



## 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 extent 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.”<sup>1</sup> 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 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.

**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 expressly 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

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<sup>1</sup> 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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