

## **TISA POSITION PAPER ON THE UNCONSTITUTIONALITY IN THE CDF ACT, 2013**

*Friday 26<sup>th</sup> April, 2013.*

### **Introduction:**

The Institute for Social Accountability (TISA) is a civil society initiative committed towards the achievement of sound policy and good governance in local development in Kenya, to uplift livelihoods of, especially, the poor and marginalized. TISA has been operational since March 2008, and is a locally registered trust previously known as the CDF Accountability Project.

TISA has extensively been engaged in the management and utilization of decentralized funds (often called devolved funds). Besides monitoring accountability, TISA also offered supply side capacity building sessions targeting Constituency Funds Committees CDFCs and CDF project Committees (PMCS) in over 30 constituencies in Kenya. We are concerned with the process of enactment and content of the Constituencies Development Act, 2013. This is detailed below:

#### **(1) Violation of the separation of powers principle**

The Constitution of Kenya creates the Legislature, the Executive and the Judiciary as different arms of national government and provides for separation of powers between them.

*Article 1 (3) of the constitution states that the sovereign power under the Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—*

- (a) Parliament and the legislative assemblies in the County governments;*
- (b) The national executive and the executive structures in the County governments; and*
- (c) The Judiciary and independent tribunals.*

Whereas, the supremacy of the Constitution is recognized.

*Article 2. (1-3) states that the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.*

- (2) No person may claim or exercise State authority except as authorised under this Constitution.*
- (3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.*

#### **(2) Intergovernmental Relations:**

The constitution provides for national government and county governments and the principles that guide their relationship.

*Article (4) states that the sovereign power of the people is exercised at—*

- (a) The national level;*
- (b) The County level.*

The constitution further provides the principle that guides the relationship between the national government and county governments.

*Article 6(2) states that the governments at the national and County levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.*

The Constitution also provides for national values and principles that bind all state organs and persons. This is provided for in Article 10 (1): The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them–

(a) Applies or interprets this Constitution;

(b) Enacts, applies or interprets any law; or

(c) Makes or implements public policy decisions;

(2) The national values and principles of governance include--

(a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.

Whereas, The Constitution clearly demarcates the functions of the national and the County governments. **Read the 4<sup>th</sup> Schedule.** The following functions of the County government are fundamental:

a. 8<sup>th</sup> function: *County planning and development*

b. 14<sup>th</sup> function: *Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.*

Whereas, The Constitution establishes the County Executive Committee as the executive authority in the County government.

**Article 179 (1) states that** *the executive authority of the County is vested in, and exercised by, a County executive committee.*

Whereas, The Constitution further acknowledges the principle of separation of powers between the executive and legislative arms of the County government.

**Article 185 (1) states that** *the legislative authority of a County is vested in, and exercised by, its County assembly;*

**Article 185 (2)** *A County assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the County government under the Fourth Schedule;*

**Article 185 (3)** *A County assembly, while respecting the principle of the separation of powers, may exercise oversight over the County executive committee and any other County executive organs.*

### **(3) Fiscal Transfers (Conditional and Unconditional) to County Governments:**

Whereas, the CDF Act, 2013 purports to establish a national grant as provided under **Article 202(2) ‘County Governments may be given additional allocations from the national government’s share of the revenue, either conditionally or unconditionally’;**

We find that the CDF Act, 2013 is unconstitutional on several grounds. Upon this basis we seek to petition the court to suspend the implementation of the CDF Act, 2013 and provide a period of 30 days upon which parliament shall review the act to conform to the letter and spirit of the constitution and to be consistent with the devolution laws.

### **(4) Unconstitutionality of CDF Act, 2013**

**(i) The Act disrespects the functional distinctness of County Governments**

Article 189(1) of the constitution provides that **Government at either level shall perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of government at the other level and respects the constitutional status and institutions of government at the other level and in the case of county governments within the county level.**

The 4<sup>th</sup> Schedule of the Constitution clearly demarcates the functions of the national and the County governments, for instance;

- Local infrastructure projects: county abattoirs, county transport, markets, county public works and services.
- County planning and development
- Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

The Act disrespects the functional distinctness of County governments on several grounds including:

- a. The CDF Act provides a framework for the assignment of funds to implement development programmes in the counties without regard to the constitutional distribution of functions between national and county governments.

**CDF Act 2013- Section 3: The provisions of this Act shall apply, as more specifically provided for in the Act, and shall ensure that a specific portion of the national annual budget is devoted to the constituencies for purposes of infrastructural development, wealth creation and in the fight against poverty at the constituency level.**

**b. Types of projects**

The CDF Act, 2013 states that the projects to be implemented should be community based; CDF funds projects that fall within the functional jurisdiction of county governments. **CDF section 22(1) projects under this Act shall be community based in order to ensure that the prospective benefits are available to a widespread cross section of inhabitants of a particular area.**

**c. Establishment of development committees for execution of county functions**

The CDF Act, 2013 purports to assign national government and the members of the National Assembly the responsibility of mobilizing the community for purposes of establishing executive units at the sub County level without regard to the separation of powers of different arms of government and the distinctiveness of the levels of government. **CDF 24(3-a) within forty-five days of being sworn in, each Member of Parliament for a particular constituency shall convene open public meetings of registered voters in each of the elective wards in the constituency to establish ward and constituency level development committees.** County government functions cannot be performed by an institution under the National government unless under provision contemplated in Article 187 and 189 of the Constitution.

**(ii) Disrespects Article 202(2) on sharing of revenue**

**a. Ordinary revenue vs. National government revenue**

CDF Section 4(1-a) CDF shall be a national fund of moneys of an amount not less than 2.5% of all national government ordinary revenue; this provision is unconstitutional as Article 202 (2) is clear on the fact that the monies for the conditional funds (CDF) will be sourced from the National government's allocation of revenue. **County Governments may be given additional allocations from the national government's share of the revenue, either conditionally or unconditionally;**

**b. County vs. Constituency**

CDF Act Sec. 4(1) (c) provides that CDF shall be disbursed by the national government through the Board to **constituencies** as a **GRANT** to be channeled to the **constituencies** in the manner provided for under the Act.

This contradicts the constitutional provision art 202(2), by stating that the national government disburses monies to the **constituencies** and not to the **counties**. The Constitution establishes government at only 2 levels national and county (Article 1(4)). The constitution is very clear that **County governments** may be given additional allocations from the national government's share of the revenue, either conditionally or unconditionally. It is therefore unconstitutional to allocate funds to the sub county level.

**(iii) MP's and Senators involvement in the implementation of projects through the County Project Committee violates the principles of separation of powers:**

The CDF Act, 2013, Section 36, 37, 38 and 39 unconstitutionally provides for a leaders meeting called 'County Projects Committee' to undertake functions assigned to the county government and in contravention of the purpose for which different elected offices are created. MPs and Senators should restrict their roles to oversight over the use of public funds

**5. Inconsistencies in the CDF Act**

**(i) County Planning Framework:**

The CDF purports to undertake the planning function for identification of CDF projects through its own institutions the ward development committees, Constituency Development Committees and the County Projects Committee. (CDF sections 21, 22, 23, and 24).

Both the County Government Act, 2012 and the Public Finance Management (PFM) Act, 2012 create elaborate mechanisms for planning and funding of all county development projects. Under Section 126 of the PFM Act it is anticipated that all projects within the county will accord with the approved development plan approved by the County Assembly. The planning process provided for under the CDF Act runs counter to this process and can lead to duplication of projects and consequent misuse and misapplication of public resources.

The County Government Act, 2012 provides among other things an elaborate framework for the County to undertake the function of County Planning and Development as provided for in the Constitution.

Article 104 (1) of the County Government Act, 2012 states that a County government shall plan for the County and no public funds shall be appropriated outside a planning framework developed by the County executive committee and approved by the County assembly;

Article 104 (3) *The County government shall designate County departments, cities and urban areas, sub-counties and Wards as planning authorities of the County;*

Article 104 (5) *County plans shall be binding on all sub-County units for developmental activities within a County.*

The County Government Act, 2012 provides for the County to establish planning units.

Article - **105** (1) *states that a County planning unit shall be responsible for—*

(a) *Coordinating integrated development planning within the County;*

(b) *Ensuring integrated planning within the County;*

(c) *Ensuring linkages between County plans and the national planning framework; and*

(d) *Ensuring meaningful engagement of citizens in the planning process;*

(e) *Ensuring the collection, collation, storage and updating of data and information suitable for the planning process;*

The County Government Act, 2012 provides for the link between planning and funding of development activities in the County that respects the constitutional assignment of functions.

**Article 107** (2) *The County plans shall be the basis for all budgeting and spending in a County.*

#### **(ii)Emergency reserve**

The CDF emergency reserve duplicates the role of the County Emergency Fund.

**Section 12 of the CDF Act, 2013** provides

(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.

(2) The Constituency Development Fund Committee shall determine the allocation of the emergency reserve in accordance with the Act.

Sections 110 and 111 of the PFM Act, 2012 establish the County Emergency Fund (CEC): CEC may with the approval of county assembly establish an emergency fund for county governments which shall be administered by the CEC member for finance.

We recommend Parliament to expeditiously review the CDF Act, 2013 to comply with the Constitution failure to which CDF may be scrapped entirely and deny counties a valuable source of development revenue.

**This statement is prepared by the Institute for Social Accountability in the interest of the public good.**

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