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Review of the Public Finance Management (Affirmative Action Social Development Fund) Regulations, 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.

Introduction

The Public Finance Management Act- Affirmative Action Social Development Fund Regulation, 2015 **is unconstitutional** mainly due to the following reasons:

1. The role of the Women MPs in the fund goes against the functions of the Members of Parliament as outlined in Article 95. The funds provides for women representatives to take up executive functions **violating and the principle of separation powers**.
2. The fund **undermines the principle of subsidiarity** as provided in Article 187 (1) of the constitution as the most of the activities and functions to be funded through AASDF are primarily functions assigned to the Counties. Counties, through the requirements of the County Government Act, 2012 and the Public Finance Management Act, 2012, are to provide elaborate mechanisms for planning and funding of all county development projects. Because of the structure of the AASDF Regulations and their framework of administration, counties would be unable to factor it into their planning resulting in the possible duplication of functions undertaken within a County.
3. The fund **undermines the constitutional principle of prudent use of public resources** as it duplicates existing social assistance measures by the national government outlined in the Social Assistance policy and Act

4. The fund purports to **compliment CDF, which was declared unconstitutional.**

In addition to the foregoing, the regulations were made without justification on funding gaps within line ministries, which the fund is supposed to finance outside the legitimate budget process. The public finance management regulation 207 provides that the cabinet secretary of finance can establish a national fund for a national government entity under which the functions of the fund fall with justification on what gaps the fund intends to fill.

Analysis matrix

| | <u>Provisions in regulations</u> | <u>Point of Concern</u> |
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| 1 | The Affirmative Action Social Development Fund and Regulations | The framework is drafted outside the Social Assistance policy/Act and related organs within the Act which guide and coordinate the implementation of social assistance programmes in the Country. This duplication amounts to imprudence use of resources contrary to Article 201(d) of the constitution |
| 2 | (Regulation 4) Sources of the Fund | The regulation does not clarify the source of funds for appropriation. It also does not provide any role for the CRA in line with Article 216 |
| 5 | (Regulation 6) Object and purpose of the fund | The object and purposes of the fund are to complement CDF which has been declared unconstitutional by the High Court |
| 5 | (Regulations 6-2) | The objects of the fund almost entirely address functions assigned to the county governments contrary to Article 6(2) and 186. |
| 3 | Regulation 8 Composition and Establishment of the board | Duplicates in part the composition of the National Social Assistance Authority Board as provided in Section 5 of the Social Assistance Act |
| 4 | Regulation 9 on the functions of the board | Usurps the role of the National Social Authority of sponsoring, developing and operating social services projects in the country |
| 5 | Regulation 11 (1) Fund disbursement and the role of parliamentary committee | The role of parliamentary committee (Labour and Social Welfare as per the second schedule of the parliament standing orders) are outlined in Standing Order No. 216 are limited to reviewing effectiveness of implementation of policies, investigations and vetting |
| 6. | Regulation 11 (3) Annual disbursements from the Fund to each respective County shall be based on equal amounts per constituency. | The regulation is inadequate as it fails to appreciate the different social needs of constituencies |

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| 7 | Regulation 13 emergencies | <p>There are national and county resources already set aside to address emergencies. Schedule 4 of the Constitution assigns the national government “disaster management” functions. Regulation 13 (1) runs contrary to the Constitution’s assignment of functions and also poses the risk of operational conflict between the national and county governments.</p> <p>Further, the Social Assistance Act makes provisions for emergencies assistance</p> |
| 8 | Regulation 16 (1) Functions of the committee | <p>Duplicates functions of the Social Assistance Authority Board which may also set up such committees as it deems fit</p> |
| 9. | <p>Role of the Women Rep in the fund</p> <ul style="list-style-type: none"> • 16(3) Ex officio member of the County Committee • 16(6) Convenes first meeting and presides over elections of the County Committee • 16(12) Is Patron of the Fund • 18(1) County Coordinator of the County Secretariat shall be appointed in consultation with the County Women Representative from that county. | <p>The County Women Representative role in the fund offends the principle of separation of powers. The fund takes a direct implementation role (Regulations 6(2).</p> <p>The structure and spirit of the Constitution establishes the principle of separation of power. The Constitution creates legislative organs at both the national and county levels that are separate and independent from the executive.</p> <p>Importantly, the functions of Parliament relative to financial matters are spelt out in Article 95 of the Constitution which states:</p> <p style="margin-left: 40px;">(4) The National Assembly—</p> <p style="margin-left: 80px;">(a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve;</p> <p style="margin-left: 80px;">(b) appropriates funds for expenditure by the national government and other national State organs; and</p> <p style="margin-left: 80px;">(c) exercises oversight over national revenue and its expenditure.</p> <p>Administration and implementation of projects for which the National Assembly has determined the allocation and appropriated the funds is not a function assigned to the National Assembly.</p> <p>Further, Articles 129 and 130 assigns the executive authority to the national executive comprised of the President, Deputy President and Cabinet.</p> |
| 10 | Regulations 19 (2) and (3) Projects are identified at the constituency level and through the CIDP | <p>The constituency is not a unit of county administration and as such this should be considered a <i>parallel and unconstitutional structure</i> and further all development projects should be implemented within the CIDP framework</p> |