

Re-Examination of Unbundling and Transfer of Functions and Powers

INTRODUCTION

The failure to properly and fully unbundle and transfer functions and powers is a major policy and legislative barrier to effective and efficient delivery of health services by the national and county governments. This has enabled old order policies, legislations, and institutions such as parastatals dealing with devolved health functions to continue to exist in the unitary form. Moreover, this has also enabled policy and legislation-making to proceed without being informed by proper constitutional interpretation of the functions and powers, resulting in policies and legislations that undermine devolution and encroach upon the functions and powers of county governments. This problem manifests itself in several ways identified and discussed below.

THE UNFINISHED UNBUNDLING AND TRANSFER OF FUNCTIONS AND POWERS

After the promulgation of the Constitution of Kenya, 2010 and the establishment of the Transition Authority in 2012, functions assigned by the constitution to the two levels of government were supposedly analyzed, unbundled, and transferred to the two levels of government by the Transition Authority beginning the year 2013. By the time the term of the Transition Authority expired sometime in 2016 the Transition Authority had not yet completed its work and as required by legislation, the residual functions of the TA were taken over by the Intergovernmental Relations Technical Committee (IGRTC) with effect from March 2016.

The IGRTC has reported that the analysis and unbundling of functions is an ongoing exercise and remains unfinished. Quite a lot especially regarding the analysis and unbundling of the functions of over 156 state corporations remains undone due to lack of goodwill from the two levels of government and lack of adequate resources for undertaking the exercise. Many of these state corporations were established under old order legislations which have not been reviewed to align them to the devolved system of government.

The need for review of the old order legislations

It is often said that it is one thing to adopt a new constitution and yet another to review the old order legislations to make them consistent with the new constitution. County governments should coordinate with the national government and form joint committees to undertake the review of the old order legislations to align them to the devolved system of government. In the process of this review, some state corporations that were established as entities of national government may have to be abolished while others are re-established as joint entities of national and county governments or joint entities of county governments or a few county governments within a region in terms of Article 189(2) of the constitution.

Re-examination of unbundling and transfer of functions as a constitutional interpretation exercise

There is urgent need to re-examine the unbundling and transfer of functions and powers as a constitutional interpretation exercise to first, complete the unfinished unbundling and transfer of

functions and powers; and secondly, to re-evaluate the unbundled and transferred functions to ensure that the result is consistent with the constitutional assignment of functions. This process should aim to determine the content of every function assigned by the constitution; isolate the exclusive functions from the concurrent ones; and determine the residual functions which the constitution says are assigned to the national government.

As a constitutional interpretation and application exercise, unbundling and transfer of functions ought to be objectively undertaken based on the constitutional provisions assigning functions and informed by the following guiding principles.

The exclusive/concurrent dichotomy

Given that Article 186(2) of the constitution recognizes that some functions are assigned as exclusive functions, while others are concurrent functions of both levels of government, constitutional interpretation for purposes of unbundling and transfer of functions must seek to determine the content of each function, and the categorization of functions as exclusive and concurrent.

Use of national and county prefixes in assignment of functions

The Fourth Schedule to the Constitution sometimes assigns functions and powers by describing them as national or county. Thus, a common functional area is assigned to both levels of government but differentiated by referring to certain aspects of the functional area as national while other aspects are referred to as county. These differentiated aspects may be assigned exclusively to each of the two levels of government or concurrently to both levels of government. For instance, in the functional area of health the Fourth Schedule assigns to the national government 'National referral health facilities'; while it assigns to county governments 'County health services.'

Ambit and scope of such prefixed functions

Interpretation of such prefixed exclusive and concurrent functions of national and county governments to determine their ambit and scope is normally complex as the functions and powers tend to overlap. The terms of the functional areas listed in the Fourth Schedule or set out in other constitutional provisions create overlaps that can make broadly defined national government powers and functions subsume the more narrowly defined county functions and powers in the same functional area, leaving county governments without any exclusive functions. For example, the national government's 'National economic policy and planning' functional area may appear to include the 'county planning and development functional area'.

The Bottom-up approach to interpretation of such prefixed functions

South African comparative experience indicates that a bottom-up approach to interpretation of such prefixed exclusive functions and powers is the best way to address the problem of overlaps in exclusive functional areas. This approach commences by asking the question of whose functions and powers should be defined first. The essence of the bottom-up approach is that the interpretation must begin by determining and scooping out the exclusive functions and powers of the county governments before determining the remainder as national government exclusive functions and powers.

Implied assignment of functions by use of such prefixes

Functions could be interpreted as having been assigned by implication depending on how the prefix has been used. Where the prefix is used in assigning a functional area to one level of government without a corresponding assignment of the same functional area to the other level of government the corresponding function could be interpreted as having been assigned to the other level of government by implication. In contrast however, when the constitution assigns a function to a level of government without using the prefix of national or county, the whole function is deemed as having been assigned to that level of government.

Implied assignment of functions by use of the ‘Including’ principle

Functions and powers of county governments can also be assigned by use of the ‘including’ principle. The content of most county government functions is defined and broadened using the term ‘including’ followed by a listing of some of the activities that constitute the functional area. The significance of the use of this term is that the list is not exhaustive and closed, other related items can be identified and added to the list.¹ The *ejusdem generis* principle dictates that other activities that are related to the listed ones can be identified and included as functions of county governments. First, this means that several functional areas that may at a glance appear to be unassigned may actually have been assigned by such implication and are therefore not residual functions and powers of national government. Secondly, in trying to fill these lists of ‘including’, the interpreter must also examine the national government functional list for what is excluded to ensure that additions are not made to the county list of what has been expressly assigned to the national government.²

Implied assignment of functions by use of the ‘incidental’ principle

The use of the phrase ‘incidental to’ in Article 185(2) also serves to expand the ambit of the legislative powers of county governments. An incidental power refers to a situation where a matter that would have fallen in the functional area of the national government is regarded as being so integrally linked to matters in a functional area of county government as to be incidental and form part of that functional area. Incidental powers and functions deal with grey areas around cut-off points of the functional areas; however, they are not meant to introduce new functional areas for county governments.

The ‘full effect’ principle

A purposive interpretation of the functions and powers which seeks to give ‘full effect’ to the intention of the framers of the constitution will also serve to expand the scope of county government functions and powers. This approach requires that functional areas and powers be interpreted in a manner that gives full effect to the functions and powers of the levels of government. The approach emphasizes a functional view which seeks to ensure that each level of government is enabled to discharge its ‘responsibilities completely and successfully’ and to exercise its powers fully and effectively.

¹ Mutakha Kangu Constitutional Law of Kenya on Devolution (2015) Strathmore University Press at pages 204 & 205

² Mutakha Kangu Constitutional Law of Kenya on Devolution (2015) Strathmore University Press at page 205

The principle of resources must match and follow functions in unbundling and transfer of functions

The principle of resources must match and follow functions is also important in constitutional interpretation for purposes of unbundling and transfer of functions. Often, this principle is rendered in narrow financial terms of funds must match and follow functions thereby limiting its role to financial resources. Properly conceived however, the principle goes beyond financial resources and includes infrastructural resources such as facilities; and the human resources that were managing those facilities and amenities. If the functions are interpreted as having been assigned to county governments, then unbundling and transfer would require that all these resources must follow the functions that are now with county governments and should be transferred to county governments.

Where those resources and facilities were owned and or managed by state corporations established under the State Corporations Act or any other specific statute, such legislations ought to be reviewed or interpreted in a way that aligns them to the functional assignment to the two levels of government. This may even mean the abolition of some of those state corporations whose functions have been assigned to county governments with all their resources and properties being transferred to county governments.³

Role of the territorial dimension in unbundling and transfer of functions and powers

Determination of the scope of exclusive county functional areas may be guided by functional appropriateness which requires that functions be assigned or left to the level of government that can best perform the function. This is sometimes referred to as the subsidiarity principle. This is informed by the territorial dimension, which requires that matters that are best regulated intra-county are exclusive to the county, while those that are inter-county are left to the national government. A county would therefore not have exclusive power to regulate a matter that has external dimensions. Although some items specifically refer to ‘county’, it is an inherent principle of all county functions and powers that they are limited to intra-county matters. Territorial dimension thus serves to limit the scope of the county functions and powers. These limitations may however be mitigated by the application of Article 189(2) of the constitution.

Role of Article 289(2) joint committees and joint authorities in unbundling and transfer of functions and powers

Article 189(2) of the constitution provides that ‘Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.’ For this reason, functions that are inter-county could still be interpreted and unbundled as county government functions since Article 189(2) provides for establishment of joint committees and joint authorities for purposes of cooperating to perform their functions and exercise their powers. Two or more counties can therefore cooperate and form a joint committee or a joint authority through which they can perform functions that may be inter-county and yet be interpreted as county functions.

³ See *Kenya Agricultural and livestock Research Organization (KALRO) v County Government of Kitui* [2019] eKLR, a case which concerned unbundling and transfer of the roads functions.

Role of other functions and powers assigning constitutional provisions

In the interpretation of Article 186 and the Fourth Schedule to determine the content of the functions of each level of government and whether the functions and powers are exclusive or concurrent, the following other functions and powers assigning constitutional provisions and factors must be considered:

Article 185 county legislative functions and powers

Although the Fourth Schedule assigns to national government health policy functions which because of the principle of rule of law include legislative functions, health policy and legislative functions are not exclusive functions of national government. Article 185 which assigns and confers upon county governments legislative functions and powers must be interpreted to include policy functions and powers since rule of law requires that legislation be preceded by and anchored in policy. This makes health policy and legislation concurrent functions of both national and county governments.

Article 209 revenue raising functions and powers

Article 209(4) confers upon national and county governments some revenue raising functions and powers in the form of ‘charges for services’ that are linked to the functions assigned to the levels of government. Joint formulation of policies and legislations or review of existing ones ensures that one level of government does not use legislation to assign to itself functions of another level just because those functions have higher revenue raising potential. Indeed, some disputes over functions and powers are informed by ulterior motives based on the extent of revenue raising ability of some of these functions.

Implied procurement functions and powers and Pork Barrel expenditure functions and powers

Implied in most of the service delivery functions of national and county governments are procurement functions. While some functions are light expenditure functions, others are pork barrel expenditure functions that provide ulterior motives for national government officials to want to recentralize. This may explain why even with more health service delivery functions having been assigned to county governments; there has been insistence on retaining a centralized system of procurement, warehousing and distribution of drugs and medical supplies through KEMSA.

Article 235 county governments’ public service functions and powers

Interpretation of Article 186 and the Fourth Schedule to determine the content of the functions of each level of government must be guided by the fact that implied in all the functions of county governments are the public service functions and powers assigned by Article 235. In ***Kenya National Union of Teachers v Attorney General and 4 others [2016] eKLR***, the court was called upon to determine the functions and powers of county governments to recruit and employ ECE teachers vis-à-vis the functions of the Teachers Service Commission. Although the court correctly decided the case in favour of county government functions and powers to recruit and employ ECE teachers, what was surprising was the fact that the court in its determination never considered the impact of Article 235, despite one of the parties having cited the Article.

Role of functions in Article 203 criteria in sharing of revenue raised nationally

Assignment of functions plays a critical role in the criteria for sharing of revenue set out in Article 203 of the Constitution. In terms of this Article, county governments are supposed to be allocated

an equitable share of the revenue raised nationally that can enable them to perform their functions.

A strict and narrow interpretation of residual functions and powers

Residual functions and powers refer to functional areas that are not assigned by the constitution or national legislation to any one of the two levels of government, and these are assigned by Article 186(3) to the national government. To determine residual functions and powers one must first determine whether the subject matter has not been assigned to any one of the two levels of government by examining first the functional lists, second, other provisions of the Constitution which assign functions, and finally, any legislation that may have assigned unassigned functions and powers to the county. Thus, for purposes of interpretation in respect of unbundling and transfer of functions, residual functions and powers ought to be interpreted strictly and narrowly to ensure that functions that may have been assigned by implication due to the ‘including’, or ‘incidental’ principles, or the use of the prefixes in the assignment of functions or any other principles discussed above are not wrongly regarded as residual.

The need for a functions and powers Act

Guided by the above interpretation principles there is urgent need for the two levels of government to form a joint committee to work with the IGRTC to unbundle functions in all the devolved sectors leading to the enactment of a Functions and Powers Act to provide for the following matters.

Create three lists of functions and powers

The functions and powers Act should clarify the constitutional assignment of functions and provide for three lists of (a) exclusive functions of the national government; (b) exclusive functions of county governments; and (c) concurrent functions of both levels of government. This is informed by the fact that since the adoption of devolution many Kenyans have decried the lack of clarity in the assignment of functions to the two levels of government. Many have complained that while many federal systems normally provide for three lists of functions in the constitution, the Kenyan constitution through the Fourth Schedule provides for only two lists of functions—the list of national government functions and that for county government functions. The problem is however, compounded by the fact that Article 186(2) then recognizes that while some of the functions in the two lists are exclusive to the two levels of government, others are concurrent. This therefore leaves to interpretation the question of which of these functions are exclusive and which ones are concurrent.

Create two lists sharing different aspects of the concurrent functions to the two levels of government

The functions and powers Act should also make provision on how to share out the various aspects of the concurrent functions among the national and county governments and create two lists of (a) the aspects of the concurrent functions to be performed by national government; and (b) the aspects of the concurrent functions to be performed by county governments. This sharing is necessary to provide clarity in the allocation of financial resources to the two levels of government informed by the principle that funds must match and follow functions. This sharing out should be informed by the subsidiarity principles based on the most efficient way to discharge the functions.

Provide for a legal framework for assignment of additional functions by National government to county governments

The functions and powers Act should provide a framework for assignment of additional functions by the National government to county governments through an Act of Parliament as envisaged by Articles 186(3) and 183(1)(b) of the constitution. The essence of these provisions is that the national government can assign some of the functions assigned to it by the constitution, including residual functions, to county governments. The framework must raise and address questions such as can the national government unilaterally do the assignment, or must it undertake the assignment after intergovernmental negotiations with the county governments? Has the assignment ensured that the resources necessary for the performance of functions have been provided for to avoid the emergency of unfunded mandates?

Provide for a legal framework for transfer of functions from either level of government to the other

The Functions and powers Act should provide for transfer of functions by agreement from one level of government in terms of Article 187(1) of the constitution. The framework must address questions of the institutional framework through which such agreed transfer can be done. Can the Governor sit alone and effect such transfer? Should other structures of the county or national government be involved in the intergovernmental negotiations leading to such transfer? Once such transfer has been executed how do the oversight structures of the transferring government continue with their oversight functions? Will such oversight be undertaken by both the transferring and receiving governments? How do you manage transition from the transferring government to the receiving government and subsequently, at the termination of the transfer agreement? Questions of how to avail resources for the performance of the functions must be addressed. A legal framework in this regard is urgent given that the provisions under the Intergovernmental Relations Act are inadequate as has been demonstrated by the case of Nairobi County and the Nairobi Metropolitan Services (NMS).

WAYFORWARD AND RECOMMENDATIONS

In light of the matters discussed above the following recommendation and way forward is made.

The County Governments should coordinate with the national government through the Summit and form a joint committee of the national government and county governments to work with the IGRTC, to undertake a thorough unbundling and transfer of functions in all the devolved sectors leading to the enactment of a Functions and Powers Act