

## **FRAMEWORK OF GUIDELINES FOR INTERGOVERNMENTAL RELATIONS**

### **1. Introduction**

Under the devolved system of Kenya intergovernmental relations between the national and county governments and among the counties; and the pursuit of joint solutions to most problems through intergovernmental structures and institutions are key to the successful performance of the functions assigned to each level of government. In addition to Articles 6(2) and 189 of the constitution, the Intergovernmental Relations Act established a framework within which such IGR are to be conducted. This framework includes IGR institutions and structures such as the National and County Government Coordinating Summit (Summit), the Council of Governors (COG) and the Intergovernmental Relations Technical Committee (IGRTC). The IGR Act also provides for the establishment of sectoral forums bringing together officials of the national and county governments to deal with matters within the respective devolved sectors. In the health sector various such sectoral forums have been and many will continue to be established to deal with various matters within the sector. This Framework of Guidelines is in recognition of the fact that though IGR are key to the functioning of the two levels of government, the legal framework in the IGR Act is inadequate in guiding the players in this regard. Therefore, this Framework sets out guidelines that should enable key players in the various devolved sectors, including the health sector to clarify various aspects of the IGR concept and undertake effective Intergovernmental relations.

In addition to this introduction, the framework covers the following issues: the meaning and nature of intergovernmental relations; and the necessity of and factors influencing intergovernmental relations. This is followed by an examination of the Kenyan cooperative form of devolved government and how it necessitated a system of cooperative intergovernmental relations. The next key section examines the role of intergovernmental structures and institutions; their objectives; and the design of such IGR structures and institutions for effective intergovernmental relations. Next is a section examining the pathway for effective intergovernmental relations covering the obligations of the governments to cooperate with each other; consult; communicate and share information; negotiate on certain issues; enter into intergovernmental agreements; and coordinate policies and activities. The Intergovernmental agreements may establish joint entities of the two levels of government; delegate certain functions of the two levels of government to the joint entities; provide for how the entities will be financed and the mechanisms of accountability to the governments that have established them; where the joint entity generates revenue in the course of its work, provide for how that revenue is to be shared among the governments establishing the entity; and how the agreement is to be enforced—sometimes through enactment of some of the terms of the agreement into either Acts of Parliament or county legislations. The penultimate section of these guidelines examines the challenges of a possible proliferation of IGR structures and institutions; and the consequent

difficulties of financing them as well as the risk of duplication of roles and expenditure they necessitate.

## **2. Meaning of IGR**

Intergovernmental relations (IGR) constitute one of the key structural features of federal or devolved systems of government. IGR are best defined as the interactions between and among governments within a non-centralized system of government.<sup>1</sup> Avoidance of substantial interaction and interdependence between different levels of government is impossible. Indeed, intergovernmental relations, being the processes and institutions through which the governments of federal or devolved systems coordinate public policy making, have become the “workhorse of any federal system”. The governments must share information; in cases of shared competences 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.

Intergovernmental relations encompass all the complex and interdependent relations among various levels of government as well as the coordination of public policies among national and sub-national governments through mechanisms such as programs reporting requirements, grants-in-aid, the planning and budgetary processes, and informal communication among officials. IGR also refer to the fiscal and administrative processes by which levels of government share revenues and other resources generally accompanied by special conditions that must be satisfied as prerequisites to receiving assistance.

## **3. Nature of Intergovernmental relations**

In nature, intergovernmental relations take a variety of forms. These include, vertical interactions between two or more levels of government; horizontal interactions among governments in the same level of government; formal interactions in the sense that they are provided for and structured by provisions of the constitution and/or legislation; informal interactions where they are not provided for and structured by the constitution and/or legislation; and both formal and informal interactions where some are provided for and structured by the constitution and or legislation while others are not so provided for. However, in some cases interactions may begin informally before the emerging best practices are eventually enacted into legislation. The interactions may involve legislative, executive, and judicial institutions of the different levels of government or governments in the same level of government.

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<sup>1</sup> Intergovernmental Relations Technical Committee ‘Report on emerging issues on devolution and best practices in intergovernmental relations’ (2018) 5. (IGRTC Report on emerging issues).

The South African White Paper on Local Government makes reference to the formal and informal nature of intergovernmental relations when it defines intergovernmental relations as a set of formal and informal processes as well as institutional arrangements and structures for bilateral and multilateral co-operation within and between the two or more levels of government.<sup>2</sup> Similarly, Mentzel and Fick (1996: 101) define intergovernmental relations as "a mechanism for multi and bi-lateral, formal and informal, multi-sectoral and sectoral, legislative, executive and administrative interaction entailing joint decision-making, consultation, co-ordination, implementation and advice between spheres of government at vertical as well as horizontal levels and touching on every governmental activity".

Two distinct modalities of intergovernmental relations can be identified. Firstly, intergovernmental relations that are co-operative in nature which exhibit co-operative institutions and processes such as consultation, co-decision making and coordination. Secondly, intergovernmental relations that are competitive in nature which exhibit conflictual processes such as tension, collusion, competition, control and even coercion.

#### **4. Necessity of and factors that influence intergovernmental relations**

Federal or devolved systems of government combine elements of self-rule at the local level in matters that are uniquely local and have been assigned to the sub-national governments as functions, with shared rule at the national level in matters that affect the whole country and are assigned to national government. Such combination results in levels of government that have relative autonomy with divided and separated functions and powers. Inherent in this combination are natural tensions; conflicts; and threats that need to be managed. There always will be in-built potential tension between national direction and priorities, that define how to secure the well-being of all the people, and locally defined preferences determined by government at the local level. Intergovernmental relations are the necessary mechanisms of managing these tensions, conflicts, and threats. They are the engine oil that ensures that the various parts of the system interact with each other without destructive friction.

The Kenyan devolved system is founded upon a similar combination which necessitates intergovernmental relations. Article 6(2) of the Constitution which establishes the national and county levels of government that are distinct and interdependent, settled for and required co-operative intergovernmental relations among the governments, when it requires the governments to conduct their mutual relations, on the basis of consultation and cooperation. Because of this the following key architectural and design factors of the Kenyan devolved system that necessitate and influence intergovernmental relations are examined. These are the role and influence of the manner of functional assignment to the two levels of government; the role and influence of the financial design and sharing of the financial powers

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<sup>2</sup> Government of South Africa 'The White Paper on Local Government' (1998) 38.

and resources; and the cooperative nature of the devolved system and the obligations of cooperative intergovernmental relations that it imposes.

#### **4.1 Assignment of functions and powers**

Federal or devolved systems are founded upon the concept of separated and divided functions and powers among the two or more levels of government. The manner of functional assignment is thus a major factor that necessitates and influences intergovernmental relations as it tends to make it impossible for the levels of government to operate in total isolation of each other. Often the division of functions and powers among the two levels of government is never neat, and governments are mutually dependent on each other in many respects. Given that responsibilities overlap and since many public issues cut across several policy areas, most policy problems in a federal or devolved system concern several governments within the system.<sup>3</sup>

##### **4.1.1 The dichotomy of exclusive and concurrent functions**

Assignment of functions and powers often draws a distinction between exclusive and concurrent functions and powers which generate operational difficulties that necessitate intergovernmental relations. Exclusive powers and functions are defined as ‘those which are vested in only one level of government to the exclusion of the other level’.<sup>4</sup> On the other hand, concurrent powers and functions are defined as ‘those which can be exercised or performed by both national and county governments in the same functional area at the same time’.<sup>5</sup>

The effective execution of concurrent functions and powers requires intergovernmental engagement between the two levels of government in order to address a number of inherent challenges. Concurrent functions and powers often lack clarity as it is normally 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. This 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.<sup>6</sup> Moreover, concurrent functions may lead to competing policies and laws in the same functional area that may lead to conflict of laws that require resolution. In the Kenyan situation a bigger problem that necessitates intergovernmental relations is the fact that the constitution recognizes the concept of concurrent functions without providing a clear list of such functions. This leaves

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<sup>3</sup> Johanna Schnabel, *Managing Interdependencies in Federal Systems: Intergovernmental Councils and the Making of Public Policy* (2020) Palgrave Macmillan 1.

<sup>4</sup> Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (2015) 185.

<sup>5</sup> Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (2015) 192.

<sup>6</sup> IGRTC Report on emerging issues (2018) 6.

the identification concurrent functions to constitutional interpretation that ought to be undertaken through joint intergovernmental structures and institutions.

Furthermore, intergovernmental relations may be necessary even where there are exclusive functions, because of operational problems that may still arise due to functional interdependence and inter-governmental functional impact. For example, one level of government may depend on policies and laws developed and enacted by another level of government or be required to administer and implement policies and laws enacted by another level of government.<sup>7</sup> Similarly, exclusive functions of one level of government may hinder or facilitate the other level of government in the performance of its own exclusive functions. For example, the failure by national government to deliver on its security functions has seen county governments in counties in the former North-Eastern Province unable to deliver on health due to insecurity fears suffered by health workers from other regions who eventually abandon their jobs and run for their safety. In addition, intergovernmental relations in areas of exclusive functions are necessary because of the obligations imposed by the concept of cooperative devolved government.

Article 186(1) of the Constitution of Kenya read together with the Fourth Schedule, assign the greater part of the essential health service delivery functions to the county governments, while the national government is assigned health policy, capacity building and technical assistance to counties, and management of national referral health facilities. Article 186(2) of the constitution recognizes that while some of these health functions and powers are exclusive to each of the two levels of government; others are concurrent in the sense that they can be performed by any one of the two levels of government. The constitution recognizes the exclusive/concurrent dichotomy without specifying which of the health functions are exclusive and which ones are concurrent. This leaves the matter to constitutional interpretation which will require to be executed through intergovernmental mechanisms. This therefore heightens the demands for intergovernmental relations aimed at determining which functions fall in which category. For example, though the constitution assigns the health policy function to national government, implied in some of the health functions of county governments such as the ‘county health facilities and pharmacies; ambulance services; promotion of primary health care; and veterinary services’<sup>8</sup> are policy and legislative or regulatory functions. This therefore makes health policy in these areas a concurrent function of both national and county governments that necessitate intergovernmental engagement.

#### **4.1.2 The dichotomy of dualist and integrated devolved systems**

The manner of assignment of functions and powers may create a loose dichotomy between dualist and integrated devolved systems. In dualist systems, both the national and sub-

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<sup>7</sup> IGRTC Report on emerging issues (2018) 6.

<sup>8</sup> See Schedule Four of the Constitution.

national governments have a full set of institutions such as the legislative and executive arms and can enact and administer their own legislative programs. In contrast, in integrated federal systems, the sub-national governments implement both their own laws and many other laws enacted by the national level of government. More legislations are enacted by the national government, while the sub-national governments implement them. This is the case for the Kenyan county governments which implement not only their own county legislation but also implement and work with national legislation in many respects.

In dualist systems, functions are assigned by reference to subject matter such as health, with each 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. For example, national government may be assigned policy and/or legislative powers over health, while another level may be assigned execution or implementation powers over the same health subject matter. Consequently, though both dualist and integrated federal systems require intergovernmental relations to operate effectively, the need is higher in integrated systems. This stems from the fact that those who implement policy or legislation ought to be involved in the processes of developing the policy or legislation. Moreover, intergovernmental engagement may avoid the possibility of national government using policy and legislative making powers to create unfunded mandates for county governments without their consent or provision of additional resources for the created mandates.

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.

#### **4.1.3 The design of the second chamber of Parliament**

The challenges arising out of an integrated approach to functional assignment are best addressed through mechanisms that allow joint approaches to policy solutions by both national and sub-national levels of government. Often sub-national governments are allowed participation in policy and law making at the national level through a bicameral parliament. This is necessary since, ultimately, such policies and laws are to be administered or implemented by the sub-national governments. However, the success of bicameral parliaments as intergovernmental mechanisms in this respect varies depending on the design of the second chamber of the bicameral parliament. Where the second chamber of parliament is designed in such manner that its members are representatives of the sub-national governments, indirectly elected by them, as is the case in Germany and South Africa, the bicameral parliament is more effective, and the demands of additional intergovernmental mechanisms are less. The members of the second chambers are often delegates of the

governments of the sub-national units which can recall them, and on whose instructions, they make decisions in policy and law making at the national level.

However, where the members of the second chamber of parliament are directly elected by the voters of the sub-national units and not indirectly by the governments of the sub-national units, the federal function performed by that chamber is less important, and direct participation of the sub-national governments in national lawmaking is not assured. As a result, the influence exerted by the sub-national units and their governments on national policies is less institutionalized. The demands of additional intergovernmental mechanisms in this kind of situation are higher to ensure formulation of joint solutions, policies, and laws. The design of the Kenyan Senate has taken this second approach thereby necessitating and emphasizing the need for additional intergovernmental mechanisms that allow county governments more direct participation in policy and law making at the national level. Therefore, efforts ought to be made to ensure that most bills introduced into Parliament are originated by intergovernmental joint committees of national and county governments. National government ministries and agencies must thus be discouraged from unilaterally originating and introducing bills into Parliament.

#### **4.2 Financial arrangements and processes**

The distribution of financial and other resources is another dimension of the division of competences that has important implications for intergovernmental relations in various respects. First, in many systems the national government is normally assigned more revenue raising powers with the tax bases that raise more money being 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. From this perspective many systems design the financial arrangements in a manner that ensures that the revenue raised by national government does not accrue to national government exclusively but to both national and subnational governments which must share that revenue equitably. In some systems such as Germany, Austria and South Africa, the constitution recognizes and protects the constituent units' entitlement to revenue that is raised centrally. Constitutional entitlement preserves a measure of equality between the orders of government and inhibits the use of threats to withdraw funding as a lever in intergovernmental negotiations.

Kenya has once again taken this direction in its approach to the design of fiscal and financial arrangements with national government being assigned more revenue raising powers than county governments. Article 209(1) empowers the national government to impose—income tax; value-added tax; customs duties and other duties on import and export goods; and excise tax. However, in terms of Article 202(1), the proceeds from these sources accrue to both national and county governments and must be equitably shared among the two levels of

government in an objective manner, in terms of the criteria set out in Article 203, that requires cooperative government and intergovernmental relations.

Secondly, the constitution assigns county governments very limited powers to raise their own revenue locally. Article 209(3) empowers each county government to raise own revenue through the imposition of property rates; entertainment taxes; and any other tax that it is authorised to impose by an Act of Parliament. The any other tax that a county is authorized to impose by an Act of Parliament is a source that cannot be unilaterally identified by national government alone in total isolation of county governments. The identification and authorization of any other tax by an Act of Parliament is a function national government ought to discharge in a cooperative manner requiring intergovernmental relations.

Thirdly, in terms of Article 209(4) both the national and county governments may impose charges for services. This source of revenue is ordinarily directly linked to the discharge of the functions the governments are assigned by the Constitution. It empowers them to levy and recover fees, charges, or tariffs in respect of any function or service they perform or provide. As sources linked to functional areas, these are exclusive to the level of government that has been assigned a function upon which the charge is to be imposed. This is a source of revenue that has potential for conflict in two respects. One, the lack of clarity in terms of what are the exclusive functions of the two levels of government is likely to lead to conflicts in interpretation of the constitutional provisions with each level of government seeking to have functions that have higher potential for revenue raising, while avoiding those that have no revenue raising potential. Two, conflicts are bound to arise where the fees or charges are in respect of concurrent functions, regarding which level should charge the fees, and whether and how if at all, the accruing fees or charges are to be shared between the two levels of government. In both cases it is imperative that national and county governments cooperate with each other and coordinate their actions through intergovernmental processes and structures.

Fourthly, in terms of Article 202(2), county governments may be given additional allocations either conditionally or unconditionally. The design and implementation of the conditions attached to additional allocations is a matter that calls for cooperation and coordination between national and county governments.

Fifthly, in addition to revenue raised nationally and by county governments at the local level, development partners play a critical role in financing health in Kenya. How resources provided by development partners for health are to be utilized and shared between national and county governments, given that under the devolved system health is one of the major devolved functions, is a matter that requires intergovernmental, consultations, negotiations, and engagement between the two levels of government, and the development partners. The same applies to the delivery o services by both national and county governments in several other devolved sectors in which development partners play a critical financial complementary role.



### **4.3 Co-operative devolved government and the obligations it imposes**

The constitution of Kenya establishes a cooperative devolved system of government that imposes upon the governments, obligations to pursue cooperative as opposed to competitive intergovernmental relations in the conduct of their affairs and relations. Article 6(2) recognizes that the governments at the national and county levels are distinct and interdependent and requires them to conduct their mutual relations based on consultation and co-operation. The governments are distinct in the sense that they each have a certain measure of autonomy as entities and in their functions and powers; and are not hierarchical in their relations. They are also interdependent in the sense that they are interconnected and dependent on each other and need to work in concert in the discharge of their constitutional mandates. The distinct and interdependent nature of the governments necessitates and influences cooperative intergovernmental relations between them.

The concept of cooperative government refers to a partnership between the two levels of government that seeks to ensure a well-coordinated and cohesive system of government that provides services to the people as a whole; based on the system of effective service delivery at the local level that is well coordinated with national priorities. The system also seeks to avoid competition among the governments and their working at cross-purposes or in a mutually destructive way. It aims to avoid duplication of roles and their consequent wastefulness of resources as well as provide harmonious co-existence among the governments and their institutions.

Article 189 sets out details of the principles of such consultation and cooperation that underlie intergovernmental relations among the two levels of government. First, in terms of Article 189(1)(a), each level of government has an obligation to perform its functions, and exercise its powers, one, in a manner that respects the functional and institutional integrity of government at the other level; and two, in a manner that respects the constitutional status and institutions of government at the other level. The essence of the provisions is to impose an obligation on the governments to respect each other's functions and institutions.

Secondly, in terms of Article 189(1)(b), governments at either level have an obligation to, one, assist each other; two support each other; three, consult each other; and four, where appropriate, implement the legislation of the other level of government, within the county level. The essence of this provision is that there is an obligation imposed upon national and county governments to embrace solidarity in the discharge of their responsibilities. In the case of national government, when this provision is read together with the national government's function of capacity building for counties, the obligation to assist, support and consult county governments becomes obvious. On the other hand, given that national government is assigned more legislative functions, while county governments have more responsibility to implement such legislation, the obligation of national government to involve the county governments in the formulation such laws becomes imperative, while that of county governments to implement the legislation of national government also becomes obvious.

Thirdly, in terms of Article 189(1)(c), governments at either level have an obligation to liaise with government at the other level for the purpose of exchanging information, coordinating policies, and administration and enhancing capacity. What this means for example, is that when government is conceiving legislation that ought to be implemented by county governments, it must liaise with county governments so that the policies and legislations are joint efforts of both levels of government.

Fourthly, article 189(2) imposes an obligation upon the governments at the two levels to cooperate in the performance of functions and exercise of powers and empowers them to set up joint committees and joint authorities through which they can perform some of their functions and exercise some of their powers.

Fifthly, Article 189(2) imposes upon the two levels of government in the case of any dispute between them, an obligation to avoid litigation and make reasonable efforts to settle the dispute through alternative dispute mechanisms. This obligation underscores the role and necessity of cooperative government and intergovernmental engagement as mechanisms for avoiding litigation.

## **5. Intergovernmental Relations Structures and institutions**

Intergovernmental structures and institutions are entities that bring together players from both levels of government as an effort to pursue and find joint solutions to problems. Whereas Intergovernmental relations are processes and institutions through which the governments of a non-centralized system coordinate public policy making, and may occur informally; intergovernmental structures and institutions have been established in many countries to give intergovernmental relations a formal structure.<sup>9</sup> They provide formal infrastructure and avenues through which the different levels of government consult, coordinate and negotiate on issues such as policies and proposed laws.

Most of these structures and institutions are created by a political decision of officials of the national and sub-national governments even without legislative provisions requiring their establishment. However, there are cases in which some of such structures and institutions may be created pursuant to provisions of the country's constitution or legislation mandating their creation. For example, the Intergovernmental Relations Act of Kenya establishes the National and County Governments Coordinating Summit, a forum that brings together the President and the 47 County Governors; and the Council of Governors which is an intergovernmental institution that brings together the 47 county Governors. In addition, this Act empowers various players to establish sectoral forums to deliberate on matters of mutual interest to the two levels of government in the relevant sectors including health. In respect of financial matters, the Public Finance Management Act establishes the Intergovernmental Budget and Economic Council to deliberate on and address financial matters and disputes concerning both levels of government.

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<sup>9</sup> Johanna Schnabel, (2020) P 3.

While some of the business of the intergovernmental structures and institutions is undertaken through informal processes which may include telephone calls, letters, emails, meetings, workshops, and conferences; most Intergovernmental structures and institutions conduct business and make their decisions through regular formal meetings of the different governments of a federation or a devolved system of government. In some cases, these meetings are known as summits as in the case of the National and County Governments Co-ordinating Summit; councils as in the case of the Council of Governors; and forums as in the case of Sectoral Forums. At these meetings, governments establish policy solutions to problems they are all confronted with.

## **5.1 Categories of intergovernmental structures and institutions**

Intergovernmental structures and institutions can be divided into two broad categories based on their membership—vertical intergovernmental structures and institutions, and horizontal intergovernmental structures and institutions. These two categories can be further divided into two other categories based on their rank in their governments—those comprising high level politicians, and those that are comprised of technical government officials.

### **5.1.1 Vertical intergovernmental structures and institutions**

Vertical intergovernmental structures and institutions comprise and bring together officials of the national and county governments providing opportunities for collaboration and intergovernmental engagement between the two levels of government. Good examples in this respect are the National and County Governments Co-ordinating Summit which brings together the President and the 47 county Governors; the Intergovernmental Budget and Economic Council that brings together national and county government officials to consult and negotiate on fiscal and financial matters; and the Health Sector Intergovernmental Consultative Forum established by section 27 of the Health Act and brings together the Director-General of Health at the national level of government and the County Directors of Health from the 47 counties. These structures and institutions focus on resolving issues that concern both levels of government.

### **5.1.2 Horizontal intergovernmental structures and institutions**

Horizontal intergovernmental structures and institutions are those in which the national government does not participate but bring together officials of the county governments and give them opportunities to collaborate among themselves. Such structures and institutions may be multilateral in the sense that they bring together all the 47 counties, regional among counties within a given regional bloc, and bilateral among just two counties. The Council of Governors which brings together the 47 county Governors is one of the best examples of this type of structures and institutions. While the COG provides a forum for the 47 governors to resolve issues that concern the counties among themselves; it also serves as a preparatory forum through which the counties can formulate and consolidated their positions on issues that require vertical intergovernmental collaboration, consultation, negotiation, and

coordination with national government before escalating them to the Summit for decisions at that vertical intergovernmental level. Other good examples are the caucuses of the County Executive Committee members, County Chief Officers, and County Directors in a specific sector such as health for example. These respective caucuses bring together the respective officials to consult and collaborate in finding solutions in their respective mandate areas.

### **5.1.3 Intergovernmental structures and institutions of high-level politicians**

These are intergovernmental structures and institutions that comprise high-level politicians such as the President, Governors, Cabinet Secretaries and County Executive Committee members. They are very important forums since they can make policy, legal and pragmatic decisions that bind and give direction to other structures of government at both national and county levels. Their decision-making power emanates from the fact that they comprise high-level politicians who can resolve highly political and sensitive matters. Members of these intergovernmental structures and institutions can meet to share information, discuss common problems, contemplate co-ordinated or even joint action and where appropriate even establish joint committees and authorities and task them to undertake certain assignments and report back to them.

A good example in this respect is the National Government and County Governments Coordinating Summit which can make decisions and direct other institutions such as Cabinet Secretaries to implement the decision. The Summit can even establish a joint committee to formulate policy and legal reforms in a specific area and draft Bills to be introduced in Parliament. It is advised that for purposes of effective intergovernmental management to achieve the objectives of the Kenyan devolution, especially in the health sector, which is undergoing major reforms, the Summit should establish several joint committees of national and county government representatives to spearhead the comprehensive policy and legislative reforms required the sector. This will ensure that draft policies and laws are not unilaterally originated by national government but instead, are products of joint efforts of both levels of government.

Another good example is the Council of Governors given that it comprises Governors who are the Chief Executives at the county level. These structures and institutions of high-level politicians often operate based on technical advice and information supplied to them by technical officials and intergovernmental structures and institutions of technical officials.

### **5.1.4 Intergovernmental structures and institutions of technical government officials**

These are intergovernmental structures and institutions that comprise senior technical officials of the governments at both levels who serve the technical purpose of preparing advisory documents and proposals for decision making by plenary meetings of intergovernmental structures and institutions of high-level politicians. Most of the times these technical intergovernmental structures are advisory in nature and may not themselves make decisions, especially on sensitive matters that require direct involvement of high-level politicians.

### **5.1.5 Distinguishing intergovernmental structures and institutions from coordination and partnership structures and institutions**

Even as a distinction is drawn among different types of intergovernmental structures and institutions, it is also important to explain the difference between intergovernmental structures and institutions, and coordination and partnership structures. The constitution assigns service delivery functions in the various devolved sectors such as the health sector, to the two levels of government. In some sectors such as the main responsibility to deliver health services is assigned to the two levels of government. However, experience indicates that in Kenya, non-state actors also play a major role in complementing efforts of the two levels of government to deliver health services. The faith-based organizations, the civil society and international NGOs such as Amref and the Red cross play a critical role in the delivery of services. In addition, development partners play a critical role in supporting financing of health. All these non-state actors need to engage with coordination with government players and to deliver services.

In these circumstances, intergovernmental structures are provided for and required by constitutional provisions as well as legislation. These structures are therefore restricted to the two levels of government as players to the exclusion of the non-state actors. They are decision-making structures and institutions through which the governments coordinate with each other, negotiate, and make decisions. Partnership and coordination structures are those through which the non-state actors can be consulted by the two governments. These therefore may include the two levels of government and the non-state actors. However, they can only be advisory to the government intergovernmental structures which have the ultimate authority to make decisions with voting rights. If they were to be allowed to attend with voting rights, they may tilt scales in favour of one government against the other, with the effective of undermining effective intergovernmental relations.

## **5.2 The objectives of intergovernmental structures and institutions**

The objectives and purposes served by Intergovernmental structures and institutions are one, avoiding recentralization of functions and powers by the national government; two, protecting the autonomy of the county governments; three, avoiding a unilateral approach to policy making; and four, ultimately safeguarding the balance of power in the devolved system between the national and county levels of government. Each of these is examined and discussed in the following subsections.

### **5.2.1 Avoiding recentralization of functions and power**

In federal and/or constitutionally entrenched devolved systems functions and powers are separated and divided between the two levels of government. The functions and powers are then entrenched in the constitution which seeks to keep each level of government within its functional areas and protect the functions and powers of each level of government from encroachment tendencies of the other. However, this division of functions and powers is never neat, and governments are often mutually dependent on each other in many respects.

This is because responsibilities overlap and since many public issues cut across several policy areas, most policy problems concern several governments in the devolved system at the same time.<sup>10</sup> Policy problems that touch upon the responsibilities of several governments in the federal or devolved system, therefore, normally pose challenges for the efficient delivery of public services, making it difficult to confine the governments within their functional areas.

Inherent in the separation and division of functions and powers are tensions between the two levels of government which tend to pull in different directions. While national governments are drawn towards discretionary decision making and pull towards more discretion; sub-national governments like the Kenyan county governments are drawn towards protection of their relative autonomy and their assigned functions and powers. In the circumstances, despite the constitutional entrenchment and protection of the functions and powers, national governments often have a tendency towards recentralization of functions and powers in their hands, which is often secured through over-reliance on discretionary and unilateral decision making to establish nation-wide solutions without involvement of sub-national governments. The propensity to recentralize realized through discretionary decision making finds fertile ground in the areas where the division of functions and powers is not neat because of the overlaps in the functional areas. National governments are more attracted to unilateral decision making in these functional areas and in the process end up encroaching on and recentralizing functions and powers of the sub-national governments without their consent.

Intergovernmental structures and institutions thus, become useful tools for avoiding this tendency towards discretion, usurpation, and recentralization by national government. These structures and institutions provide forums through which collaborative as opposed to unilateral or discretionary approaches to finding policy solutions to problems that affect both levels of government are secured. As more important decisions and policy solutions are secured through joint efforts, recentralization is avoided.

### **5.2.2 Protecting the autonomy of the sub-national governments**

In addition to being a bulwark against recentralization of functions and powers, intergovernmental structures and institutions provide avenues for protection of the autonomy, functions, and powers of the sub-national governments. The autonomy of governments in a federal or devolved system is founded upon and builds on a clear division of authority among the two or more levels of government. Each level of government enjoys genuine functions and powers assigned by the constitution that are not delegated from one government to another.<sup>11</sup> The levels of government are only accountable to their respective electorate—from which they gain their legitimacy—rather than to each other. For these reasons functions and powers cannot be withdrawn or re-assigned unilaterally by another level of government. Instead, the two levels of government must jointly agree on the correct

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<sup>10</sup> Johanna Schnabel, (2020) P 1.

<sup>11</sup> Johanna Schnabel, (2020) P 1.

interpretation of the distribution of the functions and powers among them, and whenever there is need to re-assign functions and powers to another level or entity of another level of government.<sup>12</sup>

As noted, in the tension inherent in the separation and division of functions and powers, sub-national governments normally pull in the direction of protection of their autonomy as well as functions and powers. Where the national government succeeds in exercising extreme discretion in decision making and finding policy solutions to problems that affect both levels of government, the autonomy, functions, and powers of the sub-national governments are easily exposed to danger. However, in cases where through intergovernmental structures and institutions, the governments pursue collaborative and joint strategies to decision making and finding solutions to policy problems, the autonomy, functions, and powers of the sub-national governments are protected. Well designed and functioning Intergovernmental structures and institutions incentivize governments in a federal or devolved system to respect each other's autonomy. They also safeguard and prevent the national government from encroaching on the functions and powers of the sub-national governments and shifting costs to them through allocation of unfunded mandates.

### **5.2.3 Avoiding unilateral approach to policy making**

The best mechanism for avoiding recentralization of functions and powers, and protection of the autonomy, functions, and powers of the sub-national governments is avoidance of unilateral approaches to the pursuit of policy solutions to and decision making in respect of Policy problems that touch upon the responsibilities of several governments in the federal or devolved system. As already observed Article 6(2) establishes national and county governments that are distinct and interdependent on each other. Essentially, interdependence refers to the extent to which governments at different levels are required to operate in a mutually coordinated manner. These interdependencies may arise out of assignment of functions and powers along the lines of one, national government passing more legislation while county governments implement them; and two, different aspects of the same policy area being assigned to different governments. While the assignment of functions and powers as well as interactions between policy areas create interdependencies between the national and county governments, the county governments are also often mutually dependent on each other due to territorial spillovers, economies of scale, the pressures for harmonization. Despite all these, unilateralism is normally disruptive to mutual interdependence among the governments as county governments can lose their autonomy due to unilateral policy making or imposition by national government.<sup>13</sup>

One of the fundamental features of federalism or constitutionally entrenched devolved systems is that changes to the distribution of power require the consent of both levels of

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<sup>12</sup> Johanna Schnabel, (2020) P 1 & 2.

<sup>13</sup> Johanna Schnabel, (2020) P 41.

government.<sup>14</sup> Unilateral policy solutions in situations in which governments are mutually dependent, however, may limit the other government's autonomy, so that they lose power without giving their consent. Moreover, unilateral solutions to policy problems cutting across jurisdictions lead to changes in the distribution of functions and powers since they shift authority and discretion from one level of government to another without the consent of all the governments concerned, even though the extent of such disruptive unilateralism may vary from case to case. Unilateral policy and legislative formulation or reform of existing policies or laws can lead to recentralization of power in the hands of the national government. Thus, policy problems affecting more than one government destabilize the federal or devolved system, unless the governments meet to develop joint policy solutions to such problems.

Unilateralism can take different forms such as individual solutions, national government imposition of policy solutions, and non-compliance by county governments. When national government imposes a policy solution on county governments, the chances are that county governments may react by failure to comply are very high. The extent of the disruption arising out of unilateralism depends on various factor. These may include whether or not the imposed solution encroaches on the functions and powers of county governments; and whether or not imposed policy solution addresses the problem in a manner similar to how the county governments had intended to.

Intergovernmental structures and institutions serve the objective of guarding against the possibility of one level of government trying to change the distribution of functions and powers without the consent of the other. Although collaborative solutions can alter the distribution of functions and powers, at least these changes are agreed upon by both levels of government and the consent of the government whose functions and powers are adversely affected is at least secured. When governments jointly develop, adopt, and implement policy and legislative solutions to problems affecting all of them, they avoid the unwarranted amendments of the distribution of functions and powers that may lead to instability in the federal or devolved system.<sup>15</sup> Intergovernmental structures and institutions serve to discourage and shift governments away from unilateral decision making towards collaborative and joint approaches to formulation and implementation of policy and legislative solutions to society's problems. In this manner the capacity to make good policies and laws that are easily accepted and implemented by both levels of government is boosted, resulting into improved delivery of services to the citizenry.

However, in certain circumstances, what appears to be a joint solution may still be a unilateral imposition of a solution due to various factors. For instance, where national government designs the so-called joint solution but presents it at intergovernmental meetings as a 'take-it-or-leave-it' offer. A good example in this respect is where national government takes a

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<sup>14</sup> Johanna Schnabel, (2020) P 1.

<sup>15</sup> Johanna Schnabel, (2020) P 4.



decision to provide conditional grants to county governments without consulting them when defining funding levels and the conditions to be attached to the grants. Another example is the manner in which the national government procured the Managed Equipment Service (MES) project on behalf the county governments. In such situations, the county governments have little influence on the design of the joint solution, especially since such ‘take-it-or-leave-it’ offers have financial incentives that might increase the acceptability of an imposed solution.

#### **5.2.4 Safeguarding the balance of power in the federal or devolved system**

When the separation and division of functions and powers is respected through avoidance of recentralization; the autonomy of the sub-national governments is protected; and unilateral decision making is avoided as the two levels of government collaborate more and seek joint solutions to many of society’s problems, intergovernmental structures and institutions end up serving the object and purpose of ultimately safeguarding the balance of power among the governments in the federal or devolved system. Federal or constitutionally entrenched devolved systems of government can only deliver on their objectives and purposes if the balance of power in the system is protected by ensuring that the distribution of responsibilities, functions and powers can only be changed by agreement of the national and sub-national governments. In most systems the main objects and purposes of adopting a devolved system are to maintain a specific balance between unity and diversity in an otherwise diverse society of competing centralized and localized interests and priorities.

Moreover, the system’s survival also depends on the ability of the two levels of government to deliver public services.<sup>16</sup> The survival of the system will also depend on the manner the governments approach the formulation of policy solutions to solve the numerous problems and challenges that emerge in the very fast changing society. If the adoption of new policies or the reform of existing ones affects the balance of power in the system, tensions between the different governments occur, which leads to instability in the devolved system. These tensions lead to what some scholars call the system’s dilemmas of whether to maintain unity in diversity or allow recentralization that may lead to the breakup of the system and loss of unity. If these tensions and instabilities are allowed to persist and intensify, they can seriously undermine the system’s ability to deliver on its objects and purposes because the system becomes either too centralized or breaks apart.

Consequently, for the devolved system to fulfill its purpose, public policies ought to be delivered in a manner that respects the autonomy of both levels of government. That is to say that for the system to be stable, it needs to approach society’s problems in a manner that prevents or does not cause system-threatening disturbances. Unilateral policy making in

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<sup>16</sup> Johanna Schnabel, (2020) P 37.

situations which governments are interdependent can cause instability in the devolved system and must be avoided.<sup>17</sup>

Intergovernmental structures and institutions boost the system's policy making capacity and enhance the devolved system's stability.<sup>18</sup> The structures and institutions constitute a safeguard of the devolved system as they are a mechanism of maintaining the devolved system because they incentivize the governments to respect each other's autonomy. Such safeguards prevent the national government from encroaching on the responsibilities of the sub-national governments and from shifting costs to them; while discouraging the sub-national governments from shirking on their duties or shifting the burden on their part. Intergovernmental structures and institutions enable governments to coordinate public policy making in such a way that respects the balance of power among the two levels of government and ensures effective delivery of public services. These structures and institutions secure the protection of the balance of power through development, adoption, and implementation of joint solutions.

### **5.3 The design of intergovernmental structures and institutions**

The degree to which intergovernmental structures and institutions are strong safeguards of the devolved system and balance of power depends on their design. The design of an intergovernmental structure or institution at its very establishment stages is a critical matter that shapes how policy solutions are developed, adopted, and implemented when policy problems cut across jurisdictions. Indeed, the design of the intergovernmental structures and institutions will indicate the commitment of the governments to the pursuit of coordinated joint solutions to problems. If governments are not committed to coordination, they will establish weak structures and institutions that will most likely fail to produce joint collaborative solutions. Such structures will be loosely designed with very minimal formal characteristics. The design should take into account three broad areas—one, the capacity of the structures and institutions to process and determine important devolution policy issues; two, their level of institutionalization; three, the binding nature of their outputs; and four, the extent to which they are dominated by the national government.

#### **3.5.1 Capacity to process and determine devolution important policy issues**

The determination of whether or not an intergovernmental structure or institution is designed to have capacity to process and determine important devolution policy issues, is guided by three factors. The first relates to the character and level of importance of the policy issue the structure can resolve; the second relates to provisions concerning the participation of non-politicians in the intergovernmental structure and institution; and the third relates to the use or not of circulars to resolve the policy problem.<sup>19</sup>

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<sup>17</sup> Johanna Schnabel, (2020) P 37.

<sup>18</sup> Johanna Schnabel, (2020) P 4.

<sup>19</sup> Johanna Schnabel, (2020) P 53.

### **3.5.1.1 Level of importance of the devolution policy issue**

The concept of capacity to process and determine devolution important policy issues is premised upon the notion of a hierarchy of devolution policy issues that require intergovernmental joint resolution. It means that some devolution policy issues are more important than others. For example, policy and legislative solutions that may involve the re-assignment of the functions and powers of one level of government to another level or delegation of those functions and powers to an entity of another level of government are more important devolution policy issues than those that merely provide for a regulatory framework for the performance of those functions. Similarly, policy and legislative solutions that involve the allocation of financial resources to the two levels of government such as conditional grants or the sharing of grants from development partners are more important as compared to other normal policy issues. Moreover, issues relating to the equitable division of revenue raised nationally between national and county governments as well as allocation of the county equitable share among the counties are obviously more important policy matters.

Policy issues of this kind are best resolved by intergovernmental structures and institutions that comprise high-level politicians. The establishment of such structures and institutions with mandate to deal with such important policy issues will signal the willingness on the part of the governments to reach joint solutions on such important issues. Moreover, the past record of an IGR structure or institution in successfully resolving such important matters will demonstrate that it has experience and can be trusted with problems of a similar magnitude. On the other hand, Intergovernmental structures that ordinarily deal with less important technical issues will not be trusted to handle such important policy issues.

### **3.5.1.2 Representation of politicians by staff in the IGR structures**

Ordinarily, politicians may send bureaucrats to represent them at meetings of intergovernmental structures and institutions. Unfortunately, officials of this level lack the legitimacy to make political decisions on behalf of their bosses.<sup>20</sup> From a design perspective therefore, intergovernmental structures and institutions whose design allows public servants to represent politicians in meetings of such structures and institutions will lack the capacity to resolve important devolution policy issues of a political nature that require the involvement of the politicians themselves. Public servants will concentrate on technical, non-contentious policy issues and cannot be the right people to resolve important contentious issues. Indeed, intergovernmental structures are likely to exclude important policy issues from discussion and resolution if public servants attend to represent politicians in plenary meetings of the IGR structures and institutions. It is therefore advisable that intergovernmental structures and institutions should be designed in such a way that politicians are not allowed to delegate their participation to Chief Administrative Secretaries, heads of departments, or other members of the administration.<sup>21</sup>

### **3.5.1.3 The use of circulars in resolving policy problems**

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<sup>20</sup> Johanna Schnabel, (2020) P 53.

<sup>21</sup> Johanna Schnabel, (2020) P 54.

The outputs of meetings of intergovernmental structures and institutions may take various forms such as intergovernmental agreements, statements, Communiques, or press releases produced at face-to-face meetings of the members of the structure or institution. There however, are circumstances in which an intergovernmental structure or institution may adopt circular resolutions and reach agreement through the exchange of letters. Written consent is sufficient for such a resolution to be adopted. However, comparative evidence suggests that circular resolutions are used for technical, non-contentious policy matters, and not important contentious policy issues. Consequently, intergovernmental structures and institutions that can and frequently do use circular resolutions are less likely to process important devolution policy problems. In contrast, if members of intergovernmental structures and institutions always meet in person, the structures or institutions are more likely to find solutions to important devolution policy issues and problems.

### **3.5.2 The level of institutionalization of the structures and institutions**

An important dimension of the design of intergovernmental structures and institutions is the level of their institutionalization as opposed to their being left to operate informally. According to Johanna Schnabel, once a policy problem is placed on the agenda, the intergovernmental structure or institution needs to ensure that all governments participate in the establishment of a joint solution for it to be collaborative. This requires that the interests and preferences of all the governments are accommodated during its development. Intergovernmental structures or institutions that are highly institutionalized adopt a problem-solving approach or orientation. If the members of the intergovernmental structure or institution focus on problem-solving, proposals and drafts are prepared, circulated, discussed, and updated.<sup>22</sup>

Such intergovernmental structures or institutions follow two distinct steps in the development of the policy solutions. Firstly, members of the intergovernmental structure or institution brainstorm and define the main direction of reform after reviewing proposals and recommendations submitted to them by working groups, committees, or individual members of the structure or institution. For example, the COG may escalate to the Summit a recommendation or proposal calling for the establishment of a joint committee to undertake comprehensive reforms in a specific policy area. This may be followed up by a discussion of the recommendation or proposal in the submit leading to the establishment of a joint committee to undertake the reforms. Secondly, after the general direction is set, governments decide on the detailed regulations, drawing once again on proposals, recommendations, and drafts. In this manner, coordination becomes a continuous process and an ongoing joint-decision system, through which joint interests can emerge. As the governments work together through the joint committees, they start moving away from their narrow perspectives that are informed by their individual momentary interests and converge on the broader interests that address the problem for the benefit of all.

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<sup>22</sup> Johanna Schnabel, (2020) P 55.

Where the intergovernmental structures or institutions are weakly institutionalized, the introduction of joint solutions occurs in an *ad hoc* manner, especially when interests and preferences of the governments momentarily overlap. This is because such intergovernmental structures or institutions lack the organizational framework needed for problem-solving. Compliance with the joint policy solution is easily achieved where there is a high level of institutionalization of the intergovernmental structures or institutions. To ensure the continuity of coordination, highly institutionalized intergovernmental structures or institutions discuss, and may even monitor, policy implementation. It is thus recommended that intergovernmental structures be highly institutionalized to enable them to safeguard the devolved system and its objectives.

The level of institutionalization of intergovernmental structures and institutions can be indicated by—one, the frequency of meetings; two, the presence or not of a secretariat; three, the number of committees and working groups; and four, the formalization of the rules of procedure and operation in documents such as bylaws or terms of reference.

#### **3.5.2.1 Frequency of meetings**

It has been noted that intergovernmental structures or institutions conduct their business through meetings known as summits, councils or forums which may or may not be held regularly. Intergovernmental structures or institutions that meet on a regular basis, have a high likelihood of securing joint policy solutions to problems. In these circumstances, the chances are that the decision to develop a joint solution may be taken at one meeting; the next steps are then defined at the subsequent meeting; progress in the development of the joint solution is then discussed or reviewed at the next meeting; the solution may be adopted at the following meeting; and subsequent meetings may serve to monitor implementation. This makes it more difficult for governments to act unilaterally at any stage of the process.

Intergovernmental structures or institutions may be said to be highly institutionalized if plenary meetings regularly take place twice or more times a year. Where meetings are held on an annual basis, the intergovernmental structures may be said to have a medium level of institutionalization. Where however, the intergovernmental structures or institutions meet on an *ad hoc* basis and less than once a year, it becomes difficult to ensure that the decisions of the intergovernmental structure or institution extend beyond a momentary overlap of interests and preferences. Likewise, if meetings take place irregularly, the chances of developing a joint solution and monitoring its implementation become minimal.

Although the National Government and County Governments Coordinating Summit is the apex intergovernmental structure in Kenya which has the potential to resolve many of the critical devolution challenges, its meetings can be said not to be regular enough to provide an opportunity for resolution of the many policy challenges that devolution faces. It is recommended that the Summit increases the regularity of its meetings to be able to address the emerging devolution policy and legislative challenges. The fact that to respond to the COVID pandemic the Summit has held more meetings than before is evidence that with

commitment, it can increase the regularity of its meetings to address the other salient devolution issues.

### **3.5.2.2 The Secretariat**

The success of an intergovernmental structure or institution requires the support services of a secretariat that is responsible for the day-to-day business of the intergovernmental structure or institution. A secretariat is important because it deals with administrative matters such as the organization of meetings, the writing of minutes, the circulation of information, and provides support to the chairperson of the intergovernmental structure. In addition, the secretariat also prepares draft versions of resolutions. The existence of a secretariat increases the level of institutionalization.<sup>23</sup>

However, the design and nature of the secretariat matters. For example, it will make a difference if the secretariat is permanent or if it rotates with the chair of the Intergovernmental structure. A permanent secretariat fosters the development of institutional interests that do not merely reflect those of individual governments and keeps institutional memory when membership of the structures or institutions changes following elections. In addition, a permanent secretariat ensures that coordination continues in-between plenary meetings. Hence, the presence of a permanent secretariat increases the level of institutionalization of an intergovernmental structure or institution. In some cases, the permanent secretariat is located national government, a factor that serves to deny it objectivity and neutrality.<sup>24</sup> Such secretariat is easily perceived as being biased in favour of the national government. Therefore, while a permanent secretariat located in the national government may be able to ensure the continuity of coordination, the factor of its location in the national government undermines its ability to develop institutional interests of the intergovernmental structure or institution as a joint entity of the two levels of government.<sup>25</sup>

In Kenya, the Summit is at least served by a permanent Secretariat in the form of the Intergovernmental Relations Technical Committee (IGRTC). However, the IGRTC needs to be restructured to properly place it as an important Secretariat of the Summit that undertakes all the secretariat responsibilities of an important intergovernmental structure such as the Summit. Its functions ought to be re-examined to capture all the functions of a secretariat of an intergovernmental structure. Its membership and recruitment process should also reflect the reality that it is a joint entity of the two levels of government that should be answerable to both levels of government. Currently, it is unfortunate that the Principal Secretary of the Ministry of Devolution is a member of the IGRTC while the county governments are not represented in it.

Many other intergovernmental structures do not even have permanent secretariats and are instead, served by officials of the national government. For example, many of the

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<sup>23</sup> Johanna Schnabel, (2020) P 56.

<sup>24</sup> Johanna Schnabel, (2020) P 56.

<sup>25</sup> Johanna Schnabel, (2020) P 56.

intergovernmental structures in the health sector are served by officials of the Ministry of Health on an ad hoc basis. These secretariats suffer from not only lack of permanency, but also lack of inclusiveness as they national government officials only. As is discussed in a subsequent section, this compromises the ability of the intergovernmental structures to address the health sector policy problems in a genuinely collaborative and coordinated manner. The consequence is that most of the policy solutions that appear to be joint, are unilateral impositions in disguise. Secretariats of this kind, as will be seen later, afford national government an opportunity to dominate the intergovernmental structures and processes, including the resultant policy solution.

### **3.5.2.3 Committees and working groups**

Some intergovernmental structures or institutions are very large in terms of membership. For example, the Summit has all the 47 County governors and the President, while the COG has all the 47 Governors. For such structures to be effective in the discharge of their mandates, they ought to work through committees and working groups to ensure the continuity of the coordination process. The committees and working groups prepare plenary meetings by exploring solutions, drafting reports and recommendations, and preparing draft versions of resolutions to be adopted by the intergovernmental structure in its plenary meeting. Committees and working groups can also identify what joint solutions are appropriate and politically feasible. By submitting reports to plenary meetings, they suggest possible solutions or report on the progress of implementation.<sup>26</sup> Some intergovernmental structures include among their committees, executive or steering committees that oversee the operation of other committees and working groups. Ordinarily, committees and working groups meet more often than the plenary assembly which means that the absence of committees and working groups weakens the institutionalization of an intergovernmental structure. The level of institutionalization increases with their number, and it is highest when several committees and working groups exist.<sup>27</sup>

### **3.5.2.4 The rules of procedure and operation**

While the operations of some intergovernmental structures are guided by convention, some intergovernmental structures are established by statutes and ought to be guided by highly precise rules of procedures that are written down in a statute, bylaws, or equivalent document such as terms of reference. Where the intergovernmental structure is established by statute, its mandate ought to be clearly set out in the statute. In addition, there ought to be rules of procedure that define matters such as the chair of the structures and his responsibilities of the structure, the secretary and his responsibilities, the committees and working groups of the structure and their terms of reference, who can convene the meetings of the structure, the quorum of the meetings, and the decision-making procedures including the required majorities for decision making. Where formal rules of procedure are clearly set out in statutes coordination follows formal rules and such formalization provides structure

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<sup>26</sup> Johanna Schnabel, (2020) P 57.

<sup>27</sup> Johanna Schnabel, (2020) P 57.

and makes coordination more predictable. The formal rules of operation increase the level of institutionalization of an intergovernmental structure or institution while the lack of such rules of procedure reduces institutionalization. Some of the procedural issues mentioned in this section are discussed in a subsequent section to show how their design can serve to increase the dominance of national government in the intergovernmental structures and processes and the resultant solutions.

### **3.5.3 The binding nature of their outputs**

For the intergovernmental structures and institutions to be taken seriously as strong safeguards of the devolved system, they must be able to produce binding outputs. Decisions of intergovernmental structures and institutions regarding the design of joint policy solutions are ordinarily summarized in written documents which then constitute the outputs of the intergovernmental meetings. The degree of bindingness of these outputs indicates the commitment of the governments to refrain from unilateralism in implementing a policy solution. Therefore, the stronger this commitment is, the more likely it is that the governments will comply with the joint solution. Different types of outputs with varying degrees of bindingness can be identified as reports, statements, actions plans, and intergovernmental agreements.

Reports issued by intergovernmental structures or institutions normally identify policy problems that governments consider important. They can also summarize the possible solutions to these policy problems which the governments have identified. However, reports merely contain recommendations that governments can decide to draw upon when making public policies. As they are highly informal outputs, they reflect a low commitment from governments to comply with the policy solution proposed in a report and therefore, have a very low degree of bindingness.<sup>28</sup>

On the other hand, public statements released after meetings of intergovernmental structures or institutions, may have a higher degree of bindingness. This is because governments issue public statements to inform about their views regarding a policy problem and ways to solve it. Such statements can be delivered as communiqués of the intergovernmental structures, press releases, or official letters.<sup>29</sup> For example, if the Council of Governors releases a statement or issues a communique after its meeting, asking the national government to take action regarding a specific policy matter, they have identified as requiring a policy solution, they are likely to be taken seriously by national government. Likewise, if the COG places on the agenda of the Summit a recommendation regarding a certain policy issue or direction to be taken, the President who is a member of the Summit is bound to give the matter serious consideration. Public statements reflect a higher investment of political capital compared to reports and may have a higher degree of bindingness.

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<sup>28</sup> Johanna Schnabel, (2020) P 58.

<sup>29</sup> Johanna Schnabel, (2020) P 58.



This higher degree of bindingness is enhanced when an intergovernmental structure decides to establish action plans in which governments commit to pursue joint objectives. Action plans are detailed plans that outline the steps to be taken to achieve specific policy objectives. In contrast to reports and statements, action plans contain a precise strategy on how to reach a defined goal. They thus indicate governments' commitment to implement certain measures to solve a policy problem.

At the highest level of degree of bindingness is an intergovernmental agreement entered into by the governments following engagement through an intergovernmental structure. An intergovernmental agreement may be styled as an accord, protocol, compact, or memoranda of understanding and is the most formalized type of an output of an intergovernmental structure. This is because this is a written contract signed by the different governments and can sometimes be legally binding. It therefore indicates a strong commitment to implement a joint solution.<sup>30</sup> However, the Intergovernmental agreements can be made more binding by enacting some of their terms into national legislation that creates legal obligations for the governments.

#### **3.5.4 The extent of their dominance by the national government**

An important dimension of the design of intergovernmental structures is the need to ensure that the design does not allow the national government's dominance in the intergovernmental structures. Such dominance tends to weaken the ability of the structure as a safeguard for the devolved system and allows unilateralism to prevail. Although it may be argued that national government's superior position in vertical intergovernmental structures may be justified on grounds that hierarchical coordination can be more effective and efficient, the reality is that such dominance in intergovernmental structures in which national government participates, gives it significant leverage on the intergovernmental agenda that creates room for reversion to unilateralism. Such dominance enables national government to determine whether and how a joint solution is developed.<sup>31</sup> Consequently, intergovernmental structures or institutions must be designed in a manner that avoids their being dominated by national government.

A major problem with national government's dominance in a vertical intergovernmental structure is that it allows it to decide which matters to include on the structure's agenda and when to call meetings. The national government can thus exclude policy problems from the meeting's agenda or even refuse to call a meeting when it considers a policy crucial for its autonomy even if intergovernmental structures have the capacity to process such matters. As a result, a joint solution may not be enacted because the national government refuses to coordinate and decides to pursue its own policy in a unilateral manner. Through such approach, the autonomy of county governments may be affected, and this may become the reason county government's interests and preferences are not addressed even if a joint

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<sup>30</sup> Johanna Schnabel, (2020) P 59.

<sup>31</sup> Johanna Schnabel, (2020) P 61.

solution is found. Other times national government may organize the meetings of the intergovernmental structure but design a policy without consulting the sub-national governments and then present it to them as a “take-it-or-leave-it” offer. In this manner the national government is able to use its superior role within an intergovernmental structure to impose a policy solution.

Furthermore, the national government may refuse to call meetings once a joint solution is adopted, so that the intergovernmental structure is denied a chance to monitor progress in implementation of the policy solution. Overall, the dominance of national government in vertical intergovernmental structures enables it to refuse being held accountable by the other members of the intergovernmental structure. Various factors which enable national government to dominate an intergovernmental structure can be identified.

First, the national government dominates a vertical intergovernmental structure if it permanently chairs its meetings, instead of the role of the chair rotating annually among the members of the intergovernmental structure. The experience in Kenya is that most intergovernmental structures are co-chaired by members of national and county governments. Although this sounds good, the reality is that where a national Cabinet Secretary Co-chairs an intergovernmental structure with a county CEC, the tendency is for the CEC to defer to the Cabinet Secretary and deal with him from a position of a superior and inferior. Ultimately, the national government is left in a dominant position. This is compounded by the fact of the national government also providing the secretariat.

Secondly, national government dominates a vertical intergovernmental structure if it provides the secretariat. When the national government provides the secretariat, staff within a national ministry such as MOH organize meetings, circulate information in-between meetings, and manage the day-to-day business of the intergovernmental structure. It is only when the national government neither chairs the intergovernmental structure on a permanent basis nor provides its secretariat that the national government becomes merely one of several equal members of a vertical intergovernmental structure, so that it cannot formally dominate it. Notably in the case of horizontal intergovernmental structures, the national government’s dominance is absent by default given that it does not participate in such intergovernmental structures other than as a visiting guest.

Thirdly, national government dominates a vertical intergovernmental structure if membership of the intergovernmental structure is tilted in its favour in terms of numbers. The membership of the intergovernmental structures must have meaningful representation of the county governments as opposed to mere tokenism. Many intergovernmental structures and entities established by national government through legislation have Boards of directors have very large numbers of national government officials with no representation of county governments or representation of one or two members. In such structures decisions that are based on votes may eventually lead to decisions that favour the position of the national government.

Fourthly, the rules of procedure governing the intergovernmental structures or institutions on matters relating to convening of the meetings of the structure also allow the national government to dominate the intergovernmental structure. This is compounded by quorum rules that require a certain number of participants without subjecting the rule to the requirement that such quorum must include representatives of both levels of government. For instance, if a quorum of fifty percent of the members is required for a meeting to be held, would such quorum be achieved where all the members who constitute that fifty percent are all representatives of one level of government? Similarly, the rules on the majorities for required for decision-making may require to be re-examined from this perspective.

Fifthly, national government dominates intergovernmental structures and institutions through the fact that it is the one the finances most of the structures.

## **6. The Pathway to effective intergovernmental relations**

Based on the issues examined above and the obligations of cooperative intergovernmental relations imposed by Articles 6(2) and 189 of the constitution, the two levels of government ought to follow the pathway set out in the next sections to ensure effective management of intergovernmental relations. In terms of this pathway, the governments must coordinate each other; they must communicate and share information; they must consult each other; they must negotiate with each other on certain matters; the negotiations should lead to intergovernmental agreements being signed among the governments; the intergovernmental agreements may establish some joint entities of the two levels of government; such intergovernmental agreements may delegate some of the functions of the governments to the entities established to discharge on their behalf; the agreements must indicate how the joint entities established will be financed; and some of the terms of the agreement may be enacted into legislation.

### **6.1 Governments must coordinate their activities**

The first step in the pathway towards effective management of intergovernmental relations which the governments ought to understand is the obligation to coordinate their activities, especially the development of policy and legislative solutions to problems. In terms of Article 189(1)(c) of the constitution, governments at national and county levels are required to liaise with each other for the purpose of coordinating policies and administration and enhancing capacity. National government should co-ordinate its functions and legislation with those of county governments. Likewise, the national executive authority should co-ordinate the functions of state departments with county departments and administrations.

Co-ordination is the process through which the levels of government ensure that their activities and functions do not overlap, and that no duplication of functions occurs. From the perspective of public administration and public management, coordination is viewed as referring to the 'negotiated mutual adjustment that causes governments to pursue different

policies than they would have chosen had policy-making been unilateral'.<sup>32</sup> Policy coordination fosters the efficiency of public policy making and policy implementation by reducing incoherencies, fragmentation, redundancies, contradiction, and duplication in the provision of public services.<sup>33</sup> In federal or constitutionally entrenched devolved systems however, coordination can also protect the autonomy of governments since it avoids the negative effects of unilateral decision-making on the balance of power in the system.<sup>34</sup>

When governments coordinate their activities, they reach joint solutions to policy problems that cut across jurisdictions and avoid unnecessary conflict that arises out of unwanted shifts of autonomy that unilateralism may occasion. Coordinated policy solutions can take the form of Intergovernmental agreements to exchange information, joint priorities, common policy frameworks, harmonization, and even uniformity. A joint solution may consist of an agreement between governments to share information in order to provide each other with the means to consider the impact of their policy actions on other members of the devolved system. Ideally joint solutions ought to be collaborative in character. From this perspective collaboration means the active search for joint policies by agreement rather than coercion or imposition. Collaboration ensures that the two levels of government coordinate as equal partners. Joint solutions are therefore collaborative if they are formally adopted by all the governments in the devolved system; if all the governments participated in their development as more or less equal partners; and if all governments comply with the joint solutions.<sup>35</sup>

Notably coordination is not an end in itself but a means of avoiding incoherencies, inconsistencies, fragmentation, redundancies, contradiction, and duplication in policies in order to ensure efficiency in the deliver of public services. As already noted, coordination of the development of policy solutions is best achieved through intergovernmental structures that bring together the two levels of government. It is imperative that national government, and especially MOH in the health sector, should abandon unilateral approaches to policy formulation and resort to establishment of joint committees of national and county governments to undertake any reforms that may be required in the sector. County governments should be involved in the development of the policies right from the very inception of the process. The current practice of unilaterally developing first drafts of policies and legislations and then sending them to COG for comment at the last minute is unacceptable. Sometimes these draft policies reach county governments for the first time when a Bill has already been introduced in Parliament. Effective coordination would require that the participation of the county governments be sought at the initial stages of conceiving and conceptualizing the policy reforms. Given that COG is a coordination structure for coordinating the forty seven counties to formulate and consolidate their positions on policy, it is imperative that even if this approach were to be followed, the COG ought to be given

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<sup>32</sup> Johanna Schnabel, (2020) P 49.

<sup>33</sup> Johanna Schnabel, (2020) P 49.

<sup>34</sup> Johanna Schnabel, (2020) P 49.

<sup>35</sup> Johanna Schnabel, (2020) P 50.

adequate notice to enable it reach out to its members and organize meeting for generating and consolidating the position of the counties on any given policy proposals.

## **6.2 The governments must communicate and share information**

For coordination to be effective, the second step in the pathway of effective intergovernmental relations is communication and sharing of information. Indeed, proper coordination will include communication and sharing of information among governments. Article 189(1)(c) of the constitution requires governments at either level to liaise with each other for purposes of exchanging information and enhancing capacity.

Communication and information sharing is a key strategy that works towards improving the quality of intergovernmental relations. Communication is the exchanging of thoughts, ideas, perceptions, or information in a written, verbal or non-verbal way. It is through the communication process that information is conveyed from one level of government to the other. Therefore, guidelines for the improvement of the quality of intergovernmental relations ought to not only provide for formal communication structures but also selection of appropriate communication structures and technologies. Where the levels of government are engaged in joint activities, information and communication should be passed along organizations with liaison functions such as councils, working groups, task forces and commissions.

Often governments disagree and slide into disputes merely because of lack of information and poor communication among them. When they communicate and share information, they identify numerous areas of agreement thereby narrowing the areas of disagreement which they isolate and focus their negotiation efforts on. Communication and sharing of information also enable different governments, to educate each other, build capacity and consensus, and thereby avoid disputes and unnecessary litigation. The country has experienced problems and disputes in the devolution sector mostly not because there are bad people but because, sometimes the key players simply lack information.

## **6.3 The governments must consult with each other**

A key element of effective coordination is consultation with each other which becomes the third step in the pathway to effective intergovernmental relations. In terms of Article 189(1)(b) of the constitution, the governments at either level are required to assist, support and consult with each other and, where appropriate implement the legislation of the other level of government.

Consultation entails the duty to make conscious and deliberate efforts to seek out the views of the other party, and to consider them before arriving at a decision. It ensures that the exercise of the autonomous and distinct powers is informed, not merely by the narrow interests of the government exercising its powers, but also the wider interests of the other level of government and all other concerned persons. Consultation serves as a means of

improving decision-making for the benefit of all concerned. Effective consultation encompasses three key elements—a genuine invitation to present views; affording the invited party a reasonable opportunity to present views; and consideration of the presented views in good faith.<sup>36</sup> The element that requires affording a reasonable opportunity to present views militates against national government’s approach of presenting documents to the COG and requiring them to present views on very short notice. Given that COG coordinates 47 county governments a reasonable opportunity must consider the need for COG to reach out to the 47 county governments to seek and consolidate views before sharing them with the national government. It is for this reason that the idea of involving county governments from the stage of the inception of the policy proposal comments itself.

#### **6.4 The governments must negotiate on certain issues**

Many of the intergovernmental issues which require coordination will have elements that require negotiations among the two levels of government. The national and county governments must therefore negotiate with each other in order to resolve such issues. Often, the governments involved in coordination of policy development will start the process with each one of them holding different views and positions informed by their narrow interests. They will thus need to negotiate and arrive at a consensus common position.

Negotiation is one of the processes of private decision-making by the parties themselves in which the parties control the process and the outcome. It involves bargaining by and between the parties to a dispute who seek to resolve the conflict between them through the exchange of resources or structuring of relationships. The process does not follow a formal structured procedure as the parties who are in control can follow any method that is likely to yield results.<sup>37</sup>

#### **6.5 The negotiations should lead to Intergovernmental Agreements**

As part of coordination, the negotiation process among the governments must lead to intergovernmental agreements being concluded among them. Comparative experience presents intergovernmental agreements as important and familiar instruments for managing intergovernmental relations. Intergovernmental agreements can be vertical, horizontal, bilateral, multilateral, and even “omnilateral” in the sense that they are concluded between all the partners in the devolved system. These 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; taxation, social security, and environmental protection in Argentina and Canada; law enforcement agreements in Switzerland; the regulation of provincial boundary changes in South Africa; and

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<sup>36</sup> Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (2015) 324-325.

<sup>37</sup> Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (2015) 338.

joint performance reporting agreements in Australia. County governments may also conclude multilateral horizontal intergovernmental agreements to adopt uniform norms and programs to fend off centralization of a particular policy area. In integrated systems intergovernmental agreements may specify how constituent units are to implement national policies and programs. Indirectly, intergovernmental agreements may play a role in restructuring the federal or devolved system including the adjustment of functional assignment on the margins of its formal architecture.

#### **6.6 The IGR Agreements may establish some joint entities of the two levels of government**

Intergovernmental agreements may set up joint bodies and institutions, with or without autonomous regulatory powers. Depending on the issues the governments are seeking to resolve through the intergovernmental negotiations, the terms of the intergovernmental agreement may include an agreement to establish a joint entity of the two levels of government. Article 189(2) of the constitution provides in this respect that ‘government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities’. This provision draws a distinction between two types of joint entities—joint committees and joint authorities. For this purpose, a joint committee is an entity whose membership may include officials of the governments and appointees of the governments. On the other hand, joint authorities are independent entities appointed by the governments but whose members do not include officials of the governments establishing them. The independent members of the joint authority are, however, ultimately accountable to the governments that have jointly established the entity. For example, KEMSA ought to be conceptualized, established, and structured as a joint authority and not a joint committee. As such, officials of both the national and county governments ought not to be members of KEMSA’S Board of Directors.

When such joint committees and joint authorities are established, the principle of genuine collaboration, anchored in equal partnership among the two levels of government ought to be observed and reflected in the membership of their boards of directors. This means that the national and county governments ought to be represented in such entities on an equal or near equal basis.

Currently, there are numerous entities which were established under the old constitutional order and whose functions were devolved by the constitution but have not been aligned to the constitution to reconceptualize them as joint entities of both national and county governments. A good example is the Pharmacy and Poisons Board established under the Pharmacy and Poisons Act as a regulatory entity of the then unitary government. However, and examination of functional assignment under the constitution the policy and regulatory function in these areas is now shared between national and county governments. While the constitution assigns national government the function of health policy; county governments

are assigned county health facilities and pharmacies. Implied in this county function are some policy and regulatory functions over pharmacies. These therefore means that the role of the Pharmacy and Poisons Board ought to be re-examined to see how to reconceptualize the Board. National government has since the enactment of the constitution also continued to unilaterally establish other entities of the national government even in functional areas where such entities ought to be joint entities of national and county governments. A good example is the National Construction Authority established under the National Construction Authority Act. The functions of the authority affect and intersect with the county governments housing function, roads function and water and sanitation functions among others.

#### **6.7 The Agreements may delegate some of the functions of the governments to the established entities to discharge on their behalf**

Article 189(2) of the constitution which empowers national and county governments to establish joint committees and joint authorities makes it clear that they do so in the course and as part of co-operating in the performance of their functions and exercise of their powers. It follows therefore that the joint committees and joint authorities are set up to assist the two levels of government to perform their constitutional functions and exercise their constitutional powers.

Consequently, when national and county governments agree to establish certain joint entities, they must determine the functions those entities will be performing and the powers they will be exercising. Quite often these will be functions constitutionally assigned to the two levels of government which they then agree to delegate to the joint entities. The intergovernmental agreements must therefore clearly provide for the delegation of the constitutional functions which the two levels of government have agreed to delegated to the established entities to discharge on their behalf. The agreement ought to clearly and explicitly identify the functions the governments are delegating to the joint entities.

Thus, a joint entity is one to which the functions of both levels of government are delegated. When examining a legislation that establishes a joint committee or joint authority the functions and powers assigned to the joint entity must be examined to establish whether the entity is truly a joint entity. If the functions and powers the legislation assigns to the entity intersect with and affect the functions and powers of only one level of government, then the entity is not joint and belongs to only that level of government whose functions and powers are affected. However, where the functions and powers the legislation assigns to the entity intersect with and affect the functions and powers of both levels of government, then the entity is a joint entity of the two levels of government.

#### **6.8 The Agreements must indicate how the entities will be financed**

The principles of financial devolution under the Kenyan constitution include that of funds must match and follow functions. This means that when the governments agree to delegate their functions to a joint entity, the intergovernmental agreement must provide for how the



two levels of government will be contributing resources to finance the activities of the joint entity. One level of government cannot just unilaterally appropriate the funds of other to the joint entity without the consent of that other government. The manner in which national government has previously allocated money to entities that it unilaterally establishes such as KEMSA and the proposed Universal Health Coverage Funds disguised as conditional grants is unacceptable and ought to be carefully examined.

In addition, where the joint entity the governments agree to establish will be generating revenue in the course of its operation, the IGR Agreement must make provision regarding how the revenue generated will be shared among the governments forming it.

### **6.9 Enacting some of the terms of IGR Agreement into legislation**

A major challenge in intergovernmental relations is how to secure enforcement of the terms of intergovernmental agreements. Experience shows that one of the mechanisms for securing enforcement is by reducing some of the terms of the intergovernmental agreement into either national or legislations of the counties involved in the intergovernmental agreement. It is thus advisable that where the governments want to take this route, the must identify the agreement matters that ought to be reduced into legislation and even jointly formulate the draft Bill to be introduced into Parliament. Experience with regional Economic Blocs indicates that there have been situations on which county governments in a regional bloc have agreed to give legal force to some of their agreements through each of the signatory counties passing its own county legislation in respect of the agreed terms.

### **6.10 The challenges of proliferation of intergovernmental structures and their financing**

A major challenge in the effective management of intergovernmental relations is the risk of a proliferation of intergovernmental structure and institutions or forums. If this is left to take its own course, it would create the challenge of duplication of roles and responsibilities with the resultant high costs of financing the structures and institutions. It is thus imperative that criteria for determining the necessity of an intergovernmental structure be and set. Intergovernmental structures and institutions should only be established when a clear need has been identified. There is always the risk of establishing unnecessary structures that interfere with the work of public institutions, duplicate efforts, and waste public resources.

The institution or agency proposing the formation of an intergovernmental structure should be required to set out grounds that justify its establishment, indicate its proposed functions and powers, suggest an administrative structure, sources of funding and the reporting and accountability framework governing it. Ad hoc joint committees, which address particular issues and exist only for a given period, may also be formed on a need basis. The criteria and procedure for establishment of such Ad hoc committees should be more flexible, as

compared to that for establishment of joint authorities and joint committees of a permanent nation.<sup>38</sup>

#### **6.11 The role of Parliament in the implementation of these Guidelines**

It is one thing to develop and establish guidelines for effective intergovernmental relations, and yet another to have the two levels of government take them seriously and use them as they engage with each other. However, a role can be identified which parliament can play in facilitating the enforcement of some aspects of these guidelines. To give effect to the constitutional provisions regarding introduction in parliament of money bills and bills concerning counties, parliament has developed rules that require any body introducing a bill in parliament to indicate in the memorandum of objects and purposes of the bill, whether or not the bill is a money bill, and also whether it is a bill concerning counties. It is proposed that such a rule should be introduced in respect of whether the bill has been originated unilaterally by one level of government or through joint action of both levels of government. This will serve to encourage governments to seek joint policy solutions and therefore resort to more use of joint mechanisms of originating bills.

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<sup>38</sup> IGRTC Status of Sectoral and intergovernmental Forums in Kenya (2018), Pages 34-35.