

Health policies and legislations under devolved health context: Successes and Challenges

INTRODUCTION

Since the adoption of the devolved system of government with health as one of the major devolved sectors, many reforms in the Kenyan health sector have been undertaken through policies and legislations at both the national and county levels of government. No doubt, there are some areas in which success has been registered in terms of policies and legislations.

AREAS OF RELATIVE SUCCESS IN HEALTH POLICY AND LEGISLATIONS

Following the adoption of the constitution and the devolved system, several policies and legislations have been adopted and enacted both at the national and county levels of government which evidence relative success in the delivery of health services. The introduction of the devolved system with national health policy assigned to the national government, policy making activities have increased leading to policies in areas that hitherto operated without any policy framework. For example, the development and adoption of the Kenya Health Policy 2014-2030 though with some aspects that are not fully aligned to the constitution can be said to be a relative success in this regard. More recently, the development of the Policy on Donation, Transfusion and Transplant of Human Derived Products, and the Intergovernmental Blood Service Coordination Framework spearheaded by the Kenya National Blood Transfusion Service through a very extensive consultative process with county governments, the Council of Governors and other stakeholders has been an illustrative demonstration of a good cooperative and consultative process of policy and legislation making; hence a relative success. The comprehensive Amendment Bill of the Mental Health Act which has been spearheaded by Senator Sylvia Kasanga is also a demonstration of how a comprehensive amendment that seeks to fully align the law to the constitution and the devolved system can look like.

Despite the successes discussed above, there have also been numerous challenges which due to various reasons identified and discussed in the following sections, have been encountered with respect to formulation and implementation of policies and legislations.

Anchorage of the Devolved System in a Supreme Constitution

A major challenge in the formulation and implementation of policies and legislations is the fact that the Kenyan devolution is anchored in a supreme constitution adopted in 2010 against a background of a highly centralised and unitary system of government that was supported by policies and legislations founded in the unitary system. The constitution establishes and protects two levels of government—the national and county; assigns and protects exclusive and concurrent functions of the two levels of government; and provides for a protected system of sharing of resources to enable the performance of the functions. For these reasons, the policies and legislations that underpin the devolved system both pre-and-post the constitution, ought to be in conformity with the constitutional provisions, both in substance and the process of their making. A major implication of the adoption of devolution through a supreme constitution was the need to comprehensively review all the existing health policies, legislations, strategies, and institutions to ensure their compliance with the constitution and the devolved system including the functional assignment by the constitution to the two levels of government.

Incomplete transition from the unitary to the devolved system

The adoption of the constitution was followed by a two phased transition period that ended in 2015 and aimed at establishing enabling institutions, policies, and legislations to align the health system among

other devolved sectors, to the constitution and the devolved system of government. The transition process was overseen by the Commission on Implementation of the Constitution (CIC), established under the Constitution and a statutory Transition Authority (TA), established under the Transition to Devolved Government Act, both of which had responsibility to ensure that the draft policies and legislations were in conformity with the constitution. The terms of both CIC and TA expired before the completion of the transition process thereby leaving an institutional vacuum in the process of development of enabling policies and legislations. While the constitution identified certain enabling laws and required them to be enacted within specified timelines, many policies and legislations as well as institutions from the old unitary constitutional order have remained in place and in the statute books, thereby posing challenges, and raising barriers to efficient and effective health service delivery. For example, the 2009 HIV and AIDS Policy has not been comprehensively reviewed to align it to the devolved system, while the 2007 National Reproductive health Policy remains operational since the process of developing a new reproductive health policy remains incomplete. Similarly, legislations from the old unitary constitutional order such as the HIV/AIDS Prevention and Control Act of 2006; the Pharmacy and Poisons Act; the Public Health Act; the Mental Health Act Cap 248; the Anatomy Act Cap 249; the Narcotic Drugs and Psychotropic Substances Act of 1994; the Kenya Medical Training College Act Cap 261; the Human Tissues Act Cap 252; the Malaria Prevention Act Cap 246; and the National Hospital Insurance Act of 1998 have not been comprehensively and conclusively reviewed to align them to the constitution and the devolved system of government.

Inadequate alignment of post-constitution policies and legislations to the constitution and the devolved system

Since the adoption of the constitution in 2010 and the election of the pioneer county governments in 2013, many policies and legislations have been developed which are inadequately aligned to the constitution and the devolved system of government. Many of these policies and laws encroach upon the functions and powers of county governments and assign them to the national government either directly or indirectly through entities or state corporations of national government. For example, although the following policies were adopted after the promulgation of the constitution, they have various aspects that fall short of proper alignment with the constitution and the devolved system of government: The Kenya Health Policy 2014-2030; Kenya National eHealth Policy 2016-2030; Health Information Systems Policy; The National Food and Nutrition Security Policy; The Kenya Mental Health Policy 2015-2030; Health Sector Strategic and Investment Plan 2013-2017; Tobacco Control and Prevention Strategy: Towards Tobacco Free Kenya 2012-2017; Kenya National Strategy for the Prevention and Control of Non-Communicable Disease 2015-2020; The National Cancer Control Strategy 2017-2022; and Kenya Health Sector Referral Strategy 2014-2018. Likewise, the following legislations enacted after the promulgation of the constitution fail to fully align themselves to the constitution and the devolved system of government: The Health Act of 2017; the Kenya Medical Supplies Authority Act of 2013; the Public health Officers (Training, Registration and Licensing) Act of 2013; the National Authority for the Campaign Against Alcohol and Drugs Abuse Act of 2012; The Alcoholic Drinks Control Act of 2012; Counsellors and Psychologists Act of 2014; the Health Records and Information Managers Act of 2016; and the Clinical Officers (Training, Registration and Licensing) Act of 2017. While some of these legislations encroach upon the functions of county governments, others do not recognize any role for county governments, yet they deal with areas that the constitution has devolved to county governments. For example, many of them establish entities such as management boards in which county governments do not play any role. Various factors discussed in the following subsections account for this state of affairs of continued development of post-constitution policies and legislations that are not fully aligned to the constitution and the devolved system.

Lack of or inadequate operationalization of cooperative devolved government

The inadequacy in alignment of post-constitution policies and legislations to the constitution and the devolved system of government has been occasioned by various reasons relating to operationalization

of cooperative devolved government. First, some policies and legislations were developed before the pioneer county governments were elected in 2013, whose input could therefore not be sought. Secondly, even after the first county governments were elected, some policies and legislations were developed at a time when these governments were still struggling with the transition challenges of establishment of the initial county structures and institutions; unbundling and transfer of functions and powers; and taking over from the defunct local authorities and so they could not meaningfully engage in the scrutiny of the policies and legislations then under development. Thirdly, the devolved system of government was new to all players including the national government officials who needed time and learning to internalise and understand the system especially the concept of cooperative devolved government and its operationalization. Fourthly, after the expiry of the term of both the CIC and the TA, the institutional vacuum created left the Council of Governors without the useful support it was receiving from these defunct institutions in terms of scrutiny of draft policies and legislations for compliance with the constitution. Fifthly, even where county governments were involved, the cooperation has been inadequate as it is limited to consultation which at times would not be meaningful given the short notices given to COG that would deny it ample opportunity to coordinate the 47 county governments in coming up with a common position. Details regarding the understanding and operationalization of cooperative devolved governments are discussed in the fourth session where recommendations and calls for action in this respect are made.

Lack of clarity in functional assignment and unfinished unbundling and transfer of functions

A major cause of non-alignment and inadequate alignment of policies and legislations to the constitution and the devolved system of government has been the lack of clarity in the assignment of functions and powers and the need for such clarity through unbundling and transfer of functions. The constitution assigns functions to the two levels of government through two lists set out in the Fourth Schedule with some functions being exclusive while others are described as concurrent. First, the development of policies and legislations started before the unbundling and transfer of functions to clarify the content of the functions and separate the exclusive functions from the concurrent was undertaken or even started. Notably, CIC was established and started its work even before the TA was established, yet it is the TA that bore the responsibility of unbundling and transfer of functions. Secondly, since the expiry of the term of the TA with unfinished unbundling and transfer of functions, policies and legislations have continued to be developed without the necessary clarity that functional assignment would bring on board in ensuring that the policies and legislations are in conformity with the constitution and the devolved system including functional assignment. Thirdly, even though the Intergovernmental Relations Technical Committee (IGRTC) took over the unfinished business of the TA as provided by the IGR Act, the IGRTC has not completed this assignment and policies and legislations have continued to be developed without clarity of functional assignment. Because of these reasons, both national and county governments have continued to develop and implement policies and legislations without the benefit of clarity in functional assignment. Once again details on this issue are discussed in the fourth session and comprehensive recommendations on the way forward are made.

Lack of capacity at both national and county governments

Another cause of non-alignment and/or inadequate alignment of policies and legislations to the constitution and the devolved system of government has been the lack of adequate capacity at the COG Secretariat. Although the COG is an important intergovernmental relations organisation with a mandate to coordinate the 47 county governments in cooperating with the national government and plays a critical role in representing the position of the county governments on various issues, the COG's Secretariat is not established by legislation. The failure to legally establish and recognize the COG Secretariate with entitlement to funding from the exchequer has denied the COG the capacity to effectively scrutinise draft policies and legislation to make meaningful contribution.

Contradictions and gaps in health policies and legislations

Apart from lack of and or inadequate cooperation between national and county governments, there have also been lack of inter-sectoral coordination among various devolved sectors even at the national level. This has resulted in contradictions in various health policies and legislations made at the national level of government as well as areas of gaps in policy and legislation leaving certain areas without policy and legal frameworks to govern them. For example, while the Health Act of 2017 makes provision for some matters governed by the Public Health Act; the Pharmacy and Poisons Act; and the Kenya Medical and Supplies Authority Act, these other Acts remained in force unamended and with provisions that may appear contradictory or duplicative of what the Health Act provides. On the other hand, some counties have gaps in their policies and legislations having not legislated for certain matters. For instance, while a few counties have enacted laws to ring fence Facility Improvement Funds to ensure the availability of financial resources for delivery of health services, many others are yet to take steps in this regard.

CONCLUSION

Given the challenges discussed above and in the context of the country's prioritisation of Universal Health Coverage, policy and legislation making or comprehensive review should prioritise and focus on policies and legislations in the following areas: Sustainable financing for Universal Health Coverage (UHC) including NHIF reforms which are extensively discussed in session two and recommendations made; Health Commodities security including financing, local production, governance and accountability in the devolved context which are discussed in session three and recommendations made; and county health service delivery readiness and preparedness including COVID 19 response which are discussed in session five and recommendations made. In focusing on these areas lessons must be drawn from the experiences and challenges identified and discussed above and in session four which focuses on the understanding and operationalization of cooperative government and intergovernmental relations; and the role of unbundling and transfer of functions and powers in ensuring the policies and legislations comply with the constitution and the devolved system of government.