

Refugee Protection in Multi-level Governance Regimes: A Case for Kenya and Indonesia

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Article Info	Abstract
<p>Keywords: <i>Functional Assignments, Multi-Level Governance, Refugee Protection.</i></p> <p>DOI: <i>10.25041/lajil.v5i1.2868</i></p>	<p><i>In Indonesia, The Presidential Regulation No. 125 of 2016 concerning the management of asylum seekers, signed by President Joko Widodo on the last day of 2016, formalizes the role of sub-national units in refugee management, including the provision of appropriate, non-custodial accommodation. While in Kenya, the recently enacted Refugee Act of 2021 alludes to the engagement of the County Governments in Refugee protection. Within the context of the legal framework of these two countries, this article analyses the place of refugees in a multi-layered governance system through a comparative appraisal of local government structures in the selected States. The Article compares forms of decentralization adopted in these two refugee-hosting countries with the primary aim of establishing local government formation responsive to asylum seekers' plight. The research finds a novelty that involving local governments in refugee protection is a crucial step toward the effective and sustainable management of displaced populations. However, for it to be effective, it must be supported by adequate resources, clear guidelines, and a strong institutional capacity.</i></p>

A. Introduction

In its very form, multi-level governance structures call for responsibility sharing between different tiers of government. In most jurisdictions, immigration controls, where refugee protection conventionally falls, is the domain of national or federal government function. While local communities play a critical role in providing refuge for displaced populations, policies and discourses about refugees and asylum seekers remain largely a preserve of Central Governments, leaving little room for local government involvement in refugee protection measures. In most instances, local governments are directly involved in managing

crises. Their role during displacement emergencies is limited to carrying out tasks delegated to them by central governments rather than planning and decision-making processes.¹

However, notwithstanding their peripheral legislative and policy functions, local governments remain important actors in refugee affairs, not least because of their direct physical presence as hosts to displaced populations. In many refugee-receiving countries, local administrations are often the first-line asylum receivers responding to humanitarian emergencies. Furthermore, beyond reception, long-term and successful inclusion necessitates the integration of refugee-related issues into a wide range of local government roles. Inevitably, the range of specified services offered by these geographically delineated areas is at the core of addressing the very basic needs of such a vulnerable group.

Different sovereign jurisdictions have local government formations with varying legal foundations that determine their functional scope. This is to say, the extent to which a local authority can undertake a given task depends on whether the task falls within the setting of functions allocated to it by the legal regime constituting its very formation. In this respect, while acknowledging the vital role of local authorities in refugee affairs and their varying legal formations in different jurisdictions, this paper attempts to provide a comparative assessment of the Kenyan and Indonesian multi-level governance regimes with specific reference to refugee management.

Using a comparative method, the paper evaluates local government designs in Indonesia and Kenya, specifically focusing on their role in refugee protection. This comparison is based largely on secondary sources such as journals, textbooks, and government reports, which may have impacted refugee protection within the framework of multi-level governance structures embraced in the two countries. Relevant statutes and cases are critically examined, drawing on various points of view presented in the existing literature to test the efficacy of different forms of Multi-level governance in refugee protection.

The choice of the two countries is informed by the fact that both host a significant number of refugees in their territories. Secondly, while Kenya is a signatory to both the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, Indonesia is not, but unlike its close Southeast Asia (SEA) neighbors, Malaysia and Thailand, Indonesia has a progressive National legal regime including the constitutional right to asylum.² Third, the selected countries practice some form of decentralized governance under different legal and continental jurisdictions. As such, this selection is considered significant in demonstrating the diversity of the spectrum in local governments' responses to the imposition of obligations and care for refugees in their respective governance frameworks. Comparing countries with different legal commitments towards the 1951 Convention and different national/regional dynamics of refugee protection is significant because it allows for a better understanding of the role of local governments in refugee protection within diverse contexts.

Despite the wealth of research on refugee protection and multi-level governance, there remain gaps in the literature regarding the specific challenges and opportunities for refugee protection in the context of multi-level governance in Kenya and Indonesia. This article aims to address these gaps by analyzing the legal and policy frameworks for refugee protection in these two countries and assessing the effectiveness of these regimes in ensuring the protection of refugees.

In the first instance, the article offers a conceptual analysis of the functional assignment of roles and responsibilities to various levels of government and an overview of decentralized

¹ Diane Archer, 'Migrant and Refugee Transit: The Role of Local Authorities in Humanitarian Response' (International Institute for Environment and Development 2016) <<https://www.jstor.org/stable/resrep16680>> accessed 19 February 2022.

² Nikolas Feith Tan, 'The Status of Asylum Seekers and Refugees in Indonesia' (2016) 28 *International Journal of Refugee Law* 365.

governance systems as practiced in Kenya and Indonesia. Subsequently, the study compares how the local government structures in the selected countries have been tailored to respond to obligations to foster refugee protection by assessing their fundamental formations and functional allocations of various tiers of government structures. This comparison is aimed at appraising those formations to establish models suitable for promoting refugee protection at the local level.

The novelty of this research is that analyzing the importance of recognizing the legal framework for functional assignment is not always well reflected on the ground due to various challenges, ranging from poor coordination to limited resource allocation to sub-national units. While these challenges arose in both Indonesia and Kenya, decentralization design choices varied in terms of their responsiveness to refugee protection issues. Therefore, in the instant case, the concurrent nature of functional allocation under the Indonesian model appears to be more responsive compared to the exclusively functional approach in Kenya.

B. Discussion

1. Functional Assignment in Multi-level Governance

Gary Marks first coined the phrase Multi-level governance³ in describing developments in European Union's (EU) major structural reform in 1988. Hooghe and Marks⁴ expanded on the multi-level governance model by examining the integration of the EU and its policymaking processes compared to the state-centric model. In their subsequent writings, Marks and Hooghe⁵ two types of multi-level governance called Type I & II. The initial category pertains to all-purpose jurisdictions that contain subordinate jurisdictions, while the second category concentrates on particular policy issues and includes jurisdictions with a distinct purpose.

As alluded to by Bache & Flinders,⁶ multi-level governance is manifested in vertical and horizontal dimensions as well as jurisdictional and territorial boundaries, both within and beyond the normative Nation-state frame. Vertical dimensions echo the State-centric dispersion of roles to subnational or local levels of administration. In contrast, horizontal dimensions entail the distribution of functions across the traditional arms of government and interrelations between subnational levels. This describes governing arrangements that apply to an entire system, characterized by a small number of clearly defined, non-overlapping jurisdictions at limited territorial levels. Each of these jurisdictions is responsible for a distinct set of functions.⁷

Therefore, literature on multi-level governance encompasses rationalization of authority in decision-making within various levels of state structures, whether horizontal or vertical. Conversely, this article focuses on Multi-level governance from the standpoint of vertical or areal decentralization of public services from the Central Government to other subsidiary units. Political science and public administration define decentralization as a process or mechanism that distributes authority and divides duties between central government entities and locally established political and administrative bodies. The aim is to enhance the delivery of public services, promote economic and regional progress, and empower various groups'

³ MARKS, G. (1992). 'Structural Policy in the European Community', in A. Sbragia (Ed.), *Uk Politics: Institutions and Policy Making in the "New" European Community* (Washington: The Brookings Institute).> accessed 10 October 2022.

⁴ 'Marks-Structural-Policy-in-the-European-Community.Pdf' <<https://garymarks.web.unc.edu/wp-content/uploads/sites/13018/2016/09/marks-Structural-Policy-in-the-European-Community.pdf>> accessed 10 October 2022.

⁵ Marks, G. & Hooghe, L. (2004). *Contrasting Visions on Multi-Level Governance*, in Bache, I. & Finders, M. (Eds.), *Multi-Level Governance*. Oxford/New York: Oxford University Press, Pp. 15-30.

⁶ Ian Bache and Matthew Flinders (eds), *Multi-Level Governance* (Oxford University Press 2004).

⁷ *Handbook on Theories of Governance* | Christopher Ansell (Editor), Jacob Torfing (Editor) | Download <<https://book4you.org/book/21300848/ac19ae>> accessed 9 October 2022.

political and other rights.⁸ Notably, while definitions and approaches may differ depending on the context of the usage, the common thread that runs through the notion of multi-level governance is that authority, on a broad swathe of issues, is shared in a vertical relationship between levels of the public sector.

While there exist different forms of Multi-level governance with varied characteristics, the scope of this Article is limited to functional assignment as a core element of such a design of governance with one or more subnational levels of government with a particular focus on the place of Refugee protection in such a setup. Gabriele Ferrazzi and Rainer Rohdewohld⁹ describe Functional assignment as a sequence of activities through which levels of government receive roles and specific duties. To them, functional assignment is about transferring responsibilities and powers and the attendant resources to exercise them.¹⁰

It is worth noting that the approach adopted by States in determining what function becomes the responsibility of what level and what resources should accompany the distribution of roles to different levels are as varied as the number of States practicing such a form of governance. Moreover, the architecture or constructions regarding the autonomy and legal standing of the nature of the Multi-level governance model in practice in a given country significantly influences functional assignments and other building blocks of such a system of governance. That is to say, depending on the legal instruments establishing them, the statuses and extent of role distribution across National and Sub-national levels of government vary across the globe. These variations in legal formations result in distinct models of decentralization and functional categorizations.

The degree of functional assignment to various government levels is dynamic. In addition to legal governance design, the decision on whether or not a given function should fall under the jurisdiction of the National or Sub-national level must consider aspects such as appropriate policy process for the involvement of various levels of government, allocation of financial and human resources required across different levels of government, and necessary accountability measures to the public. When deciding to delegate or devolve a function from one level of government to another, effectiveness and efficiency are often crucial factors considered.¹¹ Seemingly therefore, the basis of these functional allocations appears to be informed by grounds such as the competence level of the unit in performing a given task, the nature of the function to be undertaken; for instance, functions such as agricultural extension works are in their very nature suitable for devolved units while foreign relations duties suit the central government.

Ferrazzi and Rohdewohld observed that functions could be assigned to levels of government with varying degrees of exclusivity in a multi-level government of a federal or unitary structure.¹² These variations are visible in obligatory, exclusive, residual, and concurrent functions typologies. Exclusive functions, in principle are allocated to one level of government to the exclusion of the other level of government, while one or more levels of government share concurrent functions. On the other hand, obligatory functions, also known as mandatory or statutory functions in some jurisdictions, are normally characterized by the state's commitment to citizens, usually as part of the social compact in international

⁸ Yusoff, Mohammad Agus; Sarjoon, Athamabawa; Hassan, Mat Ali, 'Journal Library of Politics and Law' 9 57<https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/jpola9&id=59&men_tab=srchresults> accessed 18 March 2022.

⁹ Gabriele Ferrazzi and Rainer Rohdewohld, 'The Context of Functional Assignment – Decentralization, Multi-Level Governance and the Quest for Impact', *Emerging Practices in Intergovernmental Functional Assignment* (Routledge 2017).

¹⁰ *ibid.*

¹¹ Erwan Agus Purwanto and Agus Pramusinto, 'Decentralization and Functional Assignment in Indonesia: The Case of Health and Education Services' (2018) 39 *Policy Studies* 589.

¹² Gabriele Ferrazzi and Rainer Rohdewohld, *Emerging Practices in Intergovernmental Functional Assignment* (Taylor & Francis 2017).

conventions, national constitutions, or national laws. While residual functions generally refer to those not explicitly provided for in the function assigning instrument in operation.

Table 1. Below is an Illustration of the Normative Trend of General Functional Assignment in a Multi-Level Governance Structure

Levels of Government	Functional assignment (normative trend)			
	Obligatory function	Exclusive function	Concurrent function	Residual function
Central Government	Largely a preserve of central government	Assigned to the exclusion of the other level	Both levels perform the same role	Varies from one jurisdiction to the other
Local Government	Plays no significant role	Assigned to the exclusion of the other level		

Fig. 1. Illustration of functional assignment between levels of governments as conceived by Ferrazzi and Rohdewohld

Each of these formations has merits and demerits depending on the framework of operations and interests of the various actors in the decentralization process. For instance, it has been argued on the one hand, that concurrent functions can lead to tension and disputes between levels of government and inefficiencies when two or more levels proceed to undertake the same duties, especially in instances where there is no clarity on the modalities of executing a given task in such functional assignment. However, on the flip side, certain services would naturally demand the involvement of all levels for effective execution and, therefore, cannot be avoided by both levels completely. Depending on the nature of the legal instrument assigning it, exclusive allocation of functions may foster rigidity that might completely bar the involvement of the other level of government even when the situation demands the intervention of both levels.

The question that arises within the context of this study is; of these varied functional allocation formations in multi-level governance, which form is more responsive for refugee protection measures? In response to this question, the article examines the functional formations in practice within the selected case studies. It appraises the most reliable formation in implementing a national asylum framework. In laying the foundation for this assessment, it is important to consider, albeit briefly, the sort of layers of decentralized structures in the two countries.

2. Decentralized Systems of Governance in Kenya and Indonesia

The debate on decentralization revolves around the three traditional deconcentration, devolution, and delegation models. Each of these three models is characterized by a distinctive institutional framework, financial accountability, and personnel allocation across various levels of government.¹³ Kenya and Indonesia have embraced political devolution as a form of decentralization with considerable variations in their functional distributions. This section summarizes the forms of multi-level governance in Kenya and Indonesia to provide a basis for the functional allocation of roles and responsibilities among various levels in the next part.

¹³ Purwanto and Pramusinto (n 13).

a. The Indonesian Model

Visibly, Indonesia has been restructuring its National-Subnational relations by decentralizing public service to the local units since 1999. Article 18 of the 1945 Constitutional Act establishes and maintains local government by adopting a local government charter.¹⁴ This article provides the fundamental tenet of the regional rights in the local government system to preside over their local affairs. The second constitutional amendment law, passed in 2000, incorporated parts of the decentralization reforms, such as democratic elections for mayors and governors, into the Constitution to ensure long-term system stability and provide political guarantees against arbitrary overthrow.¹⁵ With the passage of Law No. 22/1999 on Regional Government and subsequent revisions by Law No. 32/2004 and Law No. 23/2014, local government has been enshrined as a fundamental aspect of local self-governance. This has reduced the central government's role to primarily administer functions related to defense and security, external affairs, fiscal and monetary matters, religion, and the judiciary.¹⁶ However, at any time, the national government can revise these assignments relating to inter-governmental relations as it deems fit.¹⁷

Although the law has undergone several changes as part of the government's transition from the old order to the new, the three fundamental principles of decentralization, deconcentration, and task assistance have continued to be reinforced in the governance structures of the Republic of Indonesia. In practice, though, the deconcentration principle appears more dominant than others, especially at the lowest levels of government structures. The devolved structure of Indonesia is better understood in light of the overall goals of national political integration and political stability. That is to say. It is intended to have a conflict reduction and ethnic cohesion effect on Indonesia's multi-ethnic population.

As observed by Erwan Agus Purwanto and Agus Pramusinto,¹⁸ the execution of decentralization has resulted in both favorable and unfavorable effects on the delivery of public services in the country. These elaborate structures have their roles and responsibilities set out in the constituting instruments as well as local legislations and presidential regulations issued occasionally. In particular interest within this study's scope is the Presidential Regulation No. 125 of 2016 concerning the treatment of Refugees signed by President Joko Widodo in 2016. The extent to which these governance structures have been enabled to accommodate the rights and interests of the diverse and vulnerable population, such as refugees, is the main focus of this article. The evaluation is conducted within the framework of functional distributions within various levels of government in line with their fundamental constitutive regimes and legal framework that is in practice in Indonesia.

The article also considers functional interactions between the various layers of government to interrogate whether such relations between different levels and actors is reflective of functional imperatives arising from legal instruments or are inspired by the actors' attempts to promote certain interests in respect of a level of government. There is also the consideration of how the various levels of government act in instances of crises and emergencies that are likely to compel the participation of all units in a given situation, whether for temporary interventions or otherwise and the impact such intervention will have on vulnerable population such as refugees is of importance too.

¹⁴ Dr T Krishnamohan, 'The Local Government System in Indonesia and Sri Lanka: A Comparative Overview' (2016) 03 <<https://papers.ssrn.com/abstract=2910222>> accessed 19 March 2022.

¹⁵ *ibid.*

¹⁶ Purwanto and Pramusinto (n 13).

¹⁷ Ferrazzi and Rohdewohld (n 11).

¹⁸ Purwanto and Pramusinto (n 13).

b. The Kenyan model

After gaining independence from British rule on 12th December 1963, Kenya adopted a federal constitution called *Majimbo*¹⁹. This gave regions significant autonomy in the management of public service. However, the federal system was quickly dissolved into a centralized form of governance Shortly after independence. This status changed in 2010 when a new constitutional order with two levels of government, National and County government, was established.²⁰ Kenya's devolution aims to recognize communities' right to govern their own affairs, pursue their development objectives, and safeguard and advance the interests and rights of minorities and underprivileged communities.

Kenya's supreme law divides the country into forty-seven (47) counties with clearly defined geographical boundaries and role allocations. Notably, neither the county nor the national government holds superiority over the other. Still, both have a clear mandate to provide a range of functional assignments as outlined under the Fourth Schedule of the Constitution:

“Article 6 (2) of the Constitution of Kenya 2010 provides that the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations based on consultation and cooperation.”

The autonomy of the local government is to the extent that, in the realm of an exclusive county function, the generation of legislation governing such functions becomes a preserve of the county government. As such, where conflict of laws arises, such county legal framework precedes the National law as detailed under Article 191 of the Constitution.

“(2) National legislation prevails over county legislation if—
a) the national legislation applies uniformly throughout Kenya and any of the conditions specified in clause (3) is satisfied; or
b) the national legislation is aimed at preventing unreasonable action by a county that—
i. is prejudicial to the economic, health, or security interests of Kenya or another county; or
ii. impedes the implementation of national economic policy.
And 191 (4) provides that County legislation prevails over national legislation if neither of the circumstances contemplated in clause (2) applies.”

As a result, counties have the authority to "regulate all matters relevant to the local community under their responsibility within limits established by the laws." Apart from the judicial arm that has remained with its national outlook, the forty-seven county governments exercise their autonomy in having their own legislative and executive authorities to further this distinction. However, numerous mechanisms exist to enforce collaboration and joint decision-making across levels and jurisdictions to ensure concurrent function and unity of purpose. The Constitution mandates the two levels of government to control their budgets and accounts and further empowers them to raise their revenue. The county governments have also been given a constitutional mandate to make and enforce local legislation.

Besides the decentralized county structures, the central government has its presence at the local level through National coordination units Representatives in this setting are responsible to the central government. Regarding functional allocations, entities entrusted with refugee management fall within the realm of the National government. So, the question that the article interrogates is whether the national government can undertake refugee protection roles to

¹⁹ *Majimbo* is a Swahili term for political devolution of power to regions within a state territory

²⁰ The Constitution of Kenya, 2010. At Article 6(1) the Constitution provides that, the territory of Kenya is divided into the counties specified in the First Schedule

exclude county involvement, considering that county governments have been mandated to take charge of critical sectors such as health, community land ownership, and management of county affairs generally. These essential services are certainly needed by the refugees too. Therefore, if Counties have no role in managing and protecting refugees, who or which entity will provide them with such services? The next part of the article interrogates how the selected countries' decentralized governance structures have attempted to address such needs.

3. A Comparative Analysis of Kenya and Indonesian Governance Models in Refugee Protection

The distribution of functional responsibilities across different levels of government in Indonesia and Kenya is evaluated in assessing the impact of multi-level governance in light of refugee protection in the two countries. As alluded to in the preceding part, the article focuses on the vertical dimension of the allocation of functions by examining the implications of local governance in its interactions with a higher level of government in a Centre–periphery relations.

a. The Practice in Indonesia

In Indonesia, refugee management, an aspect of international migration, naturally falls within the realm of central government function. It should be noted from the onset that Indonesia's geographical location makes it a transit country for refugees, primarily from Asia to the Australian continent. Because Indonesia is not a signatory to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, refugee management in Indonesia appears to be based on the principle of human dignity that runs through her national ideology Pancasila. This principle is expanded upon in the 1945 Constitution, particularly Articles 28A through 28J, as well as in Law Number 37, the Year 1999 on International Relations, Law Number 39, the Year 1999 on Human Rights, and other rules and regulations in Indonesia. These provisions have been strengthened by Presidential Regulation Number 125 of the Year 2016 on the Treatment of Refugees, which essentially fills a legal void in the country that has long affected asylum seekers and refugees. As it attempts to provide coordination and functional allocation for various levels of government, this regulation is a critical point of reference regarding the treatment of asylum seekers and refugees.

In Indonesia, applying the principle of decentralization has left the central government mainly with the role of creating norms, standards, procedures, and criteria. While Article 2 of the regulation expressly states that refugees are handled following cooperation between the central government and the United Nations (UN) through the United Nations High Commissioner for Refugees (UNHCR) in Indonesia and other international organizations, Articles 24-26 of the same regulation delegate the role of non-custodial refugees to local governments.²¹ These non-custodial practices entail measures authorities apply to migrants and asylum seekers on their territories where some form of control is deemed necessary. The City of Makassar, for example, has been successful in placing a large number of refugees in shelters that meet international quality and safety standards.²² Besides the assigned functions of Shelter provisions for the asylum seekers, regency/municipal governments are key actors in the burial of deceased asylum seekers. The bulk of the task regarding administrating Refugees' affairs rests with the Central government agencies.

However, the Presidential Regulation No. 125 of 2016 concerning the Treatment of Refugees in Indonesia sets out a coordination mechanism for national and local governments

²¹ Refworld | Indonesia: Regulation of the President of the Republic of Indonesia No. 125 Year 2016 Concerning the Handling of Foreign Refugees 2016.

²² Antje Missbach, Yunizar Adiputera and Atin Prabandari, 'Is Makassar a "Sanctuary City"? Migration Governance in Indonesia after the "Local Turn"' (2018) 11 *Advances in Southeast Asian Studies* 199.

in refugee protection efforts.²³ The regulation mandates the establishment of a National Committee for the Treatment of Refugees, which serves as a coordination body between the national government, local governments, and other relevant stakeholders in the implementation of refugee protection policies and programs. The committee is responsible for monitoring and evaluating the implementation of refugee protection policies and programs at the national and local levels and for promoting greater cooperation and collaboration between different levels of government.

From the preceding, the devolution of tasks concerning refugees where the national government is increasingly keen to involve local governments in managing asylum seekers to resolve coordination problems between various levels is noticeable. Further, it is visible from the provisions of the regulation that the functional arrangement adopted in the Indonesian setting appears to be that of shared responsibility between the levels of government. This is to say, besides the national government, various subnational units have been allocated certain refugee management roles and, therefore, concurrently perform the assigned functions with the national government.

The Venn diagram below illustrates the interaction between levels of government in refugee protection in the country. The illustration is limited to functional allocations as outlined in Presidential Regulation Number 125 of the Year 2016 on the Handling of Refugees, which indeed is the primary legislation with express provisions outlining role allocation for the various levels of government as far as refugee protection is concerned. The regulation covers refugee search and rescue, housing, security, supervision, and funding for related activities.²⁴ The four other elements manifestly demonstrate the Indonesian refugee policy's localization, except for search and rescue operations, which national organizations oversee. Local administrations are authorized and accountable for caring for refugees within their respective jurisdictions within this framework.

The diagram reflects the normative trend of general functional assignment in a multi-level governance structure, focusing on the distribution of refugee management roles between the central government and various tiers of subnational units, generalized as 'Local Governments.'

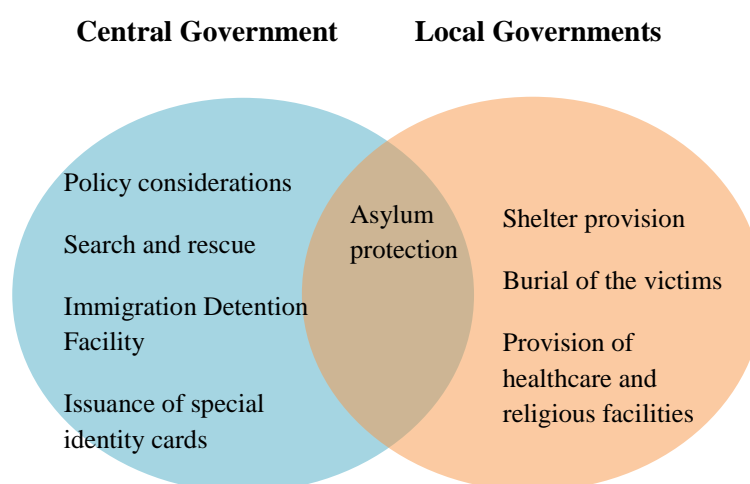


Fig 2. Illustration of interaction between levels of government in refugee protection in Indonesia

²³ Indonesia: Regulation of the President of the Republic of Indonesia No. 125 Year 2016 Concerning the Handling of Foreign Refugees [Indonesia], 31 December 2016, available at: <https://www.refworld.org/docid> [accessed 7 March 2022]

²⁴ *ibid.*

From the above illustration, there is the express allocation of refugee protection functions to both levels of government. The central government is responsible for policy considerations, search and rescue, immigration detention facilities, and issuance of special identity cards. In contrast, the local government is charged with Shelter provision, the burial of victims, healthcare provision, and religious facilities. While Indonesia has a long history of dealing with refugee issues, there is no comprehensive legal instrument to address refugee-related matters, including claims made by foreign nationals seeking asylum to obtain recognition as refugees.

However, the government of Indonesia continues to address the refugee problem as a universal human rights issue. Currently, the Presidential Regulation No. 125 of 2016 concerning the Treatment of Refugees provides a legal framework for all practices that continue to be implemented in principle. Regarding coordination among levels of government, the presidential regulation provides some clarity beginning with the stages of discovery, shelter, security, and immigration supervision. Despite some substantive issues gripped by a funding dilemma, particularly for regions that receive or accommodate asylum seekers and refugees, the regulation establishes a framework for coordination in handling refugees and asylum seekers at both the central and regional levels.

b. The Kenyan Scenario

Kenya has a comprehensive refugee policy that outlines the rights and obligations of refugees and the government's and other stakeholders' responsibilities. Though, unlike in Indonesia, where the functional arrangement on refugee protection appears to be a shared responsibility between various levels of government, Kenya's refugee protection system is generally a centralized function of the national authorities. Regarding functional assignment, entities entrusted with refugee protection are responsible to the national government and have no relationship with the authorities in the county governments. Therefore, within the normative trend of general functional allocation in a multi-level governance structure, Kenya's refugee protection role can be considered both an obligatory and exclusive national government function.

However, the Refugee Act of 2021²⁵ represents a significant shift in conceptualizing refugee protection. The Act provides access to the labor market and livelihood opportunities. In terms of local government presence, it provides for the inclusion of a representative from the Council of Governors in the Refugee Advisory Committee.²⁶ This is intended to enhance counties' participation in refugee protection, even though there is no clear framework for this participation. Nonetheless, rather than relying solely on external assistance and the traditional asylum model, the Act emphasizes the importance of self-reliance and local integration. By doing so, the Act seeks to create a more sustainable and locally-driven approach to refugee protection that benefits refugees and the local community.

Moreover, Kenya is a pilot country for the UNHCR's Comprehensive Refugee Response Framework (CRRF).²⁷ The CRRF is a multi-stakeholder approach involving the participation of national and local authorities, civil society organizations, the private sector, and refugees. This follows the provision of the Global Compact for Refugees,²⁸ which states in paragraph 106 that all stakeholders should "facilitate meaningful participation of refugees, including women, persons with disabilities, and youth" in refugee decision-making. Kenya's devolved

²⁵ The Refugee Act, 2021. Section 28 (2) Provides that the Cabinet Secretary may, by notice in the Gazette and in consultation with the relevant county governments, designate specific counties to host refugees while sub-section (4) ...refugees shall be enabled to contribute to the economic and social development of Kenya by facilitating access to, and issuance of, the required documentation at both levels of Government.

²⁶ Refugee Advisory Committee established under Section 11 of the Refugees Act

²⁷ Randall Hansen, 'The Comprehensive Refugee Response Framework: A Commentary' (2018) 31 *Journal of Refugee Studies* 131.

²⁸ BS Chimni, 'Global Compact on Refugees: One Step Forward, Two Steps Back' (2018) 30 *International Journal of Refugee Law* 630.

system, which the 2010 Constitution established, also provides important avenues for CRRF engagement and public participation. For instance, Turkana and Garissa counties have incorporated refugee concerns into their County Integrated Development Plans (CIDPs). Both regions created Integrated Socio-Economic Development Plans focused on area-based refugee and host community development approaches.

Notably, there is a gap between the provisions of the Act and the initiatives of the county and other stakeholders, owing to the exclusive nature of Kenya's refugee protection function. The exclusive nature of the protection role, without a doubt, impedes the effective coordination and responsiveness of county government structures to the needs of refugees. County governments have no mandate to intervene in refugee protection under exclusive functional allocation, as in Kenya. As such, even when a county government expresses its intention to allocate resources for refugee protection programs, such allocations can be easily challenged for lack of legal mandate.

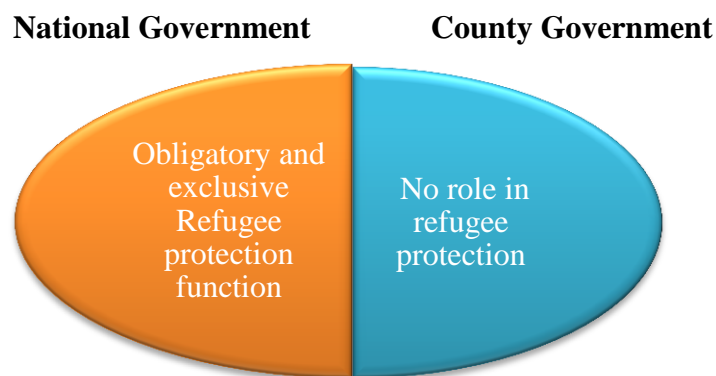


Fig 3. Illustration of Kenya's functional allocation of refugee protection between the two levels of government

As shown in the above diagram, the national government undertakes refugee protection roles in Kenya to exclude the county government. The question that arises, therefore, considering that the county governments have mandates over critical sectors such as health, community land ownership, and management of county affairs generally, will the national government undertake refugee protection functions to the exclusion of the county government effectively? Certainly, bearing in mind the critical sector role that the counties perform, the complete assignment of refugee protection tasks to just one level of government comes with profound challenges that will, in the process, deter the effective application of refugee protection measures.

C. Conclusion

From the preceding, it can be argued that functional distribution to the various levels determines which mode of functional allocation is responsive to refugee protection. This study takes the view that concurrent or shared functions that are dispersed to subnational levels impact more positively on the protection of refugees. The case of functional assignment in the refugee sector for Kenya and Indonesia demonstrates that central governments continue to be the dominant actor in refugee protection and public service delivery in general. It is also worth noting that while local governments are generally assigned a wide range of functions, they are not accompanied by adequate budgetary allocations. The functional assignments delegated to local governments vary and are heavily influenced by the capacity of each region.

Indonesia's continued decentralization and regional autonomy implementation have yielded positive and negative outcomes.²⁹ For Indonesia, implementing the cited presidential regulation appears to increase an understanding and better coordination between the levels of government. In turn, this has enhanced cohesion in implementing refugee protection measures in the country. These positive assessments notwithstanding, major shortcomings have also become apparent during emergencies in attending to the plight of asylum seekers. Some are attributable to local governments, while others may result from uncoordinated shared responsibility at different levels. The presidential regulation has not necessarily resulted in better outcomes for refugees. Still, it has revealed some flaws in refugee protection, such as the limitations of care provided by local governments being tightly linked to national decision-making, a lack of resources for refugee programs, and the absence of political will to agree to take responsibility for asylum seekers in the country.

On the other hand, Kenya, despite being a signatory to all international and regional legal frameworks governing refugees and elaborate national legislation, the nature of functional allocation within its multi-level governance structures is not as responsive in refugee protection. This exclusive nature of the functional allocation of refugee protection role to the National government hampers the effective participation of the county governments in the implementation of protection programs largely due to a lack of structured coordination

It is important to recognize that legal frameworks for functional assignment are not always faithfully reflected on the ground due to various challenges, ranging from poor coordination to limited resource allocations to sub-national units. While these challenges appear in both Indonesia and Kenyan settings, decentralization design options vary in their responsiveness to matters of refugee protection. In the instant case, therefore, the concurrent nature of functional allocation under the Indonesia model appears to be more responsive than Kenya's exclusive functional approach.

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