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ELEVENTH PARLIAMENT – THIRD SESSION - 2015

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REPORT OF
THE SELECT COMMITTEE ON THE CONSTITUENCIES DEVELOPMENT
FUND, ON THE NATIONAL GOVERNMENT CONSTITUENCIES
DEVELOPMENT FUND BILL, 2015

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1.0 PREFACE

The Select Committee on Constituencies Development Fund (C.D.F.) is established under Section 28 of the Constituencies Development Fund Act, 2013 and Standing Order 173. Section 28(1) of the Constituencies Development Fund provides that “the National Assembly shall, in accordance with its Standing Orders, establish a Select Committee consisting of a chairperson and not more than eighteen other members of the National Assembly.

MANDATE OF THE COMMITTEE

Section 28(5) of the Constituencies Development Fund Act, 2013, expounds on the mandate of the Committee, and states that:-

(5) The functions of the National Assembly Select Committee shall be —

- a) to consider and recommend to the National Assembly any matter requiring action by the National Assembly pursuant to the provisions of this Act;*
- b) to oversee the implementation of this Act and in this respect, shall after every two years submit a report to the National Assembly and where necessary, propose any amendments to this Act, in particular, with respect to the quantum of funds repayable into the Fund in accordance with section 4 of the Act;*
- c) to oversee the policy framework and legislative matters that may arise in relation to the Fund;*
- d) to continually review the framework set out for the efficient delivery of development programmes financed through the Fund;*
- e) to consider and report to Parliament with recommendations, names of persons required to be approved by Parliament under this Act; and*
- f) to carry out any other functions relevant to the work of the Fund.*

(6) The Committee may make reports other than the statutory report stated in sub section 5(b) to appraise the National Assembly on various matters relating to the Fund and to seek various approvals as required by the Act.

COMMITTEE MEMBERSHIP

The following are the Members of the Committee:-

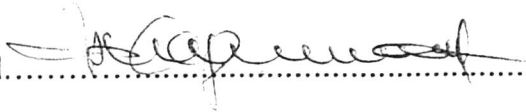
1. The Hon. Moses Lessonet, MP – **Chairperson**
2. The Hon. Esther Gathogo, MP – **Vice - Chairperson**
3. The Hon. Mohamed Haji, MP
4. The Hon. Raphael Letimalo, MP
5. The Hon. Maina Kamanda, MP
6. The Hon. (Eng.) Nicolas Gumbo, MP
7. The Hon. Peter Kaluma, MP
8. The Hon. Abdikadir Ore, MP
9. The Hon. Mohamed Abass, MP
10. The Hon. John Lodepe Nakara, MP
11. The Hon. Benson Mbailtwiku, MP
12. The Hon. Silas Kipkoech Tiren, MP
13. The Hon. Kyengo Katatha Maweu, MP
14. The Hon. Elijah Mosomi Moindi, MP
15. The Hon. Yusuf Chanzu, MP
16. The Hon. Gideon O. Ochanda, MP
17. The Hon. Kamoti Mwamkale, MP
18. The Hon. Joseph O. Ndiege, MP
19. The Hon. David Wafula, MP

ACKNOWLEDGEMENT

The Committee takes this opportunity to sincerely appreciate the Offices of the Speaker and the Clerk of the National Assembly for the invaluable support extended to it in the execution of its mandate.

As the Chairperson of the Committee, I take this opportunity to record my appreciation for the services rendered by the staff of the National Assembly that enabled the production of this Report.

On behalf of the Members of the Select Committee on Constituencies Development Fund, and pursuant to Standing Order 127, it is my pleasure and duty to present to the House, the Report of the Constituencies Development Fund Committee on its consideration of the National Government Constituencies Development Fund Bill, 2015.

Signed.....

Hon. Moses Lessonet, MP
Chairman, Select Committee on Constituencies Development Fund

Date.....24th Nov. 2015

2.0 BACKGROUND

The Institute for Social Accountability (TISA), a registered trust in Kenya, together with its co-petitioner, the Center for Enhancing Democracy and Good Governance (CEDGG), filed a petition in the High Court (Constitutional and Human Rights Division, Petition No. 71 of 2013). The respondents were the National Assembly; the Senate; the Attorney General; the Constituencies Development Fund (C.D.F.) Board and the Commission on Implementation of the Constitution (as an Interested Party).

The petitioners sought a Declaration that the Constituencies Development Fund Act No. 30 of 2013 ('C.D.F. Act'), which replaced the C.D.F. Act, 2003 is unconstitutional as it violates the tenets of the Constitution on the process leading to its enactment and the substance of the legislation. The core issue before the Court therefore, was whether the C.D.F. Act as amended is constitutional.

The following four key issues were identified for determination by the Courts:

- i. Whether the process leading to the enactment of the C.D.F. Act is Constitutional;
- ii. Whether the C.D.F. Act offends the principles of public finance and division of revenue provided under the Constitution;
- iii. Whether the C.D.F. Act violates the division of functions between the national and county government; and
- iv. Whether the C.D.F. Act offends the principle of separation of powers.

In light of the foregoing, the High Court on 20th February 2015, found that the C.D.F. Act 2013 is unconstitutional and made the following;

- i. A declaration is hereby issued that the Constituencies Development Fund Act, 2013 is unconstitutional and therefore invalid.
- ii. The order of invalidity above is suspended for a period of twelve (12) months from the date of judgment.
- iii. The National Government may remedy the defect within that period and the Constituencies Development Fund Act shall stand invalidated at the expiry of the twelve (12) months or may be earlier repealed whichever comes first.

- iv. Each party shall bear its own costs.

Following the Judgment, the National Assembly Select Committee on C.D.F. and the C.D.F. Board held a two days retreat in Serena Hotel Mombasa between 12th and 15th of March 2015. The following resolutions were arrived at:

- i. Appeal against the High Court ruling should continue. This shall be executed once the Court dispenses off with the application for extension of time.
- ii. The C.D.F. Board and other respondents to apply to the High Court for an extension of the one year suspension of unconstitutionality and ask for a minimum of four years. The ruling is scheduled to be delivered on 17th December, 2015
- iii. Re-enactment of a new C.D.F. Act aligned to the Constitution of Kenya 2010.
- iv. That a Working Group be established to spearhead the process of drafting the new Bill(s).
- v. Constitutional amendment- working group to advice on whether a constitutional amendment is required to anchor the C.D.F. in the Constitution to permanently insulate it against future legal challenge.
- vi. The National Assembly to debate and pass a policy statement anchoring the objectives of C.D.F. into the national budget during debate on Budget Policy statement and the national budget - this shall be based on the role the C.D.F. plays in terms of spurring development and guaranteeing the social and economic rights of citizens.
- vii. Publicize the negative implications of the judgment against C.D.F. and mobilize all constituents to agitate for the retention of C.D.F. in its current or even improved form.

2.1 MEMORANDUM OF OBJECTS AND REASONS OF THE BILL

The principal purpose of this Bill is to provide for the establishment and administration of the National Government Constituencies Development Fund and recognise the constituency as a platform for identification, performance and implementation of national government functions. The Bill also seeks to facilitate the performance and implementation of national government functions in all parts of the country pursuant to Article 6(3) of the Constitution. The Bill further

seeks to provide a legislative and policy framework pursuant to Article 21 (2) of the Constitution for the progressive realisation of the economic and social rights guaranteed under Article 43 of the Constitution.

PART I of the Bill contains preliminary provisions.

PART II of the Bill seeks to establish the National Government Constituencies Development Fund as a national government fund consisting of monies of an amount of not less than 2.5% (two and half per centum) of all the national government's share of revenue as divided by the annual Division of Revenue Act enacted pursuant to Article 218 of the Constitution.

PART III of the Bill seeks to establish the National Government Constituencies Development Fund Board and outlines among other things the membership of the Board, functions of the Board and the process of removal of members of the Board.

PART IV of the Bill contains provisions relating to nature of the projects to be undertaken in constituencies by providing that projects under this Act shall be only in respect of works and services falling within the functions of the national government under the Constitution.

PART V of the Bill provides for the modalities and mechanisms of submission and approval of projects and proposes among other things the budget ceiling for each constituency to be three quarters of the amount specified in clause 4(1) divided equally among all constituencies and an amount equal to a quarter of the amount specified in clause 4(1) divided by the national poverty index multiplied by the constituency poverty index.

PART VI of the Bill contains provisions relating to implementation of projects and in particular provides that projects under the Act shall be implemented by the project management committee in each case, with the assistance of the relevant department of Government and all payments through cheques or otherwise to be processed and effected in accordance with government regulations for the time being in force. This part also contains provisions relating to procurement of services and works, record of receipts and disbursements and the establishment of the Constituency Account and the Bank Account of the Fund.

PART VII of the Bill contains provisions relating to the establishment of the National Government Constituency Development Fund Committees for every

constituency and provides for the composition of the committee and their qualifications mode of selection and requirements for approval by the National Assembly. It also provides for the making of regulations by the in respect to the selection of members, convening of the first meeting of members after an election, removal of members from the committee and engagement of staff by the committee.

PART VIII of the Bill contains provisions relating to the establishment of the National Assembly Select Committee on the National Government Constituencies Development Fund to oversee the policy framework and legislative matters that may arise in relation to the Fund and to continually review the framework set out for the efficient delivery of development programmes financed through the Fund.

PART IX of the Bill contains miscellaneous provisions.

PART X of the Bill contains provisions on delegated powers. The Bill once enacted shall confer on the Cabinet Secretary the authority on the recommendation of the Board, to make provisions having force of law in Kenya in terms of Article 94(6) of the Constitution of Kenya, 2010.

The Cabinet Secretary for the time being responsible for matters relating to national economic planning and development is given powers under clause 52(1) of the Bill to make regulations for better carrying into effect the provisions of this Act.

PART XI of the Bill contains transitional provisions.

The **First Schedule** to the Bill outlines the structure of the Constituency Projects Submission form.

The **Second Schedule** to the Bill outlines the structure of the Project Description Form

The **Third Schedule** to the Bill outlines the structure of the Project Re allocation Form.

The **Fourth Schedule** to the Bill contains provisions relating to the conduct of the business and affairs of the Board.

Statement on delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill delegates legislative power subject to the limitations set out in clause 53 but does not limit fundamental rights and freedoms.

Statement on whether the Bill concerns county governments

The Bill does not concern county governments in terms of Article 110 of the Constitution.

Statement on financial implications of the Bill

The enactment of this Bill shall not occasion additional expenditure of public funds.

3.0 PUBLIC PARTICIPATION IN THE CONSIDERATION OF THE BILL

The committee invited the public to give their comments on the bill pursuant to Article 118 (1) (b) of the Constitution which provides that, "*Parliament shall facilitate public participation and involvement in the legislative and other business of the Parliament and its Committees.*"

Further, Standing Order 127 (3) provides that "*The Departmental Committee to which a bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the Committee makes its report to the House*"

The National Government Constituencies Development Fund Bill, 2015, having been read a first time on 22nd October, 2015 stood committed to the Select Committee on Constituencies Development Fund for consideration and thereafter to make a report to the House.

Pursuant to Article 118 (1) (b) of the Constitution and Standing Order 127 (3), the Committee invited interested members of the public to submit any representations they may have on The National Government Constituencies Development Fund Bill, 2015 to the office of the Clerk of the National Assembly. The advertisement was placed in the local dailies on Thursday 12th November, 2015. The deadline for submission of Memoranda was Wednesday 18th November, 2015 at 1700 hours. (*Refer to Annex 2 for a copy of the advertisement*).

3.1 COMMITTEE SITTINGS WITH STAKEHOLDERS

3.1.1 SUBMISSIONS BY THE CONSTITUENCIES DEVELOPMENT FUND (C.D.F.) BOARD

3.1.1.1 OBSERVATIONS BY THE C.D.F. BOARD

Clause 3 on the objects of the Bill:

The Court ruled that Section 3 of the C.D.F. Act 2013 introduces conflict of roles and threatens to violate the division of functions between the National and County Governments.

In view of the above, the C.D.F. Board noted that objects of the Fund are now clearly provided for, hence eliminating ambiguity.

Clause 4 on the establishment of the Fund:

In determining the applicable principles of public finance, the Court held that the Constituency Development Fund is not a conditional grant to county governments as envisaged under Article 202 (2) of the Constitution. The Court held that the formula of C.D.F., being 2.5% of national revenue, upsets the formula for equitable sharing of national revenue provided under the Constitution.

The Bill now clearly specifies that the Fund is drawn from the National Government's share of revenue in accordance with the Division of Revenue Act enacted pursuant to Article 218 of the Constitution.

This provision serves to correct the view that C.D.F. Act introduces a third level of Revenue Sharing contrary to the constitution, as highlighted in the High court ruling.

Clause 22 on the nature of projects to be funded:

The Court held the position that the provisions of the Act conflicted with the division of functions as envisaged in the Constitution.

Projects funded through The National Government Constituencies Development Fund (N.G.C.D.F.) Bill, 2015 will be community based in order to ensure that the benefits are available to a widespread cross-section of the inhabitants of a particular area, and unlike the previous case, will only be in respect of works and services falling under the functions of the National Government as provided for in the Constitution under the Fourth Schedule.

Clause 41 on the establishment of the National Government Constituencies Development Fund Committee:

The Court held that the involvement of the Members of Parliament in the C.D.F. implementation violates the core principle of separation of powers.

The membership of this committee therefore excludes the Member of the National Assembly (MP) in line with the Court's finding that the ex-officio membership of the MP amounted to exercising of an executive function in conflict with the Constitution. In addition, the MP has no role in the appointment of members of the National Government Constituency Fund Committee in the new Bill.

Clause 53 on delegation of legislative powers and limitation of fundamental rights and freedoms:

The Bill empowers the Board to make Regulations subject to the limitations set out in the said clause, but does not limit fundamental rights and freedoms.

Statement on whether the Bill concerns County Governments:

The Bill does not concern County Governments in terms of Article 110 of the constitution, as it is exclusively focused on National Government Functions.

Financial implications of the Bill:

The Bill retains allocation to the Fund at a minimum of 2.5% of the National Government Share of the National Revenue. The Bill therefore does not occasion additional financial Burden on the exchequer.

Post-Publication Inputs on the Bill

The Board presented proposals for further amendments to the Bill. The presentation was mainly informed by the need to align the Bill with the *Mwongozo* Code for State Corporations, other pertinent Statutes and the court ruling.

3.1.1.2 Proposed Amendments by the C.D.F. Board

Clause 10 (1) that provides that opening of bank accounts to be approved by the Board:

The Board proposed the Amendments to that clause to ensure that opening of the account is approved by the National Treasury in accordance with the Public Finance Management Act.

Rationale of the Amendment is that Public Finance Management Act reigns supreme on financial matters over any other statute, hence it prevails in case of a conflict with any Act.

Clause 10(6) that provides that Constituency funds balances at the end of the financial year be returned to the Board Fund Account.

The Board proposed that Clause 10(6) be Amended to ensure that all monies to remain in the constituency account at the end of the financial year, consistent with the practice in C.D.F.

Clause 11 on signatories to the bank account of the fund:

The Board proposed that Clause 11(3) be amended to provide that the Signing instructions shall be such that the signature of the Chief Executive Officer (C.E.O.) to be mandatory on all payment cheques/instruments intended for actual release of money from the Fund, plus any one of the other threesignatories.

The rationale of the proposed amendments is to conform to the provisions of the existing electronic disbursement system that entails only two levels of approval (C.E.O. and one Director). Further, the amendment will minimise bureaucratic red tape in disbursement in order to facilitate timely and efficient disbursement of funds to every constituency, consistent with the provision of Clause 14(a) of the Bill.

Clause 13 on composition of the board (which unlike the current Act does not include the Attorney General)

The Board proposed that the Bill be amended to include the Attorney General or his designated Alternate as a member of the Board. The rationale is that the

Attorney General has hitherto played a crucial role since the Board plays a Quasi-judicial role in complaint resolution. Further, the inclusion will not result in increasing the size of the Board membership beyond the Mwongozo guidelines.

Clause 14 on functions of the Board:

The Board proposed amendments to this clause by inserting the following additional sub clauses as functions of the Board:

- g) Receive and address complaints that may arise from implementation of this Act;
- h) Encourage best practices in the implementation of projects.

Rationale of the proposed inclusions is to align the functions of the Board in Clause 14 to the provisions of clause 52 of the Bill. It is further meant to encourage continuous learning among constituencies by demonstrating best practices to encourage continuous improvement in the implementation of the Act.

Clause 18 on appointment of the C.E.O.:

The Board proposed that Section 18(2) to be amended by enhancing working experience needed for one to be appointed C.E.O. from five years to ten years and to have served in senior management position for a period of at least five years.

Further, the Board proposed that Section 18(4) be amended to provide for three years tenure of office for the C.E.O.

Rationale for the proposed amendments is to ensure that a person with necessary experience is recruited as C.E.O.

Clause 45 on exclusion of personal awards:

The Board proposed amendments to Section 45(2) to enhance the ceiling of allocation to education bursary schemes, mock examinations, continuous assessment tests and funding of social security programmes from 25% to 35%.

The rationale is to provide for greater focus on education as a National Government function and to cater for Social Security programmes, which is a newly proposed project type under C.D.F.

Clause 52 on dispute resolution:

The Board proposed that the clause be amended at Sub Clause 52(4) to provide that parties to the dispute shall be allowed to petition the Cabinet Secretary directly in the case whereby they disagree with the Board's decision on their dispute, yet they are unable to jointly agree on the appointment of an arbitrator.

Paragraph 6(2) under the Fourth Schedule on authentication of the seal usage by board members:

The Board proposed amendment of the sub-clause to provide that authentication of the seal be done by the C.E.O.& witnessed by the Corporation Secretary and the Board to ratify such usage.

Rationale of the amendment is that the Board does not get involved in day-to-day operations, hence cannot effectively be involved in authorisation of usage of the seal without adversely affecting expeditious execution of its programmes.

Transitional clause:

The Board proposed that this Clause be amended to save the current Constituency Development Fund Committees (C.D.F.Cs) to ensure that they do not lapse with passage of the Bill, which would have adverse effects on implementation of projects.

The proposed insertion will provide for current C.D.F.Cs to terminate upon appointment of a new committee. (*Refer to Annex 3 for a copy of the Memorandum*)

3.1.2 SUBMISSION BY THE MINISTRY OF DEVOLUTION AND PLANNING

3.1.2.1 OBSERVATIONS BY THE MINISTRY

The ministry noted that the National Government Constituencies Development Fund Bill 2015 had been prepared at the Backdrop of the High Court ruling on

20th February, 2015, that declared the Constituencies Development Fund (C.D.F.) Act 2013 unconstitutional.

Subsequent to the High Court Judgment, the Board in liaison with the National Assembly Select Committee (NASC) on C.D.F. embarked on remedial measures aimed at addressing the issues raised. Among the said measures was legislative redress whereby the Board filed an appeal in Court against the Judgment, and also sought High Court review of the orders by extending the time granted by the court beyond twelve (12) months to afford stakeholders ample time to complete on-going projects. The matters are still pending before the respective courts.

On the other hand, the Board kick-started the process of re-enacting the C.D.F. Act, through a widely consultative process, which culminated in a Draft C.D.F. Bill 2015 that was presented to the Ministry and the C.D.F. Committee of the National Assembly.

The Bill seeks to change the name of the Fund by clearly specifying that it is an initiative focused on National Government functions. It is also notable that the Bill specifically addresses many other aspects of the High Court ruling through the following provisions:-

Clause 3 on the objects of the Act:

The objects of the Fund are now clearly provided for, hence eliminating ambiguity as highlighted in the ruling of the Court.

Clause 4 on the establishment of the Fund:

It is now clearly specified that the Fund is drawn from the National Government's share of revenue in accordance with the Division of Revenue Act enacted pursuant to Article 218 of the Constitution. That provision serves to correct the view that C.D.F. Act introduces a third level of Revenue Sharing contrary to the constitution, as highlighted in the High court ruling.

Clause 22 on the nature of projects to be funded:

Projects funded through N.G.C.D.F. Bill, 2015 will be community based in order to ensure that the benefits are available to a widespread cross-section of the inhabitants of a particular area, and unlike the previous case, will only be in respect of works and services falling under the functions of the National Government as provided for in the Constitution.

Clause 41 on the establishment of the National Government Constituencies Development Fund Committee:

The membership of this committee now excludes the Member of the National Assembly (MP) in line with the Court's finding that the ex-officio membership of the MP amounted to exercising of an executive function in conflict with the Constitution. In addition, the MP has no role in the appointment of members of the National Government Constituency Fund Committee in the new Bill.

Clause 53 on delegation of legislative powers and limitation of fundamental rights and freedoms:

The Bill empowers the Board to make Regulations subject to the limitations set out in the said clause, but does not limit fundamental rights and freedoms.

Statement on whether the Bill concerns County Governments:

The ministry noted that the bill does not concern County Governments in terms of Article 110 of the constitution, as it is exclusively focused on National Government Functions.

Financial implications of the Bill:

The Bill retains allocation to the Fund at a minimum of 2.5% of the National Government Share of the National Revenue. The Bill therefore does not occasion additional financial Burden on the exchequer.

3.1.2.2 Proposed amendments by the Ministry

The Ministry largely concurred with the Board's proposals as they will enhance the management of the Fund. In addition the Ministry made the following proposals to Clauses in the Bill:-

Clause 20 on the staff of the board:

The Bill in sub-clause 20(2) provides that:

“the officer of the Board shall administratively report to the Constituency Committee.”

This sub clause is intended to streamline the operations of the Committees at the Constituency level in relation to the officers of the Board seconded to each Constituency.

However, it is important to take into account that the Officer of the Board defined in Clause 2 of the Bill as an officer of the Board appointed under Clause 20 enjoys a contractual relationship of employment between himself/herself and the Board. Further Clause 20 vests on the Board the power to appoint such officers and staff as may be necessary for the proper management of the Fund and discharge of the functions of the Board. It is therefore important that the jurisdiction to determine the employees' terms and conditions of service rests on the Board, and this is in line with the Employment Act which is the primary legislation on matters employment.

In order to ensure harmonious working relationship between the Committee and the officer of the Board, that Clause 20(2) be amended to provide that:

“the Constituency Committee shall be involved in the annual appraisal of the officer of the Board seconded to the constituency, based on a tool to be developed by the Board.”

This will serve to streamline the administrative working relationship between the officer of the Board and the C.D.F.Cs as envisioned in the Bill while taking cognisance of the legislation in place on employment matters.

Clause 21 on Finances of the board:

The Bill in sub clause 21(1) proposes that the Board's Annual Budget be approved by the National Assembly Committee on C.D.F. We note that this is a change from the current status where the approval of the Annual Budget of the Board is by the Cabinet Secretary.

While taking due cognisance of the key role of National Assembly in Budgeting process, it's also important to note that Section 11 of the State Corporations Act requires State Corporations to submit their annual estimates to their respective Ministries and the National Treasury for any particular financial year.

In order to conform to pertinent statutes on approval of State corporations Budgets, proposed that Clause 21 be amended to provide for the approval of the Board's budget by the Ministry with the concurrence of the National Assembly Select Committee on C.D.F. If adopted, the Clause would therefore provide as follows:-

*“The expenditure for the running the Board and related purposes shall be set aside at the beginning of the financial year and not more than five per centum of the total allocation to the Fund in the financial year may be used for this purpose, the annual budget of which shall be approved by the Cabinet Secretary with the concurrence of the National Assembly Select Committee”
(Refer to Annex 4 for a copy of the Memorandum)*

3.1.3 SUBMISSION BY THE INSTITUTE FOR SOCIAL ACCOUNTABILITY (T.I.S.A.)

About T.I.S.A.

The Institute for Social Accountability (TISA) is a civil society organization committed towards the achievement of sound policy and good governance in local development, to uplift livelihoods of, especially, the poor and marginalized in Kenya. TISA has been operational since March 2008, and is a locally registered Trust that has engaged with various relevant state and non-state actors in the quest to promote effective local governance in Kenya.

The National Assembly had prepared the National Government Constituency Development Fund Bill, 2015 and invited public submissions on the same through a newspaper notice on Thursday 12th November 2015 seeking submissions by Wednesday 18th November 2015.

TISA noted that the period for submission of views was far too short. The memorandum was informed by the issues raised during meeting with the Select Parliamentary Committee on Tuesday 17th November 2015.

The bill has made a great attempt to redress the weaknesses in the present C.D.F. Act. However TISA noted there are challenges and gaps in the bill and this memorandum seeks to address.

3.1.3.1 Co-ordination of the fund

The legislature should not create parallel bureaucracies for the implementation of national government functions. This is because; the principles of integrated governance on which our devolution system is based on is to ensure, “that the work of government impacts the totality of the lives of the citizens in an integrated way.” Integrated governance means to create structures and systems that serve the purpose of ensuring effective and cost effective service to improve the quality of life of the people living in Kenya.

- By using the term constituency, the bill contravenes the court ruling, which held the constituency is not a unit of development. It should use the term sub-county.
- P.F.M. s24 provides that the cabinet secretary finance can establish a national fund. S207 of the PFM guidelines gives conditions for the same. At present the bill does not meet these requirements.
- The National Government Coordination Act establishes the County Commissioners for purposes of coordination of national government functions. The bill fails to adequately integrate with this structure.
- The Education Act, Police Service Act and other national statutes assign national government functional responsibilities to respective statutory bodies at the county level such as the County Education Board, County Policing Authorities' and so forth. The bill fails to integrate the fund with these existing structures.

3.1.3.2 Objectives of the Constituency Development Fund

C.D.F. has emerged as a very popular fund because it gives citizen a direct role in their development. It has also been effective in redressing deficits in local infrastructure development. The original objectives of the C.D.F. should not be lost in the revised bill. The bill should provide citizens a direct say in decision making in the fund. It should decentralize decision making to the lowest level of the fund. The design of the fund should ensure the community drives project selection, implementation and monitoring. The bill should be clear in its functional roles.

3.1.3.3 T.A.P. (Transparency, Accountability and Public participation)

The bill should make adequate provision for Transparency, Accountability and Public participation. The bill needs to provide for proactive disclosure of information, citizen oversight mechanisms through social audits, oversight forums by the member of national assembly.

3.1.3.4 Broader policy questions

Whereas the fund proposes to support national functions, it does not specify the areas of need. For instance there is already a Security integrated Infrastructure Fund set up in 2015/16 which will finance housing, office blocks and other installations for the National Police Service and other Uniformed Officers. Through this the National Youth Service (NYS) will construct 15,000 housing units for the National Police Service in 2015/16.

There is need for a policy note (PFM regulations 207) to identify specific funding gaps.

By isolating, the new fund to national government functions there is also a possibility that county government functions will suffer due to inadequate coverage. There is required a policy note for the fund that should provide an analysis of present development spending to ensure all devolved functions receive equitable support. *(Refer to Annex 5 for a copy of the Memorandum)*

3.1.4 SUBMISSION BY THE CENTRE FOR ENHANCING DEMOCRACY AND GOOD GOVERNANCE

About the Institution

The Centre for Enhancing Democracy and Good Governance (CEDGG) is a grass root civil society organization that works to empower vulnerable and marginalized citizens to claim their rights in local development and governance processes. CEDGG has been in operation since the year 2001 and legally exists as a Non-Governmental Organisation. The head office is in Nakuru Town, Nakuru County. The programme work of the organization covers mainly the mid rift valley region i.e. Nakuru, Baringo, ElgeyoMarakwet, West Pokot, Laikipia and Kericho Counties.

3.1.4.1 Public finance principles on sharing of revenue

PFM Act 2012 Section 24 provides that the cabinet secretary finance can establish a national fund. Section 207 of the PFM guidelines gives conditions for the same. At present the C.D.F. bill 2015 does not meet these requirements.

The composition of National Government C.D.F. committee (Part VII Sec 41) does not reflect the sectoral representation of National government function at the county/sub county level to inform appropriate and effecting allocation of resource based on existing development indicators in reference to decentralized functions assigned to the national government e.g. education, national security, registration of births and deaths among others.

The proposed structure lacks in technical expertise to inform professional decision making in prioritization, budgeting and implementation of projects to be supported under the Fund. Furthermore the bill does not provide for strong

linkages with the national budget process thus increasing a potential for duplication and low utility of project implemented under the fund.

Recent studies have shown that C.D.F. has constructed numerous health and education infrastructure without prior consultation of the line ministries leading to increased pressure for staff and equipment and recurrent expenditure.

Recommendation: that the National Government C.D.F. committee (*Part VII Sec 41*) take the form of the County Budget and Economic Forum where there will be representation of both national government officials and equivalent number of non-state/citizen groups to facilitate participatory planning and allocation of resources while providing a social accountability mechanism.

3.1.4.2 Division of functions as provided in the Constitution

Whereas the C.D.F. bill 2015 has confined itself to the National government function, Schedule 4 part 1 of the COK 2010 largely assigns the national government function related to policy formulation and planning. In addition county governments have been assigned function related to largely service delivery. The National Government Coordination Act establishes the County Commissioners for purposes of coordination of national government functions. The C.D.F. bill fails to adequately integrate with this structure.

Whereas the fund proposes to support national functions it does not specify the areas of need. For instance there is already a Security Integrated Infrastructure Fund set up in 2015/16 which will finance the housing, office blocks and other installations for the National Police Service and other Uniformed Officers. Through this the National Youth Service (NYS) will construct 15,000 housing units for the National Police Service in 2015/16. There is need for a policy note (PFM regulations 207) to identify specific funding gaps.

Recommendation: the C.D.F. bill 2015 should seek to integrate its operation with the National Government Coordination Act. Refer to National Government Coordination Act section 3, 4, 14(5) and 17 and other mechanisms for financing National government infrastructural projects at the county level.

3.1.4.3 Separation of powers - the role of the Member of the National Assembly

The C.D.F. bill 2015 Section 41(2) provides for two persons nominated by the constituency office. It therefore follows that the constituency office is a parliamentary arm and therefore has no business participating in the executive

role anticipated in the functions of National Government C.D.F. committee (Part VII Sec 41).

(Refer to Annex 6 for a copy of the Memorandum)

4.0 RECOMMENDATIONS

The Committee upon consideration of Memorandum and consultations with various stakeholders wishes to move the following amendments;

1. Clause 3 of the Bill be amended as follows:
 - (a) paragraph (h) by deleting the words “deliberate on and resolve issues of concern to the people as provided for under Article 95(2) of the Constitution” and substituting therefor the words “exercise oversight over the performance of specified national government functions at the constituency level as provided for under Article 95 of the Constitution.”
 - (b) by deleting paragraph (k).

Further, the following additional objectives be included;

- a) provide a framework for citizen led development to assist the national government in planning and prioritizing the use of its resources;
 - b) create a harmonious relationship between citizens and the national government and its officers in local development;
 - c) provide a platform for citizen participation in service delivery; and
 - d) Build local accountability and transparency in the use of resources.
2. Clause 6 (1) be amended by deleting the words “with the concurrence of” and substitute therefor the words “with the approval of”.
3. Clause 8 (4) and (5) be redrafted as separate clauses each and should accommodate all projects and not just emergencies.
4. Clause 10 (1) be amended to ensure that opening of bank accounts be approved by the National Treasury in accordance with the Public Finance Management Act.
5. Clause 10 (6) be amended to ensure that all monies to remain in the constituency account at the end of the financial year, consistent with the practice in C.D.F.
6. Clause 11 (2) be amended by deleting the word “three” and substituting therefor the word “two”. Clause 11 (3) be amended by deleting the word “two” and substituting therefor the word “one” and further by deleting the word “three” and substituting therefor the word “one”.

7. Clause 13 be amended to include the Attorney General or his designated Alternate as a member of the Board. Further, Clause 13 (c) be amended to include persons qualified in matters relating to education and security.
8. Clause 14 be amended by inserting the following additional Sub Clauses as functions of the Board;
 - g. Receive and address complaints that may arise from implementation of this Act;
 - h. Encourage best practices in the implementation of projects.
9. Clause 17 (1)(a) be amended by deleting the words “including a contravention of Chapter Six”. Further Clause 17 be amended by inserting the following new Sub Clause “(f) engaging in politics”.
10. Clause 17 (4) be amended to provide for the Committee’s deliberations on the petition before suspension by the Cabinet Secretary.
11. Clause 18 be amended by enhancing working experience needed for one to be appointed Chief Executive Officer from five years to ten years and to have served in senior management position for a period of at least five years. Further, that Section 18(4) to be amended to provide for a three years tenure of office for the C.E.O.
12. Clause 20 to provide that the officer of the Board shall administratively report to the Constituency Committee. Further, the Clause be amended to provide that the Constituency Committee shall be involved in the annual appraisal of the officer of the Board seconded to the constituency, based on a tool to be developed by the Board.
13. Clause 21 be amended to provide that the expenditure for the running of the Board and related purposes shall be set aside at the beginning of the financial year and not more than five per centum of the total allocation to the Fund in the financial year may be used for this purpose, the annual budget of which shall be approved by the Cabinet Secretary with the concurrence of the National Assembly Select Committee.
14. Clause 22 be amended by inserting a new paragraph “(c) subject to Paragraphs (a) and (b) include economic empowerment projects”.
15. Clause 25 (3) be amended by deleting the words “Chairman of the Constituency Committee to the Board after approval by the Constituency Committee for that Constituency” and substitute therefor the words “Constituency Committee to the Board”.
16. Clause 26 (2) be amended by deleting the words “the Chairman of the Constituency Development Fund” and substitute therefor the word “Constituency”.

17. Clause 34 be amended to provide for mechanisms for appointment and removal of Project Management Committees.
18. Clause 41 (2) (a) be amended by deleting the words “at the constituency as may be designated by the Cabinet Secretary or an alternate” and substituting therefore with the words “responsible for co-ordination of National Government functions”. Further Clause 41 (2) (b) be amended by deleting the word “two” and substituting therefor the word three” Further Clause 41 (2) (c) be amended by deleting the word “two” and substituting therefor the word three”.
19. “Clause 41 (8) be amended by deleting the words “irrespective of a term of Parliament” and substituting therefore the words “on the appointment of a new Constituency Committee”. Further the Clause be amended to provide for the appointment of the Chairperson and Vice Chairperson of the Constituency Committee.
20. Clause 42 be amended by deleting Paragraphs (c) and (d).
21. Clause 45 be amended by redrafting the marginal note to reflect the substance of the text and to further provide for two independent provisions.
22. Clause 52 be amended at Sub Clause 52(4) to provide that parties to the dispute be allowed to petition the Cabinet Secretary directly in the case whereby they disagree with the C.D.F. Board’s decision on their dispute, yet they are unable to jointly agree on the appointment of an arbitrator.
23. The Bill be amended by introducing a new clause to provide for a Citizen Oversight Committee to be convened by the Member of the National Assembly and to further provide for monitoring of projects.
24. Transition Clauses be amended to provide for the saving for the current Constituency Development Fund Committee pending the making of Regulations by the Board.

5.0 ANNEXURE

Annex 1 Minutes of Adoption, Attendance Register

Annex 2 Advertisement inviting for Submission of Memoranda

Annex 3 Memorandum by the C.D.F. Board

Annex 4 Memorandum by the Ministry of Devolution and Planning

Annex 5 Memorandum by The Institute for Social Accountability

Annex 6 Memorandum by the Centre for Enhancing Democracy and Good Governance



COMMITTEE ON CONSTITUENCIES DEVELOPMENT FUND

ATTENDANCE SCHEDULE

AGENDA: ADOPTION OF THE NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND BILL, 2015

DATE: 24/11/2015 TIME: 11.00 AM VENUE: 4TH FLOOR, PROTECTION HOUSE

	NAME	SIGNATURE
1	Lessonet Moses D.	
2	Hon Estu Gathogo	
3	Hon Benson I NBAR	
4	Kamori Mwanjira	
5	David Wajulu Mwangi	
6	Hon Raphael Setuabo	
7	HON MOSHIE MAINI	
8	HON SILA TILIA	
9	Hon M. Abdi Haji	
10	Hon A. O. R. S.	
11	HON KYENGO MAAWA	
12	Hon. Yusuf Chanzu	
13	HON. JOSEPH TORGE	
14	Hon. Ochanda Gideon	
15		
16		
17		
18		
19		

AHMAD KADHI

FOR -CLERK OF THE NATIONAL ASSEMBLY

MINUTES OF THE 22ND SITTING OF THE SELECT COMMITTEE ON CONSTITUENCIES DEVELOPMENT FUND HELD ON TUESDAY, 24TH NOVEMBER, 2015 AT 9TH FLOOR BOARDROOM, HARAMBEE HOUSE, AT 11:00 A.M.

PRESENT

1. Hon. Moses Lessonet, MP - Chairperson
2. Hon. Esther Gathogo, MP - Vice - Chairperson
3. Hon. Raphael Letimalo, MP
4. Hon. Mohamed Haji, MP
5. Hon. Gideon Ochanda, MP
6. Hon. Kyengo Katatha Maweu, MP
7. Hon. Yusuf Chanzu, MP
8. Hon. Silas Tiren, MP
9. Hon. Elijah Mosomi Moindi, MP
10. Hon. Benson Mbai Itwiku, MP
11. Hon. David Wafula, MP
12. Hon. Kamoti Mwamkale, MP
13. Hon. Abdikadir Ore, MP
14. Hon. Joseph Ndiege, MP

ABSENT WITH APOLOGY

1. Hon. John Lodepe Nakara, MP
2. Hon. Maina Kamanda, MP
3. Hon. Mohamed Abass, MP
4. Hon. George P. Kaluma, MP
5. Hon. Eng. Nicolas Gumbo, MP

IN ATTENDANCE - NATIONAL ASSEMBLY

1. Ahmad Kadhi - First Clerk Assistant
2. Dennis Abisai - Principal Legal Counsel
3. Sharon Cherono - Research Officer

MINUTE NO. 100/2015: PRELIMINARIES

The Chairperson called the meeting to order at 11:15 a.m. The sitting commenced with a word of prayer.

MINUTE NO. 101/2015:

ADOPTION OF THE REPORT ON THE N.G.C.D.F.
BILL, 2015

The Chairperson invited members to consider the report of the Committee on the National Government Constituencies Development Fund (N.G.C.D.F.) Bill, 2015.

Members recalled that they had conclusively deliberated on the report at the previous sitting of the Committee.

However it was proposed that Recommendation 19 read as follows;

“Clause 41 (8) be amended by deleting the words “irrespective of a term of Parliament” and substituting therefore the words “on the appointment of a new Constituency Committee”. Further the Clause be amended to provide for the appointment of the Chairperson and Vice Chairperson of the Constituency Committee.

The Report of the Committee Consideration of the National Government Constituencies Development Fund was adopted having been proposed by the Hon. Raphael Letimalo, M.P. and seconded by the Hon. Benson Mbai, M.P.

MINUTE NO. 102/2015: ADJOURNEMENT

There being no other business, the meeting was adjourned at twenty minutes past twelve noon to Tuesday 1st December at 10.00 am.

SIGNATURE.....

Chairperson

DATE.....
24th NOV, 2015.

REPUBLIC OF KENYA

NATIONAL ASSEMBLY
ELEVENTH PARLIAMENT - THIRD SESSION

In the Matter of consideration by the National Assembly of the National Government Constituencies Development Fund Bill, 2015

SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that "Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees." Standing Order 127(3) states that "the Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account views and recommendations of the public when the Committee makes its report to the House."

The National Government Constituencies Development Fund Bill, 2015 has undergone First Reading pursuant to Standing Order 127(3) and is now committed to the **Select Committee on Constituencies Development Fund** for consideration and thereafter report to the House.

Pursuant to Article 118(1)(b) and Standing Order 127(3), the Committee invites interested members of the Public to submit any representations they may have on the said bill. The representations may be forwarded to the **Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi**; hand-delivered to the **Office of the Clerk, Main Parliament Buildings, Nairobi**; or emailed to **clerk@parliament.go.ke**; to be received **on or before Wednesday 18th November, 2015 at 5.00 pm.**

JUSTIN BUNDI, CBS
CLERK OF THE NATIONAL ASSEMBLY

BOARD'S PRESENTATION ON SUGGESTED AMENDMENTS TO THE CDF BILL 2015

The Board noted the following on the Bill:-

1.1.1. Clause 3 on the objects of the Act:

The objects of the Fund are now clearly provided for, hence eliminating ambiguity as highlighted in the ruling of the Court.

1.1.2. Clause 4 on the establishment of the Fund:

It is now clearly specified that the Fund is drawn from the National Government's share of revenue in accordance with the Division of Revenue Act enacted pursuant to Article 218 of the Constitution.

This provision serves to correct the view that CDF Act introduces a third level of Revenue Sharing contrary to the constitution, as highlighted in the High court ruling.

1.1.3. Clause 22 on the nature of projects to be funded:

It is noted that Projects funded through NG-CDF will be community based in order to ensure that the benefits are available to a widespread cross-section of the inhabitants of a particular area, and unlike the previous case, will only be in respect of works and services falling under the functions of the National Government as provided for in the Constitution.

This is an important provision in an effort to comply with the ruling of the High court.

1.1.4. Clause 41 on the establishment of the National Government Constituencies Development Fund Committee:

The membership of this committee now excludes the Member of the National Assembly (MP) in line with the Court's finding that the ex-officio membership of the MP amounted to exercising of an executive function in conflict with the Constitution. In addition, the MP has no role in the appointment of members of the National Government Constituency Fund Committee in the new Bill.

1.1.5. Clause 53 on delegation of legislative powers and limitation of fundamental rights and freedoms:

The Bill empowers the Board to make Regulations subject to the limitations set out in the said clause, but does not limit fundamental rights and freedoms.

This is excellent and in line with the constitution.

1.2. Statement on whether the Bill concerns County Governments:

We note that the Bill does not concern County Governments in terms of Article 110 of the constitution, as it is exclusively focused on National Government Functions.

1.3. Financial implications of the Bill:

It is noted that the Bill retains allocation to the Fund at a minimum of 2.5% of the National Government Share of the National Revenue. The Bill therefore does not occasion additional financial Burden on the exchequer.

2.2 Post-Publication Inputs on the Bill

The Board presented proposals for further amendments to the Bill. The presentation was mainly informed by the need to align the Bill with the Mwongozo Code for State Corporations, other pertinent Statutes and the court ruling.

The proposed Amendments which were deliberated and agreed upon by the participants may be summarised as follows: -

a) Clause 6(2) on authentication of the seal usage by board members:

The Board proposed amendment of the sub-clause to provide that authentication of the seal be done by the CEO & witnessed by the Corporation Secretary and the Board to ratify such usage.

Rationale of the amendment is that the Board does not get involved in day-to-day operations, hence cannot effectively be involved in authorisation of usage of the seal without adversely affecting expeditious execution of its programmes.

b) Clause 10 (1) that provides that opening of bank accounts to be approved by the Board:

The Board proposed the Amendments to that clause to ensure that opening of the account is approved by the National Treasury in accordance with the Public Finance Management Act.

Rationale of the Amendment is that Public Finance Management Act reigns supreme on financial matters over any other statute, hence it prevails in case of a conflict with any Act.

c) Clause 10(6) that provides that Constituency funds balances at the end of the financial year be returned to the Board Fund Account.

The Board proposed that Clause 10(6) be Amended to ensure that all monies to remain in the constituency account at the end of the financial year, consistent with the practice in CDF.

d) Clause 11 on signatories to the bank account of the fund:

The Board proposed that Clause 11(3) be amended to provide that the Signing instructions shall be such that the signature of the Chief Executive Officer (CEO) to be mandatory on all

payment cheques/instruments intended for actual release of money from the Fund, plus any one of the three signatories.

The rationale of the proposed amendments is to conform to the provisions of the existing electronic disbursement system that entails only two levels of approval (CEO and one Director). Further, the amendment will minimise bureaucratic red tape in disbursement in order to facilitate timely and efficient disbursement of funds to every constituency, consistent with the provision of Clause 14(a) of the Bill.

e) Clause 14 on functions of the Board:

The Board proposed amendments to this clause by inserting the following additional sub clauses as functions of the Board:

g.) Receive and address complaints that may arise from implementation of this Act;

h.) Encourage best practices in the implementation of projects.

Rationale of the proposed inclusions is to align the functions of the Board in Clause 14 to the provisions of clause 52 of the Bill. It is further meant to encourage continuous learning among constituencies by demonstrating best practices to encourage continuous improvement in the implementation of the Act.

f) Clause 13 on composition of the board (which unlike the current Act does not include the Attorney General).

The Board proposed that the Bill be amended to include the Attorney General or his designated Alternate as a member of the Board. The rationale is that the Attorney General has hitherto played a crucial role since the Board plays a Quasi-judicial role in complaint resolution. Further, the inclusion will not result in increasing the size of the Board membership beyond the Mwongozo guidelines.

g) Clause 18 on appointment of the CEO:

The Board proposed that Section 18(2) to be amended by enhancing working experience needed for one to be appointed CEO from five years to ten years and to have served in senior management position for a period of at least five years.

Further, the Board proposed that Section 18(4) to be emended to provide for a three years tenure of office for the CEO.

Rationale for the proposed amendments is to ensure that a person with necessary experience is recruited as CEO.

h) Clause 45 on exclusion of personal awards:

The Board proposed amendments to Section 45(2) to enhance the ceiling of allocation to education bursary schemes, mock examinations, continuous assessment tests and funding of social security programmes from 25% to 35%.

The rationale is to provide for greater focus on education as a National Government function and to cater for Social Security programmes, which is a newly proposed project type under CDF.

i) Clause 52 on dispute resolution:

The Board proposed that the clause be amended at Sub Clause 52(4) to provide that parties to the dispute shall be allowed to petition the Cabinet Secretary directly in the case whereby they disagree with the Board's decision on their dispute, yet they are unable to jointly agree on the appointment of an arbitrator.

The rationale is to propose amendments to the Bill.

j) Transitional clause:

The Board proposed that this Clause be amended to save the current Constituency Development Fund Committees (CDFC) to ensure that they do not lapse with passage of the Bill, which would have adverse effects on implementation of projects.

The proposed insertion will provide for current CDFCs to terminate upon appointment of a new committee.

REPUBLIC OF KENYA

THE PRESIDENCY
MINISTRY OF DEVOLUTION AND PLANNING

COMMENTARY ON THE CONSTITUENCIES DEVELOPMENT FUND BILL, 2015

1. Introduction

1.1. The ministry notes that the National Government Constituencies Development Fund Bill 2015 has been prepared at the Backdrop of the High Court ruling on 20th February, 2015, that declared the Constituencies Development Fund (CDF) Act 2013 unconstitutional. The basis of the declaration was: -

- That the process through which the CDF (Amendment Act) 2013 was enacted was flawed in that the Senate was not involved;
- That the Act in substance, violated the doctrine of separation of powers;
- That there was infringement of powers and functions of the county governments in that the Act implies that CDF can finance projects falling under Devolved functions contrary to the provisions of the fourth Schedule of the Constitution; and
- That the CDF Act offends the principles of public finance and division of revenue provided under the Constitution.

1.2. Based on these premises, the High Court ordered as follows:

- That the CDF Act 2013 is unconstitutional, hence invalid;
- That Order of invalidity is suspended for a period of 12 months;
- That during the period of suspension, the National Government may remedy the defects in the Act by way of Amendment or repeal of the CDF Act, in which case the orders would lapse.

1.3. Subsequent to the High Court Judgment, the Board in liaison with the National Assembly Select Committee (NASC) on CDF embarked on remedial measures aimed at addressing the issues raised. Among the said measures was legislative redress whereby the Board filed an appeal in Court against the Judgment, and also sought High Court review of the

orders by extending the time granted by the court beyond twelve (12) months to afford Stakeholders ample time to complete on-going projects. The matters are still pending before the respective courts.

On the other hand, the Board kick-started the process of re-enacting the CDF Act, through a widely consultative process, which culminated in a Draft CDF Bill 2015 that was presented to the Ministry and the CDF Committee of the National Assembly by August 2015.

2. The National Government Constituencies Development Fund Bill 2015

2.1. Based on the Draft submitted by the Board, the National Assembly published the National Government Constituencies Development Fund (NG-CDF) Bill 2015.

2.2. We note that the Bill seeks to change the Name of the Fund by clearly specifying that it is an initiative focused on National Government functions. It is also notable that the Bill specifically addresses many other aspects of the High Court ruling through the following provisions:-

2.2.1. Clause 3 on the objects of the Act:

The objects of the Fund are now clearly provided for, hence eliminating ambiguity as highlighted in the ruling of the Court.

2.2.2. Clause 4 on the establishment of the Fund:

It is now clearly specified that the Fund is drawn from the National Government's share of revenue in accordance with the Division of Revenue Act enacted pursuant to Article 218 of the Constitution.

We observe that this provision serves to correct the view that CDF Act introduces a third level of Revenue Sharing contrary to the constitution, as highlighted in the High court ruling.

2.2.3. Clause 22 on the nature of projects to be funded:

It is noted that Projects funded through NG-CDF will be community based in order to ensure that the benefits are available to a widespread cross-section of the inhabitants of a particular area, and unlike the previous case, will only be in respect of works and services falling under the functions of the National Government as provided for in the Constitution.

This in our view is an important provision in an effort to comply with the ruling of the High court.

2.2.4. Clause 41 on the establishment of the National Government Constituencies Development Fund Committee:

The membership of this committee now excludes the Member of the National Assembly (MP) in line with the Court's finding that the ex-officio membership of the MP amounted to exercising of an executive function in conflict with the Constitution. In addition, the MP has no role in the appointment of members of the National Government Constituency Fund Committee in the new Bill.

2.2.5. Clause 53 on delegation of legislative powers and limitation of fundamental rights and freedoms:

The Bill empowers the Board to make Regulations subject to the limitations set out in the said clause, but does not limit fundamental rights and freedoms.

This is good and in line with the constitution.

2.3. Statement on whether the Bill concerns County Governments:

We note that the Bill does not concern County Governments in terms of Article 110 of the constitution, as it is exclusively focused on National Government Functions.

2.4. Financial implications of the Bill:

It is noted that the Bill retains allocation to the Fund at a minimum of 2.5% of the National Government Share of the National Revenue. The Bill therefore does not occasion additional financial Burden on the exchequer.

3. Post-publication inputs on the bill

I am informed that upon publication of the said Bill, the CDF Board organised a joint retreat with the National Assembly Select Committee from 2-3rd November 2015, during which the Board presented proposals for further amendments to the Bill. The presentation was mainly informed by the need to align the Bill with the Mwongozo Code for State Corporations, other pertinent Statutes and the court ruling.

The proposed Amendments which were deliberated and agreed upon by the participants may be summarised as follows: -

3.1. Section 6(2) on authentication of the seal usage by board members:

The Board proposed amendment of the sub-clause to provide that authentication of the seal be done by the CEO & witnessed by the Corporation Secretary and the Board to ratify such usage.

Rationale of the amendment is that the Board does not get involved in day-to-day operations, hence cannot effectively be involved in authorisation of usage of the seal without adversely affecting expeditious execution of its programmes.

3.2. Clause 10 (1) that provides that opening of bank accounts to be approved by the Board:

The Board proposed the Amendments to that clause to ensure that opening of the account is approved by the National Treasury in accordance with the Public Finance Management Act.

Rationale of the Amendment is that Public Finance Management Act reigns supreme on financial matters over any other statute, hence it prevails in case of a conflict with any Act.

3.3. Clause 10(6) that provides that Constituency funds balances at the end of the financial year be returned to the Board Fund Account.

The Board proposed that Clause 10(6) be Amended to ensure that all monies to remain in the constituency account at the end of the financial year, consistent with the practice in CDF.

3.4. Clause 11 on signatories to the bank account of the fund:

The Board proposed that Clause 11(3) be amended to provide that the Signing instructions shall be such that the signature of the Chief Executive Officer (CEO) to be mandatory on all payment cheques/instruments intended for actual release of money from the Fund, plus any one of the three signatories.

The rationale of the proposed amendments is to conform to the provisions of the existing electronic disbursement system that entails only two levels of approval (CEO and one Director). Further, the amendment will minimise

bureaucratic red tape in disbursement in order to facilitate timely and efficient disbursement of funds to every constituency, consistent with the provision of Clause 14(a) of the Bill.

3.5. Clause 14 on functions of the Board:

The Board proposed amendments to this clause by inserting the following additional sub clauses as functions of the Board:

g.) Receive and address complaints that may arise from implementation of this Act;

h.) Encourage best practices in the implementation of projects.

Rationale of the proposed inclusions is to align the functions of the Board in Clause 14 to the provisions of clause 52 of the Bill. It is further meant to encourage continuous learning among constituencies by demonstrating best practices to encourage continuous improvement in the implementation of the Act.

3.6. Clause 13 on composition of the board (which unlike the current Act does not include the Attorney General).

The Board proposed that the Bill be amended to include the Attorney General or his designated Alternate as a member of the Board. The rationale is that the Attorney General has hitherto played a crucial role since the Board plays a Quasi-judicial role in complaint resolution. Further, the inclusion will not result in increasing the size of the Board membership beyond the Mwongozo guidelines.

3.7. Clause 18 on appointment of the CEO:

The Board proposed that Section 18(2) to be amended by enhancing working experience needed for one to be appointed CEO from five years to ten years and to have served in senior management position for a period of at least five years.

Further, the Board proposed that Section 18(4) to be emended to provide for a three years tenure of office for the CEO.

Rationale for the proposed amendments is to ensure that a person with necessary experience is recruited as CEO.

3.8. Clause 45 on exclusion of personal awards:

The Board proposed amendments to Section 45(2) to enhance the ceiling of allocation to education bursary schemes, mock examinations, continuous assessment tests and funding of social security programmes from 25% to 35%.

The rationale is to provide for greater focus on education as a National Government function and to cater for Social Security programmes, which is a newly proposed project type under CDF.

3.9. Clause 52 on dispute resolution:

The Board proposed that the clause be amended at Sub Clause 52(4) to provide that parties to the dispute shall be allowed to petition the Cabinet Secretary directly in the case whereby they disagree with the Board's decision on their dispute, yet they are unable to jointly agree on the appointment of an arbitrator.

The rationale is to propose amendments to the Bill.

3.10. Transitional clause:

The Board proposed that this Clause be amended to save the current Constituency Development Fund Committees (CDFC) to ensure that they do not lapse with passage of the Bill, which would have adverse effects on implementation of projects.

The proposed insertion will provide for current CDFCs to terminate upon appointment of a new committee.

4. Ministry's Input on the Bill

The Ministry largely concurs with the Board's proposals as they will enhance the management of the Fund. In addition the Ministry would like to make the following proposals to Clauses in the Bill:-

4.1. Clause 20 on the staff of the board:

The Bill in sub-clause 20(2) provides that:

"The officer of the Board shall administratively report to the Constituency Committee."



Speaking Points Presentation to CDF select committee

Monday, November 16, 2015

ABOUT TISA

The Institute for Social Accountability (TISA) is a civil society organization committed towards the achievement of sound policy and good governance in local development, to uplift livelihoods of, especially, the poor and marginalized in Kenya. TISA has been operational since March 2008, and is a locally registered Trust that has engaged with various relevant state and non-state actors in the quest to promote effective local governance in Kenya.

Key Questions on the National Government Constituency Development Fund 2015 bill

The ruling on petition 170 of 2013 declared the CDF unconstitutional and the act invalid. It gave the national government 12 months to align the fund with the constitution, failure to which it would be declared invalid. The following were the grounds on which the court declared CDF unconstitutional

- a) CDF offends the principles of public finance in the allocation of funds from revenue raised nationally.
- b) CDF violates the division of powers and functions
- c) CDF offends the doctrine of separation of powers
- d) CDF creates a parallel structure and fails to respect the structures of the county government
- e) The process of enactment failed to provide for Senate input

In this regard the National Assembly has prepared the **National Government Constituency Development Fund Bill, 2015**. We note that the bill has made a great attempt to redress the weaknesses in the present CDF Act. However we note there are challenges and gaps in the bill and this memorandum seeks to address these. We have framed this memorandum around key constitutional questions.

1. Is it constitutional?

1(a) Does the bill respect public finance principles on sharing of revenue? Yes.

1(b) Does it respect the division of functions as provided in the constitution? It makes a strong attempt but fails to do so in some cases.

1(c) Does it safeguard the separation of powers especially with respect to the role of the member of the national assembly? It makes a strong attempt but there are still aspects that need to be streamlined.

1(d) Does it respect the administrative structures of development established under the national and county governments? The legislature should not create parallel bureaucracies for the implementation of national government functions. This is because; the principles of integrated governance on which our devolution system is based on is to ensure, “that the work of government impacts the totality of the lives of the citizens in an integrated way.”¹ Integrated governance means to create structures and systems that serve the purpose of ensuring effective and cost-effective service to improve the quality of life of the people living in Kenya.

- By using the term constituency the bill contravenes the court ruling which held the constituency is not a unit of development. It should use the term sub-county.
- PFM s24 provides that the cabinet secretary finance can establish a national fund. S207 of the PFM guidelines gives conditions for the same. *At present the bill does not meet these requirements.*
- The National Government Coordination Act establishes the County Commissioners for purposes of coordination of national government functions. The bill fails to adequately integrate with this structure.
- The Education Act, Police Service Act and other national statues assign national government functional responsibilities to respective statutory bodies at the county level such as the County Education Board, County Policing Authorities’ and so forth. The bill fails to integrate the fund with these existing structures.

2. Objectives of the Constituency Development Fund

CDF has emerged as a very popular fund because it gives citizen a direct role in their development. It has also been effective in redressing deficits in local infrastructure development. The original objectives of the CDF should not be lost in the revised bill.

2a) Does the bill provide citizens a direct say in decision making in the fund? Does it decentralize decision making to the lowest level of the fund? Does the design of the fund ensure the community drives project selection, implementation and monitoring? No, We make detailed recommendations on this in the next section.

- The bill fails to provide a representation in the National Board
- The bill fails to provide citizen say in composition of the Sub-county. The idea of the national board and parliament vetting sub-county citizen nominees is inimical to the philosophy of Articles 174 3,4 of the constitution. The bill needs to provide for a full fledged community development framework.
- Decisions of the sub-county committee need to be approved by the board, undermining the authority of the board. We make a detailed proposal for a community development framework.

2b) Does the bill provide for the support of local infrastructural development?

The bill is ambiguous in the functions it seeks to support. We make suggestions on this.

3. TAP (Transparency, Accountability and Public participation)

¹ Dept of Public Service and Administration (2003) “The Machinery of Government- Structure and functions of government” Retrieved from <<http://www.dpsa.gov.za/dpsa2g/documents/lkm/mog.pdf>>

Does the bill make adequate provision for Transparency, Accountability and Public participation? No. The bill needs to provide for proactive disclosure of information, citizen oversight mechanisms through social audits, oversight forums by the member of national assembly.

3a) Public Participation

The bill needs to foster a culture of collective action and mutual support to solve problems within a community. It will help local residents and stakeholder groups

- i. Define their national development priorities
- ii. Assist the NG in planning and prioritizing the use of their resources
- iii. Discuss and decide upon the most effective and efficient ways to achieve their development priorities
- iv. Participate in service delivery
- v. Build local accountability and transparency in the use of resources
- vi. Create a harmonious relationship between citizens and the NG and its officers
- vii. Establish ways of funding their development plans, at a group and individual level

3b) Guiding principles of community lead development

- i. Participation by the public shall be based on inclusivity and volunteerism;
- ii. Members elected to represent communities shall meet standards required by chapter 6 of the constitution;
- iii. The process of identifying, prioritizing, and implementing projects must be driven by the community rather than government or state officers
- iv. The responsibilities of selecting members to serve in communities must adhere to the ideals of democracy and inclusivity.
- v. The role of government should be restricted to technical and advisory tasks.
- vi. The process shall employ proactive information disclosure and effective communication means including the use of ICT;

3c) Role of Project Management Committees should be captured in the bill.

Project Management Committees (PMC) are committees appointed by the members of a community to oversee implementation of a particular project. Existing structures such as school committees may, will serve as PMCs for school projects. Self-organized PMCs may also be allowed to oversee projects whose proposals they developed. Project Management committees shall be trained on mechanisms of redress and oversight tools particularly procurement monitoring and social audits.

The functions of the PMC include:

- i. Monitoring of project implementation
- ii. Reporting of progress to the monitoring group
- iii. Representation at site meetings
- iv. Supervision of contractors
- v. Supervision of procurement process
- vi. Review of projects as fit for purpose
- vii. Development of community ownership and sustainability strategy

3d) Sub-county Committees: Nomination to the sub-county committees should be based on bottom up model of organizing. Criteria approved by communities and through the use of sub-county vetting panels.

4. Transparency & Accountability

Access to information is a fundamental right as recognised under Article 35 of the Constitution of Kenya, 2010. National government as well as county governments are required to ensure and facilitate the enjoyment of this right by civilians.

The bill shall provide for:

- i. Access to project lists, fund reports and other information to citizens upon demand
- ii. Use more ICT through the website, social media, SMS, twitter, etc.
- iii. Establish notice boards in areas accessible to the citizens.
- iv. Communication shall be tailored to meet the needs of persons with disabilities, older members of the society and the less educated residents
- v. Ensure all projects have development project site announcements.

4a) Procurement transparency

There shall be a robust disclosure regime by the procuring entities. To begin with, the procuring entities shall prepare a procurement plan indicating procurement timelines, requirements, special conditions, budgets, etc. These plans shall be made available to the public. Additionally key procurement information shall be made available to the public including

- i. Bill of quantities for the project
- ii. List of tenderers indicating:
 - Full name and description of the tenderer
 - The tenderers' postal and physical addresses, telephone number and other contact details
- iii. Tender notice
- iv. Tender opening register
- v. Tender Committee minutes
- vi. Technical evaluation report
- vii. Final contract

4b) Citizen Oversight of County Performance Forums

The MNA shall convene at least four oversight Forums every year. During this forum citizens shall:

- ✓ Receive fund implementation reports from the chair
- ✓ Give their views on the implementation of the fund
- ✓ Report on any suspected cases of misuse of the fund or corruption
- ✓ Make recommendation for the better implementation of the fund

The views of the citizens shall be made under the protection of the privileges of the county assembly. No one may be sanctioned for giving views at the oversight meeting. A proper notice for the forum must be given at least 14 days before the forum.

5. Transition mechanisms

Does the bill make adequate provisions for transition ? No.

- The bill should provide for the disbandment of the present CDF board, in light of the Auditor General remarks that 30 constituencies are not able to account for over **200 million** after the CDF expenditure audit;
- We also note that the CDF Board is also not properly constituted as the Chief Executive Officer is holding office in an acting capacity. Further an audit report prepared by the Auditor General's office in 2013 raised substantive queries about the financial probity of the CEO;
- We call for a nationwide social audit of all CDF projects to generate an informed transition report. Reports of the social audit to be shared with the Auditor General and EACC for investigation and prosecution.
- The social audit process would also inform transition implementation plans for those projects to be handed over to county governments. It would identify abuse cases and refer them for remedial action.

6. Broader policy questions

Is the fund aligned to principles of public finance on equitable development? Whereas the fund proposes to support national functions it does not specify the areas of need. For instance there is already a Security integrated Infrastructure Fund set up in 2015/16 will finance the housing, office blocks and other installations for the National Police Service and other Uniformed Officers. Through is the National Youth Service (NYS) will construct 15,000 housing units for the National Police Service in 2015/16. There is need for a policy note (PFM regulations 207) to identify specific funding gaps.

By isolating the new fund to national government functions there is also a possibility that county government functions will suffer due to inadequate coverage. The policy note for the fund should provide an analysis of present development spending to ensure all devolved functions receive equitable support.

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Analysis Matrix

Clause	Issue	Proposal
<p>Long title: The National Government Constituencies Development Fund Bill, 2015</p>	<p>As noted in this memorandum, the national government has an already established service delivery structure and system as provided for under the National Government Co-ordination Act, No. 1 of 2013. Consequently, the Bill should align with this structure. The sub-county is the proximate unit of service delivery of the national government functions.</p>	<p>THAT the title of the Bill be amended be deleting the word “Constituencies” and substituting therefore the word “Sub-Counties” in relevant sections of the bill.</p> <p>The Committee may consider use of an alternative title such as the “National Government Community Development Fund”.</p>
<p>3. Objects of the Act</p> <p>b) recognize the constituency as a platform for identification, performance and implementation of national government functions;</p> <p>h) provide mechanisms for the National Assembly to deliberate on and resolve issues of concern to the people as provided for under Article 95 (2) of the Constitution; provide mechanisms for the</p> <p>k) National Assembly to facilitate the involvement of the people in the identification and implementation of projects for funding by the national government at the constituency level; and</p>	<p>i. This Bill provides for the establishment of the fund and it is not the legal framework that is rightly placed to provide for the structure of the national government service delivery. Consequently, the Bill cannot provide for the establishment of the Constituency as a service delivery unit for the national government whereas all the national government services are delivered at local level in the county, sub-county, ward/location and sub location. A constituency is not a unit of national development planning or service delivery.</p> <p>ii. Whereas the National Assembly is mandated under Article 95 of the Constitution to deliberate and resolve matters of concern to the people, the power does not imply that the National Assembly should be involved in the service delivery. In addition, establishment of the Fund is not related to the exercise of the power of the National Assembly to deliberate and resolve the matters of concern for the people.</p>	<p>THAT Clause 3 of the Bill be amended as follows–</p> <p>(a) by deleting paragraph (b), (h) and (k).</p> <p>(b) by inserting in clause 3(d) the words - pursuant to Article 10(2) “and Article 174 (c and d)” of the Constitution;</p> <p>(c) by inserting in clause 3(e) the words - pursuant to Article 10(2)(b) “and Article 174 (e)” of the Constitution;</p> <p>v. We suggest additional objectives to include:</p> <p>i. To provide a framework for citizen lead development to assist the national government in planning and prioritizing the use of its resources;</p> <p>ii. To create a harmonious relationship between citizens and the national government and its</p>

	<p>ii. The objects of devolved government are binding upon both levels of government. The bill should recognize this by making reference to Articles 174.</p>	<p>officers in local development;</p> <p>iii. To provide a platform for participate in service delivery;</p> <p>iv. Build local accountability and transparency in the use of resources;</p> <p>v. Establish ways of funding citizen development plans at a group and individual level.</p>
Principles of the Fund	<p>It has become commonplace to include principles to guide the implementation of legislation. This is particularly so when seeking to incorporate the values enshrined in the constitution of Kenya. We suggest the inclusion of the following:</p>	<p>i. Participation by the public shall be based on inclusivity and volunteerism;</p> <p>ii. Members elected to represent communities shall meet standards required by chapter 6 of the constitution;</p> <p>iii. The process of identifying, prioritizing, and implementing projects must be driven by the community rather than government or state officers;</p> <p>iv. The responsibilities of selecting members to serve in communities must adhere to the ideals of democracy and inclusivity;</p> <p>v. The role of government should be restricted to technical and advisory tasks;</p> <p>vi. The fund shall employ proactive information disclosure and effective communication means including the use of ICT;</p>
4. (1) There is established a fund to be known as the National Government Constituencies Development Fund which shall-	<p>The National Government Co-ordination Act, No. 1 of 2013 establishes the mechanism for implementation and coordination of national government services. In order to address the local development as intended by the Bill, the Fund should be aligned with the national government service delivery system and structure. Consequently, the Fund can only be established for</p>	<p>THAT Clause 4 of the Bill be amended by deleting the word "Constituency" and substituting therefore the word "Sub-counties".</p>

	<p>the development planning and service delivery within the established structures i.e. county, sub-county, ward, location and sub-location as well as any other unit of decentralization of services as established by the county governments.</p>	
		<p>1. INSERTION OF A NEW CLAUSE 5 THAT the Bill be amended by inserting a new Clause 5 as follows and renumbering the Bill accordingly–</p> <p style="text-align: center;">Utilization of the Fund</p> <p>5. (1) The Fund shall be utilized for financing local infrastructure development related to the implementation of national government functions in the sub-county.</p> <p>(2) The Fund shall be utilized and integrated within the national government budget planning and execution process in accordance with the Public Finance Management Act, 2012.</p> <p>(3) In accordance with Article 186 and section 1 of the Fourth Schedule to the Constitution of, the national government functions referred to under subsection (1) to be implemented under this Act shall be–</p> <p>(a) primary, secondary and special education schools and tertiary education institutions in the sub-county;</p>

		<p>(b) disaster management;</p> <p>(c) promotion of sports and sports education;</p> <p>(d) protection of environment and natural resources; and</p> <p>(e) policing services.</p> <p>(4) In accordance with Article 186 (2) and Article 189 (1) and (2) where the national government is implementing the functions described under subsection (3) (b), (c) and (d), the national government shall consult, collaborate and coordinate with the county government.</p> <p>(5) The function described under subsection (3) (e) shall be implemented in accordance with the structures established under the National Police Services Act, No. 11A of 2011.</p>
<p>8. (1) A portion of the Fund, equivalent to five per centum (hereinafter referred to as the "Emergency Reserve") shall remain unallocated and shall be available for emergencies that may occur within the Constituency.</p> <p>(2) The Constituency Committee shall determine the allocation of the emergency reserve in accordance with the Act.</p> <p>(3) "Emergency" shall be construed to mean an urgent, unforeseen need for expenditure for</p>	<p>The national government has a mechanism and system for dealing with emergencies. There is no justification for the national government to maintain an emergency reserve for each sub-county through fund.</p>	<p>Clause 8 of the Bill be deleted</p>

<p>which it is in the opinion of the committee that it cannot be delayed until the next financial year without harming the public interest of the constituents.</p> <p>(4) For each project, the Project management Committee shall set aside a sum not exceeding five per centum of the total allocation for the project to cater for the administration expenses of the project.</p> <p>(5) The sum set aside under subsection (4) shall be properly accounted for and proper books of accounts kept and returns made to the Constituency Committee for that constituency on how the sum has been used.</p>		
<p>Composition of the Board Clause 13</p>	<p>The bill has moved away from representative composition of the board (CDF Act 2003, 2007) to a direct nomination process. This has undermined public participation and accountability in the management of the fund. We recommend that the previous process of appointments to the board be used with the following amendment.</p>	<p>Composition of the board shall comprise the Principle Secretary of ministries of devolution and planning, finance, education, security, sports and environment.</p> <p>The Board shall have an equal number of members nominated by organizations representing professionals, business, faith based groups, civil society, women, youth, persons with disabilities, the elderly.</p> <p>The Act shall provide guidelines for the conduct of the board to ensure its accountability and transparency. (See CBEF guidelines attached)</p>
<p>14. The functions of the Board</p>	<p>The clause provides the centralization of national government services contrary to Article 6 (3) of the Constitution, which provides for the decentralization of national public services. The projects should be approved at the sub-county level by the respective national government organs or administrative structures while the Board should only confirm that the projects approved conform to the requirements of the Act.</p>	<p>THAT Clause 14 of the Bill be amended as follows–</p> <p>(a) by deleting paragraph (d).</p> <p>(b) by inserting the following</p> <ul style="list-style-type: none"> • to receive and discuss annual reports and returns from the constituencies; • ensure the compilation of proper records, returns and reports from the constituencies; • to ensure prudent management of the Fund; • receive and address complaints and disputes and take any appropriate action;

	<p>The coordination of projects across the sub-counties should be carried out under the mechanisms established for the coordination of national government service delivery under the National Government Co-ordination Act, No. 1 of 2013.</p> <p>The bill lacks accountability mandates for the board.</p>	<ul style="list-style-type: none"> • to ensure the compilation of proper records, returns and reports from the sub-county • to ensure timely submission to Parliament of various returns, reports and information as required under the Act; <p><u>Later in the act the board should be given powers of sanction;</u></p> <ul style="list-style-type: none"> • the board may withhold sending funds to any sub-county in breach of the requirements of the Act; • The board shall ensure transparency in the manner in which it enforces sanctions; • The board shall publish the status of disbursements to sub-counties and indicate those under sanctions and reasons for such sanction.
<p>17. Removal of Board member</p>	<p>Clause 17(a) cites Chapter Six. However, this chapter only applies to state officers. Chapter Six would bind principle secretaries, and members of the Board drawn from the public would be subject to the Article 232 on public officers.</p>	<p>17 (a) Insert words “or Article 232 as it may apply”.</p>
<p>18 CEO of the Board</p>	<p>The bill leaves too much discretion to the Board on this important position. The bill should clearly spell out the mandate of the CEO and empower the office to perform.</p>	<p>(2) The CEO shall serve as the accounting officer for the fund. The fund CEO shall-</p> <ul style="list-style-type: none"> (a) supervise and control the administration of the Fund; (b) prepare annual budget and such plans for better administration of the Fund to be approved by the Board; (c) with approval of the Board, impose conditions or restrictions on the use of any expenditure arising from the Fund;

		<p>(d) cause to be kept proper books of account and other books and records in relation to the Fund as well as to all the various activities and undertakings of the Fund;</p> <p>(e) prepare, sign and submit to the Board for transmission to the Auditor-General in respect of each financial year and within three (3) months after the end thereof, a statement of accounts relating to the Fund in accordance with the Public Audit Act, 2003 and in such details as the County Treasury may from time to time direct;</p> <p>(f) furnish such additional information as may be required for examination and audit by the Auditor-General or under any law; and</p> <p>(g) designate such staff as may be necessary to assist in the management of the Fund.</p>
<p>22. A Project under this Act shall-</p> <p>(a) only be in respect of works and services falling within the functions of the national government under the Constitution; and</p> <p>(b) be community based in order to ensure that the benefits are available to a widespread cross-section of the inhabitants of a particular area.</p>	<p>The projects to be funded should be linked to the requirements provided under the proposed new clause 5.</p>	
<p>23. (9) Monitoring and evaluation of ongoing , projects and capacity building of various operatives may be considered as a development project provided that not more than three per centum shall. be allocated for this purpose.</p>	<p>The national government should utilize the national monitoring and evaluation system already established under the National Integrated Monitoring and Evaluation System (NIMES).</p>	<p>(3) The Fund administrator shall, within three months after the end of each financial year prepare a report which shall include-</p> <p>(a) the programs funded through the Fund;</p>

<p>(b) the beneficiaries programs supported under the Fund;</p> <p>(c) the results of the programs implemented under these Regulations;</p> <p>(d) the challenges faced in the implementation of these Regulations and the proposed mitigation measures;</p> <p>(e) the level of public participation in the implementation of these Regulations; and</p> <p>(f) any other matter as may be required by the County Executive Committee Member responsible for public administration.</p>		<p>(b) the beneficiaries programs supported under the Fund;</p> <p>(c) the results of the programs implemented under these Regulations;</p> <p>(d) the challenges faced in the implementation of these Regulations and the proposed mitigation measures;</p> <p>(e) the level of public participation in the implementation of these Regulations; and</p> <p>(f) any other matter as may be required by the County Executive Committee Member responsible for public administration.</p>
<p>2. CLAUSE 25</p> <p>THAT Clause 25 of the Bill be deleted and substituted as follows—</p> <p>Sub-county Development Plan</p> <p>25. (1) Each sub-county Committee shall prepare a 3-year sub-county Development Plan for the national government functions provided under section 5.</p> <p>(2) The sub-county development plan shall provide among others for—</p> <p>(a) development needs of the sub-county related to the national government functions;</p>	<p>The bill aligns itself to the electoral calendar and in so doing risks breaching the principle of separation of powers.</p>	<p>25. (1) The chairperson of the , Constituency Committee shall, within the first year of the commencement of a new Parliament and at least once every two years thereafter, convene open forum public meetings in every ward in the constituency to deliberate on development matters in the ward and in the constituency.</p> <p>(2) The Constituency Committee shall deliberate on project proposals from all the wards in the constituency and any other projects which the Constituency Committee considers beneficial to the constituency, including joint projects with other constituencies, consider the national development plans and policies and the constituency strategic development plan, and identify a list of priority projects, both</p>

immediate and long term, out of which the list of projects to be submitted in accordance with the Act shall be drawn from.

(3) The list of proposed constituency based projects to be covered under this Act shall be submitted by the Chairman of the Constituency Committee to the Board after approval by the Constituency Committee, for that constituency.

- (b) the development interventions;
- (c) priority development projects that may be funded under this Act;
- (d) the cost estimates of each project; and
- (e) any other matter as may be prescribed.

(3) The sub-county development plan shall—

- (a) be aligned with the relevant national development policies and plans related to specific national government functions; and
- (b) be the basis of funding of projects under this Act.

(4) The relevant national government officer or organ responsible for the specific national government functions at the sub-county level shall, in consultation with the sub-county committee ascertain that the projects identified under section 26 comply with the requirements of this Act before their inclusion in the sub-county development

		<p>plan.</p> <p>(5) The sub-county committee shall upon the completion of the sub-county development plan submit the plan to the Board</p>
	<p>In order to ensure that all development projects by the national government are aligned and coordinated, there is need to develop a sub-county development plan to guide the development.</p> <p>The development planning for the purposes of the Fund should not be linked to the term of Parliament. The Fund is established for the purposes of implementing the national government functions in terms of services delivery. In line with the principle of separation of powers, the Fund should be delinked from the term of Parliament.</p> <p>It is necessary to provide for the collaboration of the national and county government at the local level for the purposes of development planning since some of the functions are to be implemented within the concurrent jurisdictions and others are interlinked such as pre-primary and primary schools.</p>	<p>3. INSERTION OF NEW CLAUSE 26 AND 27</p> <p>THAT the Bill be amended by inserting a new clause 26 and renumbering the Bill accordingly as follows–</p> <p>Sub-county development meetings</p> <p>26 (1) The sub-county committee shall within six months upon the coming into force of this Act and at least once every year thereafter, convene open public forums and meetings in each Ward for the purposes of deliberating on development matters in the Ward related to the implementation of this Act and preparation of the sub-county development plan.</p> <p>(2) The plan shall identify community priorities under respective sectors;</p> <p>(3) The national government officers in responsible for development or economic planning and any officer responsible for specific national or county government functions related to the functions described under section (5) shall attend the meetings held under this section and provide advice to the residents on development planning and projects viability</p> <p>(4) sub-county development plan will be shared with the county government through the County Government Intergovernmental Forum established under Section 54 of the County government Act</p>

		2012, for purposes of harmonization and coordination.
34. Implementation of Projects	The bill should provide functions of the project management committees, which stress on accountability.	The functions of the PMC include: <ul style="list-style-type: none"> i. Monitoring of project implementation ii. Reporting of progress to the monitoring group iii. Representation at site meetings iv. Supervision of contractors v. Supervision of procurement process vi. Review of projects as fit for purpose vii. Development of community ownership and sustainability strategy
41 (2) Each Constituency Committee shall comprise- (a), the national government official at the constituency as may be designated by the Cabinet Secretary or an alternate;; (b) two. men each nominated in, accordance with subsection (3) one of whom shall 66 youth at the date of appointment; (c)'two women nominated in accordance" with subsection (3), one of whom shall be a youth at the date of appointment;; (d) one persons with disability 'nominated by a registered group representing persons with disabilities in the constituency in accordance with subsection (3); (e) two persons nominated by the Constituency office Cap. 185A established under Regulations made pursuant to the Parliamentary Service Act; (f) the officer , of the Board seconded to the Constituency Committee by the Board who shall be an <i>ex officio</i> member without a vote.	Since this is a national government Fund, it must be aligned with the national government administrative systems and structure. In this regard, the coordination of the implementation of the Act at the sub-county level must be coordinated in accordance with the National Government Co-ordination Act, No. 1 of 2013. A constituency office is not a body, organ or arm of government or society established in law. Consequently, it no legal or policy capacity to appoint representatives to the Committee. In addition, the role played by the faith based communities and nongovernmental players should be integrated into the sub-county committee. The composition of the sub county committee should reflect the respective functions and responsible officers.	THAT Clause 41 of the Bill be amended as follows– (a)in subsection (2) – (i) paragraph (a) by deleting the words “at the constituency as may be designated by the Cabinet Secretary or an alternate” and substituting therefore the words “responsible for coordination of national government functions at the sub-county level” who shall be the chairperson. (ii) By inserting- “representatives nominated by the County Education Board and County Policing Authority”; (iii) by deleting paragraph (e) and substituting therefore the following– (2) (e) one person representing nongovernmental organizations or community based organizations in the sub-county nominated in accordance with section (3).

<p>(g) one member co-opted by the Board in accordance with Regulations made by the Board;</p> <p>(4) The names of the persons selected under subsection (3) shall be submitted by the Board to the National Assembly for Approval before appointment and gazettelement by the Board.</p> <p>(6) The first meeting of the Constituency Committee shall be convened within sixty days of the commencement of a new term of Parliament or the date of the holding of a by-election, by the national government official at the constituency or in his or her absence, by an officer of the Board seconded to the constituency, on such day as may be designated by the Cabinet Secretary.</p>		<p>(iv) by inserting a new paragraph (f) and renumbering the sub clause accordingly as follows–</p> <p>(2) (f) one person representing faith based organizations in the sub-county nominated in accordance with section (3)</p> <p>(b) by deleting subsection (4)</p> <p>(c) by deleting sub clause (6) and substituting therefore the following–</p> <p>(6) Nomination to the sub-county committees shall be based on bottom up model of organizing. Criteria approved by communities and through the use of sub-county vetting panels.</p> <p>The first meeting of the sub-county Committee shall be convened within twenty one days upon the appointment of the Committee</p>
<p>Functions of the Sub-County development committee</p>		<p>The functions of the Sub-County committee are;</p> <p>a) Approving the sub-county development action plan;</p> <p>b) Through consultations with technical departments making budget allocations for implementation of the sub-county development action plan;</p> <p>c) Oversee establishment of Project Management Committees</p> <p>d) Monitor implementation of sub-county action plan.</p>

Fund Manager	<p>(2) The fund manager shall-</p> <ol style="list-style-type: none"> a. supervise and control the day to day administration of the Fund; b. cause to be kept proper books of account and other books and records in relation to the Fund as well as to all the various activities and undertakings of the Fund; c. prepare, sign and submit to the Board such reports as are required under the Act; d. furnish such additional information as may be required for examination and audit by the Auditor-General or under any law; and
Reporting	<p>The CEO shall, within three months after the end of each financial year prepare a report which shall include-</p> <ol style="list-style-type: none"> (a) the programs funded through the Fund; (b) the beneficiaries programs supported under the Fund; (c) the results of the programs implemented under these Regulations; (d) the challenges faced in the implementation of these Regulations and the proposed mitigation measures; (e) the level of public participation in the implementation of this Act and (f) any other matter as may be required by the Board.
<p>Transparency & Accountability The bill needs to provide transparency provisions. Access to information is a fundamental right as recognised under Article 35 of the Constitution of Kenya, 2010. National government as well as county governments are required to ensure and facilitate the enjoyment of this right by civilians.</p>	<p>The bill shall provide for:</p> <ol style="list-style-type: none"> i. Access to project lists, fund reports and other information to citizens upon demand ii. Use more ICT through the website, social media, SMS, twitter, etc. iii. Establish notice boards in areas accessible to the citizens. iv. Communication shall be tailored to meet the needs of persons with disabilities, older members of the society and the less educated residents v. Ensure all projects have development project site announcements. <p>4a) Procurement transparency There shall be a robust disclosure regime by the procuring entities. To begin with, the procuring entities shall prepare a procurement plan indicating procurement timelines, requirements, special conditions, budgets, etc. These plans shall be made available to the public. Additionally key procurement information shall be made available to the public including</p> <ol style="list-style-type: none"> i. Bill of quantities for the project

	<p>ii. List of tenderers indicating:</p> <ul style="list-style-type: none"> • Full name and description of the tenderer • The tenderers' postal and physical address, telephone number and other contact details <p>iii. Tender notice</p> <p>iv. Tender opening register</p> <p>v. Tender Committee minutes</p> <p>vi. Technical evaluation report</p> <p>vii. Final contract</p>
<p>Citizen Oversight of County Performance Forums</p>	<p>The Member of the National Assembly shall;</p> <ul style="list-style-type: none"> (a) mobilize and sensitize the respective target group on any matter related to the Fund; (b) solicit views, opinions and proposals of public in regard to the Fund and present such views and opinions to the National Assembly. (c) shall convene at least four oversight Forums every year. During this forum citizens shall: <ul style="list-style-type: none"> ✓ Receive fund implementation reports from the chair ✓ Give their views on the implementation of the fund ✓ Report on any suspected cases of misuse of the fund or corruption ✓ Make recommendation for the better implementation of the fund <p>The views of the citizens shall be made under the protection of the privileges of the county assembly. No one may be sanctioned for giving views at the oversight meeting. A proper notice for the forum must be given at least 14 days before the forum.</p>
<p>Transitional Provisions</p>	<ul style="list-style-type: none"> • The bill should provide for the disbandment of the present CDF board, in light of the Auditor General remarks that 30 constituencies are not able to account for over 200 million after the CDF expenditure audit; A handover plan should be prepared. A transition stakeholder committee should work with the ministry to oversee this process. This should include members of civil society private sector, etc. A handover period of four months should be given for the present board to compile the necessary reports and handover information to a new board. Stern sanctions should face any member who destroys information or falsifies records. • We also note that the CDF Board is also not properly constituted as the Chief Executive Officer is holding office in an acting capacity. Further an audit report prepared by the Auditor General's office in 2013 raised substantive queries about the financial probity of the CEO; • We call for a nationwide social audit of all CDF projects to generate an informed transition report. Reports of the social audit to be shared with the Auditor General and EACC for investigation and prosecution. • A social audit should be the first agenda item of the new board. It would identify abuse cases and refer them for remedial action.



Memorandum on the National Government Constituency Development Fund Bill, 2015

Thursday, November 19, 2015

1. About CEDGG

The Centre for Enhancing Democracy and Good Governance (CEDGG) is a grass root civil society organisation that works to empower vulnerable and marginalized citizens to claim their rights in local development and governance processes. CEDGG has been in operation since the year 2001 and legally exists as a Non Governmental Organisation. Our head office is in Nakuru Town – Nakuru County, in the Republic of Kenya. Our programme work covers mainly the mid rift valley region i.e. Nakuru, Baringo, Elgeyo Marakwet, West Pokot, Laikipia and Kericho Counties.

2. Back ground information

The ruling on petition 170 of 2013 declared the CDF Act 2013 unconstitutional and the Act invalid. It gave the national government 12 months to align the fund with the constitution, failure to which it would be declared invalid. The following were the grounds on which the court declared CDF Act 2013 unconstitutional:

- a) CDF offends the principles of public finance in the allocation of funds from revenue raised nationally.
- b) CDF violates the division of powers and functions
- c) CDF offends the doctrine of separation of powers
- d) CDF creates a parallel structure and fails to respect the structures of the county government
- e) The process of enactment failed to provide for Senate input

In this regard the National Assembly has prepared the **National Government Constituency Development Fund Bill, 2015**. We note that the bill has made a great attempt to redress the weaknesses in the present CDF Act. However we note there are challenges and gaps in the bill and this memorandum seeks to address these.

3. Key Questions on the National Government Constituency Development Fund 2015 bill

We have framed this memorandum around the ruling on petition 170 of 2013.

- I. *Does the CDF bill 2015 respect public finance principles on sharing of revenue?* PFM Act 2012 Section 24 provides that the cabinet secretary finance can establish a national fund. Section 207 of the PFM guidelines gives conditions for the same. *At present the CDF bill 2015 does not meet these requirements.* The composition of National Government CDF committee (Part VII Sec 41) does not reflect the sectoral representation of National government function at the county/sub county level to inform appropriate and effecting allocation of resource based on existing development indicators in reference to decentralized functions assigned to the national government e.g. education, national security,

registration of births and deaths among others. The proposed structure lacks in technical expertise to inform professional decision making in prioritization, budgeting and implementation of projects to be supported under the Fund. Furthermore the bill does not provide for strong linkages with the national budget process thus increasing a potential for duplication and low utility of project implemented under the fund. *Recent studies have shown that CDF has constructed numerous health and education infrastructure without prior consultation of the line ministries leading to increased pressure for staff and equipment and recurrent expenditure.*

Recommendation: we propose that the National Government CDF committee (Part VII Sec 41) take the form of the County Budget and Economic Forum where there will be representation of both national government officials and equivalent number of non state/citizen groups to facilitate participatory planning and allocation of resources while provide a social accountability mechanism.

II. *Does it respect the division of functions as provided in the constitution?*

Whereas the CDF bill 2015 has confined itself to the National government function, Schedule 4 part 1 of the COK 2010 largely assigns the national government function related to policy formulation and planning. In addition county governments have been assigned function related to largely service delivery. The National Government Coordination Act establishes the County Commissioners for purposes of coordination of national government functions. The CDF bill fails to adequately integrate with this structure.

Whereas the fund proposes to support national functions it does not specify the areas of need. For instance there is already a Security Integrated Infrastructure Fund set up in 2015/16 will finance the housing, office blocks and other installations for the National Police Service and other Uniformed Officers. Through this the National Youth Service (NYS) will construct 15,000 housing units for the National Police Service in 2015/16. There is need for a policy note (PFM regulations 207) to identify specific funding gaps.

Recommendation: the CDF bill 2015 should seek to integrate its operation with the National Government Coordination Act. *Refer to National Government Coordination Act section 3, 4, 14(5) and 17* and other mechanisms for financing National government infrastructural projects at the county level.

III. *Does it safeguard the separation of powers especially with respect to the role of the member of the national assembly?*

The CDF bill 2015 Section 41(2) e provides for two persons nominated by the constituency office. What is the role of the constituency office established pursuant to the parliamentary service Act? It therefore follows that the constituency office is a parliamentary arm and therefore has no business participating in the executive role anticipated in the functions of National Government CDF committee (Part VII Sec 41)

Part VII Sec 41(6) ties the establishment of the constituency committee to the commencement of a new term of parliament/ by election thus putting the election of new member of parliament at the centre of the establishment of the constituency committee and by extension influencing the composition of the committee members who will also be appointed subject to direct parliamentary approval. To this extend we see the establishment and operation of the fund at the constituency tied to the position of the member of the national assembly.

Recommendation: if the fund is to supplement national government function, what is the point of emphasis on the parliamentary term and supposedly indirect role of the member of the national assembly in the establishment and operation of the fund structure at the constituency? Why not tie the establishment of the fund constituency committee to the respective national government administration officers at the sub county/constituency level. *Refer to National Government Coordination Act Section 3 (17).*

IV. Does it respect the administrative structures of development established under the national and county governments?

The CDF bill 2015 creates parallel bureaucracies for the implementation of national government functions. This is because; the principles of integrated governance on which our devolution system is based on is to ensure, “that the work of government impacts the totality of the lives of the citizens in an integrated way.”¹ Integrated governance means to create structures and systems that serve the purpose of ensuring effective and cost-effective service to improve the quality of life of the people living in Kenya.

The National Government Coordination Act establishes the County Commissioners for purposes of coordination of national government functions. *Refer to National Government Coordination Act Section 3 (16, 17).* The bill fails to adequately integrate with this structure.

The Basic Education Act 2013, Police Service Act 2014 and other national statues assign national government functional responsibilities to respective statutory bodies at the county level such as the County Education Board, County Policing Authorities’ and so forth. The bill fails to integrate the fund with these existing structures.

4. Citizen participation and composition of the fund structures

Part V Section 30 of the CDF bill 2015 negates the principles of public participation as captured in the COK Article 10. In addition, the bill does not provide expressively the mechanisms for public participation in the constitution of the various fund structure especially at the constituency level. In line with our recommendation above for the constituency committee to adopt the format of the County Budget and Economic Forum, the act should provide for participatory mechanisms for stakeholder involvement in the establishment of the constituency

¹ Dept of Public Service and Administration (2003) “The Machinery of Government- Structure and functions of government” Retrieved from <<http://www.dpsa.gov.za/dpsa2g/documents/lkm/mog.pdf>>

committee as well as mechanisms for social accountability/access to information in the implementation of the Funds projects.

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