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**Addressing the limits of autonomy: Origin,
organization and purpose of horizontal
intergovernmental forums in three federations**

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Abstract

Horizontal intergovernmental forums that bring together the constituent units of a federation are increasingly common. This article examines the origin, organization and purpose of the premium horizontal intergovernmental forums in Kenya, Spain and Canada. The constitutional origin of institutions of horizontal intergovernmental relations is uncommon. The experience of the three political forums confirm the view that institutionalization of intergovernmental relations may not be a necessary condition for effective intergovernmental relations. Yet, in countries with no history of multilevel governance or a culture of cross-boundary interaction, institutionalization might give horizontal intergovernmental relation the prompt it needs. Despite the expectation that they will focus on facilitating horizontal collaboration, however, the forums are focused on creating a common front against the national government. They may be horizontal in their structure but vertical in their orientation.

Keywords

Horizontal intergovernmental forums, Council of Federation, Council of County Governors, Conference of Autonomous-Community Governments

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1. Introduction

Horizontal intergovernmental forums that bring together the constituent units of a federation are increasingly common. They are distinguished from vertical forums in their exclusion of national governments. They, however, come in different forms. They could be summit forums that bring together the leaders of subnational units. They could be sectoral structures that bring together persons responsible for the relevant sector in their respective subnational governments. They could be forums that involve all subnational units or structures that involve only some of the subnational units, often based on regional, linguistic or other bonds. In some occasions, they are bilateral. Mostly, however, they are multilateral.

This article examines the origin, organization and purpose of horizontal intergovernmental forums in three federal jurisdictions across three continents: Kenya, Spain and Canada. In order to do so, it focuses on summit forums (also known as political forums) that bring together the leaders of the different subnational governments. The focus is thus on the Council of Federations [COF], the Council of County Governors [CCG] and the Conference of Autonomous-Community Governments [CAG], the premium horizontal intergovernmental forums in Canada, Kenya and Spain respectively. The countries are not selected because they provide a representative sample of horizontal intergovernmental forums. They are chosen in order to examine the different experiences of intergovernmental forums in three different jurisdictions.

The rest of the article is structured as follows. The article commences the discussion by tracing the origin of the three intergovernmental structures, focusing on the constitutional framework within which intergovernmental relations operate in the three federations. The article then discusses the organization of the three horizontal intergovernmental structures. That is followed by a discussion that examines the purposes of the structures. The article concludes the discussion by offering some comparative observations.

2. Origin

Horizontal intergovernmental relations have a long history in Canada. The first meeting of Canada's premiers dates to 1887 when Premier Honore Mercier of Quebec convened what is then known as the interprovincial conference (Meekinson 2002). Presided by



Premier Oliver Mowat of Ontario, the conference brought together five (of the seven) provinces. It did not, however, immediately develop into a regular event. In fact, between 1887, when the first conference took place, and 1926, after which the inter-provincial conference went dormant, only six conferences were held. The interaction between provincial governments became more regular when the inter-provincial conference was rebranded and re introduced as Annual Premiers' Conference (APC) in 1960, again upon the initiation of the premier of Quebec. The ten premiers continued to meet every year and the Conference developed into an important arena of inter-provincial collaboration though not so immediately. By the time the leaders of the three territories (i.e. Northwest territories, Nunavut and Yukon) joined as equal members of the conference in 1990s, after initially attending the conference as observers, the APC have already become an important arena not only for collaborating on inter-provincial issues but also for forming a common position in negotiations with the federal government. It was only after 40 years of regular meetings that a decision was made, again based on a proposal made by the Government of Quebec, to create the COF in 2003.^I Although the idea originally proposed by Quebec envisaged the establishment of an intergovernmental council that brings together the federal government and the provinces,^{II} the premiers decided to limit the COF to a forum for horizontal collaboration. That makes the COF a slightly institutionalized version of the APC.

By the time the COF was celebrating its fifth-year anniversary, the seeds of horizontal intergovernmental structures were just being planted in Spain (Segui 2013).^{III} In 2008, a number of Autonomous Communities amended their statutes of autonomy. That same year, in a meeting held in Zaragoza, those same Autonomous Communities, upon the initiative of the Government of Aragon, agreed to establish a forum through which they can harmonize the implementation of their new statutes. That gave birth to the Meetings between Autonomous Communities for the Development of the Statutes of Autonomy, a forum that was aimed at 'pool[ing] together the issues that affect or interest them, to exchange information, and to set up lines of action that can lead to the signature of cooperation agreements or the creation of collaborative tools for a better performance of their powers in the interest of citizens' (Segui 2013: 242). The forum met quiet frequently and regularly. Between 2008 and 2010, it met eight times and was able to adopt six statements and managed to conclude eleven agreements or protocols (Gálvez and and Ruiz



2013).^{IV} The Autonomous Communities were able to form a common position vis a vis the national government on a number of issues, including the division of powers, the role of the autonomous Communities with respect to decisions made by the State with regard to EU, the Senate and state subsidies. They have also developed ‘an early warning system’ that is used ‘to detect if there is draft legislation by the central government that might encroach upon AC competences’ (Morales 2013: 100). The forum has also facilitated horizontal collaboration in the delivery of services through the conclusion of agreements and protocols in several sectoral areas (Gálvez and Ruiz 2013). Perhaps it is the relative success of the forum that encouraged the establishment of a broader and more regulated horizontal intergovernmental institution. But it was only after seven meetings that, in 2010, the original members of the forum were joined by the other autonomous communities and a decision was made to establish CAG (León & Pereira 2011). Its first meeting was held in March 2011.

As an institution whose establishment was only envisaged in a constitution that is only adopted in 2010 and a country that does not have a recent history of federalism, the horizontal forum in Kenya has, in contrast, a very short history. Article 40 of the Constitution envisages an act of parliament that establishes intergovernmental forums (Kenya Constitution 2010). This was realized when the parliament adopted the Intergovernmental Relations Act No. 2 of 2012 (hereafter IGR Act), which ‘establishes a framework for consultation and co-operation between the National and County governments and [most importantly for our purpose] amongst county governments’. Article 19 of the IGR Act declares the establishment of the CCG, which shall consist of the governors of the forty-seven counties.

From the foregoing, with the exception of Kenya, it is clear that the origins of the horizontal forums were evolutionary and incremental. In the case of Canada, the introduction of the COF was preceded by hundred years of informal but well structured horizontal interactions. It evolved from the early days of being a social gathering to a forum where social interactions have become a side show and more serious issues have taken centre stage. Spain does not have a history of hundred years of intergovernmental forum. Nevertheless, what is also notable in the case of Spain is also the incremental way in which the Meetings of the Autonomous Communities (with few members) evolved into a relatively formal horizontal intergovernmental forum that brings together all Autonomous



Communities. As Gálvez and Ruiz (2013: 234) note, the establishment of CAG was preceded by the ‘progressive increase’ in the number of Autonomous communities that attend the Meetings and ‘in the number and importance of the agreements and Protocols signed and the issues dealt with in the meetings’. The outlier here is Kenya, where intergovernmental relations has no roots. This should not be surprising given its history and tradition of unitary centralized government. A form of government that makes intergovernmental relation imperative was only introduced recently.

The contrasting history of the origin of horizontal intergovernmental forums in the three case studies raises the question whether a history of intergovernmental structures matters for the effective functioning and success of a horizontal forum. There is no doubt that a rich history of IGR and intergovernmental forums provides a country with a wealth of knowledge and experience in putting in place an effective intergovernmental forum. At least, in those cases, there won’t be ambiguities about the institutions and processes of IGR that must be employed in order to ensure a forum that meets regularly and frequently. Experience might also allow such forums to be less ambitious and adopt decisions that are sensitive to the autonomy of subnational units. Perhaps, it is fair to suppose that the continued existence and relevance of some form of horizontal forum in Canada owes to its long history of horizontal interactions.

3. The Organization

Some intergovernmental structures are more formal and institutionalized than others. There are several structural features that determines the formalization and institutionalization of an intergovernmental forum (Simmons 2004; Börzel 2000; Bolleyer 2006). This first depends on whether the intergovernmental relation is ad hoc or based in law. And if it is not ad hoc, the question is whether it is based on a constitutional or extra-constitutional rule. Another indicator is whether the forum has a clear mandate and rules of procedures, which includes pre-determined periodic meeting and rules on how its chair is determined. It also depends on whether the structure benefits from support mechanisms in a form of a technical wing and interlinked subcommittees that have clear mandates. An institutionalized intergovernmental forum would also have a support mechanism in a form



of a secretariat that is limited to providing administrative assistance or goes beyond that and advises the political forum on policy options. Equally important is also that the forum is convened regularly.

The organization of intergovernmental institutions takes different forms in the three countries. The horizontal forum in Kenya represents the most formal and institutionalized intergovernmental institution. This largely has to do with the fact that the Kenyan Constitution stands in sharp contrast to the Spanish and Canadian constitutions in its explicit embrace of intergovernmental cooperation. Although the Constitution expects each level of government to exercise its powers in a manner that respects the autonomy and distinctiveness of other governments, it also expects the two levels of government to 'assist, support and consult' with each other (Article 189 (1) (b), Kenya Constitution). It also expects them to liaise with each other 'for the purpose of exchange information, coordinating policies and administration and enhancing capacity' (Article 189 (1) (c), Kenya Constitution). It expects these to be achieved through forums and mechanisms that facilitate cooperation between the different levels of governments. More importantly for our purpose, the Constitution does not only envisage vertical interaction between the national government and the 47 county governments. It also obliges county governments to 'co-operate in the performance of functions and exercise of powers' (Art.189 (2), Kenya Constitution). The emphasis on cooperative government is also evident in the fact that the Constitution mandates the different levels of government to resolve disputes without resorting to courts through alternative dispute resolution mechanisms, including negotiation, mediation and arbitration (Art.189(3), Kenya Constitution). In short, the Constitution, drawing from its South African counterpart, declares cooperative government as an important principle of intergovernmental relations in the devolved system of the Kenyan State (Simiyu 2015).

The establishment of intergovernmental structures, as mentioned earlier, was sanctioned by the Constitution that envisaged the establishment of an Act of Parliament that provides for intergovernmental structures. The envisaged Act of Parliament, the IGR Act, was adopted in 2012. As a result, the constitutive document of the CCG is an Act of Parliament, which requires it to meet at least twice a year (Art.21, IGR Act). If requested by one third of the members of the council, the Chairperson is obliged to convene a special meeting. The Council elects both its chairperson and vice-chairperson (Art.21, IGR Act).



Both can serve for a term of one year, but they are eligible for re-election for one further term of one year. The IGR Act does not provide for the establishment of a secretariat that can provide bureaucratic support specifically to the Council. Rather, it mandates the Intergovernmental Relations Technical Committee, a shared secretariat that is also responsible for providing technical support to the Summit, to facilitate and implement the activities of the CCG (Art. 12, IGR Act). In practice, however, the CCG has opted to establish its own secretariat that is funded by determined contributions from the counties and plans to have it recognized by law (Intergovernmental Relations Technical Committee, 2018). In addition, the CCG has established 18 technical committees.

Unlike its Kenyan counterpart, the Spanish Constitution does not sanction cooperation between the national government and the Autonomous Communities (ACs) (Aja and Colino 2014). In fact, the Constitution makes no reference to intergovernmental relations or cooperation. The only closest reference that the Constitution makes to intergovernmental relations is when it regulates the conclusion of agreements between autonomous communities. Even then, it does not provide for a framework that encourages agreements between ACs. It actually makes it difficult for ACs to conclude horizontal agreements (Morales and Marin 2015).^v The Constitutional Court of Spain has, however, declared that cooperation is an integral part of the form of government that the country has adopted. According to the Court, the principle of cooperation is implicit in the territorial design of the state that the Constitution has put in place (STC 18/1982; STC 11/1986). Although the Court made the comment in a context of vertical relationship between the central government and the AC, the principle is arguably applicable to horizontal relationships.

The absence of a constitutional framework for intergovernmental relations in Spain means that the CAR, unlike its Kenyan counterpart, is not based on a constitution or any other law. Its existence and continued relevance is not legally guaranteed. Although not institutionalized, it is not completely ad hoc. It was established based on an agreement signed by the ACs. The Conference has ‘operating rules’, which outline the purpose of the conference, its composition as well as the frequency and convening of the meeting (Segui 2013). According to the rules, the highest decision-making body of the conference is the plenary session, which is expected to meet twice a year and is chaired on rotational basis. Often, the chair of the plenary session, whose term lasts until the next meeting is held,



effectively making the term of a chair six months, is a representative of the autonomous community that hosts the meeting. The Chairperson, if requested by at least nine members, is required to convene a special meeting. The CAR is supported by a Technical Commission and a permanent secretariat. Composed of at least Director Generals from the autonomous communities, the Technical Commission is responsible for ‘preparing the meetings of the conference’. The Permanent Secretary is ‘in charge of the tracking of communications, the preparation and the custody of the documents of the conference’ (Seguí 2013: 243). In addition to the Permanent secretary, each meeting of the conference has also a secretariat, which is ‘held by the Community holding the presidency’. It is responsible for convening the conference and, when necessary, organizing preparatory meeting.

Although intergovernmental relations, including its horizontal variant, as discussed earlier, have a long history in Canada that goes back to the 19th century, it has no explicit basis in the constitution. The Constitution of Canada does not include anything that resembles the principles of cooperation between the different levels of governments. In fact, the division of power that characterizes the Canadian federation, famously known as ‘watertight compartments’,^{VI} many believed, does not leave much room for intergovernmental cooperation and coordination for it to receive a constitutional recognition. That might also explain why the Constitution of Canada is silent on intergovernmental mechanisms despite the numerous and diverse intergovernmental forums that exist in the country. Like in Spain, however, Canadian courts have noted the evolving nature of Canadian Federalism that is increasingly encouraging cooperation between the different levels of governments. As the Supreme Court of Canada has itself indicated, in the Securities Reference of 2011, the Court has, since 1949, ‘moved toward a more flexible view of federalism that accommodates overlapping jurisdiction and encourages intergovernmental cooperation — an approach that can be described as the ‘dominant tide’ of modern federalism’ (Reference re Securities Act (2011) 3 SCR 837 57). It must at the same time be noted that the Court does not see cooperative federalism as the building block of the Canadian federal system. It does not force the different levels of government to act in a cooperative manner. According to the Court, it is up to the two levels of government to exercise their powers in ‘the spirit of cooperative federalism’. The Court simply suggests that a ‘cooperative approach’ might be useful ‘to ensure that each



level of government properly discharges its responsibility to the public in a coordinated fashion' (Reference re Securities Act (2011) 3 SCR 837 9). In fact, the Court was sure to emphasise the distinctiveness of each level of government and the need to respect 'the constitutional boundaries that underlie the division of powers' (Reference re Securities Act (2011) 3 SCR 837 62).

The operation of COF, unlike its Kenyan counterpart, is not based on constitution or any other law. Like its Spanish counterpart, however, the COF is not an ad hoc institution. As an institution of IGR that is based on an agreement signed by the premiers and the leaders of the three territories, however, it represents a departure from the era of the APC where the interaction, albeit regular, was informal. The agreement envisages that the Council meets at least twice a year (Art.9, COF Founding Agreement).^{vii} The premier of the chair is selected on a rotational basis, with each chair only serving one year (Art.7, COF Founding Agreement).

The COF receives bureaucratic support in a form of a steering committee and a secretariat. The steering Committee, which is composed of the deputy ministers in charge of intergovernmental relations or a representative designated by a premier of a province, assists the council by preparing 'the meetings of the Council and carry[ing] out the study, research and analysis mandates that it receives from the Council' (Art.14, COF Founding Agreement). It is responsible for giving direction and supervision of the Secretariat, which provides administrative support by way of making the necessary preparations for meetings of the Council (Art.16, COF Founding Agreement). This suggests that the work of the secretariat is administrative in nature, limited to facilitating the meetings. It does not 'serve as an instrument of research analysis and prescription' (Leclair 2006: 55).^{viii} The Secretariat, like its Kenyan counterpart, is funded by the provinces 'on pro rata basis formula according to their respective populations' (Art.17, COF Founding Agreement).

There is a long ongoing debate on whether a legal framework, in a form of a constitution or ordinary law, is essential for the effective functioning of an intergovernmental forum. The indication from the case studies is that it does not. The Constitution of Canada, the federation with the most frequent and regular intergovernmental relations and structures, makes no mention of intergovernmental relations. There is also no empirical evidence to suggest that institutionalization matters or that legally regulated intergovernmental structure does a better and enduring job of



facilitating collaboration among constituent governments. Of course, constitutionalisation and institutionalization of intergovernmental relations might promote or ensure periodic intergovernmental interactions. The reverse is not, however, true. The absence of constitutionalisation does not suggest weak intergovernmental relations. There is no evidence to suggest that intergovernmental forums that are not institutionalized unavoidably fall into a period of disuse. Intergovernmental relations that does not have constitutional recognition might be as effective as a constitutionally recognized intergovernmental relations, if not more.

Perhaps the need for formal and institutionalized intergovernmental relations depends on a context, particularly on the culture of intergovernmental dialogue in a country. In a country where there has not been a long history and practice of intergovernmental dialogue, a law that mandates such interaction might be a good idea. With respect to Spain, for example, some argue that as a country ‘where a culture of political cooperation has yet to take root’, Spain should have considered constitutionalizing intergovernmental relations. According to them, ‘a constitutional framework that enshrines the principle of partnership and removes the obstacle for the collaboration among the different territorial powers would help to consolidate these new cooperation mechanisms’ (Galvez and Ruiz 2013: 235). The same argument is advanced by Segui, who also emphasizes the need for a law that regulates intergovernmental relations in Spain. ‘Providing a framework for a joint cooperation in the autonomous State can serve to eliminate the shortcomings and deficiencies of the current regulatory system, considering the lack of culture of cooperation that exists in our state’ (Segui 244). Perhaps their fear is borne out by the fact that, at the end of the day, the relevance and effectiveness of CAG, depended on the wishes of some of the Autonomous Communities and literally died when those Autonomous Communities lost interest and stopped taking the initiative.

In short, what is important is that there is a shared feeling among constituent governments about the value of dialogue and cooperation. Institutionalization and formalization of intergovernmental relations may not bring about the desired result in the absence of an agreement on the values of dialogue and cooperation.



4. Decision-making

In line with the long tradition of its predecessor, the APC, decisions at the COF are made by consensus rather than by majority vote (Article 10, COF Founding Agreement). The CAG, on the other hand, follows a slightly different rule. The level of support required for making a decision depends on the nature of the decision (Glávez and Ruiz 2013: 233). If the decision is to merely make a political statement in a form of a declarations, unanimity is not a requirement. It suffices if the statement is endorsed by at least 15 Autonomous Communities. That would make the statement an official position of the forum. Unanimity is required when the decision involves the conclusion of agreements and protocols. This does not mean that an agreement may lapse if it does not secure the support of all Autonomous Communities. Members of the forum that sponsor or support the agreement are required to engage with the members that are refusing to support the agreement, struck a compromise and pass the agreement at the next meeting. If that does not happen, the agreement may be adopted by a majority vote provided that the dissenting autonomous communities do not object to the conclusion of the agreement. The agreement will not have an effect on Autonomous Communities that are not party to the agreement. The constitutive document of the CCG is silent on decision-making process.

The requirement of unanimity for decision making suggests that constituent units in Canada and Spain are unwilling to forfeit their sovereignty for the sake of horizontal collaboration. But this should not be surprising. Given the zealotry with which subnational units tend to protect their autonomy, it is not realistic to expect a decision-making process that is not based on consensus. At best, as it is the case in Spain, it might be possible for a horizontal intergovernmental forum to pass a declaration without binding effect based on majority votes. It is, however, unlikely for a subnational government to abide by decisions of others on matters that it has exclusive jurisdiction. What Collins (2015, 14) said with respect to Canadian provinces would apply to subnational governments in other federations: ‘On their own, provincial governments often have neither the interest nor the power to force each other to take certain actions to implement particular solutions’.

Even in situation where decision has been secured, none of the horizontal forums have put in place a clear mechanism to ensure that those decisions are implemented. The



subnational governments are not, for example, required to introduce mirror legislation for the purpose of implementing agreements adopted by a horizontal forum (Leclair 2006, 55). One of the main challenges of the CCG is the failure of implementation of resolutions it has adopted, which is largely attributed to the lack of enforcement mechanisms for decisions (Intergovernmental Relations Technical Committee, 2018). The conclusion of an agreement by the CAG does not entail a legal obligation on the Autonomous Communities that have expressed their support (Seguí 244). It merely encourages them to take the administrative or legal actions that are necessary to implement the agreement. Failure to do so does not represent a violation of the agreement. This shows that the agreements are a little more than political statements. When the COF adopted the recommendation of its Health Care Innovation Working Group (HCIWG), the report released by the premiers simply stated that ‘provinces and territories intend to implement the measures and recommendations outlined in the report as they deem appropriate to their health care system’ (Council of Federation, 2012, 6). The discretionary tone of the statement suggests the absence of a strict obligation to implement agreements reached by member of the COF. This is not surprising given that ‘[p]rovinces do not seem eager to establish binding mechanisms that could ensure the implementation of their agreements over interprovincial matters’ (Leclair 2006, 55).

5. Purposes of horizontal intergovernmental forums

As the name itself suggests, horizontal intergovernmental forums are often deemed to be motivated by the need and desire to coordinate interactions between and among subnational governments. Horizontal collaboration seems to be the goal. This could be about exchange of information and best practices. It could also be about formulating and implementing joint projects or ensuring that citizens have access to minimum level of services when they move from one subnational unit to another (Colino 2009).^{IX} Linked to this is the desire to remove internal trade barriers and harmonize standards, avoiding situations where citizens are burdened by laws and regulations that do not recognize the licenses or permits they obtained or the educational qualification they received from other parts of the country. The same applies to companies that work across subnational



boundaries. Horizontal intergovernmental forums that can facilitate the harmonization of standards or the removal of barriers play a crucial role in the creation of one economic community.

However, horizontal collaboration may not be the only and, in some cases, even the primary focus of horizontal intergovernmental forums. Horizontal forums are also used to develop common position against the federal government. This could be about subnational governments using the forum as a means to increase their bargaining powers with federal government. It may also be about protecting jurisdictional autonomy from interventions of the federal government. Effective cooperation between constituent governments might take away from the national government the argument that it needs to intervene on a certain area on the ground that it affects all constituent units. In such cases, a forum might be horizontal in its organization but vertical in its orientation.

The purpose of the COF was one of the issues that was flagged by some of the provincial governments when the Premier of Quebec, Jean Charest, proposed its establishment (Noél 2003). The other provinces were happy to support the idea on the condition that the council does not become a forum to fight the federal government. The premier of Ontario blatantly indicated that the council should not be used as a forum to gang up on the federal government. For him and many others, it should be a forum for promoting provincial collaboration on matters of mutual interest. It was probably a commitment from the Premier of Quebec that the forum will not be used to bash the federal government that encouraged the provinces and the three territories to bring the COF into a reality.

A look at the objectives of the council indicates that horizontal collaborations forms an important part of the mandates of the COF (Art.3 & 4, COF Founding Agreement). The COF seeks to strengthen 'interprovincial-territorial cooperation' by, among other things, serving 'as a forum where members can share and exchange viewpoints, information, knowledge and experience'. It is also mandated to 'address any issue of priority, which, in the opinion of the members, requires the pooling of expertise, a greater dialogue between them or the co-ordination of their actions'. Yet, horizontal collaborations are not the only focus of the COF. The Council is expected to 'exercis[e] leadership on national issues of importance to provinces and territories and in improving federal-provincial-territorial relations'. This has two objectives. On the one hand, the aim is to use the Council as forum



to present a unified front in the face of the federal government. It is expected to achieve this by ‘provid[ing] integrated and coordinated approach to federal-provincial-territorial relations through the development of shared common analysis and positions’. On the other hand, it aims at protecting the autonomy of the provinces against the actions and laws of the federal government. The constitutive document of the Council states that the COF’s mandate is to ‘analyze actions or measures of the federal government that in the opinion of the members have a major impact on provinces and territories’.

Similarly, in Spain, the CAG seeks to serve dual purposes. The institution is expected to facilitate both vertical and horizontal interaction (Gálvez and Ruiz 2013: 233). On the one hand, it aims to facilitate dialogue and promote collaboration between the Autonomous Communities within the scope of their competences. It does so, first, by serving as a ‘forum for dialogue among the autonomous regions’ and, second, by allowing for ‘voluntary political and administrative cooperation in the field of regional powers’. But it also targets the relationship between the national government and the autonomous Communities. It strives to promote ‘collaboration between the Autonomous-Community Governments and the Government of Spain’. The dual role assumed by the forum was also reflected in the ‘institutional statement’ it adopted in its first meeting in 2011 when it stressed both the autonomy of the Autonomous Communities and the importance of collaboration with national government.

On the other hand, a quick look at the stated functions of the CCG reveals that it is expected to promote collaboration on inter-county matters. From the nine functions listed for the Council, none of them speak to the idea of using the council as a forum to forge a common front against the national government or protect the autonomy of the counties from intrusive laws and actions of the national government (IGR Act). The COG is, among other things, expected to facilitate consultation amongst county governments, sharing of information and promotion of best practices. Dispute resolution, capacity building of governors, receiving reports and monitoring the implementation of inter-county agreements on inter-county projects, considering matters referred to the council by a member of the public and consideration of reports from other inter-governmental forums on matters affecting national and county interest or relating to performance of counties are some of other the functions of the Council. Perhaps the only reference that, albeit indirectly, allows the counties to the use the forum as means to gang up against



national government is that the Council is expected to serve as a forum for ‘considering matters of common interest to county governments’. These, however, could mean both national and inter-county issues.

A quick survey of the practice of the three intergovernmental structures indicates that the three horizontal intergovernmental structures have done, to a varying degree, a good job of facilitating horizontal collaboration. The COF, for example, has done a very good job with respect to internal trade. Following in the footsteps of the APC that is largely responsible for the harmonization of interprovincial trade, the COF, albeit after initial failures that forced provinces to create bilateral agreements, managed to produce the Canadian Free Trade Agreement (CFTA) (Collins 2017: 6), an intergovernmental agreement that aims at removing barriers and facilitating internal trade. The Premiers also deservingly boast the success that the COF and its HCIWG achieved by creating the pan-Canadian Pharmaceutical Alliance (pCPA) through which the Premiers managed to put together their resources and purchased prescription drugs in bulk, which reportedly saved governments’ 712 million dollars (Health Care Innovation Working Group, 2016)). In 2010, the COF also adopted a water charter, ‘which sets out principles for inter-jurisdictional coordination on water conservation’ (Collins 2017: 7). The forum has also served as a forum to share information (Collins 2017: 10).

In the case of Spain, the CAG, following in the footsteps of its predecessor, continued to facilitate horizontal collaboration. In fact, in the first meeting, the members adopted a number of agreements and protocols, among other things, on ‘fisheries, industry, research and transport’. They have also signed a convention declaring ‘the mutual recognition of licenses for hunting and recreational freshwater fishing’ (Seguí, 244). Prior to that, individuals were required to obtain a license from each AC where they want to engage in hunting and fishing. Another convention ‘for the coordination of networks of domestic violence shelters for women’ was also signed in the first meeting.

Yet, despite their stated original aim, horizontal collaboration is not given priority by the three horizontal structures. They are more preoccupied with national issues rather than with inter-subnational matters. Creating a common front against the national government has been the primary task of the three horizontal structures. In the case of Canada, for example, one of the early successes of the COF involved the creation of common front against the national government on negotiation around health care.^x The negotiation



resulted in the adoption of the 2004 health accord, ‘a set of 10-year intergovernmental health-funding agreements’, which ‘increased federal health transfers by 6 percent a year’. ‘For many years’, Morrison (2013) argues, ‘the Council of the Federation largely provided a forum for the provinces and territories to bash the federal government and ask for more money’. This is also a sentiment shared by Leclair (2006: 55), according to whom, ‘[t]he main purpose of the council has rather been to build common fronts against what the provinces considered unconstitutional incursions by the central government in their own affairs’^{XI}

The same is true in Kenya. Despite its constitutive document that is disproportionately oriented towards horizontal collaboration, the practice of the CCG shows a forum that is used to wage a battle against national government and national institutions. Sometimes these battles were about challenging actions of national government and national politician that seem to interfere with the autonomy of county governments. In other cases, it is about securing more authority and resources from the national government. The battle was intense during the early days of the Council when Isaac Ruto was the first Chairman of the CCG. At one point, the chairman declared that the national government is waging an onslaught on devolution. He argued that ‘MPs seem determined to claw back on devolution’ and referred to ‘23 pieces of legislation which do not recognize devolution and this, [he said], we must stop’ (Daily Nation, 4 August, 2014).^{XII} At one point in time, the Council was mulling over the possibility of drafting a comprehensive Bill that aims at ‘saving’ devolution and ‘into which we will enter everything to stop any maneuvers against devolution’ (Ibid). In addition to attempting to enact an all-inclusive legislation that protects the system of devolution, the Council has also gone to court a number of times challenging the actions of national government.^{XIII} As Kangu (2019: 36) noted, the relations of the CCG ‘with the national government have been more adversarial than cooperative’.

Creating a common front is not always possible. In Canada, for example, the premiers, in 2016, attempted to renegotiate the intergovernmental health-funding agreement. After initially rejecting the proposal of the federal government unanimously, the premiers did not stay long before each of them, with the exception of Manitoba, signed individual agreements with the federal government (Collins 5). Similarly, the provinces were successful in using the COF to jointly oppose a federal government plan to reaffirm ‘its role in the labor market training’ but they were less successful in preventing the federal



government from introducing changes ‘to the temporary foreign workers program’ (Collins 2017: 5-6). The experience is similar in Spain and Kenya. There is a limit to what a united subnational front can do in terms of pressuring the federal government to accept their wishes.

Some scholars seem to suggest that the limitation of a horizontal forum in advancing a vertical aim is inherent in the nature and design of horizontal intergovernmental forums. A national government, goes the argument, can hardly be expected to be bound by a decision of a forum of which it is not a member. In the case of the COF, for example, the provincial government can only recommend ‘a solution to the federal government’ (Leclair 2006: 55). This might be a valid point but only so if we see a horizontal forum as direct means of communicating with national government. That is, however, rarely the case. A horizontal forum does not promote a ‘vertical agenda’ by adopting a decision that binds the federal government. It is rather used as a forum for developing a common position to negotiations with the federal government. At best, it is a forum for lobbying. This means that, of course, the effectiveness of a horizontal forum presupposes the availability of an active vertical intergovernmental forum through which subnational governments can negotiate with the federal government and the existence of a link between the horizontal and vertical forum. The link could be formal, established in the form of submission of reports and decisions of the meetings of the horizontal forum as well as the inclusion of those decisions in the agenda of the vertical forum. It could also be informal, established by the nearly identical composition of the two forums.

Of the three horizontal forums discussed in this article, the CCG has a formal link with other intergovernmental structures. It is expected to submit an annual report to the summit, the apex vertical intergovernmental structure that brings together county leaders and the national government.^{xiv} The Spanish horizontal forum, the CAG, had also links with the national government as it is required to inform the national government about the outcomes of its meetings, including a report on agreements concluded in every conference. The CAG may, from time to time, invite the President of the national government to attend its meetings. Similarly, in Canada, the COF ‘may decide, from time to time, to hold special meetings to which it may invite the Federal Government’^{xv} but it does not have formal links with the vertical intergovernmental structures. It, for example, does not have a



link with the First Ministers Conference (later renamed the First Ministers' Meetings) that brings together the premiers and the federal prime minister.

As mentioned earlier, the link does not have to be formal. In the case of Canada, for example, the absence of a formal link has not totally shielded the vertical forum from the influence of positions taken and decisions made at the COF. It was only after the united position of the Premiers on the future of a health care, initially developed through the horizontal forum of the COF, was put at the First Ministers' Meetings that the 2004 Health Care Accord came into reality (Hueglin and Fenna 2015). What is crucial is the continued existence of a functioning vertical intergovernmental forum. The impact of the the COF as a horizontal forum that allows for the development of common front was, for example, limited during the Harper government that was not enthusiastic about the vertical forum and preferred to engage in bilateral terms with the provinces (Collins 2015). Prime Minister Stephen Harper had also declined repeated requests to attend meetings of the COF (Hueglin and Fenna 2015: 257). That perhaps explains the failure to renegotiate the 2004 Canada Health Accord that, as a result, expired in early 2014 (Hueglin and Fenna 2015: 257).

From the foregoing, it is clear that the Kenyan and Spanish horizontal forums have better links with their vertical counterparts. This is not always seen favorably. In Kenya, for example, some question the wisdom of requiring the CCG to submit a report to the summit (Mitullah 2012). They argue that the Summit is not required by law to discuss the reports of the Council and more importantly, it is not clear why a body composed of county governors has to submit a report to another body that is almost similar in composition. The only difference between the Summit and the COG, they argue, is that the latter does not include the President of the Country as its member.

This criticism of the reporting structure misses the important role of the horizontal structure as the forum to create a common united front against the national government. The link through reporting allows the counties to communicate the national government their common position on matters of political and constitutional importance. The link would in particular be effective if the mechanism requires the Summit to consider the report and take actions, if required. The consideration of the reports gives the counties a direct opportunity to pressure or convince the national government on the issue considered. One cannot, therefore, dismiss the value of linking the horizontal and vertical



forum through reporting. Furthermore, the fact that the Kenyan horizontal forum is linked with national and county parliaments through reports adds transparency to the activities of the forum. The only problem is that the nature of the duty of reporting imposed on the forum ‘could lead to a situation where the county assemblies receive the reports after the Summit, the Senate and the National Assembly’ (Mitullah 2012: 3). One would expect that the link with county assemblies would be given more priority and attention given that the COG is a council of counties.

The absence or presence of a link with vertical intergovernmental structure is not the only factor that determines the success of a horizontal forum as a structure for creating and sustaining a common front. Finance also matters. The financial muscle of national governments, in particular, makes it difficult to sustain a common front against the federal government. In the case of Canada, for example, its fiscal leverage allows the federal government to easily undermine provincial solidarity. ‘Small and poor provinces are particularly vulnerable to the federal “divide and conquer” strategy’ (Leclair 2006: 55). The 1999 Social Union Framework Agreement, signed by the federal government and all the provinces, except Quebec, is a good example of Ottawa’s successes when it strategically resorts to its fiscal leverage to sway poorer provinces to toe the line.

It is also often difficult for subnational governments to create or sustain a common front against the federal government when the subject matter involves matters on which the provinces have disparate interests (Collins 2017: 7). This is the case, for example, in Canada with respect to issues related to energy where a more pronounced and at times public divide between the interest of the oil rich Alberta and other provinces that have expressed their interest in energy strategy that takes climate change into account has made an agreement impossible. This shows that horizontal collaboration is difficult to achieve when the interest of the provinces is disparate.^{XVI} This is facilitated by the fact that the forum makes decisions based on consensus.

6. Conclusion

The quick survey of three horizontal intergovernmental interactions has revealed that such interactions rarely have a clear constitutional basis. With the exception of Kenya, the



constitutions of the other two federations do not sanction cooperation as an imperative mode of intergovernmental reaction. As a result, there is no constitutional provision or law that provides for the establishment of horizontal intergovernmental structures, for that matter any intergovernmental structure. That, however, does not seem to matter. The federation with the most frequent and regular interactions is Canada, whose constitution or laws do not regulate intergovernmental relations. This discounts the argument that attaches constitutionalisation of intergovernmental relations with robust and effective intergovernmental cooperation. The constitutional origin of institutions of IGR is uncommon

The experience of the three federations also reveals that institutionalization of intergovernmental relations may be useful but it is not a necessary condition for effective intergovernmental relations. The horizontal intergovernmental structures discussed here vary from the highly institutionalized CCG in Kenya to the moderately institutionalized COF and loosely institutionalized CAG. The relevance of institutionalization depends on context. In a country like Kenya where there has not been any history of multilevel governance, let alone history of intergovernmental interactions, institutionalization might have given it the kick start it needs. It probably has allowed the country to develop the habit of engaging in intergovernmental dialogue. The same might be true for Spain where there has not been a 'culture of cooperation and dialogue'. What is equally clear, however, is that effective intergovernmental relation may take place even in the absence of a formalized and institutionalized intergovernmental structure.

Finally, horizontal intergovernmental structures may not be functioning in manner that their name suggests. Despite the expectation that they will focus on facilitating horizontal collaboration, they are invariably focused on matters that involve the national government. They may be horizontal in their structure but vertical in their orientation. They are used as forums to create a common front against the national government or a forum to protect the autonomy of the units from what they regard as intrusive actions of the federal government.

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¹ The establishment of such a forum was first proposed by Premier Daniel Johnson of Quebec in 1994. That did not materialize due to the electoral success of *Parti Québécois* that was not really interested in strengthening the federal system. The idea was resuscitated when the Quebec Liberal Party came to power in 2003.

¹¹ The 2001 Pelletier Report, as it was known, named after the Intergovernmental Relations Minister Benoit



Pelletier, who drew the report, included not only the membership of the federal government but also a voting system that included vetoes. The report even envisaged the possibility of providing the forum a quasi-constitutional status. The Quebec government at the time (the Charest government) was not confident that the other Premiers would endorse the establishment of an intergovernmental forum that has a quasi-constitutional status (Collins 2015). The Premiers were also in agreement in the decision to exclude the federal government from the forum, preferring to make it a purely horizontal institution of IGR (Collins 2015).

^{III} The Constitution of Spain acknowledges the possibility of cooperation agreements between Autonomous Communities although such agreement is subject to authorization by the *Cortes Generales*, the national parliament (Article 145, Spanish Constitution). It is reported that the number of cooperation agreements between Autonomous Communities has seen a steady rise since 2006. But despite the numerous horizontal agreements concluded between Autonomous Communities, institutionalized horizontal intergovernmental relations was non-existent in Spain. Many of the horizontal agreements did not also involve many Autonomous Communities but were usually concluded between Autonomous Communities that happen to share borders and, as a result, found it necessary to cooperate in order to solve common problems. (Morales, 96).

^{IV} It is reported that there were about only 20 cooperation agreements signed between Autonomous Communities between 1978 and 2005. This number doubled within a period of five years after 2005, with more than 40 agreements being signed between 2006 and 2011, with the significant increase in the number of agreements attributed to the Meetings Between Autonomous Communities (Morales 99).

^V It prohibits the federation of Autonomous Communities. This was not seen as a big problem as the Autonomous Communities were initially focused on consolidating their autonomy and gave little or no attention to the need for intergovernmental relations.

^{VI} It was Lord Atkin in 1937 that famously described the division of powers between the federal and provincial legislatures as ‘watertight compartments’ (*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326, at p. 354).

^{VII} Its predecessor, the APC, used to meet only once a year. The COF has not only increased the frequency of meeting to two but has actually met twice every year except in 2010, 2011 and 2014. In fact, there were years when it met five times (twice), four times and three times (three times).

^{VIII} The agenda of the meeting of the CCG is determined by the chairperson and vice chairperson of the Council. This includes the date, time and venue of the meeting. This, however, has to be done in consultation with the secretariat. In the case of the COF, the founding agreement is silent on agenda setting.

^{IX} In the case of Spain, for example, Colino (2009, 1) notes that ‘[c]omplaints about the need of 17 different authorizations and standards for citizens or companies operating around the country, the reported cases of difficulties in getting free health care for travelling citizens in other regions, and other cases of lacking coordination have newly brought to public attention some dysfunctionality in areas of exclusive regional jurisdiction’.

^X The same is true with the first meeting of the Premiers in 1887. Despite the fact that it was declared that the purpose of the conference is to promote collaboration on provincial matters, the first conference ended after proposing ‘17 constitutional amendments’ that, among other things, targeted national government and its institutions. ... The five-point plan of action it adopted immediately after the establishment of the Council reveal as much.

^{XI} Collins (2015) disagrees with this view and hold that the business of the COF is not disproportionately focused on federal-provincial matters.

^{XII} ‘He listed posting of county commissioners, prohibiting governors from flying flags, creating a summit for deputy governors, and attempts to take over some of their functions such as health and early childhood education as examples of the war against devolution’ (Daily Nation 2014).

^{XIII} This was the case, for example, when they challenged the 2014 County Government Act that established County Development Boards. The Boards, chaired by Senators, are empowered to control initiation and approval of development projects in counties. The County governors, who are supposed to serve as secretaries of the boards, opposed the act on the ground that it is anti-devolution as it interferes with the autonomy of county governments. It was the CCG that went to court and secured a ruling that declared the Act ‘null and void as it gave senators, MPs and the executive unlawful powers to interfere with county governments’ (Daily Nation 2014).



^{XIV} The CCG is also linked with parliaments of both national and county parliaments. It is required to submit annual report to both house of the national parliament. In addition, the same report must be forwarded to the county assemblies ‘within three months after the end of every financial year’.

^{XV} It has, however, placed under it at least two sectoral horizontal intergovernmental councils: The Premiers’ Council on Canadian Health Awareness and the Secretariat for Information and Co-operation.

^{XVI} This also explains why it has been impossible for the COF to facilitate agreement among the provinces and the territories on matters of climate change. The interests of the oil and natural gas rich provinces and the other provinces has made it impossible for the COF to broker a common provincial/territorial position on the matter.

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