

INTERGOVERNMENTAL RELATIONS ACT 2012: REFLECTION AND PROPOSALS ON PRINCIPLES, OPPORTUNITIES AND GAPS

By

Winnie V. Mitullah

University of Nairobi

Institute for Development Studies

1. Overview

Intergovernmental relation is an important principle in realising synergy among different levels of government and within specific levels for stability of entire government. It applies irrespective of the system of government embraced by a country since there is always the state and its related agency, the government. For governments to work efficiently there has to be further decentralisation with lower levels of government taking central role in implementation of policies through various programmes. Although decentralisation, in particular its devolution aspect, has been challenging to effectively realise, many countries have opted for some form of decentralisation aimed at ensuring efficient provision of services.

For many years Kenya embraced the deconcentration form of decentralisation which did not give full powers to local governments. Decision making was largely done at the centre with the Local Authorities (LAs) not having a free hand to formulate policies and laws relevant for managing their jurisdictions. Critiques of this model attributed the poor record of local development to the strong hand of central government, and advocated during the Constitution making for devolution of powers to the lower levels of government. This was achieved through the promulgation of the Kenya Constitution in August 2010. This, notwithstanding, more work remained to be done in terms of enacting relevant laws for full realisation of the devolution aspect of the Constitution. To achieve this, a Task Force was constituted to come up with a report, policy and propose relevant Acts of Parliament for operationalisation of devolution. It is this process, enabled by various government agencies and the Parliament, that produced the Intergovernmental Relations (IGR) Act, 2012.

The IGR Act 2012 is Kenya's mechanisms for ensuring smooth operation between the two levels of government, National and County, created by the Constitution of Kenya. Whereas there are many provisions in the Constitution that inform the IGR, Article 6 (2) is particularly crucial. The Article provides for two levels of governments at the national and county levels. The provision notes that the 'governments are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation'. These are not unique caveats to Kenya. They prevail in other jurisdictions which have embraced higher forms of decentralisation such as USA, South Africa and Nigeria. Apart

from this introduction, this paper reviews the IGR Act of Kenya, 2012 by first providing a conceptual understanding of intergovernmental relations followed by presentation and discussion of the provisions of the IGR Act, 2012, including opportunities and gaps.

2. Conceptualising Intergovernmental Relations

IGR encompasses all the complex and interdependent relations among various spheres of government as well as the co-ordination of public policies among different levels. The concept is commonly used to refer to relations between and within levels of government that facilitate the attainment of common goals through cooperation (Opeskin, 2001: 92,) and the interactions between the different levels of government within the state (Ademolekun, 2002: 60). These relations and interactions occur through policy alignment, reporting requirements, fiscal grants and transfers, the planning and budget and informal knowledge sharing and communication among officials (Fox & Meyer, 1995). The concept also refers to the fiscal and administration processes by which spheres of government share resources.

The concept of cooperation is central in AGR. Public service responsibilities are divided across governments, and each level has to operate within its jurisdiction taking into consideration the principles of cooperation and coordination. Cooperation should be geared towards sustainable development, the integrated delivery of services by inter-governmental system that ensures mutual consultation, coordinated strategic planning and accountability for performance and expenditure in terms of legislation. In adopting devolution, one anticipates a system that is dynamic whole but made up of various parts for efficiency and viability, each and every part must work coordinately otherwise the system collapses. No single level of government can deliver its mandate and vision of a nation on its own and hence the importance of cooperation and coordination which are pillars of effective IGR.

It can therefore be argued that cooperative government cannot be achieved without developing appropriate intergovernmental forums at national and lower levels to deal with issues of alignment, integration and coherence. Achieving this requires developing systems and processes with clarity on functions of each level of government, common objectives and protocols for engaging in joint work. This is because the levels of government have to interact both vertically and horizontally, with intra-governmental relations occurring when departments within the same level of government interact, with an ultimate goal of ensuring one vision of integrated government. Scholars, for example Layman (2003) in discussing the case of South Africa has observed that uncoordinated strategic planning and unilateral delivery of action by departments contribute to fragmented service delivery. Layman further notes that 'the role of national government departments in service delivery must be made very clear, especially where the services create long term costs for lower levels.

Wright (1988) and Bogdanor (1991) identifies essential features of IGR to include: all units of government, actions of officials and their attitude, regular interactions among public elected and

appointed officials, intergovernmental revenue and expenditure financial policy issues, borrowing and debt, policy formulation and implementation as well as distribution and regulatory policy content issues. Wright (1988) further identifies three models of IGR, namely: coordinate or separated authority, inclusive authority and overlapping authority model. Kenya seems to have embraced the overlapping model with constitutional status. In this model the Constitution defines areas of autonomous actions by respective jurisdiction, and model power relations are also governed by the Constitution. Each level of government can defend its constitutional powers which make the powers limited and dispersed as argued by Wright. Wright concludes by noting that 'in relation to authority patterns, the negotiation of the terms of exchange or agreement is interlocking, interdependent, balanced and bargaining'. This latter point brings out the spirit of Kenya Constitution highlighted in Article 6 (2) giving prominence to consultation and cooperation.

Besides, the importance of the features of IGR, there are different approaches in understanding and realising IGR. Lawson (2011) identifies four approaches to IGR, namely democratic, constitutional legal, financial, and normative operational. In many ordinary discussions these approaches are often muddled. It is therefore useful to have an understanding of each approach. The democratic approach stresses local government right to self determination to the extent of regarding lower levels as independent institutions. Advocates of this approach do not support centralisation of authority, but are in favour of greater devolution to lower levels or subordinate authorities (Hattingh 1998: 11). Sometimes advocates of this approach are viewed as separatists since they stress the autonomous right of existence of every level of government in itself. Critiques of this approach, for example Roux et al (1997: 171) argue that pressing democratic principle at the expense of values contradicts the basis of participation within a total government hierarchy.

The advocates of constitutional legal approach have been largely associated with the federalist movement in the US in the 18th and 19th century where hierarchy of government was accepted as constitutional fact. These advocates view the constitution as the basis for determination of IGR (Roux et al 1997: 71). This is contrary to democratic perspective advocates who view the constitution and other legislations as a point of departure. The financial approach lays emphasis on equitable sharing of revenue raised nationally among national and other levels of government. In addition, it advocates for determination of each level of government's equitable share of revenues, any other allocations accrued to it from national governments share of revenue and conditions on which such allocations may be made. This approach is not limited to federal governments but also to decentralised governments so long as the levels have defacto decision making authority.

The normative operational approach stresses the significance of considering all norms in order to understand the operational reality of government relations, without one aspect of government relations being given too much prominence at the expense of another. In this approach, the behaviour of officials

must be guided by norms. This basically means that in coming up with an AGR, one has to codify the values and norms which will dictate relations in order to realise a common vision. This can be quite challenging if there is no adequate IGR protocol outlining rules and norms and procedures of interaction between the different levels of government.

3. Kenya Model of IGR

The Kenya model of IGR as provided in the IGR Act 2012 falls along the lines discussed in the above conceptual sub section. The Act establishes a framework for consultation and co-operation between the National and County governments and amongst county governments. It further establishes mechanisms for the resolution of intergovernmental disputes as provided in Article 6 and 189 of the Kenya Constitution. The Act provides details of how IGR in Kenya will operate upon the final announcement of the results of 2013 elections (see box 1)

Provisions of AGR Act, 2012

Act provides objectives and purpose of the Act, principles of intergovernmental relations, objects of intergovernmental structures, application of principles and objects of the Act, establishment of the National and County Government Co-coordinating Summit, including functions, meetings, and reports of the Summit; establishment of the Intergovernmental Relations Technical Committee, including functions of the committee, sectoral working groups or committees, reports by the technical committees; establishment of the Intergovernmental Relations Secretariat, including removal from office of the Secretary, Staff of the Summit and Technical Committees, remuneration of staff; establishment of Council of County Governors, including functions, meetings and reports of the Council; Joint committees; Transfer and delegation of powers, functions and competencies, including principles of transfer or delegation of powers and functions, agreements on transfer of powers, functions or competencies, service standards, criteria for transferring powers, functions or competencies; public participation and dispute resolution mechanisms, including measures for dispute resolution, dispute resolution mechanisms, formal declaration of dispute, procedure after formal declaration of dispute, , judicial proceedings and offence.

Source: IGR, Act 2012

3.1 Objects, Principles and Purpose

As highlighted in conceptualisation of IGR, the Act provides a framework for consultation and cooperation between the established two levels of government. Institutional structures such as

the National and County Government Coordination Summit, Intergovernmental Technical Committee, Council of County Governors are provided. These structures are expected to operate on principles of peoples' sovereignty, inclusive and participatory, respect of each level of government, promotion of national values, promotion of equality and equity in service delivery, impartiality, and minimisation of disputes and institutionalised protection of marginalised groups among others.

The intergovernmental structures will provide structures for coordinating governments' policies, legislation and functions as well as providing mechanisms for transferring power, functions and competencies to either level of government.

3.2 National and county Government Co-coordinating Summit

This is the apex body that is expected to ensure smooth operations of the different levels of government. It brings together the President and the 47 County governors and promotes cohesion, unity and matters of national interest. It receives reports, and provides advice as appropriate as well as coordination, monitoring and implementation of national and county development plans and recommends appropriate action. Another key function is the facilitation and co-ordination of the transfer of functions, power and competencies from and to either level of government among other functions highlighted in the Act.

The operations of the Summit will be facilitated by an Intergovernmental Technical Committee of not more than a Chair, eight members competitively recruited and appointed by the Summit and the Principal Secretary of State department responsible for matters relating to devolution. The team is charged with the implementation of the decisions of the Summit and of the Council. In addition, the team is mandated to take over the residual functions of the transition entity after the expiry of its mandate. The Act also gives the Technical Committee mandate to establish sectoral working groups or committees for the better carrying of its operations.

For efficient operations of the Technical Committee, the Act provides for establishment of a secretariat for the Committee headed by a Secretary. The secretariat shall be composed of competitively recruited and appointed individuals by the Technical Committee, with approval of the Summit. The salaries, benefits and allowances of the secretariat staff may be determined by the Technical Committee, in consultation with the Salaries and Remuneration Commission (CRA)

3.3 Council of County Governors

The Act provides for the County governors' Council for consultation among county governors. The Council has a mandate to elect a chairperson and a vice chairperson from among

themselves, who shall serve for a term of 1 year and shall be illegible for re-election for one further term of one year. The functions of the Council include consideration of common matters of interest, sharing information, dispute resolution, capacity building of governors, receiving reports and monitoring the implementation of inter-county agreements on inter-county projects, considering matters referred to the Council by a member of the public and consideration of reports from other inter-governmental forums on matters affecting national and county interests or relating to performance of counties.

The Council has powers to establish other intergovernmental forums including inter-city and municipal forums. As in the case of the Summit, the Council also has powers to establish sectoral working groups or committees for the better carrying of its mandate.

3.4 Transfer and delegation of powers, functions and competencies

This is a critical aspect of IGR requiring sobriety, impartiality and honesty. Power corrupts absolutely once in the hands of one entity. The Act requires each level of government to limit its powers and functions to what it has competencies for. Otherwise the powers, functions and competencies can be transferred to other level or government or delegated to joint committees, authorities or entities, other decentralised units or urban areas and cities. Principles of transferring powers, functions and competencies include: ensuring availability of adequate resources, transfer in accordance with set procedures, including written agreement and set criteria. This should be done bearing in mind that transfer does not transfer constitutional responsibility assigned to that level of government.

3.5 Dispute Resolution

Intergovernmental disputes between national government and county, county and government or amongst county governments will occur in the process of interaction and the Act provides for how such disputes will be resolved. The Act provides for both Alternative Dispute Resolution (ADR) and formal mechanisms for resolving disputes. Section 33 of the Act notes that 'before formally declaring the existence of a dispute, parties to a dispute shall, in good faith, make every reasonable effort to take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary'. It is only if this fails that a party to a dispute may formally declare a dispute by referring the matter to the Summit, the Council or any other intergovernmental structure established under the IGR Act of 2012. The Act further provides procedures after formal declaration of a dispute, including judicial proceedings.

4. Opportunities and Gaps in AGR Act 2012

Opportunities

The AGR Act 2012 has good provisions, but most of the provisions require operationalisation some of which is already being addressed by the Transition Authority (TA) and the incumbent regime. The authority is supposed to be the neutral arm that ensures that the devolved government provisions are operationalised and implemented to the letter. Once the term of the authority expires the Technical Committee of the Summit is mandated to pick up the residual functions of the authority.

The Task Force on Devolved Government that conceptualised the IGR Act thought it wise to have a Transitional Authority constituted of those competitively recruited and key public officials by providing for a total of 7 Principal Secretaries to be members of the authority. Although the positions of Principal Secretaries will not be effected until after the 2013 national elections, the Permanent Secretaries in the current government are playing the role of Principal Secretaries. They were doing this even before the establishment of the Transition Authority.

Theoretically, it is known that ceding power is a difficult task and an incumbent regime may not necessarily act in the interest of the still to be established counties. In the Kenya case, one can argue that the TA is acting on behalf of the counties, but this is also problematic considering the late entry of the TA and how the authority is constituted. The rationale of having public officials as members of the TA was to ensure smooth transition by coordinating ministries and respective government departments in line with the principles of IGR. However, the Permanent Secretaries who are currently part of the Transition team seem to have more powers than the other members recruited from the public. Although the Permanent Secretaries understand the current government and have an upper hand in moving processes, their engagement in the process is likely to generate tension. They are likely to be biased towards the central national government and by extension the still to be constituted national government.

GAPS

Going through a transition is not an easy task and requires adequate change management facilitated by an impartial and well capacitated team. The Sessional Paper on Devolved Government, Under the Constitution of Kenya, 2010 (GOK 2012) acknowledges this by calling the implementation of devolution a leap into the unknown for many Kenyans. It further points out that there are a number of risks to transition including half-hearted implementation efforts by responsible authorities and mitigation measures should be put in place. Most of the criticisms on IGR do not relate to the various provisions of the IGR Act. It is therefore necessary to assess

potential of the various provisions in line with the broad fears that are anticipated in realising devolution, in particular the relations within and among the various levels of government.

The National and County Government Co-coordinating Summit (NCGCS) are noted to be an apex body for intergovernmental relations in the Act. The Institute of Economic Affairs (IEA, 2012) in assessing the Bill that informed the Act noted that the Summit is merely a peer evaluation and learning forum where lessons arising from interactions by the heads of governments can be applied. IEA also sees a problem in the Summit being given the mandate to determine the terms and conditions of the Intergovernmental Relations Technical Committee. It is noted that this provision will usurp the mandate of the Salaries and Remuneration Commission and goes against Article 230 (4) of the Constitution. IEA further questions the full time employment of the Intergovernmental Relations Technical Committee (IRTC), arguing that most decisions of the Summit and the Council will require action from the National and County governments, leaving IRTC with hardly any responsibility.

The critique on the Summit being given the mandate to determine the terms of employment for the IGRTC is valid and will need to be reviewed in light of the provisions of the Constitution. However, the insinuation that the IGRTC should not operate on a full time basis seems to be a misunderstanding of the provisions and mandate of the Summit, Council and IGRTC. The IGRTC and its administrative arm, the Intergovernmental Relations Secretariat (IRS) will make both the Summit and the Council operational. In particular, the IGRTC will take over the residual functions of the Transition Authority which are likely to be quite substantive. Secretariat is going to be a fulcrum of devolution and it bound to have a number of issues to deal with during the three phases of transition and beyond.

The above, notwithstanding, the Summit if well operationalised should base its work on Integrated Development Plans (IDP). In jurisdictions such as South Africa, IDP is used as a framework for interaction and assist in decisions relating to municipal budgets, land management, promotion of local economic development, and institutional management in consultative, systematic and strategic manner (Layman, 2003). The IDPs are also supposed to guide the activities of any government agency from National Government, corporate service providers, NGOs and private sector within counties. This whole process generates a lot of tasks that have to be effectively managed for the entire system to function. Embedded in the IDPs is the issue of shared resources, ports and hydroelectric dams. IGR has to resolve issues of exploitation and management of conflicts over such resources across counties and between the National and the County governments. Good examples include the port of Mombasa which affect relationship between national and the County of Mombasa and the Turkwell

Hydroelectric dam which affect the relationship between Turkana and Pokot counties. Oil resources being prospected in the same region will soon become a major issue to be resolved through intergovernmental relations.

The NCGCS is a political organ and although its provisions are good, once operational it will be engulfed with a lot of politics, largely informed by party interests and alliances. It is therefore necessary to start thinking of how to cushion the Summit from party politics and make it objective and useful for intergovernmental relations. The same case will apply to the Council of Governors. The Act provides for both the Summit and the Council to establish sectoral working groups and committees where necessary for achievement of objects and principles of devolution.

Another concern relates to the reports generated by the Council of Governors. The IEA publication points out that the provision of the Act is not clear on timing of reports produced by the Council. The report suggests that County Assembly should receive the reports of the Council before the Summit, Senate and National Assembly. The IEA publication further questions the rationale of merely sending reports to the Summit without requiring the Summit to table the same for discussion. While sending reports is important for keeping the Summit abreast with the issues of Counties, there will be need once the institutions are fully operational to reassess this provision as indicated by the IEA publication. The argument raised by IEA that 99 per cent of the Summit is composed of the governors and it is not useful for the Council to submit reports to the Summit does not take into consideration the fact that, each of the 47 governors and the National government represent governments with unique dynamics. The principles of IGR require interaction among these governments and information availability is the glue for efficient interaction, coordination of cross cutting issues and nurturing synergy across between and across the different levels of government.

The transfer and delegation of powers, functions and competencies is going to be the most challenging task for transition and IGR. Unless an objective criteria, is developed through consensus, the provision is likely to result in tensions and conflict. A publication of Australian AID and the World Bank (2012) notes that 'the policy processes through which the detail of devolution is being decided has been characterized by distrust between civil society organisations and government, county level actors determined to maximise their authority and entrenched central government interests and over the allocation of resources to different parts of the country' (Australian AID and World Bank (2012: 165). The publication also observes that 'there is far more 'heat' in the above disparities than typically accompanies decentralisation, and they are likely to escalate as implementation begins in earnest'. The publication concludes

by noting that although much emphasis has been put on the apex issues such as finance, sectoral issues will be the most challenging.

The sectoral issues are bound to be the most challenging since service delivery is the heart of devolution. Experience from South Africa reveals that there is no consistency in approach to lower level by line departments at the national and provincial level. Each national department has discretion to determine its own strategic priorities for local governments, which may or may not correspond with other sector priorities or interests of local sphere (Layman, 2003). This is the caution that the Australian AID and World Bank report provides and it will be relevant for the intergovernmental framework to prioritise sectoral issues in the course of interaction between the two levels of government.

Another challenge will be convincing some governments that they cannot immediately take up roles due to capacity limitation. This is closely linked to transfer of power, functions and competencies which the TA is mandate to undertake. Once the task is complete, facilitating required capacity building programmes by the TA as stated in the Act is going to be a daunting exercise requiring a combine resources from both levels of government, civil society organisations, and private sector and development partners. In this process, foul play by the National Government and related public agencies cannot be ruled out. A number of public agencies will continue to view themselves as national bodies as opposed to shared institutions with mandate of serving both levels of government. This should be guarded against and agencies such as the Constitution Implementation Commission (CIC) must be alert to these issues. The CIC should ensure that public agencies serve both levels of government, and the county governments are not treated as under-dogs during the transition and beyond.

The Dispute Resolution Mechanism provision puts high premium on Alternative Dispute Resolution (ADR) with judicial proceedings as the last option. The IEA publication faults the emphasis on ADR, in particular the provision which gives the summit mandate to convene a meeting between the parties in an effort to resolve the dispute and to recommend an appropriate course of action for the resolution of dispute. However, IGR works on principles of based on Article 6 (2) of the Constitution whose pillars include mutual relations based on consultation and cooperation. This cannot be achieved without first and foremost exhausting ADR path. The question which arises is whether the Act should be reviewed to allow governments to decide on the options of dispute resolution without tying them to ADR as a prerequisite. This can be done through consultation once the governments are constituted and the Act amended as necessary.

Concluding Remarks

The IGR Act has good provisions, and the few areas of concern such as the reporting mechanism and transfer and delegation of powers, functions and competencies, and nature of dispute resolution can be discussed and reviewed once the two governments are in place. Relatedly, the main challenge seems to be the first phase of the transition, where the TA is acting on behalf of both levels of government. Due to political leverage, the public officials in the TA wield more power, and unless checked, the outcome of TA operations are likely to favour central government and by extension the still to be constituted National government.

Depending on how TA manages the first phase of the transition, there is a likelihood that the country may begin on a wrong footing once national elections are held on the 4th March 2013 due to unavoidable advantage of central government. Apart from the fact that public officials drawn from the central government are members of the TA, issues of inter-government relations are already being addressed before Kenya rolls out the new system of governance. This is giving advantage to central government and causing tension and conflict. A good example is the deployment of County Commissioners and assuring the Provincial Administrators of security of their jobs. In addition, before the Transition Authority began its work, a number of transition issues, including documentation of assets and audit of human resources were being managed by the central government. Despite the public raising their voices on some of these issues and the court ruling in favour of the public on the deployment of County Commissioners, the national government has stuck to its gun. This sets a very bad precedence for the future of IGR.

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