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Review of the Kenya Uwezo Fund Bill 2015

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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.

A Review of the Uwezo Fund Bill

1. Background

The Constitution of Kenya creates two levels of government at national and county level (Article 1(4)) and assigns functions according to Article 186 which classifies functions as exclusive, concurrent and residual. These are in turn detailed in the Fourth Schedule. The assignment of responsibilities for the performance of public functions is 'tantamount to the distribution of political power in the state and is consequently a matter of fundamental importance in every devolved system' (Robson, 2006:1).

The 2015 report of the Working Group on Socio-Economic Audit of the Constitution of Kenya, states that the 'division of functions enhances the concept of separation of powers and checks and balances' (RoK, 2015: 24). The report further stresses that the 'devolution of power and resources is perceived as a means of enhancing the concept of good governance by incorporating vertical separation of powers and increasing the ambit of checks and balances' (RoK, 2015: 23).

According to Robson (2006), the assignment of responsibility to national and sub-national governments sets in place the structure for representative government. It presents the locus of accountability as it allows for the assignment of responsibility and enforcement. Proper assignment of responsibility directly impacts efficiency.

Decentralized fiscal governance is not new to Kenya, however functional overlaps and duplication have marred the effectiveness of service delivery in Kenya. The Task Force to Devolved Government Report of 2011 report stresses that the absence of clarity in the assignment of responsibility for service delivery greatly compromised service delivery under the previous constitutional dispensation. The Working Group report commissioned by the National Assembly also decries the impact of duplication of government initiatives and funds, and the resultant inefficiency stating.

With the centralisation of power and resources came inefficiency and bureaucracy in governance. The centralised system of governance stifled service provision and led to a decline in service delivery. The government responded to this by proliferating central government channels with field offices of central government ministries, the Provincial Administration, specialised funds, and later the parliamentary constituency level structures. While these multiple channels may have been intended to address service delivery, they contributed to further decline by fragmenting efforts and resources, creating confusion of roles and causing general inefficiency (RoK: 2015, 29).

The report goes on to state another area that has historically compromised functional clarity in service delivery is the tendency for either level of government is to establish structures and assign resources to features within their limited mandate as opposed to the use of harmonised and coordinated intergovernmental mechanisms. The report notes that by failing to undertake elaborate scrutiny of policies and programs from a functional approach the legislatures are perpetuating functional overlaps and duplication and resultant wastage and inefficiency. The report recommends that

All legislation emanating from National and County Assemblies should incorporate a schedule outlining the functions to be performed by each level of government and

define to the lowest possible level the functions for the area under legislation, indicating exclusive functions for the National Government and County Government and concurrent functions. All the functions in the legislation should then be compiled into a compendium of assigned functions in a distinct legislation for the purposes of defining a comprehensive list. (RoK: 2015, 29)

2. Context of Affirmative Action/Enterprise funds

Whereas government at both levels has established numerous initiatives to address unemployment and to promote inclusiveness to employment opportunities, these funds face a myriad of problems. According to KIPPRA these include slow or delayed payments, corruption which increases the cost of doing business and distorts conventional competitive forces. The sector is also not able to access other business support services, including technology and infrastructure, which further affects the productivity of enterprises. Informality, limited access to credit, and inefficiency are other challenges cited by the Kenya 2013 Enterprise Survey (Kippra, 2016). The report calls for a comprehensive multiagency coordinated approach to deal with these challenges.

A social audit report of four funds by TISA found numerous accountability barriers in the administration of enterprise and affirmative action funds; They erroneously treat Youth, women and PWDs as a homogenous group and the subsequent design locks out the most needy who are often not able to meet the requirements of the fund. They have a very high default rates implying ineffectiveness for the interventions.

In FY 2012/2013, 2013/2014 and 2014/2015, the women enterprise fund non-performing loans accumulated to Kes 63,370,000 , Kes 64,600,000 and Kes 92,577,000 respectively.

The TISA report found that despite the wide array of funds available, much needed LSO and LPO financing is not widely available and where it is, criteria for qualification are prohibitive. The linkage of the Uwezo Fund needs to the Constituency Development Fund (CDF) framework, was also found to create a situation where the constituency fund structure does not have adequate accountability provisions resulting in abuse of powers by local officials by favouring beneficiaries or soliciting bribes. The study recommended that there is need to involve the youth, women and PWDs in the design of the fund products to ensure that the products and processes respond to the needs of the target population. The study also called to greater beneficiary involvement in the implementation of the funds for accountability purposes. Linking the funds to the member of Parliament has also created a culture of clientelism whereby MPs are able to influence allocation of the fund toward political allies.

Lastly, the presidential taskforce of Parastatals reforms¹ that recommended the merging of all agencies, funds and initiatives supporting, financing and developing SME's in Kenya into the Biashara Kenya entity. This has not happened. It is unfortunate that the Parastatal reforms report failed to address functional mandates in the administration of the enterprise and affirmative action funds.

3. Functional Mandates Enterprise and Affirmative Action

The Fourth Schedule on the distribution of functions between the National and County Governments Part 1 assigns National Government the following relevant functions.

14. Consumer protection, including standards for social security and professional pension plans.

32. Capacity building and technical assistance to the counties.

In turn Part 2 assigns County Governments the following relevant functions;

7. Trade development and regulation, including—

(a) markets;

(b) trade licences (excluding regulation of professions);

(c) fair trading practices;

(d) local tourism; and

(e) cooperative societies.

14. 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 and participation in governance at the local level.

4. Review of Uwezo Fund Bill

a. Functional Adherence

The bill makes no effort to unbundle functions to be carried out under the bill. On the face of it, it appears to encroach upon county government mandates. It also fails to provide intergovernmental cooperation/transfer agreements for sub-functions under its jurisdiction on the basis of subsidiarity (Article 174(f)). It therefore does not meet the constitutional standard of a functionally aligned bill, and a preliminary reading indicates that national

¹<http://www.cofek.co.ke/Report%20of%20The%20Presidential%20Task%20force%20on%20Parastatal%20Reforms.pdf>

government institutions seek to undertake functions which are under the exclusive functional mandate of county governments.

b. Separation of powers

The Uwezo fund is presently administered at the electoral constituency level. The bill proposes to establish a committee under the patronage of the Member of Parliament.

In this regard the bill offends the principles of separation of powers by purporting to use the constituency as a level for development contrary to the Constitution which only recognises the national and county government as levels of development. The role of the MNA in the bill would also have to be scrutinised more carefully to assess if those roles concord with the responsibilities of a legislative member or creates a conflict of interest.

c. Article 201 on prudent and accountable use of resources

As elaborated in the introduction there exist numerous funds and schemes which overlap and duplicate each other. The bill makes no effort to address the issue of harmonisation. It also does not seek to align itself with the planning and budgeting system at either level of government likely to lead to even further overlaps and duplication. It is also noteworthy that county governments have themselves established enterprise and affirmative action funds (see accompanying schedule). It is unfortunate that under the devolved system of government, historical duplication and overlap of development initiatives has reached a new fevered high resulting in wastage of public resources.

d. Enterprise Needs

It is noteworthy that the bill is being proposed outside of a policy context and therefore is likely to replicate and aggravate the already observed shortcomings of the present fund structures including corruption and clientelism, ineffectual impact evidence by high default rates, inefficient, poor targeting and accessibility. In short the fund is political in nature and not a sound development solution and is unlikely to make an impact on unemployment.

e. Affirmative Action Needs

The failure to adequately address sub-groups of youth, women and PWDs in the targeting of the funds has contributed to continued marginalisation of proposed beneficiaries. In the absence of stronger targeting tools and mechanisms the funds will continue to benefit an elite at the expense of the marginalised majority.

f. TAP provisions

Similar to other funds established by government such as the CDF, the bill does not contain adequate transparency, accountability and public participation provisions. This is likely to exacerbate the culture of impunity in administration of the funds. As observed by the Working Group on Socio-Economic Audit of the Constitution of Kenya

...endemic corruption reached a level where it impacted negatively on the effectiveness of state institutions and particularly their ability to provide essential public services. The general decline of public services and ineffectiveness of public institutions, most of it traceable to endemic corruption, led Kenyans to question the *status quo* and added impetus for the clamour for reforms. (RoK, 2015: 17)

It is unconscionable that parliament continue to design funding schemes which by their very nature abet corruption and clientelism institutionalise the very culture of impunity which the Constitution of Kenya seeks to redress.

5. Recommendations

- a. The bill be withdrawn immediately and revised to provide for a functional framework informed by Article 6(2) and the fourth schedule;
- b. The National Assembly in the division of revenue process make provision for a comprehensive review of existing funds to inform an appropriate policy framework including a comprehensive multiagency coordinated approach, constitutionally aligned functional assignment and intergovernmental relations, technical capacity building among other identified gaps;
- c. The National Assembly generate regulations on minimum Transparency, Accountability and Participation guidelines to inform all funds.
- d. The court provide appropriate jurisprudence on the functional application of funds such as in the case of the NGCDF and AASDF.