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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.

### **Introduction**

The Constitution provides that the role of the Member of Parliament is legislation, representation and oversight<sup>1</sup>. The effect of the Kenya Uwezo Fund Bill 2015 erodes the degree of separation of powers between the Executive and the Legislature. This is because the legislature should not play any role in distribution and expenditure of public resources other than the role they have in the budget process during which they approve executive spending. The function of the Members of Parliament as patrons of the fund, in addition to undermining the principle of separation of powers, means that members of Parliament obtain a stake in the fund, which may further reduce the credibility of MPs in the division of revenue process between the National and County Government.

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<sup>1</sup> Article 94, 95 and 96

## **Constitutionality of the Kenya Uwezo Fund Bill 2015**

### ***Question 1: Does it adhere to functional roles of the constitution of Kenya 2010?***

The bill provides:

#### *6.0 Objects and purpose of the fund*

- a) To promote youth women and PWD enterprises at constituency level;*
- b) to generate self employment of the youth, women and PWD;*
- c) to model an alternative framework for community driven development;*
- d) to attract and facilitate MSME ..etc;*

Whereas the constitution of Kenya provides:

#### *Schedule 4 Part 2*

*(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 powers and participation in governance at the local level.*

**Conclusion: The bill directly encroaches the functional mandates of county governments and is therefore unconstitutional.**

### ***Question 2: Does the bill provide requisite intergovernmental mechanisms in accordance with Articles 6(2) and 189(a)?***

No. This bill entirely fails to recognize the county governments and their structures. It makes no provisions for intergovernmental coordination. In this regard, it is unconstitutional. It also lacks any linkage to county planning structures.

**Conclusion: The bill lacks the requisite intergovernmental approach and mechanisms and is therefore unconstitutional.**

### ***Question 3; Does the bill adhere to principles of prudent utilization of resources as provided under Article 201 (d) ?***

No. The bill purports to establish a management framework for the fund including a board (s10) and constituency level fund committees. These structures would be additional to similar structured established under unconstitutional laws such as the CDF, AASDF and so

forth. It also duplicates existing management structures such as the Gender commission, youth Council, which have similar management boards.

***Question 4: Does the bill provide for openness and accountability including public participation (Article 201(a) in its set up?***

The bill fails to provide provisions for a fund manager at the devolved level and proactive disclosure of information to citizens.

***Question 5: Does the bill respect the separation of powers?***

The bill provides that the fund will be administered at the national level and constituency level. The constituency is an electoral unit, implying that it is a legislative fund.

Section 33 gives the MP (presumably MNA) the role of patron, these in themselves do not appear to offend the principle of separation of powers except to the extent that they encroach the reasonable mandates of the executive and communities.

Section 34 (h) provides for the CDFM as an ex-officio member of the constituency committee- this is problematic because the CDF has been declared unconstitutional and the position no longer exists; It also provides an indirect link the MNA in an implementing capacity hence offending the principle of separation of powers.

**Conclusion: The Bill offends the principle of separation of powers and is unconstitutional.**

**Final Word:** It is disturbing that there is no youth employment policy in the country at present. The fund therefore lacks a policy anchor on which it can be justified. The bill is likely to end up as another populist one-off initiative driven more by the need to campaign for votes than development needs. Furthermore the bill is blatantly unconstitutional and another disappointing initiative by the National Assembly to usurp county functions for political mileage. Finally, by making direct reference to the CDFAct 2013 institutions t demonstrates abject impunity on the part of the National Assembly in failing to respect court rulings.