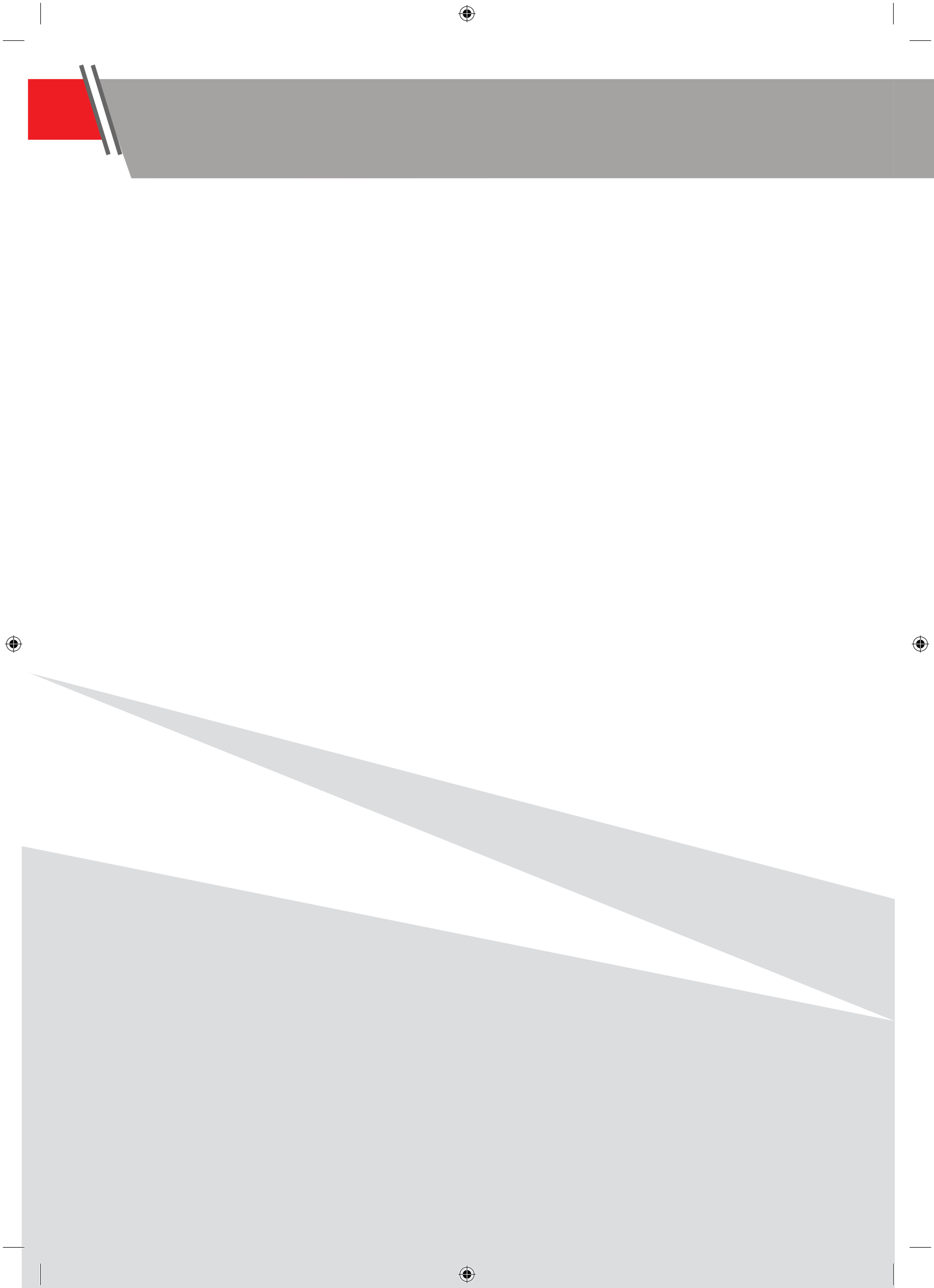




IGRTC
INTERGOVERNMENTAL
RELATIONS TECHNICAL
COMMITTEE

Consultation, Cooperation & Coordination in Devolution

**REPORT ON EMERGING
ISSUES ON DEVOLUTION
AND BEST PRACTICES IN
INTERGOVERNMENTAL
RELATIONS**





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RELATIONS**



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List of Abbreviation

ACIR	Advisory Commission on Intergovernmental Relations
APAC	Association of Public Accounts Committees
CAF	County Assemblies Forum
CIC	Commission for the Implementation of the Constitution
CoG	Council of Governors
CRA	Commission on Revenue Allocation
COAG	Council of Australian Governments
IBEC	Intergovernmental Budget and Economic Council
IFMIS	Integrated Financial Management Information System
IGR	Intergovernmental Relations
IGRTC	Intergovernmental Relations Technical Committee
ISC	Inter-State Council
KEMSA	Kenya Medical and Supplies Authority
MCA	Member of County Assembly
MINMECs	Ministers and Members of Executive Committees
NCOP	National Council of Provinces
PCC	President's Coordinating Council
PFMA	Public Finance Management Act
PICC	Provincial Infrastructure Coordinating Council
SRC	Salaries and Remuneration Commission
TA	Transition Authority
TDGA	Transition to Devolved Government Act



Introduction

The Intergovernmental Relations Technical Committee (IGRTC) is a statutory body established by the Intergovernmental Relations Act of 2012. It is one of the various intergovernmental relations organs which the Act establishes with the specific aim of facilitating cooperative government and intergovernmental relations within the devolved system of Kenya. The IGRTC has the responsibility to facilitate dialogue and consultations between the two levels of government, and other government agencies, to promote effective operations of the devolved system of government. Section 12 of the Act details the specific functions of the IGRTC as including facilitation of intergovernmental relations and taking over the residual functions of the TA. A purposive interpretation of these functions puts the IGRTC at the centre of intergovernmental relations. The practical implications of these functions are that the IGTRC has the responsibility of offering timely and evidence-based advice on strategic intergovernmental relations' issues to the levels of government, the Summit, and the CoG as well as other players in the devolved system of governance.

Despite the importance of the IGRTC and its central role in intergovernmental relations, there was undue delay in the appointment of the members and constitution of the IGRTC. The first elections under the new Constitution of Kenya, 2010 were held in March 2013 leading to the immediate establishment of the National and County Governments Coordinating Summit (The Summit), and the Council of County Governors (CoG). However, the IGRTC was not established until the beginning of 2015. This has put the IGRTC in the unenviable position of trying to catch up with intergovernmental relations and devolution issues that have emerged during that period. The IGRTC has to move very fast to appreciate the important role intergovernmental relations have to play in a devolved system such as Kenya's and come up with a very clear strategic plan of carrying out its statutory functions.

1.1 Background

The IGRTC was established against a background of the adoption of the Constitution of Kenya 2010, which introduced a devolved system of government comprising two levels of government—the national government and the county governments. The two levels of government, in terms of Article 6(2), are distinct but interdependent. This entails a combination of self-governance at the local county level, with a shared rule at the national level. By devolving political power, responsibilities and resources to the 47 counties, the Constitution created a system of divided and separated powers and functions among the two levels of government. Because of the distinct and interdependent nature of the governments, intergovernmental relations become necessary as a mechanism of bilateral and multilateral interactions between and among the governments.

Intergovernmental relations could be cooperative involving cooperative institutions and processes such as consultation, co-decision making, coordination, and support. They could also be competitive involving conflictual institutions and processes such as tension, collusion, competition, control, and even coercion.¹ Article 6(2) of the Constitution of Kenya, 2010 expressly settles for a cooperative as opposed to a competitive system of devolved government, which necessitates cooperative intergovernmental relations. The cooperative form of devolved government combines a certain measure of autonomy on the part of each of the two levels of government, with a measure of joint and collaborative action and decision-making by the two levels of government. Detailed principles of cooperative government and intergovernmental relations, which both levels of government are required to adhere to when discharging their functions and responsibilities, are set out by Article 189 of the Constitution. To facilitate these constitutionally required intergovernmental relations, Parliament has enacted several legislations that have established various organs that play important roles in intergovernmental relations. One of these legislations is the Intergovernmental Relations Act which has established among other intergovernmental relations organs, the IGRTC. To realise it's mandated, the IGRTC with the support of the Research Foundation of the State University of New York through the Agile and Harmonized Assistance for Devolved Institutions (AHADI) project in Kenya commissioned the research project that has led to this report to assist it to develop a strategy for discharging its functions.

¹ Poirier J & Saunders C "Comparing intergovernmental relations in federal systems: An introduction" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 1-41 at p 1. Poirier J & Saunders C "Comparing intergovernmental relations in federal systems: An introduction" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 1-41 at p 1.


1.2 The Assignment and Its Terms of Reference

Though an important intergovernmental relations structure, the IGRTC was only established at the beginning of 2015. This was almost two years since the first elections under the Constitution were held and the National and County Government Coordinating Summit, and the CoG were established. The delay has created a sense of urgency in trying to catch up with intergovernmental relations and devolution issues that have emerged since the first county governments were elected in 2013. Furthermore, the term of office of the TA has also come to an end with a lot of unfinished business, necessitating the IGRTC to take over the residual functions. To be able to effectively discharge the identified functions, the IGRTC urgently needs to identify the strategic emerging issues and design strategies for addressing them. These include issues that relate to both cooperative government and intergovernmental relations and management of the transition to devolved governance.

This report seeks to identify emerging issues on devolution and best practices in intergovernmental relations. The emerging issues encompass two categories: First, are matters relating to the facilitation of co-operative government and intergovernmental relations. Second, are matters falling within the unfinished business of Transition, which involves the management of the transition to devolved government. This is because effective management of the transition to devolved government required effective cooperation and intergovernmental relations. Indeed, many of the unfinished matters may rightly be attributed to a failure of cooperative government and intergovernmental relations in the first three years since the election of the first governments under the devolved system of government. These objectives must be pursued within the context of a thorough understanding of the concept and nature of intergovernmental relations, their necessity within a devolved system of government, comparative approaches to the management of intergovernmental relations, and the Kenyan constitutional and legal framework for intergovernmental relations.

Specifically, the report:

- a) Identifies best practices in intergovernmental relations and indicates how the IGRTC can draw lessons from them in trying to resolve the emerging issues of cooperative government and intergovernmental relations.
- b) Identifies emerging devolution issues which require cooperation and intergovernmental relations between the two levels of government and among the counties.

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- c) Makes recommendations on how the IGRTC can go about to realize such cooperation and intergovernmental relations.
 - d) Identifies the issues relating to the management of the transition to the devolved government which remain as the unfinished business of the TA.
 - e) Makes recommendations about how IGRTC can deal with such issues through cooperative government and intergovernmental relations.
 - f) Identifies the challenges the IGRTC may face in discharging its functions and makes strategic recommendations about how to strengthen and facilitate the IGRTC to overcome such challenges.

The report is organized and presented in several chapters or sections as follows:

- a) **Chapter One:** Introduction—this focuses on and sets out the introduction, background, the assignment and terms of reference, the objectives of the assignment, the justification of the assignment and the methodology used to execute the assignment.
- b) **Chapter Two:** The nature, necessity and approaches to intergovernmental relations from a comparative perspective—this focuses on the understanding of the nature of devolved systems of government and how they give rise to inherent tensions, conflicts and threats that require intergovernmental relations. It also examines some of the comparative approaches and best practices that Kenya may draw lessons from when designing and developing its intergovernmental relations.
- c) **Chapter Three:** The constitutional and legal framework for cooperative government and intergovernmental relations in Kenya—this focuses on the clear understanding of what the Constitution of Kenya, 2010 provides on matters of intergovernmental relations and the legal framework that has been put in place to operationalize the system.
- d) **Chapter Four:** The role of the Intergovernmental Relations Technical Committee—this focuses on the analysis of the legal framework establishing the IGRTC and its functions and powers. The chapter considers the establishment of the IGRTC and its structures; its autonomy; its functions and powers; its funding and that of the other structures of intergovernmental relations; and its challenges as well as recommended solutions including legislative amendments to strengthen it.
- e) **Chapter Five:** Emerging issues that require cooperative government and intergovernmental relations to resolve them. This is the main chapter that

identifies the many issues that have arisen. These include the unfinished business of the transition to the devolved government since, as has been noted, such issues require to be dealt with through cooperative government and intergovernmental relations. In addition to the identification and analysis of emerging issues, the chapter makes recommendations about how co-operative government and intergovernmental relations can be used to resolve the issues.

- f) **Chapter Six:** Comparative best practices in intergovernmental relations.
- g) **Chapter Seven:** Conclusion

1.3 Objectives of the assignment

This research project was commissioned with the specific objectives of—

- 1) Identifying emerging issues on devolution that require intervention through intergovernmental relations.
- 2) Identifying comparative best practices in intergovernmental relations that Kenya can draw lessons from when developing her system of intergovernmental relations.
- 3) Making actionable recommendations that can guide the conduct of intergovernmental relations in Kenya.

1.4 Justification of the assignment

The Constitution of Kenya which was adopted in 2010 establishes a devolved system of government that has been regarded by many as the most transformative aspect of the constitution. The hope of many is that devolution will fundamentally transform the Kenyan society for the benefit of the people. Intergovernmental relations are an important dimension in most devolved or federal systems that are often underappreciated. Indeed, though the Constitution of Kenya, 2010 prescribes cooperative government and intergovernmental relations, the experience of the first three years after the election of the first governments under the devolved system discloses failure of cooperative government and intergovernmental relations. Relations between the two levels of government as well as other organs of state have been more adversarial and conflictual rather than cooperative. One could rightly talk of dysfunctional cooperative government and intergovernmental relations. Yet success in the delivery of the policy objectives of devolution can only be secured if plans, programs and expenditures by the two levels of government are well coordinated and managed. It is thus significantly timely for the IGRTC to have commissioned this research project to identify better ways of making intergovernmental relations in the Kenyan system work.



1.5 Methodology

Undertaking this assignment has involved several methods, with a major method being review and analysis of secondary materials. Several publications, including reports, evaluations, books and journal articles have been generated on the Constitution of Kenya, 2010 in general and devolution in particular. These documents have been keenly reviewed and analyzed to identify emerging issues that require cooperative government and intergovernmental relations. There are pertinent areas of concern which could only be understood through primary information gathering. As such, the author had to draw from discussions and interviews with various stakeholders. He also drew from comments and input from participants in various workshops and meetings which he participated in. Most important was input from stakeholders who participated in a validation workshop organized by the IGRTC and held on the 17th August 2016 at the Kenya School of Government to enable stakeholders to comment on the draft report.

Nature, Necessity and Comparative Approaches to Intergovernmental Relations

2

Introduction

Intergovernmental relations refer to interactions between and among governments within a non-centralized system of government. They are an integral part of any federal or devolved system of government, regardless of differences in the historical, geographical, constitutional framework, legal culture, distribution of competences or resources, and the architecture and design of the system.² It is not possible to avoid substantial interaction and interdependence between orders of government. 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. 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 on the basis and through which they may discharge some of their functions.

Due to differences in the architecture and design of the system as well as cultural issues, intergovernmental relations take a wide variety of forms. While most interactions are vertical and involve the national government and the governments of the sub-national units, others are horizontal interactions between the governments of the sub-national units only. Intergovernmental relations may involve any or all of the three arms of government—the Legislative, the Executive, the Judiciary and even other organs or agencies of the state. The relations could be formal in the sense that they are provided for and structured by the Constitution and/or legislation, or informal in the sense that they are not provided for and structured by the Constitution and/or legislation. Several devolved or federal systems combine both formal and informal mechanisms to realize intergovernmental relations. Other systems begin with informal processes before they are formalized through legislation or constitutional amendments.

Kenya has adopted a devolved system of government that is best defined as a non-centralized system of a federal nature. It cannot, therefore, avoid intergovernmental relations. Consequently, this chapter sets out a comparative conceptual framework for understanding intergovernmental relations, which Kenya can draw lessons from when developing her system of intergovernmental relations. The chapter also identifies comparative best practices which Kenya can learn from.

² Poirier J & Saunders C “Conclusion: Comparative experiences of intergovernmental relations in federal systems” in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 440-498 at p 442.

2.1 Necessity of and Factors Influencing Intergovernmental Relations


The Kenyan devolution, like many federal systems, is founded upon the theory and concept of two or more levels of government that combine elements of “self-rule” for regional or local matters or responsibilities, with “shared rule” for nationwide matters or responsibilities. Article 6(2) establishes two levels of government—the national and county governments, that are described as being distinct and interdependent. The system is founded upon a combination of self-governance at the local county level with shared-rule at the national level. Inherent in this kind of devolved system of government is natural tension, conflict and threats between the two levels of government. There is in-built tension between national direction and priorities, defining how to secure the well-being of all the people, and locally defined preferences determined by government at the local level. These tensions and conflicts result from the fact that in nature a devolved system of this kind combines self-rule with shared-rule. Such a combination produces levels of government that have a measure of autonomy with divided and separated powers and functions. Intergovernmental relations, therefore, become necessary as a mechanism of managing these tensions, conflict and threats to ensure a coherent government that delivers services to the nation through the two levels of government.

2.1.1 The Architecture and Design of the Devolved System

Several architectural and design factors of a devolved system can necessitate and influence intergovernmental relations in terms of its institutions and the form of processes the relations take. The most important features are the assignment of functions and powers; the sharing of financial powers and resources, and the character and number of the constituent units.

2.1.1.1 Distribution of Functions and Powers

A key feature of devolved or federal systems is the concept of divided and separated functions and powers among the levels of government. There must be a formal constitutional division of functions and powers among the levels of government. How the Constitution provides for functional assignment tends to make it impossible for the levels of government to operate in total isolation of each other. Many systems distinguish exclusive and concurrent powers and functions which generate operational difficulties that necessitate intergovernmental relations. First, concurrent functions often lack clarity in the sense that it is not clear which level of government has responsibility for doing what. Such lack of clarity may lead to duplication of efforts, roles and expenditure by the levels of government. It may also result in wasteful use of financial resources as both levels of




government may invest money in the same activity. A bigger problem is 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. This fundamentally undermines democratic accountability since citizens may not know whom to hold accountable.

Secondly, even where there are exclusive functions, operational problems may still arise due to functional inter-dependence and inter-government functional impact. For example, one level of government may depend on policies and laws developed and enacted by another level of government.

Comparative experience indicates that how functions and powers are assigned to levels of government may create a loose dichotomy between dualist and integrated devolved systems. In dualist systems, both the national government and the governments of the constituent units have a full set of institutions such as the legislative and executive arms and can enact and administer their legislative programs. Federal systems that may be categorized as dualist include Argentina, Australia, Brazil, Canada, Spain, and the United States of America. Contrasted with this are federal systems that are integrated into nature in the sense that the governments of the constituent units implement both their laws and many other laws enacted by the national level of government. There is more legislation at the national level, while the sub-national governments do more implementation of national legislation. Countries whose systems may be categorized as integrated 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 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, while both dualist and integrated federal systems require intergovernmental relations to operate effectively, the need is higher in integrated systems.

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 lawmaking at the national level. This is necessary since ultimately, such policies and laws are to be administered or implemented by the constituent unit governments. 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 lawmaking 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. As a result, the influence exerted by the constituent units on federal policies is less institutionalized.

Second, integrated systems adhere to the principle of cooperation which requires 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, 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.

2.1.1.2 Sharing of Financial Powers and Resources

The distribution of financial and other resources is another dimension of the division of competences that has important implications for intergovernmental relations. In many systems, the national government is normally assigned more revenue-raising powers with the tax bases that raise more money put in the domain of the national government. 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 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.


2.1.1.3 Levels of Government and their Diversity

Intergovernmental relations are also influenced by the number of constituent units a country settles for. Where there are fewer constituent units, there would be fewer actors in the intergovernmental negotiations which, potentially facilitates multilateral agreements. Fewer constituent units may, however, make bargaining, alliances, and compromises more difficult since each of the units is more powerful. A second factor influencing intergovernmental relations is the number of orders of government. While many federal systems have only two orders of government, recent experience points at increasing constitutional recognition of local government as a distinct third level of government.³ Such recognition creates the third sphere of government that must be allowed at the table of intergovernmental relations as a player. While Kenya has only two levels of government, 47 counties as constituent units are rather too many. This will create some difficulties in the management of intergovernmental relations among them.

2.1.2 Form of Government

Federalism within parliamentary systems tends to lead to intergovernmental relations that are different from relations within presidential systems. The separation of powers as opposed to competencies that are common in presidential systems influences the modalities of intergovernmental relations in a variety of ways. Intergovernmental relations in parliamentary systems tend to emphasize executive dominance because in such systems the legislature is often controlled by the executive. The executive can negotiate most intergovernmental deals and as long as it maintains the confidence of the legislature, easily secure legislative approval of the deal. This has been the case in Australia and Canada where intergovernmental relations have been labelled executive federalism. In the Canadian system, inter-legislative interaction between the provincial legislatures and the national legislature hardly exists. This is because the Canadian system follows the Westminster model of parliamentary sovereignty, under which a legislature cannot agree to bind itself.⁴ The cooperation of the legislature in approving executive negotiated intergovernmental deals is, however, reduced where party discipline is weak or the electoral system produces a fragmented legislative chamber.

³ Good examples in this respect are South Africa whose Constitution provides for three spheres of government with constitutional rights to participate in intergovernmental relations; and India whose Constitution was amended to recognize Local government as a third level of government.



Executive dominance of intergovernmental relations is less likely in presidential systems where the executive may not be assured of easy legislative approval of the deals negotiated by the executive. The two branches of government may thus pursue distinct or uncoordinated intergovernmental agendas. This may lead to a multiplication of intergovernmental relations processes including lobbying, with some geared towards legislators, while others toward the executive branch. The disagreements over the 2016 Third Devolution Conference organized by governors leading to the Senate and the county assemblies organizing their Legislative Summit may be indications that Kenya's presidential system is headed in that direction.

2.1.3 Party Politics and Electoral Systems

Intergovernmental relations including institutions and processes in a given country can also be influenced and shaped by party politics. A strong party controlling government at both national and constituent unit level may ease co-operation among the levels of government, while the lack of such congruence may make co-operation more difficult to achieve.⁵ But such strong parties and their influence may create a false impression of very successful intergovernmental relations. The reality, however, may be that party discipline is hindering constituent unit governments from raising regional concerns because of fear of being seen to oppose the position taken by their party bosses.⁶ In India for example, serious vertical intergovernmental relations started developing at the time when the Indian National Congress party lost control of government at both national and states levels and was forced to enter into alliances with other political parties to form a government.⁷ In this respect, Kenya is exhibiting mixed signals.

Intergovernmental relations may also be influenced by the electoral system. Systems with proportional representation and coalition governments are more likely to favour cooperative arrangements since compromise is inherent in the system. Those with strong majority governments, on the other hand, find greater disadvantages in the constraints

4 See Adam M, Bergeron J and Bonnard M "Intergovernmental Relations in Canada: Competing Visions and Diverse Dynamics" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 135-173 at p 143-144.

5 The experiences of both South Africa and Ethiopia which have had very strong ruling parties provide evidence in this respect.

6 See Derek Powell "Constructing a Developmental State in South Africa: The Corporatization of Intergovernmental Relations" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 305-349 at p 311.

7 See Singh P.M. and Saxena R "Intergovernmental Relations in India: From Centralization to Decentralization" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 239-271 at p 239..

arising out of cooperative government. Kenya's first past the post electoral system may be part of the reasons the governments are finding it difficult to work the system of cooperative devolved government.

2.2 IGR Mechanisms and Processes


There are several mechanisms, instruments, and processes which several countries have used for purposes of intergovernmental relations. These offer useful comparative best practices from which Kenya may draw lessons when developing her system of intergovernmental relations to address the emerging issues. While the previous part focuses on why intergovernmental relations are necessary and what influences them, this part addresses the modalities of how to conduct intergovernmental relations.

2.2.1 Legislative Institutions and Techniques

There are two sets of legislative mechanisms for intergovernmental relations. The first set comprises institutional mechanisms in the sense that the features of the legislative body are designed to facilitate interaction between the levels of government. The second comprises legislative techniques which are instruments and processes designed to achieve intergovernmental outcomes.

2.2.1.1 Legislative Institutions

The legislative arm of government in federal systems may itself favour co-operation through its composition, the use of parliamentary committees, or structured co-operation between legislative assemblies both vertically and horizontally. First, second chambers of parliament are in many systems meant to provide some degree of representation for constituent units in the federal lawmaking process. The German system which is the best example of an integrated federal system has a second chamber of the federal parliament that is more active in shaping the interaction between central authorities and the constituent units. Indeed, the German Bundesrat is said to be an important platform for intergovernmental relations. The Austrian and South African second chambers are designed along the same lines and play an equally important role in intergovernmental relations. In these three countries, the members of the second chambers are more closely linked to the governments of the constituent units. In both Germany and South Africa, the members are also bound to exercise their votes according to directions from the governments of the units they represent. The central role of a second chamber in a classically integrated system flows from the understanding that constituent units ought to participate in decisions about the laws they must implement. They must also approve federal laws that affect constituent units or encroach on their legislative or administrative functions and powers. These countries offer the best examples in which



second chambers of Parliament serve as important forums through which constituent units engage in intergovernmental relations with the federal level of government. Kenya borrowed the notion of a second chamber from the German and South African systems but settled for directly elected Senators. This has severed the necessary link between the Senate and the county governments of the counties they represent. The result has been that the role of the Senate as an important forum for intergovernmental relations has been compromised. This has led to conflictual relations between Senators and county governors. The result is that the county governments are denied a forum through which they can share in decision making at the national level. This has compromised the notion of a combination of self-governance at the local level and shared rule at the national level.

Second, parliamentary committees provide another avenue through which legislatures may engage in intergovernmental relations. In integrated systems with second chambers that perform a significant federal role, mediation committees composed of members of both chambers may be used to resolve disagreements between them. The Constitution of Kenya, 2010 provides for a joint Mediation Committee of the two Houses of Parliament which may play an important intergovernmental relations role.⁸ In South Africa, 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.⁹ This should provide instructive lessons for Kenya to avoid the apparent attempt by the Senate to take over the oversight functions of the county assemblies. The Senate should, through associations of this kind, seek to capacitate the county assemblies to conduct effective oversight instead of taking over the function from them.

Third, general co-operation between the National Assembly and the legislative assemblies of the constituent units may also provide an avenue for intergovernmental relations. Meetings between the Speakers of the National Assembly and those of the constituent units can develop into useful informal forums for interaction and co-operation. In South Africa, the Speakers of the two houses of parliament and the Speakers of the nine provincial legislatures have established a national speakers' forum which plays an important role in intergovernmental relations. A variety of issues including skills development, and

⁸ See Article 113 of the Constitution.

⁹ See Derek Powell "Constructing a Developmental State in South Africa: The Corporatization of Intergovernmental Relations" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 305-349 at p 319.

improving communication between legislatures and the public, are dealt with through this forum.¹⁰

2.2.1.2 Legislative Techniques


Legislative techniques can be used for various purposes—(1) legally alter the constitutional division of functions and powers; (2) facilitate coordination between orders of government; and (3) approve intergovernmental agreements concluded by the executive branches of government. In several countries, constitutional provisions permit the assignment or transfer of matters within the competence of one level of government to another level through intergovernmental relations. The national level of government through legislation can assign some of its functions to constituent units. Such mechanisms are best employed to concretize a negotiated transfer of functions and powers. Coordination between levels of government can be achieved through participating legislatures adopting a law enacted by one of them or enacting a model law developed through executive intergovernmental relations. Intergovernmental agreements may, and in some cases must involve legislative action. Legislation may be required to implement an agreement where its purpose is to secure legislative uniformity.

2.2.2 Executive Institutions and Processes

Executive institutions such as heads of government at both levels of government, ministers and public servants play an extremely important role in intergovernmental relations. Executive processes such as consultations and negotiations on matters such as the development of policies also play an important role in intergovernmental relations. Key among the institutions are first, the federal cabinet as an intergovernmental site. The federal cabinet may in its composition include members from constituent units thereby becoming an important forum in which vertical co-operation 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.¹¹

¹⁰ See Derek Powell “Constructing a Developmental State in South Africa: The Corporatization of Intergovernmental Relations” in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 305-349 at p 319.

¹¹ See Derek Powell “Constructing a Developmental State in South Africa: The Corporatization of Intergovernmental Relations” in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 305-349 at p 325.



Second, 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.¹² 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,¹³ Australia has the Council of Australian Governments (COAG),¹⁴ India has the Inter-State Council (ISC),¹⁵ and South Africa has the Presidents Coordinating Council.¹⁶ These are the equivalent of Kenya's National and County Governments Coordinating Summit.¹⁷

Third, horizontal interactions among the executive heads of the governments of the constituent units are also common. Various forums have 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 governments¹⁸ and the Council of the Australian Federation.¹⁹ These may be seen as the equivalent of the Kenya statutory CoG which brings together all the 47 county governors.²⁰ 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.²¹

Fourth, the civil service of both levels of government also plays an important role in

12 See Adam M, Bergeron J and Bonnard M "Intergovernmental Relations in Canada: Competing Visions and Diverse Dynamics" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 135-173 at p 147.

13 See Adam M, Bergeron J and Bonnard M at p 146.

14 See Phillimore J and Harwood J "Intergovernmental Relations in Australia: Increasing engagement within a Centralizing Dynamic" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 42-80 at p 46.

15 See Singh P.M. and Saxena R "Intergovernmental Relations in India: From Centralization to Decentralization" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 239-271 at p 252.

16 See Derek Powell "Constructing a Developmental State in South Africa: The Corporatization of Intergovernmental Relations" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 305-349 at p 325.


17 The Summit is established by section 7 of the *Intergovernmental Relations Act No. 2 of 2012*.

18 See Adam M, Bergeron J and Bonnard M at p 148.

19 See Phillimore J and Harwood J at p 46.

20 The CoG is established by section 19 of the *Intergovernmental Relations Act No. 2 of 2012*.

21 See Derek Powell "Constructing a Developmental State in South Africa: The Corporatization of Intergovernmental Relations" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 305-349 at p 324.



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.

2.2.3 The Logistics, Management, and Facilitation of IGR


A key element of effective intergovernmental relations is a system of management and facilitation of the IGR processes. A distinction must be drawn between logistics for vertical intergovernmental relations between levels of government, and logistics for horizontal intergovernmental relations within orders of government. At the vertical level, many federations thus, make provision for some form of specific secretariats to manage and facilitate intergovernmental relations. Between 1959 and 1996, the United States of America had an Advisory Commission on Intergovernmental Relations (ACIR) which provided technical assistance and recommendations. ACIR also 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.²² The life of this Advisory body might be a good case study for Kenya's IGRTC. In some countries, organization and follow-up of vertical top-executive conferences are often handled by the office of the federal prime minister or president. In Australia, the department of the Prime Minister and Cabinet provides the secretariat of the Council of Australian Governments.²³ In Spain on the other hand, vertical meetings are held in the Senate but are under the responsibility of the Minister for Territorial Policy.²⁴

The logistics for sectoral meetings also vary. At the ministerial level, most vertical

²² See Troy E. Smith "Intergovernmental relations in the United States in the Age of Partnership and Executive Assertiveness" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 410-439 at p 427.

²³ See Phillimore J and Harwood J at p 58.

²⁴ See Morales MJG and Marin XA "Intergovernmental relations in Spain: An Essential but Underestimated Element of the State of Autonomies" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 350-378 at p 363.



meetings are convened and chaired by a federal minister, who also sets the agenda, sometimes in consultation with constituent units. This is the approach in Argentina, Australia, India, and Spain. In Canada, some meetings are co-chaired by the federal and the provincial ministers in charge of the relevant policy area. Some sectoral forums have independent administrative secretariats. A good example is Switzerland where sectoral conferences have their plenary assembly and executive board funded by the cantons in proportion to their population. In other cases, sectoral conferences rely on central administration. In Germany, some sectoral conferences have small secretariats linked to a relevant committee of the Bundesrat, though not formally part of the Bundesrat administration.

Canada has a unique approach that may mirror and provide instructive lessons for the Kenyan approach of the Intergovernmental Relations Technical Committee. Since 1973, Canada has maintained a rather original 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.²⁵

Many countries also provide for logistics for IGR within orders of government. Within the federal level of government, for instance, the most sensitive and political dimensions of IGR are generally 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.²⁶ In South Africa, responsibility for IGR is shared between four departments. The first is the presidency which is responsible for the overall coordination of government policy. The second is the Ministry of Cooperative Governance and Traditional Affairs, which administers the IGR Act and Local Government legislation. The third is the National Treasury which is responsible for intergovernmental fiscal relations and public finance policy. The fourth is the Ministry of Public Service and Administration

²⁵ See Adam M, Bergeron J and Bonnard M at pp 152-153.

²⁶ See Adam M, Bergeron J and Bonnard M at p 151.

which is responsible for the national and provincial public service.²⁷ In Brazil, IGR is mostly handled by a Secretary for Federal Relations, directly linked with the presidency.²⁸

2.2.4 Joint Institutions and Specialized IGR Agencies

Comparative best practices indicate that there are two types of structures established by the levels of government which play a critical role in intergovernmental relations. These are a variety of joint institutions and specialized intergovernmental relations agencies. 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.²⁹ Joint institutions are established by intergovernmental action to achieve shared goals in a designated policy area and are thus shared institutions. They frequently focus on natural resources, environmental programs, or infrastructure projects that cut across constituent unit borders.³⁰ The river-basin commission in Argentina and the Port Authority of New York and New Jersey are good examples. Joint institutions may be used in a host of other areas such as higher education admission in Germany;³¹ a national park in Spain;³² criminal investigation in India;³³ gene technology regulation in Australia;³⁴ and placement of children in the United States.

Joint institutions exist alongside the individual levels of government and are typically initiated by agreement of the governments involved. In some countries such as Argentina, Germany, and the United States of America, the Constitution facilitates its establishment and clarifies the legal force of their acts and decisions. They also can be established by national legislation which at times may be preceded by intergovernmental negotiations

27 See Derek Powell "Constructing a Developmental State in South Africa: The Corporatization of Intergovernmental Relations" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 305-349 at p 330.

28 See Marta Arretche "Intergovernmental relations in Brazil: An Unequal Federation with Symmetrical Arrangements" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 108-134 at p 120.

29 See Roland Lhotta and Julia von Blumenthal at p 225.


30 See Roland Lhotta and Julia von Blumenthal "Intergovernmental relations in the Federal Republic of Germany: Complex Co-operation and Party Politics" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 206-238 at p 225.

31 See Singh P.M. and Saxena R "Intergovernmental Relations in India: From Centralization to Decentralization" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 239-271 at p 252.

32 See Morales MJG and Marin XA at p 364.

33 See Singh P.M. and Saxena R "Intergovernmental Relations in India: From Centralization to Decentralization" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 239-271 at p 257.

34 See Phillimore J and Harwood J at pp 59-62.



and agreement. Joint institutions are generally set up in the course of vertical IGR, although some may result from exclusively horizontal arrangements.

Several issues must be addressed and resolved when establishing joint institutions that genuinely are shared by the participating levels of government. First, arrangements for appointments, funding, termination, and reporting are necessary. Secondly, provision must be made regarding decision-making procedures and processes of the joint institution. The intergovernmental character of the body may offer three choices—simple majority voting rules, which are more efficient but enable major players to dominate; consensus approach which has the potential for stalemate; and weighted majority voting system. Thirdly, it may also be necessary to provide specifically for the laws by which the body is to be governed, where these differ between constituent units.

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 short-term 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.³⁵ 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. Bodies of this kind may be used to deal with other problematic intergovernmental issues. A good Nigerian example is the Niger Delta Development Commission which was created in the face of tension between contiguous states over oil extraction and revenue.³⁶ Other specialized agencies are institutions established by the constitution to provide particular services to both levels of government. Examples may include the independent commissions and independent offices such as the Auditor General.

³⁵ See Eghosa E. Osaghae “Nigeria: Struggling to Formalize and Decentralize Intergovernmental Relations” in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 272-304 at p 287.

³⁶ See Eghosa E. Osaghae at p 287.

2.2.5 Intergovernmental Agreements (IGAs)

Comparative experience presents another important and familiar instrument for managing intergovernmental relations as a best practice in the form of intergovernmental agreements. Intergovernmental agreements can be vertical, horizontal, bilateral, multilateral, and even “omnilateral” (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. Examples are intergovernmental agreements in infrastructure programs in Nigeria;³⁷ taxation, social security, and environmental protection in Argentina³⁸ and Canada; law enforcement in Switzerland; the regulation of provincial boundary changes in South Africa; and joint performance reporting in Australia. 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.

2.3 Conclusion

The Kenyan devolved system of government is by and large an integrated system and can draw instructive lessons in intergovernmental relations from integrated systems such as that of Germany, South Africa and Austria. The various intergovernmental relations mechanisms and processes offer very useful lessons for Kenya when developing her system of intergovernmental relations and managing the emerging issues.

³⁷ See Eghosa E. Osaghae at p 292.

³⁸ See Walter F. Carnota “Intergovernmental Relations in Argentina: Systematic Confusion and Predominance of the Centre” in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 14-41 at p 29-30.


3 The Constitutional and Legal Framework for Intergovernmental Relations in Kenya

Introduction

Kenya has, by and large, settled for a system of formal intergovernmental relations that are provided for and structured by both the constitution and legislation. While several constitutional provisions recognize and prescribe certain processes of intergovernmental relations, others expressly establish certain institutions and structures meant to play a central role in intergovernmental relations. Similarly, while some constitutional provisions expressly require Parliament to enact legislation that may structure and govern intergovernmental relations, others by implication envisage the enactment of such legislation. According to these constitutional requirements, several legislations have been enacted which structure intergovernmental relations and establish various intergovernmental structures and institutions. Intergovernmental relations in Kenya are, however, not exclusively formal. Some informal processes and structures have also emerged and are playing an important role. For example, county assemblies have established the County Assemblies Forum (CAF) even without any constitutional or statutory requirement for such forum. Similarly, county attorneys have also established a County Attorneys' Forum. Various counties have formed various regional blocks meant to spearhead joint development projects for the counties that fall in those regions. Thus, though largely formal, intergovernmental relations in Kenya can best be described as combining both formal and informal processes and institutions. The informal processes and structures may indeed, become the forerunners of legislation in some of these areas establishing formal processes and structures.

3.1 Constitutional Framework

The Constitution of Kenya, 2010 has established a devolved system of government under which the exercise of the sovereign power of the people is delegated to two levels of government—the national and county. Article 6(2) recognizes the need for intergovernmental relations by providing for a multilevel system of government with national and county governments that are distinct and interdependent. As noted earlier, intergovernmental relations could be cooperative or competitive. Article 6(2) of the Constitution of Kenya, 2010 expressly settles for a cooperative as opposed to a competitive system of devolved government, which necessitates cooperative intergovernmental relations. The cooperative form of devolved government combines




a certain measure of autonomy on the part of each of the two levels of government, with a measure of joint and collaborative action and decision-making by the two levels of government. Detailed principles of cooperative government and intergovernmental relations, which both levels of government are required to adhere to when discharging their functions and responsibilities, are set out by Article 189 of the Constitution. This Article creates various obligations which serve to limit the powers of the levels of government and how they exercise them. First, the governments are bound to perform their functions and exercise their powers in a manner that respects the functional and institutional integrity of each other. They must also do so in a manner that respects the constitutional status and institutions of each other. They must, therefore, restrain themselves to avoid straying into or interfering with the functional domain of each other. Second, the governments are bound to assist, support and consult each other. Third, they must liaise with each other for purposes of exchanging information, coordinating policies and administration and enhancing capacity. Fourth, the governments are equally bound to co-operate with each other in the performance of their functions and exercise of their powers and may achieve this purpose by forming joint committees and joint authorities. These provisions envisage some of the comparative intergovernmental relations best practice mechanisms already discussed such as joint institutions and intergovernmental agreements. The Intergovernmental Relations Act appears to have interpreted the constitutional provisions in this manner and made provision for both joint institutions, and some intergovernmental agreements. On the one hand, section 23 of the Act empowers national and county governments to establish joint committees with a specific mandate to achieve certain objectives. On the other hand, section 26 of the Act makes provision for agreements among governments dealing with the transfer and delegation of functions from one government to another.

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. Consistent with the best practice comparative experiences discussed above, the Constitution provides for both legislative and executive mechanisms and techniques for intergovernmental relations.

3.1.1 The Senate as a Key Legislative Mechanism

The design of the legislature at the national level of government is bicameral with a Senate that is a key structure and institutional framework for cooperative government and intergovernmental relations. Parliament comprises the National Assembly, whose role is to represent ‘the people of the constituencies and special interests,’ and the Senate that ‘represents the counties, and serves to protect the interests of the counties and



their governments'. The Senate provides a forum for the representation and protection of the counties and their governments as well as their interests in the decision-making processes at the national level, and the participation of the counties and indirectly their governments in such processes. In terms of Article 96(2), the Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties. A properly functioning Senate, therefore, provides a forum through which national government is obligated to cooperate and consult with county governments when discharging its policy formulation and legislative functions. The legislative processes which must involve the Senate include the sharing of revenue raised nationally through the enactment of both the Division and Allocation of Revenue Bills. The Kenyan Senate, like the Argentina one, is elected directly by the voters in the counties and thus, lacks linkage with the governments of the counties it represents. This has strained relations between the Senators and the county governments and undermined its role in the protection of the interests of the county governments.


3.1.2 Independent Commissions as Specialized IGR Agencies

In addition to the Senate, the Constitution, as in a number of the comparative cases considered, establishes some advisory Commissions which play a major role in intergovernmental relations. Key among such commissions are the Commission on Revenue Allocation (CRA), the Commission for the Implementation of the Constitution (CIC), the Salaries and Remuneration Commission (SRC), and to some extent the Public Service Commission. Article 215 establishes the CRA, while Article 216 sets out its functions as being advisory to the levels of government on matters relating to the equitable sharing of revenue raised nationally and any other matters regarding the financing of county governments.

Though advisory in nature, in terms of Article 218(2), the recommendations of the CRA may be binding unless a deviation from them can be justified by the body deviating. The CRA is an important intergovernmental relations structure that may serve as a bridge that facilitates the various players to negotiate on financial matters.

The Statutory Framework

There are several Acts of Parliament which have been enacted and make provision for cooperative government and intergovernmental relations processes and institutions. Key legislation in this regard is the Intergovernmental Relations Act of 2012 which establishes several intergovernmental relations structures and provides for dispute resolution mechanisms. Section 3 of the Act provides for the objects and purposes of the Act. Key




among them is the provision of a framework for consultation and cooperation between the national and county governments; and provision of a framework for consultation and cooperation amongst county governments. Establishment of institutional structures and mechanisms for intergovernmental relations; and provision of a framework for the inclusive consideration of any matter that affects relations between the two levels of government and amongst county governments are also mentioned as objects and purposes of the Act. The Act similarly identifies the giving effect to Articles 187 and 200 of the Constitution, in respect of the transfer of functions and powers by one level of government to another, including the transfer of legislative powers from the national government to the county governments; and provision of mechanisms for the resolution of intergovernmental disputes where they arise as other objects and purposes of the Act.

The principles of intergovernmental relations are set out by section 3 of the Act. These include recognition of the sovereignty of the people as provided for under Article 1 of the Constitution; inclusive and participatory governance; and respect for the functional and institutional integrity of the two levels of government. Other identified principles are the promotion of national values and principles of governance provided under article 10 of the Constitution; respect for the constitutional status of the levels of government and the institutions of government established at either level of government; and promotion of equality and equity in service delivery. Similarly identified is objectivity and impartiality in decision making. Other principles are the requirement for consultation and cooperation as provided under Article 6(2) of the Constitution; the need to minimize intergovernmental disputes while cooperating in exercising their functions; promotion of accountability to the people in decision making and actions taken; and institutionalized protection of marginalized groups. The Act then establishes a variety of intergovernmental structures for both vertical and horizontal intergovernmental relations which are examined in the following sections.

The National and County Government Coordinating Summit

Consistent with the comparative experience of other countries, one of the important intergovernmental structures established by the Act is the National and County Government Coordinating Summit. Section 7 establishes the Summit as a body comprising the President or in the absence of the President, the Deputy President, who shall be the chairperson; and the governors of the forty-seven counties. The chairperson of the CoG is the vice-chairperson of the Summit. This is the apex intergovernmental relations structure for interactions among the top-executives of the governments at both levels. Section 8 provides for the functions of the Summit as, among other things,



being to provide a forum for consultation and cooperation between national and county governments; promotion of national values and principles of governance; promotion of national cohesion and unity; consideration and promotion of matters of national interests; consideration of reports from other intergovernmental forums and other bodies on matters affecting national interests; evaluation of the performance of national or county governments and recommendation of appropriate action; receiving of progress reports and providing advice as appropriate; monitoring the implementation of national and county development plans and recommending appropriate action; consideration of issues relating to intergovernmental relations referred to the Summit by a member of the public and recommending measures to be undertaken by the respective county governments; co-ordination and harmonization of the development of county and national governments policies; facilitation and co-ordination of the transfer of functions, powers or competencies from and to either level of government; and performance of any other functions that may be conferred on it by this Act or any other legislation or that it may consider necessary or appropriate.

The Summit is required by statute to meet at least twice a year and in terms of section 10(1), submit its 'annual report to the National Assembly, the Senate and the county assemblies, within three months after the end of every financial year'. Section 10(3) requires the National Assembly, the Senate or the county assemblies to, upon receiving the annual report, make such recommendations to the Summit as they may consider necessary. Section 10(4) on the other hand permits the National Assembly, the Senate or the county assemblies to, at any time, request for information from the Summit on any matter.

Despite these elaborate functions, the fact that many disputes and acrimony between the national and county governments have frequently played out maybe testimony that these structures have not yet been fully utilized. This is perhaps because of the nature of intergovernmental relations in federal systems but may also be as a result of a failure by the players to understand the law and appreciate the importance of these structures. The success of this very well-intentioned forum calls for the understanding of the principles of cooperative devolved government and commitment to them. Otherwise, the Summit will not effectively discharge its envisaged role of cooperative intergovernmental relations.

Council of Governors

Another important structure for intergovernmental relations which the Act establishes is the CoG. Section 19 establishes the CoG as a body consisting of the governors of the 47 counties with a chairperson and vice-chairperson elected from among its members for a term of one year that can be renewed for a further one year. Section 20 identifies the functions of the CoG as being a forum for consultation amongst county governments; sharing of information on the performance of the counties in the execution of their functions with the objective of learning and promotion of best practice and where necessary, initiating preventive or corrective action; considering of matters of common interest to county governments; dispute resolution between counties within the framework provided under this Act; facilitating capacity building for governors; receiving reports and monitoring the implementation of inter-county agreements on inter-county projects; consideration of matters referred to the Council by members of the public; consideration of reports from other intergovernmental forums on matters affecting national and county interest or relating to the performance of counties; and performance of any other function as may be conferred on it by this Act or any other legislation or that it may consider necessary or appropriate.

This body was constituted immediately after the March 2013 elections and has been quite robust in discharging its mandate. However, its relations with the national government have been more adversarial than cooperative. Section 20(2) empowers the CoG to establish other intergovernmental forums including inter-city and municipality forums. Section 20(3) empowers the CoG to 'establish sectoral working groups or committees for the better carrying out of its functions'. The CoG is required to meet at least twice a year and to submit an annual report to the Summit, the Senate and the National Assembly. Such reports must be transmitted to the county assemblies within three months after the end of every financial year. As already indicated, section 23 of the Act also empowers the national and county governments to establish joint committees with specific mandates where such committees are necessary for the achievement of the objects and principles of devolution provided in Articles 174 and 175 of the Constitution; and the objects and purposes of the Act.

3.1.3 The Intergovernmental Relations Technical Committee

A third important structure for intergovernmental relations which the Act establishes is the Intergovernmental Relations Technical Committee whose details are discussed in the next chapter.

Sectoral Forums

Consistent with the comparative practice in other countries, the Act also provides for the establishment of sectoral working groups or committees as important intergovernmental structures. The responsibility for the establishment of such sectoral working groups is assigned to the Technical Committee but may also be exercised by a cabinet secretary to address issues of an intergovernmental nature within his or her portfolio. Section 13 provides in this respect that:

- 1) The Technical Committee may establish sectoral working groups or committees for the better carrying out of its functions.
- 2) Nothing in this section may be construed as precluding a cabinet secretary from convening consultative fora on sectoral issues of common interest to the national and county governments.


The IGRTC may need to prioritize the preparation and adoption of regulations for the establishment and operation of these Sectoral Forums. These forums may offer very useful intergovernmental avenues for addressing day to day matters affecting various sectors at both the national and county levels of government.

Intergovernmental Budget and Economic Council

In respect of intergovernmental fiscal and financial relations, the Public Finance Management Act establishes the Intergovernmental Budget and Economic Council (IBEC). According to section 187(1), this comprises—

- a) The Deputy President who shall be the chairperson;
- b) The Cabinet Secretary responsible for finance;
- c) A representative of the Parliamentary Service Commission;
- d) The Chairperson of the Commission on Revenue Allocation or a person designated by the chairperson;
- e) The Chairperson of the CoG;
- f) Every County Executive Committee member for finance; and
- g) The Cabinet Secretary responsible for intergovernmental relations.

In terms of section 187(2), the purpose of the IBEC is to provide a forum for consultation and cooperation between the national government and county governments on the contents of the Budget Policy Statement, the Budget Review and Outlook Paper and the Medium-Term Debt Management Strategy. IBEC also provides a forum for



consultation and cooperation on matters relating to budgeting, the economy and financial management and integrated development at the national and county level; and matters relating to borrowing and the framework for national government loan guarantees and eligibility for guarantees. It is also an important forum for agreeing on the schedule for the disbursements of available cash from the Consolidated Fund based on cash flow projections. It offers an avenue for consultation and cooperation on any proposed legislation or policy which has a financial implication for the counties, or any specific county or counties; any proposed regulations to this Act; recommendations on the equitable distribution of revenue between the national and county governments and amongst the county governments as provided in section 190; and any other matter which the Deputy President in consultation with Council members may decide.


The Transition Authority

Kenya adopted the devolved system of government after having a highly centralized system of government for quite a long time. Thus, the transition from the centralized to the devolved system could not happen overnight—it had to be carefully managed. The Fourth Schedule to the constitution, therefore, makes provision for a very carefully managed and phased out the transition process to devolved government. The Transition to Devolved Government Act of 2012 was thus enacted to provide for mechanisms for the proper management of the transition to devolved government. Since the term of office of the Transition Authority (TA), has already expired and the Intergovernmental Relations Technical Committee is required by the Intergovernmental Relations Act to take over the residual functions of this Authority, details relating to the structure of this intergovernmental relation are discussed in the next chapter which deals with the Intergovernmental Relations Technical Committee.

The County Intergovernmental Forum

The County Government Act of 2012 which provides for county government decentralized structures establishes yet another very important intergovernmental relations organ which has not yet been put to use. Section 54 of the Act establishes the county intergovernmental forum in the following terms:

54(2) There is established for every county a forum to be known as the county intergovernmental forum which shall be chaired by the governor or in his absence, the deputy governor, or in the absence of both, a member of the county executive committee designated by the governor.

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- (3) The county intergovernmental forum shall comprise—
 - ♦ the heads of all departments of the national government rendering services in the county, and
 - ♦ the county executive committee members or their nominees appointed by them in writing.
 - (4) The intergovernmental forum shall, according to the Fourth Schedule (Articles 185(2), 186(1) and 187(2) of the Constitution, be responsible for—
 - ♦ harmonization of services rendered in the county,
 - ♦ coordination of development activities in the county,
 - ♦ coordination of intergovernmental functions, and
 - ♦ such other functions as may be provided for by or under any law.
 - (5) The governor shall chair such other committee or another forum as may be established at the county level according to Articles 6(2), 189(2) and 239(5) of the Constitution.
 - (6) The governor shall receive regular briefings from county security committee referred to under section 41(1)(d) of the National Police Service Act, 2011.

Given that both national and county government services are delivered in the counties, there is a clear need for coordination of the delivery of goods and services by both governments in the counties. The plans, programs, expenditures and even personnel of both the national and county governments within the counties need to be carefully coordinated, harmonized and synchronized. This underscores the importance of this particular intergovernmental relations structure. Yet the experience of the past three years indicates that these forums have not been activated, and their activation ought to be one of the priorities of the IGRTC.



Conclusion

The above discussion discloses that Kenya has adopted a very highly formalized system of cooperative government and intergovernmental relations with very elaborate constitutional and legislative provisions creating and governing both the processes and institutions of intergovernmental relations. The system, however, also leaves room for a measure of informal processes that may eventually result into formalized mechanisms and techniques such as intergovernmental agreements; joint institutions, and legislations that enact these agreements and joint institutions into law.

Despite the highly formal system with a multiplicity of institutions, there is evidence that these institutions have not been effectively used in the past three years. This may be explained by the fact that given the nature of some of these institutions, they cannot propel themselves—they must be propelled, assisted and aided by another institution. The IGRTC is that other institution that has been established to propel cooperative government and intergovernmental relations.

4 The Intergovernmental Relations Technical Committee

Introduction


In the previous chapter, it was concluded that the Intergovernmental Relations Technical Committee (IGRTC) was established as a very important institution meant to propel both the processes of intergovernmental relations and the numerous intergovernmental relations institutions established by the constitution and legislation. This chapter thus discusses the details of the IGRTC covering its establishment and structures; its autonomy; its functions and powers; its funding and that of the other structures of intergovernmental relations; and its challenges.

4.1 Establishment of the IGRTC and its Structures

As noted in chapter three, one of the important structures for intergovernmental relations established by the Intergovernmental Relations Act is the Intergovernmental Relations Technical Committee. In terms of section 11 of the Act, the IGRTC is a body comprising:

- a) a chairperson competitively recruited and appointed by the Summit;
- b) Not more than eight members competitively recruited and appointed by the Summit; and
- c) The Principal Secretary of the State Department for the time being responsible for matters relating to devolution.

As will be seen from its functions, the IGRTC is established as a logistics and facilitation structure meant to provide logistics and facilitation for the other institutions involved in intergovernmental relations. However, while logistics structures of similar nature are often internal structures of a given level of government such as the staff of the office of the federal prime minister or president, as is the case in Australia and Spain; the Kenyan approach goes for a structure located outside any of these offices. This may be justified on grounds of the need for independence from both levels of government. Given the high levels of mistrust and suspicion among the levels of government, a logistics institution based in the office of the president or a national government ministry would not earn the trust of the county governments. Moreover, the functions of the IGRTC go beyond those of similar institutions in other countries and include an advisory role



on intergovernmental relations matters. Such advisory opinions on policy issues coming from an IGRTC that appears as a part of one of the levels of government would not be trusted by the other level. The IGRTC is thus, independent and reports to both levels of government through the Summit and the Council to which it is answerable. In terms of section 14, the IGRTC is required to submit quarterly reports to the Summit and the Council; and be accountable to the Summit and the Council. It is important to underscore the fact that the Summit is not just a meeting but a statutory institution of both the national and county governments existing in perpetuity, of which, the IGRTC forms an important part. Similarly, the CoG is not just a meeting but an important statutory perpetual institution of the county governments, of which, the IGRTC forms an important component.

4.1.1 The Secretariat of the IGRTC

One of the structures of the IGRTC is the secretariat established by section 15(1) that provides that ‘there shall be a Secretariat of the Technical Committee which shall be headed by a secretary’. According to section 15(4), the secretary of the Secretariat shall be “the chief executive and accounting officer of the Secretariat; and responsible to the Technical Committee for the day to day administration of the affairs of the secretariat and implementation of the decisions arising from the intergovernmental relations structures established under this Act”. Since this is the secretariat of the IGRTC, the secretary is thus the chief executive and accounting officer of the IGRTC.

The secretariat discharges its services to the IGRTC through the secretary of the secretariat and the staff he/she establishes. Section 15(5) elaborates the roles of the secretary as being “responsible for—

- ♦ the implementation of decisions of the Summit, the Council and the Technical Committee,
- ♦ the establishment and development of an efficient administration of the Secretariat,
- ♦ the organization, control and management of staff of the Secretariat,
- ♦ maintaining accurate records on financial matters and resource use,
- ♦ ensuring the preparation and approval of the budget for the required funding of the operational expenses of the Summit, the Council and the Technical Committee, and
- ♦ performing any other duties as may be assigned to him by the Summit, the Council and the Technical Committee.

4.1.2 The Staff of the IGRTC


The second structure of the IGRTC is its staff. The Act envisages that the IGRTC may have a very large staff comprising, not only the staff of the IRGTC but also the staff of the Summit and some of the staff of the CoG. Section 17 empowers the IGRTC to employ officers and staff as are necessary not only for the proper discharge of its functions but also those of the Council and the Summit.

The IGRTC not only employs the staff but also pays their salaries and other benefits. Such staff, according to section 18 of the Act, “shall be paid such salaries, benefits and allowances for expenses as may be determined by the Technical Committee, in consultation with the Salaries and Remuneration Commission”.

Although the Staff of the IGRTC includes some of the staff of the Council, the delay in the constitution of the IGRTC ensured that by the time it was established, the Council had already established its structures and staff. However, even if the IGRTC had been constituted ahead of the Council, the Council would still have been justified to have two sets of staff—those of the IGRTC seconded to the Council and those recruited by and in the employ of the Council. The Council is a large institution with some other internal matters better dealt with by its internal staff and not that of the IGRTC. Since the IGRTC has the responsibility of facilitating the activities of the Council and implementing its decisions, it needs to second some staff to the Council to keep following the activities of the Council to enable the IGRTC to facilitate them and advise them appropriately. The IGRTC ought to liaise with the Council to ensure that the Council provides the IGRTC with regular reports which can enable the IGRTC to take action in the discharge of their statutory functions of facilitating the Council.

4.2 Autonomy of the IGRTC

The IGRTC is established as an important independent body meant to serve both levels of government. As such, the IGRTC is independent has autonomy from both levels of government. Three major factors demonstrate the independence of the IGRTC from the two levels of government. The first factor relates to the fact that the IGRTC is not an instrumentality of any one of the two levels of government. In particular, it is not a department of the Ministry of Devolution and Planning and is not answerable to it. While the ministry is a department of the national government, the Act establishes the IGRTC as an entity of both levels of government which must thus be independent and answerable to both the national and county levels of government. First, it is instructive to note that section 11(2) expressly provides for the appointment of the members of



the IGRTC by the Summit, which is constituted by and is an instrumentality of both the national and county governments. Second, section 11(3) is explicit that the members of the IGRTC “shall be appointed on terms and conditions as the Summit may determine”. Third, according to section 14, the IGRTC reports quarterly to the Summit and the Council to which it is also accountable and not the national government. Furthermore, the Principal Secretary of the ministry responsible for matters relating to devolution is made a member of the IGRTC instead of the IGRTC being made a department of the ministry. Thus, when the Principal Secretary of the ministry attends the meetings of the IGRTC, he/she does so as a member and the meeting is chaired by the Chairperson of the IGRTC. Similarly, when the IGRTC meets and consults with other stakeholders, the spokesperson of the IGRTC is its Chairperson and not the Principal Secretary.

The inclusion of the Principal Secretary as a representative of the national government in the IGRTC, without the inclusion of a representative of the county governments, serves to compromise the independence and autonomy of the IGRTC. This should be addressed by proposing amendments to the Act to either remove the Principal Secretary from the membership of the IGRTC or include a representative of the CoG in the IGRTC. If the Act is amended to include the representative of the CoG, both the Principal Secretary and such representative of the CoG should be made *ex officio* members of the IGRTC.

The second factor relates to the functions of the IGRTC. The IGRTC is established as a very unique independent statutory body with massive responsibilities to not only administer its activities and manage its resources but also administer the activities and manage the resources of the Summit and the Council. The IGRTC is thus a critical component of both the Summit and the Council. First, section 15(5)(e) identifies one of the responsibilities of the secretary of the IGRTC as being “ensuring the preparation and approval of the budget for the required funding of the operational expenses of the Summit, the Council and the Technical Committee; and performing any other duties as may be assigned to him by the Summit, the Council and the Technical Committee. Secondly, the Act assigns the responsibility of appointing staff for the Summit and the Council to the IGRTC.

The third factor relates to the fact that the IGRTC is a body corporate with perpetual succession. Although the Intergovernmental Relations Act has no specific provision that expressly states that the IGRTC is established as a corporate body with perpetual succession and capable of suing and being sued as well as holding property, a purposive interpretation of other provisions of the Act and other laws indicates that the IGRTC is a corporate body with such powers. First, the IGRTC is modelled along the lines of independent constitutional commissions and statutory bodies that are empowered

to establish secretariats that serve as the accounting arm of the bodies. Indications that the IGRTC is a body corporate with perpetual succession can be implied from the fact that the secretary is appointed for a single term of six years and is not eligible for reappointment. This means that a different person must be appointed as a replacement as both the secretariat and the IGRTC are long-lasting entities. If the secretariat is established in perpetuity, the IGRTC must also be established to last in perpetuity. Moreover, the secretary has secured tenure at least for the period of his term of office. Secondly, in terms of section 16, the secretary can only be removed from office by the IGRTC with approval of the Summit, on any one of the specified grounds. These are inability to perform the functions of the office arising out of physical or mental incapacity; gross misconduct or misbehaviour; incompetence or negligence of duty; or any other ground that would justify removal from office under the terms and conditions of service. Thirdly, provisions that empower the IGRTC to hire and fire its members of staff are testimony that it is a body corporate. Powers to hire and fire officers and staff can only be vested in a corporate body that is capable of suing and being sued. Fourthly, provisions entitling the IGRTC to its budget are testimony that the IGRTC can own, hold and transfer property.


4.3 The Functions of the IGRTC

The Act assigns to the IGRTC several functions that set it out as an intergovernmental relations structure that is critical to the successful realization of intergovernmental relations as well as the policy objectives of devolution. Closely examined, the functions of the IGRTC may be divided into two major categories—functions relating to the facilitation of cooperative government and intergovernmental relations; and those relating to the management of the transition to devolved government.

4.3.1 Facilitation of Cooperative Government and Intergovernmental Relations Functions


The first set of functions of the IGRTC comprises functions relating to the facilitation of cooperative government and intergovernmental relations. These are set out by sections 12(a), (c), and (d) of the Act which provides that the Committee shall—

- a) Be responsible for the day to day administration of the Summit and of the Council and in particular—
 - i. Facilitate the activities of the Summit and the Council and
 - ii. Implement the decisions of the Summit and the Council.
- b) Convene a meeting of the forty-seven County secretaries within thirty days preceding every Summit meeting.

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- c) Perform any other function as may be conferred on it by the Summit, the Council, this Act or any other legislation.

Each of these provisions must be examined to establish the extent of the responsibilities of the IGRTC. An examination of section 12(a) discloses four distinct major functions of the IGTRC. First, the IGRTC has the responsibility for the day to day administration of the Summit and in particular the facilitation of the activities of the Summit. This function puts the IGRTC at the centre of vertical intergovernmental relations between the national and county governments. This results from the fact that the Summit is an intergovernmental relations structure meant for vertical intergovernmental relations between the two levels of government. The Summit is not an abstract entity existing in the abstract world but a concrete entity comprising the national and county governments existing in reality. As already noted, the Summit is not just a meeting but a statutory perpetual body of both the national and county governments, of which, the IGRTC forms a crucial component. The activities the IGRTC must facilitate are thus, activities of the national and county governments which constitute the Summit. These activities of the Summit which the IGRTC must facilitate relate to the functions of the Summit, which the IGRTC must examine and understand. For example, since one of the functions of the Summit is to provide a forum for “consultation and co-operation between the national and county governments”, the IGRTC has the responsibility to facilitate the national and county governments to consult and co-operate with each other. Likewise, since another function of the Summit is to provide a forum for “coordinating and harmonizing the development of the county and national governments policies”, the IGRTC must facilitate county and national governments to ensure that they coordinate and harmonize the development of their policies. The IGRTC must facilitate the national and county governments to do all the other things that relate to the functions of the Summit. Facilitation may involve identifying the issues on which the governments may need to cooperate, consult, and work together; carrying out research about this issues; developing scenarios around which the governments may negotiate before arriving at an agreed position; convening or encouraging the governments to meet and consider the issues; and assisting the governments to reach and enter into intergovernmental agreements on some of these issues. Given that the IGRTC has the responsibility to hire staff for the Summit and prepare and ensure the approval of the budget for the operation of the Summit, the facilitation role includes providing this resources for the activities of the Summit.

Second, the IGRTC has responsibility for the day to day administration of the Council and in particular, the facilitation of the activities of the Council. This particular function gives the IGRTC a critical role in the horizontal intergovernmental relations among




the 47 counties or some of them. This is explained by the fact that the CoG is an intergovernmental relations organ aimed at horizontal relations among counties. The IGRTC must thus facilitate activities of the county governments among themselves since the activities of the Council are activities of the county governments. Such activities relate to the functions of the Council which the IGRTC must examine and understand. Going by the functions of the Council, the IGRTC must thus, for example, facilitate the county governments to consult among themselves; share information on the performance of the counties in the execution of the functions; consider matters of the common interest to the county governments; resolve disputes among themselves, and build the capacity of the governors. What facilitation entails in respect of vertical relations applies in equal measure to facilitation in these horizontal relations.

Third, the IGRTC has responsibility for the day to day administration of the Summit and in particular the implementation of the decisions of the Summit. This means that once that IGRTC has facilitated the national and county governments to cooperate, consult, negotiate, and perhaps enter into intergovernmental agreements, or make any other decisions, it must pursue the implementation of those decisions. The implementation of some of the agreements or decisions may require their being reduced into legislation. It is the responsibility of the IGRTC, therefore, to ensure that they are reduced into draft legislation and eventually enacted into law. The implementation may also involve informing other players who are supposed to take action and monitoring them to ensure that they eventually act as required by the Summit decision or agreement. For example, the Summit may agree on a particular formula for sharing of finances among national and county governments, and among the counties which may require both the CRA and the National Treasury to adjust their proposed formulae. IGRTC must thus monitor the CRA and the National Treasury to ensure that they reflect the Summit decision in their documents. The IGRTC could also advise Parliament to correct any deviations from the agreement. The IGRTC may report any defaulting player back to the Summit for it to take any sanctions.

Fourth, the IGRTC has responsibility for the day to day administration of the Council and in particular the implementation of the decisions of the Council. In the same manner that the IGRTC follows up on decisions and agreements of the Summit to ensure their implementation, is how it must follow up on the decisions of the Council and ensure their implementation.

In terms of section 12(c), the IGRTC has the mandate to “convene a meeting of the forty-seven county secretaries within thirty days preceding every Summit meeting”. A narrow interpretation may mean that the meeting is meant to consolidate and harmonize the




issues and concerns of different county governments and consolidate them into common issues in preparation of the Agenda items to be presented to the Summit meeting. Indeed, from this narrow perspective, the governors have taken over this function arguing that they are better placed to identify and draw the agenda items of concern to the counties for the Summit meeting. From a broad and purposive interpretation, this function is an elaboration of the various activities that constitute the IGRTC's responsibility to facilitate the activities of both the Summit and the Council. While the governors may be better placed to identify the agenda items for the Summit meeting, the IGRTC may be able to identify other issues from the county secretaries for the Summit agenda which may have escaped the attention of the governors. The function could also enable the IGRTC to gather issues of concern which the governors may not be aware of and present them to the meetings of the CoG for resolution. This is necessary because, sometimes the governors may be out of touch with their officers on the ground, who may even fear to bring certain concerns to their attention. The forum may be useful for ventilating such concerns to the governors.

In terms of section 12(d), the IGRTC may also “perform any other function as may be conferred on it by the Summit, the Council, this Act or any other legislation”. Given the dynamic nature of intergovernmental relations, it is appropriate that the list of the functions of the IGRTC be left open to be added onto as the system of intergovernmental relations develops and new issues and needs arise. The many legislations that this report envisages may arise out of intergovernmental agreements may identify and assign to the IGRTC important new functions.

Ideally, therefore, the IGRTC is a critical institution in the facilitation and coordination of cooperative government and intergovernmental relations between the two levels of government. This approach may avert unnecessary conflict and disputes between the levels of government and among the county governments. A broad and purposive interpretation of these functions leads to the conclusion that the IGRTC has the responsibility of offering timely and evidence-based advice on strategic intergovernmental relations issues to not only the Summit and the CoG but also the two levels of government and the counties that are represented in both the Summit and the Council. To effectively discharge these functions, the IGRTC must present itself as an independent and neutral institution that must earn the trust of both levels of government.

4.3.2 Management of Transition to Devolved Government Functions

The second set of functions comprises functions relating to the management of the transition to devolved government. These are set out by section 12(b) of the Act which provides that the Committee shall:




Take over the residual functions of the transition entity established under the law relating to the transition to the devolved government after dissolution of such entity.

To understand what this provision entails and the functions it confers on the IGRTC to develop a strategic plan for discharging them, this particular provision requires analysis and understanding of the notion of transition to devolved government and the mechanisms established for the management of such transition.

Kenya adopted the devolved system of government after having a highly centralized system of government for quite a long time. Thus, the transition from the centralized to the devolved system could not happen overnight—it had to be carefully managed. The Fourth Schedule to the Constitution, therefore, makes provision for a very carefully managed and phased out the transition process to devolved government. The Transition to Devolved Government Act of 2012 was thus enacted to provide for mechanisms for the proper management of the transition to devolved government. This necessitates a reading of the Intergovernmental Relations Act together with the Transition to Devolved Government Act, which established the TA with specific functions focused on the management of the transition to devolved government. Section 3 of the Transition to Devolved Government Act provides for the object and purpose of the Act as being to”:

- a) provide a legal and institutional framework for a coordinated transition to the devolved system of government while ensuring the continued delivery of services to the citizens;
- b) provide, under section 15 of the Sixth Schedule to the Constitution, for the transfer of powers and functions to the national and county governments;
- c) provide mechanisms to ensure that the Commission for the Implementation of the Constitution performs its role in monitoring and overseeing the effective implementation of the devolved system of government effectively;
- d) provide for policy and operational mechanisms during the transition period for audit, verification and transfer to national and county governments of:
 - i. assets and liabilities;
 - ii. human resources;
 - iii. government and local authorities; and
 - iv. pensions and other staff benefits of employees of any other connected matters;
- e) provide for closure and transfer of public records; and
- f) provide for the mechanism for capacity building requirements of the national government and the county governments and make proposals for the gaps to be addressed.



Section 4 of the Act establishes the TA as an important intergovernmental structure necessary for facilitating intergovernmental relations and ensuring a smooth transition from the hitherto highly centralized system to the devolved system of government. The Authority was assigned responsibility to facilitate and coordinate the transition to the devolved system of government as provided for under section 15 of the Sixth Schedule. Section 7 of the Transition to Devolved Government Act sets out the specific functions of the TA which must be read and understood within the context of the objects and purposes of the Act already set out and the activities to be undertaken in the two phases of transition to devolved government set out in the Fourth Schedule to the Act. In terms of section 7(2), despite the generality of subsection (1), the Authority shall:

- a) Facilitate the analysis and the phased transfer of the functions provided under the Sixth Schedule to the Constitution to national and county governments.
- b) Determine the resource requirements for each of the functions.
- c) Develop a framework for the comprehensive and effective transfer of functions as provided under section 15 of the Sixth Schedule to the Constitution.
- d) Coordinate with the relevant state organ or public entity to:
 - i. Facilitate the development of the budget for county governments during Phase One of the transition period.
 - ii. Establish the status of ongoing reform processes, development programmes and projects and make recommendations on the management, reallocation or transfer to either level of government during the transition period.
 - iii. Ensure the successful transition to the devolved system of government.
- e) Prepare and validate an inventory of all the existing assets and liabilities of the government, other public entities and local authorities.
- f) Make recommendations for the effective management of assets of the national and county governments.
- g) Provide mechanisms for the transfer of assets which may include vetting the transfer of assets during the transition period.
- h) According to section 15(2) (b) of the Sixth Schedule to the Constitution, develop the criteria as may be necessary to determine the transfer of functions from the national to county governments, including:
 - i. Such criteria may be necessary to guide the transfer of functions to county governments.


ii. The criteria to determine the transfer of previously shared assets, liabilities and staff of the government and local authorities.

- i) Carry out an audit of the existing human resource of the government and local authorities.
- j) Assess the capacity needs of national and county governments.
- k) Recommend the necessary measures required to ensure that the national and county governments have adequate capacity during the transition period to enable them to undertake their assigned functions.
- l) Coordinate and facilitate the provision of support and assistance to national and county governments in building their capacity to govern and provide services effectively.
- m) Advice on the effective and efficient rationalization and deployment of the human resource to either level of government.
- n) Submit monthly reports to the Commission for the Implementation of the Constitution and the Commission on Revenue Allocation on the progress in the implementation of the transition to the devolved system of government.
- o) Perform any other function as may be assigned by national legislation.

From the examination of these provisions, the functions of the TA can be summarized as being:

- a) Facilitation and coordination of transition to the devolved system of government.
- b) Facilitation of the analysis, unbundling and transfer of functions and powers.
- c) Audit, verification, inventory and transfer assets.
- d) Audit, verification, inventory and liquidation of liabilities.
- e) Audit, verification, transfer and rationalization of human resources.
- f) Audit and rationalization of terms and conditions of service of the personnel including pension schemes in both levels of government.
- g) Closure and transfer of public records.
- h) Capacity-building.
- i) Submission of reports.

The IGTRC must undertake a critical analysis of these functions of the TA to identify the unfinished business of the TA; the challenges that may have led to the unfinished business; and develop strategies for navigating such challenges. Given that the Term of office of the TA ended at the beginning of March 2016, a critical analysis of the functions and the status of devolution disclose a lot of unfinished business, which the IGTRC must take over. For example, it is clear that the process of interpretation, analysis and unbundling of functions, and their transfer to the two levels of government, was not very well done and quite a lot remains unfinished. It is for this reason that the past three years



have seen numerous conflicts and accusations about the transfer of functions to the county governments. The processes of audit, verification, inventory and transfer of assets, liabilities, and human resources have also raised a lot of acrimony among the two levels of government. There is thus clear evidence of unfinished business in these areas. The audit and rationalization of the terms and conditions of service of personnel in governments at both levels are also outstanding matters. While underscoring the achievements of the TA, Kinuthia Mwangi in his Forward to The End-Term Report of the TA acknowledges that there is a lot of unfinished business which stakeholders in the devolution sector must address. He observes that:


Despite all these milestones, critical aspects and key components of the TA mandate such as clarification of devolved functions, costing of service delivery, audit and transfer of public assets and liabilities, are still outstanding. Rationalization and deployment of human resource between the two levels of government are also critical in setting up efficient and effective public service.³⁹

Though these functions fall within the category of functions relating to the management of the transition to devolved government, their effective discharge raises several issues of cooperative government and intergovernmental relations. Indeed, some of them remain unfinished business because of the failure of cooperative government and intergovernmental relations in the first three years since the first elections under the new constitution. One of the challenges the TA may have faced leading to the unfinished business of transition, maybe that while the business of management of the transition to devolved government, by and large, involved issues of intergovernmental relations, the players did not realize this and the TA did not have the tools for facilitating and managing intergovernmental relations. This leads to the conclusion that the functions of the IGTRC are quite massive, complex and controversial and they involve both the facilitation of cooperative government and intergovernmental relations and management of the transition to devolved government.

4.4 The Powers of the IGTRC

Although there is no express provision of the Act which stipulates the powers of the IGTRC, these can be implied from the functions of the IGTRC. A purposive interpretation would lead to the conclusion that a body cannot be assigned functions without the powers it requires to perform the functions. Such powers must be implied. Since the IGTRC inherited some of the functions of the TA, it must be taken to have also acquired

³⁹ Kinuthia Mwangi Forward to the End-Term Report of the TA (2016) The TA p iii



all the powers the TA had under the Transition to Devolved Government Act. Indeed, it would be sensible to allow the IGRTC to take over all the resources the TA had at its disposal. These should most importantly include some of the personnel the TA had as they will be useful in bringing on board the institutional memory of the TA. This will not only hasten the work of the IGRTC but also avoid starting from scratch with new members of staff who have no idea about what the role of the TA was.


4.5 Funding for Intergovernmental Relations

Intergovernmental relations play a pivotal role in the successful operation of a federal or devolved system, even though it is a concept that is often underappreciated and studied. Likewise, despite the importance of intergovernmental relations many countries hardly expressly provide for its funding in their constitutional financial arrangements. Kenya is an exception in this regard as both its constitution and some legislation make some provision for the financing of some of the processes and institutions of intergovernmental relations. While a number of the intergovernmental relations institutions established by the constitution such as the CRA, the Senate, the National Assembly, and the National Treasury are allocated funds in terms of constitutional provisions; the Intergovernmental Relations Act, which establishes several statutory intergovernmental relations structures, also provides for their funding. This underscores the importance of the Kenyan constitution framers attached to cooperative government and intergovernmental relations, yet many players do not seem to recognize and commit themselves to the principle.

4.5.1 Funding of IGRTC

The IGRTC is established as an independent body with its funding allocated as a separate vote through the national government budget. First, section 37(c) of the Intergovernmental Relations Act identifies the IGRTC as one of the intergovernmental structures whose operational expenses “shall be provided for in annual estimates of the revenue and expenditure of the national government”. According to the section, the operational expenses shall cater for “the Technical Committee, Secretariat and the sectoral working groups established by the Technical Committee”.

Secondly, section 15(5)(e) of the Act includes among the responsibilities of the secretary of the Secretariat of the IGRTC, that of “ensuring that the preparation and approval of the budget for the required funding of the operational expenses of the Summit, the Council and the Technical Committee” are done. It is recommended that provision for this funding should begin at the level of Division of Revenue Bill with the CRA making specific recommendations regarding the amount of money to be included in the share



of the national government as a vote for financing intergovernmental relations. These provisions on the funding of the IGRTC underscore its independence and autonomy.

4.5.2 Funding of the other IGR Structure

As already observed, the Intergovernmental Relations Act also provides for the funding of all other intergovernmental relations structures established by the Act. Section 37 is explicit in this respect:

The operational expenses in respect of the structures and institutions established in this Act shall be provided for in the annual estimates of the revenue and expenditure of the national government to cater to:

- ♦ the Summit;
- ♦ the Council of County Governors;
- ♦ the Technical Committee, Secretariat and the sectoral working groups established by the Technical Committee; and
- ♦ the sectoral working groups established by the Council.

Once again the responsibility to prepare the budgets for funding all these structures and present to Parliament for consideration and approval is vested by section 15(5) referred above, in the IGRTC through the secretary of its secretariat. This underscores the pivotal role of the IGRTC in the facilitation of cooperative government and intergovernmental relations.

4.6 The Challenges of the IGRTC

There are some challenges the IGRTC may face when trying to work with the legislation that establishes it. While a purposive interpretation can be used to enable the IGRTC to operate with this legislation in this format, there would be no harm in seeking to amend the legislation to clarify certain matters. As noted, the powers of the IGRTC are implied and there would be no harm in providing for such powers expressly through amendments to the Act. The Act has no provision dealing with the term of office of the members and their replacement as well as removal from office before the end of the term. Amendments to the Act to provide for the term and a staggered process of replacement of the members of the IGRTC to ensure institutional memory and continuity is necessary. As already noted, amendments to address the composition of the IGRTC and enhance its independence and autonomy are also necessary.


Emerging Issues on Devolution and Intergovernmental Relations

5

Introduction

The Kenyan Constitution of 2010, like constitutions of many other countries made in the past few decades, has adopted a governance system referred to as devolution. What Kenya means by devolution is however markedly different from what is meant by devolution in other countries. The determination of what a country means by devolution must be drawn from an examination of the instruments through which the country adopts devolution such as the constitution or statutory instruments. Since Kenya's devolution is entrenched in the Constitution, its meaning can only be drawn from an examination of the constitutional provisions establishing the system. Kenya's devolution is best defined as a multilevel system of government under which the Constitution creates two levels of government—the national and county—that are coordinate and not subordinate to each other. The two levels of government are distinct and interdependent and are required to conduct their mutual relations based on consultation and cooperation. Their distinct and interdependent nature is reflected in the constitutional assignment and protection of functions and powers as well as financial resources. It is also reflected in the constitutional protection of the counties' right to participate in decision-making at the national level through the Senate, and provision for cooperative rather hierarchical intergovernmental relations among the governments. This constitutional entrenchment renders the Kenyan counties relatively autonomous capable of conducting relations with the national government on a co-equal basis. Thus, cooperative intergovernmental relations must play a central role in the success of the Kenyan devolved system of government.

Although Kenya has been described in this report as having adopted a highly formal system of intergovernmental relations with both the Constitution and legislation making very elaborate provisions on the processes and institutions of intergovernmental relations, the experience of the first three years since the election of the first governments under the devolved system have disclosed a failed system of intergovernmental relations. The system can justifiably be described as one of dysfunctional cooperative government and intergovernmental relations. There are several emerging issues of intergovernmental relations which the IGRTC may need to address as it facilitates the processes of intergovernmental relations. This chapter thus identifies and examines some of the



important issues that have emerged and need to be resolved through intergovernmental relations. They include the following:

- 1) Clarification of functions and powers.
- 2) Creation of three lists of functions and powers.
- 3) Sharing out of concurrent functions and powers.
- 4) A framework for national government assignment of additional functions to county governments.
- 5) A framework for the intergovernmental transfer of functions and powers.
- 6) Unbundling and transfer of functions and powers.
- 7) Restructuring of the old order institutions.
- 8) Unbundling, costing and transfer of functions in the health sector.
- 9) Transfer and management of human resources in the health sector.
- 10) Unbundling and transfer of functions in the roads sector.
- 11) Unbundling and transfer of functions in the housing sector.
- 12) Unbundling and transfer of functions in the water sector.
- 13) Unbundling and transfer of functions in the agriculture sector.
- 14) The institutional framework for fiscal intergovernmental relations.
- 15) Intergovernmental relations on the powers to raise revenue.
- 16) Intergovernmental relations on the vertical and horizontal division and allocation of revenue raised nationally.
- 17) A framework for conditional grants.
- 18) A framework for the expenditure of the Equalization Fund.
- 19) A framework for mobilization and sharing of donor grants.
- 20) A framework for borrowing by both national and county governments.
- 21) The IFMS and e-procurement framework and its implementation.
- 22) Audit, verification, and transfer of assets.
- 23) Audit, verification, validation, and liquidation of liabilities.
- 24) Rationalization of staff and harmonization of terms and conditions of service.
- 25) The role of the Senate and its relationship with other institutions including county governments.
- 26) Intra-governmental relations
- 27) Accountability by governors.
- 28) Dispute resolution.
- 29) Gender balance in intergovernmental relations structures and institutions.
- 30) Preparation for managing another transition.

5.1 Framework for Addressing Intergovernmental Relations on Emerging Issues

Before discussing the above mentioned emerging issues and making recommendations on how they should be addressed, this chapter first lays down a general framework that can be followed and used when addressing the intergovernmental relations on each of the emerging issues. The framework draws lessons from the comparative experiences of other countries and indicates that an effective intergovernmental relations process of addressing intergovernmental issues would need to follow a path that has various stages.

5.1.1 Cooperation, Consultation and Negotiation

It has been noted that the Kenyan devolved system settled for a cooperative system of government and intergovernmental relations. 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 resolving emerging issues through intergovernmental relations must thus, begin with cooperation, consultation and negotiations among the governments. According to its function of facilitation of the activities of the Summit and the Council, the IGRTC must encourage the governments at both levels of government and guide them towards cooperating, consulting and negotiating among themselves. Facilitation could include developing scenarios for them as negotiating positions, researching and providing advisory opinions to guide informed positions by the governments on the issues, convening the parties to the negotiating table, and recording the proceedings of the negotiations.

5.1.2 Intergovernmental Agreements

The cooperation, consultation and negotiation processes may lead to the settlement and conclusion of intergovernmental agreements among the cooperating and negotiating governments. Indeed, 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. Many of the emerging issues identified in this report urgently call for cooperation, consultation and negotiation leading to the conclusion of intergovernmental agreements among the governments.

5.1.3 Establishment of Joint Entities and Institutions

Article 189(2) prescribes that the governments at both levels of government shall cooperate in the performance of their functions and exercise of their powers. The Article adds that for these purposes, the governments may set up joint committees and joint authorities. Furthermore, section 23 of the Intergovernmental Relations Act recognizes the concept of joint efforts and institutions when it provides that the national and county governments may establish joint committees with specific mandates to achieve certain objectives of devolved governance. The joint institutions could be formed among either the national and county governments, or counties or groups of counties among themselves. It follows, therefore, that among the many issues the intergovernmental agreements may provide for is the establishment of joint institutions that are constituted jointly by both levels of government and provide services to both levels or county governments or groups of counties. 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.

5.1.4 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. One 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 governments 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 be establishing some joint institutions and mechanisms. The uniform norms and standards the national government is required to provide for through national legislation to guide the county governments in their activities ought to result from such intergovernmental agreements.

The following sections focus on the discussion of the emerging issues identified above and making recommendations on how the IGRTC can facilitate their resolution through intergovernmental relations.

5.2 Emerging Issues

5.2.1 Clarification of Functions and Powers

An area in which major issues have emerged, which require to be resolved through cooperative government and intergovernmental relations is that relating to the manner of assignment of functions and powers under the Constitution of Kenya, 2010. Observers of the Kenyan devolved system have all concluded that the hallmark of the system is the lack of constitutional clarity in the assignment of functions to the two levels of government. However, nothing stops the two levels of government from using cooperative government and intergovernmental relations to clarify the constitutional assignment of functions and powers through legislation.


5.2.1.1 National Legislation on Functions and Powers

It is submitted that there is a need to, through cooperative government and intergovernmental relations, enact national legislation on functions and powers to clarify the constitutional assignment of functions and powers to the two levels of government. This legislation, which should be styled “The Functions and Powers Act”, should aim to operationalize Articles 186(1), (2) and the Fourth Schedule, 186(3), 183(1)(b), and 187 of the Constitution. This must be achieved through making provision for the clarification of functional assignment and the functional lists; establishment of a framework for national government assignment of additional functions and powers to county governments; and establishment of a framework for the intergovernmental transfer of functions and powers.

5.2.1.2 Creating Three Lists of Functions and Powers

The Constitution of Kenya, 2010 provides for two lists of functions and powers only—one for the national government, and another for county governments. This is contrasted with the approach in many federal constitutions which provide for three distinct lists of functions and powers comprising exclusive functions and powers for the federal level of government; exclusive functions and powers for the sub-national level of government; and concurrent functions and power for both national and sub-national levels. Article 186(2) of the Constitution compounds the problem of lack of clarity by recognizing that some of the functions and powers in the two lists are exclusive while others are concurrent, without specifying which ones are exclusive and which ones are concurrent.

The creation of the required clarity in this area is a matter that calls for interpretation through cooperative government and intergovernmental relations. It is recommended that the IGRTC must facilitate the national and county governments to cooperate, consult




and jointly interpret the functional lists to determine which aspects are exclusive to each level of government and which are concurrent. Once the agreement is reached the governments should reduce the intergovernmental agreement into national legislation on functions and powers.

Although the Constitution provides for only two lists of functions and powers that lead to lack of clarity, nothing stops the two levels of government from providing in the legislation for three lists of national government exclusive functions and powers; county government exclusive functions and powers; and national government and county government concurrent functions and powers. These three lists can be created from the constitutional two lists through interpretation. The legislation must, therefore, have apart that deals with the clarification of the Fourth Schedule lists of functions and powers. This would then mean that the constitutional assignment of functions and powers must be read together with the statutory assignment of functions and powers which clarifies the constitutional assignment.

5.2.1.3 Sharing Out the Concurrent Functions and Powers

Even after creating a list of concurrent functions and powers, it is important to recognize that several problems normally arise in the execution of concurrent functions and powers. First, concurrent functions and powers normally lead to duplication of roles, efforts, programs, projects and expenditures as both levels of government may choose to do the same thing. The consequence is a waste of resources and lack of coordination of the programs and projects. Secondly, there is always a likelihood of both levels of government failing to take action in the concurrent functional areas with each believing that the other will take action. This may result in total failure of delivery of services to the constituents. Thirdly, it is normally difficult to give effect to the principle of “funds must follow functions”, which guides the allocation of financial resources to the two levels of government. Moreover, credit for one project may be claimed by both levels of government even when the project was undertaken by only one level of government. This may create the possibility of a loss of funds in the possession of the level of government that did not undertake the project. Finally, democratic accountability may be compromised since the citizens may not know whom to hold accountable for what. Evidence indicates that all these problems are already raising their heads in the Kenyan devolved system of government.

In light of all these problems, the cooperative government and intergovernmental relations clarification of functions through legislation should include clarification of which level of government should be responsible for which aspects of the concurrent




functions. In addition to the three lists of exclusive and concurrent functions and powers, the legislation on functions and powers should have a section on the clarification of concurrent functions with a list of which aspects of concurrent functions belong to which level of government.

5.2.1.4 Framework for National Government Assignment of Additional Functions to County Governments

The main source of county government functions and powers is Article 186(1) and (2) read together with the Fourth Schedule of the Constitution. These set of functions are classified as original functions and powers of the county governments since they derive from the Constitution directly. The Constitution, however, envisages that county governments may be assigned additional functions and powers by national legislation. Functions and powers assigned to county governments in this manner are classified as secondary functions and powers since they do not derive from the Constitution directly, but are, however, assigned by the national government through national legislation. Article 186(3) envisages this approach when it stipulates that “a function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government”. This means that the national government may through legislation assign to county government, some of its own constitutionally assign functions and powers, or some of the unassigned functions and powers known as residual functions. Article 183(1)(b) also envisages that national government may through legislation assign to county government executive committees, the functions and powers of implementing national legislation or parts of it, within the county.

An emerging issue which needs to be addressed through cooperative government and intergovernmental consultation, negotiation and agreement is whether the exercise of these powers is in the absolute discretion of the national government. The national government is not free to determine whether and when it should assign some of its functions as there are some circumstances under which it is under an obligation to assign the functions to county governments. Three reasons arising out of other provisions of the constitution lay a basis for some circumstances in which national government may be under an obligation to assign functions and powers to county governments. First, Article 201(d) establishes the principle that “public money shall be used prudently and responsibly”. This principle may be invoked to create an obligation to assign functions and powers to county governments to avoid the establishment of duplicative and wasteful national government parallel structures in the counties. Secondly, the subsidiarity principle which dictates that functions and powers should be left to the lowest level which can best perform them and which is implied in Articles 174 and 187 may also be



invoked to justify an obligation to assign functions to county governments. Thirdly, it has already been noted that one of the obligations of cooperative government provided for under Articles 6(2) and 189 of the Constitution imposes limitations on how a level of government may exercise its powers even if they are exclusive. Exclusive powers cannot be exercised in the absolute discretion of the level of the government concerned. They must, however, be exercised in cooperation and consultation with the other level of government. Thus, the national government must cooperate and consult with county governments whenever it is planning to assign some of its functions to them.

The proposed national legislation on functions and powers must thus, have a section with provisions seeking to operationalize the power of national government to assign additional functions and powers to county governments. This part of the legislation must have provisions that establish a framework guiding how and when the national government must assign some of its functions to county governments. The framework may also provide for the consultation and negotiation processes, and agreements that must precede the decision to assign functions and powers to county governments. The financing of such assigned functions must also be provided for in this legislation to avoid the creation of unfunded mandates.

5.2.1.5 A Framework for the Intergovernmental Transfer of Functions and Powers

Another aspect of functions and powers that must be provided for in the legislation on functions and powers is that relating to the transfer of functions from either one government to another or from one or more governments to a joint entity or institution. First, Article 187 provides for the intergovernmental transfer of functions based on intergovernmental agreements. Second, Article 189(2) envisages the creation of joint institutions and the transfer of functions and powers by governments to such joint institutions. All these must be accomplished through cooperation, consultation, negotiation and intergovernmental agreements. The proposed functions and powers Act must have a part seeking to operationalize these constitutional provisions by providing a framework within which the governments can cooperate, consult and negotiate the transfer of such functions.


Notably, there is a clear distinction between assignment of additional functions by the national government to the county governments under Article 183 and 186, and transfer of functions by either government to the other under Article 187. While assignment can only be done by the national government to county governments through national legislation, transfer under Article 187 could be done by either level of government to the other and by agreement. The agreement may, however, be reduced into legislation to give it the force of law.

Although sections 24-29 of the Intergovernmental Relations Act have addressed some of these matters relating to transfer and delegation of functions and powers, there may need to review these provisions taking into account the lessons learned in the past three years and provide a more elaborate framework in the proposed functions and powers Act. Moreover, there is value in reviewing these provisions through cooperative intergovernmental processes. Although the framers of the Constitution intended that the country should save on costs by empowering national government to assign or transfer some of its functions, we have seen the duplication of roles, programs and expenditure by the national government in the counties. It is for this reason that a framework ought to be put in place to facilitate assignment and transfer of functions.

5.3 Unbundling, Costing and Transfer of Functions and Powers

Unbundling, costing and transfer of functions and powers is a major issue that has arisen and is posing serious challenges to cooperative government and intergovernmental relations in the operation of the Kenyan devolved system. Although this was one of the major functions of the TA which has reported successful accomplishment of the task, there is evidence of unfinished business in this area. The TA has in its on End-Term Report acknowledged that certain aspects of this function are incomplete and must be addressed. The report identifies the following as some of the unfinished business.

- a) Unbundling/analysis of functions of state corporations performing devolved functions.
- b) Publishing and dissemination of unbundled reports.
- c) Transfer of delayed functions to the national and county governments.
- d) Analysis and costing of function No. 14 of the Fourth Schedule to the Constitution of Kenya, 2010.
- e) Costing of functions under the Ministries of Energy and petroleum; the National Treasury; Devolution and Planning; Education; ICT; Lands and Housing; Tourism, Commerce and East African affairs; Mining; Sports, Culture and the Arts; Industrialization and Enterprise development; Labor and Social Services; Interior and Coordination of national government.
- f) Validation and dissemination of the costing report for the 5 sectors.
- g) Developing a framework to guide the analysis and performance of concurrent functions.
- h) Analysis of concurrent functions.
- i) Documentation and analysis of residual functions domiciled in various MDAs.

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- j) Strategic intervention on emerging issues arising from the implementation of transferred functions.
 - k) Technical backstopping during sectoral intergovernmental consultative forums on implementation/performance and emerging functional assignment issues.⁴⁰

Controversy and acrimony among the two levels of government regarding these matters of unbundling, costing and transfer of functions have persisted. Moreover, legislation in a number of the major devolved sectors such as health, which ought to clarify the unbundling and assignment of functions and powers have not been enacted or reviewed. The IGRTC may thus need to re-examine the unbundling and transfer of functions and powers to not only address any unfinished business but to also do a thorough job and settle all the outstanding issues. Indeed, the TA in its End-Term Report observes that “the functional analysis process is not a one-time off process but it is continuous” one.⁴¹ The old order legislation in some of the devolved sectors which were continued in existence and which have not yet been reviewed, urgently need to be reviewed through a cooperative and intergovernmental process. Likewise, time is ripe for the review of the many laws that have been enacted since the promulgation of the new Constitution. Such review should aim at identifying any inconsistencies in the laws and seek to harmonize them; any gaps in the legislation and seek to fill them either by amendment or enactment of new legislation; and any legislation that is not working and seek to repeal and replace them with well thought out legislation that can work.


5.3.1 The Meaning and Process of Unbundling

The unbundling of functions and powers is a process of analysis and interpretation of the constitutional provisions aimed at transferring powers and functions to the level of government they have been assigned by the Constitution. The process seeks to analyze and interpret powers and functions assigned by the Constitution and realizing the constitutional intention to have the powers and functions exercised and performed by the level of government the Constitution has assigned them to. Unbundling and transfer of functions and powers is not a process through which one level of government can unilaterally start changing the constitutional intention. The analysis and interpretation of the constitutional provisions must be done against and within the context of the factual evidence of the activities that take place in the identified functional area, aimed at determining which activities have been assigned to which level of government.

This task is necessitated by the fact that Article 186 and the Fourth Schedule assign

⁴⁰ *The End-Term Report of the TA (2016) page 48.*

⁴¹ *The End-Term Report of the TA (2016) page 19.*




powers and functions in very general terms that may not easily enable one to know what is supposed to be done by which level of government. The constitutional provisions assign the powers and functions in bundles that must be analyzed, unbundled into specific tasks which then can be assigned to the governments as responsibilities to be discharged. The unbundling exercise seeks to achieve clarity in the functional assignment through analysis and clarification of the competencies and assigning them to the respective governments. According to the TA, the process must seek to clarify functions, competencies and responsibilities assigned to the two levels of government. It must seek to achieve clarity in the functional assignment through unbundling and clarifying them and assigning competencies between the national and county governments; determine the service level gaps in respect of each competency; determine the expected performance level; allocate funds to levels of government according to their service delivery mandates; identify capacity and capability constraints; develop a short, medium to long term capacity building programmes; and review the organization of national government to reflect the assignment of functions under the Constitution.⁴²

The process of unbundling and transfer of functions and powers is intergovernmental and must be accomplished in a cooperative intergovernmental process. Thus, unbundling is not a process through which the national government has the discretion to determine what and what not to assign to county governments. Unbundling must involve both levels of government interpreting the Constitution and analyzing the functions in a cooperative and consultative manner to determine which level has been assigned which functions. This must be done in all the major devolved sectors to determine the proper functional assignment in those sectors. Once such determination is made, the clarified functional assignment in the sector can then be reduced into legislation that deals with that specific sector.

5.3.2 Restructuring the Old Order Institutions

A major emerging issue has been the retention of the old order institutions whose functions have been devolved to county governments. This has the effect of duplication of roles leading to wasteful use of limited financial and other resources. The transition from the centralized system to the devolved system of government entails the deconstruction of the old order and some of its institutions and the construction of the new order with its new institutions. In particular, unbundling and transfer of functions entails raising the question of which institution used to perform the transferred functions under the old centralized system. Where the functions used to be performed by the former Local

⁴² *The End-Term Report of the TA (2016) page 18.*




Authorities, the Constitution required that the Local Authorities would be immediately abolished upon the first elections under the new Constitution being held. As such, the functions were immediately transferred to the newly created county governments. Where, however, the functions were being performed by the former central government, unbundling and transfer of functions and powers would necessitate a re-examination of the old order institutions that used to perform the functions. Such institutions must be re-examined to either, transfer the personnel concerned to the level of government to which the functions are transferred; restructure the institutions to make them consistent with the devolved system of government, or simply abolish the institutions.

The concept of restructuring the old order institutions is captured by section 17 of the Sixth Schedule to the constitution which provides for the restructuring of the former provincial administration “to accord with the system of devolved government”. A purposive interpretation of this provision indicates that not only the uniformed aspect of provincial administration required re-examination and restructuring but also the line ministries which had structures and officers in the provinces, districts, and divisions performing functions that have been devolved to county governments. The government in the centralized old order did not, however, deliver all its services through line ministries. Many other services were delivered through the very many state corporations and parastatals. The functions performed by these state corporations and parastatals must be unbundled and transferred to county governments where the Constitution assigns them to county governments. Unbundling and transfer of such functions thus requires the re-examination and restructuring of these state corporations and parastatals to accord with and respect the devolved system of government. Some of them may have to be abolished altogether while others are restructured to become entities of the level of government to which the functions have been assigned and transferred or joint entities of both levels of government.

5.3.3 Unbundling in the Health Sector

The unbundling of the health functions and powers is a cooperative and intergovernmental process which must be undertaken by both levels of government. The IGRTC may thus seek to bring together players from both the national government Ministry of Health and the county ministries of health to undertake the process. This is a proper case for a sectoral consultative forum in the health sector, which may be convened in terms of section 13 of the Intergovernmental Relations Act, to cooperate, consult and negotiate the unbundling and transfer of functions and powers. The consultative forum may, however, have high-level participation from the CoG represented by its sectoral working group or committee envisaged by section 37(d) of the Intergovernmental Relations Act.



The consultative forum should also have participation from stakeholders in the health sector such as the Medical Practitioners and Dentist Board and the health workers trade unions.

5.3.3.1 Unbundling and Transfer of Health Functions

The first issue the consultations must focus on is the functional assignment in the sector to clarify and clearly define the functions and powers of each level of government. Health is one of the major devolved sectors. While the national government is assigned the functions of health policy and national referral health facilities, county governments are assigned county health services, including county health facilities and pharmacies; ambulance services; promotion of primary health care; licensing and control of undertakings that sell food to the public; veterinary services (excluding regulation of the profession); cemeteries, funeral parlours and crematoria; and refuse removal, refuse dumps and solid waste removal, nuisances and outdoor advertising.

Analysis and unbundling of the health functions and powers must go beyond these provisions as health issues are cross-cutting and also appear in other functional areas which must be examined. Failure to do this creates difficulties in getting clarity in the assignment of the health function and a full picture of what functions may be exclusive and which ones are concurrent to the two levels of government. For example, consumer protection, education and research, protection of the environment, and disaster management, which are identified as national government functions, have health aspects that must be considered during the unbundling process. Likewise, county government functions such as the agriculture plant and animal disease control function; control of air pollution and noise pollution; cultural activities such as liquor licensing including production and consumption; and animal control and welfare including facilities for the accommodation, care and burial of animals, have important health aspects. The county government functions relating to the environment, water and sanitation services, fire-fighting services and disaster management, and control of drugs and pornography have important health aspects that must all be considered in the unbundling process.

The process must identify exclusive and concurrent health functions and powers and come up with three lists for the national government exclusive functions and powers; county government exclusive health functions and powers; and the national and county government concurrent health functions and powers. This must be followed up by a clarification of what aspects of the concurrent functions and powers are to be undertaken by which level of government.

5.3.3.2 Transfer and Management of Human Resources in the Health Functions


Management of human resources in the health sector has emerged as a second major issue that is threatening to derail the devolution of the health sector. Though health is one of the most important and successfully devolved sectors, several challenges have been experienced concerning the management of the transfer of health workers to county governments, which, it would seem was mismanaged and needs to be sorted out. A large number of health workers including doctors and nurses were transferred to county governments even before the county governments had put in place their own human resources management systems including payroll systems. It appears that there was a failure to conduct change management training sessions, to prepare these health workers, which has led to resistance on their part.

As a result, there have been frequent complaints and strikes by health workers in the various county governments about issues such as delayed payment of salaries, posting of intern doctors, posting of doctors after the internship, demands for the establishment of a Health Workers Commission among others, which are undermining service delivery. There are those such as members of Parliament and health workers' unions who have even suggested that the health sector should not have been devolved and that it should be reverted to the national government. Yet statistics also record stories of immense success in the health sector with improvement recorded in the services and their delivery. Many counties have invested in ambulances thereby improving the speed at which patients in urgent need of medical attention are delivered to health facilities. Many counties have improved medical equipment in their hospitals. Many have purchased generators to supplement the poor supply of electricity to ensure that operations can go on even when the power goes out.

The persistence of the problem is perhaps due to failure by some players to fully understand the constitutional framework and the mechanisms it provides for addressing some of these issues. While county governments have been given administrative autonomy to establish their administrations and or public services, the Constitution recognizes that they must exercise that autonomy within a framework of uniform norms and standards established by national legislation. Article 235(1) renders this position in terms following:

A county government is responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for:


- a) establishing and abolishing offices in its public service;
 - b) appointing persons to hold or act in those offices, and confirming appointments;
- and

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- c) exercising disciplinary control over and removing persons holding or acting in those offices.

The provision imposes an obligation on the national legislature to establish the uniform norms and standards which county governments must comply with when managing their human resources. As the controversy in the health sector continues, Parliament has not yet enacted any law that establishes uniform norms and standards for health workers. This failure by Parliament has largely contributed to the complaints raised by health workers which are adversely affecting the delivery of health services by county governments. This is a matter which cooperation and intergovernmental consultations and negotiations must deal with. The levels of government together with stakeholders such as trade unions of health workers and regulatory professional bodies in the health sector must consult on and determine what the uniform norms and standards should be. They must reach agreement on the matters that should be formulated as issues requiring uniform norms and standards and make proposals regarding what should go into legislation. The issues may include minimum wages that counties may pay, posting for an internship, appointment into employment after the internship, career progression including promotion and further studies, transfer from the employment of one county to the other, and transfer from the employment of one level of government to another. The health workers concerns have included worries about separately negotiating collective bargaining agreements with 48 different governments. For example, establishing minimum wages that a county may pay to personnel of a particular category as one of the uniform norms and standards would address this problem. The issues the health workers have been raising are valid and need to be addressed through cooperative government and intergovernmental relations.

5.3.3.3 National Legislation on Health


Whatever intergovernmental agreements the governments arrive at touching on the emerging health issues in the health sector should be enacted into health legislation. This may involve the review of several legislations in the health sector to make them consistent with the devolution of the health sector, and enactment of new legislation to address some of the issues identified. For example, the Health Bill still pending for enactment ought to be closely examined to ensure that it effectively addresses and provides for all the identified issues. Moreover, the process of reviewing the old laws and examining the Health Bill must be cooperative and intergovernmental involving both national and county governments. The Health Bill must have parts with provisions dealing with the following matters.

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- 1) The clarification of 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.
 - 2) The sharing of the concurrent health functions among national and county governments indicating which level of government is responsible for which aspects of the concurrent functions.
 - 3) 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.
 - 4) The establishment of joint institutions in two areas—one which is advisory, dedicated to the management of human resources matters in the health sector, and another for procurement of medical equipment and supplies, both of which are discussed in detail in the next two sections.

5.3.3.4 A Joint Institution for Human Resources Management in the Health Sector

As already noted the Kenyan devolved system of government is a hybrid of a dualist and integrated system. While the system is highly integrated into many respects, there are also some very clear dualist features. For instance, in respect of the civil service, the Constitution settles for distinct public services for each of the two levels of government. County governments have administrative autonomy over their public servants. As noted, Article 235(1) empowers them to have and manage their public services, subject to uniform norms and standards established by national legislation. According to this constitutionally recognized administrative autonomy, sections 55 to 86 of the County Government Act make very elaborate provisions about county governments' public services with fully-fledged County Public Service Boards as well as County Assembly Public Service Boards.

Yet it is acknowledged that human resources management is an expert area that is studied leading to qualified professionals. Within the profession, there are also specialized areas that cannot be effectively handled by general human resources managers. For example, there are specialized areas and courses in health management distinct from general human resource management. This necessitates some disaggregation in human resource management to cater for these specialized areas. It is for these reasons that even under the old constitutional dispensation, both teachers and health workers were managed differently, outside the Public Service Commission system. While the Teachers Service Commission managed the teachers' human resource issues, the ministry of health had a




department dedicated to the human resource management of the health workers. The health workers have in the past demanded the establishment of a constitutional Health Workers Commission to handle human resources management matters.

While such a Commission cannot be established without amendments to the Constitution and may not be necessary, it is possible to establish a negotiated advisory joint institution to advise the two levels of government on management of human resources in the health sector without compromising the administrative autonomy of the county governments. Such a joint institution would advise on the management of human resources in the health sector for both national and county governments, including formulating the uniform norms and standards on the issues raised by health workers. This would avoid unnecessary strikes and improve service delivery. Article 189(2) obligates governments at both levels, to cooperate in the performance of their functions and exercise of their powers, and for that purpose, may set up joint committees and joint authorities to which, they may delegate and or transfer some of their functions and powers. Under these provisions sections, 24 to 29 of the Intergovernmental Relations Act have made provision for transfer and delegation of powers, functions and competencies. Section 24 in particular, recognizes that functions and powers may be transferred and delegated to not only other levels of government but also to “joint committees, authorities or entities”. It is thus, recommended that the IGRTC facilitates the two levels of government while negotiating other matters in the health sector, to also negotiate an intergovernmental agreement to establish an advisory Joint Human Resources Management Authority. This Joint authority should be provided for in the Health Act. The Act must provide for the appointment of its members, funding, and control by both levels of government as well as its reporting to both levels.

5.3.3.5 A Joint Institution for Procurement of Medical Equipment and Supplies

Similarly, issues of procurement of medical equipment and supplies are specialized in nature and remain controversial calling for resolution. While county governments have financial autonomy including procurement of their goods and services, the national government has the responsibility to protect consumers including through the control of quality standards of the goods procured. This is more imperative in the health sector. Under the old centralized constitutional system, all medical equipment and supplies were procured centrally through the Kenya Medical and Supplies Authority (KEMSA). With the advent of devolution, KEMSA has been restructured with all county governments required to procure their medical equipment and supplies through KEMSA which has, however, remained a national government entity.



It is thus recommended that the restructured KEMSA be re-examined with a view to re-establishing it as a joint authority of both national and county governments. This must once again be done through cooperative intergovernmental consultation and negotiation leading to intergovernmental agreements that must be included in the Health Act. The IGRTC may thus begin by itself re-examining KEMSA and advising appropriately.

5.3.4 Unbundling in the Roads Sector

Unbundling, costing and transfer of functions and powers in the roads sector have also raised issues regarding the correct classification of national trunk roads and county roads, and the allocation of adequate funds to perform the transferred roads functions. These issues suggest the unfinished business of transition to devolved government in this sector. County governments are still raising issues regarding the classification of roads and the funding of those transferred to the counties. Many roads classified as national trunk roads are county roads which ought to be transferred to county governments. In the formula for the vertical division of revenue between the two levels of government proposed for the financial year 2016/2017, more roads were transferred to the county governments without commensurate funds being added to them. Attempts by both CRA to get more funds allocated were rejected by the national government. Unbundling in this sector must thus re-examine the classification of roads and ensure the transfer of all those that are rightly regarded as county roads. It must also involve the costing of the transferred county roads and ensure the allocation of the necessary funds.

5.3.4.1 National Legislation on Roads


Unbundling in this sector must also re-examine and review all old order legislation as well as the new ones to ensure that they are consistent with the devolved system.

5.3.4.2 Joint Institutions for Roads Construction and Maintenance

The reviewed older order legislation and newly enacted legislation must restructure the old order institutions in the sector and make them consistent with the devolved system. In particular, the Kenya Urban Roads Authority and the Kenya Rural Roads Authority must be restructured into joint Authorities of both the national and county levels of government.

5.3.5 Unbundling in the Housing Sector

Functions and powers in the housing sector could also be unbundled following the same cooperative intergovernmental engagement as is explained in the case of the health and roads sectors. According to the Fourth Schedule, while the national government is assigned the function of housing policy; the county governments are assigned county



planning and development including among other things, housing. This function has raised issues of concern especially given that national government seems to be going beyond its policy functions and allocating itself a lot of money for the actual construction of houses, a function that falls in the domain of county governments.


It is also important to note that the housing construction sector in the country has suffered a lot from the problem of collapsing structures that lead to the death of innocent citizens. There seems to be a disconnect between the regulatory framework encompassing standards and quality of construction and the enforcement and implementation of this framework. This raises the question as to who is failing in his responsibility and should be held accountable. This is a sector in which some very difficult decisions need to be taken to streamline the sector. This would better be done in a cooperative intergovernmental manner. There is a need to re-examine and review legislation in the housing and construction sector in a cooperative intergovernmental approach to address the problems bedeviling the industry. The establishment of the statutory National Construction Authority in terms of the National Construction Authority Act of 2011 is an issue that may need to be re-examined to replace it with a joint institution. As currently constituted, the Authority does not make provision for participation by county governments, yet its functions have serious implications for several county government functions. The National Construction Authority Act touches on not only the housing functions of county governments but also the roads, water, and energy functions of county governments. This is, therefore, legislation that should have been formulated through cooperative intergovernmental engagement between the two levels of government.

5.3.6 Unbundling in the Water Sector

Unbundling in the water sector in which both levels of government have been assigned some water functions, must also be done in a cooperative and intergovernmental manner. The process must examine the functions, the existing old order legislation and the restructuring of the state corporations and parastatals such as the Regional Water Boards, to replace them with joint institutions that can serve the interests of both levels of government. Consideration should be given to transferring the Regional Water Boards to joint institutions of groups of counties within the relevant regions. These joint institutions could be owned jointly by the relevant counties alone or with the national government.

5.3.7 Unbundling in the Agriculture Sector

Unbundling in the agriculture sector must follow the same matrix that has been set out in this report. It must examine the functional assignment to the two levels of government



to determine which level does what. Agriculture is one of the sectors in which there are very many laws that need to be reviewed to align them with devolution. Quite a number have been reviewed and replaced with new laws which still do not meet the threshold according to and respecting the system of devolved government. IGRTC must thus encourage a review in a cooperative and intergovernmental manner.


Similarly, agriculture is an area in which there have been very many state corporations that deliver services in functional areas that have been devolved to county governments. These state corporations require re-examination and restructuring to ensure that they accord with and respect the system of devolved government. Some of them may require replacement with those that are consistent with the devolved system of government, while others may have to be abolished altogether.

5.4 Fiscal Intergovernmental Relations

The Constitution of Kenya, 2010 has assigned financial powers and resources to the two levels of government in a manner that raises several issues that necessitate cooperative intergovernmental engagement. Both levels of government are assigned some revenue-raising powers, though tilted in favour of national government which has been assigned tax bases that raise more money. The counties are assigned very limited revenue sources. There is, therefore, an imbalance in the fiscal arrangements which necessitate heavy reliance by county governments on transfers from revenue raised nationally. Because of this, the revenue raised national accrues not exclusively to the national government but jointly to both national and county governments. The county governments are thus, entitled to an equitable share of the revenue raised nationally.

5.4.1 The Institutional Framework for Fiscal Intergovernmental Relations

The financial design mentioned above necessitated the establishment of a multiplicity of institutions that play a critical role in the fiscal intergovernmental relations. These include the Commission on Revenue Allocation, the Senate, the National Assembly, the Summit, the CoG, the Intergovernmental Budget and Economic Council, and the National Treasury. The IGRTC must examine how effectively each one of these institutions is performing its role and facilitate them to improve. Of particular concern is the National Treasury whose massive functions and powers fundamentally impact upon the activities of both levels of government. The Treasury has powers to make regulations in many areas meant to govern the operations of county governments. It is recommended that the National Treasury exercises those powers in a cooperative manner. It should consult the county governments about proposed regulations and circulars before they are



issued to secure their input in advance. Consulting with those supposed to be governed by regulations and circulars in advance will not only secure their input but also their support of the regulations and circulars, thereby reducing resistance. It can be part of the change management strategies meant to prepare the county governments to accept the regulations and circulars and avoid resistance.


5.4.2 Intergovernmental Relations on Powers to Raise Revenue

Although Article 209(3)(2) and (b) assigns to county governments very limited revenue-raising powers; namely, property rates and entertainment taxes; Article 209(3)(c) also empowers county governments to impose “any other tax that it is authorized to impose by an Act of Parliament”. This means that parliament can through legislation expand the revenue-raising powers of the county governments. So far parliament has not yet enacted any legislation identifying any other tax for county governments and authorizing them to impose it. The effective use of this provision to enhance the revenue sources of county governments is certainly a matter that requires cooperative intergovernmental engagement between the two levels of government. The governments must cooperate, consult and negotiate about the possible other taxes that the county governments could be authorized to impose. The IGRTC must, therefore, facilitate the national and county governments to engage with each other to identify additional viable sources that may enhance the own revenues of county governments.

5.4.3 Intergovernmental Relations on the Vertical and Horizontal Division and Allocation of Revenue Raised Nationally

Given the historical fiscal imbalances and development as well as service delivery deficits that devolution was intended to address, the Constitution has established the principle that equitable shares are entitlements of the levels of government. County governments are entitled to the equitable shares which are not discretionary gifts of the national government to them. This principle makes the process of sharing the revenue raised nationally a highly controversial matter that requires a very well managed process of cooperative government and intergovernmental fiscal relations. It is for these reasons that both the Constitution and legislation have established a multiplicity of institutions that play important intergovernmental fiscal relations roles. Many of these institutions have not realized their role and discharged them effectively. Others such as the National Assembly and the Senate have been blinded by self-vested interests and acted in a manner that undermines devolution.

This multiplicity of institutions cannot propel themselves—they must, however, be supported and aided by other institutions and players. It is submitted that the IGRTC was



established as an important institution meant to aid and propel these other institutions into performing their intergovernmental relations role. One issue the IGRTC as a body that has the mandate to implement the decisions of the Summit, the Council, and other intergovernmental forums must start addressing is the problem of the failure by the National Treasury to follow through negotiated decisions of the Summit. It must also start addressing the issue of whether the recommendations of the CRA can just be ignored without due justification and explanation.


Arising out of the principle of equitable shares being entitlements is the issue of delay in the transfer of funds to county governments and the change from quarterly to monthly transfers. The change was implemented even without amending the relevant legislation. The IGRTC must take up these matters and facilitate the national and county governments to engage each other cooperatively to find a lasting solution.

5.4.4 A Framework for Conditional Grants

In terms of Article 202(2), in addition to the equitable shares, the county governments may also be given additional allocations from the national government's share of the revenue, either conditionally or unconditionally. Conditional grants are equally controversial and call for cooperative intergovernmental consultations and negotiations to develop an agreed framework for allocations of such grants and the kind of conditions that may be attached to them. The negotiations and agreement must address issues such as whether the conditional grants should be indicated in the Division of Revenue Bill, the fact that such grants must be included in the county government budget since a county government cannot spend money not included in its budget; the process of monitoring compliance with the conditions and by whom; and the reporting mechanisms about the implementation of the conditions among others. The IGRTC must facilitate the governments and other players to engage each other and settle this matter conclusively. The intergovernmental agreement arrived at must also be legislated into law.

5.4.5 A Framework for the Expenditure of the Equalization Fund

An important emerging issue which requires intergovernmental engagement regards how to expend the money voted to the Equalization Fund. Article 204 of the Constitution establishes the Equalization Fund meant to provide basic services such as water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of services in those areas to a level generally enjoyed by the rest of the country. Article 204(3) provides for the use of the money in the following manner: "The national government shall use the Equalization Fund—either directly, or indirectly through conditional grants to counties in which marginalized communities exist." The




controversy between the national and county governments has been on the issue of whether the national government has absolute discretion to determine whether to use the money directly or through counties.

A purposive interpretation which looks at the objects of devolution among other constitutional and statutory provisions leads to the conclusion that the national government has no such discretion. The basic services on which the Fund is to be used fall within the functional domain of county governments which must align the expenditure of the Fund to the County Integrated Development Plan (CIDP). The objects of devolved government, on the other hand, include the giving of powers of self-governance to the people; and the enhancement of their participation in the exercise of the powers of the state and in the making of decisions that affect them. The recognition of the right of communities to manage their affairs and further their development; and the protection and promotion of the interests and rights of minorities and marginalized communities are also listed as objects of devolved government. Interpreted in this manner, one concludes that the Equalization Fund is meant to be spent through county governments as conditional grants. In this event, such conditional grants become a matter of intergovernmental engagement. It is recommended that the interpretation of the controversial provision should be done in a cooperative and intergovernmental manner leading to agreement on a framework for the expenditure of the Equalization Fund.

5.4.6 A Framework for Mobilization and Sharing of Donor Grants

A distinction must be made between conditional grants provided for by Article 202(2) and donor grants which the county governments may receive from both internal donors and foreign development partners. Although legislation recognizes that county governments can receive donor grants, difficulties still exist in the operationalization of this provision. There is a need for a cooperative intergovernmental approach towards this subject to enable the governments to come up with a framework that works for the interests of both. While county governments would like to access donor grants as part of their revenue mobilization strategy to boost the revenues for development and services delivery; the national government has macro-economic responsibilities to discharge to ensure a coordinated system and the fulfilment of the donor conditions attached to the grants.

All these issues can be negotiated and settled through intergovernmental agreements which may also enable national government and donor partners to secure good governance and fiscal discipline undertakings from county governments as part of the attached conditions. Once the agreement is reached some of the agreed terms can be



enacted into legislation to provide a framework for future use. The IGRTC must thus flag out this matter and pursue it for cooperative intergovernmental interaction among the governments.

5.4.7A Framework for Borrowing by Both National and County Governments


The Constitution permits county governments to resort to borrowing as part of their strategy for mobilization of revenue. This can, however, only be done in terms of Article 212 of the Constitution, if the national government guarantees the loan; and the county assembly approves. Article 213 prescribes that the terms and conditions of such loan guarantees by national government must be set out in an Act of Parliament. The Article also requires the national government to publish annual reports about the guarantees that it gave during the ended financial year. This is meant to ensure transparency and fairness in the system of granting loan guarantees to county governments.

Borrowing by both national and county governments has implications for macro-economic stability and becomes an important issue for cooperative intergovernmental engagement by both levels of government. The past three years have indeed, seen controversy surrounding this issue which must be resolved through cooperating intergovernmental strategies. There is a need to negotiate a clear framework for borrowing by both levels of government and how to enforce controls on the borrowing power of both governments. None of the levels of government should be allowed to bankrupt or mortgage the country and the welfare of future generations through borrowing.

5.4.8 The IFMIS and E-procurement Framework and its Implementation

The introduction of IFMIS and e-procurement and its implementation by county governments has raised a lot of problems for county governments. Indeed, the problems experienced bear testimony to the fact that it is dangerous for the National Treasury to be introducing new measures without consulting with the county governments that are required to use them in the management of the finances. While devolution was adopted to effectively question and correct the problems emanating from the political economy of marginalization, developed since the colonial days; IFMIS and e-procurement seem to be founded upon centralization, which undermines the devolution policy objectives of equalization through affirmative action in procurement. The system was also introduced without proper preparation and management change courses to prepare the users.

The e-banking aspects of IFMIS which require all county governments to bank their money in the Central Bank was also introduced without consultation and amendment of the Public Finance Management Act (PFMA), which allows county governments to bank their money either in the Central Bank or any commercial bank. Section 109(4)(a) of the




PFMA provides in this regard that “the County Treasury shall arrange for the County Revenue Fund to be kept in the Central Bank of Kenya or a bank approved by the county executive committee member responsible for finance and shall be kept in an account to be known as the “County Exchequer Account”.

From the problems that have been experienced, it becomes clear that these issues call for cooperation and intergovernmental resolutions. The IGRTC must thus engage the National Treasury on these matters and facilitate its engagement with the county governments to secure agreed approaches to the resolution of the matters. Indeed, when it became apparent that this ought to have been the approach, the Summit meeting of late 2015 resolved that both the CoG and the National Treasury should cooperate and consult to find a way forward. This initiative ought to be encouraged for use in many other matters in which the National Treasury plays a fundamental role. Moreover, the problems arising out of the adoption of the IFMIS and e-procurement system underscore the fact that although the National Treasury is regarded as one of the ministries in the national government, it is established by the constitution and conferred with very many responsibilities of an intergovernmental nature. These responsibilities elevate the Treasury into an important intergovernmental relations organ that may require to be made independent of both levels of government for it to earn the trust of both.

5.5 Audit, Verification, and Transfer of Assets

One of the tasks which the TA had been mandated to undertake was the audit, verification, and transfer of assets. The TA has reported having undertaken very many activities in this respect. However, it has also identified and reported a long list of activities that are pending in the area and remain as unfinished business of the TA which the IGRTC must take over and complete. These include a wide physical verification exercise of the assets and liabilities of the defunct local authorities using independent experts like Forensic Auditors, Actuaries; and preparation of an inventory of the remaining seven ministries of the national government. Also listed, are the verification and audit of the inventory of assets and liabilities of all the nineteen ministries of the national government; and preparation of the inventory of the remaining one hundred and fifty-six state corporations and agencies. Other unfinished activities are the verification and audit of the inventory of assets and liabilities of all the state corporations in Kenya; and the development of guidelines on disposal of bonded public assets which needed to be publicized more to reach all the public entities. Gazettement of the developed regulations for transferring or sharing of public assets and liabilities between the two levels of government; and the facilitation of the transfer of assets and liabilities between the two levels of Government



also remain as pending matters. Other pending activities are the dissemination of the mechanism to all stakeholders; dissemination of the validated criteria to all stakeholders; transfer of previously shared assets and liabilities between the two levels of Government; gazettelement of the transferred assets and liabilities; and publication of the validated (verified and audited) inventory in the Kenya Gazette.⁴³

As already noted, the process of restructuring state corporations and parastatals has not been undertaken. Yet some of them perform functions that have since been devolved to county governments. They also hold public property and assets, which may require to be transferred to the two levels of government when the corporations are eventually abolished or restructured. All these matters evidence the unfinished business of audit, verification and transfer of assets. These assets risk being stolen or lost during the transition from the TA to the IGRTC and urgently need to be protected. Indeed, the TA in its End-Term Report has identified this as one of the urgent emerging issues and made the following worrisome observation.

The moratorium on the transfer of public assets and liabilities as provided for in Section 35 of the TDGA, 2012 ceases with the elapse of the TDGA, 2012 on 4 March 2016. This will provide a lacuna where public assets and liabilities attached to devolved functions can easily be transferred, and these transfers cannot be reversed due to the expiry of the moratorium. The security of public assets and liabilities attached to devolved functions will be compromised.⁴⁴

The IGRTC must thus, move with haste and resolve these matters by engaging both levels of government in a cooperative and intergovernmental manner.

5.6 Audit, Verification, Validation, and Liquidation of Liabilities

The TA also had a responsibility to audit, verify, validate and provide for a process of liquidation of liabilities. As indicated in the previous section this aspect also remains unfinished business. In the mean-time confusion reigns with some Courts ruling and ordering that county government automatically inherits the liabilities of the former Local Authorities, in the same manner, they inherited the assets. In some cases, county officials are being threatened with committal for contempt of court for failure to pay in terms of Court Degrees. Other Courts in similar matters declined to make orders of this kind preferring to wait for the decision of the TA.

⁴³ *The End-Term Report of the TA (2016) page 56.*

⁴⁴ *The End-Term Report of the TA (2016) page 57.*

Now that the TA has ceased to exist, the IGRTC must take over this matter and finalize it. It is recommended that the IGRTC deals with these matters from the perspective of cooperation and intergovernmental consultation and negotiation.

The TA in its End-Term Report has itself identified some emerging and worrisome issues which urgently need to be attended to. Key among these issues is the spiralling interest rates on unpaid liabilities. It has in this respect observed that:

The liabilities attached to devolved functions which include: unpaid loans, unpaid emoluments, unremitted statutory deductions, unpaid suppliers and other creditors continue to attract interests as the debts are still outstanding.⁴⁵

Another emerging issue which the TA identified and reported about relates to the draft regulations for transferring assets and liabilities about which the TA observed as follows:

The regulations for transferring and sharing of public assets and liabilities between the two levels of governments has not yet been gazetted as such, clarity on which level of government is to bear the responsibility of liabilities attached to devolved functions is not anchored in law.⁴⁶

As part of the lessons learnt, the TA appropriately observed in respect of liabilities that “there is need for further consultation between the two levels of government on how the transferred liabilities attached [to] devolved functions will be settled, with a proposal of a “conditional grant” from the national government”.⁴⁷ The report concludes by referring a multiplicity of unfinished matters of assets and liabilities to the IGRTC to deal with through intergovernmental relations.⁴⁸

5.7 Rationalization of Staff and Harmonization of Terms and Conditions of Service

The TA also left as unfinished business the task of rationalization of staff and harmonization of the terms and conditions of service of staff of both national and county governments. Although a process of rationalization of staff was undertaken and recommendations made on what needs to be done, the two levels of government have developed cold feet and failed to implement some of the recommendations that required retrenchment of some staff members. As such, the TA has identified the pending issues in this respect as being

⁴⁵ *The End-Term Report of the TA (2016) page 57.*

⁴⁶ *The End-Term Report of the TA (2016) page 57.*

⁴⁷ *The End-Term Report of the TA (2016) page 57.*

⁴⁸ *The End-Term Report of the TA (2016) page 58.*

the “rationalization, deployment and transfer of human resource; and the “finalization of closure and transfer of public records and information”.⁴⁹ The reason for developing cold feet is informed by the fear of political consequences given that the election period is drawing close. Postponing the finalization of this process is simply postponing a problem which eventually will have to be addressed.

The failure to conclude this issue has left county governments with four different categories of staff, all working on different terms and conditions of service. Some were inherited from the former local authorities; those who were seconded from national government headquarters; those who were working in the counties in the sectors that were devolved; and those who have been employed by the county governments. This has left some counties with more staff than they require thereby straining their wage bills. While some are on permanent and pensionable terms, others are on periodic contract terms.⁵⁰ Failure to address the problem of contract terms is likely to expose the concerned staff to the risk of loss of employment when new county governments are elected. The IGRTC must thus take up these matters and start pursuing them in a cooperative and intergovernmental manner.


5.8 The Role of the Senate and its Relationship with Other Institutions

There are also important emerging issues relating to the Senate, its role in the devolved system, and its relationship with other institutions which require intervention through intergovernmental relations. In terms of Article 96(1), the Senate is established primarily to represent the counties and serve to protect the interests of the counties and their governments. However, because of reference to the exercise of “oversight over national revenue allocated to county governments” in Article 96(3), the Senate has over-focused on oversight functions in total disregard of its primary role to represent and protect the county governments and their interest among others. This has strained the relations between the Senate and the county governments especially the county governors. Furthermore, the Senate has over-focused on this oversight function in total disregard of the constitutional oversight functions of the county assemblies. With time this is likely to also strain the relationship between the Senate and the members of county assemblies.

The IGRTC may need to facilitate intergovernmental engagement among these institutions to come up with an agreed interpretation of the oversight powers of the Senate under

⁴⁹ *The End-Term Report of the TA (2016) page 71.*

⁵⁰ *The End-Term Report of the TA (2016) page 72.*




Article 96(3) if any, and the limits that must be imposed on their exercise to avoid intruding into the functional domain of the county assemblies and subsequent straining of the relations with the county governments.

Relations between the Senate and the National Assembly have also been strained over the process of determination of Bills concerning counties within the meaning of Article 110 of the Constitution. Because of this many Bills have been enacted without the involvement of the Senate, thereby undermining devolution. The IGRTC must facilitate intergovernmental engagement among the two Houses of Parliament and the county governments to consult, negotiate, and agree on the proper procedure for the determination of Bills concerning counties. An intergovernmental agreement in this respect could be reduced into legislation to recognize the obligation of the county Senators to consult the county governments of their respective counties; structure the consultations; require all Bills to be introduced in both houses of Parliament; require the Bills passed by Parliament to be presented to the President for assent with a certificate of compliance signed by the two Speakers of both Houses of Parliament, and prohibit the President from assenting to any Bill not accompanied by such certificate.

5.9 Intra-governmental Relations

A distinction must be drawn between intergovernmental relations, which are expressly provided for by Articles 6(2) and 189; and intra-governmental relations for which there is no express constitutional provision. Intergovernmental relations refer to vertical interactions between the national and county governments and horizontal relations among county governments. Intra-governmental relations, on the other hand, refer to interactions and relations among different institutions and/or organs of state within the same government. For example, at the national level, intra-governmental relations may involve interactions between the Legislature and the Judiciary; the Legislature and the Executive; the Judiciary and the Executive; and even the National Assembly and the Senate. At the county level, intra-governmental relations may raise issues of interactions between the county executive and the county assembly; the county governor and the county assembly; the county governor and the deputy county governor; and the county assembly speakers and the county assembly members.


A major emerging devolution issue relates to these intra-governmental relations. The experience of the past three years or so has disclosed that interactions at this intra-governmental level have not been smooth. There have been more intra-governmental conflict than cooperative relations among various institutions at these levels. At the national level, relations between the Judiciary and the Legislature as well as the Executive have



been acrimonious with the Legislature and the Executive complaining that the Judiciary is overreaching its mandate and interfering with their mandates. Similarly, relations between the National Assembly and the Senate have been conflictual rather than cooperative. On many occasions, the National Assembly has proceeded with Bills concerning counties without bothering to involve the Senate as required by the Constitution.

At the county level, conflicts among various institutions have been witnessed. In several counties, conflicts have ruined the working relations between the deputy governors and their county governors. While some of the conflicts have been occasioned by political reasons given that several deputy governors are preparing themselves to run for governorship, there is need to review the County Government Act to spell out the role of the deputy governors. There have also been frequent intra-county conflicts between county assemblies and county executives on several issues. Key among these issues has been the budget process at the county level of government often caused by the allocations made for the county assemblies' expenses. The county assembly members have always complained that county governors collude with the CRA and the Controller of Budget to set budget limits which allocate very little money to the county assemblies. This matter may be addressed by encouraging the CRA to always meet the county executive in the presence of the county assembly members whenever they are discussing the setting of such budget limits. This will avoid unnecessary suspicions. Relations between the county governors and the members of county assemblies have also been strained. One of the reasons for this has been how the MCAs exercise their powers of impeachment of the governors. There have been concerns that these powers are sometimes misused to extort favours from the governors.

Although a strict interpretation of Articles 6(2) and 189 of the Constitution would yield the conclusion that the provisions do not apply to intra-governmental relations, there is evidence that some of these intra-governmental conflicts are negatively impacting upon intergovernmental relations and the policy objectives of devolution. Because of this, these provisions should be given a purposive interpretation within the meaning of Article 259 of the Constitution. Approached in this manner, some of the intra-governmental relations and conflicts should be treated as part of intergovernmental relations and be made subject to the obligations of cooperative government. This would bring them within the domain of the IGRTC which should facilitate intergovernmental relations among the relevant institutions. Indeed, section 3 of the Intergovernmental Relations Act which sets out the objects and purposes of the Act takes a broad approach that seems to include any activities that have an impact on the intergovernmental relations among the governments. Section 3(d) identifies one of the objects and purposes of the Act as



being to “provide a framework for the inclusive consideration of any matter that affects relations between the two levels of government and amongst county governments”. How two or more arms of one government may adversely affect how that government engages in intergovernmental relations with another government, either at the same level or the other level of government. The IGRTC must thus facilitate these intra-governmental relations to avoid their negative effects on intergovernmental relations.

5.10 Accountability by Governors

Another emerging issue that seems to worry many people is the accountability of county governors and how to enforce fiscal discipline among them. The Senate has always justified its exercise of oversight powers over county governments on grounds that the county assemblies are too weak to adequately oversee the county governor because of the control of the huge financial resources. This argument about control of huge financial resources, however, could also explain the keen interest by Senators in being the ones who oversee the county governors. The IGRTC needs to facilitate intergovernmental engagement among Senators, governors and county assemblies to come up with a way forward.

5.11 A Framework for Alternative Dispute Resolution

Having established the principle of cooperative government, Article 189(3) of the Constitution then requires the governments to make every reasonable effort to settle the disputes through alternative dispute mechanisms provided for by national legislation. Article 189(4) identifies some of such procedures that the legislation may provide for as including negotiation, mediation and arbitration. Although sections 30 to 36 of the Intergovernmental Relations Act provide for alternative dispute mechanisms and processes, these have so far not worked well. This may in part be attributed to the fact that the Minister has not yet formulated and published regulations to provide for dispute resolution mechanisms as required by section 38(2)(c) of the Act. It is submitted that in the exercise of his powers under this section, the Minister is subject to the obligations of cooperative government and must thus ensure that such regulations result from intergovernmental agreements between the two levels of government. The IGRTC should, therefore, handle this matter of regulations as one of the emerging issues on which it must facilitate intergovernmental relations.

5.12 Gender Balance and Participation in IGR Structures and Institutions

As part of the effort to promote democratic and accountable government, the Constitution of Kenya, 2010 puts a lot of emphasis on public participation and involvement in governance issues. The Constitution has express provisions requiring the participation and involvement of various marginalized groups such as women. The Constitution explicitly establishes the principle that no particular gender shall have more than two-thirds representation in any given public office. A major emerging issue is how to realize this principle in some of the intergovernmental relations structures and institutions. While the Senate and the CRA which play a critical role in intergovernmental relations have representation from both genders, the National and County Government Coordinating Summit and the CoG do not have representation from the female gender. In terms of the Intergovernmental Relations Act, the Summit comprises the President and the 47 seven-county governors, while the CoG comprises the 47 county governors. The challenge is how to secure women representation in these two bodies given that both the president and the governors are elected to office by the voters who did not elect any woman to any one of the two offices. Although some people have suggested that women deputy governors be allowed participation, this would detract from the theory that these are bodies through which the heads of government at both the national and county levels meet to interact. To address this problem, the focus should be on how to ensure the election of some women governors at the next elections.

5.13 Preparation for Management of Another Transition

The country is due to hold elections in August 2017 which are likely to lead to the election of very many new persons to various offices. Taking into account the Kenyan historical experience of high numbers of members who lose their seats at elections, there certainly will be many new MCAs, National Assembly members, Senators, governors who will appoint new CECs, and even new cabinet secretaries. Many of these newcomers may know very little if not nothing at all about the devolved system, yet they will be required to work in the system. The IGRTC will thus, require to prepare for systems of training, induction or capacity building on devolution matters but more especially on cooperative government and intergovernmental relations. The term of the CRA is due to expire at the end of 2016 when new members should be appointed. Given that there is no provision for a staggered process of replacing the commissioners, there will be loss of institutional memory, as new members will be appointed who will begin from the scratch to understand the issues. While the secretariat members will remain in office and carry onboard the institutional memory, the new members as the policymakers may take a completely new approach that may undermine the gains already made in devolution and intergovernmental relations. Yet the CRA is a critical intergovernmental relations structure for fiscal intergovernmental relations.

6 Best Practices in Intergovernmental Relations

Introduction

There is no single country that provides a complete set of comparative best practices in intergovernmental relations. The IGRTC must, therefore, pick and choose lessons that are relevant to different issues from different countries. This choice must be guided by the fact that this report has classified the Kenyan devolved system as being, by and large, an integrated system. From this perspective, some of the countries Kenya must turn to for best practices in intergovernmental relations must be those such as South Africa and Germany, both of which have integrated systems. There are also some best practices on specific issues that will be drawn from countries with dualist systems such as Canada, Australia and India.

6.1 Best Practices from South Africa

Several reasons make the South African devolved system an important source for lessons and best practices in intergovernmental relations for Kenya. Key among them is the fact that the Kenyan devolved system borrowed heavily from the South African system. Indeed, several Kenya's constitutional provisions on devolution are similar to the South African provisions almost word for word. A good example is Article 203 of the Constitution of Kenya, 2010 which sets out the criteria to be used in the equitable sharing of revenue raised nationally. This provision is in similar terms with section 214(2) of the South African Constitution which also sets out the criteria for equitable sharing of revenue raised nationally. Most important, however, is the fact that the concepts of distinct and interdependent governments, and cooperative government and cooperative intergovernmental relations provided for by Articles 6(2) and 189 of the Constitution of Kenya, 2010 draw from the South African Constitution which embeds them in sections 40 and 41. In terms of institutional structures for intergovernmental relations, Kenya's Commission on Revenue Allocation and its functions provided for by Articles 215 to 218 of the Constitution of Kenya, 2010 is drawn from the South African Financial and Fiscal Commission which is provided for by sections 220 to 225 of the South African Constitution. Besides the constitutional provisions, several intergovernmental structures provided for by the Kenyan Intergovernmental Relations Act have drawn from some South African statutory structures.


6.1.1 Best Practices Relating to Legislative Institutions and Techniques

In matters relating to legislative institutions and techniques, South Africa offers several examples from which Kenya can draw lessons. The South African parliament comprises two houses—the National Assembly and the National Council of Provinces (NCOP). The NCOP is a house of provinces through which the provinces add their voice to the legislative decision making processes at the national level. One important lesson Kenya can learn from the South Africa NCOP is the rules of procedure which are used to tag Bills that concern provinces. These rules could be used to lay a framework for determining Bills that concern counties to reduce or avoid the conflicts between the National Assembly and the Senate.

Although South Africa has a parliamentary system of government, it has developed very good inter-legislature intergovernmental relations involving the three spheres of government. These take place through several special-purpose bodies and meetings that involve inter-legislature collaboration on matters of common interest among the spheres of government. A best practice that Kenya may learn from is the National Speakers Forum which South Africa has established. This forum brings together speakers of Parliament and the nine provincial legislatures. In most provinces, the provincial speakers have also established equivalent forums bringing them together with their local government counterparts. These speakers fora are used to discuss and deal with a variety of issues including skills development, strengthening the role of constituency offices, and improving communication between legislatures and the public.⁵¹ As recent as 2015, South Africa had a significant collaboration in this respect going on aimed at establishing common national-provincial legislation to regulate the internal budgeting and financial management procedures of provincial legislatures and to increase their ability to hold provincial executives to account. The collaboration of the speakers of the Kenyan National Assembly and the Senate on the one hand, with speakers of county assemblies, could be used to assist county assemblies to enhance their capacity and ability to exercise oversight over county executives and governors and avoid the current situation under which the Senate is taking over the oversight powers of county assemblies.

Another example of a best practice in this area is the Association of Public Accounts Committees (APAC) which South Africa has developed. In the interest of financial probity and accountable administration, national and provincial legislatures have public accounts committees whose function is to oversee public expenditure. APAC was thus formed as

⁵¹ See Derek Powell “Constructing a Developmental State in South Africa: The Corporatization of Intergovernmental Relations” in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 305-349 at p 318-319.



a platform through which these committees could share experience and develop their collective capacity for effective oversight by the two levels of government. Partly as a result of this inter-legislative collaboration, public accounts committees in South Africa have earned a reputation for effective oversight of the country's public finances. These structures are recommended as best practices in intergovernmental relations which Kenya can draw lessons from.

6.1.2 Best Practices Relating to Executive IGR


The Executive arm of the government plays an extremely important role in intergovernmental relations. South Africa offers several important best practices in intergovernmental relations in this respect.

6.1.2.1 The “Extended National Cabinet”

South Africa's innovative concept of an “extended national cabinet” provides provincial and local governments with an important opportunity to contribute to the overall national planning. The “extended national cabinet” comprises the normal national cabinet, the Premiers of the provinces, and representatives of organized local government.⁵² The extended cabinet meets twice a year to set out national priorities and assess progress. The extended cabinet meets in January, to determine the national executive's comprehensive program of action for the year, and in July, to review the progress made. According to Derek Powell, the nine Premiers and representatives of organized local government attend meetings of the extended cabinet. Through the participation of these officials, the provincial and local spheres of government have an opportunity to influence the national executive. All spheres of government are required to submit quarterly reports on the program of action to this extended cabinet. Decisions of this extended cabinet have the status of cabinet decisions and can, therefore, be implemented in the normal manner. The importance of this extended cabinet is underscored by the fact that South Africa's Intergovernmental Relations Act was itself crafted in two full-day sessions of the extended cabinet before the bill was submitted to the regular cabinet for adoption and introduction to Parliament.⁵³ It is recommended that the IGRTC should recommend and facilitate the two levels of government to consider restructuring the national cabinet to create sessions of a similarly extended cabinet. This could be secured through a decision

⁵² See Derek Powell “Constructing a Developmental State in South Africa: The Corporatization of Intergovernmental Relations” in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 305-349 at p 325.

⁵³ See Derek Powell (2015) at p 325.




of the Summit which the president could easily implement administratively since the president has powers to structure cabinet.

6.1.2.2 The President's Coordinating Council (PCC)

South Africa's President's Coordinating Council (PCC) which is the equivalent of Kenya's National and County Government Coordinating Summit is another important best practice in intergovernmental relations that Kenya can learn from. How the PCC operates, and the range of issues it deals with provides instructive lessons for Kenya. The PCC in South Africa is an important avenue through which the provincial and local spheres of government influence national policy. The PCC comprises the president and deputy president of the country; the nine provincial premiers; the national ministers responsible for provincial and local government, finance, and the public service; and representatives of organized local government. The president chairs meetings determine the agenda and may invite any other person to a meeting. According to Derek Powell, "the PCC, which meets at least twice a year, is a forum for the president to raise matters of national interest, and for mutual consultation on any matter affecting the implementation of national policy and legislation in provinces and municipalities".⁵⁴ In practice, however, the PCC's agendas emerge through a process of consultation among the different spheres of government. Discussions in meetings are normally open and frank, the consensus is sought, but there is no voting procedure. In some provinces, the draft PCC agenda is tabled in the provincial cabinet for broader provincial consultation to enable provincial cabinet members to make a contribution that the Premier may draw from when contributing to discussions in the PCC meeting. Past meetings of the PCC have had agenda items that have included things such as rural development strategy, the state of school infrastructure in the country, vacancies in the public service, the alignment of intergovernmental planning, and preparations for the 2010 FIFA World Cup. Other agenda items have been progressing with a national support program for municipalities, quarterly reports on provincial and local expenditure, and audit outcomes.

In terms of the IGR Act, the PCC like all other IGR forums is a consultative structure that takes resolution and not binding decisions. However, the PCC resolutions are formally tabled in the cabinet for adoption as national executive cabinet decisions. Once adopted in this manner, they become binding on the national executive as decisions of cabinet. According to Derek Powell, this procedure establishes the appropriate relationship between the cabinet and the PCC and provides certainty about the content of PCC resolutions. The stature and authority of the PCC derive less from its formal power as a

⁵⁴ See Derek Powell (2015) at p 325.



statutory body but more from its political authority given the fact that it comprises the most senior executive offices in the country. In practice, the PCC has become a powerful and respected body whose decisions are implemented even if not legally binding.⁵⁵

6.1.2.3 Sector IGR Forums and Meetings

South Africa's MINMECs and their operations provide another important best practice from which Kenya can draw lessons when coming up with regulations for the formation and operation of sectoral forums. The MINIMECs comprise the national minister, counterpart provincial ministers, and organized local government. The IGR Act defines the standard role of MINIMECs as being to discuss "matters of national interest within a functional area".⁵⁶ A good example of a MINIMEC that has worked well is the Local Government MINIMEC (LGMINIMEC). The LGMINIMEC is a prominent national forum that has played an influential role in the formulation of the national policy on local government and its subsequent implementation. According to Derek Powell, LGMINIMEC sometimes holds joint sessions with other MINIMECs and regularly serves as a conduit between other ministries and local government.

Interdepartmental meetings between national and provincial spheres of government are a common feature. Within the national government, a cabinet committee and departmental cluster system were introduced to promote interdepartmental collaboration, and much of the interdepartmental work takes place in these clusters. Such a cluster system that brings together ministries in the major devolved sector may be a useful lesson.

6.1.2.4 Provincial Infrastructure Coordinating Council (PICC)

The national government in Kenya is currently undertaking major infrastructure development projects. There is, however, no evidence that any attempt is made to involve the county governments in decisions about these projects. This is an area in which Kenya may draw lessons from South Africa's best practice of the Provincial Infrastructure Coordinating Council (PICC). The PICC is a new structure that was established by the Infrastructure Development Act of 2014 as one of the foundations of the development state.⁵⁷ The purpose of the PICC is to coordinate infrastructure development across sectors and spheres of government from planning to implementation. The members of the PICC include the president as the Chairperson, the national ministers responsible for infrastructure, the nine provincial premiers, the executive mayors of metropolitan

⁵⁵ See Derek Powell (2015) at p 325.

⁵⁶ See Derek Powell (2015) at p 327.

⁵⁷ See Derek Powell (2015) at p 327.

municipalities, and representatives of organized local government.⁵⁸ All major infrastructure projects that meet criteria for national economic significance are subject to the jurisdiction of the PICC and mandatory obligations created under the legislation. According to Derek Powell, the Act goes further than any other IGR legislation by conferring powers of executive decision-making on the PICC. These include the power to expropriate land.⁵⁹

6.2 Best Practices on the Logistics of IGR

The Kenyan Intergovernmental Relations Act has established a unique intergovernmental relational Technical Committee (IGRTC) which is meant to facilitate cooperative government and intergovernmental relations. To be able to fully operationalize the IGRTC, Kenya may need to draw lessons from best practices of countries that have structures of almost a similar nature. In this respect, one of the best practices that the IGRTC will need to study in the United States of America Advisory Commission on Intergovernmental Relations (ACIR) which existed between 1959 and 1996 and provided technical assistance and recommendations in the conduct of intergovernmental relations.⁶⁰ ACIR also 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.⁶¹

In some countries, organization and follow-up of vertical top-executive conferences are often handled by the office of the federal prime minister or president. In Australia, the department of the Prime Minister and Cabinet provides the secretariat of the Council of Australian Governments.⁶² In Spain on the other hand, vertical meetings are held in the Senate but are under the responsibility of the Minister for Territorial Policy.⁶³

58 See Derek Powell (2015) at p 327-328.

59 See Derek Powell (2015) at p 328.

60 See Deil S. Wright "The Advisory Commission on Intergovernmental Relations: Unique Features and policy Orientations" *Public Administration Review* Vol. 25 No. 3 (1965) Pp 193-202.

61 See Troy E. Smith "Intergovernmental relations in the United States in the Age of Partnership and Executive Assertiveness" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 410-439 at p 427.

62 See Phillimore J and Harwood J at p 58.

63 See Morales MJG and Marin XA "Intergovernmental relations in Spain: An Essential but Underestimated Element of the State of Autonomies" in Poirier J, Saunders C & Kincaid J (eds) *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (2015) Oxford University Press Pp 350-378 at p 363.

6.3 Overall Recommendation

Canada's Intergovernmental Conference Secretariat, which is staffed and funded by both the federal government and the constituent units and is based in the federal capital is also a best practice which Kenya may draw instructive lessons from. 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.

It is a recommendation that the IGRTC should visit South Africa to undertake a detailed study of the workings of some of these IGR structures and processes with a view to drawing lessons that can inform their recommendations for the development of intergovernmental relations in Kenya. The IGRTC may also need to visit the United States of America to study the workings of the ACIR, and Canada to study the workings of the Intergovernmental Conference Secretariat as well as the Centre for Intergovernmental Relations to access more information on intergovernmental relations.⁶⁴

⁶⁴ See Adam M, Bergeron J and Bonnard M at pp 152-153.


Conclusion

7

At the beginning of this report, it was acknowledged that Kenya's devolved system of government, like many federal systems, is premised upon a combination of the concept of self-rule at the local county level with shared governance at the national level. To manage the internal tensions and conflicts that are naturally inherent in such a system of government, intergovernmental relations were identified as playing a critical role in the success of such a devolved system of government. The IGRTC was thus established by the Intergovernmental Relations Act as a critical structure and institution in the facilitation and management of cooperative government and intergovernmental relations. The IGRTC needed to understand the concept of intergovernmental relations and develop a workable system of Kenyan intergovernmental relations.

The research leading to this report proceeded on the hypothesis that although intergovernmental relations ought to play a critical role in the successful operation of the Kenyan devolved system of government, the evidence from the experience of the past three years or so indicates the fundamental failure of the Kenyan devolution in this respect. The governments at both levels of government appear not to have fully understood the concept of cooperative government and intergovernmental relations which have become dysfunctional. The overall objective of the research leading to this report was thus, to assist the IGRTC, which was constituted rather late in the day as compared to other intergovernmental relations structures, to fully understand the concept of cooperative government and intergovernmental relations; and develop strategies which it can use to facilitate meaningful cooperative intergovernmental relations.

First, the report seeks to assist the IGRTC to fully understand the concept of intergovernmental relations; and the constitutional and statutory role of the IGRTC in the facilitation of such relations. This is done through a critical examination of the comparative conceptual framework for intergovernmental relations and the constitutional and legal framework for such relations in Kenya. Drawing lessons from this comparative conceptual framework the conclusion arrived at is that the Kenyan system of devolved government requires cooperative rather than competitive intergovernmental relations. In terms of the constitutional and legal framework, the Kenyan system can be described as being a combination of both formal and informal intergovernmental relations. Many Kenyan intergovernmental relations processes and structures are provided for by the Constitution and statute law. But some other processes and structures have emerged informally without any constitutional or statutory provisions. The comparative conceptual framework indicates that there are many lessons Kenya can learn from other countries



systems of intergovernmental relations, particularly those that have integrated federal or devolved systems. The legal framework points at an IGRTC that is independent but which must devise means of working with other players in the devolution sector to be effective in its mandate of facilitation of intergovernmental relations. However, the report recommends that some amendments to this legal framework should go a long way in making the IGRTC more effective in the delivery of its mandate. While the legal framework as currently structured should be interpreted purposively to enable the IGRTC discharge its functions, amendments to it to clarify certain matters would be useful.

Secondly, the report seeks to assist the IGRTC to identify the emerging devolution issues that required to be dealt with through cooperative government and intergovernmental relations and come up with strategies of resolving them. The report has identified numerous emerging issues and drawing lessons from the comparative conceptual framework and best practices set out a very clear path that ought to be followed when addressing them. The path requires the IGRTC to encourage the governments to cooperate, consult and negotiate with each other. The negotiations should lead to intergovernmental relations agreements, some of whose terms ought to be reduced into legislation that is binding on the governments to ensure enforceability. Besides the intergovernmental relations may lead to the creation of statutory joint institutions and entities through which the governments can discharge some of their functions. The report discloses that if this path is followed with commitment from both levels of government, many of the problems being experienced and the emerging issues could easily be resolved.

Thirdly, the report seeks to assist the IGRTC by identifying some of the best comparative practices from which the IGRTC can draw lessons to develop a Kenyan system of intergovernmental relations. In this respect, the report has indicated that there is no single country with a complete set of best practices on all the issues of intergovernmental relations which Kenya can draw from. Instead, the report recommends that there are lessons that can be drawn from different countries on different intergovernmental issues. However, South Africa from which Kenya's system of devolved government drew a lot offers lessons on several intergovernmental issues. The report has therefore recommended that the IGRTC considers serious making benchmarking trips to some of these countries to closely study how they manage their intergovernmental relations.



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