

A CRITICAL APPRAISAL OF THE CONSTITUENCY DEVELOPMENT FUND ACT⁺

By:

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Therefore, as much as the pressure for immediate results in respect of the horrible status of our roads is intense and much as emotions are high against misappropriation of public funds, we must not act on expediency. Everything must be done constitutionally. We must look long and hard at our established principles and sort out the enduring values of our society lest we let out problems, whatever they may be, rob us of our values and aspirations as embodied in the constitution. That there be a separation of powers between the executive, the legislature and the judiciary is an enduring value which the makers of our constitution intended to be supported and maintained in the manner provided. I find that it would be against the constitutional principle of separation of powers for members of parliament to take part in the actual spending, then submit their annual estimates to themselves in parliament for approval, then query the spending themselves through Public Accounts Committee or the Public Investments Committee. I therefore hold that Section 17(1) of the Kenya Roads Board Act is inconsistent with the constitution to the extent that Members of Parliament participate in the activities of the District Roads Committees in Executive capacities.¹

1.0 Introduction

The striking out of parliamentary Acts in Kenya on grounds of being unconstitutional has become a norm only second in rank to the apparent lethargy on the part of the Parliament of the Republic of Kenya to enact any meaningful number of legislations in any given session. This 'belligerent' contention is not without basis².

Parliamentary loss of credibility through the apparent conspiracy while voting on matters affecting the personal interests of members of parliament in Kenya is not made better by the failure of parliament to enact statutes that pass the test of constitutional scrutiny.

In this paper, we seek to interrogate the issue whether the Constituency Development Funds Act, arguably one of the few land mark achievements of the ninth parliament, passes the test of constitutionality.

It is the authors' contention that in light of the previous jurisprudence from the High Court of Kenya, sitting as a constitutional court, this self declared achievement by the

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¹ Kasanga Mulwa, J. in the case of *Republic Vs Kenya Roads Board ex parte John Harun Mwau*, Nairobi High Court Civil Application No. 1372 of 2000.

² In the case of *Kenya Bankers Association & Others Vs Minister for Finance & Another* [2002] 1KLR 61, The court struck down portions of the Central Bank of Kenya (Amendment Act) 2000 for being unconstitutional. Further in the case of *Republic Vs Kenya Roads Board ex parte John Harun Mwau*, Nairobi High Court Miscellaneous Civil application No. 1372 of 2000 the provisions of the Kenya Roads Boards Act was declared unconstitutional.

ninth parliament of the Republic of Kenya is yet another dismal performance from the August House.

Needless to say, the enactment of the Constituency Development Funds Act has been met by mixed reactions from a cross section of the people it was intended to serve –the Kenyans.³

2.0 Constitutionality of Acts of Parliament

The Constitution is the supreme law of the land and any other law that is inimical to the postulates of the constitution is null and void to the extent of its inconsistency.

This principle is recognized by the Constitution of Kenya at Section 3 where it is provided that:

This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya, and subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency be void.

The philosophical foundations of the supremacy of the constitution above was emphasized in the case of **Njoya & 6 Others Vs Attorney General & 3 Others (N0.2)**⁴ where at page 282 Ringera J. stated:

And lest somebody wonder why, the supremacy of the Constitution proclaimed in Section 3 is not explicable only on the basis that the constitution is supreme law, the grundnorm in Kelsenian dictum; nay, the Constitution is not supreme because it says so: its supremacy is a tribute to its having been made by a higher power, a power higher than the constitution itself or any of its creatures. The Constitution is supreme because it is made by they in whom the sovereign power is reposed, the people themselves.

It follows that any other law must be in accordance with the basic tenets upon which the constitution is founded in order to pass the test of constitutionality.

3.0 The Constituency Development Fund Act - A critical Analysis

The very existence of the Constituency Development Funds Act, arguably, is an indication that Kenya as a country has accepted, or is on the path of acceptance of the principle of devolution of power.⁵

In principle, there is no problem with a development in the nature of moving towards devolution of power. As a matter of fact, such are very positive developments the world over as they lead to a people's greater participation in the wider development agenda.

The problem with these developments is rarely found in the theoretical ideals, the challenge is usually with design and architecture. The difficulty is at the implementational stage. Historically, Kenya has completely and consistently lost out at

³ Johnson M. Huugu, '*Constituency Development Fund Act watertight*', Daily Nation, April 20, 2005, P. 10; Sargutta Rutto, MPs' '*Control of constituency cash must be tamed*', Daily Nation, April 13, 2005, P. 10; Joe Aketch, '*MPs must keep their hands off our fund*', Daily nation April 27, 2005 P. 9; Sam Kiplagat et al, '*Law Society's Plea Over CDFs*', Daily Nation, April 26, 2005, P. 36; '*Ruling on the First CDF dispute to be made today*', Daily Nation, May 23, 2005, P. 6; David Mugonyi, '*16 MPs Miss development funds due to negligence*', Daily Nation July 25, 2005 P. 1; J.A. Chumo, '*Change Self Serving Law on the use of CDF Cash*', Daily Nation Monday April 4, 2005, P. 10; Lawrence Ndegwa, '*MPs are using Constituency Fund as a Weapon Against their Opponents*', The Standard Interactive, Tuesday May 10, 2005, P.III; James Kariuki et al, '*Don't blame fund*', says MP, Daily Nation, Monday June 20, 2005.

⁴ [2004] KLR 261

⁵ The other evidence of the acceptance of this principle in Kenya finds home in the now defunct District Focus for Rural Development and the entire local authority system.

the design level in the endeavour to devolve power and allow the citizenry greater participation in the wider development agenda.

The Constituency Development Fund Act, 2003⁶ became law on 31st December 2003 upon receiving presidential assent. The Act was expressed to come into force by Notice. The objective of the Act, to be gleaned from the Preamble is:

To provide for the establishment of the Constituency Development Fund and for connected purposes.

The Act is divided into 10 parts and 51 sections. To the Act are also annexed three schedules.

Part I of the Act, is the Preliminary part setting out the short title, the interpretation section and the application section. The application section provides that the provisions of the Act shall ensure that a specific portion of the national annual budget is devoted to the constituencies for purposes of development and in particular the fight against poverty at the constituency level.⁷

Part II of the Act established the Constituency Development Fund, the National Management Committee, the Officer administering the Fund and the Emergency Reserve.

Part III deals with submission of constituency project proposals which is to be done by Members of Parliament, the submission deadline, submission form, project description form and the procedure of approval of the proposals.

Part IV sets out the type of projects to be funded as “community based in order to ensure that the prospective benefits are available to a widespread cross-section of the inhabitants of a particular area”. Other provisions under this part relate to the number of projects, and the composition of the Constituency Development Committee.

Part V established the Constituency Fund Committee as a committee of the National Assembly to consist of a chairman and not more than ten other members of parliament who are not ministers or assistant ministers of government.

Part VI deals with the implementation of projects under the Act.

Part VII of the Act establishes District Project Committees whose membership consists of members of parliament in the district whether elected or nominated, all chairmen and mayors of local authorities, district commissioners of the district, District Development Officer of the district, chairpersons of the Constituencies Development Committee; and the District accountant of the district.

⁶ Act No. 10 of 2003.

⁷ This is further evidence that this Act was intended to me a mode of devolution of power and resources to the grassroots using the constituency as the unit of devolution.

Part VIII is dedicated to the role of the District Projects Committee whereas part IX deals with finance and administration.

Finally, part X sets out miscellaneous provisions.

As indicated above, the Act has three schedules. The first schedule has the list of organizations that can nominate persons to the National committee; the second schedule has the standard constituency projects submission form, the third schedule sets out the standard projects description form.

3.1 Inherent Defects within the Constituency Development Funds Act

Save for compliance with Section 30 of the Constitution, which shows that parliament exercised powers vested in it under the Constitution in legislating the C.D.F. Act, the entire statute is largely wanting in terms of accommodation of constitutional principles.

3.1.1 The Act does not Respect constitutional ideals relating to devolution.

A constitution by its very nature is an agreement on how people in a given place would like to live together, promote and advance their interests, and protect those interests from all types of threats. That agreement is often based on a realization that people of diverse characteristics live together in a particular territory.⁸

The Constitution, generally speaking, is meant to, among others, achieve the following:

- ❖ Create government
- ❖ Define levels of government
- ❖ Assign functions to the levels of government
- ❖ Ensure that institutions of governance at every level are held responsible for performance
- ❖ Allocate resources.

Each level of government that has been assigned a function ought then to perform the function allocated to it, without unduly meddling into or interfering with the other levels.

For devolution of power to succeed, it must be founded on the Constitution and not just on statute. This is more so in a country that purports to exalt constitutional supremacy over either parliamentary supremacy or the supremacy of any other organ of the state. The concept of devolution of power demands that there be separate levels of governance, these are;

- a. National level - in which generally the National Assembly (hence members of parliament) would fall; and
- b. The local level

⁸ Macharia Munene, '*The Manipulation of the Constitution of Kenya, 1963 - 1996*': A Reflective Essay, an Article originally prepared at the Law Society of Kenya Annual Conference on "CONSTITUTIONAL REFORM IN KENYA" Naivasha, Kenya, February 28, 1997.

Involving the Members of Parliament who are at the national level, in the control and management of the CDF, which targets and is for the benefit at the local level is a violation of the above stated ideal of devolution. This is more so considering that it is the MPs who legislated the statute hence there are real conflicts of interest. It is worth noting that MPs still reserve the power to amend the statute.

3.1.2 The Fund has no “Specific development agenda” hence it stands out as a political unit

There is no precise development function spelt out for the Constituency development Fund. Take for instance, provision of water services. If the residents of a specific constituency have a deficiency in supply of water, do they call upon the city council of Nairobi, the Ministry of water and natural resources, or the specific Constituency Development Fund committee to address the issue? It is a tacit constitutional principle of resource allocation that money should be allocated to purely functional units of governance.

It is nearly impossible to evaluate and monitor the use of funds allocated to the CDF.

3.1.3 Lack of Proper governance and accountability systems.

The system under the CDF currently subsisting has great democratic deficits. We have a situation where a sitting member of parliament who is a member and a chairman of the CDF handpicks people from the constituency into membership to the committee. These people are answerable to him.

As far as the constitution goes, the work the work of the arm of Government that is the Legislature is formulation of policies, law making and acting as a check to the Executive and Judiciary.

In a system where the legislator makes a Law [**the CDF Act** 'herein], is active in implementing the law and accounts the expenditure to the National Assembly, such a scenario implies that the legislator is participating in auditing himself through the parliamentary committee.

This way, democratic accountability goes overboard without a whimper.

3.1.4 Separation of Powers

The country generally lacks a proper structure of devolution of powers. The situation is not made any better by the evolution of the CDF from the woodworks.

The Act grossly reneged on the traditional and noble principle of separation of powers. This principle has over the centuries emerged as bedrock of democracy and constitutionalism.

The principle requires that the Government be divided into different branches each with its clearly spelt out powers and functions. It finds the main arms of the government as threefold: The Executive, The Judiciary and the Legislature. It then requires that each arm of government be accorded specific functions, entrenched in the basic law of the

land⁹ and each to be *limited to the exercise of its "proper function"* and the balance was completed by allowing each arm a limited right of interference in the functions of the other in order to prevent the encroachment of any one of them upon the function of any other.

Part 1 of the Kenyan Constitution adopts this principle by creating and defining the specific powers and functions of the Executive at chapter II, the Parliament chapter III and the Judicature at IV.

The rationale behind separation of powers is that if three or two functions of Government above, are exercised by only one organ of the Government, then such government would be arbitrary.

A logical deduction following the doctrine is that since the arms of Government are creations of the constitution, they can *only* be subordinated to it. To borrow a passage from the Ugandan case of Paul Ssemogerere & Zachary Olum vs. The Attorney general¹⁰

"It is clear that if parliament is to claim and protect its powers and internal procedures, it must act in accordance with constitutional provisions which determine its composition and the manner in which it must perform its functioning. If it does not do so, then any purported decision made outside these constitutional provisions is null and void and may not be claimed to be an Act of parliament"

The constituency Development Fund defies this principle.

The Constituency development Fund Act under section 23(1) allows sitting MP's to be members of the Constituency Development Committee [**herein after referred to as the CDC**]. The MP's are mandatorily required to constitute and convene the CDC within the first thirty days of the new Parliament and shall have a maximum of fifteen members who *shall* in terms of section 23(1) comprise of;

- (a) The elected member of parliament
- (b) Two councillors in the constituency
- (c) One district officer in the constituency
- (d) Two persons representing religious organisations in the constituency
- (e) Two women representatives from the constituency
- (f) One person nominated from among the active NGO' in the area if any

Table A: The role of various members of parliament in the Constituency Development Fund Committees in the 210 Constituencies in the country Data collected courtesy of Standard Newspaper, April 7 2005 and the Nation Newspaper April 8, 2005.

	DISTRICT	CONSTITUENCY	MEMBER OF PARLIAMENT	DESIGN ATION
1	Busia	Nambale	Hon. Chris Okemo	Chairman
2		Butula	Hon. Prof. C.A. Mango	Chairman

⁹ The constitution in our jurisdiction

¹⁰ Constitutional Appeal No 1. 2000, at page 14, also cited with approval in Republic vs. Kenya Roads Board (*infra*)

3		Funyula	H.E. Dr. A.A. Moody Awori, EBS	Patron
4		Budalangi	Hon. R.B.S. Wanjala	Chairman
5	Siaya	Ugenya	Hon. Archbishop S.O.A. Ondieki	Chairman
6		Alego Usonga	Hon. Sammy Weya	Patron
7		Gem	Hon. Jakoyo Midiwo	Patron
8	Bondo	Bondo	Hon. Dr. Oburu Odinga	Patron
9		Rarieda	Hon. Raphael Tuju	Patron
10	Kisumu	Kisumu Town East	Hon. Gor Sunguh	Patron
11		Kisumu Town West	Hon. Rev. Ken. O. Nyagundi	Chairman
12		Kisumu Rural	Ho. Prof. Anyang Nyongo	Patron
13	Nyando	Nyando	Hon. Eng. E.O. Nyamunga	Chairman
14		Muhoroni	Hon. Prof. P. Ayiecho Olweny	Chairman
15		Nyakach	Hon. Peter Odoyo	Patron
16	Rachuonyo	Kasipul Kabondo	Hon. Eng. Peter Owidi	Patron
17		Karachuonyo	Hon. Dr. Adhu Awiti	Patron
18	Homa Bay	Rangwe	Hon. Phillip O. Okundi	Patron
19		Ndhiwa	Hon. Joshua Orwa Ojode	Patron
20	Migori	Rongo	Hon. Ochilo Ayako	Patron
21		Migori	Hon. Charles Owino Likowa	Patron
22		Uriri	Hon. Odhiambo Omamba	Chairman
23		Nyatike	Hon. Ochola Ogur	Patron
24	Suba	Mbita	Hon. Otieno Kajwang	Chairman
25		Gwassii	Hon. Hon. Z.M. Syongoh	Patron
26	Kuria	Kuria	Hon. Dr. Wilfred G. Machage	Patron
27	Kisii	Bonchari	Hon. Zebedeo Opore	Patron
28		Nyaribari Masaba	Hon. Dr. Manduku	Patron
29		Nyaribari Chache	Hon. Simeon Nyachae	Not a member
30		Kitutu Chache	Hon. Jimmy Angwenyi	Chairman
31	Gucha	South Mugirago	Hon. Charles Omingo Magara	Patron
32		Bomachoge	Hon. Joel Onyancha	Member
33		Bobasi	Hon. Stephen K. Manoti	Chairman
34	Nyamira	Kitutu Masaba	Hon. S. M. Okioma	Chairman
35		West Mugirango	Hon. S.O. Obwoncha	Chairman
36		North Mugirango/Borabu	Hon. G.O. Masanya	Chairman
37	Turkana	Turkana North	Hon. John Munyes	Chairman
38		Turkana Central	Hon. David Ekwee Ethuro	Chairman
39		Turkana South	Hon. Francis Ewaton Achuko	Chairman
40	West Pokot	Kacheliba	Hon. amuel Phogisio	Chairman
41		Kapanguria	Hon. Samuel Moroto	Chairman
42		Sigor	Hon. Phillip Rotino	Patron
43	Samburu	Samburu West	Hon. Simeon Lesirma	Patron
44		Samburu East	Hon. Sammy Leshore	Patron
45	Trans-Nzoia	Kwanza	Hon. Noah Wekesa	Member
46		Saboti	Hon. David Nakitare	Patron
47		Cherangani	Hon. Kipruto Arap Kirwa	Patron
48	Uasin Gishu	Eldoret North	Hon. William Rutto	Patron
49		Eldoret East	Hon. Joseph Langat	Patron
50		Eldoret South	Hon. David Koross	Patron
51	Marakwet	Marakwet East	Hon. Linah Kilimo	Chairman
52		Marakwet West	Hon. Patrick J.A. Yano	Chairman
53	Keiyo	Keiyo North	Hon. Lucas Chepkitony	Patron
54		Keiyo South	Hon. Nicholas Biwott	Patron (9 members in CDC)
55	Nandi	Mosop	Hon. John K. Sambu	Patron

56		Aldai	Hon. Jim Choge	Patron
57		Emgwen	Hon. Stephen Tarus	Patron
58		Tinderet	Hon. John Kosgey	
59	Baringo	Baringo East	Hon. Asman Kamama	Chairman
60		Baringo North	Hon. William Boit	Chairman
61		Baringo Central	Hon. Gideon Moi	Chairman
62	Koibatek	Mogoritio	Hon. Joseph Korir	Chairman
63		Eldama Ravine	Hon. Musa Sirma	Patron
64	Laikipia	Laikipia West	Hon. G.G. Kariuki	Patron
65	Nakuru	Naivasha	Hon. Jayne Kihara	Patron
66		Nakuru Town	Hon. Mirugi Kariuki	Chairman
67		Kuresoi	Hon. Moses Cheboi	Patron
68		Molo	Hon. Macharia Mukiri	Patron
69		Rongai	Hon. Alicen J. Chelaite	Patron
70		Subukia	Hon. Koigi Wa Wamwere	Patron
71	Trans Mara	Kilgoris	Hon. Gideon Konchellah	Chairman
72	Narok	Narok North	Hon William Ole Ntimama	Patron
73		Narok South	Hon.S.K. Ole Ntutu	Patron
74	Kajiado	Kajiado North	Hon. Prof. George Saitoti	Patron
75		Kajiado Cental	Hon. Maj. Gen.Ttd.Nkaissery	Patron
76		Kajiado	Hon. Katoo Ole Metito	Patron
77	Bomet	Bomet	Hon. Nick Salat	Chairman
78		Chepalungu	Hon. John Arap Koech	Chairman
79		Sotik	Hon. Anthony Kimetto	Chairman
80	Bureti	Konoin	Hon. S. Koech	Chairman
81		Bureti	Hon. K.M. Sang	Chairman
82	Kericho	Belgut	Hon. Charles Keter	Chairman
83		Ainamoi	Hon. Noah N. Arap Too	Chairman
84		Kipkelion	Hon. Dr. Sammy K. Rutto	
85	Lugari	Malava	Hon. Soita Shitanda	Patron
86		Lugari	Hon. E. W. Kibunguchy	Chairman
87	Butere-Mumias	Mumias	Hon. Wycliff Osundwa	Chairman
88		Matungu	Hon. D.A. Were	Patron
89		Butere	Hon. Wyclioff. A. Oparanya	Chairman
90		Khwisero	Hon. J.O. Arunga	Patron
91	Kakamega	Lurambi	Hon. Dr. Newton Kulundu	Patron
92		Shinyalu	Hon. Daniel Khamasi	Chairman
93		Ikolomani	Hon.Dr. B. Khalwale	Chairman
94	Vihiga	Emuhaya	Hon. Kenneth Marende	Chairman
95		Sabatia	Hon. Moses Akaranga	Patron
96		Vihiga	Hon. Andrew N. Ligale	Chairman
97		Hamisi	Hon. George Khaniri	Patron
98	Mt. Elgon	Mt. Elgon	Hon. J.B. Serut	Patron.
99	Bungoma	Kimilili	Hon. Mukhisa Kituyi	Patron
100		Webuye	Hon. Musikari Kombo	Patron
101		Sirisia	Hon. Moses Wetangula	Patron
102		Kanduyi	Hon. Wafula Wamunyinyi	Chairman
103		Bumula	Hon. Sylvester B. Wakole	Patron
104	Teso	Amagoro	Hon. Sospeter Ojaamong	Patron
	NairobiProvince			
105		Makadara	Hon. Reuben Ndolo	Patron
106		Kamukunji	Hon M.G.K. Nyagah, M.P.	Patron
107		Starehe	Hon. Maina Kamanda	Patron
108		Langata	Hon. Raila Odinga	Chairman
109		Dagoreti	Hon. Beth Mugo	Chairperson
110		Westlands	Hon.Fred Gumo	Patron

111		Kasarani	Hon. William Omondi	Patron
112		Embakasi	Hon. David Mwenje	Patron
	Coast (Province)			
113	Mombasa	Changamwe	R.S. Kajembe	Chairman
114		Kisauni	Hon. A.M. Mwaboza	Patron
115		Likoni	Hon. S. Shakombo	Chairman
116		Mvita	Hon. Najib balala	Patron
117	Kwale	Msambweni	Hon. Abdallah Juma Ngozi	Chairman
118		Matuga	Hon. Chirau Ali. Mwakwere	Patron
119		Kinango	Hon. Gonzi Rai	Chairman
120	Kilifi	Bahari	Hon Joe Hamisi	Chairman
121		kaloleni	Hon. Morris Dzoro	Chairman
122		Ganze	Hon. Joseph Kingi Kahindi	Chairman
123	Malindi	Malindi	Hon. Lucas Maitha	Chairman
124		Magarini	Hon. Mwalimu Harry Kombe	Chairman
125	Tana River	Garsen	Hon . Danston Mungatana	not a member,
126		Galole	Hon. Tola Kofa	Patron
127		Bura	Hon. Ali Wario	Member
128	Lamu	Lamu- East	Hon. FahimY. Twaha	Chairman
129		Lamu West	Hon. Abu Mohammed	Patron
130	Taita	Taveta	Hon. (Dr.) Naomi N. Shaban	Chairperson
131		Wundanyi	Hon. Mwandawiro Mgahga	Chairperson
132		Mwatate	Hon. Marsden H. Madoka	Chairman
133		Voi	Hon. Boniface Mghanga	Chairman
	North Eastern Province			
134	Garissa	Dujjs	Hon. Hussein M. Mohammed	Chairman
135		Lagdera	Hon. Abdullahi S. Dahir	Chairman
136		Fafi	Hon. A.S. Ahmed	Chairman
137	Ijara	Ijara	Hon.M.Y. Haji	Patron
138	Wajir	Wajir North	Hon. Dr. A.I. Ali	Member
139		Wajir West	Hon. Mohammed Khalif	Patron
140		Wajir East	Hon Mohammed A. Mohammed	Chairman
141		Wajir South	Hon. Abdieahaman	Patron
142	Mandera	Mandera West	Hon. Mohamed Adbi Haji	Patron
143		Mandera Central	Hon. Billow Kerrow	Patron
144		Mandera East	Hon. Shaaban A. Isaack	Patron
	Eastern Province			
145	Moyale	Moyale	Hon. G. B. Galgalo	Chairman
146		North Horr	Hon. Bonaya Godana	Chairman
147		Saku	Hon. A.T. Sasura	Chairman
148		Laisamis	Hon. Titus L. Ngoyoni	Chairman
149	Isiolo	Isiolo North	Hon. Dr.Abdi Kuti	Patron
150		Isiolo South	Hon. A. A. Bahari	Chairman
151	Meru North	Igembe	Hon Raphael Muriungi	Chairperson
152		Ntonyiri	Hon. R. M. Maore	Patron
153		Tigania West	Hon. Kilemi Mwiria	Patron
154		Tigania East	Hon. Peter Munya	Patron
155	Meru Central	North Imenti	Hon. David Mwiraria	Patron
156		Central Imenti	Hon. J.K.I M'Mukindia	Chairman
157		South Imenti	Hon. Kiraitu Mutrungi	Patron
158	Meru South	Nithi	Hon. Petkay Miriti	Patron
159	Tharaka	Tharaka	Francis Nyamu Kagwima	Patron

160	Embu	Manyatta	Hon. Peter Ndwiga	Patron
161		Runyenjes	Hon. Martin Wambora	Chairman
162	Mbeere	Gachoka	Hon. Joseph W. N. Nyagah	Patron
163		Siakago	Hon. Justin B. Muturi	Chairman
164	Mwingi	Mwingi North	Hon. S. Kalonzo Musyoka	Patron
165		Mwingi South	Hon. David Musila	Chairman
166	Kitui	kitui West	Hon. Nyiva M wendwa	Chairlady
167		kitui Central	Hon. Charity Ngilu	Patron
168		Mutito	Hon. Kiema Kilonzo	member
169		Kitui South	Hon. Patrick Ivuti	Patron
170		Masinga	Hon. Benson I. Mbai	Patron
171		Yatta	Hon. Charles M. Kilonzo	Patron
172		Kangundo	Hon. Moffat Maitha	Patron
173		Kathiani	Hon. P. Kyalo Kaindi	Patron
174		Machakos Town	Hon. F. Mwanzia	Patron
175		Mwala	Hon. Benjamin Mbalu	Chairman
176	Makueni	Mbooni	Hon. J.K. Munyao	Patron
177		Kilome	Hon. John M. Mutiso	Patron
178		Kaiti	Hon. Gideon Ndambuki	Patron
179		Makueni	Hon. Prof. Kivuthat Kibwana	Patron
180		Kibwezi	Hon. Kalembe Ndile	Patron
	Central Province			
181	Nyandarua	Kinangop	Hon. Waithaka Mwangi	Chairman
182		Kipipiri	Hon. Amos Kimunya	Patron
183		Oi Kalau	Hon. Eng. M.K. Muriuki	Chairman
184		Ndaragwa	Hon. G. Gachara Muchiri	Chairman
185	Nyeri	Tetu	Hon. Wangari Maatai	Patron
186		Kieni	Hon. Dr. Chris Murungaru	Patron
187		Mathira	Hon. Nderitu Gachagua	Patron
188		Othaya	H.E. Hon. Mwai Kibaki	Patron
189		Mukurweini	Hon. Mutahi Kagwe	Chairman
190		Nyeri Town	Hon. P.G. Mureithi	Patron
191	Kirinyaga	Mwea	Hon. Alfred M. Nderitu	Patron
192		Gichugu	Hon. Martha Karua	Patron
193		Ndia	Hon. Robinson Njeru Githae	Patron
194		Kerugoya/Kutus	Hon. Daniel Karaba	Chairman
195	Muranga	Kangema	Hon. John N. Michuki	Chairman
196		Mathioya	Hon. J.J. Kamotho	Patron
197		Kiharu	Hon. Kembi Gitura	Chairman
198	Maragua	Kigumo	Hon. Onesmus Kihara Mwangi	Chairman
199		Maragua	Hon. Elias Mbao	Patron
200		Kandara	Hon. Joshua Toro	Patron
201	Thika	Gatanga	Hon. Peter kenneth	Patron
202		Gatundu South	Hon. Uhuru Kenyatta	Patron
203		Gatundu North	Hon. Patrick Muiruri	Patron
204		Juja	Hon. William Kabogo Gitau	Patron/Chairman
205	Kiambu	Githunguri	Hon. A. K. Magugu	Patron
206		Kiambaa	Hon. Njenga J. Karume	Patron
207		Kabete	Hon. Paul Muite	Patron
208		Limuru	Hon. Simon Kuria kanyingi	Patron
209		Lari	Hon. V. J. Kimathi	Patron
210		Laikipia East	Hon. Mwangi Kiunjuri	Patron

The CDC, in terms of section 23(4), deliberates on project proposals from all locations and draws up a priority projects list out of which the list of projects to be submitted to parliament in accordance with section 12, which section provides that that the list of proposed priority based projects shall to be *submitted by the MP*

The Act makes the members of Parliament for the different constituencies, automatic chairpersons to the fund. This is under section 24 (5) of the Act¹¹. In terms of section 23(1)

“There shall be a constituency Development committee for every constituency, which shall be constituted and convened by the elected member of parliament within the first thirty days of a new parliament and shall have a maximum of fifteen members, comprising of (a) the elected member of Parliament “ among others...

Does the Composition of CDF Committees comply with the stipulations of the Act?

A look at the composition of the committees from the available data alluded to above, indicates a great deal of discrepancies, while some constituencies have less members than the mandated 15 members¹², some have more than 15 members¹³, some do not have the MP's as members of the committees at all¹⁴, while others have MP's sitting in as 'patrons'¹⁵ and not chairpersons. The term patron is undefined in the Act, the position is not provided for and the role of the "Patron" is also undefined. It is possible that the term Patron is a modified term for the position of a chairperson in the wisdom of our MP's. The CDF therefore does not conform to the stipulations of that Act to the extent stated.

Under rule 6 of section 23, the quorum of the committees shall be one half of the total membership.

Without more, the following emerge from the section highlighted

- There is nothing in the Act to prevent the MP from hand picking the members of the said committee.
- There are no procedural checks and/or guidelines as to who ought or ought not be a member ¹⁶
- The time of 30 days specified, leaves room for handpicking by MP's of their affiliates-political, tribal or relational. (allegations to this effect are increasing by the day)

In other words, the Acts gives the MP a go ahead to select a cabinet of his own to manage the CDF during his term.

¹¹ The elected MP may however surrender the chair of the committee to another member.

¹² Examples include Mathira, Nyeri Town, Mwea, Gichugu, Mathioya, Kangema, Kiharu, Maragua, Limuru, Wajir South, Mandera West, Mandera Central, Mandera East, Isiolo South and Isiolo North, Meru Central, Meru South, Mwingi North, Mwingi South Kinangop inter alia

¹³ These include Othaya , Mukurweini, Ndia kerugiya Kutus and Kigumo

¹⁴ Nyaribari Chache and Garsen constituencies

¹⁵ MP's sit have made themselves *patrons* in many constituencies, around 117 MP's are patrons, while the MP for Juja is both the Patron and Chairman.

¹⁶ This is a legitimate interest of every constituent and voter in Kenya, as there is a incompetent persons overseing developmental projects at the constituencies.

However, it wouldn't matter how the MPs in the committees are clothed whether Patrons or Chairpersons, the truth of the matter is that CDF Act gives total control, management and supervision to the MP's creating adverse conflict of interest and compromises the proper functioning of different arms of government.

The doctrine of separation of powers as we know it would require that the role of Mp's as far as CDF's are concerned be those of independent watchdogs. The role of the parliamentarians, whose importance cannot be overemphasised, was to debate upon and pass the Bill (CDF) into Law. That was done in January 2004. Their place right now would be to watch over the executive arm's usage of the fund.¹⁷

The MP is to account the expenditure to the clerk of the National Assembly
From the reading of this years' budget, given that 2.5 % of the revenue is to be channelled to the CDF and that there are 210 constituencies, a member of parliament will have under his control, directly or indirectly an average of 25 million Kenya Shillings.

Sight should also not be lost to the fact that the secretariat of the fund is at the continental house, which is part of parliament building.

From the above, it emerges that Parliament enacted the CDF, which is a fund that operates on the wheels of the taxpayers' money. Parliamentarians control the fund through either chairing it or handpicking those to run the fund. It is parliament, which approves the budget estimates for the CDF. As if this is not enough, it is the Member of Parliament for a particular constituency who is expected to raise question regarding the manner in which funds in the constituency are applied. Parliament through the parliamentary watchdog, the Public Accounts Committee is expected to question the governance systems of the fund at every constituency which governance system is headed by members of parliament.

Through the implementation of the CDF, the Legislative arm of parliament has clearly usurped executive powers and functions which include the use of government funds, while parliament is to monitor such use. Here lies the root of the CDF crisis.

In Montesque's words "everything comes to an end."

4.0 The Jurisprudence from the Kenya Roads Board Act case¹⁸ reviewed.

This case was one of those that the High Court of Kenya, shook up the presumption that parliament was supreme and reaffirmed the principle of constitutional supremacy.

The Facts of the case were fairly straight forward.

The applicant, John Harun Mwau made an application in the nature of judicial review¹⁹ for the prohibition of the implementation of the Kenya Roads Board Act No. 7 of 1999

¹⁷ It is the executive that is empowered, through its civil servants, to implement laws and policies

¹⁸ Republic Vs Kenya Roads Board ex parte John Harun Mwau, Nairobi High Court Miscellaneous Civil application No. 1372 of 2000.

¹⁹ This is the power to review actions of other branches of government, lower courts and administrative bodies on their legal or factual findings.

and declarations that the Act was unconstitutional. The applicant's contentions were that the provisions of the KRB Act were discriminatory and violated the provision of Section 82 of the Constitution for providing for only certain societies and organizations that may nominate representatives to be appointed members of the board; the appointment of permanent secretaries to be members of the board by virtue of Section 7 of the Act would be unconstitutional; the Act under Section 17 which allowed members of parliament to be members of the District Roads committees was unconstitutional as it conferred executive powers on legislators, contrary to the doctrine of separation of powers and that was unconstitutional for legislators to enact and enforce the laws. [emphasis supplied]. Finally, the applicant argued that the Act unconstitutionally delegated legislative powers by allowing a corporate body to prescribe penalties. The court framed the issues for determination as follows:

- a) Whether the applicant had *locus standi*²⁰ to bring an application for Judicial Review to challenge the constitutionality of the Act of parliament;
 - b) Whether the court had jurisdiction to determine the constitutionality of Acts of Parliament and whether the court could grant the orders and declarations sought;
 - c) Whether the provisions of the Kenya Roads Board Act were unconstitutional;
 - i. Particularly Section 7(2) which provides for certain organizations to nominate representatives to be appointed as members of the Kenya Roads Board for being discriminatory;
 - ii. Particularly section 7(1) which provides for secondment of Permanent Secretaries to the Kenya Roads Board for subjecting constitutional appointees to control of statutory appointees;
 - iii. Particularly section 17 which provides for mandatory membership of members of parliament in the District Roads Committees which is a designated roads agency under the purview of the Kenya Roads Board which itself is an executive body, for being contrary to the principle of separation of powers,
- and so whether the Act or the said provisions are null and void; and
- d) Whether a body corporate could prescribe penalties or purport to enforce to enforce any other Act other than that under which it was established.

For purposes of this article, we propose to limit ourselves to the manner in which the court grappled with issue number (c)(iii), that is, the constitutionality of Section 17 of the Kenya Roads Board Act that provided for compulsory membership of members of parliament in the District Roads Committees which is a designated roads agency under the purview of the Kenya Roads Board which itself is an executive body, for being contrary to the principle of separation of powers.

The court noted that Section 17(1) of the Kenya Roads Board Act established the District Roads Board Committees and that the provision made it mandatory that the committees

²⁰ This is the right to bring an action or be heard in a given forum "*The place of standing*"

be comprised of, among others, all members of parliament from the District. The court further noted that by virtue of section 40 of the Kenya Roads Board Act, the National Assembly could by a resolution dissolve the Board if the Board performed its functions in a manner inconsistent with the provisions of the Act.

On the premises of these provisions, the court came to a finding that there was "clearly a violation of the separation of powers envisaged in the constitution."

In the court's own words:

I have no doubt that the enactment of this Act was prompted by good intentions as its objectives are indeed noble. I have no doubt that Parliament was responding to real needs of our society going by the horrible conditions of our roads and the rampant misappropriation of funds. There are many areas in the operations of government where the executive may not be performing their duties as they should. Is it feasible and desirable that Members of parliament physically go to supervise such operations? The answer lies in parliament using its legislative powers to correct the evils and shortcoming. I understand why the members of parliament are not feeling secure with only scrutiny of the executive after the spending by the inclusion of this provision in the Act, which allows them to supervise the spending of the money... Separation of powers is an enduring value of our society, which I feel ought to be protected and maintained. That is so. The doctrine of separation of powers is implicit in the constitution. ... In my view any outfit that is composed of members of parliament and is charged with expenditure of public funds is commingling of roles of the different organs of state in a manner that is unacceptable. ... I find that it would be against the constitutional principle of separation of powers for members of parliament to take part in actual spending, then submit their annual estimates to themselves in parliament through the Public Accounts Committee of the Public Investments Committee. I therefore hold that Section 17(1) of the Kenya Roads Board Act is inconsistent with the constitution to the extent that Members of Parliament participate in the activities of the District Roads Committees in Executive capacities. [Emphasis supplied].

In light of these findings by the High Court sitting as a constitutional court, one can be justified in holding, as an opinion, that the enactment of the CDF Act during the pendency of this jurisprudence is yet another occasion when the legislature and the executive in Kenya have gone out to undermine the judiciary. It need not be overemphasized that given the occasion to pronounce on the constitutionality of the CDF Act, the High Court, will be under pressure from the doctrine of *stare decisis* to uphold the Kenya Roads Board decision.

Conclusion and Way Forward.

This paper set out to interrogate the preparedness of the Constituency Development Funds Act to meet the test of constitutionality.

As aptly put by a judge of the Supreme Court of the United States of America.

If the whole legislature... should attempt to overlap the bounds prescribed to them by the people, I, in administering the public justice of the country will meet their united powers at my seat in the tribunal and pointing to the constitution will say to them, here is the limit of your authority and hither shall you go no further²¹

Our refuge must lie in the Court of law. This Act must be challenged by public-spirited taxpayers on this ground as being alien to constitutionality. The bulk of the fund consists of tax payer's money.

Under Section 4(2) (a) of the Act, an amount equal to not less than two and a half percent (2.5%) of all the Government ordinary revenue collected in every financial year will be part of the fund. This gives 'the tax payer' a legitimate interest in the use of the fund.

²¹ Supreme Court of the U.S.A, Justice Wythe

The Constituency Development Fund Act is inconsistent with the constitution and incapable of implementation. It needs to be declared unconstitutional. The undeniable and unfortunate consequences flowing from the implementation of the Act evidenced by Court cases and public outcry is enough to prove that the Act in its present form produces undesired results.

It cannot be disputed that during the active subsistence of the jurisprudence in the Kenya Roads Board case, the Constituency Development Fund Act particularly that part that prescribes the membership cannot be constitutional.

What is the way out?

There is need to propose a way forward in two respects, namely; the way forward out of the unconstitutionality of the Constituency Development Fund Act and the way out of the legislative non-seriousness of parliament.

In respect of the formulae for getting out of the CDF fiasco, there is need for:

- Embedding the procedures of devolution of government in the constitution.
- In the alternative amend the CDF Act to reengineer the membership thereof, with a clear intention of doing away with members of parliament.
- Define clearly the development agenda and performance index of the CDF.

In respect of the way out of the recent consistency of mediocrity on the part of parliament it is proposed that:

i. A case a code of ethics for Kenyan Parliamentarians

There is dire and urgent need for a code of ethics for the "parliamentary profession"²². This is one way of ensuring that there are basic minimum standards of behaviour among members of parliament.

Cases of Members of Parliament being bribed to vote in a particular way can be discouraged by the creation of a committee to monitor stipulated ethical standards for members of parliament.

ii. A Case for Increasing Parliamentary Quorum

At present, 30 members of parliament are enough to pass a Bill into law. It is shocking that in Kenya today, Members of parliament have passed motions in the house without meeting the quorum requirements. The recent spates of want of quorum in the house are of course an issue of concern. At this rate, parliamentarians in Kenya paint a picture of a lazy, and irrelevant and inconsiderate bunch who have lost all sight to their constitutionally created function. They cannot be said to be a working house by any dint of imagination.

²² the phrase parliamentary profession is used in contradistinction with politics which perfunctorily subscribes to the philosophy that absurdity is no handicap

The quorum number, has been 30 when the number of members was 150 in the eighties, to currently when we have 210 constituencies and members. It would appear logical to raise the number of members to constitute a quorum to be commensurate to the increased number of members. If the quality of Bills is to be improved by any, then the quorum for passing of Bills must be

iii. **A Case for Engaging Researchers for MPs**

The quality and result of debate in the House is of absolute importance to ensure that sustainable Bills are eventually passed.

Possible challenges facing MP's in their duties include: -

1. Lack of preparedness
2. Lack of relevance
3. Intellectual deficits regarding content and substance of Bills.

Flipping through Bills at time for debates and raising matters outside the scope of tabled Bills is manifestation of lack of relevance and preparedness. Passing of Bills with apparent lack of legal foresight is a case of intellectual inadequacy.

That being the case, it becomes crucial that any MP, who is not only self aware but also aware his job requirements and is also concerned about the welfare of the nation, will surely discover that a Researcher then, for each of them, becomes akin to a pocket dictionary.

Researchers are not only available through the various young intellectuals in the country (some of whom are unemployed), but they are also affordable.

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