³ *Land Act s.20.*

²⁴ *Industrial Court Act, 2011 (Act No. 20 of 2011), Laws of Kenya.*

²⁵ *IGRA 2012 ss.30 – 36.*

²⁶ *Land Act, 2012, s.4(m).*

2

OVERVIEW AND HIGHLIGHTS ON THE BASIC PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION AND THE CHALLENGES

ADR refers to any means of settling disputes outside of the courtroom. Although certain ADR techniques are well established and frequently used, for example, mediation and arbitration, alternative dispute resolution has no universally agreed definition. The term includes a wide range of processes, many with little in common except that each is an alternative to full-blown litigation. The main aim of ADR is to harmonize the interests of the parties concerned to achieve an amicable resolution that will be easily complied to by the parties.

■ **ADR Mechanisms**

ADR generally encompasses several mechanisms that are used to resolve disputes out of the court setting. Notably, these mechanisms have specific advantages and disadvantages that make them applicable to different types of disputes.

a) Early Neutral Evaluation/Neutral Fact-finding

This is an ADR mechanism where an independent third party, usually a conciliator, helps parties in a dispute to identify the disputed issues, develop options, consider alternatives and try to reach an agreement by way of clarifying misconceptions and perceptions to reduce tension and promote effective communication. The neutral party creates an environment where the parties feel comfortable to engage in continued negotiations until a favourable and amicable compromise is reached. A conciliator may have professional expertise in the subject matter in dispute and will generally provide advice about the issues and options for resolution.

b) Negotiation

Negotiation is a basic dispute resolution mechanism with parties having autonomy over the process of reaching a mutually acceptable decision without assistance from third parties. Negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation but have reached a deadlock.²⁷

²⁷ Mwangiri, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 115.

c) Mediation

Mediation is the voluntary, informal, consensual, strictly confidential and non-binding process in which the disputants submit to a neutral third party to assist them to reach a negotiated solution. The third party in the discussion facilitates the flow of information, aiding the process of the parties to reach an agreement. The mediator must be acceptable to all disputants and all signatories to the settlement agreements must have binding authority.

d) Arbitration

Arbitration is a dispute settlement mechanism where an arbitrator appointed by the parties or an appointing authority determines disputes and gives a final and binding award. It is a quasi-judicial mechanism of settling disputes, whether administered by a permanent arbitral institution or not.²⁸

■ Challenges Facing ADR

There is no integrated national policy, regulatory framework and strategy to support, harmonize, regulate and popularize ADR development in the country. The gap leads to challenges with ADR credibility and process finality. This negatively affects the efficacy of ADR. It further limits the capacity of ADR to resolve disputes. Therefore, a national policy and regulatory framework for ADR is necessary.

a) Obligation of Parties to Participate in ADR

ADR is a voluntary process whose success is dependent on the level of commitment of all parties. However, due to a general lack of public awareness and support, parties may be reluctant to participate in the process. The CoK, 2010,²⁹ and IGRA, 2012,³⁰ have provided for ADR processes. However, there are gaps, such as the lack of a national policy and regulations on ADR, thus limiting its implementation. Regulations will ensure that justice becomes accessible³¹ and affordable to all and make it easier for ADR mechanisms to be widely recognized and respected.

²⁸ Section 3 (1) Arbitration Act 1995.

²⁹ CoK, 2010, articles 159 (2) (c), 189 (3) and (4), 252(b).

³⁰ IGRA, 2010, ss.30 – 36.

³¹ Article 48, Constitution of Kenya, 2010.

b) Confidentiality of Communication in ADR

Confidentiality is one of the main pillars of ADR. The obligations and the exceptions to confidentiality of communication made during ADR proceedings must be underscored in a coherent legal framework. However, the Arbitration Act of Kenya does not address this expressly, yet confidentiality is considered a custom of trade.

Parties to an ADR process are under an implied or express duty to maintain the confidentiality of the proceedings. The debate that arises is that since inter/intra-governmental disputes are publicly funded, can confidentiality be maintained in ADR proceedings involving public parties?

c) Admissibility of ADR Proceedings

Standards, policies and guidelines for admissibility of evidence of statements made during an ADR process should be clear to facilitate a seamless relationship between ADR and court proceedings. Such clarifications are also necessary in future proceedings that may require ADR practitioners to appear as witnesses in court. In the absence of this linkage, there will be no motivation to use ADR mechanisms.

d) Enforcement of ADR Outcomes

Arbitration is a legal process. Although it takes place outside the courts, the resolution is a final and legally binding decision similar to a court judgment. The decision or award is a determination on the merits by an independent tribunal. Similarly, in mediation, since the parties will develop and sign a resolution they feel is fair to them and which they are capable of performing, the likelihood of not fulfilling obligations of the settlement are reduced. Should one party fail to live up to their obligation, the affected party can seek enforcement through the court. Enforcement of a dispute resolution outcome is the process by which disputants live up to a settlement or an award. Once accepted, it becomes a judgement and is enforceable. However, once it becomes a judgment, it will be subject to the rigors of the judicial process, which can be lengthy and frustrating. It can then be challenged or dismissed or set aside for a number of reasons provided for in legislation. An intergovernmental framework to provide for certain measures to make compliance of these outcomes manageable in terms of time and resources needs to be considered to mitigate such a challenge.



e) Cost of Legal Services

Counties are incurring relatively huge expenditures on legal services compared to the budgetary allocations to these services. The need to reduce the outsourcing of counsel cannot be overemphasised. The County Attorney Bill 2018³² seeks to establish the Office of the County Attorney in all the 47 county governments. The Bill puts in place a structured manner through which governors can deal with legal issues.

Through the appointment of the county attorney and county legal counsel, county governments will reduce the cost of procuring external counsel to represent them in legal matters. This Bill will hopefully improve the representation of the counties in legal matters and save taxpayers money spent on external lawyers.

f) Indirect Costs

Litigation is a long drawn-out process and extremely expensive. The related costs have a direct bearing on delayed implementation of projects, strained relationships between parties, negative public image, and low investor confidence, among others. The spending of scarce county resource in unnecessary litigation cannot be justified. Savings on litigation can be ploughed back into economic projects, thus improving development of infrastructure and the livelihoods of the people. The judiciary is also burdened with unnecessary cases. The time spent by the Judiciary on litigation cases that should not be there in the first place, leads to delayed justice to other sectors and individuals.

³² http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2018/OfficeoftheCountyAttorneyBill_2018.pdf. Accessed in December 2018.

3

ANALYSIS OF THE STATUS OF IMPLEMENTATION OF THE DEVOLVED SYSTEM OF GOVERNMENT

■ Causes of Intergovernmental Disputes

While the devolved system of governance is relatively new in Kenya, there are a few key issues that may be considered the main causes of intergovernmental disputes in the country. This section highlights some of the problems that give rise to intergovernmental disputes.

■ Lack of Constitutional Clarity

There is a lack of constitutional clarity in the laws governing transfer, function, distribution and regulation of functions and powers. Article 187 of the CoK, 2010, as well as sections 24 through 29 of the IGRA, provide for transfer of functions to either level of government. There is a need to develop, through cooperation between the two levels of government, regulations to clarify the assignment of functions and powers to the two levels of government as a deliberate conflict resolution instrument. Establishing a framework for clear assignment of functions and powers to county governments and other intergovernmental organs will go a long way in the acceptance of dispute resolution in the country.

The required clarity in this area calls for concerted efforts at reviewing the legislation that governs intergovernmental relations. This has been spelt out in sections 8 through 15 of the IGRA. The interests of respective governments in disputes over concurrent functions and intergovernmental fiscal relations³³ have been addressed through actions under the general provisions.

Continuous review of intergovernmental disputes should be encouraged to develop robust reforms. A proactive approach in facilitating the national and county governments to cooperate, consult and to clearly demarcate functions is encouraged.

33 *Council of County Governors v Attorney General & 4 Others [2015] eKLR para 97*

■ Institutional Conflicts of Interest

The institutional structures of the IGRTC as a secretariat of both the CoG and the Summit, are spelt out in the IGRA. However, the delay in operationalization of this function created a vacuum that necessitated the CoG to establish its own secretariat. This has generated structural challenges in the relationship between the IGRTC and the CoG secretariat due to inherent overlap in responsibilities.

The architecture of the IGRA 2012, providing for the principal secretary in the ministry responsible for devolution affairs to be a member of the committee tends to compromise the neutrality of the IGRTC. Consequently, there have been instances of strained relations between IGRTC and CoG, and IGRTC and MoDA. To address the perceived institutional conflicts, a few structural changes and shift in mind-sets to create a conscious and deliberate collaborative climate may be necessary. Amendments to the IGRA 2012 could propose inclusion of the CoG, and other intergovernmental bodies to the committee of IGRTC. The other option would be to remove the MoDA representation in the IGRTC so that the committee remains truly neutral.

IGRTC needs to establish itself as a neutral and impartial body to facilitate dispute resolution. The IGRTC as the secretariat of the Summit needs to identify potential conflict areas with the input of all intergovernmental actors. For the IGRTC to focus on this huge responsibility, it needs to be restructured to carry out the mandate under the IGRA 2012. It should, therefore, be established as a fully-fledged authority – an autonomous and impartial body devoid of governmental and institutional interference. Efforts should focus on conflict identification and resolution while working with other intergovernmental bodies as partners in developing and implementing systems to avert conflicts. It will foster closer working relations with MoDA to continually review policies, laws, regulations and procedures for collaborative governance and risk mitigation. Adopting ADR mechanisms such as early neutral evaluation/neutral fact-finding, will help in the identification of areas of potential disputes. Through such a framework, allocation of additional powers to the country would be implemented in a structured manner and risks and capacities understood, mitigated, and subsequently accepted with the concurrence of all parties.

■ The Need to Apply the Principle of Subsidiarity

This principle provides that functions and powers should be left to the lowest level where they can be best performed. The powers currently delegated exclusively to one level of government should be exercised in cooperation and consultation with the other level.

For example, although foreign affairs and internal security are national government functions, in undertaking these duties, the national government is at liberty to constructively consult with the counties. Emerging areas of conflict include functions transfer, development of trade policies independently by each county, elections, county borders, and resource utilization among different communities across counties.

As counties grapple to raise revenue, matters of domestic trade, security, taxation and tariffs are now emerging issues. Development of infrastructure and governing policies that impact on trade and economic development on county trade need to be prioritized.

■ **Conflicts Arising Due to Transfer of Functions and Powers**

Article 187(2) provides that once a function or power is transferred from a government at one level to the other, arrangements shall be made to ensure the resources necessary for the performance of the function or exercise of the power are transferred in line with the ‘finance follows functions’ principle. An increasing number of disputes continue to find their way to the court concerning the transfer of powers. In particular, the CoG has taken the national government to court over a number of contentious issues, such as infrastructure development.

Under the IGRA, 2012, agreements between parties must have provisions for dispute resolution. The regulations should provide that where there is a dispute resolution mechanism under a given agreement, it must be exhausted before judicial proceedings. It is important that this is implemented to preserve the spirit of Article 187 on intergovernmental transfer of functions based on agreements, as well as the provisions under Article 189(2) on cooperation and consultation between the two levels of government. Assignment of specific powers to county governments or joint entities as achieved through negotiation arising from prescribed ADR mechanisms, will give the regulations the necessary enforceability to ensure compliance.

The transfer of functions should be viewed as a policy dialogue that may serve to initiate some learning opportunities through the building of capacity, clarity in the vision of decentralization, and confidence in the benefits to be gained ³⁴.

³⁴ *Functional Assignment in Multi-Level Government (Volume II: GTZ-supported Application of Functional Assignment)* – available at: http://www2.giz.de/wbf/4tDx9kw63gma/GA_Functional_Assignment_VoIII.pdf.

■ **Unbundling, Costing and Transfer of Functions and Powers**

Several practical and inherent risks and challenges such as functional overlaps and responsibility conflicts between county governments and the national government continue to impede the implementation of the devolved governance system. Issues such as management of cross-county planning and service delivery, inadequate human resource, structural overlaps between national and county governments, lack of institutional capacity in counties to execute their mandates, continue to be barriers to the proper implementation of devolution.

Political resistance to devolution usually manifests in delays in the transfer of funds by the national government to the counties. County governments continue to grapple with weak sources of revenue and low economic viability of devolved units, partly caused by weak planning and budgeting capacity.

The delayed unbundling and costing of functions have been a cause of disputes. The Constitution anticipated a phased and asymmetrical transfer of the functions to the counties. The implementation of these functions strongly depends on the clarity of responsibility between the two levels of government, and on the rules or management framework for handling or dealing with areas of functional overlaps that arise³⁵.

Controversy and acrimony among the two levels of government regarding matters of unbundling, costing and transfer of functions³⁶ have persisted and the cost of litigation has risen in tandem. As the substantive intergovernmental body dealing with conflict/dispute resolution, the IGRTC needs to prioritize the aspect of the unbundling and transfer of functions and powers, and address any outstanding issues through a cooperative and intergovernmental process.

■ **Restructuring the Old-order Institutions**

Some of the conflicts witnessed to date stem from the old order institutions. The lack of understanding of key issues around powers and functions continues to generate a great deal of mistrust among stakeholders who believe that the national government is seeking to frustrate them. The contestation is over the piecemeal transfer of functions that has taken place so far, with arguments that all powers provided in Schedule Four of the CoK be transferred at once. The demand is partly driven by belief on the part of county governments that officials of some of the national government structures being phased

35 Report on Emerging Issues on Transfer of Functions to National and County Governments – Kamotho Waiganjo.

36 *Republic v TA and Another Ex Parte Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU) and two Others [2013] eKLR.*

out remain resentful of the invasion of their previous scope of authority. The reality is that many county governments, if not all, lack the capacity to absorb all such powers at once. Kenya currently lacks enough of trained and experienced road engineers, teachers, medical personnel, fiscal and economic planning experts, etc, to adequately cater for the 47 counties.

To illustrate this, an example is given of Kenya Rural Roads Authority (KeRRA). It is a state corporation established under the Kenya Roads Act 2007, with responsibility for the management, development, rehabilitation and maintenance of rural roads classified as classes D, E, as well as the unclassified. The authority's offices in all the 47 counties are headed by regional engineers. However, the authority is riddled with poor objective setting, lack of strategic awareness, resistance to strategy implementation, and late involvement of staff in the strategy process, which are an impediment to the implementation of its mandates.

Duplication of functions between KeRRA and the county engineers continues to contribute to a persistent acrimony between the two levels of government. The transition of governance has not been effectively completed to make way for the devolved system.

■ **The Role of Sectoral Fora**

The IGRA, 2012, sections 13(1) and (2) provide for the establishment of intergovernmental working groups and sector forums. The purpose of these forums is to bring together the two levels of government (national and county) to discuss issues of mutual interest in the transition to devolved governance. These include health, finance, education, and other cross-cutting areas. Currently, 18 such forums have been established and operationalized.³⁷ Formation of a specific forum on ADR matters and intergovernmental coordination could play a critical role in conflict management and dispute resolution.

There are several challenges faced in the establishment of these forums, such as functions that have not been specified and the absence of administrative procedures for establishing and managing these forums. Under these circumstances, the decisions of the forums may not bind the parties, hence the need to establish legally supported enforcement mechanisms.

A framework of analysis and unbundling of all the functions should be established so that all parties may cooperate at the forum level to develop and enforce agreements. Requisite policies and laws should be created to give teeth to such fora.

37 www.devolutionasals.go.ke/inter-governmental-relations. Last accessed on December 18, 2018

4

RECOMMENDATIONS AND WAY FORWARD TO THE ESTABLISHMENT OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

The following recommendations may be considered:

a) Promotion of public awareness and capacity building

- i. Increase visibility and impartiality of IGRTC. Engage in an aggressive civic education with the public, national and county governments, and other intergovernmental bodies, on its role and function.
- ii. Public awareness should be undertaken in the counties to educate county government officers (especially the newly elected/appointed leaders/officers) and the public on the benefits of ADR. This will help popularize and enhance the efficacy of ADR.
- iii. Given that causes of disputes mostly arise from the assignment and exercise of functions and powers, IGRTC should embark on a process to actively engage with all intergovernmental bodies to develop legislative amendments and regulations with provisions that establish a framework guiding how ADR can be rolled out and practised throughout the country.

b) Establishment of a resource center

Deep and candid reflections in understanding the unique contexts in which intergovernmental disputes arise are required. Experiences from the first phase of devolution will serve as a guide to inform the development of an appropriate dispute resolution framework to avoid problems of similar nature.

The resource centre can be tasked to undertake the following functions, among others:

- i. Establish a document management system;
- ii. Enable the public to access information on disputes, agreements and treaties that affect intergovernmental relations and devolution;
- iii. Establish an information database, including stock of current cases and disputes before court;
- iv. Conduct periodic visits to the counties to gather information for preservation as referral materials. This will be an important tool for promoting and protecting Kenya's best interests in future disputes;
- v. Catalogue and preserve all disputes lodged at the various IGR bodies;
- vi. Develop capacity building programs for ADR education; and
- vii. Establish and maintain a database of accredited dispute resolution practitioners. These ADR experts will be independent and can provide technical support in assisting the IGRTC to execute its mandate.

5

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COSTING, UNBUNDLING AND TRANSFER OF FUNCTIONS IN THE KENYAN DEVOLVED SYSTEM OF GOVERNANCE



INTRODUCTION


The promulgation of the Constitution of Kenya, 2010 (hereinafter the Constitution) heralded a new dawn for the country. Its principal achievement was the ushering in of the devolved system of governance. Article 6 of the Constitution provides that Kenya consists of two distinct levels of government, the national and 47 county governments. In recognition of the distinctiveness of the two levels of government, Article 189 (a) requires each level of government to act in a manner that respects the other's constitutional status, and that both levels of government respect the institutional and functional integrity of the other.

However, while affirming distinctiveness, Article 6(2), and Article 189(b) and (2) also require that the two levels of government work in consultation, cooperation and to set up joint committees and authorities to facilitate cooperation in the performance of their functions.

The Constitution emphasizes the delivery of services to citizens at both levels of government. To facilitate effective delivery of services, articles 186, 187 and the Fourth Schedule of the Constitution provide for the specific functions of both the National and county governments. These Articles also set out the principles that should inform the transfer of functions and powers between the two levels of government.

One of the principles set out in Section 15 of the Sixth Schedule is the requirement for asymmetrical functions transfer subject to prescribed criteria. Under the asymmetrical approach, functions are devolved promptly to counties that can perform them so that no county is given functions it cannot perform. The Constitution requires the national government to build the capacity of county governments, where such capacity deficit exists.





In furtherance of Section 15 of the Sixth Schedule, Parliament enacted the Transition to Devolved Government Act (TDGA) to provide the legal and institutional framework for the transfer of functions. The Act established the TA as the institution to oversee the implementation of the transfer of functions process and set out the steps that would be undertaken to facilitate an effective transfer of functions process. These steps included a capacity assessment process, analysis, unbundling and costing of the functions to be transferred and the eventual transfer of those functions and resources necessary to perform them.

With coming into operation of county governments according to the conduct of the first elections¹, the process of transfer of functions ought to have been defined by the above constitutional and statutory precepts. Unfortunately, that was not the case. No significant capacity assessment for the counties was carried out before the initial transfer of functions. The process of analysis, unbundling and costing was beset by several missteps that continue to prejudicially impact the performance of many of the functions to date. For instance, a full analysis of what were deemed to be exclusive functions of the national government, like international trade, was not carried out leading to an expansion of the boundaries of those functions by the national government. The parameters of many of the concurrent functions concerning each level of government remain undefined. Regarding costing, the TA applied the historical costing system, which it is alleged, led to inadequate allocation of resources for transferred functions. These challenges have led to a less than the optimal provision of services by county governments thus prejudicing the objectives of the Constitution generally and devolution specifically.

The successful implementation of the system of devolved governance is central to the success of the Kenyan state. It is therefore of utmost importance that its implementation is consistent with the provisions of the Constitution. This will especially require the effective transfer of all functions to the respective governments, the allocation of sufficient resources to perform the functions and the application of constitutionally guaranteed norms and standards so that optimal provision of services by both levels of government is guaranteed to the Kenyan population.

¹ The First General elections in Kenya under the 2010 Constitution were held on the 4th of March 2013. It is pursuant to these elections that the system of devolved governance provided for under the Constitution came alive.

2

TRANSFER OF FUNCTIONS

Pre-transfer processes

The process leading to the transfer and eventual implementation of the various functions assigned by the Constitution to the two levels of government involves a multiplicity of activities and agencies. The principal processes include:

- a) Disaggregation of functions
- b) Functions analyses, unbundling and costing

Disaggregation of the functions into exclusive, concurrent and residual functions

To effectively assess the status of the transfer of functions, it is important to assign the functions in the manner that the Constitution disaggregates them. Article 186 defines three classes of functions namely, exclusive, concurrent, and residual.

The classification of any function within these categories has implications on the nature of analysis and unbundling that will be required before the function can be transferred and performed.

Exclusive Functions

These are the functions that are exclusively assigned to either the National or county governments. A function is exclusive if one sphere of government is solely assigned the responsibility of setting out the administrative framework for facilitation and performance of the function. Functions exclusively assigned to the national government include foreign affairs, defence, security and international trade while county governments are exclusively assigned health, agriculture and Early Childhood Education (ECDE).

Even though a function might be exclusive, it may be exclusive within the domain of one level of government but there is still need for its unbundling to ensure that no component of the function is retained by one level of government particularly through semi-autonomous governmental agencies such as state corporations.

Even though a function is devolved to county governments exclusively, counties will still be required to abide by the national standards and norms for the performance of the function. It is the responsibility of the national government to develop the norms and standards for the performance of functions. The set norms and standards must be complied with at both national and county government levels.

A function may be an exclusive responsibility of the national government but when looked at from a subsidiarity perspective, which provides that functions and expenditure responsibilities should be assigned to the lowest government level that can perform them efficiently, a greater utility in the realization of the function would rest with the lower level of government. There may, therefore, need for the entire function or its components to be devolved.

Concurrent Functions

These are functions that are assigned jointly to both the National and county governments. Both governments retain competency to legislate on the functions and to facilitate their performance. Concurrent functions include disaster management and electricity and gas reticulation, which are assigned to both levels of government by the Constitution. Within the meaning of the Constitution, concurrency of powers refers to the existence of the same powers over the same functional areas. The notion of concurrent functions is often loosely used, and in some cases, the usage seems to simply point out to broad sectors that are assigned in a block as unbundled functions and assigned to different levels.

To avoid jurisdictional overlaps and conflicts on roles, there is an absolute necessity for clarity in the unbundling and mapping out of all activities related to concurrent functions. Such unbundling will bring out precision on the content of the functional assignment to each level of government. Thus, it is important to identify which level has specific responsibilities for various components of concurrent functions in the areas of policy, regulation, and implementation. This ensures that functions are effectively and smoothly implemented and that funds are allocated accordingly.

Residual Functions

These are the functions that are not assigned to any level of government by the Constitution. Article 186(3) of the Constitution provides that any function or power not assigned by the Constitution to any level of government is automatically a national government function. The article, however, contemplates that some residual functions can be assigned to county governments by national legislation converting them to exclusive or concurrent functions depending on the nature of the statutory assignment.

As stated in a previous Inter-Governmental Relations Technical Committee (IGRTC) publication, the following concerns still subsist:²

2 *Emerging issues on transfer of functions to national and county governments. IGRTC publication November 2017. Functional analysis and assignment Consolidated Report, Government of Nepal*

“...is the national government well placed in performing all residual functions? As a response to this question, we must be ready to assess whether or not residual matters that fall within the competencies of the national government are subject to the subsidiarity principle and if so, how best to apply the principle. As it stands, county governments are the level of government closest to the people and as such is involved in the rendering of a wide range of services that materially affect the lives of the people within their areas of competence...”

It is necessary to list all the residual functions and disaggregate them into their unbundled components. This ought to ensure that any their components that can be better performed by county governments be transferred to them through legislation as contemplated by Article 186(3), once the process for the unbundling, costing and transfer of functions is completed.

Function analysis, unbundling and costing

Under Section 7 and 4th Schedule to the Transition to Devolved Government Act, before the transfer of functions several processes were to have been undertaken as detailed below.

i Functions analysis:

Function analysis involves an evaluation of the nature of the functions before their transfer from one level of government to the other. Functions analysis is valuable in identifying and clustering sub-functions of a similar nature together. The underlying principle of functional analysis and assignment of functions at different levels of government is to make each level of government accountable and transparent in service delivery by avoiding ambiguities, duplication, undesirable intervention and coordination problems³.

ii Unbundling

Unbundling relates to the disaggregation of functions to their bare components and assigning those components a cost within the larger framework of functional analysis thus paving the way for transfer to the deserving level of government. For purposes of avoiding duplication and other undesirable outcomes like, ineffective service delivery whilst making government more accountable, the functions have to be unbundled to identify what sub-functions and attributes of the service are assigned to each of the concurrent levels of government.

3 Ministry of General Administration Project to Prepare the Public Administration for State Reforms (PREPARE). Kathmandu February 15, 2015.

iii Costing:

Once functions are broken down, costing is done to determine the level of financial and other resources necessary to enable the government to which a function has been transferred to effectively implement them. Costing of functions involves determining the financial resources necessary to ensure effective implementation of the function to be transferred.

The Constitution and the laws⁴ thereunder required that functional assignment and transfer processes be preceded by steps that ensure sufficient funding and capacity building initiatives as is necessary for the performance of the assigned functions or powers by the concerned counties. This would protect the counties from unfunded mandates and ineffective service delivery. Therefore, it must be noted that the most important element of the process of transfer of functions is to ensure that functions are not transferred without resources and the capacity to effectively perform them. Therefore, resources must follow functions.

Since resources follow functions, any transfer of responsibilities must be accompanied by the necessary resources to be used to perform the functions. Ideally, the costing of functions should be based on the settled principle of funds following functions. The Kenyan experience is that costing of functions underwent the following challenges during the transition phase.

- i. Inadequate baseline information and data on costing of functions, which slowed down the process of adequate costing, including not being able to precisely determine the cost of service delivery.
- ii. Asymmetry of information where the national government had control and access to all information relating to historical costing while the receiving county governments had little or no data.
- iii. Reliance on historical data or historical allocations as the basis for determining the costs of transferred functions.

This could not necessarily reveal the true costs associated with the implementation of the functions assigned to county governments due to the apparent fiscal gaps that such an approach is unable to fill. This historical approach relies on the historical spending that the entities that provided services before the onset of devolved governance engaged in.

Most importantly, these costs were guided by the centralized planning approach associated with the former centralized structures; hence their accuracy had always been subject to contestation.

⁴ *The Transition to Devolved Government Act and the County Government Act*

3

STATUS OF FUNCTIONS TRANSFER AND ISSUES ARISING

Introduction

The manner and procedure for the transfer of functions and powers are set out in Article 187 and Section 15 of the Sixth Schedule to the Constitution and enforced by the TDGA. The process is expected to be flexible and efficient and must be following the objectives of devolution specifically and the Constitution generally. The general norm which is implied in Section 15 of the Sixth Schedule and which is restated in the TDGA is that the functional transfer process is informed by an analysis of the nature and content of the function to be transferred, an assessment of the resources necessary to implement the function upon transfer and by the state of preparedness by the receiving government. It is noteworthy that functions analyses, unbundling, costing, capacity assessment and capacity building were to precede the function transfer process.

The now-defunct TA⁵ was charged with the responsibility of ensuring the seamless transition from the old order to the new constitutional dispensation and played a critical role in overseeing the functional transfer process. The TA was responsible for the analysis, unbundling and transfer of national and county functions. It also charged with overseeing costing of functions to facilitate national and county planning, budgeting, and audit of assets and liabilities among other functions related to the transition to devolved governance.

The TA was also supposed to oversee the assessment and rationalization of human resource requirements between the two levels of government.

Part of the role that the TA played was ensuring that if a function or power was transferred from a government at one level to a government at the other level, then arrangements had to be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are also transferred⁶.

As already noted, the Constitution provided for the phased transfer of functions to county governments that was to be undertaken within three years of their coming into operation. The TDGA outlined the two phases of transition in the manner below.

- a) The first phase was meant to encompass the preparation of functional roles of county governments in line with their assessed capacity. This phase was to

⁵ The TA was established pursuant to the provisions of the Transition to Devolved Governments Act.

⁶ Article 187(2) of the 2010 Constitution of Kenya.

coincide with the pre-election period and entailed the unbundling, costing, assigning of functions, determination of capacities and carrying out of capacity building interventions.

- b) The second phase was to involve completion of activities commenced during the first phase. This phase entailed the overseeing of the transfer of functions from the national government to county governments, and to facilitate them in the performance of their functions.

Unfortunately, the above ideals were not adhered to and Kenya, through the facilitation of the TA, adopted the “Big Bang” approach to the transfer of functions between the national and county governments. In August 2013 after an inter-governmental agreement at the Summit, the TA gave the go-ahead for the controversial “Big Bang” transfer, which was the bulk transfer of the functions under Schedule 4 part II, to all counties simultaneously. The big bang transfer simply meant that not long after coming into existence, the counties were assigned political, financial, and administrative autonomy all at once notwithstanding the prescription of the Constitution for phased transfer including a determination of existing counties’ capacity.

Challenges in the transfer of functions

While subsequent functions transfers have been preceded by more thorough analyses and unbundling of the functions, significant challenges are still evident in each class of functions.

Exclusive Functions

Whereas most of the exclusive functions were duly transferred by the TA through various gazette notices⁷, several challenges have been noted with these functions.

These challenges include:

- i Many functions that belong to county governments have been retained by the national government through state corporations. The most notorious of these is in the agricultural sector where the national government retains the functions on the basis that it is in charge of international trade and that most of the agricultural products are intended for export hence within the mandate of the national government. This position has resulted from the failure to delineate the roles and boundaries by the national government in respect to the international trade function.

⁷ Legal Notice 16 of 2013, Legal Notice 137-183 of 2013 and Legal Notice 33 of 2014

- ii County governments have been undertaking functions that are within the exclusive competence of the national government .The most common of these is education where county governments have been budgeting for bursaries for secondary school students while all education, save for early childhood education is assigned to the national government. Some county governments have also budgeted and expended resources on the security function whilst this is an exclusive function of the national government.
- iii Since some of the functions were not comprehensively unbundled, there have been consistent allegations that even though functions were transferred resources were not fully transferred to the county governments thus making it difficult for the latter to perform the unfunded functions. Conflicts continue to arise in the roads and health sectors over the retention of funds by the national government .
- iv Pieces of legislation under which some exclusive functions were being undertaken before 2010 have not been aligned to be under the devolved system of government. Some post-2010 legislation also contains provisions that violate the functional responsibilities of the two levels of government.The most obvious of this is the Roads Act and several agriculture-related laws that assign county functions to national level institutions.

Concurrent functions

Many of the concurrent functions were unbundled by the TA vide Legal Notice No 137-183 of 2013. However, challenges still subsist in the performance of these functions.

These include:

- i Inadequate analyses and unbundling of some of the functions have led to lack of clarity on role boundaries. In the water sector, the Water Act has not been properly aligned to the devolved system of government. Since the exact roles of the national regulatory bodies had not been properly demarcated during the unbundling process, the Act has permitted an invasive engagement by national regulatory bodies into the operations of county governments.
- ii There is extensive duplication in the performance of some of the services. In disaster management, the respective roles of the two levels of government are not well defined.This has at times led both levels of government to invest resources in tackling the same disaster, which can lead to wastage.



- iii Inequitable allocation of funds. The failure to adequately analyze and unbundle some of the concurrent functions have led to allegations that the national government has retained an inordinate quantum of resources for the components of the functions that they have retained.

Residual functions

The exact number of residual functions remains undefined. Challenges here include:

- i Concerning identification and analysis of functions, residual functions remain unlisted and un-analyzed. Consequently, it is not clear whether any of the functions or parts of them should be performed by county governments according to the subsidiarity principle.
- ii Flowing from the above, the lack of analysis means that the assignment of residual functions to county governments by statute anticipated by the Constitution has not been carried out to the prejudice of county governments.

Cross-cutting challenges

i) Absence of effective alternative dispute resolution mechanism and subsequent costly litigation

In the last seven years of devolution, there have been numerous litigations pitting the county governments, either through the Council of Governors or other interested parties, against the national government and its agencies. Litigation has occurred on the health, roads, and most recently the agricultural sectors. The effect of the litigation has been to limit the space and opportunities for intergovernmental consultation on key issues related to shared functions and to incur huge costs on legal fees and other litigation costs. Since dispute resolution through third party processes is on many occasions inevitable, an effective ADR mechanism would save both parties huge costs and allow a more conciliatory resolution of issues as opposed to litigation.

ii) Law and policy gaps

One of the major responsibilities of the national government is to develop policies on all aspects of functions that are then implemented exclusively by either government or concurrently. Unfortunately, there has been a lacuna in many policy areas leading to contestation on aspects that could have been resolved through policy intervention. Some of the policies have also not been properly aligned to the Constitution leading to laws that violate the Constitution. For instance, the Water Towers Policy has several provisions that run counter to the Constitution.

iii) Norms and standards of performance of functions

The national government is supposed to set norms and standards concerning the performance of functions by both levels of government. Regrettably, these norms and standards have not been set and the performance standards are therefore left to various agencies to determine the appropriate performance standards to the prejudice of the citizen. The latter also makes it difficult to carry out an effective national performance monitoring process.

iv) Exchequer challenges

Since the introduction of devolution, allocation of revenue has been as a result of intergovernmental consultations at the Intergovernmental Budget and Economic Council (IBEC), the COG and the Senate. However, the exchequer release process is still at the discretion of the National Treasury contrary to the provisions of the Public Finance Management Act, 2012. In the last three years, there have been massive delays in disbursements of the revenue allocated to counties leading to the inability of the counties to perform many of their functions and inability to absorb revenue as the exchequer releases are disbursed very late in the financial year.

Lessons learnt

Some of the lessons learnt from the Kenyan experience in the process of transferring functions include the ones below.

- i That despite clarity in the law relating to functions transfer, the practice of transfer is still a political process. Nothing reflects this reality more than the “Big Bang” transfer of functions in August 2013. While one would have expected county governments to object to the unplanned and unlawful “dumping” of services on them, the big bang transfer was approved unanimously at the Summit, which included both levels of government. Many counties believed that their political profile during the nascent period required them to be seen to be delivering services, however unprepared they were.
- ii Besides the difficulties posited above, transitional challenges remain as cross-cutting impediments to the successful implementation of the system of devolved governance. These include slow uptake and appreciation of change, poor inherited systems and practices, ineffective coordination between the National and county governments on the requisite service delivery standards that are key to the effective performance of their duties and responsibilities.



- iii The contribution the judiciary has made towards clarifying the constitutionally assigned powers and functions of the county governments demonstrates how courts have the potential to contribute towards delineating the constitutional powers and functions contours of both levels of government beyond the Fourth Schedule of the Constitution. Thus, courts have an important role to play in redefining the powers and functions of both levels of government beyond the rigid walls of the said Schedule.

As surmised by one commentator:⁸

Courts have, inevitably, been faced with issues of division of powers and functions in the course of safeguarding the Constitution and judicial adjudication of disputes. The process of unbundling and clarifying the powers and functions of the National and county governments (or simply put, determining what functions (and resources) belong to which level of government) has emerged as one of the greatest challenges in the implementation of devolution.

In the matter of *Okiya Omtata Okiiti & one other v Attorney General and six others*⁹, the High Court was moved to declare the decision of the TA to transfer health institutions to the county governments from the national government as being unconstitutional.

The petitioner contended that health institutions that were being managed by the Ministry of Health before the onset of devolved governance were not subject to transfer under the Constitution. The petitioner argued that county health services as used in the Fourth Schedule referred to the health institutions that were formerly under the direction and control of the former local authorities. This argument was rejected by the courts, which clarified that the delineation of health facilities was a policy matter within the preserve of the national government.

Additionally, in the matter of the *Institute for Social Accountability (TISA) and another v The National Assembly and three others*¹⁰; the Court held that the Constituency Development Fund (CDF) which fund was under the control of the members of the National Assembly and mainly adopted for service delivery at the local level, as being unconstitutional. The Court contended that the CDF Act as then was, violated not only the principle of separation of powers but most importantly, that the objectives of the Act including the

⁸ *The Emerging Approach of Kenyan Courts to Interpretation of National and County Powers and Functions*, Conrad M. Bosire. (2015).

⁹ *Okiya Omtata Okiiti & 1 other v Attorney General and 6 others* (2014) eKLR

¹⁰ *The Institute for Social Accountability (TISA) and another v The National Assembly and three others* eKLR (2015) eKLR.

services that it provided for were vague and thus likely to infringe or impact on county functions.

In South Africa, the Constitutional Court has made it clear that questions relating to the interpretation of functional areas are not questions of politics but a matter of legal principle.¹¹

From the foregoing, the courts shall continuously be confronted with the task of settling disputes touching on the functional divisions between the national and county governments.

Recommendations

To ensure the completion of the outstanding processes relating to functions transfer, the IGTRC must ensure the realization of the following.

- a) The Fourth Schedule needs further breakdown since the functions listed therein are still highly aggregated by nature. A casual division along the lines of “policy versus implementation” or “national versus county” is still a broad spectrum for classification with a high degree of haziness on the specific boundaries of the functions. This can only be achieved through a consultative inter-governmental mechanism involving the key institutions and departments engaging in the performance of the functions in question.
- b) There must be a consistent process by which all relevant stakeholders in the devolution space understand and commit to the full implementation of the constitutional principles of devolution and fiscal decentralization as they relate to the transfer of functions. This will help scale down any potential resistance to the implementation of the system of devolved governance.
- c) A continuous review of the existing legal and institutional frameworks for the performance of all functions in the Fourth Schedule and residual functions, for purposes of determining disputes and eliminating duplication of mandates and misallocation of resources, is necessary.
- d) There must be more investment in capacity building initiatives that enhance the abilities of both levels of government to deliver on their policy, legal and functional mandates provided for under the Constitution. Deliberate strategies

¹¹ Victoria Bronstein ‘Legislative competence’ in Stuart Woolman et al (eds) *Constitutional Law of South Africa 2 ed (Original Service, 2004)* 15–8.

must be employed for purposes of identifying capacity gaps as well as designing activities that improve capacity performance especially on the part of the county governments.

Policy silence on key issues has made it difficult to define the parameters of operationalization of several functions. The national government must, therefore, through a consultative process, define the policy frameworks for the areas that the Constitution has accorded it that mandate.

Critical areas for review in the context of intergovernmental relations and functions transfer

Apart from general inertia in the analysis, unbundling, costing and transfer of functions, there have been problems such as lack of clarity on policy and institutional development necessary to implement the Kenyan system of devolved governance. Additionally, there has been little attempt to seek a joint conceptual understanding of devolution and its consequences by both levels of government.

As a premier intergovernmental institution, the IGTRC must continually rally both levels of government towards a joint appreciation of the issues afflicting devolved governance and, taking advantage of the existing platforms for intergovernmental relations, give direction or advisories on outstanding issues surrounding the transfer of functions for purposes of fostering better relations between the two levels of government.

Some of the key areas that IGTRC ought to look into include:


- a) Devising, reviewing, and coming up with strategies that strengthen the intergovernmental relationships between the National and county governments at the political level.
- b) Clarifying roles and responsibilities by ensuring that roles and responsibilities between the two levels of government and the process of functions transfer are concluded. The numerous areas of functional duplication and overlap between the two levels of government not only undermine service delivery but also hurt public finances.

The actions needed to clarify the roles and responsibilities of the two levels of government include the ones below.

- a) Strengthening existing inter-governmental frameworks to enable them to reassess the respective roles of the National and county governments particularly concerning concurrent and residual functions. This may involve full

operationalization of the Summit, the IBEC and the sector working committees so that the latter can deal with the sector-specific issues which lead to duplication or overlap of functions.

- b) A review of the institutional and legal framework currently subsisting for purposes of determining gaps, inconsistencies and implementation flaws and proposing remedial measures thereto. It is conceded that stable intergovernmental structures must be well grounded in law and institutional practices. Thus, central to this institutional and legal framework review would include a review of the following inter alia:
 - i Exploring ways and means of promoting the exchange of information and general interactions between the national and county governments.
 - ii Auditing the legal and institutional framework to determine its levels of effectiveness for purposes of providing adequate opportunities for the counties to undertake their respective competences in a manner that is beneficial to the country at large.
 - iii Evaluation and coming up with agreements on regulatory, legal, and administrative impediments to proper functional implementation and where necessary amendments or abolition of those laws/regulatory practices that undermine devolution and functional separation between the two levels of government.
 - iv Reviewing the framework to allow for more suitable forums for resolution of inter-governmental disputes through different modes of ADR including conciliation and mediation thus minimizing recourse to litigation.
- c) Capacity Building of the counties in line with the law, which is clear that the national government is responsible for the capacity building of county governments. Capacity building is the mainstay of devolved governance and in that regard, the national government must invest resources in administrative and institutional development capacity that spans individual, organizational and institutional spectrum. IGTRC as an intergovernmental institution, in consultation with the National and county governments, should continually assess the capacity of institutions and agencies at both levels of government and design programs and activities that enhance the capacities of such institutions or agencies as required by law.

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- d) Based on the fact that the experience of Kenya in devolution is still nascent, it would be incumbent on the country to study and borrow best practices from countries that have adopted and implemented devolution and fiscal decentralization over some time greater than Kenya's. The experiences of countries like the United States, India, Malaysia, South Africa and Germany where the upper house is an inter-governmental institution, present useful perspectives that Kenya can learn from.

THE ROLE OF COUNTY GOVERNMENTS IN CIVIC EDUCATION AND PUBLIC PARTICIPATION



INTRODUCTION

The Constitution of Kenya of 2010, adopted a devolved system of government comprising two levels of government; the national and county levels of government. A key element of the constitution is the emphasis it places on civic education and public participation in governance affairs.

This paper examines the role of county governments in civic education and public participation and is organised in several sections. Section one introduces the review, section two focuses on the definition; the purposes and benefits, the consumers, the principles, and the mechanisms of civic education. Section three covers the definition of public participation, the purposes and benefits, the levels and characterisation, the principles, and the mechanisms of public participation.

The fourth section examines the nexus between civic education and public participation. Section five examines the constitutional and legal obligation of county governments in respect of civic education and public participation as well as the governance areas in which the county governments have such obligations. Section six addresses the challenges experienced in respect of civic education and public participation, while the final section makes conclusions and recommendations regarding civic education and public participation.



2

DEFINITION OF CIVIC EDUCATION

Broadly defined civic education refers to all the processes that affect people's beliefs, commitments, capabilities, and actions as members or prospective members of communities. It need not be intentional or deliberate since institutions and communities can naturally transmit values and norms. Indeed, the problems that Kenya faces today can partly be attributed to unintentional civic education by leaders, who by their conduct and utterances impart wrong and harmful values in the younger generations. Civic education is certainly not limited to schooling and the education of children and youth. Often, families, governments, religions, and mass media play major roles in civic education, which is understood as a lifelong process. Rietbergen-McCracken, J. (n.d.) defines civic education from the perspective of its ability to equip and empower citizens as follows:-


Civic education (also known as citizen education or democracy education) can be broadly defined as the provision of information and learning experiences to equip and empower citizens to participate in democratic processes. Education can take very different forms, including classroom-based learning, informal training, experiential learning, and mass media campaigns.

Civic education can be targeted at children or adults, in developed or developing countries, and at the local, national or international level. As such, civic education is an approach that employs a range of different methods and is often used in combination with other participatory governance tools.

Kibwana, Ongwen and Oloo (1998) put civic education in that category of informal and general education that seeks to make a citizen a better or more civil citizen. In a democracy, civic education is an education in self-government (p.592). Democratic self-government means that citizens are actively involved in their governance and do not just passively accept the dictums of others or acquiesce to the demands of others.

2.1. Purposes and benefits of civic education

In a democratic society, civic education serves a variety of purposes and delivers several benefits to the governance system. First, civic education equips citizens with the knowledge and skills to participate effectively in democratic life. It prepares citizens for participation in their communities and involvement in the political processes of their communities. The processes are voter education among others that prepare them to participate in the electoral process from an informed position. Civic education leads to



the overall improvement of the democratic functioning of government at both national and local levels. It eventually serves to preserve and enhance democracy by cultivating citizens' care and concern for their communities. The result of good and well-executed civic education is increased participation in political processes based on greater political knowledge.


Secondly, civic education creates awareness for disadvantaged groups, such as the poor, women and marginalised communities on their social and political rights. This enables the marginalised groups to demand their rights. It strengthens the ability of citizens and civil society groups to organize themselves to participate in governance as well as demand for their rights and effective delivery of services. With civic education, citizens are enabled to interact with each other and make their voices heard by those who govern them.

Thirdly, civic education plays a major role in capacity-building and leadership training for leaders at both the national and local level. It capacitates local civil society activists and other community and opinion leaders who interact with the citizens on a day to day basis.

Fourthly, civic education equips citizens with moral and civic values and virtues as well as beliefs, habits and principles. It creates in citizens a positive disposition of interpersonal and intrapersonal values, virtues and behaviours. The behaviours are informed by tolerance, respect, appreciation of difference, rejection of violence, concern with the rights and welfare of others. Others are committed to balancing personal liberties with social responsibility to others, personal efficacy and effectiveness, a sense of belonging to a group or polity, readiness to compromise personal interests to achieve shared ends, a desire for community involvement, and attentiveness to civic matters such as news and other goings-on in society.

This broad conceptual framework about the purposes and benefits of civic education is underscored by the County Governments Act, which clarifies that civic education is meant for not only the governed but also those who govern. In this respect, section 98(1) of the Act sets out the principles of civic education, which promotes empowerment and enlightenment of citizens and government; continual and systemic engagement of citizens and government; and values and principles of devolution in the constitution. Furthermore, section 99(1) which establishes the purpose of civic education also underscores the above-mentioned purposes by providing that “the purpose of civic education under this Act is to have an informed citizenry that actively participates in governance affairs of the society based on enhanced knowledge, understanding and ownership of the Constitution”.

When setting out the objectives of civic education, section 99(2) remains consistent to the broad purposes and benefits identified above even as it focuses more on civic



education in the context of the new constitutional dispensation. It identifies the objectives of civic education as being sustained citizens' engagement in the implementation of the Constitution; improved understanding, appreciation and engagement in the operationalisation of the county system of government; and the institutionalising of a culture of constitutionalism. Other objectives which the section identifies are knowledge of Kenya's transformed political system, context and implications; enhanced knowledge and understanding of the electoral system and procedures; enhanced awareness and mainstreaming of the Bill of Rights and national values; and heightened demand by citizens for service delivery by institutions of governance at the county level.

Finally, the section adds that the objectives of civic education are to create ownership and knowledge on the principal economic, social and political issues facing county administrations and their form, structures and procedures; as well as an appreciation for the diversity of Kenya's communities as building blocks for national cohesion and integration.


As a forerunner to the new constitutional dispensation and these statutory purposes and objectives of civic education, Kibwana et al (1998, p. 594) had expressed the view that:

Acquisition of civic education enables citizens to enforce the “social contract” with their political leaders. Such education leads to political empowerment where citizens can undertake citizen action for safeguarding community interests and values. Civic education can, as it supplements and strengthens formal education, equalize citizens to the extent that a threshold level of comprehension and knowledge becomes possible for all. Civic education will promote civic virtue and responsibility and the growth of knowledge, culture and civilization in society. Also, acquisition of civic education can avoid political and other pitfalls usually associated with an ignorant and unquestioning citizenry such as tribalism, corruption, abuse of human rights, bad governance, electoral malpractices, gender discrimination, the pursuit of harmful customs among others.

In contrast to the unintentional civic education, which can impact society in negative ways by imparting wrong and undesirable values and morals, Kibwana et al (1998) envisioned positive civic education that impacts society positively. They advocated for civic education that is “not sporadic in nature” but has “the potential to be transformed into a movement” by which they meant “a phenomenon, which once it catches on, engulfs or overwhelms society or a sector thereof in terms of space and time leading to qualitative—indeed far-reaching—changes in that society” (p. 592).

2.2 The consumers of civic education

Contrary to the general belief the consumers of civic education are not limited to the citizens at the grassroots levels; they include the elites in society. Thus, transformative



civic education must be holistic and target both the grassroots citizens and the elites in society; as well as the governed and those who govern. In this respect, Kibwana et al (1998) observed that “often the erroneous picture is painted that only grassroots communities are the proper constituency for delivery of civic education” (p. 595). They add that “due to their numerical superiority, the possible prior position of lack of civic knowledge, potential influence on a country’s political life, grassroots populations may be the most important category of those deserving to be exposed to civic education” (p. 595).

This does not, however, underestimate the urgent and dire need for civic education on the part of the elites and those, who govern. Notably, when the struggle for constitution-making started in Kenya, it was made to look like a civil society affair in which those in government, both in politics and civil service did not play a significant role. The result was that by the time the constitution was enacted many political and civil service elites were not well informed about it and the new system of government it had introduced. Yet they found themselves at the centre of the implementation of the new system and its daily operations. This makes them key consumers of civic education on the new system if they are going to successfully work with it. It is for this reason that section 98 makes it clear that civic education is meant for both the citizens and the government.

The devolved system of government is not only novel and complex but also the least understood aspect of the new Kenyan constitutional dispensation (Mutakha 2015, p. 2). The system permeates the entire Kenyan economic, social and political spectrum. Nobody, whether in the private or public sector, can now do anything in Kenya outside the context of devolution. Civic education must thus, be a movement that targets the entire population or society and must particularly focus on all those, who play key roles in the system. The political elite in government requires civic education for them to appreciate the new system of devolved government. Opposition political parties have been assigned specific roles in the new system, which necessitate civic education on their part. The middle class need civic education because their consistent and persistent action can offer leadership to the democratic struggles of the Kenyan people to realise the envisioned transformation of governance and the fruits of the new system. The upper classes and capitalists need to realise that they now must conduct their business within the context of the new system and need to commit their resources to make the system work. The women, youth, labour movement, teachers and co-operative societies must realise that they have vested interests in the system and need to understand it to be able to claim their envisaged benefits. Finally, the organised sector of civil society and citizens generally require civic education to make them the most primary agents of change in Kenya.

3

DEFINITION OF PUBLIC PARTICIPATION


Public participation is defined as any process that directly engages the public in decision-making and gives full consideration to public input in making that decision. Adre, P., Martin, P., and Lanmafankpotin, G. (2012, p. 1) refer to it as citizen participation and define it in the following terms:

Citizen participation may be defined as a process in which ordinary people take part – whether on a voluntary or obligatory basis and whether acting alone or as part of a group – to influence a decision involving significant choices that will affect their community. Such participation may or may not take place within an institutional framework, and it may be organized either by members of civil society (for example, through a class action, demonstrations citizens’ committees, etc.) or by decision-makers (for example, through referendums, parliamentary commissions and mediation, etc.).

The emphasis of these scholars is on the ability of the citizens to take part in the decision-making process and to influence the decision. Most important, however, is the emphasis on the fact that “citizen participation includes power-sharing and influence over major decisions in a community” (Adre et al (2012, p.2). They do this within the context of distinguishing between public involvement, which is broader and includes “public communication, public consultation and public participation” and citizen participation, which as noted “includes power-sharing and influence over major decisions in a community” (Adre et al (2012, p.2).

Writing in a period of extreme exclusion of non-whites in the United States of America, Arnstein, S.R (1969) defined public participation as being “a categorical term for citizen power” (p. 216). She perceives public participation in terms of redistribution of power and other benefits among the haves and have-nots within a given society. From this perspective, she elaborated on the meaning of public participation in the following manner:-

It is the redistribution of power that enables the have-not citizens, presently excluded from the political and economic processes, to be deliberately included in the future. It is the strategy by which the have-nots join in determining how information is shared, goals and policies are set, tax resources are allocated, programs are operated, and benefits like contracts and patronage are parcelled out. In short, it is how they can induce significant social reform which enables them to share in the benefits of the affluent society (p. 216).




Arnstein, (1969) emphasises “that participation without redistribution of power is an empty and frustrating process for the powerless” (p. 216). Such participation “allows the power holders to claim that all sides were considered but makes it possible for only some of those sides to benefit” and ends up maintaining “the status quo” (p.216). This emphasis formed the basis of Arnstein’s quest to identify the various levels and characterization of public participation in the form of a ladder of participation.

When writing in the context of public participation and minorities way back in 1994, Ghai, P.Y. (1994), defined public participation in terms of the “right to take part in government or the conduct of public affairs”. After analyzing the protection of such right in various international instruments, Ghai elaborated on what public participation entails in the following manner:-

Conceived in this broad way, participation covers many areas of life, and state and private sector organization, and involves several activities. These include taking part in national politics through participation in political parties, standing for elections and voting in them. Participation covers forms of enacting legislation and may include vetoes by a group on specified matters. It encompasses other forms of influencing policies, through the media, lobbying, etc. It can cover mechanisms for consultation and negotiations. Thus participation may signify the ability of minorities or their members to bring relevant facts to decision-makers, argue their position before decision-makers, propose reform, be co-decision-makers, veto legislative or administrative proposals, and establish and manage their institutions in specified areas.

In the context of the new Kenyan constitutional dispensation Ghai, P.Y. (2013), views public participation as being “A vision of democracy in which citizens are active in public affairs, promoting their notion of justice and good policies, and engaging in dialogues with the legislature and the executive and in these ways enhancing public deliberation and democracy.

It is a means of bringing people’s preferences and aspirations onto the agenda of the state. And it is seen as relevant to accountability.” On the other hand, Sessional Paper on devolved government under the Constitution of Kenya, 2010 refers to public participation as “an open accountable process through which individuals and groups within selected communities can exchange views and influence decision-making.” In terms of the Public Participation Guidelines prepared by the Ministry of Devolution and Planning in collaboration with the Council of Governors (CoG), public participation refers to “the process where individuals, governmental and non-governmental groups influence decision-making in policy, legislation, service delivery, oversight and development matters.”



Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process. Public participation is, therefore, the process by which an organisation consults with interested or affected individuals, organizations, and government entities before making a decision. It is a two-way communication problem-solving method, whose goal is to achieve better and more acceptable decisions. It is a means to involve those, who are affected by a decision in the decision-making processes. It promotes sustainable decisions by providing participants with the information they need to be involved in a meaningful way, and it also communicates to participants how their input affects the decision. From this perspective, the Kosovo Civil Society Foundation (2011) referred to public participation as being “the possibility for citizens, civil society organization and other interested parties to influence the development of policies and laws, which affect them.”

3.1 The “Public” in public participation

“The public” means one or more natural or legal persons—a collection of numerous continually shifting interests and alliances, which may conflict with each other (Ewing, M.). According to Ewing, M, public in public participation is a catch-all word, meant to describe those with an interest in a decision, other than a proponent, operator, or responsible authority. The individuals making up a public may be involved as individuals or as members of organisations. They may become involved due to their proximity, economics, social or environmental issues, values, among others. Although some scholars use the phrase “citizen participation” instead of “public participation”, “public” is not limited to citizens (Andre et al, 2012). A person does not have to be a citizen to be a member of the public. Ewing, M (2003) observes that “in practice, there are as many publics as there are different people who care, positively or negatively, about a project”. The public regardless of who they are may depend on their viewpoints about ethical, moral, interest groups, and welfare issues. Sometimes different “publics” may be referred to as “stakeholders”, which means those with a stake in an issue and may include non-governmental organizations (NGO’s), government or its agents, industry, individuals, and/ or communities. Stakeholders may not always want to be involved in a decision-making process, but they have the right to know if their interests are affected. They may also want to become involved at different stages of the process.

In the context of public participation in the new Kenyan constitutional dispensation, public means “Resident of a particular county, professional associations, community-based organisations, and ratepayers of a particular city or municipality” MODP and CoG Public Participation Guidelines (2016). In terms of section 2 of the County Governments Act, 2012, “the public” when used concerning public participation means “the resident

of a particular county; ratepayers of a particular city or municipality; any resident civic organisation or non-governmental, private sector or labour organization with an interest in the governance of a particular county, city or municipality; non-resident persons who because of their temporary presence in a particular county, city or municipality make use of services or facilities provided by the county, city or municipality.”


3.2. Purposes and benefits of public participation

Public participation is not an end in itself but a means to an end. Its main objective is to enable the public to play a central role in making decisions that affect their affairs or at least influence such decisions. According to Arnstein (1969 p. 216), the main end or objective of public participation is to enable the citizens to exercise citizen power. In the view of Wouters, M., Hardie-Boys, N. and Wilson, C (2011, p. 17), the main objective of public participation is to encourage the public to have meaningful input into the decision-making process. Thus, participation provides the opportunity for communication between agencies making decisions and the public. This communication can be an early warning system for public concerns and a means through which accurate and timely information can be disseminated. This can ultimately contribute to sustainable decision-making. These benefits apply when public participation is a two-way process—where both the agency and the public can learn and gain benefit. Effective public participation allows the public values to be identified and incorporated into decisions that ultimately affect them.

Against this general approach, several purposes and objectives of public participation can be identified. First, public participation strengthens democracy and governance. Through public participation, the public exercise their constitutional right to govern themselves and the decision making processes become more representative. Openness to the public provides a platform in which they present their concerns while insufficient public engagement limits the power of the people to participate in democratic governance (MoDP & CoG (2016, p. 4)).

Secondly, public participation enhances the transparency and accountability of the government and its officials to the citizens. The people can critically engage in the social, political, cultural, economic, and environmental impacts of policies, laws and development plans. Participation gives the public a say in deciding how costs and benefits will impact on different segments of society. Public participation also ensures that governments are held to account for their actions and are responsive to the interest of citizens. Likewise, public participation increases trust between public officials and the community which makes the leaders responsive to the needs of the community. Participation also enhances public confidence and support of the decision making processes (MoDP & CoG (2016, p. 4)).






Thirdly, public participation improves not only the quality of the processes of decision-making but also that of the results which lead to better decisions. Participation enables governments to understand and appreciate the expectations of the people and different opinions and concerns of various stakeholders. Before policies are approved, they undergo a comprehensive review and revision thus ensuring that policies, laws and development plans are robust and responsive to the real needs of the people. Participation brings into the decision making process additional skills, knowledge, concerns, and ideas that might have been overlooked had the process been limited to government officials. Overall, this should result in better decisions and greater ownership and support of the decisions, projects, programs and plans by all stakeholders whose relationships are improved (MoDP & CoG (2016, p. 4)). Because of the community's understanding and ownership of the decisions and projects, there is greater compliance with the decision Wouters et al (2011, p. 18). Most important is the fact the community comes to understand the responsibilities of their governance structures.

Fourthly, public participation manages social conflict and enhances harmony in society. Participation enables citizens to understand the views and positions taken by different stakeholders, which enables them to tolerate and respect each other's views and positions. This leads to a rejection of violent approaches to the resolution of problems and manages social conflicts. According to (MoDP & CoG (2016, p. 4)), "public participation helps alleviate social conflicts, by taking care of the interests of different stakeholders and building consensus. Investment in public participation at an early stage minimises the number and magnitude of social conflicts arising throughout the implementation of policies, laws and development plans".

Finally, public participation enhances not only the legitimacy of processes and improves the credibility of leadership, but also legitimises implementation processes. Without significant public participation, citizens may become suspicious and feel manipulated. This would undermine effective dialogue and create distrust.

3.3. Levels and characterization of Public Participation

There are several levels of public participation informed by their effectiveness and extent to which they go in giving the citizens real power and influence in the end product of the process of participation. While some processes that are characterised as public participation go far enough as to amount to genuine and real participation, some forms or levels of participation fall short of this and may amount to mere window dressing, which Arnstein calls non-participation. Arnstein (1969) presents these levels of public



participation in the form of a “ladder of participation” with eight levels, or rungs, corresponding to increasing degrees of citizens’ power in decision making. At the bottom of the ladder are two rungs, Manipulation and Therapy, which Arnstein characterized as Non-participation. The middle rungs 3, 4 and 5, identified respectively as Informing, Consultation and Placation, are characterised as tokenism. At the top of the ladder, rungs 6, 7 and 8 correspond to the partnership, delegated power and citizen control respectively and are classified as citizen power. The higher up the ladder an instance of citizen participation can be placed, the more citizens can be sure that their opinions will be integrated into decision making and applied in the interest of their community (Andre et al, 2012, p. 2).

3.3.1. Non-participation

As noted, non-participation comprises the first two lowest rungs in the ladder; namely, manipulation and therapy.

Manipulation refers to public participation process in which, under the guise of citizen participation, people are placed on advisory committees or advisory boards solely for purposes of being used as rubber stamps (Arnstein, 1969, p. 218).

The sole purpose of those in power is to educate the participants and/or engineer their support. Often, such participants are required to append their signatures to documents and decisions even when they were not part of the decision making process. This level of participation distorts genuine citizen participation and reduces it into a mere public relations vehicle used by the power-holders. Meetings of such citizen advisory committees are normally turned into forums for officials to educate, persuade, and advise the citizens without listening to the views of the participants. The advisory committees often have no legitimate functions or powers; instead, they are used by those in power to prove that the public is involved in the running of the governance affairs (Arnstein, 1969, p. 218). On the other hand, therapy refers to a public participation process in which it is assumed that the public is incapable of decision-making. As such, those in power subject citizens to paternalistic education exercises, or clinical group therapy, as a form of enlightenment and cure (Babu, M.T 2015). Both manipulation and therapy are non-participatory processes devised by those in power to substitute for genuine participation. They are purposed not to enable people to effectively participate in the planning or conducting programs, but to enable power-holders to “educate” or “cure” the participants.

3.3.2. Tokenism

Tokenism comprises the third, fourth and fifth rungs in Arnstein's ladder; namely, informing, consultation and placation.


Informing or sharing information with citizens is one of the mechanisms of public participation.

In this process, citizens are informed of their rights, responsibilities, and options. Unfortunately, however, "the emphasis is placed on a one-way flow of information—from officials to citizens—with no channel provided for feedback and no power for negotiation" (Arnstein, 1996, page 219). The one-way communication is often by way of news media, pamphlets, posters, and responses to inquiries. One drawback of this approach is that information is provided at a late stage in the planning process, which leaves the people with little opportunity to influence the decision and the resultant project. According to Arnstein, informing and consultation, when proffered by those in power as the total extent of participation, allow citizens to hear and be heard but under conditions under which the citizens lack the power to ensure that their views are taken into account by those in power when they are making the final decisions.

Participation that is restricted to these levels often lacks follow-through mechanisms. The citizens may be heard but there is no guarantee that the status quo will change. Although the citizens have a chance to contribute ideas, their views are not binding on the decision-makers. Moreover, although placation may appear to give the citizens a reasonable measure of influence, this kind of participation remains in the realm of tokenism since the citizens have room to advise but have no decision-making powers. Similarly, the citizens may be included in committees and agencies that have decision-making powers but are outnumbered by other members in a manner that ensures that they will always be outvoted when decisions are made. The citizens in such committees are also not made accountable to the rest of the public whose interests they may appear to be representing. This level of participation ends up being a mere public relations exercise.

3.3.3. Citizen power

Citizen power comprises of the sixth, seventh and eight rungs in Arnstein's ladder; namely, partnership, delegated power and citizen control. At the level of partnership the "citizens and power holders agree to share planning and decision-making responsibilities through such structures as joint policy boards, planning committees and mechanisms for resolving impasses" (Arnstein, 1969, p. 221). The public participation enables the citizens to negotiate and engage in trade-offs with those in power and gives them real influence



on the decisions that are eventually made. Participation at the level of delegated power puts the citizens in a dominant decision-making position with authority over the project or program. This ensures that accountability is to the citizens and not the power-holders (Arnstein, 1969, p. 222). Participation at the level of citizen control is the highest level of participation which ensures that the citizens have majorities in the decision-making bodies, or have full managerial power (Arnstein, 1969, p. 217).

3.3.4. Effective public participation

In contrast to the approach set out by Arnstein, a clearer approach to the process of effective public participation entails the following five aspects—informing, consulting, involving, collaborating and empowering the public (MoDP and CoG (2016) p. 1). Wouters et al (2011, p. 18) offer this formulation as a better approach to the understanding and securing of effective public participation.

Their approach relies on a combination of these five increasing levels of effective public participation and impact; namely, information, consultation, involvement, collaboration and empowerment.

First, at the information level, the goal of the government is to provide the public with balanced and objective information to assist it in understanding the problem, alternatives, opportunities and/or solutions. The promise of the government to the public in this respect is to keep the public informed.

Secondly, at the consultation level, the goal of the government is to obtain public feedback on analysis, alternatives, and/or decisions, while its promise to the public is to keep them informed, listen to and acknowledge their concerns and aspirations, and provide feedback on how public input influenced the decision. Thirdly, at the level of involvement, the goal of the government is to work directly with the public, throughout the process, to ensure that public concerns and aspirations are consistently understood and considered. The promise of the government to the public in this respect is to work with the people to ensure that their concerns and aspirations are directly reflected in the alternatives developed and provide feedback on how public input influenced the decision. Fourthly, at the collaboration level, the goal of the government is to partner with the public in each aspect of the decision, including the development of alternatives and the identification of the preferred solution. In this respect, the government turns to the public for advice and innovation in formulating solutions and incorporate their advice and recommendations into the decisions to the maximum extent possible. Finally, at the empowerment level, the goal of the government is to place final decision-making in the hands of the public, while its promise to the public is to implement what the public decide.

3.3.5. Principles of public participation

To achieve effective public participation certain broad principles that must be institutionalised in all the processes of governance have been identified by various scholars as well as Section 87 of the County Governments Act. First, there must be recognition of the fact that the public should have a say in decisions about actions that could affect its members' lives, and this must include the promise that the contribution of public will influence the decision finally taken (Wouters et al (2011) p. 18). Secondly, there must be recognition of the fact that public participation not only seeks out and facilitates the involvement of those potentially affected by or interested in a decision, but also seeks input from participants in designing how they participate (Wouters et al (2011) p. 18).

Thirdly, in terms of section 87(a) of the County Governments Act, there must be timely access to information, data, documents and other information relevant or related to policy formulation, implementation and oversight. Both levels of government must provide approved and authenticated official documents to the public for discussion and ensure that information going out to the public are clear and devoid of ambiguity (MoDP and CoG (2016) p. 3). The essence of this is that the public must be provided with all the information they need to participate in a meaningful way (Wouters et al (2011) p. 18). Fourthly, in terms of section 87(a) of the County Governments Act, governments should provide reasonable access to the process of formulating and implementing policies, laws, and regulations including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards (MoDP and CoG (2016) p. 3). Fifth, the processes of public participation must be inclusive and protect and promote the interest and rights of minorities, marginalized groups and communities and their access to relevant information (s. 87(c) of CGA). The practice of public participation should make provision for legal standing of interested or affected persons, organizations, and where pertinent, communities to appeal to or, review decisions or redress grievances with particular emphasis on persons and traditionally marginalized communities, including women, youth, and disadvantaged communities (MoDP & CoG (2016) p. 3, and s. 87(d) of CGA). The sixth, reasonable balance should be maintained in the roles and obligations of county governance and non-state actors in decision-making processes. Recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight are necessary (s. 87(e) of CGA). Provision for Public-Private Partnerships (PPPs), such as joint committees, technical teams and citizen commissions to encourage direct dialogue and concerted action on sustainable development should be made.

3.3.6. Mechanisms for public participation

There are various mechanisms through which public participation can be secured. First, the citizens can attend and take part in community forums in the form of meetings and rallies convened to deliberate on specific matters of concern to the community. In most communities, such fora may be in the form of town hall meetings, public barazas and Bunge Mashinani.

The citizens can also take part in information communication technology-based platforms. In this respect section, 91 of the County Governments Act which provides for the establishment of modalities and platforms for citizen participation has imposed an obligation upon county governments to facilitate the establishment of structures for citizen participation. According to this section, such structures may include information communication technology-based platforms; town hall meetings; budget preparation and validation fora; notice boards announcing jobs, appointments, procurement, awards and other important announcements of public interest; development project sites; avenues for the participation of peoples' representatives; and establishment of citizen fora at the county and decentralised units. Similarly, section 207 of the Public Finance Management Act permits the making of regulations to govern the realisation of public participation under the Act. The regulations may provide for structures for participation; and mechanisms, processes and procedures for participation, among other matters.

Secondly, the media such as radio; television; and online and social media platforms such as WhatsApp, Facebook and Twitter provide an important mechanism for public participation for citizens to participate in discussions.

This mechanism is recognised by section 95 of the County Governments Act, which requires county governments “to establish mechanisms to facilitate public communication and access to information in the form of media with the widest public outreach in the county”.

According to the section, such media “may include television stations; information communication technology centres; websites; community radio stations; public meetings; and traditional media”.

Thirdly, demonstrations on positions taken on issues and or a cause or government policy, marches, boycotts, sit-ins and peaceful protests provide another important mechanism for public participation. This is consistent with the right to assemble, demonstrate, picket and present petitions established by Article 37 of the Constitution.



Fourthly, participation in the sector working and interest groups, advisory committees and planning and budget forums to receive information and give views is another mechanism for public participation. Lobbying decision-makers and presentation of petitions and written memoranda to decision-makers such as parliament and county assemblies provide a useful mechanism for public participation.

The fifth mechanism for public participation is participation by the people in local referenda which is provided for by section 90 of the County Governments Act. According to this section, a county government may conduct a local referendum on several local issues such as county laws and petitions; and planning and investment decisions affecting the county. In the case of planning and investment decisions, a petition must have been raised and duly signed by at least twenty five per cent of the registered voters where the referendum is to take place.


Finally, a major mechanism of participation is through participation in the election of a representative to county elective offices. Even after the election to office, the people retain the right to recall their elected leaders. Participation in the recall of county assembly members provided for by sections 27, 28 and 29 of the County Governments Act is an important mechanism for public participation.

3.3.7. The nexus between civic education and public participation

There is a close nexus between civic education and public participation. Civic education is a mechanism through which public participation can be effectively achieved. As already noted, civic education prepares and equips citizen to participate in governance affairs. Rietbergen-McCracken, J. (n.d.) has stated in this respect the following:

The overall goal of civic education is to promote civic engagement and support democratic and participatory governance. The idea behind civic education is to promote the demand for good governance (i.e. an informed and engaged public), as a necessary complement to efforts to improve the practice of good governance.

Section 99(1) of the County Governments reflects this relationship by providing that “the purpose of civic education under this Act is to have an informed citizenry that actively participates in governance affairs of the society based on enhanced knowledge, understanding and ownership of the Constitution”.



MoDP and CoG (2016, p.32), in their guidelines, recognized this nexus when they observed that:

Civic Education is a critical and effective empowerment tool for promoting public participation in democratic and governance processes. It empowers the public, both as individuals and as part of collective groupings. Public participation is built by protecting individual and collective rights and ensuring an appreciation of each citizen's obligations to society. Hence, if the public does not have a good understanding of the process and content of public participation, they will not effectively engage with county governments.

Because of this, the subsequent sections of this paper will not distinguish between the two but will instead focus on the public participation which is regarded as including civic education as a preparatory stage.



4


THE CONSTITUTIONAL AND LEGAL OBLIGATION OF COUNTY GOVERNMENTS IN RESPECT TO CIVIC EDUCATION AND PUBLIC PARTICIPATION

The role of county governments in civic education and public participation is anchored in several constitutional provisions. First, the Constitution of Kenya, 2010 is founded upon the concept of the sovereignty of the people making the participation of the people in all governance matters an integral part of the governance system. The constitutional foundation of public participation is Article 1(1) and (2) of the Constitution which declares that all sovereign power belongs to the people who may exercise it either directly or indirectly through their representatives. Indirect exercise of the sovereignty of the people does not oust or exclude the participation of the people since representative democracy can harmoniously co-exist with the participation of the people.

Secondly, Article 10 of the Constitution, which establishes the national values and principles of governance includes among them, the value of “democracy and participation of the people”. These values impose an obligation upon all state organs, state officers, public officers and all persons whenever they apply or interpret the constitution; enact, apply or interpret any law; or make or implement public policy decisions. County governments are included among the entities that are bound by these obligations and must respect democracy and participation of the people.

Thirdly, when setting out the objects of devolution, Article 174(c) identifies giving to the people the powers of self-governance and enhancing the participation of the people in the exercise of the powers of the state as one of the objects of devolution. Fourthly, item 14 of Part 2 of the Fourth Schedule identifies one of the functions of county governments as being “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”. These provisions not only underscore the essential role of civic education and public participation in governance but also establish the obligation of governments at both levels to ensure civic education and public participation.

In respect of county governments this obligation is imposed upon first, the county government generally; second, the county assembly; third, the county executive and some of its functionaries such as the governor.



For example, section 30(3)(g) of the County Governments Act, on the one hand, requires the county governor, when performing his functions, to “promote and facilitate citizen participation in the development of policies and plans, and delivery of services in the county”. Section 92(2) on the other hand, requires the governor to submit annual reports to the county assembly regarding citizen participation in the affairs of the county government.

The obligation of the county governments in respect of civic education and public participation is provided for in various constitutional and legislative provisions and manifests itself through several governance areas discussed in the subsequent sections of this paper.



5

OBLIGATION IN THE FORMULATION OF POLICIES AND PLANS

The Constitution of Kenya assigns to county governments not only service delivery functions but also development functions. County governments are therefore critical players in the development and planning of such development. County governments have both constitutional and statutory responsibilities for both short term and long term county planning. Section 104(1) of the County Governments Act imposes an obligation on all county governments to plan for the county and bars them from the appropriation of any funds outside a planning framework. They must develop integrated economic, physical, social, environmental and spatial plans (s. 104(2)).

Public participation is a mandatory requirement in the entire planning processes undertaken by the county governments. First, as part of the promotion of public participation in planning, section 104(4) requires a county government to incorporate non-state actors in the planning processes. Secondly, section 105(d) of the County Governments Act, 2012 requires all county planning units to ensure meaningful engagement of citizens in the planning process. Thirdly, section 106(4) stipulates that “county planning shall provide for citizen participation”. Fourthly, section 115(1) which is dedicated to public participation in county planning makes public participation in the county planning processes a mandatory requirement. According to this section, such public participation must be facilitated through mechanisms provided for in Part VIII of the Act; and provision to the public of clear and unambiguous information on all matters under consideration in the planning process. Fifth, in matters relating to performance management plans, section 47 requires a county executive committee to design a performance management plan to be used to evaluate the performance of the county public service and the implementation of county policies. According to section 47(2)(d), such a plan must provide for “citizen participation in the evaluation of the performance of county government”. Finally, section 114 which deals with planning for nationally significant projects in a county, requires such projects to be preceded by mandatory public hearings in each of the affected counties. After such public hearings, the projects must be considered and approved or rejected by the county assemblies of the respective affected counties.

Article 232(1) of the Constitution establishes values and principles of public service, which include “involvement of the people in the process of policymaking” relating to public service matters (Article 232(1)(d)).

5.1. Obligation manifests in the legislative process

The importance of public participation in the legislative processes is underscored by constitutional provisions that specifically require both Parliament and county assemblies to facilitate public participation and involvement in their work. While Article 118 of the constitution addresses parliament on this issue; Article 196 requires county assemblies to first, conduct their businesses openly, and hold their sittings and those of their committees in public, and second, facilitate public participation and involvement in the legislative and other business of the assemblies and their committees.

To give effect to this obligation, section 15 of the County Government Act establishes the right to petition a county assembly. In terms of section 15(1) of the Act, “a person has a right to petition a county assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation”. According to sub-section (2), an obligation is imposed upon the county assembly to prescribe a procedure that must be followed to realise the exercise of this right.

5.2. Obligation manifests in Public Finance Management matters


One governance area in which public participation is central is that of public finance management. Both the Constitution and the Public Finance Management Act, 2012 impose an obligation on county governments to ensure and facilitate public participation.

First, Article 201(a) identifies openness, transparency and public participation in financial matters as one of the principles of public finance.

To give effect to this constitutional requirement section 10(2) of the Public Finance Management Act, 2012 (PFMA) requires the Parliamentary Budget Office to observe the principle of public participation in budgetary matters.

Similarly, section 25(5) of the PFMA imposes an obligation on the National Treasury to seek and take into account the views of not only the Commission on Revenue Allocation; county governments; Controller of Budget; the Parliamentary Service Commission; and the Judicial Service Commission, but also the public and any other interested persons or groups. In terms of section 36(5) of the PFMA, the Cabinet Secretary for Finance is required to make regulations providing for procedures regarding how, when and where members of the public shall participate in the budget process.

Most important, however, is the fact that in respect of county governments, section 137 establishes a specific forum through which county governments can conduct consultations with the public. This is the County Budget and Economic Forum (CBEF)




whose membership includes representatives of non-state actors such as professionals, business, labour organisations, women, persons with disabilities, the elderly and faith-based groups in the county.

Secondly, the Senate which has the responsibility to determine the five-year basis for the allocation of revenue among the counties is required by Article 217(1)(d) to “invite the public, including professional bodies, to make submissions to it on the matter”.

5.3. Obligation manifests as Bill of Rights issues

In several respects, the obligation of county governments to ensure civic education and public participation is rendered as rights of members of the public under the Bill of Rights. First, it has already been discussed that one of the objectives of civic education is to equip the public with knowledge and information that can enable them to engage in effective public participation. On the other hand, public participation begins with the obligation of the state to share information with the public and to allow members of the public access to information held by the state. From this perspective Article 35 of the Constitution establishes the right of every citizen to access information held by the state; and information held by another person but which is required for the exercise or protection of any right or fundamental freedom. In particular, Sub-Article (4) imposes an obligation on the state to publish and publicize any important information affecting the nation.

The Article 35 on the right to access to information is underscored and re-enacted by section 96(1) of the County Government Act under which a person can request for such information from a county government or any unit or department of the county government. To give effect to this constitutional right and obligation, part IX of the County Governments Act is dedicated to matters relating to public communication and access to information. Section 93 establishes principles of public communication that require integration of communication in all development activities; observance of access to information by county media; and observance of media ethics, standards and professionalism. The objectives of county communication are set out by section 94 which requires county governments to use media to create awareness on devolution and governance; promote citizens understanding for purposes of peace and national cohesion; undertake advocacy on core development issues such as agriculture, education, health, security, economics, and sustainable environment; and promote freedom of the media. A framework for county communication is set out by section 95 as discussed in the section dealing with mechanisms for public participation. Finally, section 96 requires each county government and its agencies to not only designate an officer for purposes



of ensuring access to information, but also enact legislation that is consistent with the national legislation governing access to information to ensure the realization of the right to access to information.

Secondly, Article 37 of the Constitution establishes the right of citizens to present petitions to public authorities. This constitutional right is re-enacted and elaborated by section 88 of the County Governments Act. The section confers upon every citizen a right to petition the county government on any matter under its responsibility. Such petition must be in writing although a county government can enact legislation aimed at realizing the right. In respect of county assemblies, section 15 of the County Governments Act establishes the right of every person “to petition a county assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation”. As part of the realization of the right, section 89 imposes a duty on county government authorities, agencies and agents to expeditiously respond to petitions and challenges from citizens.

5.4. Obligation manifests as affirmative action for minorities and marginalized groups

As noted public participation aims at redistribution of power, equity and inclusion of minorities and marginalized groups in governance and sharing the benefits of governance. Article 27 of the Constitution, therefore, provides for the right to equality and outlaws any form of discrimination on any ground. The constitution identifies several groups of persons as marginalized groups that require affirmative action and establishes specific rights for them including their participation in the affairs of the society. These include children under Article 53, persons with disabilities under Article 54, youth under Article 55, minorities and marginalized groups under Article 56, older members of society under Article 57. Article 100 in particular, requires the representation of women; persons with a disability; youth; ethnic and other minorities; and marginalized communities in parliament.

Article 227 of the Constitution which governs the procurement of public goods and services requires protection and preference of marginalized groups in the procurement process. For this reason section, 35 of the County Government Act requires county governors when nominating persons to be appointed as members of the executive committee to take into account the diversities in the county and the marginalized groups. Likewise, section 97 establishes principles that focus on the inclusion and integration of minorities and marginalized groups. These principles include the protection of marginalized groups; the outlawing of discrimination; special protection of vulnerable persons; special measures of affirmative action; and promotion of effective participation of marginalized and minority groups in public and political life.



6

CHALLENGES OF CIVIC EDUCATION AND PUBLIC PARTICIPATION

Civic education and public participation require an open, accountable and structured process enabling public interaction and decision making influence. However, challenges have been witnessed in several respects.

The cost of public participation may be high making it difficult for county governments to fund or adequately fund meaningful public participation. Lack of time, accessibility and trust may also pose challenges to the realisation of meaningful public participation.

Ensuring the accommodation of all the diversity in a county may also be a problem. The capture of the entire process by the elites often threatens the realisation of effective public participation. So far a national policy, norms, standards as well as regulations have not been developed thereby posing a challenge to the entire process.

Political competition may reduce the process of public participation in a contest. Expectations of compensation for participation have undermined the noble objectives of civic education and public participation.

In communities where there are high levels of illiteracy realisation of meaningful public participation is a challenge, especially when there is inadequate civic education on the issues in question.

The consequence is the manipulation of public participation forums by either the organizers of the same or a few participants who may hijack them and use them for their narrow sectarian interests.

7

CONCLUSION

This paper has demonstrated that civic education and public participation are central in the governance system established by the Constitution of Kenya, 2010. Public participation is, therefore, expected to be prominent in the entire governance system especially at the county level.

The obligation to facilitate public participation is indeed onerous and unless well-executed, meaningful public participation may not be realised.

The paper has shown that while public participation plays an important role in the realisation of good governance, the appreciation of meaningful and effective public participation may be a challenge.

Governments may very easily engage in tokenism under the guise of public participation. There is an urgent need to develop legislation, norms, standards and administrative procedures to guide civic education and public participation processes.

The necessary sensitization and civic education activities to create citizen awareness of their responsibility in public participation ought to be undertaken.

It has emerged that meaningful public participation requires feedback mechanisms to give people confidence that they were listened to. These feedback mechanisms ought to be developed by all county governments.



8

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PART 3

ANNEXES

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ANNEXE I: FULL SPEECHES DURING THE OPENING AND WELCOMING SESSION

2.1. Waceke Wachira, Chief of Party, Agile and Harmonized Assistance for Devolved Institutions (AHADI)

Wachira realized there is a rich and diverse representation of institutions from the Government. She gave a brief background of AHADI for the benefit of participants that had not interacted with AHADI.

AHADI has been doing devolution work since 2014. The theory of change seeks to ensure capacity is built in the various devolved institutions. If citizens are effectively engaged in the devolution process, if there are effective Intergovernmental Relations (IGR) between the two various levels of government, then the country will achieve the promise of devolution which seeks to bring services closer to the Kenyan people, and ensure there is equity in the distribution of resources. AHADI has provided a lot of technical assistance to the various institutions managing the devolved system of governance, including partnering with IGRTC and providing capacity to Council of Governors, Ministry of Devolutions and ASALs, County Assembly Forum (CAF), Senate, and the Commission on Revenue Allocation (CRA).

In respect to IGRTC, AHADI has provided technical support on strategic interventions. For example, support in the publishing of various studies which include; The status of Public Participation in National and County Governments, Cost of litigation in inter/intergovernmental litigation in Kenya, Report on Emerging Issues on Devolution and best practices in Intergovernmental Relations, Emerging issues on Transfers of Functions to National and County Governments.

AHADI supports IGRTC because it believes that IGR is critical in ensuring the success of devolution. Without an effective framework on IGR devolution cannot work. If you have a strong national government and a strong County Government but they do not communicate with each other, or the various levels of government at the horizontal level (County Assemblies and County Executives) are not communicating with each other, then devolution will not be successful. This is why AHADI has invested and continues to partner with key government institutions to ensure that the Intergovernmental framework is established.

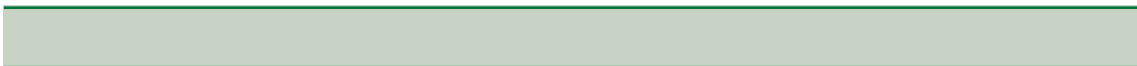
The first 5 years of devolution under the new constitution was an establishment phase. IGRTC, COG, the Ministry of Devolution and ASALs, and all other forums and sectoral

committees were established. The second Government under devolution should now focus on operationalization. There is a need to embrace the spirit of devolution and allow IGR institutions that have been established to be fully operational. The spirit of co-operation, co-ordination and consultation should be embraced to ensure that IGR moves to the next level of being efficient and effective. This is the main reason for having the workshop.

Going forward, AHADI expects the following from the workshop; that the workshop is a space for having discussions on the gaps that exist, that hinder the effective working of the IGR institutions and framework; what must be addressed under the legal and policy framework to ensure that the IGR framework is more effective; the ADR framework which is in the cabinet awaiting approval is operationalized to avoid the cost of litigation experienced in the past where the various levels of government were not able to understand each other and the issues ended up in court, AHADI has supported the process of developing the ADR framework by the Ministry of Devolution and ASALs; discussions on strengthening IGR committees and sectoral forums, discussions on legal and legislative gaps that exist, and discussions around the bodies supporting the IGR framework and how they can be strengthened and made independent so that they can provide leadership on IGR issues.

Ms Waceke believed that the participants representing the various institutions from the government have the power and authority and ability to discuss issues so that at the end of the workshop there will be a clear Action Plan on how IGR can be strengthened and how it can be made effective going forward.

She concluded by stating that AHADI is honoured and privileged to be partnering with IGRTC and all the institutions represented at the workshop. She hoped that a clear Action Plan that AHADI can support will be formulated.



2.2 Hon. Jeremiah Kioni, Chairperson, National Assembly Constitutional Implementation Oversight Committee (CIOC)

The chairperson of the Constitutional Implementation and Oversight Committee (CIOC) Hon. Jeremiah Kioni pointed out that the committee has been keen on taking stock of the devolution implementation process. He shared with the workshop participants some of the challenges that CIOC encountered when it was being constituted. He mentioned that at the time of its establishment, few legislators were willing to be members of CIOC. “It was very clear that I was going to be the only person who was going to be a member” the chairperson noted.

The chairperson reiterated that the committee will pursue its mandate as outlined in the Sixth Schedule of the Constitution of Kenya (CoK, 2010). This will ensure respect for, adherence to and implementation of the devolved system of governance for the benefit of all Kenyans. “The implementation of the constitution was not going to end after the first phase of devolution. It is going to be with us. The 11th parliament tried to hide it but realized that it was not possible as it was provided for in the constitution. The message is that CIOC exists in the parliament” said the legislator.

The chairperson further expressed CIOC’s readiness to offer any support regarding the amendment of the constitution. “CIOC is waiting to hear who has difficulties in implementing the constitution and why? CIOC role is to listen, check and see the gaps. The committee will be keen to offer any guidance and support” Hon. Kioni stated.

In response to some issues that had emerged previously and whether they were weakening or strengthening devolution, the chair mentioned that the issues had been tabled to the technical committee. The issues were diverse ranging from revenue collection, assets that are still with the national government, misappropriation of funds, role of the many nominated leaders like the Members of the County Assembly (MCAs), failure of ministries to align their policies to the new constitution among others. He called for stronger, vibrant and independent committees than they are at the moment. “Committees need to reclaim their independence and cut themselves off from the national government,” the chair said.

He reiterated that CIOC was entrenched in the constitution to ensure implementation of the constitution irrespective of who and what. “There are those people who are looking for political and economic devolution, while the citizens are looking for devolution of services. These are the challenges that we have to deal with” Hon. Kioni noted.

Hon. Jeremiah Kioni emphasized that CIOC will work closely with IGRTC to deliver its mandate. “The importance of the IGRTC can never be overemphasised”. The mandate needs to be strengthened. The committee’s presence is to hear and learn what should be done. This underlies the rationale of why IGRTC was established” the legislator noted.

The chairperson concluded by pointing out on the need for amendment of some of the existing laws, noting that it was the responsibility of CIOC to deal with some of the amendments within the constitution.

2.3 Professor Karega Mutahi, Chairperson, IGRTC

He began by thanking the people of Kisumu and the governor of Kisumu County, Prof. Anyang’ Nyong’o for the warm welcome as well as appreciating all participants, organizers, AHADI, United States Agency for International Development (USAID), Department for International Development (DFID) and all development partners for their commitment towards the workshop’s success.

IGRTC facilitates harmonious consultation between the two arms of government. By choice, Kenya was made to have devolution overnight and there was little preparation for devolution. There is little understanding of what devolution is, and what it is all about and we have made minimal progress. There is a need, therefore, to deal with devolution as far as inter-governmental relations are concerned. IGR should move devolution forward because Article 6 and 189 of the constitution provides for this.

Cooperation and/or consultation are mutually interdependent and there is none above another. The county governments are the implementers and the national government are the policy formulators, this was designed to deliver services. The constitution expects consultation and public participation, initially, public participation was seen as a gathering without meaningful participation. Hence, public participation was not taken seriously, this has to change and public participation should not be symbolic but real.

In cases of dispute, discussion and negotiations play a big role in resolving the problem. In the case of IGRTC, we are happy to announce that IGRTC has been involved in 15 cases, 8 issues have been resolved, 6 pending and 1 is back to court. Support and consultation need to be adhered to, to avoid delays in resolving disputes. There is a need to understand the milestones that have been achieved in intergovernmental relations because knowledge is an important factor when facilitating service delivery. Therefore, IGRTC is delighted to inform participants on its activities relating to IGR.

Prof. Karega noted that countries that devolved years back are still struggling with the implementation of devolving and therefore, there is need to appreciate the Constitution of Kenya (CoK, 2010) and what it has mandated various institutions to perform. He concluded by noting that IGRTC is committed to working with the two levels of government and is ready and willing to solve and discuss issues to do with intergovernmental relations, ensuring effective and efficient delivery of services.

2.4 Charles T. Sunkuli, CBS, PS, Ministry of Devolution and Arid and Semi-Arid Lands (ASALs)

Let me first say as I open this workshop that I appreciate the participation by all participants and AHADI for continuing to support the Ministry of Devolution and especially for supporting the workshop forum. I am happy to see the faces that discussed the Constitution of Kenya 2010, (CoK, 2010) are represented in the workshop.

This workshop should, therefore, act as a forum for us to look back and take stock of how much we have achieved so far, the difficulties we have gone through and how to move forward.

It is my honour to read this speech on behalf of Hon. Eugene Wamalwa.

2.5 Official Opening Speech: Hon. Eugene Wamalwa, E.G.H., Cabinet Secretary, Ministry of Devolution and ASALs

Honourable Governors, Honorable Senators, Honorable Members of Parliament, Honorable Members of the County Assemblies, the Intergovernmental Relations Technical Committee, Development Partners, Distinguished Guests, Ladies and Gentlemen.


It is an honour for me to join you here today and address this distinguished gathering, one of its first kind. Considering the current status of intergovernmental relations in the country and our vision moving forward, let me take this opportunity to express my appreciation to the Chairman and the entire IGRTC team for their efforts in organizing this workshop.

We are now in our sixth year of implementing the Constitution. I am proud to state that we have made commendable progress in implementing devolution and in particular, improving Intergovernmental Relations between the National and County governments. This success has been as a result of concerted efforts by both the national and county government due to the realization that cordial relations are a prerequisite to the implementation of the country's development agenda.

The path to success has not been entirely smooth and there were occasions in the formative stage of devolution where relations between the national and county governments faced some challenges. We have now gained considerable experience in the implementation of the devolved system of government. This, therefore, is an opportune time for us to take stock of our experiences in the management of intergovernmental relations. As we all appreciate, the successful implementation of various national and county government policies and programmes is dependent on an effective system of intergovernmental relations that facilitates harmony between the two levels of government.

The performance of functions by one level of government has a big impact on how the other levels perform. This is recognized and addressed by the constitution in Article 6(2) which requires the two levels of government to conduct their mutual relations based on consultation and collaboration.

A key objective of intergovernmental relations is to promote the national development agenda. As you are all aware, the national government has identified the Big Four Agenda as priority areas to guide the development agenda of the country during the third Medium-Term Plan period 2018-2022. The identified areas focus on key basic needs that are critical to the uplifting of the standard of living of Kenyans.




The prioritized areas are affordable and decent housing, affordable healthcare, food and nutritional security, and employment creation through manufacturing. These are devolved functions and their effective implementation will require close consultations and synergy between the national and county governments. Harmonious Intergovernmental relations will play an important role in the realization of the Big Four Agenda. In this regard, my Ministry will facilitate the interactions between the two levels of government through convening various intergovernmental sector forums where policy and technical consultations and cooperation will be coordinated.

The Constitution in the Fourth Schedule assigned the national government the responsibility of Policy and Legislation. In this regard, the Ministry developed the Policy on Devolved System of Government in 2016. The policy addresses emerging institutional, intergovernmental and resource issues to improve the implementation of the devolved system of government and to achieve optimal service delivery. The Policy, therefore, aspires to have a devolved system of government that is responsive to the needs of the citizens.

The Ministry is in the process of reviewing the County Government Act and Intergovernmental Relations Act. Concerning the Intergovernmental Relations Act, interactions with various stakeholders has revealed the need to relook into the overall architecture of the Act to determine whether the current intergovernmental institutions, their roles and responsibilities and the consultation processes are effective in the furthering the concept of cooperative government. Various emerging intergovernmental relation issues that are a hindrance to intergovernmental relations and those that provide a learning experience have been considered during the review process of the Intergovernmental Relations Act, 2012.

In the course of the first administration of the county governments, we experienced several challenges that need to be addressed if we are to make county governments more effective in the discharge of their constitutional mandate. We have also experienced several success stories in various fields of county management which need to be recognized and concretized as reference points for peer learning and for building our knowledge management of county governments.

The relationship between the Executive and Legislative arms of county governments have particularly been of concern as this determines how effectively a particular county will undertake its responsibility. The integration of public participation in the management of county affairs is critical in creating a sense of ownership within the population. These are some of the areas that are being considered in the review of the County Government Act.



The review of both Acts is ongoing and is expected to be finalized by the end of January 2019. This will culminate in the two draft Bills to be presented to stakeholders for validation. Upon enactment of the bills into law, the Ministry will embark on developing the requisite Regulations to facilitate the implementation of the new laws.

The Ministry in collaboration with county governments is in the process of developing a policy and legal framework that will lay the foundation for the establishment and operations of Regional Economic Blocs. The economic blocs can unlock the great economic potential inherent in our counties. By their very nature, the economic blocs are intergovernmental structures that, of necessity, require effective intergovernmental relations to facilitate their operations. The Ministry is leading the process as part of its responsibility to develop the appropriate environment for counties to thrive.

To support the county governments in discharging their mandate, the Ministry, in collaboration with key stakeholders including the county governments, developed the National Capacity Building Framework to guide how the capacity building would be undertaken at the counties. Further the Ministry, through the Kenya Devolution Support Programme, is supporting all counties through Capacity and Performance-Based Grants in Public Finance Management, Planning Monitoring and Evaluation, Human Resource and Performance Management, and Civic Education and Public Participation. Through the Instrument for Devolution Advice and Support (IDEAS) Programme, the Ministry is supporting fifteen counties to undertake Local Economic Development Projects (LEDP).

While we have made progress in nurturing the devolved system of government, I am aware that there are some pending transition matters which are hindering county governments from exploiting their full potential. These residual functions were to be finalized during the transition period. The Ministry will collaborate closely with the institutions involved to ensure that any residual functions are finalized expeditiously, and of critical concern, is the completion of unbundling of all functions assigned to county governments which currently ongoing under the leadership and guidance of Intergovernmental Relations Technical Committee. Am glad to learn that the Verification and Validation of Assets and Liabilities of defunct Local Authorities are complete and awaiting presentation to Intergovernmental Economic Council (IBEC).

Going forward the Ministry will focus on the following areas which are considered critical in supporting devolution: -

Development of regulations for both the County Government Act and Intergovernmental Relations Act.

- a) Implementation of the Alternative Dispute Resolution Regulations.
- b) Development of management framework for concurrent functions.
- c) Review and alignment of sector laws with the spirit of devolution.
- d) Development of Regulations for Intergovernmental Sector Forums
- e) Development of a framework for the establishment of Intergovernmental Units in both MDAS and County Governments


As a country, we chose the path of devolution. As a Ministry, we have and will continue to play our role in providing policy direction and the requisite legislative framework to support the performance of county governments. We will continue to support the counties through capacity building and technical assistance. The performance by counties has been impressive though challenges remain. With the various strategies developed by the Ministry, and guided by the Policy on Devolved Government and with effective Intergovernmental Relations, I am confident that the devolved system of government will continue delivering the dividends that Kenyans expected when they adopted the new constitution.

With these remarks, I now wish to declare the Intergovernmental Relations workshop officially open.

2.6 Keynote Address

2.6.1 Prof. Peter Anyang Nyong'o Governor, Kisumu County,

The PS Ministry of devolution, Charles Sunkuli, The Pioneer Speaker of the Senate, Hon. Ekwe Ethuro, The Chairperson of the National Assembly Constitutional Implementation Oversight Committee, Hon. Jeremiah Kioni, Members of the National Assembly present, Members of Kisumu County Assembly present, Members of the Fourth Estate, invited distinguished guests, Ladies and Gentlemen, “If freedom was the crown which fighters of liberation sought to place on the head of mother Africa, let the upliftment, the happiness, prosperity and comfort of her children be the jewel of the crown. There can be no dispute among us that we must bend every effort to rebuild the African economies”. That was the voice of Nelson Mandela at the 1994 Organization of African Unity (OAU) Summit in Tunis, Tunisia. Ladies and gentlemen, where is the relevance of Madiba’s rallying call on us to “rebuild our economies” in our society today?



The Constitution of Kenya at Article 1 recognizes the sovereignty of the people of Kenya has been gracious enough to delegate the responsibility of governance in the hands of the elected leadership. The major concern for them, therefore, is the realization of enhanced service delivery and good governance. The same constitution introduced the two levels of governments which are distinct and interdependent, primarily to bring governance to the doorstep and improve service delivery by involving the citizenry more in public decision making.


The seamless interdependence of the two levels of governments is anchored on Intergovernmental Relations which has the enviable role of facilitating the alignment and coordination of the administrative and governmental systems. The attainment of this seamless interdependence between the two levels of government will put us at a pedestal of building our economy.

This is why ladies and gentlemen, I am truly excited to join you here today to participate in the conversation of how we can make better the intergovernmental relations that should eventually lead us to Canaan of economic prosperity. The high calibre of participants gathered here today fills me with hope in the future and true belief that indeed we made the right choice to bequeath unto ourselves the devolved system of government.

Ladies and Gentlemen, the privileged position I hold as the governor for the people of the great County of Kisumu have convinced me beyond any reasonable doubt that devolution is truly the next best thing that happened to this country after penicillin and probably followed by the internet. This is exemplified in the improved access to healthcare provision, improved road networks in the villages, enhanced access to water and a safer environment and a more economically empowered populace.

It is this hope and conviction in the success of devolution that has made us here in Kisumu to affirm our resolve in the actualization of devolution as spelt in our laws. We shall soon be embarking on the recruitment of the village administrative structures once we receive the nod from our County Assembly. These structures, the Village Councils, will further improve the participation of our people in the management of government affairs. The epitome of “bottom-up” philosophy!

Ladies and gentlemen, the six years of devolution have provided us with a learning platform that must be embraced to propel devolution experience. As we enumerate the successes of devolution, we must be cognizant of the challenges that have continued to insulate its uptake. We must be bold enough to confront the reality that devolution continues to be dogged by the impact of sceptics whose behaviour affect societal behaviour, some of which are deliberate efforts targeting resource suffocation on devolved services.



At the same time, deliberate efforts must be made to address the inadequacy in human resource capital which accounts to about 60% of the hiccups in the devolution uptake chain.

To safely navigate the enumerated challenges, we must appreciate the significance of the role of the intergovernmental relations institutions in making devolution work for this country. This calls for internalizing of the provisions of the constitution which recognize the functionality of the two levels of government as highlighted in Articles 6, 174, 186 and 189.


Ladies and gentlemen, we need to look back at the first phase of devolved governments as a learning curve which should have laid out the foundation for take-off in the second phase today.

This workshop then presents us with a pregnant opportunity to analyses and determine the efficacy and adequacy of the legislation relating to devolution while at the same time calling to action the actors in both levels of government to be more conversant with the whole concept of intergovernmental relations. This workshop wouldn't have come at a more opportune time as it accords us a platform to harness succinct recommendations for implementation by both levels of government concerning IGR. We need to draw from the experiences of the pioneer devolution leaders from both levels of government.

Our humble duty as county governments will be to continuously offer support to intergovernmental relations institutions particularly the Intergovernmental Relations Technical Committee which we look up to play a critical role as a neutral intermediary between the COG and the Summit. The role of IGRTC in making devolution work cannot be overemphasized and it is, therefore, incumbent upon both levels of government to provide unequivocal support to its activities as envisaged in the law.

Ladies and gentlemen, my government forever remains committed to the true ideals of devolution, a walk that is taken in very close companionship with the national government. We are in the process of registration of our people to Universal Health Coverage, having been graciously selected by the national government among the four piloting counties.


Two weeks ago, we converged in Marrakech, Morocco for the 8th edition of Africities Conference. Kisumu with the support of the national government put in a bid to host the 9th edition scheduled for 2021 and indeed won against pronounced names such as Cairo and Cape Town. Hosting this premier event will see about ten thousand delegates converge in Kisumu with a resultant direct injection of about two billion shillings to our



economy. These are clear examples of what can be achieved when the two levels of government work in consonance.

Ladies and Gentlemen, let me take this opportunity to sincerely thank IGRTC and the organizing committee of this workshop for choosing Kisumu as the host, especially our own Prof. Judith Attyang. Surely a fruit doesn't fall far from the tree. May you continue to bear fruits for us at the IGRTC.

In conclusion, it is my pleasure to welcome you all to Kisumu, the great County of boundless passion. You are welcome to indulge; indulge in our finger-licking fish; indulge in our great scenic sites such as Kit Mikayi, indulge in the only other game park in the city out of Nairobi; indulge in the beautiful welcoming people of this great county. Thank you and May God bless us all.



ANNEXE II: EXPERTS' POWERPOINT PRESENTATIONS

ADR in Intergovernmental Relationship

Presented at the Intergovernmental Relations Workshop, Grand Royal Swiss hotel, Kisumu, 3 -5 December 2018

Introduction to ADR

- Means of settling disputes
- Consensual process
- Third party neutral appointed by consent of the parties
- Court may appoint where parties are not able to agree, but cannot interfere, s.10 AA

Legal Provisions

1. Constitution of Kenya 2010
2. The Intergovernmental Relations Act, 2012,
3. Urban Areas and Cities Act, 2011,
4. County Governments Act, 2012 and Public Finance Management Act, 2012.
6. Arbitration Act, 1995 (Kenyan)
7. Arbitration Act, 1996 (English)
8. Civil Procedure Act

ADR Mechanisms

1. Early neutral Evaluation/ Neutral fact-finding
2. Negotiation
3. Conciliation
4. Mediation
5. Arbitration (Ad hoc/Institutional)
 - a. Expert determination
 - b. Documents only
6. Med-Arb (Hybrid of the two mechanisms)

Principles of Arbitration, AA '95

Principle of Party Autonomy

Arbitration Agreement - s.4 (ADR Reg 2018)

Procedure - s. 20

Evidence - s. 20 (3) & 28

Autonomy in Choice of Arbitral Tribunal

Appointment - s. 11 & 12

Challenging Tribunal - s.13 & 14

Terminating Mandate s. 14 (5) & 15

Immunity of Arbitrator - s.16 B

Minimum Court interference

Limited court action s. 10

Kompetenz Kompetenz s.17

Limited Costs and Interest

Costs in Arbitration -s.32

Security for costs s.18

Specific performance

Arbitrator has the same power as the High Court to order specific performance of any contract, other than a contract relating to an interest in land. (Govt procedures Act s.17)

Powers of Arbitrator

- If claimant fails to file their pleadings within specified time arbitrator may TERMINATE proceedings
- If claimant fails to prosecute claim after filing pleadings arbitrator may DISMISS the claim or give directions
- If respondent fails to file their pleadings arbitrator may PROCEED EX-PARTE

Causes of Inter/intra-governmental Disputes

- I. Lack of constitutional clarity

Institutional conflicts of interests

- Summit s.7,8 & 34
- IGRTC s.12
- CoG s.20



- IBECs.187 (PPA)
 - IGR consultative sectoral forums s.13
2. Conflicts arising due to transfer of powers/assets
 3. Roles of the IGR sectoral forums
 4. Vested interests

Types, Nature and Volume of Cases

1. National 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 between State agencies.
6. Members of public

Types of Cases/Disputes

1. Constitutional interpretation
2. Civil cases

Judicial review of administrative decisions Disputes include:

1. The powers and mandate of the various state institutions, legislation, transfer of functions, employment relations, land, border disputes and political disputes.
2. Majority of these cases are inherited from local authorities.

Role of the IGRTC

1. Public perception/ confidence
2. Advisory
3. Provide platform for dispute resolution - impartiality
4. Data capture and management
 - a. Confidentiality of ADR in IGR
 - b. Monitoring and evaluation
 - c. Acceptance/compliance

Challenges

1. Lack of data of cases filed or lodged by the various bodies (statutory annual reports)
2. Cases involving the national and county governments increasing
3. The National Assembly and Senate have intergovernmental cases with majority of these cases filed by the Council of Governors. (As at 2017)
4. Political agendas/vested interests.
5. Lack of clarity of powers/procedures to deal with Intra governmental structures lacking
6. Lack of data on costs due to majority of cases still in court or discussion
7. Many counties have not published their budgets, estimates
8. Over-reliance on outside counsel
9. The cost of undertaking litigation is not only in monetary terms but also in terms of opportunity and indirect costs

Recommendations/Way Forward

1. Regain constitutional authority
2. Public awareness. Demystify role of IGRTC.
Establish working relationship with other IGR bodies. –
3. Incorporate representatives from CoG, IBEC, National Assembly, Senate to their board and have reciprocal arrangement.
4. Spearhead ADR promotion/public awareness
5. IGRTC to seek co-operation with OAG to develop national ADR Policy

Data capture and management.

1. Establish and encourage reporting structure,
2. Manage the information as the dispute escalates.
3. Embrace technology: cloud, blockchain, etc. information sharing
4. Advise on policy, legislation, monitoring and evaluation



Costing, Unbundling and Transfer of Functions

IGRTC Workshop, Kisumu, 2-5th December 2018

Outline

- Introduction
- Processes in transfer of functions
- Transfer of functions processes
- Status of Functions transfer
- Issues and Challenges
- Recommendations
- Conclusion

Introduction

- Constitutional and legal foundation for functions
- The Constitution
- Art 6(2) and 10
- Art I (sovereignty) , 174 (principles)
- Art 183, 186, 187, 189 (respect functional and institutional integrity)
- Schedule 4
- Section 15 6th schedule
- Statute law
- Transitions to Devolved Govt Act
- Intergovernmental relations Act
- Other function transferring statutes eg Water, Roads Acts
- Case law
- Petition 593 of 2015 Okiya Omtatah Vs AG on Health
- Petition NO 472 of 2014 COG Vs Kenha on Roads
- Petition No 315 of 2014 on Betting
- Republic v CS, Ministry of Agriculture, Livestock & Fisheries & 4 others Ex Parte COG 2017 on Agriculture functions

Processes in Transfer of Functions

- Allocation-CoK
- Analysis-IGR
- Unbundling-IGR
- Costing-IGR
- Assignment
- Legal and institutional review-IGR
- Capacity assessment--IGR
- Asset/ liability assessment -IGR
- Transfer-IGR
- Planning budgeting and funding-
- Policies, Norms and standards-
- Implementation-IGR
- Monitoring-VARIOUS

Status of Functions Transfer

- TA and IGRTC Gazette notices of 2013, 2015 ,2016, 2017
- Big bang transfer and consequent challenges
- Breach of law
- Impact on service delivery
- August 2013 transfers of majority of functions
- Sectoral transfers
- Exclusive Functions unbundled, transferred
- Concurrent functions largely unbundled-transfer ongoing
- Residual functions undefined
- Costing
- Historical costing (What is Vs What should be)
- Incomplete unbundling
- Information asymmetry and accuracy
- Complexity and cost
- Inadequate baseline info
- Unbundling and transfer of concurrent functions ongoing
- Assets and liability transfers ongoing
- IGR frameworks initiated in some sectors
- Legal and institutional changes effected in some sectors



Issues and Challenges

- Exclusive
- Retention of functions
- State corporations
- Regional authorities
- Duplication (CG in education and security)
- Ineffective unbundling hence funds retention (eg RMLF)
- Transfers without resources
- Transfers without implementation (eg PP)
- Donor funded programs
- Ineffective IGR
- Concurrent Functions
- Clarity of role boundaries eg Water, Agriculture, disaster management leading to mandate overreach
- Duplication
- Inequitable allocation of funds
- Ineffective IGR
- Residual
- Clarity on functions
- Ineffective IGR
- Cross cutting Challenges
- Absence of ADR and subsequent Costly litigation
- Law and policy gaps
- Laws in conflict with COK and functional transfer requirements
- Norms and standards of performance of functions
- Exchequer challenges
- Major challenges in performance

Recommendations

- Mindset change
- Further analysis and unbundling especially of Concurrent functions
- State corporation functions
- Determination and transfer of residual functions based on principles eg subsidiarity

- Review of current status to determine scope for Article 187 transfers
- Primary school education?
- Regional referral hospitals?
- Review of function related legislation
- Norms and standards setting
- Surveillance
- Monitoring and enforcement
- Capacity building for function performance
- Review Senate powers over “laws affecting Counties”
- Review IGR frameworks Mandates and powers-Summit, IBEC, IGRTC, Sectoral Coms, COG,
- Enhanced IGR
- Amongst counties
- Between NG and CGs
- Sectoral
- In-county (eg Section 54 CGA)

Conclusion

- Significant steps accomplished in transiting to devolved system
- Outstanding issues must address effective service delivery
- National government role in capacity building policy formulation underutilized
- Citizen empowerment required for effective monitoring of service delivery



Intergovernmental Relations: Concepts And International Best Practices—The Kenya Experience

Presented at the Intergovernmental Relations Workshop, Grand Royal Swiss hotel, Kisumu, 3 -5 December 2018

Introduction

- Experience of past five years indicates that an effectively working system of Intergovernmental Relations will be critical in making devolution work for Kenyans.
- This presentation focuses on the following issues:
 1. Meaning, nature and necessity of intergovernmental relations.
 2. Factors that necessitate and influence intergovernmental relations.
 4. Comparative intergovernmental relations mechanics and processes.
 5. The Kenyan constitutional and legal framework for intergovernmental relations.
 6. Emerging devolution issues that require intergovernmental relations.
 7. What needs to be done to nurture and sustain robust intergovernmental relations as contemplated by the Constitution.

Meaning, Nature and Necessity of Intergovernmental Relations

- Intergovernmental relations constitute one of the key structural features of federal or devolved systems of government.
 - 1) **Definition:** Intergovernmental relations are defined as interactions between and among governments within a non centralized system of government.
 - 2) **Nature:** Intergovernmental relations take a variety of forms
 - a) Vertical interactions between two or more levels of government.
 - b) Horizontal interactions among governments in the same level of government.
 - c) Horizontal/Vertical interactions among a number of governments in one level of government in the first places and vertically with another level of government.
 - d) Formal interactions in the sense that they are provided for and structured by the Constitution or/and legislation.
 - e) Informal interactions in the sense that they are not provided for and structured by the constitution and legislation.
 - f) Both formal and informal interactions.
 - g) May involve legislative, executive and judicial arms.

- 3) Modalities of intergovernmental relations
 - a) Co-operative in nature exhibiting co-operative institutions and processes such as consultation, co-decision, coordination.
 - b) Competitive in nature exhibiting conflictual processes such as tension, collusion, competition, control and even coercion.
 - 4) Necessity of intergovernmental relations
 - a) Federal or devolved systems combine self-rule with shared rule.
 - b) Inherent in this combination are natural tensions; conflicts; and threats.
 - c) IGR are necessary as mechanisms of managing these tensions, conflict and threats
- The Kenyan devolution is founded upon a similar combination which necessitates intergovernmental relations.
 - By Article 6(2) of the Constitution Kenya has settled for a cooperative system of intergovernmental relations as opposed to a competitive one.

What Factors Necessitate and Influence Intergovernmental Relations?

- There are a number of factors the influence intergovernmental relations:
 - 1) The distribution of functions and powers to the two levels of government; and
 - 2) The constitutional financial arrangements and sharing among the two levels of government.
- Most important here is the principle that funds must follow and match functions
 - 3) Levels of government and their diversity
- Many levels of government make IGR more difficult
- Many constituent units similarly make IGR more difficult
- 4) Form of Government
 - Presidential systems: IGR are affected by the separation of powers
 - Parliamentary systems: IGR are dominated by the executive
- 5) Party politics also influence IGR

The handshake for example, has made a lot of things change

Functions and Powers

- The distribution of functions and powers may take the approach of
 - Exclusive and concurrent functions
 - Dualist and integrated approach to assignment of functions.
- The approaches necessitate cooperative government and intergovernmental relations arising out of a number of factors.



- Concurrent functions; Where there is a measure of concurrent functions, a system of cooperative government and intergovernmental relations becomes necessary and essential.
- Intergovernmental relations would be necessary to enable the two levels of government to agree on which level should perform which aspect of a concurrent function.
- For example, the two levels may discuss and agree on how to share out the disaster management function which is concurrent.
- Another functional area that may require IGR is that of betting, casinos and other forms of gambling.
- Exclusive functions; Even where a level of government is assigned an exclusive function, there may be a number of reasons why intergovernmental relations may still be necessary.
- First, there are various circumstances in which national government is assigned the function of formulating national policy while the county governments implement such policy.
- For example, in the agriculture, health, housing and veterinary functional areas, the national government is restricted to development of policy while the actual delivery of services based on such policy is left to county governments.
- In such cases national government is under an obligation to discharge such policy functions in a cooperative manner.
- Look at the governments big four agenda:
 - Expansion of the manufacturing sector;
 - Affordable housing;
 - Affordable healthcare;
 - Food security.
- It must involve and consult the county governments at the stage of conceiving and developing the policy since those who implement the policy know the difficulties of implementation on the ground.
- Secondly, the concept of functional interdependence raises the reality of the fact that the performance of functions by one level of government may have an impact on the other level of government.
- The performance of functions by one level may hinder or facilitate another level in the performance of its own exclusive functions.

- For example, the performance of the policing or security function by national government may impact upon the ability of county governments to discharge their agriculture or health function.
- Thirdly, the impact of the Bill of Rights; The intersection of powers and functions with the Bill of Rights provisions transforms some of the powers and functions of both levels of government into binding duties.
- Article 43(1) provides for economic and social rights which it identifies as including;

the highest attainable standards of health, accessible and adequate housing and reasonable standards of sanitation, freedom from hunger and adequate food of acceptable quality, clean and safe water in adequate quantities, social security and education.
- Since agriculture, health, housing and water and sanitation are largely county functions, the intersection with this Article creates greater obligations for county governments.
- It follows that the rights implementation duty which Article 21(1) imposes on ‘the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights’ falls more on county governments than national government.
- Yet the national government which has foreign affairs as one of its exclusive functions bears the international law reporting obligation regarding the implementation of such socio economic rights.
- The national government must discharge its foreign affairs function in this respect in a cooperative manner.
- Intergovernmental relations on how the socio economic rights are to be achieved are a must and national government must cooperate, consult and coordinate with county governments before filing its human rights reports at the international level.
- Fourthly, county governments secondary powers— The Constitution envisages that in addition to the original functions and powers of county governments, county governments can be assigned additional functions and powers by national government through legislation. See articles 186(3) and 183(1)(b).
- The decision to assign such functions to county governments ought not to be unilateral but be preceded by consultations.

See also Article 187 which recognizes transfer of functions from one level to another by agreement

Financial Arrangements and Sharing Between the Two Levels of Government

- The constitutional financial arrangements and design necessitate intergovernmental relations in both the raising of revenue and the sharing of revenue raised nationally.
- Article 209(3) empowers each county government to raise own revenue through the imposition of:
 - a) Property rates;
 - b) Entertainment taxes; and
 - c) Any other tax that it is authorised to impose by an Act of Parliament.
 - The identification and authorization of any other tax by an Act of Parliament is a function national government ought to discharge in a cooperative manner requiring intergovernmental relations.
 - In terms of Article 209(4) both the national and county governments may impose charges for services.
 - This source of revenue is ordinarily directly linked to the discharge of the functions the governments are assigned by the Constitution.
 - It empowers them to levy and recover fees, charges or tariffs in respect of any function or service they perform or provide.
 - As sources linked to functional areas, these are exclusive to the level of government that has been assigned a function upon which the charge is to be imposed.
 - This is a source of revenue that has potential for conflict especially where charged in respect of concurrent functions and calls for cooperation and coordination among the two levels of government.
 - Article 209(1) empowers the national government to impose—
 - Income tax;
 - Value-added tax;
 - Customs duties and other duties on import and export goods; and
 - Excise tax.
 - The proceeds from these sources are, however, equitably shared among the two levels of government in an objective manner that requires cooperative government and intergovernmental relations.

Comparative Intergovernmental Relations Mechanisms and Processes

- A number of mechanisms, instruments, and processes are used for purposes of intergovernmental relations.

1) Legislative institutions and techniques

- Legislative institutions may be bicameral.
- Cooperation among legislative institutions at both levels of government i.e. the South African national speakers' forum.
- Cooperation among legislative committees i.e. the South African Association of Public Accounts Committees (APAC).
- Legislative techniques can be used:
 - ◆ To legally alter the constitutional division of functions and powers;
 - ◆ To facilitate coordination between orders of government; and
 - ◆ To approve intergovernmental agreements concluded by the executive branches of government.

2) Executive institutions and processes

- National cabinet may include members of constituent units.
- South Africa has a unique concept of an extended cabinet that includes heads of provincial governments.
- Formal consultations among heads of government at both levels are common.
- Sectoral consultations also common.

3) Logistics, management and facilitation of IGR

- IGR can not propel themselves; must be aided, facilitated and assisted.
- Different approaches in different countries.
- No single approach.
- Kenya has gone for an independent IGRTC.

4) Joint institutions and specialized IGR agencies

- Are institutions that are jointly owned by the levels of government or a number of constituent units.
 - They serve the participating governments.
 - Some are established by the constitution or legislation.
 - Others by intergovernmental agreements.
- Article 189 envisages joint institutions

5) Intergovernmental agreements

- Play an important role in IGR
- Can be vertical, horizontal, bilateral, and multilateral
- Articles 183(1)(b), 186(3), 187 and 189 envisage intergovernmental agreements that can alter the constitutional functional assignment.



- Drawing lessons from this comparative experiences, the following framework for addressing intergovernmental issues in the Kenyan system has been proposed.

A framework for addressing intergovernmental relations on emerging issues

- 1) The governments must cooperate, consult and negotiate.
- 2) These must culminate into intergovernmental agreements.
- 3) Some of the terms of the IGRAs must establish joint institutions and entities.
- 4) For enforcement purposes, some of the terms of the agreements must be reduced into legislation.
- 5) If this suggested path is understood and used, we would be able to avoid a lot of the problems being experienced.
- 6) The governments have however, failed to use this path in the development and enactment of many legislations affecting the devolved system of government.
- 7) A good example is the manner in which attempts have been made to establish—
 - 1) the Nairobi Metropolitan Transport Area and
 - 2) the Nairobi Metropolitan Area Transport Authority as a joint entity.

The Kenyan Constitutional and Legal Framework for Intergovernmental Relations

- By and large, Kenya has settled for formal IGR provided for by the constitution and legislation.
- But combines this with some informal IGR.
- To facilitate the necessary cooperative government and intergovernmental relations, the Constitution provides for some constitutional and also envisages some legal framework for cooperative government and intergovernmental relations.

The Constitutional Framework

- The Constitution establishes two levels of government that are distinct and inter-dependent.
- Article 6(2) settles for a cooperative as opposed to competitive intergovernmental relations by providing that mutual relations shall be on the basis of cooperation and consultation.
- Article 189 gives details of the obligations of cooperative government.
- The constitution establishes a number of structures and institutions that play important roles in intergovernmental relations.
- A key structure and institutional framework for intergovernmental relations provided for by the Constitution is the bicameral Parliament, comprising the National Assembly and the Senate.

- The Senate as a key legislative mechanism
- Senate represents the counties and their governments.
- Is an important structure for intergovernmental relations.
- Plays a key role in division of revenue raised nationally.
- Direct election has however, undermined its role and ruined its relations with county governments.
- In addition to the Senate, the Constitution establishes some advisory Commissions which play a major role in the intergovernmental relations.
- Key among such commissions are the Commission on Revenue Allocation, the Commission for the Implementation of the Constitution, Salaries and Remuneration Commission, and to some extent the Public Service Commission.

The Statutory Framework

- The Constitution empowers Parliament to establish additional IGR framework through national legislation.
- Parliament has thus enacted a number of legislations that make provision for cooperative government and intergovernmental relations processes as well as institutions.

a) The Intergovernmental Relations Act establishes

- The National and County Government Co-ordinating Summit
- The Council of Governors
- The Intergovernmental Relations Technical Committee
- Sectoral Forums

b) The Public Finance Management Act establishes

- The Intergovernmental Budget and Economic Council

c) The Transition to Devolved Government Act established

- The Transition Authority

d) The County Government Act establishes

- The County Intergovernmental Forum
- All these constitutional and statutory structures on intergovernmental relations cannot propel themselves.

The Intergovernmental Relations Technical Committee and Its Mandate

- A key intergovernmental relations institution is the IGRTC which is established with responsibility to facilitate the other structures in discharging their intergovernmental relations responsibilities.



- IGRTC is established as a logistics and facilitation structure to facilitate other IGR institutions.
- Plays an important policy advisory role.
- Must be autonomous and earn the trust of both levels of government.
 - ◆ Appointed by the Summit
 - ◆ Reports and is accountable to both Summit and CoG
 - ◆ It has two sets of functions:
 - 1) Functions relating to facilitation of cooperative government and intergovernmental relations; and
 - 2) Functions relating to management of transition to devolved government

Emerging Devolution Issues that require IGR

1) Clarification of functions and powers

- Cooperation, consultation and negotiation to lead to national legislation on functions and powers titled “The Functions and Powers Act”.
- Legislation must create three lists of functions and powers.
- Legislation must also share out the concurrent functions and powers among national and county governments creating two lists.

2) Framework for national government assignment of additional functions to county governments

- To give effect to Article 186(3), 183(1)(b)
- Must be guided by principles in Article 201(d) and subsidiarity implied in Articles 174 and 187

3) A framework for intergovernmental transfer of functions and powers

- This should operationalize Article 187 and 189(2)

Fiscal Intergovernmental Relations

- A number of issues in this area have emerged.
- Sharing of revenue raised nationally
- IGR on powers to raise own revenue
- A framework for conditional grants
- A framework for expenditure of the Equalization Fund
- A framework for mobilization and sharing of donor grants
- A framework for borrowing by both levels of government
- The IFMIS and e-procurement framework and its implementation
- A framework on borrowing by both national and county government.

Conclusion

- What emerges from this discussion is that cooperative intergovernmental relations are essential to the success of devolution.
- However, co-operative government and intergovernmental relations is a very complex subject which many important players in the devolution sector do not understand.
- Many institutions that make decisions of an intergovernmental nature do not appreciate their role. Examples, are the National Assembly and the National Treasury.
- There is need to start a process of reviewing the various legislations touching on intergovernmental relations to strengthen IGR institutions such as the IGRTC.
- There is need to start re-evaluating the process of unbundling, costing and transfer of functions.
- There is need to focus on the unfinished business of transition to devolved government.



Legal Gaps in Devolution in Kenya and Challenges posed by Emerging Issues in Devolution

Presented at the Intergovernmental Relations Workshop, Grand Royal Swiss Hotel, Kisumu, 3 -5 December 2018

Introduction

- Adoption of new Constitution of 2010
- Adopted a cooperative devolved system of government in which intergovernmental relations are essential.
- The successful devolution and intergovernmental relations require the enactment of supportive legislation.
- Implementation experience of:
 - ◆ Eight years since the adoption of the constitution; and
 - ◆ Five years since the first elections.
- This experience has disclosed legal Gaps in Devolution and a number of Challenges posed by Emerging Issues in Devolution.
- This presentation seeks to:
 - ◆ identify some of the areas that have legal gaps and proposes how they can be dealt with.
 - ◆ Some of the challenges posed by emerging issues in devolution.

Key Areas with Legal Gaps Requiring Legislation

- 1) There is need for a legal framework for structuring the process of intergovernmental relations on emerging issues
 - This should provide for a clear path drawn from comparative experiences and best practices that must be followed.
 - 1) The governments must cooperate, consult and negotiate
 - 2) This must culminate into intergovernmental agreements
 - 3) Some of the terms of the IGRAs must establish joint institutions and entities
 - 4) For enforcement purposes, some of the terms of the agreements must be reduced into legislation
- 2) There is need for legislation to clarify the functions and powers of the two levels of government.
 - All are agreed that the manner in which the constitution assigns functions and powers lacks clarity.

- Many have decried the fact that the constitution does not provide for three lists of functions and powers the way it is done in other countries.
 - Problem can be addressed through a legislation to be known as the Functions and Powers Act which should provide for:
 - Clarification of functions and powers
 - Creation of three lists of functions and powers; namely,
 - National government exclusive functions and powers;
 - County government exclusive functions and powers; and
 - National and county governments concurrent functions and powers.
 - Sharing out of concurrent functions and powers
- 3) There is need for a legal framework for national government assignment of additional functions to county governments
 - To give effect to Article 186(3), 183(1)(b)
 - Must be guided by principles in Article 201(d) and subsidiarity implied in Articles 174 and 187
 - 4) There is need for a legal framework for intergovernmental transfer of functions and powers
 - This should operationalize Article 187 and 189(2)
 - 5) There is need for a legal framework to structure and give effect to the emerging phenomenon of Regional Blocks
 - In terms of Article 189(2), a number of counties have come together to form regional economic and development blocks as joint authorities and entities.
 - The process of forming and operating such blocks can be structured and facilitated by national legislation.

Proper Analysis, Unbundling, Costing and Transfer of Functions and Powers

- There is need to do a proper analysis and unbundling of functions in a cooperative manner and legislate the intergovernmental agreement arrived at on the issue of powers and functions..
- This must be done on a sector by sector basis.



1) The health sector

- A proper case for sectoral consultations and negotiations
 - This is more because health has been identified as one of the President's big four agenda.
 - A Key issue is management of human resources in the health sector.
 - Intergovernmental Agreement may lead to legislation on health which must
- a) Clarify the health functions and powers of the two levels of government including three lists of national government exclusive health functions; county government exclusive health functions; and national and county government concurrent functions.
 - b) Share out the concurrent health functions among national and county governments indicating which level of government is responsible for which aspects of the concurrent functions.
 - c) Provide for management of human resources in the health sector including the identification of matters that require uniform norms and standards, and the establishment of such norms and standards.
 - d) Provide for establishment of joint institutions in two areas—one dedicated to the management of human resources matters in the health sector, and another for procurement of medical equipment and supplies.

2) The roads sector

- Follow the same pattern and restructure old order institutions such as KERA and KURA to make them joint entities

3) The housing sector

- Follow the same pattern and consider restructuring the National Construction Authority to make it a joint entity.

4) The water sector

- Must follow the same pattern and consider restructuring the regional water boards of the old order to become joint entities

5) The agriculture sector

- Sector has many state parastatals that must be restructured as functions are unbundled and transferred

Key Areas with Challenges Posed by Emerging Issues in Devolution

- The devolution implementation experience has disclosed a number of challenges and threats posed by emerging issues in devolution.
- Some challenges and threats are due to:
- lack of understanding of the various aspects of the system;
 - ♦ lack of proper legal framework to make the system work;
 - ♦ problems in the constitutional design; and vested interests of some key players
- With commitment to the success of the system the challenges and threats can be identified and addressed through:
 - ♦ committed capacity building;
 - ♦ review, amendment and/or repeal of old order legislation and enactment of new order legislation; and
 - ♦ constitutional amendments where necessary.

The Meaning of the Kenyan Devolution and Capacity Building

- There is confusion regarding the meaning of the Kenyan devolution leading to a number of questions—
- Did Kenya remain a unitary system even after adopting devolution?
- Is the Kenyan model of devolution mere decentralization in a unitary system?
- Did Kenya’s model of devolution shift it from a unitary to a federal system of government?
- In two Advisory Opinions by the Supreme Court, the Judges made statements suggesting that they viewed the Kenyan devolution as not creating a federal system but being mere decentralization within a unitary state.
- In *Re the Matter of the Interim Independent Electoral Commission [2011] eKLR*, in which the Advisory Opinion of the Supreme Court was sought regarding the election date, the Court at paragraph 39 stated the following

On the question whether election date is a matter of “county government”, we have taken a broader view of the institutional arrangements under the Constitution as a whole; and it is clear to us that an interdependence of national and county governments is provided for—through a devolution-model that rests upon a unitary, rather than a federal system of government.

- In *Speaker of the Senate and another v Attorney General and others [2013] eKLR*, the Advisory Opinion of the Supreme Court was sought on the issue of whether or not the Division of Revenue Bill was a Bill concerning county governments the

consideration, debate and passage of which required the input of the Senate.

- Justice Njoki Ndung'u in a dissenting opinion stated at paragraph 265 of her judgment that:

It is important from the onset to put into context, the structure of the county unit within the model of devolution crafted under the Constitution. The devolved system in Kenya is based on a unitary system of Government that decentralizes key functions and services to the county unit. The Kenyan state model is not federal in nature and does not envisage the workings of a county as a politically and financially independent state

- In the National assembly of Kenya v The Institute of Social Accountability and others [2016] eKLR (the Court of Appeal CDF judgment) the Court of Appeal at paragraph 24 stated the following:

It is quite obvious and indeed clear from the foregoing that although Kenya is a constitutionally devolved State, it does not have a federal constitution and that the county governments are not independent but semi-autonomous and an integral part of the unitary State, exercising delegated sovereign power for purposes of governance.

- Prof Yash Ghai in a book chapter titled "Comparative Theory and Kenya's Devolution" disagrees with these views of the Judges of the Supreme Court.
 - In his comments about the above pronouncements by the Supreme Court, Prof Ghai holds the view that it was not necessary for the Court to make the pronouncements that. He states the following:
 - In neither case was it necessary for the Supreme Court to decide whether Kenya is a federal state or not. The judges would have been wiser not to raise the issue, especially as the judges concerned do not seem to have any understanding of it, and do not make any reference to the numerous scholarly studies on the subject. By virtue of their interpretation, two of the most vibrant federations, Germany and India, would count as unitary states.
 - There are a number of problems with the statement made by both the Supreme Court and the Court of Appeal.
- 1) First, the statements were obiter dicta pronouncements which did not form the basis of the decision of both the Supreme Court and the Court of Appeal. They were by the way comments which were not necessary and have no precedential value.
 - 2) Secondly, the issue of the model of the Kenyan devolution was not raised in the cases before the two courts. The parties did not raise and canvass the question of whether or not the Kenyan devolution had resulted in to a unitary or federal system of government.

3) Thirdly, Justice Njoki Ndung'u's statement was made in a dissenting judgment.

- The conclusion is that the issue of the meaning of the Kenyan devolution has not been properly raised before our courts for determination. A proper case must be found in which it can be properly raised, canvassed and a final decision made on the issue.
- If that occasion were to arise, how does one conceptualize devolution in the Kenyan context to give it meaning?.

The Management of Transition to Devolved Government and Its Challenges and Threats

- A complex process because it involves:
 - ♦ Transition from an old to a new Constitutional dispensation; and
 - ♦ transition from a highly centralized system to a devolved system of government.
- Transition entails:
 - ♦ The deconstruction of the old constitutional order and the construction of a new order.
 - ♦ The deconstruction of the centralized system with its legal order and some of its structures and institutions; and
 - ♦ The construction of the devolved system of government with a new legal order and new structures and institutions.
- Did we successfully deconstruct the old order or did we simply patch the new order on top of the old order?
- The paradox and futility of relying on the old order structures and institutions to deconstruct the old order including those old order structures and institutions and replacing them with new order structures and institutions.
- Prof Ghai has observed that in many countries new Constitutions are normally imposed upon the people by the political and other elites to be used to protect the interests of the elites against the people
- There are many areas in which we did not successfully deconstruct the old order:
 - ♦ The roads sector
 - ♦ The health sector
 - ♦ The cooperatives sector
 - ♦ The housing sector
 - ♦ The water sector



- Kenya's constitution making process however, took a different trajectory that enabled the people to impose upon the elites a new constitution and a new set of values aimed at protecting the people from the elites.
- The people however allowed the said elites to play a key role in the management of transition and implementation of the new order.
- The elites have used that opportunity to claw back some of the gains that the people had made.
- The development of Draft legislation has in the past relied a lot on the very institutions that are supposed to be deconstructed or reformed.
- Vested interests in the old order therefore interfere and are a major threat to devolution.
- Examples:
 - ◆ vested interests of the members of the National assembly in CDF;
 - ◆ vested interests and conflicted roles of Senators;
 - ◆ many officials in the national government Ministries have vested interests;
 - ◆ state corporations such as KENHA, KERA, KURA
 - ◆ Treasury/establishment of the Judiciary Fund;
 - ◆ Former Local Authorities over-employed and increased salaries before they were replaced.
 - ◆ Do regimes matter?

The Challenges in the Enforcement of County Laws

- 1) The first step in the enforcement of county laws is the publication of county laws in the Gazette to give them effect.
 - Article 199(1) provides that "county legislation does not take effect unless published in the Gazette".
 - Section 25(1) of the County Governments Act provides for publication in both the County Gazette and the Kenya Gazette
 - Section 25(2) on the other hand provides that:
- (2) Subject to subsection (3), the county assembly legislation shall come into force on the fourteenth day after its publication in the county Gazette and Kenya Gazette, whichever comes earlier, unless the legislation stipulates a different date on or time at which it shall come into force.
 - Courts have interpreted these provisions and found the position taken by the County Governments Act unconstitutional. See James Gacheru Kariuki and others v Attorney General.

- These indeed are very serious issues and problems that must be addressed. How do we address them?
- National legislation to assign this function to county governments? See Articles 186(3) and 183(1)(b)
- National legislation requiring the national government or Government Printer to decentralize its functions to counties by establishing branches in every county to publish county laws and documents? See 6(3) which provides:


A national state organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.

2) The second step in the enforcement of county laws relates to arrest powers and their role in enforcement of county laws.

- These too raises a number of challenges and questions.
- Constitution confers powers in the Inspector General of police.
- Counties can through their regulatory powers create criminal offences.
- Can they have their own law enforcement agencies with powers to arrest?
- Should they entirely rely on the normal police?
- Should such own enforcement agencies be regulated by national legislation?
- Should such legislation provide for coordination with county commanders of police?
- What about holding of arrested person and where to hold them?

3) The third step in the enforcement of county laws relates to prosecution powers and their role in enforcement of county laws

- Similarly raises a number of challenges and questions.
- Article 157 vests prosecution powers in the DPP as an independent state organ
- Should prosecution for offences in respect of offences created by county laws be prosecuted by DPP?
- Should counties have their own prosecution departments?
- Should DPP delegate prosecution functions and powers to county governments?
- Should there be legislation to provide for and structure such delegation?
- How does the DPP delegate prosecution powers to the Labour Department, to NSSF, to NEMA which have their own specialized prosecutors?
- Can we draw lessons from such experiences and best practices?

- 
- 4) The fourth step in the enforcement of laws relates to the role of the judiciary in the enforcement of county laws.

Other Challenges

- Multiple oversight by the Senate and County Assemblies over the Governors and county executives.
- Strained relations between the Senate and the county governors and the need to structure the relations through legislation.
- The apparent abusive of oversight powers by MCAs in their relations with—
 - ◆ the Governors and the county executive
 - ◆ County assembly Speakers

Conclusion

- All these legal gaps and challenges can easily be addressed through intergovernmental relations and intergovernmental agreements if we embraced the system and understood it.

The Role of County Governments in Civic Education and Public Participation

Presented at the Intergovernmental Relations Workshop, Grand Royal Swiss Hotel, Kisumu, 3 -5 December 2018

Introduction

Presentation focuses on two major issues:

- 1) Civic education
- 2) Public participation

Civic Education Defined

Civic education means:

- all the processes that affect people's beliefs, commitments, capabilities, and actions as members or prospective members of communities.
- Civic education need not be intentional or deliberate; institutions and communities transmit values and norms without meaning to.
- It may not be beneficial: sometimes people are civically educated in ways that disempower them or impart harmful values and goals
- It is certainly not limited to schooling and the education of children and youth.
- Families, governments, religions, and mass media are just some of the institutions involved in civic education, understood as a lifelong process.

According to Jennifer Rietbergen-McCracken:

Civic education (also known as citizen education or democracy education) can be broadly defined as the provision of information and learning experiences to equip and empower citizens to participate in democratic processes. The education can take very different forms, including classroom-based learning, informal training, experiential learning, and mass media campaigns.

Civic education can be targeted at children or adults, in developed or developing countries, and at the local, national or international level. As such, civic education is an approach that employs a range of different methods, and is often used in combination with other participatory governance tools.

Civic Education in a democracy is education in self government. Democratic self government means that citizens are actively involved in their own governance; they do not just passively accept the dictums of others or acquiesce to the demands of others.

Purposes and Benefits of Civic Education

- 1) To preserve and enhance democracy by cultivating citizens' care and concern for their communities.
- 2) Equip citizens with the knowledge and skills to participate effectively in democratic life.
- 3) Prepare citizens for participation in their communities.
- 4) Prepare citizens for involvement in the political processes of their communities i.e. voter education,
- 5) Equip citizens with moral and civic values and virtues.
- 6) Create awareness for disadvantaged groups, such as the poor, on their social and political rights.
- 7) Strengthen the ability of citizens and civil society groups to organize themselves
- 8) Enable citizens interact with others and make their voices heard by those in power.
- 9) Capacity-building and leadership training for local civil society activists
- 10) Overall improvement of the democratic functioning of government at local level.
- 11) Creates in citizens a positive disposition of interpersonal and intrapersonal values, virtues and behaviors that are informed by:
 - a. Tolerance and respect
 - b. Appreciation of difference
 - c. Rejection of violence
 - d. Concern with the rights and welfare of others
 - e. Commitment to balancing personal liberties with social responsibility to others
 - f. Personal efficacy
 - g) Sense of belonging to a group or polity
 - h) Readiness to compromise personal interests to achieve shared ends
 - i) Desire for community involvement
 - J) Attentiveness (to civic matters, the news, etc.)

The end result of good and well executed civic education is:

- A. Increased participation in political processes
- B. Greater political knowledge

Civic Education Mechanisms

Public Participation Defined

Public Participation (PP) is:

“A vision of democracy in which citizens are active in public affairs, promoting their notion of justice & good policies, & engaging in dialogues with the legislature & the executive & in these ways enhancing public deliberation & democracy. It is a means of bringing people’s preferences & aspiration onto the agenda of the state. And it is seen as relevant to accountability,” Ghai, P.Y. (2013)

- “Redistribution of power that enables the have-not citizens, presently excluded from political & economic processes, to be deliberately included in the future,” Arnstein, S (1969)
- “Means to involve those who are affected by a decision in the decision-making processes. It promotes sustainable decisions by providing participants with the information they need to be involved in a meaningful way, & it communicates to participants how their input affects the decision,” IAPP
- “The possibility for citizens, civil society organization & other interested parties to influence the development of policies & laws , which affect them,” Kosovo Civil Society Foundation (2011)
- “An open accountable process through which individuals & groups within selected communities can exchange views & influence decision-making,” Sessional Paper on Devolved Gov’t under CoK, 2010
- “The process where individuals, governmental & non-governmental groups influence decision-making in policy, legislation, service delivery, oversight & development matters,” MoDP & CoG Public Participation Guidelines

But what is “Public”

Public means “Resident of a particular county, professional associations, community based organizations, and rate payers of a particular city or municipality,” MODP & CoG PP Guidelines

“The resident of a particular county; rate payers of a particular city or municipality; any resident civic organization or non-governmental, private sector or labor organization with an interest in the governance of a particular county, city or municipality; non-resident persons who because of their temporary presence in a particular county, city or municipality make use of services or facilities provided by the county, city or municipality,”
CGA,2012 s.2

Values & Principles of Public Participation

- 1) Right to participate
- 2) Responsiveness
- 3) Accountability
- 4) Acknowledgement of interests
- 5) Inclusivity
- 6) Affirmative action
- 7) Consultation
- 8) Transparency
- 9) Flexibility
- 10) Trust, commitment & Respect
- 11) Integration

Levels and Characterization of Public Participation

- 1) **Manipulation:** Characterized as non-participation
- 2) **Therapy:** Characterized as
 - No genuine participation
 - Education only by the leaders / “putting the citizens to work to change themselves rather than giving them a say in procedures”.
- 3) **Informing:** Characterized as
 - Patronization

Tokenism where have-nots hear & have a voice

- 4) **Consultation:** Characterized as
 - Citizens have a chance to contribute
 - Contributions not binding on decision makers

5) **Placation:** Characterized as

- Higher level of Tokenism
- Pax have room to advise
- No decision powers
- Public relations exercise

6) **Partnership**

(Citizen Power): Characterized as

- Citizens able to negotiate & engage in trade-offs with the powers
- Public has real influence on decisions

7) **Delegated Power:** Characterized as

- Citizens are in-charge of their affairs

8) **Citizen Control:** Characterized as

- Real public participation

Purposes and Benefits of Public Participation

- i) Leadership response to needs of community
- ii) Negates imposition of ideas on the community by leaders
- iii) Wide range of skills & experience tapped in decision making
- iv) Public ownership of projects, programs & plans
- v) Accountability improvement
- vi) Objectives of projects & programs understood
- vii) Improved credibility within the leadership & the public

Relationship between Civic Education and Public Participation

- There is a close nexus between civic education and public participation.
- Civic education is a mechanism through which public participation can be achieved.
- As already noted, civic education prepares and equips citizen to participate in governance affairs.
- Jennifer Rietbergen-McCracken has started in the respect the following:

The overall goal of civic education is to promote civic engagement and support democratic and participatory governance. The idea behind civic education is to promote the demand



for good governance (i.e. an informed and engaged public), as a necessary complement to efforts to improve the practice of good governance.

- Section 99(1) of the County Governments reflects this relationship in the following terms:
- The purpose of civic education under this Act is to have an informed citizenry that actively participates in governance affairs of the society on the basis of enhanced knowledge, understanding and ownership of the Constitution.

Mechanisms for Public Participation

- Community Forums
- Town Hall Meetings
- Media
- Public Barazas
- Bunge Mashinani
- Petitions
- Parliamentary /County Assembly Committee Hearings
- Written & Oral Submissions
- Referenda
- Performance Surveys, Social Audit Reports
- Impeachment/Recall Proceedings
- Sector Working Groups
- Commissions, Task Forces, Working Committee
- Constitutional & Statutory Bodies

Governance Areas for Civic Education and Public Participation

- 1) Public Finance Management
- 2) Planning (Long & Short terms)
- 3) Performance Management
- 4) Development of Policies & Legislation
- 5) Implementation of the Bill of Rights
- 6) Service Delivery

The Constitutional and Legal Framework for Civic Education and Public Education

1) Formulation of county policies, plans & legislation

- CoK 2010 Arts. 10, 118, 196 & 217 (2)
- CGA, 2012 ss.88, 90, 113, 115, 119

2) Right to petition County Assembly

- CoK 2010 Art. 196
- CGA 2012 ss.15, 88

3) Mechanisms to promote transparency & accountability

- CoK 2010 Art.10(1)(c)
- CGA 2012 ss.60 (c), 65, 116(2)

4) Public right to information

- CoK 2012 Art.35
- CGA 2012 ss. 41, 87, 95, 96

5) Mechanisms for Civic Education

- CGA 2012 s.100(1)

6) Mechanisms for affirmative action for minority & marginalized groups

- CoK 2010 Arts.27, 53-57, 100, 227
- CGA 2012 ss. 35, 97

7) Participation of govts & people's representatives

- CGA 2012 s. 91 (f)

8) Participation in intergovernmental forums on inter-sectoral issues

- CGA 2012 s.54
- IGRA 2012 s.23

9) Establishment of County Policing Authority

- CoK 2010 Art. 244 (e)

10) People shall be involved in decision making

- CoK 2010 Art.232 (d) -

11) Involvement of communities in county governance

Fourth Schedule – Part 2(14)-



Obligations of County Governments in Civic Education and Public Participation

- a) Adherence to principles of citizen participation (CGA 2012 s.87)
- b) County Assemblies must conduct business in open & transparent manner (CoK 2010 Art. 196)
- c) County Assemblies to develop laws & regulations that support effective PP in planning & performance management (CGA 2012 ss. 47 & 115
Governors must promote & facilitate PP in development plans & policies, service delivery & report annually to County Assembly on PP in county affairs (CGA 2012 ss.30 & 92)
- d) County gov'ts must create structures, mechanisms & guidelines for PP to ensure inclusion of all without discrimination & domination by one group (PFMA 2012 s.207 & CGA 2012 s. 91)

Challenges of Civic Education and Public Participation

CE & PP require open, accountable & structured process enabling public interaction & decision making influence.

However, challenges have been witnessed:

- 1) Cost of PP may be high
- 2) Lack of time
- 3) Accessibility
- 4) Lack of trust
- 5) Diversity
- 6) Elite capture
- 7) Lack of national policy, norms, standards & regulation
- 8) Political competition
- 9) Expectations of compensation for participation
- 10) Lack of adequate civic education
- 11) Lack or inadequate funding
- 12) Lack of framework for PP
- 13) Manipulation of PP forums
- 14) Illiteracy

Conclusion and Recommendations

- 1) Develop legislation, norms, standards & administrative procedures to guide CE & PP processes
- 2) Undertake sensitization & civic education activities to create citizen awareness of their responsibility in PP
- 3) Encourage political tolerance
- 4) Develop feed back mechanisms to give people confidence that they were listened to
- 5) Establish affirmative action programs to ensure women, youth & marginalized communities are effectively included in the PESTEL activities
- 6) Develop sustainable government-citizen partnerships
- 7) Undertake stakeholder mapping throughout the counties
- 8) Establish e-participation platform (Facebook, Twitter, WhatsApp emails etc)
- 9) Undertake regular data collection, collation & analysis to inform status of CE & PP



ANNEX III: DRAFT COMMUNIQUE

COMMUNIQUE OF THE FIRST INTERGOVERNMENTAL RELATIONS WORKSHOP HELD FROM 3RD TO 5TH DECEMBER, 2018 AT THE GRAND ROYAL SWISS HOTEL IN KISUMU COUNTY

Preamble

The first Intergovernmental Relations Workshop was held from 3rd to 5th December 2018 at the Grand Royal Swiss Hotel in Kisumu County. The theme of the workshop was “Intergovernmental relations moving devolution forward for quality service delivery”.

The workshop focused on intergovernmental relations practice as a key driver to the success of devolution. The workshop was convened to provide a forum for open discourse on issues of intergovernmental relations (IGR) during the first phase of implementation of Constitution of Kenya, 2010 (CoK, 2010) on devolved governance. It was expected to bring out the emphasis on the role of IGR in a devolved system of government, determine the adequacy of IGR legislation, identify salient emerging issues and recommend how to address them for successful implementation of devolution. The deliberations, therefore, provided participants with a deeper understanding of IGR while appreciating the systemic challenges and issues emerging in the process of implementing devolution.

The workshop observed that the provision of the CoK, 2010 on the distinctiveness, interdependence, consultation and cooperation had not been fully embraced by both levels of government. Failure to appreciate the need for consultation and cooperation has resulted in conflicts, tensions and threats which call for intergovernmental institutional interventions. It was also acknowledged that cooperative governance was critical for devolution to succeed and stressed on the need to address issues of clarity of functional assignments; weakness in the application of principles of public participation and civic education; inadequate capacity building; double oversight of county governments; inappropriate policy framework, laws, regulations, lack of uniform norms and standards; and lack of express legal provisions to address intra-governmental relations. Lack of IGRTC visibility and independence was also identified as a major concern.

Following intensive presentations and deliberations, the workshop made the following resolution:

I. Clarity of Functional Assignments

THAT there was a need for the national government to develop policies that are aligned to the CoK, 2010 particularly to facilitate the implementation of the functions under the Fourth Schedule of the Constitution and to develop norms and standards frameworks for delivery of service by both levels of government.

THAT there was an urgent need to develop uniform norms and standards for the delivery of services by the two levels of government.

THAT the National Treasury should ensure timely exchequer releases to both levels of government as required under the CoK, 2010 and the Public Finance Management Act, (PFMA) 2012.

THAT there was a need for a comprehensive review of functions-related legislation to ensure that it resonated with the letter and spirit of the constitution.

THAT unbundling of functions ministries, departments and agencies (MDAs) that were not finalized by the defunct TA be carried out and concluded without delay.

THAT legislation on the implementation of concurrent functions is put in place for clarity of roles.

THAT uniform norms and standards be set to guide the implementation of functions by both levels of government.

2. Weakness in the application of principles of Civic Education and Public Participation as envisaged in the spirit of the Constitution.

THAT given the critical role of civic education and public participation especially in the implementation of CoK, 2010, programs should be developed for delivery of effective civic education to Kenyans to eliminate the misconceptions that exist amongst political class and ensure adequate public participation in making decisions affecting the populace.

THAT civic education and public participation be entrenched in Kenya's system of governance following the CoK, 2010.

THAT capacity of the citizens is built to enable them to monitor the performance of services by both levels of government and to hold leaders accountable.

THAT inclusivity of persons living with disabilities, youth and women should be ensured.

3. Capacity Building

THAT IGR institutions need additional resources and capacity building facilities. Further, the workshop called upon both levels of governments to identify their needs to approach capacity building holistically.

THAT the capacity of County Public Service Boards be built to ensure quality in the recruitment of county staff to enhance service delivery following Articles 10 and 232 on values and principles of Governance and Public Service respectively.

4. Double oversight of the county administrations (Article 96 and 185)

THAT double oversight of county executives by both Senate and county assemblies needs to be resolved through legislation.

THAT in the meantime a Joint Oversight Committee of Senate and county assemblies should be set up.

5. Legislation to cater for intra-governmental relations.

THAT there is an urgent need for legislation to address intra-governmental disputes.

THAT legislation to regulate inter-county programs should be put in place.

6. Lack of IGRTC visibility, independence and weak legislation

THAT acknowledging the limited public awareness of the mandates of IGR organs especially IGRTC, the workshop underscored the need for public education on this subject.

THAT there is a need to revise the Intergovernmental Relations Act (IGRA) 2012, to give the IGRTC operational autonomy necessary for an organ that handles both levels of government.

7. Alternative Dispute Resolution

THAT use of alternative dispute resolution mechanisms or institutions should be the first level of solving intergovernmental disputes.

THAT counties need to embrace Alternative Dispute Resolution (ADR) Mechanisms to avoid expensive judicial processes.

Dated this day of 5th December 2018.

ANNEXE IV: INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM
GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018








TIME	AGENDA	PRESENTER	MODERATOR
WORKSHOP COORDINATOR, PROF. WINNIE MITULLAH			
DAY ONE - 3 DECEMBER, 2018			
0830	Registration	Secretariat	
0930	Welcoming Remarks	Chief Executive Officer, IGRTC	
	Introduction	Prof. Miguda-Atyang', IGRTC - Member	
	Workshop objectives	H.E. Governor, Kisumu County	
	Welcoming address	Prof. Anyang' Nyong'o	
	Opening Remarks	Waceke Wachira	
	Chief of Party, AHADI	Hon. Johnson Osoi	
	Chairperson County Assemblies Forum	Hon. Jeremiah Kioni	
	Chairperson National Assembly Constitutional Implementation Oversight Committee	Sen. John Kinyua Nderitu	
	Chairperson Senate Committee on Devolution and Intergovernmental Relations	H.E Gov. Stephen Sang	
	Chairperson, CoG Intergovernmental Relations Committee	Prof. Karega Mutahi, IGRTC - Chairperson	
	Overview of the IGRTC		
GROUP PHOTO & HEALTH BREAK			
1100	PS, Ministry of Devolution & the ASALs CS, Ministry of Devolution & the ASALs	Charles T. Sunkuli, CBS Hon. Eugene Wamalwa	
PRESENTER			
1130	Keynote Address	H.E Prof. Peter Anyang' Nyong'o	
1150	Intergovernmental Relations: - Concepts and international best practice - The Kenyan experience - Legal gaps in devolution in Kenya - Challenges and legal gaps posed by emerging issues in devolution. Breakaway session	Governor, Kisumu County Dr. Mutakha Kangu	Dr. Billow Khalid, IGRTC Member
1220		Dr. Mutakha Kangu	
1250			
1320	LUNCH		
1420	Group Presentations & Plenary	Dr. Mutakha Kangu	Dr. Billow Khalid, IGRTC Member
1450	Costing, unbundling and transfer of functions in the Kenyan devolved system	Kamotho Waiganjo	Dr. Francis Fondo, IGRTC Member
1520	Breakaway session		







TIME	AGENDA	PRESENTER	MODERATOR
1550	Group Presentations & Plenary		
1620	HEALTH BREAK AND END OF DAY ONE DAY TWO - 4 DECEMBER		
	PRESENTATIONS		
	TOPIC	PRESENTER	
0900	Alternative Dispute Resolution: - Effect of litigation on IGR in the devolved system of governance - Efforts towards avoidance Breakaway session	Andrew Waruhiu	Prof. Shanyisa Khasiani, IGRTC Member
0930	Group Presentations & Plenary		
1000			
1030	HEALTH BREAK		
1100	Intra and Inter-Governmental Relations in public service delivery Legislative and Functional interface between the Senate and the County Assembly in the Oversight Role	Prof. Peter Wanyande	Njambi Muchane, IGRTC Member
1130	Breakaway session	Prof. Peter Wanyande	
1200	Group Presentations & Plenary		
1230			
1300	LUNCH		
1400	The role of county governments in civic education and public participation.	H. E. Gov. Prof. Kivutha Kibwana	Dr. Raymond Nyeris, IGRTC Member
1430	Breakaway session		
1500	Group Presentations & Plenary		
1600	HEALTH BREAK AND END OF DAY TWO DAY THREE - 5 DECEMBER, 2018		
	PANEL DISCUSSIONS		
0930	Experiences and lessons learnt in IGR during the first phase of devolution. A panel discussion: • Peter Leley • Hon. Kochei Albert • Hon. Isaac Ruto • Dr. Elizabeth Muli • Hon. Ekwee Ethuro • Kinuthia Wamwangi • Dr. Willy Mutunga • Arch. Phillip Kungu • Joash Dache	Facilitator: Sen. Moses Kajwang	
1130	Plenary	Prof. Mitullah	
1145	HEALTH BREAK		
1215	Communique	Allyce Kureiya, Vice Chairperson IGRTC	
1230	Official Closing: Chairperson, Council of Governors	H.E Gov. Josphat Nanok	
1300	LUNCH AND DEPARTURE		

INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM

GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY ONE

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GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY ONE

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83	WINFED WILWAMWA	IGRTC	STAFF	winfede@olmwa.com	0722242089	

INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM
GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY ONE








ANNEXE V: LIST OF PARTICIPANTS

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO.	SIGNATURE
84	PROF. ANYANG' NYONG'D	COUNTY GOVT OF KISUMU	GOVERNOR			
85	PETER ERIFETE	TURKANA COUNTY	SECRETARY	indanbani50@gmail.com	0727305555	
86	BEATRICE WAIHEDA	IGDT	TECH OFFICER	ben.waiheda@gmail.com	0707084664	
87	Moses Musyoka	IGRTC	DRIVER	Wmuseyoka@gmail.com	0722242583	
88	Mahaf G. Shalle	IGRTC	DIRECTOR	Mshalle@igrtc.go.ke	0722237221	
89	Peter Kefey	IGRTC	CEO	kefey@igrtc.com	072780820	
90	LEN OANDA	STP MEDIA	JOURNALIST	gedgand@ignatic.com	0721956201	

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO.	SIGNATURE
91	KAMU NUGA	KYADARIA CG.	DEP C/S	directgovernance@kyadaria.com	0786292054	
92	Maureen Anwar	NPSC	Research	maureen@npss.go.ke	0724908604	
B.	BENJAMIN MASILA	NPSC	DEPUTY DIRECTOR COMMUNICATIONS	bmasila@npss.go.ke	0722795177	
94	Stanley W. Ongeth	SDC	SALES	wongeth@ghimac.co.ke	0722677415	
95	Stewo Steven	CLUSA	C.R	stewo@nbc.org	0722659936	
96	Dr Raymond agw	UKTC	Member	raymondagw	072850271	
97	Andrian Njorani	CARS		wanjiku@nkatk.or.ke	0722571800	

INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM
GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY ONE



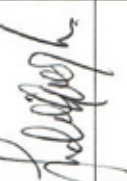



ANNEXEV: LIST OF PARTICIPANTS








NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO.	SIGNATURE
98	Peter O. Nanyande	CON	PROF.		0701281444	
99	Joseph Koskey	Privatization	CEO		0722 20860	
100	BONIFACE MAITHA	INFRASTRUCTURE	CSR		0720576007	
101	ABIBEL KIPCHURU	TRANSNZIA ASSEMBLY	D/Chair		0729987025	
102	Amos. Boaz L. NBARA	PC	COMMUNION		0716608104	
103	PATRICK LESHORE	GAMBURA COUNTY ASSEMBLY	CLERK	leshorepako.com	071818492	
104	Amelia Otano	CAJ	S.H.O	amotano@ambuchanan.g.ke	0733976994	

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO.	SIGNATURE
105	Isaac G. Tumbura	MOR	ADP	Isaacg@mor.or.ke	072679439	
106	Emmanuel Ochieng	KEPSA	PPS	eochieng@kapsa.or.ke	0711819916	
107	John Kimani	IGRIC	ACCT	kimanjoh@igric.or.ke	0721310116	
108	Gregory Kitema	IGRIC	CFO	gkitema@igric.or.ke	0722552238	
109	Phylis N. Muturi	TECHSUNT-ATTADI	RAPORTEUR	PHYLISNMUTURI	0722505125	
110	Wase' Abdullahi	University of Nairobi	Faculties	Wase'Abdullahi@gmail.com	0722820212	
111	FRANCIS FONDO	IGRIC	MEMBER	francisfondo@gmail.com	0738557	

INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM
GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY ONE







ANNEXE V: LIST OF PARTICIPANTS

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO.	SIGNATURE
113	JOHN KURIA	IGRTIC		Cash2014@gmail.com	0722226457	
114	EZUD. NTHAKI	IGRTIC	CO	elindubedi@gmail.com	0722594844	
115	Judith Mgunda-Athya	IGRTIC	Member	migundaathya@gmail.com		
116	Nancy W. Nigari	IGRTIC	SA.	nancyw@equilib	0722875515	
117	SOPHIE AMUTAYU	IGRTIC	LEGAL	AMUTAYU@IGRTIC.KE	0720856133	
118	Shadrack Ruto	IGRTIC	F	shadrackr@gmail.com	0714995997	
119	Evans Kamlavu	IGRTIC	Security	Evanskam@gmail.com	0720894861	

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO.	SIGNATURE
120	Dr. Elizabeth A. Onotu	C.G.K. 0716918699	protocol	elizabethlakinyi77@gmail.com 098518699		
21	DR. NW. ANITA KANHU	MO UNIVERSITY	SENIOR LECTURER	nwforukogun@yahoo.com	072238086	
22	Angelina Hango	ICRTC	Member	angelina.hango@gmail.com	072239769	
23	Dr. Njambi Muceme	ICRTC	Member	nuceme@gmail.com	0714635488	
24	Madam Bol	C.G.K	Member	bolmadam@yahoo.com 0722235620		
25	MONICA Okunbo	CEK	Member	genmaster87@gmail.com	0710483334	
26	Conrad Okunbo	IGRT.C	Member	—	0725026718	

INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM
GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY ONE

ANNEXEV: LIST OF PARTICIPANTS


NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO.	SIGNATURE
127	PROF. KAREGA MUTAHI	IGRIC	CHAIRMAN	blaudikab@gmail.com	0721 565 318	
128	HON. JEREMIAH KIDINI	NA	CHAR CIOC	jerkiom@gmail.com	0722 711 522	
129	Dr. Darius Omosi	COUNTY Sec. C/O	COUNTY SEC		0722 791874	
130	Priscah Rawuq	IGRIC	SECRETARY	rawuq10@gmail.com	0726 744 570	NRU.
131	CHARLES SUMBUKI	DEVOTION	PS	superphob@gmail.com	0720 609 814	
132	PHILIP SUYIA	DEV	DEBE	"	0720 689 814	
133	MUTHONI KAREGA			muthoni@gmail.com	0722 759 369	

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO.	SIGNATURE
#	Huy Kurani	DFID	Country Lead	L-Kurani@dfid.gov.uk	0705 926 255	
134	Daniel Mulca	IFATIC	Officer	Daniel.mulca@qmail.com	07723448942	
135	Freddie Agwanis	Media	Chief KSM	regina.j.s@gmail.com	0724833700	
136	Joseph Gwangi	Media	KSM	gwangijoe@yahoo.com	0728690223	
137	Damirich Ochang	Media	H/Bar	ochangdora@gmail.com	0726066157	
138	Fredrick Odua	Media	Senior	odua.fredrick@co.co.ke	072222212	
139	Kerine Omollo	Media	Visiting	omollokerine@gmail.com	0725375974	

INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM
GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY ONE

ANNEXE V: LIST OF PARTICIPANTS

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO.	SIGNATURE
1.	FLORENCE AMOIT	SDHUB	Sec. Asst	amoit-2014@gmail.com	07226569	
2.	Shaun Mutua	ATADI	Communication Assistant	mutuachadi@devolution.or.ke	0797710871	
3.	Jane Orizani	Culture & Heritage	SDS	Janen2004@yahoo.co.uk	0722625421	
4.	John Kungu	MO-DA	SDA	john.kungu@gmail.com	0722528884	
5.	Otiemo Steven	NCSA CLUSA	C.R	otieno@ncsa.coop	0722654930	
6.	FLORENCE N. WACHIRA	NGEC	Commissioner	fniwachira@ngeckkenya.org	0725744078	
7.	BENJAMIN MASILA	NPSC	DIRECTOR	bmasila@npssc.go.ke	072279877	
8.	MARILEEN AMWOT	NPSC	Researcher	marilem@npssc.go.ke	0724908604	

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO.	SIGNATURE
1	Joseph Kosken	Privatization Commission	CEO		072228866	
7	Musjoka Muthana	The National Treasury	Chief of Office	Musjokamuthana@ntr.gov.gh	0720985085	
14	EMMANUEL JUMA	AZWAN COMMUNICATIONS	CAMERA MAN	emmanueljuma@gmail.com	0723552935	
X	Amos Rexi	ALWAN	Photographer	amosaregina@gmail.com	0706949711	
Y	SAMUEL OKURO	JOOSI	Dean	okuroh@yahoo.com	0720709606	
X	JULIUS KARDIE	MOLPP	AA	helpdesk2016@yahoo.com		

INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM
GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY ONE

ANNEXE V: LIST OF PARTICIPANTS

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO.	SIGNATURE
140	Mwaura Kuria	MOE/DRST	Ass Director	Mwaura_Kuria 03@yahoo.com	0722958774	MURIA

INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM

GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY TWO & THREE

ANNEXE V: LIST OF PARTICIPANTS

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4TH DEC	5TH DEC
1	Florence Amoit	SDITHD	Sec. ADM	gmoit2014@gmail.com	0722656930		
2	John Kenya Nwotakid	consolidof		johnkenya@consolidof.com	0722881286		
3	Musjika Muthama	The National Treasury and Planning	CIGFRD	MusjikaMuthama@treasury.go.ke	0720985085		
4	Salem Bagana	TRCR	Asst CS	mjwaga@yahoo.com	072565158		
5	DR. AHMED G. GUSTO	1st COUNTY Govt	CS	ahmedgusto@gmail.com	0711447963		
6	Elizabeth Ngunjiri	C. Tr. K	Principal	wzgent.com	0716918099		

INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM

GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY TWO & THREE

ANNEXEV: LIST OF PARTICIPANTS







NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4 th DEC	5 th DEC
7	Muareen Anwar	NPSC	Research	market@npsc.go.ke	072498604		
8	John Kinectui	IGRTc	HECT	kinectui@igrtc.go.ke	0724320498		
9	Joseph Koskey	PRIVATELY COMMISSION	CEO	jkoskey@k.g.o.ke	072220466		
10	Benjamin Masila	NPSC	DIR.	bmasil@npsc.go.ke	072275177		
11	Rajeev Leshore	Smava CA	clerk	lesis@yaho.com	0724218492		
12	David Mutai	Bonet	Dir	davidmutai@ gnad.com	07165434		








NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4 TH DEC	5 TH DEC
13	Mwaura Kuria	MOE / DRST	Ass Director	Mwaura Kuria 03@Yahoo.com	0722958774	Mwaura	Mwaura
14	Peter Wanganyi	VON	Professor	Pwanganyi@phs.ac.ke 0702581444			
15	Gregory H. Temu	IGRSC	CFO	gtemu@igsc.org	072552238		
16	JOSIAH R- AKETCH	IGRSC	T-O	aketch@igsc.org	0721229692		
17	Peter Odhiambo Banda	IGRSC	COO	odhiambo@igsc.org	0722231249		
18	Hilfred W. Waweru	IGRSC	SFOA	waweru@igsc.org			

INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM

GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY TWO & THREE

ANNEXEV: LIST OF PARTICIPANTS

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4 TH DEC	5 TH DEC
19	DUILE OTHIARI	NYAPAMBA COUNTY ASSEMBLY	AG-CLERK		0701962600		
20	Amelia Otono	Commissioner of Administrative Justice	S.L.O	9.0tono@ambudsman.go.ke	0733996994		Amg
21	Dismas Mbatia	IGLTC	—	Dismas.Mbatia@iglts.go.ke	0712028888		
22	Evans Kavulamu	IGDTC	—	Evans.Kavulamu@igdts.go.ke	0720884861		Evans
23	Kamau Nduku	NYAPAMBA	DEF CLS	Director@nyapamba18@gmail.com	0786292114		
24	Amos Kegu	ALPAM	—	amos.kegu@gmail.com	0705947741		K








NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4 th DEC	5 th DEC
25	Luy Kurumani	DFID	County Level	L-Kurumani@dfid.gov.uk	0705 926 255		
26	TIMOTHY KARUKI	County ATTORNEYS FORUM	Chair	timobim@yahoo.com	0722266436		
27	EMMANUEL JUMA	ALWANI COMMUNICATIONS	CAREER ADVISOR	emmanueljuma.nziungu@gmail.com			
28	Joseph. C. Koehl	BARINGO COUNTY ASSEMBLY	CLERK TO ASSEMBLY	koehl40@gmail.com	0721463885		
29	John Kueia	IGETC	-	cash2014@gmail.com	0727224950		
30	Bob Mwangi	L'GIC	Director	Bobmwangi@yahoo.com	07222 3502		

INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM

GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY TWO & THREE

ANNEXEV: LIST OF PARTICIPANTS

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4TH DEC	5TH DEC
31	FLOHA UKWIRI	AHADI	ZAP	frumokwira@ahadi.kisumu	0726677510		
32	Elwif Nabubi	Uwazi	CG	elwifnabubi@uwazi.co.ke	074724424		
33	Rui Agongo	IGATE	IP	elagonyo@gmail.com	076000981		
34	Agnes Nithani	IGATE	Director				
35	Prof Karoga Ntethi	IGATE	Chairman				
36	Peter Leley	IGATE	CEO				

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4TH DEC	5TH DEC
37	KWITONI WAREJA			kwitoni@gmail.com	0722759369		
38	Roganda mya	IGATE	Member	roganda.my@gmail.com	072550K		
39	Offeno Jevan			offeno@ndra.coop	072265950		
40	Joel Anka			joelanka@dyk.com	0726012495		
41	James Wanyank	NCIC	Legal officer	swanyank@ncic.or.ke	072525401		
42	Ficie Onchana Aoi	Wanyank County	AS	onchana.aoi@wanyank.co.ke	072237881		

INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM

GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY TWO & THREE

ANNEXEV: LIST OF PARTICIPANTS

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4TH DEC	5TH DEC
43	DR. FREDRICK KAMUNDE	THARAKA WITHI COUNTY GOV	COUNTY SECRETARY	fredkamude@gmail.com	0722894225	4/2/18	
44	WINNIE OTIENO	CHAMBER OF COMMERCE	COUNTY EXECUTIVE OFF	knociksm@yahoo.com	0705818947		
45	JAMES MOGERA		NYMIRA	mozisjona@gmail.com	072246201		
46	LEONARD KIMUTAI	MOE	Director	Leonardkimuta2@gmail.com	0727351041		
47	ROBERT KLAUTHA	MOI HUD	Director	Robertklaus@gmail.com	023304005		
48	Daniel MUIA	IGATE	Officer	danielmuia@gmail.com	0723440042		

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4TH DEC	5TH DEC
79	Emmanuel Ochieng	KEPSA	PPD	eochieng@kepsa.or.ke	0711819916		
80	Patrick K. Chege	SDAR	PAO	wachegepk@gmail.com	0723223206		
81	Philis Ngane	MAFES	TA-CAS'S OFFICE	philisngane@yahoo.com	072394967		
82	Florence Wachira	NGEC	Commissioner	fwachira@ngeckenya.org	0725141078		
83	Judy Oduma Wimgabwa	County's Assembly Forum (CAF)	C.E.O	judy.oduma@countyassemblyforum.org	0722 884005		
84	Phyllis Muthuri	SUNT-AHADI	RAPPORTEUR	phyllismuthuri@gmail.com	0722 505125		

INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM

GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY TWO & THREE

ANNEXEV: LIST OF PARTICIPANTS

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4TH DEC	5TH DEC
55	John Kings	MODA	SAS	john.kings@equival.co.ke	0722523681		
56	Jane Mwan	Sports Culture Heritage	SPS	janemwan2004@yahoo.co.ke	0722695471		
57	Angelina Hanyo	KERIC	Member	angelinahanyo@gmail.com	07225909		
58	Nweneji Winyori	KERIC	SA	nwenejiwinyori@gmail.com	0722275555		
59	Beatrice Atieno	IGRIC			07104992		
60	JANE OTVAI	IGRIC	HRM	otvai.jane@gmail.com	0722620184		

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4 th DEC	5 th DEC
b1	MONICA A. DIXON	CGK	PROVOST	genmaster810@tel.com	0710483324		
b2	SOPHIE AMUKUY	IGTC	LEGAL	amukuy@gmail.com	0720856633		
b3	MUTHURICIM	MOPA	C.D.O	amutten2018@gmail.com	0772472828		
b4	PETER ERIPETO	MURANGA COUNTY	COUNTY SECRETARY	turnambony9cs@gmail.com	0729305558		
b5	Stanley W. Opete	SOC	SDECD	wongche9gho@ic.vic	0722677405		
b6	FREDERICK S. WABUA	MOPSM	REGIONAL GOVERNOR	fwabua65@gmail.com	0726221051		

INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM

GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY TWO & THREE

ANNEXEV: LIST OF PARTICIPANTS

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4TH DEC	5TH DEC
67	JULIUS KARDIE	MALPP	Asst	ujependo@malpp.org ujependo@malpp.org	071634948		
68	S. Ole King'etich	MOPRA	Secretary Deputy	s.olekingetich@gmail.com	072277076		
69	Jacob N. KESIME	IGKTC	Consultant	jacobnkesime@gmail.com	0725820610		
70	E. Njombi MUSA	IGKTC	Member	musa.n.jombi@gmail.com	0714655484		
81	Sae G Thuta	MOR	WFE	thutagisane@gmail.com	072672948		
82	TIMOTHY OTENYO	MODA	PDO	timothyotenyo@gmail.com	0722841160		

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4 TH DEC	5 TH DEC
73	FRANCIS FONDO	IGATIC	MEMBER	francisfondo@gmail.com	0710758557		
74	Paul Lutha	KIPRA	Patric Analyst	Plutha@kipra.or.ke	0729977881		
75	KHASIAN SHADISA	IGTC	Member	igmail.co.ke sakhassian@gmail.com	0711847403		
76	Muhammad	ATTADII WON	Facultade	Muhammad Jusaidin	0722870742		
77	Basil Paschim	ATTADII WON	Rapporteur	basilbasil2015@gmail.com	0724344810		
78	ANDREW WAPUTIN	ATTADII WON		Waputin@gmail.com	0712 9524		

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GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY TWO & THREE

ANNEXEV: LIST OF PARTICIPANTS

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4TH DEC	5TH DEC
79	Dr Mike Parkler	County Govt	CS	parkler2007@gmail.com	0722 69 2706		
80	Asbet Kipetie	Tanz Comt Assembly	D/Chk	Asbet.kipetie@tanzania.go.ke	0729987025		
81	SAMUEL OKUKO	JUST	Dean	okukos@just.or.ke	0720709600		
82	BONIFACE MATITHA	SDI	ENGINEER	bonifacemathia@gmail.com	0720526007		
83	Asb. Govt Mbaye	PC	COMMISSIONER	asb.mbaye@pc.or.ke	0716008084		
84	JUDITH MURUGI	COUNTY ASSEMBLY OF MACHAKOS	ADMIN OFFICER	murgijudith@gmail.com	0722643776		


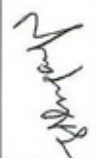












NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4 TH DEC	5 TH DEC
85	Elvis Rotich	IGRTC		elvisrotich75@gmail.com	07177819		
86	CHRISTINE J. BOIT	KWS	Senior. WARDEN	choile.kws@gokc.ke	07272454		
87	Serechia Dindia	IGRTC	Security	jermy.0@mailo@yachoo.com	071567208		
89	Wycliffe Rut	KWS		wycliffesuta@yachoo.com	0723-24-9380		
90	LAWI TAMI	IGRTC	Driver	Kipronosig7@gmail.com	072460876		
91	Jacinta Odhiambo	Kakamega County	County Secretary	jacintaodhiambo@gmail.com	07156425		

INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM

GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY TWO & THREE

ANNEXE V: LIST OF PARTICIPANTS












NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4TH DEC	5TH DEC
92	Merwina Maonda Rabera	AHADI	Rapporteur	maonda.maonda@yahoo.com	0724283106		
93	Kimulira Nanyingi Mogel		Chairman	Kwamucyaga@gmail.com	0724283106		
94	Eric Odhiambo	KAM	R.Ngr.	erick.odhiambo@ekam.co.ke	0721651198		
95	Kennedy Nyanjira	CGPC	Member		0728851117		
96	Billow KHAMO	CGPC	Member	billow.khamo@gmail.com	0722837744		
97	Judith Mugide-Atieno	KATC	Member	mugidejudith@gmail.com			
98	Nancy Sumu	CGIC	PRO	jumananyclara@gmail.com	0726378		
99	Ruth Ayugi	GPU	Communication	ruthayugi@equitem 072616874			

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4TH DEC	5TH DEC
100	JUDITH MURUGI	COUNTY ASSEMBLY of MACHAKOS	ADMIN OFFICER	munajjuditha@gmail.com	0722551376		
101	Jean Ompanga	KLRC	Swedish Researcher	jean.ombunga@krc.go.ke	0722517330		
102	Piscata Rawas	LGRTC		rawas70@gmail.com	0722571252		
103	RUSHDIE OUDIA	MEDIA	NATION	wshdru03@gmail.com	0716232414		
104	Dan Odhiambo	MEDIA	KTN	chunga.dan@ktn.co.ke	0724126313		
105	Roseos Omindi	Media	NTV	romba@kicadecommunications.co.ke	0728737155		
106	ONDANI OGEA	MEDIA	NMG	ondanioses@gmail.com	0711976042		
107	KEVIN ODHAMBO OGIPT	MEDIA	KTN	kegutteos@gmail.com	0720374476		

INTERGOVERNMENTAL RELATIONS WORKSHOP PROGRAM

GRAND ROYAL SWISS HOTEL, KISUMU 3RD TO 5TH DECEMBER, 2018 - DAY TWO & THREE

ANNEXEV: LIST OF PARTICIPANTS

NO	NAME	INSTITUTION	DESIGNATION	EMAIL	MOBILE NO	SIGNATURE	
						4 th DEC	5 th DEC
108	Peter Kibet	Self	Driver		072257561		
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