



IGRTC
INTERGOVERNMENTAL
RELATIONS TECHNICAL
COMMITTEE

Consultation, Cooperation & Coordination in Devolution

Report on Unbundling,
Assignment and Transfer
of Disaster Management
Functions to the National
and County Governments



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Abbreviations and Acronyms

COK	Constitution of Kenya 2010
COG	Council of Governors
EDE	Ending Drought Emergency
DRM	Disaster Risk Management
KEMSA	Kenya Medical Supplies Authority
KLRC	Kenya Law Reform Commission
IGRTC	Intergovernmental Relations Technical Committee
MODA	Ministry of Devolution and ASAL
NDMA	National Disaster Management Authority
NSAC	National Security Advisory Committee
OAG	Office of the Attorney General
SDG's	Sustainable Development Goals
TA	Transition Authority
WB	World Bank
UNICEF	United Nations Children Fund
USAID	United States Agency For International Development
UNDP	United Nations Development Programme

Foreword

This report was commissioned to give effect to a resolution of the Council of Governors full meeting held in 2019. IGRTC is mandated to implement decisions of the Summit and Council. In the wake of the ravaging drought in the country in early 2019, the Council met to deliberate on possible interventions and support to affected counties. One of its resolutions was the need for coordinated interventions between the two levels of government.

IGRTC as mandated, was to urgently unbundle the disaster management functions so that each level of government was clear on its mandate in the performance of the function. Under Schedule Four of the Constitution, disaster management functions fall within the purview of both the national and county governments. Thus by virtue of article 186 (2), the function is deemed to be concurrent.

This report is therefore a significant milestone in the actualization of devolution and better service delivery. The report was developed after several consultative stakeholder forums where technical, professional and administrative views were gathered. The outcome of the report is intended to inform both levels of governments on how the country and the two levels of Government in particular can deal with this function whose implementation is largely concurrent in nature. IGRTC advises that both levels of government internalize the contents of this report, developed by experts in disaster management, for a more harmonized and coordinated delivery of this function.



John Burugu

Ag. CHAIRMAN

Message from the Chief Executive Officer

The publication of this Report on unbundling, assignment and transfer of Disaster Management function is yet another milestone in the process of entrenching devolution. Disaster Management, being the organization and management of resources and responsibilities for dealing with all humanitarian aspects of emergencies; in particular preparedness, response and recovery in order to lessen the impact of the disaster is by its very nature a concurrent function. IGRTC, facilitated a consultative process for all actors and stakeholders with the support of UNDP and UNICEF. The stakeholders looked at the different types, stages and phases of disaster and proceeded to review, classify, delineate and assign the functions to facilitate orderly response to disaster in the Country.

I wish to call upon the relevant institutions of government at either level to assist, support and as appropriate, implement the outcomes of the report. As we are optimistic that this publication will close the gap that existed in the functional delineation of the concurrent components of disaster management, we are under no illusions that implementation of this report will not encounter teething challenges. This publication, for the first time seeks to ensure that each level of government undertakes its rightful role as assigned by the Constitution in our devolved system of governance.



Peter Leley

Chief Executive Officer

Acknowledgement

This report was developed through a consultative process where stakeholders in disaster management sector were involved in all stages with the guidance of the Intergovernmental Relations Technical Committee. We would like to acknowledge the following Government ministries, department, agencies and non-state actors. Ministry of Devolution and ASAL, Ministry of Interior and Coordination of National Government, The National Treasury and Planning, Council of Governors, County Governments, National Drought Management Authority, National Disaster Operation Centre, Office of the Attorney General, Kenya Law Reform Commission, The Kenya Red Cross Society, UNICEF Kenya and USAID Kenya. IGRTC benefited immensely from the contributions made towards achieving this report through your exhibited exemplary cooperation which made the outcome of the assignment excellent. We hope this document reflects your collective views.

IGRTC is appreciative and grateful to the Council of Governors for their initiative to undertake the unbundling and assignment of disaster management functions and for their support provided during the period of the study. We also acknowledge the contributions of non-state actor stakeholders who participated in the study with invaluable contributions. The technical and professional knowledge provided during the study infused the quality we were looking for in this assignment. We thank you for the support.

We wish to most sincerely thank and appreciate the UN Resident coordinator, UNDP and UNICEF for their unreserved commitment in facilitating and supporting the IGRTC in its activities. This report would not have been possible without the support. The technical and financial support offered by the UNDP and UNICEF made it possible.

Lastly we acknowledge the IGRTC members, staff and the Inter-Agency Technical Committee members who worked tirelessly to deliver on this assignment.

Executive Summary

The Intergovernmental Relations Technical Committee (IGRTC) is established under Section 11 of the Intergovernmental Relations Act, 2012. Section 12 of the Act provides that the Technical Committee shall: Take over the residual functions of the transition entity established under the law relating to transition to devolved government after dissolution of such entity and facilitating the activities and implementing the decisions of the National and County Government Coordinating Summit (The Summit) and the Council of County Governors (COG). One of the residual functions inherited by IGRTC from Transition Authority was unbundling of functions.

The Council of Governors held a full council meeting on the 25th March 2019 in the wake of the ravaging drought in the country to deliberate on possible interventions and support to affected counties. One of its resolutions was “that there was need for coordinated interventions between the two levels of government. The national government and the affected county governments should be in consonance in their response so that food and other relief implements can reach all the needy Kenyans. Additionally, IGRTC was to urgently unbundle the disaster management functions so that each level of government could be clear on its mandate in the performance of this function “Under the fourth schedule of the Constitution, disaster management functions fall within the purview of both the national and county governments. Thus by virtue of article 186 (2), the function a concurrent function because it appears on part A and B of the Fourth Schedule as “Disaster management” and “Firefighting services and disaster management” for the national government and county governments respectively.

The function of firefighting services and disaster management was transferred through Legal Notice No. 16 of 1st February, 2013 to the county governments. This report was done through a consultative process bringing together an Inter-Agency Technical Committee with expertise in the disaster management sectors. It acknowledges the

existing international and national policies and legislative frameworks on disaster risk reductions. These includes Sustainable Development Goals, Sendai Framework for Disaster Risk Reduction 2015-2030, African Union Agenda 2063, and National Disaster Risk Management policy 2017 among others. The report classifies disasters into four levels. Level 1 and 2 are within the responsibility of county governments while level 3 or 4 falls under the responsibility of national government. The report further delineates and assigns disaster management functions to the either level of government based on four disaster risk management measures; prevention, preparedness, response and recovery. The report also highlights various challenges facing the implementation of disaster management functions and makes a raft of recommendations.

1. Introduction

The Intergovernmental Relations Technical Committee (IGRTC) is established under Section 11 of the Intergovernmental Relations Act, 2012. Section 12 (a) provides that the Technical committee shall be responsible for the day to day administration of the National and County Government Coordinating Summit and (Summit) and of the Council of Governors (the Council) and in particular - facilitate the activities of the Summit and the Council and implement the decisions of the Summit and the Council. Section 12 (b) of the Act provides that the Technical Committee shall: “Take over the residual functions of the transition entity established under the law relating to transition to devolved government after dissolution of such entity”). One of the residual functions inherited by IGRTC from TA was unbundling of functions, transfer of functions and determination of resources required for the performance of functions.

The Council of Governors held a full council meeting on 25th March 2019 in the wake of the ravaging drought in the country to deliberate on possible interventions and support to the affected counties. One of its resolutions called for the need to have coordinated interventions between the two levels of government in circumstances of disasters and emergencies. The national government and the affected county governments should be in consonance in their response so that provisions such as food and other relief can reach all the needy Kenyans. Additionally the governors requested IGRTC to urgently unbundle the disaster risk management functions so that each level of government would be clear on its mandate in the performance of the function.

1.1 Assignment of Functions

Under the Fourth Schedule of the Constitution of Kenya, 2010 (CoK, 2010) disaster risk management functions fall within the purview of both the national and county governments. Thus by virtue of article

186 (2), the function is deemed to be within the concurrent jurisdiction of both levels of government. It appears on part 1 and 2 of the Fourth Schedule as “Disaster management” and “Firefighting services and disaster management” for the national and county governments respectively.

The defunct TA transferred the function of firefighting services and disaster management through Legal Notice No. 16 of 1st February, 2013 to the county governments. However, the transfer was not preceded by unbundling. This created lack of clarity between the two levels of government on implementation of the disaster management function. There have been challenges on coordination, role clarity and resourcing that have impeded service delivery in these functions.

In order to address the challenges experienced in the implementation of the disaster management function, IGRTC engaged stakeholders in the sector to look at the concurrent functions of disaster risk management, analyze and delineate appropriately.

1.2 Disaster Risk Management Terminologies

1. Disaster (small-scale, large-scale, frequent and infrequent, slow-onset, sudden-onset)

A serious disruption in the functioning of a community or society due to hazardous events interacting with conditions of vulnerability and exposure, leading to widespread human, material, economic and environmental losses and impacts. A disaster is a sudden accident or a natural catastrophe that causes great damage or loss of life.

Disasters are a type of hazardous event in which there is significant disruption of the function of all or part of society. The impact of the disaster is often widespread and could last for a long period of time. The impact may test or exceed the capacity of a community or society to cope using its own resources, and therefore may require assistance

from external sources, which could include neighbouring jurisdictions, or national or international levels.

Disaster results from the combination of the exposure to a hazard; the conditions of vulnerability that are present; and insufficient capacity or measures to reduce or cope with the potential negative consequences. Consequences may include injuries, disease and other negative effects on human physical, mental and social well-being, together with damage to property, loss of services and environmental degradation.

For the purpose of the scope of the Sendai Framework (paragraph 15) the following terms are also considered:

- **Small-scale disaster:** A type of disaster only affecting local communities which require assistance beyond the affected community.
- **Large-scale disaster:** A type of disaster affecting a society, which requires national or international assistance.
- **Frequent and infrequent disasters** depend on the probability of occurrence and the return period of a given hazard and its impacts. The impact of frequent disasters could be cumulative, or become chronic for a community or a society.
- **A slow-onset disaster** is defined as one that emerges gradually over time. Slow-onset disasters could be associated with e.g. drought, desertification, sea level rise, epidemic disease.
- **A sudden-onset disaster** is one triggered by a hazardous event that emerges quickly or unexpectedly. Sudden-onset disasters could be associated with e.g. earthquake, volcanic eruption, flash flood, chemical explosion, critical infrastructure failure, transport accident.

2. Disaster Risk

Disaster risk is the combination of the probability of a hazardous event

and its consequences which result from interaction(s) between natural or man-made hazard(s), vulnerability, exposure and capacity.

Risk is typically depicted as being a function of the combined effects of hazards, the assets or people exposed to hazard and the vulnerability of those exposed elements.

Risk is ultimately the result of decisions that we make. We make decisions about the hazards to which we are willing to expose ourselves, we make decisions about where to build schools, factories, dams and dykes and how much to invest in disease surveillance and we make decisions about how our societies organize and care for vulnerable people and assets.

3. Hazard

A Hazard is a potentially damaging physical event, phenomenon or human activity that may cause the loss of life or injury, property damage, social and economic disruption or environmental degradation.

Hazards can include latent conditions that may represent future threats and can have different origins such as natural (geological, hydro-meteorological and biological) or induced by human processes (environmental degradation and technological hazards). Hazards can be single, sequential or combined in their origin and effects. Each hazard is characterised by its location, intensity, frequency and probability.

1.3 Types of Hazards and Disasters in Kenya

Kenya has over the years experienced both Natural and Man-made hazards. The mitigation of these hazards requires that coordinated and deliberate measures are put in place to address the events should they occur. These hazards include:

a. Geotectonic and Geomorphic hazards

These hazards are driven by the earth's internal energy including

earthquakes, volcanoes and Tsunamis. Earthquakes and tremors in Kenya arise from movement along the geological faults in the East African Rift System.

b. Meteorological (Climate-related) hazards

These result from extreme climatic events including floods, landslides, lightning strikes and resulting fires, droughts, thunderstorms, hailstorms, sandstorms and frost.

c. Biological hazards

These include epidemic and epizootic diseases, proliferation of pests and parasites and invasion of areas by insects. Climatic factors and available food sources influence spread of biological hazards.

d. Technological hazards

These are risks originating from technological and industrial sites, accidents, infrastructure failures and improper waste management.

e. Environmental hazards

The major environmental hazards in Kenya include the following:

i. Floods

These are naturally occurring flash, river and coastal inundation from intense rainfall associated with seasonal weather patterns. Floods are also induced by human activities interfering with wetlands, watersheds, drainage basins and floodplains. Flooding is a major hazard affecting many parts of Kenya and occurs cyclically. Floods occur as a result of deforestation, poor land use practices and lack of efficient water harvesting mechanisms within the catchment areas. In addition, the country experiences flash floods which normally occur following torrential rains, mainly in urban areas and, to some extent, in arid and semi-arid areas (ASAL). These floods are occasioned by sudden

accumulation of water as a result of clogging of drainage systems or lack of proper drainage systems.

ii. Landslides

This is the down-slope transport of soil and rock resulting from naturally occurring vibrations, changes in direct water content, removal of lateral support, loading with weight, and weathering, or human manipulation of water courses and slope composition. The situation is worsened by human activities such as clearing natural vegetation, quarrying, mining and construction. In the affected areas, damage caused includes loss of life, destruction of crops, human settlements and other infrastructure. Landslides in Kenya are common in Central, and Rift Valley regions.

iii. Lightning

This is a natural hazard caused by the discharge of static electricity generated in storm clouds. The adverse effects include loss of life, destruction of buildings, telecommunications, power installations and electronic systems among others. In Kenya, lightning is prevalent in Kisii highlands, Nandi Hills, Kitale and Kakamega.

iv. Earthquakes

This is the sudden and violent shaking of the ground, sometimes causing great destruction, as a result of movements within the earth's crust or volcanic action. The Rift Valley, which is one of the most earthquake-prone areas of the world, runs through Kenya. In particular, the areas around Lodwar, Nakuru, Naivasha and Kilimanjaro are prone to volcanic activity and earthquakes. The likely damage includes loss of life, adverse impact on environment, and destruction of infrastructure.

v. Droughts

These are harsh climatic conditions due to rainfall deficit as a result of human induced changes in land use, higher sea surface temperatures,

increase of atmospheric carbon dioxide and greenhouse gases. In Kenya, droughts have led to high mortality rate of livestock and wildlife thereby negatively impacting the economy, power rationing, water deficiency and, more significantly, the livelihoods of pastoral and agricultural communities. Droughts have also exacerbated resource-based conflicts between communities.

vi. Pest Infestation

Pest infestation refers to an increase in pest numbers due to a combination of ecological factors. These include; temperature, crop monoculture, introduction of plants to new locations, introduction of pest species, overcoming of genetic resistance in hosts, overcoming pesticide effects, conducive weather patterns, and migration. In Kenya, incidents of pest infestation have included locusts, army worms, and quails, which cause great destruction to crops and vegetation.

vii. Chemical and Industrial Accidents

These hazards have taken many forms such as: (a) explosions and accidental discharges in plants or storage facilities handling toxic and flammable substances; (b) accidents during transportation of hazardous and toxic chemicals; (c) contamination of food or the environment by misuse of chemicals; d) improper waste management of toxic chemicals; (e) technological system failures; (f) failures of plant safety designs; (g) natural hazards such as fire; (h) earthquakes or landslides, and; (i) arson or sabotage incidents affecting human installations.

The promotion of public safety within the realms of building and construction, transport, industries, public sector, educational institutions and other key sectors should be given priority to reduce the adverse effects and impacts of these accidents.

viii. Epidemics

This results from the exposure to a toxin resulting in a pronounced rise in number of cases of parasitic or infectious origin. Epidemics spread

due to poor sanitary conditions, crowding, poverty, ecological changes that favour breeding of vectors, non-immune persons migrating to endemic disease areas, decline in nutritional status and contamination of water or food supply. The disease outbreaks associated with epidemics have led to illness and death, social and political disruption, economic loss and increased trauma in emergency settlements.

f. Radiological, Nuclear and Explosives

Radiological hazards relate to contamination by radiological isotopes and usually result from unsafe storage of the radiological isotopes or nuclear accidents. Industries, medical and research institutions, Military weaponry, as well as food supplies are frequently the sources of contamination. Radiological hazards are usually fatal to those exposed to them.

g. Civil disorder/unrest

Civil disorders/unrest is becoming common in all sectors due to the current political-socio-economic challenges e.g. political grievances, economic disputes and social discord.

1.4. Frameworks Relating to Disaster Risk Management Functions

The report takes note of stock of work that has been done in disaster management especially disaster management and legislations.

1.4.1 International and local documents developed in relation to disaster risk management

i. Sendai Framework for Disaster Risk Reduction 2015-2030

Sendai Framework for Disaster Risk Reduction 2015-2030, the Successor instrument to the Hyogo Framework of Action 2005-2015 emphasizes on the goal to preventing new risks, reducing existing risks and strengthens resilience. In the same breadth, this report borrows much of the Sendai framework especially the four key priority areas.

ii. Sustainable Development Goals (SDGs)

In the year 2015, leaders from 193 countries of the world came together to face the future and what they saw was daunting; famines, drought, wars, plagues and poverty not just in some faraway place, but in their own cities and towns and villages. The leaders from these countries created a plan called the Sustainable Development Goals (SDGs). This set of 17 goals imagines a future just 15 years off that would be rid of poverty and hunger, and safe from the worst effects of climate change. Ten (10) of the 17 Sustainable Development Goals are on DRM including: No poverty; No hunger; Good Health; Quality Education; Life on land; Life below water; Clean water and Sanitation; Climate action; Sustainable cities and communities; Peace and justice.

iii. African Union Agenda 2063

The genesis of Agenda 2063 was the realization by African leaders that there was a need to refocus and reprioritize Africa's agenda from the struggle against apartheid and the attainment of political independence for the continent which had been the focus of The Organization of African Unity (OAU), the precursor of the African Union; and instead to prioritize inclusive social and economic development, continental and regional integration, democratic governance and peace and security amongst other issues aimed at repositioning Africa to becoming a dominant player in the global arena.

iv. IGAD Drought Disaster Resilience and Sustainability Initiative (IDDRSI)

This policy links with the IDDRSI strategy on equitable and significant Disaster Risk Management, Preparedness and Effective Response in the IGAD region.

v. East African Community Climate Change Policy

The adverse impacts of climate change being aggravated by increasing average global temperatures are a threat to the livelihoods of people in almost all sectors of the economy in the EAC region. Severe droughts, floods and indeed extreme weather events associated with climatic variability phenomenon of El Niño Southern Oscillation (ENSO) are occurring with greater frequency and intensity in the region. This is worsening the state of food security and threatening all the other drivers of economic development. Hence the need for an integrated, harmonized and multi-sectoral framework for responding to climate change in the EAC region through the East African Community Climate Change Policy (EACCCP). The overall objective of the EAC Climate Change Policy is to guide Partner States and other stakeholders on the preparation and implementation of collective measures to address Climate Change in the region while assuring sustainable social and economic development. The Policy is founded on three key pillars, namely, adaptation, mitigation and climate change research (monitoring, detection, attribution and prediction).

1.4.2 Existing National Legal Frameworks Relating to Disaster Risk Management

i. Kenya Vision 2030

The Kenya Vision 2030 recognizes the need to Ending Drought Emergencies (EDE) by the year 2022 as one of the key foundations for national development. This is in line with the CoK, 2010 obligating the state to protect the rights of the vulnerable including the right to be free from hunger.

ii. Kenya National Climate Change Framework Policy, Sessional Paper No. 5 of 2016

This policy was developed to facilitate a coordinated, coherent and effective response to the local, national and global challenges and opportunities presented by climate change. An overarching mainstreaming approach has been adopted to ensure the

integration of climate change considerations into development planning, budgeting and implementation in all sectors and at all levels of government. The Policy therefore aims to enhance adaptive capacity and build resilience to climate variability and change, while promoting a low carbon development pathway.

iii. National Disaster Risk Management Policy, 2017

The National Disaster Risk Management Policy was approved by the Cabinet in 2017. The Policy is benchmarked on the best practices in disaster risk management. It lays down the strategies for ensuring the Government commits itself to enhancement of research in disasters and formulation of risk reduction strategies. The policy lists four levels of disasters.

Levels and declaration of disasters

Kenya's tiered disaster response system is based on the Principle of Subsidiarity. The levels of disasters below are based on the impact, needs, capacities and requirements of different scales of disaster.

When a disaster is assessed to be at level 1 or 2 within a county, the respective county government bears the responsibility for response and management.

When a disaster is assessed to be at level 3 or 4, the Principal Secretary responsible for Disaster Risk Management will advise and provide all the relevant information to the Cabinet Secretary, Ministry responsible for Disaster Risk Management. The Cabinet Secretary will upon certifying the situation at level 3 or 4, through the National Security Advisory Committee (NSAC), advise and request the President to declare a national disaster.

Table 1: Levels and Declaration of Disasters

Level	Description	Declaration
Level 1	Localized emergency events dealt within the regular operating mode of the protective, emergency and health services in Villages, Wards and Sub-County	County Governor
Level 2	Emergency events that overwhelm the capacity of the resources in Sub-County, but which do not overwhelm the capacity of the County resources to respond and recover	County Governor
Level 3	Emergency events that overwhelm a County and require mobilizing national resources to respond and recover	President
Level 4	Emergency events that overwhelm the existing National response capacity, thus prompting the President to seek Regional/International assistance to support the country in response and recovery	President

iv. National Drought Management Authority Act 2016 (NDMA Act 2016)

This is the law that establishes the National Drought Management Authority. The functions of the Authority are stated in Section 5 of the Act.

2. Unbundling, Assignment and Transfer of Functions

2.1 The Constitutional Provision on Unbundling and Transfer of Functions

The Constitution has distributed the functions of government between the National Government and County Governments¹ in the Fourth Schedule. These functions can be categorized either as

- i. *Exclusive* where their performance is restricted entirely to the assigned level of government, or
- ii. *Concurrent* where both levels of government share in their performance or carry them out simultaneously.
- iii. The third category relates to *residual* functions which are roles, duties or activities that are not expressly assigned to any one level of government by the constitution and are/can be assumed to remain with the level of government that was responsible for their performance prior to the enactment of the new constitution².

Generally, the functions of the two levels of government suggest that the national government is responsible for macroeconomic management of the national economy, national policy formulation, regulation, setting of national standards, monitoring and evaluation whilst the county governments will be in charge of service delivery and implementation of projects at the county level.

Article 187 (1) provides that a function or power of government at one level may be transferred to a government at the other level by agreement between the governments if a) the function or power would be more effectively performed or exercised by the receiving government; and b) the transfer of the function is not prohibited by the legislation under which it is performed or exercised.

1. Functional assignment can also be viewed as denoting the sharing of power between the national and devolved governments.

2. Current local authorities would logically be assumed to represent counties in this respect, since county governments were not in existence before the enactment of the new constitution.

Article 187 (2) also provides that if a function or power is transferred from a government at one level to a government at the other level then a) arrangements shall be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are transferred in line with the *'finance follows functions'* principle as per Article (187) (2) (b). The constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule.

Article 189 of the CoK, 2010 also provides that government at either level shall 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 the case of the county government, within the county level. Government at each level, and different governments at the county level, shall cooperate in the performance of the functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.

2.2 Objects of Functional Analysis/Unbundling and Competency Assignment

The devolved system of governance is about achieving improved public service delivery and ensuring accountability in the processes. Therefore, realization of developmental devolved government in a manner that supports the overall objectives of the CoK, 2010 will require efforts aimed at strengthening those in existence and building new institutions. This process required a clear and transparent effort to assign as well as clarify functions, competencies and responsibilities to the two levels of government. Key issues in respect of service delivery based on the functional assignment are as follows:

- Achievement of clarity in the functional assignment through unbundling/clarifying them and assigning competencies between the national and county governments;
- Determination of the service level gaps in respect of each

competency;

- Determination of the expected performance level;
- Allocation of funds to levels of government according to their service delivery mandates;
- Identification of capacity and capability constraints;
- Development of a short, medium to long term capacity building programme; and,
- Review the organization of national government to reflect the assignment of functions under the CoK 2010.

2.3 Principles Guiding Functional and Competency Assignment

The determination of the functional analysis and competency assignment used experiences drawn from other countries. Of great significance is the application of key principles to guide in competency/functional analysis. These principles that were recommended by the report of the taskforce on devolved government (Taskforce on Devolved Government Report, 2011) prepared under the Ministry of Local Government in 2011. Below are of the key principles that assisted to guide the process.

2.3.1 Constitutionality

This principle calls for the adherence to the Constitution in determining the competency assignment to any level of government. In Kenyan situation it's always important to refer to the Fourth Schedule to the CoK 2010 and confirm where it has been clearly assigned in the 4th Schedule.

2.3.2 Principle of Subsidiarity

The main economic benefits of decentralization arise from citizens having a greater influence over decisions affecting the services they receive. This concept is reflected in the principle of subsidiarity i.e., that a public service function should be assigned to the lowest level of government that is capable of delivering the service (Shah, 2007:8 and UN-Habitat, 2007). This principle is at least implied in Articles

174 – 200 of the Constitution, which pertain to the creation of county government and the objects of devolution. Specifically, Article 174 includes the objective of giving the power of self-government to the people and enhancing their participation in making decisions (clause c) and recognizing the right of communities to manage their own affairs (clause d). Furthermore, Article 176(b) states that county governments should decentralize their functions and service delivery to the extent that it is efficient and practicable.

2.3.3 Transferability of Functions

The second principle is that of “transferability of functions”. The CoK 2010 recognizes the concept of transferability of functions from one level of government to another. It is recognized that there is no permanency in the assignment of functions. Article 187(1) of the constitution recognizes this principle and provides for transfer of functions. It notes that a function or power of government of one level of government may be transferred to another level of government by agreement between the two levels of government. Such transfer would be necessary first, if the function or power would be more effectively performed or exercised by the level to which it is being transferred; and second, if the transfer of the function or power is not prohibited by the legislation under which it is assigned by the fourth schedule. Because of this, it is possible to have one level of government transfer some of or aspects of some of its functions to another level of government. Such transfer is not done by the constitution but by the agreement of the different levels of government. The transfer could be by agreement or by national legislation. Sometimes the legislation transferring the functions may be preceded by an agreement.

It is important to note that any agreement transferring a function can be cancelled and the responsibility for the function returned to the level of government to which the function or power is constitutionally assigned. This would be in line with article 187(2)(b) which provides that if a function or power is transferred from one level of government to another level, constitutional responsibility for the performance

of the function or exercise of the power remains with the level of government to which the function is assigned by the constitution..

An important element of transferability of functions is the need to ensure that functions are not transferred without resources. Since resources follow responsibilities, any transfer of responsibilities must be accompanied by the resources necessary to perform the functions. In line with article 187(2)(a) any transfer of a function or power from one level of government to another level of government must ensure that the resources necessary for the performance of the function or exercise of the power are transferred to the level of government to which the function is being transferred. This is a consideration to take into account to avoid the possibility of one level of government undermining the ability of the other to operate by simply transferring to it functions without the accompanying resources.

2.3.4 Alignment of Capital and Recurrent Expenditures

In situations where one level of government is responsible for capital functions (for example, the construction of new health facilities) but another is responsible for recurrent functions, the mismatch can undermine service delivery. In general, it is undesirable if one level of government is able to create a liability that another level bears responsibility for. In Kenya, operationalization of the Development Funds starkly illustrates the failure to observe this principle. Some of the funds support the construction of facilities, which then have to be provided with operational funding out of the limited recurrent budget of a national ministry. Sub-national governments may lack the capacity to manage large and complex construction projects. These limitations do not necessarily need to be addressed by retaining responsibility at the national level, but capital funding may be provided in the transfers to county governments.

2.3.5 Policy Formulation, Regulation, Standard vis-a-vis Implementation

The fourth principle draws a distinction between policy and standardization functions on the one hand, and implementation functions on the other. In an approach that follows this principle, the national level of government is assigned and performs the functions of formulating policy and setting national standards; while the sub-national level and any other lower levels of government are assigned and perform mainly implementation functions. In such systems, more legislation is done at and by the national level of government while the sub-national level deals with the implementation of the legislations. Ordinarily, the legislations are done in very broad terms leaving room for each of the sub-national constituent units to be unique and different when filling in details and elaborating the legislations.

2.3.6 Principle of Proportionality

This principle largely requires that a level of government is allowed only to take action to the extent that is necessary to achieve the stated objectives. Article 190(3) provides that Parliament shall enact legislation that will allow national government to intervene to ensure county governments perform their functions. In 190(4), it details that the steps for achieving this, including possible takeover by national government for performance of those functions. However, in Article 190(5), the provisions suggest some level of measured intervention through a requirement that a notice be issued to the defaulting county government and allows the national government to take only those measures that are necessary. It further provides that a process be defined by which the Senate would bring such an intervention to an end.

2.3.7 Economies of Scale

The seventh principle is the Economies of Scale. This is where there are savings to be realized in having a larger unit deliver the service. In the Kenyan context, the supply of essential medicines and supply by Kenya Medical Supplies Authority (KEMSA) is a good example. It is envisaged that KEMSA will in addition to ensuring security and standards will also save money if drugs and other essential medical supplies were purchased from a single source.

2.2.8 Spillovers:

The eighth principle is that of spillovers. This is where a particular service provides benefits or costs in more than one county. A good example is a function provided by Regional Development bodies which cuts across several counties and Level 5 and Four Hospitals

2.3 Mechanism for Functions Analysis (Unbundling of Functions)

According to the World Bank on Devolution without disruptions (2012), the unbundling (clarifying of functions) is an approach which is generally followed by many countries that rely either on a constitution or organic law to assign functions to local governments. However, most countries also find that broad-based functional assignment similar to the Fourth Schedule in the Kenya Constitution is insufficient for defining responsibility for the delivery of services among different levels of government. Rather than assigning, for example, primary education to the lowest level of government, in practice, only certain components or service delivery functions are assigned. Hence another principle of functional assignment is to “unbundle” or clarify functions within sectors. This is particularly important if the constitution or organic law does not define specifically what activities are contained in an assigned function.

The World Bank (WB) report (2012) indicates the existence of at least three dimensions to “unbundling” functions. Firstly, is to recognize that functions in most sectors include a variety of specific tasks, sometimes involving multiple ministries. Each functional activity associated with a sector should be identified and analyzed. Secondly, delivering a service involves a number of decisions, including how the service is to be planned, financed (e.g., from fees or general revenues), produced (e.g., public or private sector), and managed. Some of these tasks may be reserved for the national government whereas others may be devolved to a lower level of government. Thirdly, unbundling of functions involves decisions regarding which level of government is responsible for allocating funds to a service, i.e., budgeting, along with being responsible for “producing” the service. Production decisions include responsibility over labor and non-labor inputs, overseeing and maintaining facilities, and constructing or reconstructing facilities. In sum, there is a wide array of combinations possible in the assignment process.

3.0 Unbundling and Assignment of Disaster Management Functions to National and County Governments

For the purposes of unbundling and assignment of concurrent disaster management functions, the following were taken into consideration;

- ✓ Hazards occurrence and effects are sector/function specific hence responsibility for management shall be according function allocation as per the Fourth Schedule to the CoK 2010.
- ✓ if a certain hazard occurrence is specific on a function assigned to a county government, then the responsibility for mitigating such a hazard lies with the respective county government.
- ✓ Whereas hazards occurrence in relation to functions assigned to national government, the responsibility for mitigating and managing lies with national government.
- ✓ The unbundling is also guided by the National Disaster Risk Management Policy, 2017 and specifically the levels of disasters as per the table below.

Table 2.

Level 1	Localized emergency events dealt within the regular operating mode of the protective, emergency and health services in Villages, Wards and Sub-County
Level 2	Emergency events that overwhelm the capacity of the resources in Sub-County, but which do not overwhelm the capacity of the County resources to respond and recover
Level 3	Emergency events that overwhelm a County and require mobilizing national resources to respond and recover
Level 4	Emergency events that overwhelm the existing National response capacity, thus prompting the President to seek Regional/International assistance to support the country in response and recovery

The above assigned functional levels are described as;

1. Any hazard that is within the functions assigned to County Governments under the Fourth Schedule and it is within level 1 or 2 is the responsibility of the county government.
2. Any hazard that is within the functions assigned to County Governments under the Fourth Schedule of CoK, 2010 and it is within level 3, the national government shall provide the necessary leadership and intervention in consultation with the respective county government. However the functional responsibility remains with the level of government to which it is assigned as per the Fourth Schedule, CoK, 2010
3. Any hazard that is within the exclusive functions assigned to the National Government under the Fourth Schedule of the CoK, 2010, and falls under levels 1-4; will be the responsibility of the national government.

3.1 Disaster risk management

The paradigm shift from reactive to proactive approach to disaster risk management appreciates the need for prevention, preparedness, response and recovery. These steps in disaster risk management are expounded below;

3.1.1 Prevention

Prevention involves activities and measures to avoid existing and new disaster risks. Prevention (i.e. disaster prevention) expresses the concept and intention to completely avoid potential adverse impacts of hazards, vulnerability conditions and exposure through action normally taken in advance of a hazardous event. Examples include dams or embankments that eliminate flood risks, land-use regulations that do not permit any settlement in high risk zones, and seismic engineering designs that ensure the survival and function of a critical building in any likely earthquake.

Prevention measures can also be taken in or after a hazardous event or disaster to prevent secondary hazards or their consequences such as measures to prevent contamination of water supplies or measures to eliminate natural dams resulting of earthquake induced landslides and/or rock falls. Very often the complete avoidance of losses is not feasible and the task transforms to that of mitigation. Partly for this reason, the terms prevention and mitigation are sometimes used interchangeably in casual use.

3.1.2 Preparedness

The knowledge and capacities developed by governments, professional response and recovery organizations, communities and individuals to effectively anticipate, respond to, and recover from, the impacts of likely, imminent or current disasters.

Preparedness action is carried out within the context of disaster risk management and aims to build the capacities* needed to efficiently manage all types of emergencies and achieve orderly transitions from response through to sustained recovery. Preparedness is based on a sound analysis of disaster risks and good linkages with early warning systems, and includes such activities as contingency planning, stockpiling of equipment and supplies, the development of arrangements for coordination, evacuation and public information, and associated training and field exercises. These must be supported by formal institutional, legal and budgetary capacities. The related term “readiness” describes the ability to quickly and appropriately respond when required.

3.1.3 Response

Response is actions taken during or immediately after a disaster in order to save lives, reduce health impacts, ensure public safety and meet the basic subsistence needs of the people affected.

The provision of emergency services and public assistance during or immediate after a disaster in order to save lives, reduce impacts,

ensure public safety and meet the basic subsistence needs of the people affected

Disaster response is predominantly focused on immediate and short-term needs and is sometimes called disaster relief. Effective, efficient and timely response relies on risk-informed preparedness measures, including the development of the response capacities of individuals, communities, organizations, countries and the international community.

The institutional elements of response often include provision of emergency services and public assistance by public and private sectors and community sectors, as well as community and volunteer participation. The division between this response stage and the subsequent recovery stage is not clear-cut. Some response actions, such as the supply of temporary housing and water supplies, may extend well into the recovery stage.

3.1.4 Recovery

Decisions and actions aimed at restoring or improving livelihoods, health, as well as economic, physical, social, cultural and environmental assets, systems and activities, of a disaster-affected community or society, aligning with the principles of sustainable development, including build back better to avoid or reduce future disaster risk.

Table 3: Unbundled Functions of Disaster Management

S / No	Functions of the National Government	S/No	Functions of the County Governments
	<p>Disaster Prevention</p> <p>a. Development of National Disaster Prevention Policy</p> <p>b. Implementation of National Disaster Policy</p> <p>c. Capacity building and technical assistance to county governments on disaster prevention</p> <p>d. Conducting National disaster risk assessments/analyses.</p> <p>e. Establishing national disaster early warning sector based systems</p> <p>f. Communicate early warning disaster information to counties</p> <p>g. Carry out national civic education and awareness creation to stakeholders</p> <p>h. Development of national norms, standards and guidelines on risk prevention.</p> <p>i. Institute sector specific disasters risk pre-emptive measures based on alert levels at the national level.</p> <p>j. Implementation of National norms, Standards and guidelines on disaster risk prevention</p> <p>k. Provision of civic education on disaster risk prevention and management to counties and stakeholders.</p> <p>l. Enforcing public participation and awareness creation in disaster risk prevention management.</p> <p>m. Establishment of strong national institutional structures for disaster risk management</p> <p>n. Coordination of risk management activities between the national and county government.</p>		<p>Disaster Prevention</p> <p>a. Alignment of county disaster prevention policy with national policy</p> <p>b. Implementation of county disaster prevention policy</p> <p>c. Capacity building and technical assistance to communities on disaster prevention</p> <p>d. Conducting county disaster risk assessments/analysis</p> <p>e. Establishing/cascading national disaster early warning sector based systems to county.</p> <p>f. Communicate early warning disaster information to communities</p> <p>g. Carry out civic education and awareness to local stakeholders and communities</p> <p>h. Alignment /cascading of national norms, standards and guidelines on risk prevention</p> <p>i. Institute sector specific disaster risk pre-emptive measures based on alert levels at the county level</p> <p>j. Implementation of county specific norms, standards and guidelines on disaster risk prevention</p> <p>k. Provision of civic education on disaster risk prevention at county level</p> <p>l. Enforcing public participation and awareness in disaster risk prevention at county level</p> <p>m. Establishment of strong institutional structures for disaster risk management at county level</p> <p>n. Coordination of risk management activities in counties,</p>

Disaster Preparedness	Disaster Preparedness	Disaster Preparedness
<p>a. Development and implementation of policies, norms and standards for disaster preparedness</p> <p>b. Resource mobilization for national disaster risk preparedness, resilience, buildings and climate change adaptation strategies</p> <p>c. Capacity building and technical assistance to county governments</p> <p>d. Development of national resilience and climate change adaptation strategies</p> <p>e. Implementation of national resilience and climate change adaptation strategies</p> <p>f. Civic education, awareness creation and public participation in disaster risk preparedness at national level.</p> <p>g. Development of national climate change resilience building programmes.</p> <p>h. Development of national guidelines for disaster preparedness drills and simulation exercises.</p> <p>i. Development of national sector specific standards operating procedures for disaster preparedness</p> <p>j. Implementation of national disaster preparedness sector specific standards operating procedures</p> <p>k. Monitoring and evaluation of national disaster preparedness policies and guidelines</p> <p>l. Development and implementation of national disaster preparedness contingency plans</p> <p>m. Consolidation of national data on disaster risk preparedness</p> <p>n. Carrying out national research on disaster risk management</p> <p>o. Conduction national drills and simulation exercises to enhance disaster preparedness</p> <p>p. Develop guidelines for declaration of national disaster emergency preparedness</p> <p>q. Develop a national disaster communication strategy for information sharing between the national and county government during emergencies.</p>	<p>a. Domestication and implementation of national policies norms and standards in disaster preparedness</p> <p>b. Resource mobilization for disaster risk preparedness resilience building and climate change adaptation strategies in the county</p> <p>c. Capacity building and technical assistance to the local communities in disaster preparedness</p> <p>d. Domestication of national resilience and climate change adaptation strategies to the county</p> <p>e. Implementation of county specific strategies for resilience and climate change adaptation</p> <p>f. Civic education, creation awareness and public participation in disaster risk preparedness at county level</p> <p>g. Domesticating of national climate change resilience building programmes at the county</p> <p>h. Domestication of national guidelines for disaster preparedness drills and simulation exercises at the county</p> <p>i. Domestication of national disaster preparedness sector specific standard operating procedures to the county</p> <p>j. Implementation of county specific sectoral disaster preparedness standard operating procedures</p> <p>k. Monitoring and evaluation of county specific disaster preparedness policies and guidelines</p> <p>l. Domestication and implementation of national disaster preparedness contingency plans at the county level including prepositioning of supplies</p> <p>m. Data collection on county disaster risk preparedness</p> <p>n. Participation in research on disaster risk management</p> <p>o. Conducting county drills and simulation exercises to enhance disaster preparedness</p> <p>p. Domestication of national guidelines for declaration of county disaster emergency preparedness</p> <p>q. Develop a county disaster communication strategy for information sharing between county government, stakeholders and community</p>	<p>a. Domestication and implementation of national policies norms and standards in disaster preparedness</p> <p>b. Resource mobilization for disaster risk preparedness resilience building and climate change adaptation strategies in the county</p> <p>c. Capacity building and technical assistance to the local communities in disaster preparedness</p> <p>d. Domestication of national resilience and climate change adaptation strategies to the county</p> <p>e. Implementation of county specific strategies for resilience and climate change adaptation</p> <p>f. Civic education, creation awareness and public participation in disaster risk preparedness at county level</p> <p>g. Domesticating of national climate change resilience building programmes at the county</p> <p>h. Domestication of national guidelines for disaster preparedness drills and simulation exercises at the county</p> <p>i. Domestication of national disaster preparedness sector specific standard operating procedures to the county</p> <p>j. Implementation of county specific sectoral disaster preparedness standard operating procedures</p> <p>k. Monitoring and evaluation of county specific disaster preparedness policies and guidelines</p> <p>l. Domestication and implementation of national disaster preparedness contingency plans at the county level including prepositioning of supplies</p> <p>m. Data collection on county disaster risk preparedness</p> <p>n. Participation in research on disaster risk management</p> <p>o. Conducting county drills and simulation exercises to enhance disaster preparedness</p> <p>p. Domestication of national guidelines for declaration of county disaster emergency preparedness</p> <p>q. Develop a county disaster communication strategy for information sharing between county government, stakeholders and community</p>

	<p>Disaster Response</p> <p>Capacity building and technical assistance to counties on disaster response</p> <p>Conduct rapid assessments to understand national vulnerability/levels</p> <p>National government to declare national emergencies</p> <p>Activate plans for national emergency responses</p> <p>Implementation of the information sharing mechanism between the national and county governments</p> <p>Strategic coordination of disaster response</p> <p>Consolidate response initiatives reports from counties</p> <p>Consolidate county disaster needs assessments</p> <p>Coordination of management of food and non-food relief</p> <p>Development of national sector standard disaster operating procedures</p> <p>Implementation of national sector standard disaster response operating procedures</p> <p>Communication of national disaster response interventions to international and national stakeholders</p>	<p>Disaster Response</p> <p>Capacity building and technical assistance to communities on disaster response</p> <p>Conduct rapid assessments to understand county vulnerability levels</p> <p>County governments to declare county emergency</p> <p>Activate plans for county emergency plans</p> <p>Implementation of the information sharing mechanism between the national and county governments</p> <p>Coordinate disaster response through multi-sectoral approach and cross-county</p> <p>Reporting on response initiatives during emergencies in the counties</p> <p>Updating disaster needs assessment</p> <p>Management of food and non-food relief at county level.</p> <p>Development of county specific disaster response standard operating procedures</p> <p>Implementation of national and county standard disaster response operating procedures</p> <p>Communication of disaster response standard operating procedures</p>
	<p>Disaster Recovery</p> <p>Development and implementation of national recovery plans and programs</p> <p>Capacity building and technical assistance to counties on disaster recovery</p> <p>Consolidate post disaster needs assessments from counties</p> <p>Consolidate county monitoring, evaluation and lessons learnt report</p> <p>Mounting national public participation in recovery programs</p> <p>National resource mobilization for disaster risk recovery</p> <p>Develop national guidelines for post disaster needs assessments</p> <p>Enforce national guidelines for post disaster needs assessment</p>	<p>Disaster Recovery</p> <p>Implementation of county recovery plans and programs</p> <p>Capacity building and technical assistance to communities on disaster recovery</p> <p>Conduct post disaster needs assessment in the county</p> <p>Conduct monitoring, evaluation and developing lessons learnt report</p> <p>Mounting county public participation in recovery programs</p> <p>County resource mobilization for disaster risk recovery</p> <p>Domesticate national guidelines for post disaster needs assessment in county</p> <p>Implement national guidelines for post disaster needs assessment.</p>

4. Resourcing for Disaster Management Functions

At national level there exists a Contingency Fund that may be used for disaster risk management. The Public Finance Management Act, 2012 (PFMA) Section 110 states that 2% of county allocation may be set aside by each county for emergencies in every financial year.

With the delineation of roles between the two levels of government done, it is possible to now apportion and mobilize resources to implement the disaster management functions.

5. Challenges Facing the Implementation of Disaster Management Functions

1. Lack of a unifying national legislation in management of disasters. The function of developing policies, laws, regulations, norms and standards on disaster management is the function of the national government. In absence of national policy, legal and regulative frameworks, the county governments face challenges in developing own county specific measures to deliver services.
2. Inadequate vertical and horizontal coordination of stakeholders in all matters relating to disaster management e.g. distribution of relief food.
3. Delay to develop a law to operationalize the National Disaster Risk Management Policy, 2017.
4. The National Disaster Response Plan of 2009 is yet to be aligned to the devolved system of governance.
5. Lack of documented County Level Response Plans.
6. Absence of Hazard Atlas in most of the counties. Only 8 counties have developed hazard atlas with the help of National Drought Management Authority (NDMA) and National Disaster Operation Centre (NDOC)
7. Failure by some counties to establish and utilize county emergency funds.
8. Weak disaster risk management coordination structures at both levels of government.
9. Inadequate human resource capacity to manage disaster risks at the county level.
10. The national and county governments invest heavily on response and recovery rather than prevention and preparedness/mitigation.
11. Disaster risk reduction and management is a cross-cutting issue in development planning. It is therefore not practical to plan for it as a stand-alone intervention. Budgetary allocation for DRM is allocated to relevant sectors like Agriculture and Water, Health. However, there is need to provide for a contingency fund to compliment these sector-specific budgets.

6. Recommendations

1. National government to harmonize the two bills (at senate and National assembly) on DRM and fast track enactment of DRM legislation. **Action: (Lead actor; Ministry of Interior and Coordination of National Government)**
2. Strengthen Coordination of Disaster Risk Management:
 - a. County governments to establish well-resourced county disaster management units. **Action: (County Governments)**
 - b. Establishment of inter-county coordination framework to address disasters that affect more than one county. **Action: (COG and County Governments)**
 - c. Establishment of an intergovernmental coordination framework with regards to policy development, resource mobilization and utilization and program implementation. **Action: (Lead Actor: MODA, others; IGRTC, The National Treasury, Ministry of Interior and Coordination of National Government, and COG)**
 - d. Partnership with private sector and non-state actors in implementation of disaster risk management. **Action: (Lead Actor, National Treasury, County Government Treasuries)**
3. Development of capacity building and technical assistance programmes for disaster risk management by the national government. **Action: (MODA and Ministry of Interior and Coordination of National Government)**
4. Development of capacity building and technical assistance programmes for disaster risk management by the county governments to the communities. **Action: (County Governments).**
5. Development of public civic education programmes to create awareness. **Action: (County Governments, MODA, IGRTC, COG, Ministry of Interior and Coordination of National Government).**
6. County governments to develop legislation on disaster risk management and establish a county emergency fund in accordance with PFM Act, 2012 Section 110. **Action: (County Governments).**
7. Gazettment of the unbundling and assignment of the disaster management functions. **Action: (IGRTC, Kenya Law Reform Commission, Office of the Attorney General)**

7.0 References

1. *CoK 2010; Provides for functions allocated to National and County Governments*
2. *IGRA 2012; Establishment and Mandate of IGRTC*
3. *National Disaster Management policy, 2017; Definitions and types of hazards and disasters; Levels of disasters; Laws and regulations in disaster risk management*
4. *WB Report on Devolution without disruptions report (2012); Unbundling (clarification) of functions.*

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