Intergovernmental Relations Act 2012: Reflection and Proposals on Principles, Opportunities and Gaps

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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 withoud 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 behavior 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 realize 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 coperation 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 institutionalized 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 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 ex-

piry 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 rational 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 Coordinating Summit (NCGCS) is 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 resolve 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 prioritize 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 pre-requisite. 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 intergovernmental 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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B. Public Finance Management Act, 2012: Review

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1. Introduction

The Public Finance Management Act (PFM) was legislated last year after a protracted harmonisation exercise of the County Government Financial Management Bill and The Intergovernmental Fiscal Relations Bill on one hand developed by the Task Force on Devolved Government (TFDG) and fronted by the Ministry of Local Government (MOLG) and the Public Finance Management Bill on the other hand developed and fronted by the Treasury. The County Government Financial Management Bill design was to ensure that County Governments (CG) took full responsibility of managing their revenues and that the financial discipline is exercised by the county officials without control of the National Government (NG). That the various commissions and independent offices created by the constitution served both the NG and the CG equally and without discrimination. That the required disciplinary measures for flouting the law were adequately spelt out in the Act rather than having endless regulations to be issued by the Cabinet Secretary as is the case in most of the other legislations.

In addition the Intergovernmental Fiscal Relation Bill provided for the creation of two independent bodies, the Intergovernmental Budget Council and the Intergovernmental Loans and Grant Council. This was in the view of the need to ensure that there is independence and coordination in dealing with the budgeting for the NG and those of the CGs. Again as there is need to ensure that loans and borrowing within the country are controlled for the benefit of all people of Kenya, the Loans and Grant Council was to ensure that each of the governments borrows responsibly and that the NG would not deny a deserving county guarantees to borrow unfairly.

The Intergovernmental Fiscal Relations Bill also outlined in detail the revenue sharing mechanism between the two governments (vertical sharing) and between the County Governments themselves (horizontal sharing). Further the bill provided for the powers and responsibility of the Senate Budget Committee in ensuring the revenue sharing bills are in accordance with the provisions of the Constitution and the National Government does not use unfair methods in sharing of the national revenues.

The development of the above two bills by the TFDG was in recognition that the success of implementation of the devolved system of government depends on the financial resources and how the national government is able and willing to share these with the county governments. It is still in the memories of Kenyans that the major causes for the people of Kenya to craver for the devolved kind of government was due to watering down the independence constitution and the systematic removal of functions from the local government to the central government. Case in point was the issue of sessional paper No. 10 of 1965 which was followed by the enactment of Transfer of Functions Act of 1969.

Before the enactment of the Transfer of Functions Act the central government hand already started crippling the local authorities by systematic failure (deliberate or otherwise) to allocate the required funds for them to undertake their functions effectively. Similar scenario seems to be

developing even before the new constitution is fully implemented. Already there are bills which are either passed or are in Parliament for legislation whose effect may portray this feeling. For example the proposed Health bill which is supposed to declare certain hospitals in counties to be referral hospitals which will effectively deprive the counties a major functionality. This and many other activities have the effect of affecting the allocation of functions whose unbundling is by the Transition Authority and hence the allocation of funds between the National and County Governments.

The Constitution in Article 6 states that the governments at national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation. Therefore it is important for each of the governments to have an independent control of its revenues which are intertwined on the basis ensuring that the principles of public finance spelt out in the constitution are maintained. Hence the need to have the independent commissions and offices and now the creation of the two oversight bodies which were meant to harmonize the budgets and borrowings between the two governments.

The currently enacted Public Finance management Act is said to have combined the above two bills developed by the TFDG and integrated them in the Act. In addition the PFM Act provided for most of thematters related to Public Finance Management and has very good provisions. In spite of these, a lot of the provisions contained in the original County Government Financial Management Bill and the Intergovernmental Fiscal Relations Bill have not been addressed or have been omitted in toto in the current PFM Act. This raises the fears as to whether the National Government in developing the current PFM Act, mat be doing so with the aim of strangling the Counties with funds in the future?

This paper has made or attempted to do a basic review of the current PFM Act, (1) to establish its compliance with the provisions of the constitution in line with public finance management principles, (2) the level of independence and interdependence in terms of financial management for each of the two governments provided for in the Act, and (3) the ability of the ACT to ensure prudent management of the financial resources by each of the governments for the best interest of the Kenyan People.

The rest of this paper highlights major areas of concern based on the review of the current Public Finance management Act. However the list of issues mentioned herewith may not be exhaustive. Therefore it is our recommendation that the PFM Act to be thoroughly reviewed by an independent body to ensure its consistence with the devolution principles and the principles of public finance as provided for in the constitution.

2. Specific Areas of Concern in the Current PFM Act

2.1 Interpretations (Section 2)

In this section the interpretation of "revenue raised nationally to be shared between the national government and the county governments" has not been given. To avoid any doubt and future misinterpretation there is need to have this definition in the Act. Our suggested definition would be: *"The revenue raised nationally which is to be shared both vertically and horizontally shall include all tolls, taxes, dividends, sale of shares, proceeds on privatizations, imposts, rates, duties, fines, forfeitures, rents, and dues and all other receipts of the government, from whatever source arising, over which Parliament has power of appropriation."*

3. Responsibility of the Senate Budget Committee (section 8)

The powers of the Senate in the allocation of revenue both vertical and horizontal should be given more emphasis. Indeed it is the senate and by extension the Senate Budget Committee which have mandate to ensure that the Counties receive their rightful share of revenues. In that case the following amendments should be made to the PFM act to give the Senate the intended powers:

- Subsection 1 (b) proposes that the committee should only evaluate the County Allocation of Revenue Bill and the Division of Revenue Bill in terms of Article 218 (1)(b) of the Constitution. However its responsibility in terms of the review should also include in terms of Articles 187(2)(a), 201 and 203. In other words the vertical allocation of funds contemplated in the Division of Revenue – has it taken into consideration the principles of public finance, has the national revenue been allocated based on the criteria provided for in Article 203?

- In addition the senate budget committee should have the following other responsibilities omitted from the PFM Act:

    - to receive and consider the report of the Commission on Revenue Allocation contemplated in Section 190 of the PFM Act and make recommendations to the Senate regarding the proposals of the Commission and advise the Senate;
    - to evaluate the recommendations of the Commission in the report on the Division of Revenue Bill the County Allocation of Revenue Bill and advise Senate;
    - to provide a forum through which the Senate participates in the cooperation, consultation and negotiation between the national and county levels of government and among counties on matters relating to vertical and horizontal sharing of revenue;

4. Responsibility of the CRA indicated in (Section 190)

The responsibility of the Commission for Revenue Allocation (CRA) should be broadened to indicate that the reports referred to above to be prepared by the CRA should include the following:

- The process of sharing-

    - the revenue raised nationally among the national and the county levels of government in terms of Article 218(1)(a);
    - the allocation of the county share among the counties in terms of Article 218(1)(b);
    - any allocation of conditional and unconditional grants to counties in terms of Article 202(2); and
    - the sharing of the equalization fund in terms of Article 204,

- The reports shall contain the following details

    - an equitable division of revenue raised nationally, among the national and county levels of government
    - the determination of each county equitable share in the county share of revenue;
    - any other allocations to counties from the national government's share of that revenue, and conditions on which those allocations should be made if any;
    - the share of the equalization fund targeting marginalized areas within counties as envisaged in Article 204 of the constitution.

5. The National Treasury to enforce fiscal responsibility principles (section 15)

The National Treasury seems to have been given excessive powers which goes beyond the national Government to the county governments. Thus we recommend changes in the following subsections:

- Subsection 2 (a) gives NT the power to enforce the adherence to the 30% budget rule of allocation to the development budget by the counties. This amounts to interference with the running of the county governments by the NT. This power should be exercised by the County Treasury.
- Again in the same subsection (d) NT has power to supervise the county governments on matters of public debt. Again this power should be with the county treasuries

6. The national Treasury to administer the consolidated fund (Section 17)

This section gives the National Treasury to manage the Consolidated Fund effectively making the Controller of Budget just a mere rubber stamping organisation. we propose the section to be amended as follows:

- The Consolidated Fund contains the National Revenues to be shared between the National Government and the County Governments. Therefore the management of the CF should be under the constitutional office of the Controller of budget. The national Treasury and the County treasuries should be sending their requisitions of funds in accordance with their respective allocation of revenues to the Controller of Budget.
- The disbursement of monies to the county governments contemplated in this section should be the responsibility of the Controller of Budget based on the Division of Revenue Bill and The County Allocation of Revenue Bill. This should not be a preserve of the National Treasury.

7. The National Treasury to Administer the Equalisation fund (section 18)

This fund cannot be managed by the National Treasury as has nothing to do with the National Government. For control purposes and in line with the required approvals for allocations it should be managed by the Controller of Budget.

8. Advances from the contingent fund (section 21)

Subsection 5 should be replaced with clear criteria which would constitute an event which would require use of the contingent fund. These are widely known and should not be subjected to regulation. Use of regulations should be minimised as much as possible to only those events or issues which are able to vary from time to time.

9. Establishment of Parliamentary Fund and Other National Government public funds (section 24)

- Subsection 3 on accounting and financial management of the funds should be harmonised with other sections in the Act. All accounting and financial management should be in accordance with the systems established and recommended by the Public Sector accounting Standards Board.

- The establishment of the national government public fund contemplated in subsection 4 should be the one to be managed by the NT and not the consolidated fund. This should be the account where monies allocated to the national government in accordance with the Revenue Allocation Bill should be paid to by the controller of Budget from the consolidated fund.

10. National Treasury to prepare annual budget statement (section 25)

This section gives the national Treasury the power beyond their mandate being the national treasury of the national Government. Treasury dealing with the budgetary issues of the county amounts to usurping the county government powers. We would therefore propose that this section be amended as follows:

- This responsibility of preparation of the Annual Budget statement should be under the Intergovernmental Budget and Economic Council established under section 187. The national treasury as the secretariat of the Council can then take responsibility of preparation of the Statement on behalf of the Council. Therefore the approval and pronouncement of the annual budget policy statement should be by the council.
- The dates and other details should be detailed out in the Act
- The section should be moved from this part of the Act to Part V of the Act.

11. Budgeting process

It is prudent for the cabinet secretary to manage the budgeting process of the national government as it is for the County Executive Responsible for Finance to manage the process on behalf of the county. However the timetable and the budgeting process for both the National and the country governments should be managed by the Intergovernmental Budget and Economic Council. The National treasury as the secretariat should prepare this for the approval by the council. Hence a section of this function should be included in Part V of the Act. The date given by the council should therefore guide the both the National treasury and the County treasuries in coming up with clear and unambiguous budgeting process.

12. Loans and Grants management

The Act provides for the public debt management office under the national treasury. While this is good in terms of prudent public finance management, it is important to ensure that the counties are represented and have a say in terms of debt management and loan guarantees. To achieve this, the policies on loans and grants should be transferred to the Intergovernmental Budget and Economic Council given that the former Loans and Grants Council proposed by the Task Force on Devolution was considered unnecessary. Therefore the powers exercised by the Cabinet Secretary, the national Treasury and the debt management office under the national treasury should be exercised on behalf of the Council. Hence it would be important to include the following in Part V of the Act as part of the functions of the council:

- Development and review of public debt management policy for national and county governments and other public entities;
- Control and co-ordination of borrowing by national and county governments;
- Coordination of the borrowing requirements of both the national and county governments, after taking into account estimates of the aggregate demand for capital market funds during the financial year;

- Consideration and approval of the aggregate funds to be borrowed by both the national and county governments;
- Consideration and determination of the terms and conditions for the funds to be borrowed;
- Regulation of the internal and external borrowing by national and county governments and other public entities;
- Setting of public debt limits applicable to the national government, county governments and other public;
- Coordination, control and monitoring of inflows and use of donor grants by the national government, county governments and other public entities;
- Establishment and maintenance of data bank for public debt and donor grants;
- Documentation and audit of public debt and donor grants; and
- Development and review of policy on public participation and information sharing on the management of public debt and donor grants.

13. General

In our view the act requires a total review to ensure the following:

- That all inconsistencies in various sections are removed and harmonised
- The issues of regulations are addressed and only leave regulations which are subject to change from time to time. A lot of issues referred to regulations can indeed be defined and incorporated in the Act
- Issue of discipline of staff who fails to return imprest and other advances has not been adequately dealt with and may need further clarifications
- Unless the role and responsibility of the Controller of Budget is defined in another Act, his /her roles need to be well articulated in this Act. Indeed even if it was, the Act should be referenced to in the PFM Act. The same for the Commission on Revenue Allocation.

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