



## THE CDF ACT HAS NO TRANSITION CLAUSE: WHAT NEXT?



*The overbearing role of Members of Parliament in the framework of CDF mechanism is not in doubt; the legal and structural challenges that keep dosing the fund despite a fairly elaborate acceptance is altogether common knowledge. This article however turns the debate round by asking fundamental questions concerning the transition process as regards CDF.*

By Gedion Ochanda

The term of the ninth Parliament has ended. Legally there are now no MPs until the next Parliament is convened in 2008. So what happens to the fund? What is the process (if any) of handing over? What happens when a former Member of Parliament loses their seat and thus their constituency in the upcoming December elections? Under what arrangement would the former MP hand over? What happens to the CDF committees and the ongoing projects?

These fundamental questions call for a thorough examination of the

law and the operational policy framework for CDF. The situation has however, further deteriorated through the hasty amendment of the CDF Act, 2003 which unfortunately, similarly ignored the issue of transition.

### Transition in the Act

The law establishing the CDF (Constitutional Development Fund Act, 2003) and the attendant regulation (The Constituency Development Fund Regulations 2004) are very clear on the role of MPs in constituting constituency committees. The commit-

tees are required to be constituted within the first thirty days of a new Parliament. The regulations also add that the members to these committees, other than the MP, Councilors and Ex-Officio members, hold office for a period not exceeding two years; but are

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## The CDF Act, 2003 has no Transition Clause What Next?

eligible for re-appointment for an additional one term of two years. If gazetted, the amendment Act changes the period to three years instead of two years.

However, the laws are completely quiet on the end term of a Member of Parliament as pertains CDF. Since the dissolution of Parliament on 22 October, 2007 there are no MPs in Kenya. Why then should immediate former MPs preside over public funds until the next committee is constituted by the next MP? According to the Act, MPs are accountable to Parliament and are thus now in a situation where they do not account to any authority since Parliament is dissolved.

In a similar manner, the law is not clear on the end date of the CDF committee. As indicated earlier, there are only two clear terms of two (2) years each in a five (5) year constitutional term of Parliament. By implication it means that a third and final term of two (2) years will be shared between two (possibly different) MPs after an election marking the end of a 5 year term. It further implies that when a new MP constitutes a new committee in the first thirty days of a new Parliament, technically there will be two parallel committees running in the first year of a new Parliament.

The two year term of the previous Parliament constituency committee shall have not lapsed. The law does not state what a new MP is to do with an already existing committee constituted by the MPs predecessor, yet that new MP has the authority to constitute their own new committee. Handing over arrangement from one committee to the other is simply not there.

The Amendment Act does not help the situation either. It has proposed three year period for committees, meaning that committees will work for six years as opposed to the constitutional five year term of Parliament. The final sixth year will again encroach into the next Parliament.

Handing over arrangements would have been made much easier if the public officers were in charge of the due processes of the CDF. The practice is that any staff handling CDF is answerable

to MPs, a situation that the recently recruited accounting officers are finding very tough to handle, their acceptance notwithstanding. The District Development Planning Officers role under the CDF Act has also long been crippled. They are ineffective and un-protected by the same law that regulates them so they have chosen to sit back and let the MPs run the show.

The regulations only provide for: "*in the event that the fund is wound up (abolished)*" then the balance and credits get credited to the exchequer. This means that treasury has no say on the fund as long as the law is operational.

### Possible consequences;

- The constituency committees will continue transacting business including financial obligations without due regard to electoral changes at least in the initial months preceding the next Parliament.
- Outgoing MPs will continue using CDF monies as they wish and particularly those who have less chances of re-election.
- Increased activities during election periods as a way of wooing voters

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### Transition and Projects:

The projects under the Act do not have end dates. Any uncompleted project from a previous financial year is allowed to remain on the project list and is allowed to continue attracting funding in successive years. The provision does not obligate any new Member of Parliament to complete what was started by a previous member. But given possible differences in approach and prioritization of needs, new MPs might understandably abandon projects started by their predecessors.

### Unsecured projects:

Experiences drawn from some constituencies indicate that there are a number of projects, particularly those that involve construction of offices, social centers, and resource centers that were built

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on plots or parcels of land that are not public, yet there are no arrangements for the sale of the same. Instances have been sighted where offices were built on current MPs, relatives or cronies plots of land and what transpires is that new MPs will not be able to access these offices and might end up paying rents on CDF supported projects.

In conclusion, both the CDF Act 2003, and the

Amendment Act in October 2007, does not address the critical issues of transition from one CDF Committee to another. The Amendment Act further entrenches the role of Members of Parliament by removing the little checks and balances necessary for the CDF. This contradicts the widely held view that MPs role in CDF negates the constitutional principle of checks and balances as it also reduces the effectiveness of Parliament.

## CDF TAKES A BEND IN THE RIVER

*The Constituency Development Fund (CDF) has in the last five years established itself as a starring African model of economic devolution. The fund's first five years have however revealed some worrying shortcomings.*

By James Wamugo

The Constituency Development Fund (CDF) was an initiative established in 2003 to channel 2.5 per cent of the national budget directly to the 210 parliamentary constituencies. The constituency's Member of Parliament (MP) serves as the patron of the fund at the constituency level with considerable power and influence over the fund.

The funding is distributed to constituencies on the basis of the national poverty index and the poorer the constituency the more money. The fund averages Kshs 10 billion a year which is large enough to fund the richer constituencies with at least Kshs 20 million a year.

By all accounts, the CDF has been a roaring success. Schools, hospitals, roads, water systems and administrative infrastructure across the country have been repaired, expanded or built from scratch.

A reliable indicator of the CDF's success is that it is receiving wide endorsement on the campaign trail from both the government and the opposition. Second perhaps to the free primary education initiative, CDF is the one political innovation of the outgoing administration that is almost certain to outlast the succession of any government in Kenya for several generations. Not surprisingly, the CDF concept is also reportedly get-

ting a lot of attention from other African countries and is likely to be widely replicated across the continent.


### The Paradox of CDF

But CDF as it is currently designed has revealed some worrying weaknesses. The first is that the fund devolves power to MPs rather than to local communities. The area MP constitutes a constituency committee that identifies the projects to be funded and thus by extension wields control of the fund.

This weakness is however, comprehensible. It is in part a reflection of the fund's less acknowledged motivator, namely, the intention of parliament to eliminate the, historically abused public fundraising system, otherwise known as harambee.

The avoidance of the harambee predicament has however spawned another hazard. This is that the success of the fund is now tied to the character, organizational acumen and perception of the area MP. Where the MP is clear minded and organizationally sophisticated, the CDF has performed wondrously; where the MP is less skilled or simply bad intentioned, the CDF has failed dismally. This explains why some constituencies have

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made near-incredible developmental leaps in the last five years while others have corruption and fund mismanagement cases in court and yet others – at least 30 by the time Parliament was dissolved – are in such an organizational muddle that they could not apply for their latest instalment of funds from the exchequer.

The CDF can therefore be said to have sanitized the country's politics by replacing the harambee system with a more rational and developed system of funding infrastructural development at the community level. Better still, even the tight linkage of the fund to the personality of the area MP has spawned a pleasant governance paradox. Simply put, CDF has boosted governance at the local level by, in effect, setting up the nearest thing to a national performance rating for MPs.

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For many constituents, the basis of judging the performance of their MP has now been reduced to their perceived success or failure in administering and utilising the CDF monies. The effect of this is that there is now a new sustained pressure for MPs to give value for money. For Kenya this is a novel governance threshold. It means that the "business" of politics is being pushed out

of the shadows of rhetoric and theatrics into the light of economic management with the attendant governance considerations.

### Seeds of Degeneration

A more worrying danger for CDF is a little noticed legal sleight of hand imbedded in the Constituency Development Fund (amendment) Bill 2007 that was among one of the last

acts of the 9th Parliament before it was dissolved on October 22 2007.

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## CDF Takes a Bend in the River

The new law was also noted for partially shifting the control of the Fund from the Members of Parliament to Fund Managers who will now serve as accountants to the fund. A lot of time was also given to the refusal by MPs to tie women representation in the fund to the two major national women's interest organizations, Maendeleo ya Wanawake and the National Council of Women of Kenya.

Less noted was the fact that the new law also expands the uses of the fund to include the purchase of machinery and equipment, environmental programmes and bursaries for bright, needy students. Until now the CDF has been restricted to infrastructural projects.

The effect of expanding the expenditure scope of CDF is that the fund is now headed the same way as other failed devolution funds such as the 1993-4 District Focus for Rural development fund and the Rural Development Fund of 1969-70. The argument here is that the key plank in the overall success of CDF has been its restriction to infrastructural development.

By their very nature, infrastructural projects are straight-forward, visible and, more importantly, easy to cost-verify. This has, by default or design, given the fund an inbuilt security against pilferage, waste or accounting mischief. As the quick resort to court has illustrated, the restriction to infrastructural projects –and exclusion of salaries and supplies – has effectively made it politically expensive for MPs or their cronies to misuse or divert funds.

In contrast, the new law now ties the fund ever more to the character of the MP. Where, as is inevitable in some areas, the MP is motivated by personal interests, the new law accords the MP and their cronies the opportunities to 'hide' expenditure in the murkier details of machinery supplies, environmental projects and bursaries to needy children. The bursary component is particularly dubious since there is already a fund that serves that purpose and which would have been directly increased if the intention was in-

deed to increase the funds available for bursaries. Worse still, the justification of increasing bursary funds is incomprehensible in a situation where there is free primary education and agreements across the political divide for free secondary education to commence in the next school term. The existing bursary funds that were serving both secondary and university education for needy students are therefore set to be restricted to university students come the new year with the effect that there will be more funds to go round even without additional funds being added to the bursary fund.

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The consequence of the new law therefore is that it will be a lot more difficult for the public to untangle the web of expenditure of their CDF – and even where MPs openly channel funds to their preferred supporters and sympathizers, it will be legally difficult to contain them since the law now allows the use of funds in areas outside direct infrastructural development.

### Role of the Public

The new development lays new responsibilities on the constituents as well. It will now be twice as important for constituents to elect MPs who are trustworthy and with good governance and leadership competencies and sense of prioritization. Constituents will also need to be more demanding of their MPs. While there are indications already that the public will not take incompetence or corruption lying down, the task of tracking CDF expenditure will be a lot more time consuming and complex. And since the national management organ in charge of the fund will not be subject to the regulation of the State Corporations Act, the public will have little scope to exert political pressure on the national government to police the fund.

The new CDF order means that after five years of grand strides in community level development, the future prospects of the CDF have shifted to a more difficult terrain – and like all other aspects of good governance, will depend on the unending and costly diligence of the people.

## DO YOU THINK THE ANTI-CORRUPTION AGENDA HAS BEEN A KEY CAMPAIGN ISSUE?

*Anti-corruption agenda has been a conspicuous feature of previous election campaigns in Kenya. But unlike 2002, the ongoing elections campaigns have not propelled governance as a key issue for re-elections, even for the incumbent administration. It against this background that Adili sought peoples opinion on how well they think the anti-corruption agenda has been addressed in the on going elections campaign. Here are the excerpts:*

Martin Murigo, 34, a truck driver feels that it would be useless for politicians to make anti-corruption pledges to the electorate. According to him, Kenyans have been duped severally over the commitment of new governments to fight graft and thus do not need another "fake promise." Murigo singled out the National Rainbow Coalition (Narc) in which Kenyans had so much hope but instead turned out to be the greatest traitor. "Even former President Moi's administration has never betrayed the trust of Kenyans like Narc did"

The government was elected overwhelmingly on a platform of zero-tolerance to corruption, but what did we get

in return? The birth of Anglo Leasing, the 'burial' of Goldenberg and so many other bad things" decried Murigo, emphasizing: "Personally I would not listen to any politician make an anti-corruption pledge!"

Murigo's sentiments were echoed by 23-year-old Amina Salma who notes that the current campaigns are acting as a perfect recipe for corruption in the next government.

The hairdresser pointed out that the three major political parties are vulnerable to manipulation from in-

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### Election Corner

#### Irregularities Related to the Campaigns

- The use of government personnel, equipment vehicles and other resources. Involvement of civil servants in partisan campaigns.
- Presence of absence of security personnel and their behavior during campaigns meetings. Things to look out for include harassment of candidates by security personnel and partial provisions of security during rallies.
- Unequal political coverage of candidates by the media violence, intimidation, threats and incitements of voters.
- Disruption of campaign meetings.
- If campaigns do not end on the eve of polling day (at least 12 hours).

#### Irregularities Before Polling Day

- Buying or destruction of voting cards
- Trying to influence voters, poll watchers or election officials by bribery or promises of jobs, loans, promotion or other rewards.
- Verbal or physical threats against candidates, voters, poll watchers, election official or their families.
- Disrupting or obstructing the orderly process of preparing for voting day by spreading false reports and interfering with transportation.
- Presence of voting materials in un-official places.
- Violence

#### Irregularities on Polling Day

- Campaigns poster, t-shirts or banners worn or displayed within 400 meters of the polling stations or use of loudspeakers by anyone other than the presiding officers
- Polling clerk, Presiding officers and other electoral officials showing lack of experience and knowledge of electoral procedure
- Destruction, substitution or removal from the polling stations of election materials.
- Missing electoral material such as ballot papers and boxes, voting booths, indelible ink, Electoral Commission stamps etc.
- Inadequate election material for example not enough ballot papers or not enough ink
- Failure of the election officials to open and turn ballot boxes upside down to show they are empty before voting begins.
- Ballot papers which were not wrapped and sealed at the start of voting or ballot paper containing writing or marks.
- Improper voter identification procedures for example not checking identification documents against the Register of Electors.
- Late opening or closing of polling stations for voters. Polling stations must stay for 12 hours thereafter. ☞

## Do You Think The Anti-Corruption Agenda Has Been a Key Campaign Issue?

dividuals who are putting across demands that will need reciprocation in 2008. "We have been reading from the Press that they are spending billions of shillings within a span of two months. What do you think could be the source of these funds? It must rich businessmen contributing the funds on condition that the Government will either award them contracts or offer protection as they engage in dubious activities," she said. Like Murigo, Salma has dismissed the pledges by politicians to combat economic crimes as hot air. "Sure, some have made good pledges on how they will fight corruption. However, only the illiterate and uncivilized can believe them because once you watch keenly, their actions contravene their words. I think its the right time Kenyan politicians put their monies where their mouths are," she observed.

On his part, John Kasiva, 61, a retired teacher, says only the Orange Democratic Movement presidential candidate Raila Odinga has made a pledge so far to fight graft. "He has made it clear that, if elected, he will implement all the reports that were commissioned by previous regimes in a bid to deal with the past cases. I think this is a move in the right direction," he said. He pointed out that presidential hopefuls, President Kibaki of the Party of National Union (PNU) and Kalonzo Musyoka of ODM-Kenya, have showed their lack of commitment towards the elimination of the vice, going by their move to trash Raila's pledge to implement the reports. He added: "And going by his clean record from his short stints in both Moi and Kibaki's governments it is evident enough that he could be man Kenyans are waiting for"

But 19-year-old Betty Chania, a university student holds a different position on the matter, describing Raila's assertions as driven by personal vendetta. "Surely, if we are talking about fighting corruption, does it mean we go back to 1960s? Unless there is a personal war to fight, I dont think this is advisable." The student noted that the State has so many loopholes to seal that concentrating on past cases would leave corruption thriving inside the government. She added that both the opposition and the Government have personal interests to protect, thus leaving Kenyans on their own. According to her, corruption has featured in the campaigns only when it has affected certain politicians directly "For instance, if you look at the three main parties you see people who

were in the Kanu regime which only got credits for its success for bringing the economy of this country to its knees. These are the people now acting as think-tanks, advisers or financiers. To me that is all fraud!" she quipped.

Joyce Kerubo, 37, an hotelier notes that Kenyans have been waiting to hear a politician pledging to slash the bloated salaries paid to Members of Parliament. Kerubo pointed out that only ODM 'Pentagon' member William Ruto had made the 'noble' promise but this seems to have disappeared in thin air after he failed to clinch the party's ticket. "Although he is now a key leader in the party, he cant convince us that the party would push through with the pledge as he no longer talks about it," she said. The hotelier notes sadly that it is wickedness for less than 300 people to get almost half a billion in salaries as over 20 million Kenyans

continue to live on less than a dollar a day. "If that is not graft at its peak, what is?" posed Kerubo, adding: "I am very disappointed that none of the politicians, in their wisdom or the lack of it, has ever thought about reducing the salaries," she added.

As for 46-year-old Moses Kobia, corruption has subdued under the Narc regime, an indication that President Kibaki was committed towards eliminating graft. This, he said, leaves the opposition on the receiving end to convince Kenyans

what other measures they will put to combat the vice. None of the two other main rivals, he said, has lived up to this expectation. Kobia said: "President Kibaki does not need to convince us how he will deal with graft. He has done this by setting up the Kenya Anti-Corruption Commission, which deals with all types of corruption and whose operations he has not interfered with"

Catherine Mueni says an anti-corruption agenda is important during campaigns, but has taken a back seat this year. According to her, all the key players in the political arena are keen to discuss about power-sharing arrangements than the welfare of Kenyans. Mueni, a 46-year-old businesswoman said Kenyans have been leading wretched lives as a result of high-level corruption in the governments. "The fact that virtually all politicians have given the issue a back seat in their campaigns, means that we citizens of this great country will continue to wallow for another five years. This is a sad scenario in a nation with so much potential," she said.

**The views expressed do not represent TI-Kenya's opinion.**

## Best Practice Suggestion Designed to Address Problem in the area of Election and Campaign Funding.

- There should be a code of conduct agreed between the parties as to how they will conduct themselves during an election campaign so as to ensure that it is seen as being free and fair.
- The Electoral Commission, where possible, establish a forum or debate and consultation with and as between the political parties and ensures that the political parties fully understand their rights and responsibilities with regards to all aspects of their election process.
- Contribution (in cash or in kind) by private individual and corporation should be limited to reasonable amount that would fall short of perceived as buying influence. These limits should not extend to volunteer work.
- Candidates guilty of false declaration of over-expenditure should forfeit the position to which they have been elected.
- Paid-for radio and television advertising should be controlled to acceptable levels, if into altogether banned. In addition, the electoral commission should determine how much free time on public radio and television should be available to each party during the election campaign.
- Election advertising by special interest groups and other authority by particular candidates or parties should be banned to stop circumvention of spending limits by supposedly publicly minded individuals and groups.
- All official of the election Commission should declare their assets income and liabilities both before and after every national election.
- Campaign periods ought not to be too long by truncating them the campaigning cost can be reduced but if they are too short the ruling party will have advantages other opposition parties.

*Adopted from TI Source book 2000*

### Up coming Events

<p><b>Event:</b> Political Corruption and the State of Party Politics in Africa</p> <p><b>Date:</b> November 29th-30th</p> <p><b>Venue:</b> Nairobi, Kenya</p> <p><b>Organizers:</b> TI-S, TI-K and GTZ</p>	<p><b>Event:</b> 18th Annual Conference: Foreign Corrupt Practices Act</p> <p><b>Date:</b> November 13th -14th</p> <p><b>Venue:</b> Virginia, USA</p> <p><b>Organizers:</b> American Conference Institute</p>
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