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Assessment of the Intergovernmental Relations Bill, 2012 in light of the Constitution of Kenya 2010

1.0 Background

The Constitution of Kenya (CoK) 2010 establishes two levels of government, namely, the national government and county government. The national government and the 47 county governments will begin operating after the first national elections under the new Constitution. Article 6 (2) of the Constitution recognizes that the two levels of government are distinct and interdependent. The two levels of government will conduct their mutual relations on the basis of consultation and cooperation. Article 189 gives further details on the mechanism, for cooperation and consultations between the national and county governments and amongst county governments.

The Intergovernmental Relations Bill, 2012 seeks to establish a framework for intergovernmental consultation and cooperation and to provide mechanisms for the resolution of intergovernmental disputes whenever they arise. The bill seeks to create two main institutions to assist with intergovernmental consultation, learning and cooperation. These are the Summit and the Council of Governors. The bill also seeks to set out the principles and criteria for transferring and delegating powers, functions and competencies between the two levels of government. Lastly, the bill seeks to lay down the principles and process of dispute resolution. This assessment of the bill seeks to check its conformity with the chapter on devolution and the Constitution in general as well as its applicability and effectiveness.

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2.0 Principles and objects of intergovernmental relations structures and dispute resolution mechanisms

2.1 Principles of intergovernmental relations structures and dispute resolution mechanisms

According to Section (s) 4 of the bill, there are a number of principles that should inform the creation of intergovernmental relations structures. These are: (i) recognition of the sovereignty of the people as per Article 1 of the Constitution, (ii) inclusive and participatory governance, (iii) respect for the functions and institutional integrity of the two levels of government, (iv) promotion of national values and principles of governance as per Article 10 of the Constitution, (v) respect of the constitutional status of the levels of government and the institutions of government established at either level of government, (vi) promotion of equality and equity in service delivery, (vii) objectivity and impartiality in decisions making, (viii) the requirement for consultation and cooperation as provided under Article 6 (2) of the Constitution, (ix) the need to minimize intergovernmental disputes while cooperating in exercising their functions, (x) promotion of accountability to the people in decision making and actions taken and (xi) institutionalized protection of marginalized groups.

2.2 Objects of intergovernmental relations structures and dispute resolution mechanisms

The objects of intergovernmental relations structures and dispute resolution mechanisms are to: (i) facilitate the realization of the objects and principles of devolution provided under Article 174 and 175 of the Constitution; (ii) facilitate cooperation and consultation between the national and county governments and amongst county governments as provided under Article 6 and 189 of the Constitution; (iii) provide a forum for coordinating governments policies, legislation and functions; (iv) provide a forum for sharing and disclosing necessary data and information; (v) provide for mechanisms for the transfer of power, functions and competence to either level of government and (vi) promote accountability between the two levels of government or amongst the county governments.

3.0 Establishment of Intergovernmental Relations Structures

The bill creates four intergovernmental relations structures. These are: (i) the National and County Government Coordinating Summit (ii) the Intergovernmental Relations Technical Committee (iii) the Intergovernmental Relations Technical Committee Secretariat and (iv) the Council of Governors.

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3.1 The National and County Government Coordinating Summit

The National and County Government Coordinating Summit (referred to as the Summit in the bill), comprises of the heads of government at both levels of government; that is, the President and the 47 Governors. The functions of the Summit are listed in section 8 of the bill and include: consultation and cooperation between the national and county governments, coordinating and harmonizing the development of county and national government policies, evaluating the performance of national or county governments and recommending appropriate action and finally monitoring the implementation of national and county development plans. In this regard, the Summit appears to be more of a peer evaluation and learning forum where lessons arising from interactions by the heads of governments can be applied. In addition, it can be expected that the Summit will focus mainly on executive issues given that the participants are members of the executive arm of government.

The Summit shall meet two times a year and submit an annual report to the National Assembly, Senate and county assemblies within three months after the end of every financial year –s10(1). The legislature may make recommendations to the Summit if they think that it is necessary –s10 (3). The purpose of submitting the reports to the legislatures could be to account for time and money used by the Summit, as well as to inform legislatures on any issues that may significantly affect the performance of the government.

Conceptually, the Summit offers great opportunity for heads of government to share experiences and learn from one another. Examples of areas for such learning could be the setting up of Management Information Systems in government, dealing with government debt, options for reducing infrastructure costs and making the most of Public Private Partnerships (PPPs). In practice, it will call for some level of trust that the heads of government will not be ridiculed in the event that they express difficulty in carrying out some of their functions. It is therefore likely that in the initial stages, members of the Summit may be reluctant to share information and experiences with one another. Another possible scenario is that Governors may coalesce against the President, due to the perception that they are on opposite sides. Still, with time and depending on how sensitive matters are addressed, the Summit could prove to be useful.

3.2 The Intergovernmental Relations Technical Committee (IRTC)

The Intergovernmental Relations Technical Committee shall act as the Secretariat of the Summit – s15 (1). It will be responsible for the daily administration of the Summit activities –s12 (9). The IRTC is also supposed to implement decisions that come out of the Summit. The bill proposes that the committee has 8 members appointed by the Summit on such terms and conditions as the Summit may determine. The IRTC is permitted to form sector working groups or committees to assist it in carrying out its functions. The IRTC will be headed by a Secretary who will be appointed by the IRTC with the approval of the Summit. He or she will be the Chief Executive and the Accounting Officer of the Secretariat and responsible to the IRTC for the administration of the Secretariat -s15 (4). The IRTC will take over from the residual functions of the transition entities established under the law relating to transition to devolved government after the dissolution of the entity – s12(b).

Overall, there is need for the Summit to have a secretariat. However, there are two problems that emerge with regards to the terms of the committee as proposed by the bill. The first problem is that the bill proposes that the Summit determines the terms and conditions of the IRTC. On the face of it, this proposal appears to usurp the mandate of the Salaries and Remuneration Commission established by the Constitution, to set and review the remuneration and benefits of all state offices – Article 230 (4).

The second problem is an implication within the bill that the IRTC will run throughout the year. One concern that arises is the possible financial costs of running the IRTC throughout the year vis-à-vis the nature of its work. The Summit will be meeting twice a year and it is unlikely that majority of the decisions which come out of the Summit will require the full-time employment of the IRTC's services. Instead, a majority of the decisions are likely to require action by national and/or county government departments. It is therefore critical to look at ways that the IRTC can exist without being on the payroll throughout the year.

3.3 The Council of Governors

A Council of Governors is established to provide a forum for consultation amongst county governors, capacity building, dispute resolution and sharing of information on the performance of counties. The Council will consist of the governors of the 47 counties and shall elect a Chair and Vice Chair. The council

shall also have powers to establish other intergovernmental forums including inter-city and municipality forums – s20 (2). The Council may also establish Sector Working Groups (SWGs) or committees to better carry out its functions –s20 (3). The Council shall meet at least twice a year and not more than 4 times in a year, and will submit an annual report to the Summit, the Senate and the National Assembly –s22. The Council will be expected to submit these reports to the county assemblies within three months after the end of each financial year – s22 (2). This could lead to a situation where the county assemblies receive the reports after the Summit, the Senate and the National Assembly.

The concept of a Council of Governors is for the purpose of sharing information and peer learning. The rationale for sending reports to the Summit is not clear given that the governors form 99% of the Summit.

3.4 Joint Committee

The national and county governments may establish a joint committee with a specific mandate where such a committee is necessary for the achievement of the objects of the Act and the objects and principles of devolution as per the constitution.

4.0 The transfer and delegation of powers, functions and competencies

4.1 The Authority to transfer or delegate powers, functions and competencies

The Constitution only makes explicit reference to the transfer of powers and functions. Indeed, the Constitution does not refer to competencies, or to the delegation of powers and functions.

In order to decide whether to transfer powers or functions, Article 187 (1) (a) of the Constitution states that the question of whether the receiving government would more effectively perform or exercise the function of power must be considered. This means that the overall objective of finally transferring a power or function to another level of government has to be that of effectiveness. Once the decision to carry out the transfer is made, arrangement shall be put in place to ensure that the resources necessary for the performance of the function or power are transferred. Article 187(2) (b) provides a caution to the government transferring the power or function; that

even if the powers or functions are transferred constitutional responsibility for the performance of the function or exercise of the power remains with the transferring government. This means that the transferring government remains accountable and more so, that ‘the buck stops with the transferring government.’

The bill does not indicate the kind of powers, functions or competencies that would be transferred. By so doing, it leaves the scope of the decision to governments, assuming that they shall make their decisions within the confines of Article 186 and the Fourth Schedule.

At the start of Part III, the bill states that the transfer and delegation of powers, functions and competencies is subject to Article 186 and 187 of the Constitution. However, a review of Articles 186 and 187 reveals that (i) these articles only refer to the transfer of powers and functions and (ii) the Constitution establishes two authorities on the transfer of powers and functions. These are (i) the Constitution, whether the transfer is made explicitly – Article 186(1) and (2) or where a power or function which is not expressly mentioned in the Constitution or national legislation is considered to be a national government power or function – Article 186(3) or (ii) national legislation. On the face of it, Article 187 (1) does not limit the action of transferring powers and functions to national government; however, it is somewhat implied in Article 186 (3).

The bill interprets Article 186 and 187 to mean that (i) powers and functions can also be delegated (ii) competencies can be transferred or delegated and (iii) county government can transfer power, functions and competencies to national government – this is implied in s24(a).

Delegation is a lower level of a transfer. Delegation implies that there is still a level of control retained by the delegating government. Competence is described (in the glossary of the bill) as powers given to a public authority in respect of specific activities which is key to ensuring the provision of public services. Adding these concepts of delegation and competency into the bill are not unconstitutional; however, it seems more logical for the bill to have simply referred to powers and functions and omitted competency.

4.2 Principles for transferring or delegating powers, functions or competencies

According to s25, a government transferring or delegating a power, function or competency shall: (a) ensure assignment

to the level of government best placed to exercise or perform the power, function or competency in accordance with Article 187 of the constitution; (b) ensure that adequate resources are provided to carry out the power, function, or competency; (c) be in accordance with the procedures set out under this Act or prescribed by regulations made under this Act; and (d) ensure a transfer or delegation under this section does not transfer constitutional responsibility assigned to that level of government. In summary, it means that a transfer or delegation must be based on capacity, must be resourced, must not neglect accountability, and must be done in the right way.

4.3 Criteria for transferring or delegating powers, functions or competencies

According to s28, the criteria for transfer or delegation of powers, functions or competencies shall include: (a) the capacity of the entity to which the function is being transferred or delegated; (b) the extent to which the transfer or delegation would allow for accountability; (c) the extent to which the power, function or competency would best be performed by a single authority across a county, city, municipality or the Republic; (d) the existence of the level of technical and managerial expertise required to perform a transferred or delegated function or competence; or (e) whether the provision of the service requires substantial inter-county or large-scale bulk infrastructure. The criteria mainly center on the capacity and expertise of the receiving government, the effectiveness of the receiving government exercising the power, performing the function or using the competency and the infrastructure requirements. The objective is to avoid delegating or making transfers out of political pressure or favor.

4.4 Agreements on transfer or delegation of powers, functions or competencies

Once it is agreed that a transfer or delegation is appropriate, the terms of the transfer or delegation need to be drawn up in a written agreement - s26 (1). The agreement should incorporate: (a) the function, power or competency transferred or delegated; (b) the specific legal provisions supporting the transfer or delegation; (c) the reasons for the transfer or delegation; (d) the performance standards and frameworks in respect of the transfer or delegation; (e) the resourcing framework for delivery of the powers, function or competency transferred or delegated; (f) the capacity of the receiving entity to exercise or perform the powers, function, or competency transferred or delegated; (g) the capacity building framework for enhancing any deficits identified in the entity to which the transfer or

delegation has been effected; (i) the method of resolving any dispute that may arise under the agreement; and (f) the terms and conditions for the exercise or performance of the power, function or competency including the time frame – s26 (2). The agreement shall be published in the Kenya Gazette and the County Gazette in respect to the county which it relates, at least fourteen days before the effective date of the transfer or delegation - s26 (3) (b).

5.0 The Role of the Legislatures

According to s26 (4) of the bill, the National Assembly is to be notified of a decision to transfer a national government power, function or competency. Likewise a county assembly shall be notified of the decision to transfer a county government power, function or competency –s26 (5). It is important to note the following issues: (i) the legislatures are merely notified and not consulted; (ii) the legislatures do not have to be notified of the delegation of powers, functions or competencies and (iii) there is no time line within which the notification must be made. This gives the legislature a passive role. Although the bill implicitly focuses on the transfer and delegation of execution of functions, powers and competencies, there is need for the legislature to approve in cases where the power, function or competency being transferred is significant and will affect the resource base of the transferring or receiving government. This will enhance the legislature's oversight powers.

Another aspect of oversight that could be under-utilized if the legislature is not proactive is the Summit and Council of Governor reports. The reports are supposed to be submitted to (as opposed to laid before), the legislature. This means that by law, no action or reaction is required by the legislatures. It is therefore upon the legislature to identify and follow up on any issues arising in the report.

6.0 Dispute Resolution

Article 189 of the Constitution is concerned with cooperation between national and county governments. The Article appears to lean more towards attempting to provide a framework for addressing dispute that could arise between national and county governments, as opposed to disputes amongst county governments. This may have been influenced by what the drafters of the Constitution anticipated. However, it is also likely that disputes may arise amongst counties. These could arise

over joint ventures, natural resources or even how to handle environmental issues. Fortunately, the requirement for cooperation and dispute resolution amongst county governments is implied in Article 189 (2); this clause emphasizes the need for either level of government to respect the function and integrity of other levels of government and within county levels.

The bill takes on a more expansive view of Article 189 and addresses disputes between national government and county government and amongst county governments –s30 (1). It is important to note that the bill is not addressing itself to disputes within national government or within county government. The principles of dispute resolution can be drawn from s31, “that the governments take all reasonable measures to: (i) resolve disputes amicably; (ii) use alternative dispute resolution (ADR) mechanisms and to (iii) use judicial proceedings as a last resort as per Article 189 (3) and (4). Therefore every agreement including those regarding the transfer and delegation of powers, functions and competencies need to contain a dispute resolution mechanism and provide for ADR mechanisms. In addition, the agreements need to state that judicial proceedings will be used as a last resort – s32 (1). In the absence of such mechanisms in an agreement, the framework proposed in the bill will apply s32 (2).

6.1 The Dispute resolution process

The constitution strongly promotes alternative mechanisms or procedures of dispute resolution, as opposed to judicial proceedings in Article 159.

The parties to a dispute shall in good faith make every reasonable effort and take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary – s33(1). Where the negotiations fail, a party to dispute may formally declare a dispute by referring the matter to the Summit, the Council or any other intergovernmental structure established under the Act as may be appropriate – s33 (2). Several issues arise from these two clauses. Of most significance are that a party to a dispute must show good faith and make reasonable effort and take all necessary steps to amicably resolve the matter. Secondly, where negotiations fail, the parties can choose the institution that will facilitate the matter. Third, the bill does not mention that there will be regulations to outline the process of formally declaring a dispute.

After the declaration of a dispute, the institution chosen to facilitate the matter shall convene a meeting inviting the parties

or their designated representatives to determine the nature of the dispute –s34 (1) (a). If there are mechanisms or procedures prescribed by law or a written agreement, then the parties are required to apply them first. In the absence of such legislation or a written agreement, the facilitating institution together with the parties can agree on an appropriate mechanism or procedure for dispute resolution including mediation or arbitration – s34 (1) (b)(ii). This option allows the parties to deviate from legislation or an agreement, and agree on a separate mechanism for dispute resolution. The advantage is that it provides the parties with flexibility to adapt a suitable dispute resolution mechanisms based on the situation. The disadvantage is that it weakens the strength of legislation or a written agreement. To avoid this negative outcome, the bill puts priority and preference on mechanisms or procedures within legislation or a written agreement. The way in which s34 (1) (b) and s34 (2) and (3) are drafted, does not, however, bring this out clearly. This section of the bill needs to be amended to facilitate understanding and implementation of the bill if passed.

Another clause that is not clear is s34 (3) which appears to state that if a dispute is not resolved under legislation or a written agreement, the Summit shall convene a meeting between the two parties in an effort to resolve the dispute.

7.0 Financing

The operational expenses in respect of the structures and institutions established in this Act shall be provided for in the annual estimates of the revenue and expenditure of the national and county governments. The Summit shall be a charge to the national government. The Council and any SWGs or committees that it sets up shall be a charge to the county governments. The IRTC, and the SWGs and the committees established by the IRTC shall be a charge to both levels of governments. These provisions are made in s37 of the bill. From the nature of the institutions, it is likely that they will be more of a charge on public funds. The bill does not give the institutions revenue raising powers and it is likely that they will only raise fees through the hosting of events such as international conferences.

8.0 Implications for Devolution

The core of devolution is the transfer of powers from the center to other units of government. The process of transferring these powers is highly important, but often overlooked. This is an area that requires involvement of the executives, the legislatures and the public.

The Summit and Council of Governors created by the bill are necessary for peer and exchange learning and may even help the leaders learn from similar associations in other countries. The support institution, the IRTC, is also necessary but its terms of reference need to be reviewed. In the initial phases, officials serving in both levels of governments are likely to have several questions on how to handle issues. With time, questions interrogating the logic and rationale of issues will arise from within and outside government.

Assuming that the bill is passed, it will be interesting to observe how these institutions relate *de jure* to other county, national and intergovernmental institutions. The bill does not make reference to other relevant institutions and commissions established by the Constitution. One such relevant commission is the Salaries and Remunerations Commission. Indeed, the bill can be seen to attempt to encroach on the mandate of the commission and this needs to be checked.

In regard to powers, functions or competencies, the twin questions to ask are (i) what circumstances would necessitate the transfer or delegation of a power, function or competency? (ii) what kind of powers, functions and competencies are most likely to be transferred or delegated in the transition period? The circumstances that would give rise to transfer or delegation of a power, function or competency as per the bill, essentially revolve around efficiency and effectiveness. This is a reasonable approach and can help ward off political pressures that may not necessarily bring about public service effectiveness.

Another question to ask in the case of transferring and delegating power, function or competencies, is “what would be the implications for the accountability chain?” Whereas the bill, drawing from the Constitution, states that constitutional responsibility remains with the transferring government, this may be difficult to demarcate in practice. This is because it would send off the wrong incentive if the receiving government is absolved entirely from responsibility and accountability. The issue therefore becomes one of determining the degree of accountability to be exacted on each government. This may be difficult to incorporate in a law because it will also depend on what power, function or competence has been transferred. This will therefore need to be captured in the written agreements. In addition, there are no provisions in the constitution or the bill, for the nature of the accountability chain in the case where powers, functions and competencies have been delegated.

It is also important to ask, who makes the decision to transfer or delegate a power, function or competency. The language of the bill indicates an assumption that the decision maker is

the Executive. Indeed, the role of the public is mentioned in passing and as an afterthought in s29 which states that “the framework for public participation in the transfer or delegation of powers, functions or competencies by either level of government shall be provided by regulations.” One of the objects of devolution as per Article 174 of the Constitution is the right of communities to manage their own affairs. This can be done directly, and/or indirectly (through representative bodies such as legislatures and associations). The bill needs to require both levels of government to consult the public before making a decision to transfer or delegate a power, function or competency that might require a significant resource shift (including human capital and finance). This is because there will be trade-offs that will be borne by the public.

There is also the question of whether a written agreement transferring or delegating a power, function or competence is adequate, or whether a law is required. It may be that with time, if the same significant powers, functions and competencies are delegated or transferred to more than one county government, there may be need to develop legislation on the same. This could allow for deeper and wider consultation as it will inevitably imply a significant change to the role of the transferring government.

Lastly, there is the possibility that some powers, functions and competencies may be carried out gradually or in phases. This may be more prudent (depending on the powers, function or

competency) in the early operations of Kenya’s new system of government.

9.0 Conclusion

The strongest feature of the Intergovernmental Relations Bill, 2012 lies in the principles and criteria for intergovernmental relations, the structures and dispute resolution. These are derived largely from the Constitution. The weakest feature of this bill is that it downplays the role of the public, and the legislatures.

Prior to the development of the devolution and public finance laws, members of the public had varying perceptions on the appropriate levels of independence and interdependence of county and national government. The test of whether the structures created by the bill will bring about value for money will emerge within a few years. In assessing their value, it will be important to look at the soft issues as well as the hard (or technical issues). An example of a soft issue is the perception of each level of government, of the other.

Beyond the bill, there are several complex issues concerning the logic and framework of intergovernmental relations. Solutions to some of these issues cannot be identified now. This means that the nature and framework of intergovernmental relations will need to be debated and reviewed with time.

Reference

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© 2012 Institute of Economic Affairs

1st Ngong Avenue
5th Floor, ACK Garden House
PO Box 53989 - 00200, Nairobi, Kenya
Tel: 2721262, 2717402, Fax: 2716231
Email: admin@ieakenya.or.ke
Webpage: www.ieakenya.or.ke

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Chispine Oduor
Joy Thitu Kimani

Edited by:
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