

Understanding and Operationalization of Cooperative Devolved Government and Intergovernmental Relation

COOPERATIVE DEVOLVED GOVERNMENT AND RE-ENGINEERED INTERGOVERNMENTAL RELATIONS

The constitution establishes a system of cooperative devolved government which necessitates cooperative intergovernmental relations, and the pursuit of joint solutions to most policy and legislative problems. Lack of proper understanding and operationalization of cooperative devolved government and intergovernmental relations are major policy and legislative barriers to effective and efficient delivery of health services by the national and county governments.

The essence of cooperative devolved government

The essence of cooperative devolved government is that although the constitution creates two levels of government that are distinct and assigns them both exclusive and concurrent functions and powers; the levels of government are also interdependent and must cooperate with each other when performing their functions and exercising their powers. The concept refers to collaborative and coordinated partnership between the two levels of government that seeks to ensure a well-coordinated and cohesive system of government that provides services to the people as a whole, based on the system of effective service delivery at the local level that is well coordinated with national priorities. It also seeks to avoid competition among the governments and their working at cross-purposes or in a mutually destructive way. It aims to avoid duplication of roles and expenditures as well as provide harmonious coexistence among the governments and their institutions.

The obligations of cooperative devolved government

In terms of Articles 6(2) and 189 of the constitution, cooperative devolved government imposes upon the two levels of government certain obligations, the implications of which are to limit the way the levels of government perform both their exclusive and concurrent functions and exercise their powers. The obligations require the governments to (1) respect the constitutional status of the institutions of each other; (2) respect the functional and institutional integrity of each other; (3) assist, support and consult each other, and where appropriate, implement the legislation of the other level of government; (4) liaise with each other, exchange information, coordinate policies and administration and enhance each other's capacity; (5) cooperate with each other in the performance of functions and exercise of power, and for that purpose, set up joint committees and joint authorities; and (6) avoid judicial settlement of disputes. These obligations certainly go beyond mere consultation and among others, require collaboration, coordination, and cooperation based on partnership, as well as pursuit of joint solutions to policy and legislative problems as opposed to unilateral imposition of policy and legislative solutions.

MANIFESTATION AND MAGNITUDE OF THE PROBLEM

The problem of lack of proper understanding and operationalization of cooperative devolved government and intergovernmental relations which affects the process of policy and legislation-making manifests itself in several ways identified and discussed below with recommendations for addressing it made in respect of each dimension to the problem.

The problem of discretionary policy and legislation making

Despite the above-mentioned obligations, which favour pursuit of joint solutions to policy and legislative problems; policy and legislation making have suffered from what appears to be unilateral imposition of policies and legislations by the national government. Many draft policies and legislations touching on devolved health matters are originated and sometimes passed by the national government without any involvement of county governments. Other times the policies and legislations are originated by the national government and then passed over to the Council of Governors for comments in what amounts to mere consultation that falls short of full compliance with the obligations of cooperative government. Often, the COG is given very short notice to comment, yet its statutory mandate is to coordinate the forty-seven counties to develop common positions in respect of the policy or legislation under consideration. The approach enables national government which tends towards discretionary decision-making to encroach upon and recentralize the functions and powers of county governments; undermines the relative autonomy of county governments; disrupts mutual trust and interdependence among the governments; and destabilises the balance of power between national and county governments, including the checks and balances the devolved system was meant to create.

The need for joint policy and legislative solutions

As a solution to the problems created by unilateral imposition of policies and legislation by the national government, re-engineered cooperative devolved government and intergovernmental relations encourages collaborative and joint pursuit of policy and legislative solutions and strategies. Joint formulation of policy and legislative solutions or reform of existing policies and legislations protects the functions and powers of each level of government; avoids discretion, usurpation, encroachment and recentralization of functions and powers by national government without the consent of county governments; safeguards the autonomy of county governments; ensures stability and the balance of power within the devolved system; and increases the capacity to make good policies and laws that are easily accepted and implemented by both levels of government, which results into improved delivery of services to the citizenry. Collaborative joint policy and legislative solutions should be realised through intergovernmental structures and institutions such as joint committees of the two levels of government.

The problem of intergovernmental institutions that are not constituted as such

Several constitutional and statutory institutions that ideally have an important intergovernmental role are either not constituted as such or do not undertake their responsibilities as critical intergovernmental institutions that ought to serve both levels of government in a neutral way.

The role of Cabinet in approving draft policies and legislation

Ordinarily, draft policies and legislations are first tabled before the National Government Cabinet for approval before presentation to Parliament for consideration, debate, and passage. The Cabinet is thus a critical player in ensuring that such draft policies and legislations are originated and developed jointly by the two levels of government. The President may require such draft policies and draft legislations to be accompanied by a statement indicating whether they were developed jointly by the two levels of government. He may also require such draft policies and draft legislations to be approved by the Ministry for Devolution which must also make its own statement about the draft policy or legislation at the Cabinet before approval by cabinet.

The institutional vacuum in the policy and legislation making

The process of transition from the unitary to the devolved system of government was overseen by the Commission on Implementation of the Constitution (CIC) established under the Constitution and a statutory Transition Authority (TA) established under the Transition to Devolved

Government Act, both of which had responsibility to ensure that the draft policies and legislations were in conformity with the constitution. The terms of both CIC and TA expired before the completion of the transition process thereby leaving an institutional vacuum in the process of development of enabling policies and legislations.

The role of MODA in the devolved system and processing of draft policies and legislations

Section 121(1) of the County Governments Act envisages the establishment of a ‘ministry or government department responsible for matters relating to intergovernmental relations. According to Executive Order Number 1 of 2013, the President established a Ministry of Devolution and Planning. However, Executive Order Number 2 of 2013 assigned to this ministry only five functions relating to intergovernmental relations; and twenty-nine other functions not directly related to intergovernmental relations. These other functions may have distracted the ministry from its intended core function of coordination of national and county governments. The Ministry should be established as a Ministry of Devolution, Justice and Constitutional affairs or Devolution, Justice and Constitution Implementation Affairs and be charged with the responsibilities that the defunct CIC used to perform. While respecting the functions of the Intergovernmental Relations Technical Committee (IGRTC), the functions of the ministry should be refocused on matters of coordination between national and county governments, especially in the development and implementation of policies and legislations. The Ministry of Devolution should play a critical role in the development of draft policies and draft legislations by other ministries to ensure that they do not undermine devolution. All other ministries should be required to coordinate with the ministry of devolution to ensure that any policies and legislations they are developing are undertaken jointly with county governments. Both Cabinet and Parliament should require a statement from the ministry of Devolution in respect of any draft policy or legislation tabled before them for approval or consideration, debate, and passage.

The role of the National Treasury in the devolved system of government

Article 225(1) empowers Parliament to enact an Act of Parliament to ‘provide for the establishment, functions and responsibilities of the National Treasury’. In the context of the devolved system of government, parliament should have established a national treasury that is an independent organ of state serving the interests of both national and county governments in a neutral manner. On the contrary, section 11 of the Public Finance Management Act establishes the national treasury as ‘an entity of the national government’. This is despite the fact that the functions of the national treasury set out by section 12 of the Act affect both national and county governments. These provisions undermine mutual trust and interdependence between national and county governments whenever the National Treasury deals with disputes between the national and county governments. It is recommended that the provisions be amended to allow for establishment of the national treasury as an independent state organ.

Should debt repayment be a first charge on the shareable revenue?

Currently, debt repayment is regarded as a first charge on the shareable revenue. This undermines the concept of equitable sharing of revenue raised nationally as it allows the national government to increase its equitable share through borrowing. The correct interpretation and application of Article 203 criteria is that all the criteria should be considered together although some will have higher weighting than others.

The role of the Bicameral Parliament in the enactment of policies and legislation

The Constitution establishes a Parliament that is composed of two houses—the National Assembly and the Senate. While Article 96 specifies that the Senate represents the counties and serves to protect the interests of the counties and their governments; even the National Assembly makes

many decisions that affect devolution and county governments in fundamental ways, and this makes both houses of Parliament critical players in the devolution arena. However, poor working relations between the National Assembly and the Senate have become serious barriers in the legislation making process.

Persistent conflicts between the National Assembly and the Senate

Persistent conflicts between the National Assembly and the Senate regarding the interpretation and application of Article 110 of the constitution in the law-making process have led to policy and legislative barriers to the efficient and effective delivery of health services by both levels of government. These conflicts degenerated into a High Court judgement in October 2020 declaring 23 laws unconstitutional and invalid for having been passed by the National Assembly without involving the Senate. Although the Court of Appeal recently delivered judgement partly allowing and partly rejecting the appeal of the National Assembly, there is urgent need to address and conclusively resolve this conflict to ensure a smooth legislative process with appropriate participation of both houses as envisaged by the constitution.

The challenge of piecemeal Amendment Bills

Since the expiry of the term of the CIC, comprehensive review of old order unitary legislations to fully align them to the constitution and the devolved system of government almost ceased and an approach of piecemeal amendment of existing laws adopted. At times different Amendment Bills that propose contradictory amendments to the same legislation are introduced in each of the two houses of Parliament. Good examples in this regard are proposed amendments to the Mental Health Act; the Health Act; and the Hospital Insurance Fund Act. It is recommended that the two Houses of Parliament Jointly amend their Standing orders and establish a joint Committee of the two houses to be charged with the responsibility of examining all the Bills introduced in each of the houses to determine whether they concern counties and advise the Speakers of the two houses to make a decision based on the advice; identify any multiple Bills on the same issue and seek to merge and or harmonise them before any of the houses considers them; and to undertake any other functions that require a joint solution of the two houses of Parliament. The amended Standing Orders should also expand the scope of the necessary disclosures that should be made in all Bills to include a disclosure on whether the Draft Bill was originated by the national government alone or jointly with county governments.

The need to implement sections 54 and 114 of the County Government Act

Section 54 of the County Government Act provides for establishment of a county Intergovernmental Forum chaired by the County Governor and brings together all the heads of the national government departments rendering services in the county and all the County Executive Committee members. The responsibilities of this forum are harmonisation of services rendered in the county; coordination of development activities in the county; and coordination of intergovernmental functions. National and county governments have not operationalized this section in many counties and yet it provides an important infrastructure for coordinated development and delivery of services in the counties.

On the other hand, section 114 of the County Government Act requires that one, development of nationally significant development projects within counties be preceded by mandatory public hearings in each of the affected counties; and two, after such mandatory hearings, the projects be considered and approved or rejected by the County assembly. This is an extremely important provision for even ensuring accountability and equity in distribution of national government projects, yet the national government continues to implement development projects even in the health sector without complying with this section.

The need for a legal framework to operationalize Article 189(2) Joint Committees and Joint Authorities

Given the important role of joint solutions to policy and legislative problems and the delivery of health services generally, there is urgent need for enactment of a legislation to operationalize Article 189(2) which envisages that both national and county governments; and the county governments among themselves can establish joint committees and joint authorities through which they can perform some of their functions and exercise some of their powers. The legislation should provide for a legal framework including processes for establishment of such joint entities. County governments have currently informally established various Regional Blocs that bring together counties in the same region to work together and reap the benefits of economies of scale through establishment of shared specialised facilities and services. Establishment of these regional Blocs is best facilitated by a national legislation of the kind proposed.

The legal status, institutional and financial capacity of the COG secretariat

Sections 11, 12 and 15 of the Intergovernmental Relations Act of 2012 envisage that the Intergovernmental Relations Technical Committee (IGRTC) and its Secretariat will be the Secretariat of the Council of Governors (COG). For various reasons including the fact that IGRTC was not established until early 2015 long after the COG had been established and forced to establish its own Secretariat, this has not worked well or at all. COG thus operates with a Secretariat that is not established in law and is not funded by the exchequer. This has been a major barrier to the effective performance of the COG's coordination functions. Through various proposed amendments to the Intergovernmental Relations Act, there is consensus among the COG, IGRTC and the Ministry of Devolution that there is a need to amend the legislation to establish a separate Secretariat for COG that would be legally recognized in law and funded by the exchequer. It is recommended that a Joint Committee of the three institutions be established to study and harmonise these proposed amendments and hasten their being tabled in Parliament for enactment.

Health workforce issues.

Although there have been many health workforce issues that have posed challenges to the delivery of health services, this policy brief addresses a few that have intergovernmental relations dimensions. First, there is the problem of an apparent misinterpretation and application of Article 235 which empowers each county government to, 'within a framework of uniform norms and standards prescribed by an Act of Parliament' establish and abolish offices in its public service; appoint and confirm persons to those offices; and exercise disciplinary control over its public officers. The misinterpretation of this provision has led to an apparent unconstitutional section 31 of the Health Act which assigns to the Kenya Health Human Resources Advisory Council functions to review and establish uniform norms and standards without requiring them to be prescribed by an Act of Parliament as stipulated by Article 235 of the constitution. Secondly, contrary to the obligation to pursue joint policy and legislative solutions, recent statements from the Minister for Devolution indicate that the Ministry has without involvement of county governments embarked on drafting legislation to provide for transfer of county staff to other counties. Thirdly, there is the problem of county governments continuing to pay the personnel emoluments of county health workers when they are on study leave, even when such health workers are rendering services in National Government teaching and referral health facilities. It is recommended that county governments coordinate with the national government to take over the burden of personnel emoluments during the training period of such health workers. Fourthly, there is a need for the national government to coordinate with county governments when negotiating bilateral agreements touching on health workers such as agreements to bring in foreign health workers to work in county health facilities; and to recruit Kenyan health workers for employment in foreign countries.

RECOMMENDATIONS AND WAY FORWARD

Considering the matters discussed above, the following recommendations and way forward should be considered:

1. County governments should engage the national government and agree to re-engineer cooperative devolved government and intergovernmental relations to embrace the pursuit of joint policy and legislative solutions in the health sector, undertaken through joint committees and joint authorities.
2. The County Governors should coordinate with the President through the Summit and secure his consent to restructure the process of cabinet approval of draft policies and draft legislations to require--
 - a. Disclosure by the relevant ministry on whether the policy or legislation was originated jointly by the national and county governments.
 - b. The involvement of the Ministry of Devolution in the development of the draft policy or legislation to confirm whether the policy or legislation concerns county governments and coordinate the involvement of county governments in its development.
 - c. A statement by the relevant ministry on whether the Ministry of Devolution was involved in the development of the policy or legislation.
 - d. A statement of the Ministry of Devolution to confirm its involvement in the development of the policy or legislation.
3. The County Governors should engage the President through the Summit on the need to restructure the Ministry of Devolution into a ministry of Devolution, Justice and Constitutional affairs or Devolution, Justice and Constitution Implementation Affairs to take over the functions of the defunct CIC, and also focus its mandate on coordination of the national and county governments; coordination of intergovernmental relations; and ensuring strict compliance to the constitutional mandates of the two levels of government, especially in the process of development of policies and legislations.
4. The County Governors should coordinate with the President through the Summit and establish a Joint Committee to review the Public Finance Management Act leading to Amendments that aim to establish the National Treasury as an independent state organ that serves both levels of government in a neutral manner.
5. The County Governors should engage the President through the Summit on the need to engage the Speakers; Majority; and Minority Leaders of the two houses of Parliament regarding the need to amend the Standing Orders of the two houses of Parliament to--
 - a. Conclusively resolve the persistent conflicts between the two houses over the interpretation and application of Article 110 of the Constitution regarding the role of the Senate in the legislative process.
 - b. Establish a Joint Committee of the two houses charged with the responsibility of determining and advising the Speakers on whether a Bill concerns county governments and reviewing and harmonising bills introduced in the two houses of Parliament to avoid multiple piecemeal Amendment Bills.
 - c. Require each Bill to disclose whether it was originated jointly by the national and county governments.

6. The County Governors and the national government should take the necessary steps to implement sections 54 and 114 of the County Government Act
7. The County Governors should engage the President through the Summit and establish a joint committee of the national government, county governments, IGRTC and the Ministry of Devolution to review the Intergovernmental Relations Act and all the previously proposed amendments and propose amendments that streamline intergovernmental relations including amendments to establish a separate COG Secretariat that is legally recognized and funded by the Exchequer
8. The County Governors should engage the Ministry of Health and the National Treasury to find agreement on how best the National Government can take over the payment of Personnel Emoluments of county governments' Health workers when they are on further studies and working in the National Teaching and Referral health facilities