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COMMENTS REGARDING THE

THE NATIONAL GOVERNMENT
CONSTITUENCIES DEVELOPMENT FUND
(AMENDMENT) BILL, 2021

PROPOSED AMENDMENTS TO THE NATIONAL GOVERNMENT

CONSTITUENCIES DEVELOPMENT FUND (AMENDMENT) BILL, 2021

INSTITUTION: [African Women Studies Centre, University of Nairobi](#)

DATE: [29 September, 2021](#)

| S/No | Clause No. | Provisions of the Amendment Bill* | Rationale for Amendment Recommendation | Proposed Amendment** |
|---|------------|-----------------------------------|--|----------------------|
| 1. | N/A | N/A | N/A | N/A |
| <ul style="list-style-type: none"> ▪ The AWSC has no specific recommendation for amendment to the Bill as is and instead takes this opportunity to applaud the initiative to increase the allocation to the NG-CDF from 2.5% p.a. to 5% p.a. This notwithstanding, the AWSC has noted the need for certain Sections of the NG-CDF Act to be amended in order to make the enhancement from 2.5% to 5% more meaningful and impactful to the achievement of the stated objects of the Act which are found in Section 3. In particular, the AWSC would, in relation to women, youth, persons with disability, and marginalized persons in the constituency, state that the increment in the amount of NG-CDF would serve to further alienate and marginalize this group of persons as distinct groups together with their interests in the absence of a cogent framework for inclusion and engagement. The AWSC provides the reasons for the foregoing statement and suggested amendments hereafter. ▪ The AWSC also celebrates the stated objects of the NG-CDF Act that are clearly geared towards the elevation of the status of women, youth, persons with disability and marginalised persons in the constituency. | | | | |

Background

The National Government Constituencies Development Fund (Amendment) Bill, 2021 (NG-CDF Bill, 2021) seeks to amend the National Government Constituencies Development Fund Act, No. 30 of 2015 (NG-CDF Act) as amended in 2016. The NG-CDF Act was amended in 2016 to ensure clarity in the roles between the levels of national and county governments that had been conflated in the previous Constituency Development Fund Act, 2013. The NG-CDF Act therefore applies to the roles allocated to the National Government in the Fourth Schedule of the Constitution of Kenya.

The purpose of the NG-CDF Act is to provide for the establishment of the National Government Constituencies Development Fund (the Act) and connected purposes. Among the objects of the Act with specific reference to the thrust of this paper include:

3. The objects of this Act are to-(a) provide for the establishment and administration of the Fund; (b) recognise the constituency as a platform for identification, performance and implementation of national government functions; (d) provide for the participation of the people in the determination and implementation of identified national government development projects at the constituency level pursuant to Article 10(2)(a) of the Constitution; (e) promote the national values of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized pursuant to Article 10(2) (b) of the Constitution; (f) provide for the sustainable development of all parts of the Republic pursuant to Article 10 (2) (d) of the Constitution; (g) provide a legislative and policy framework pursuant to Article 21 (2) of the Constitution for the progressive realisation of the economic and social rights guaranteed under Article 43 of the Constitution; (i) provide for a public finance system that promotes an equitable society and in particular expenditure that promotes equitable development of the country by making special provisions for marginalized groups and areas pursuant to Article 201 (b) (iii) of the Constitution; (l) provide a framework for citizens led development to assist the national government in planning and prioritizing the use of its resources;

Further, Section 4 of the Act establishes the National Government Constituencies Development Fund (NG-CDF) and states:

4. (l) There is established a fund to be known as the National Government Constituencies Development Fund which shall-(a) be a national government fund consisting of monies of an amount of not less than 2.5% (two and half per centum) of all the national government's share of revenue as divided by the annual Division of Revenue Act enacted pursuant to Article 218 of the Constitution ; (b) comprise of any monies accruing to or received by the Board from any other source; and (c) be administered by the Board.

In order to animate the NG-CDF Act, the National Government Constituencies Development Fund Regulations were passed in 2016. They essentially expound on the provisions of the NG-CDF Act but particularly clarify the use of funds for social security programmes outlined by Section 48 of the NG-CDF Act; Whereas Section 48 of the

NG-CDF Act makes provision for expenditure on *“social security programmes, education bursary schemes, mock examinations and continuous assessment tests”*, it is not couched in mandatory terms except for a capping of 35% placed on such expenditure where executed. Regulation 21(5) however makes it compulsory for a constituency committee to allocate not more than 25% of the constituency development funds to education bursaries. **It is not clear whether the said 25% should be hived off of the 35% allocated in Section 48 of the NG-CDF Act OR from the total funds allocated to the constituency. There is also an uncertainty created from the language in the NG-CDF Act that creates an option in the expenditure over the items stated above including education bursaries and Regulation 21(5) that makes expenditure on education bursaries mandatory.**

Evidently, the NG-CDF Act ensures that a portion of National development monies is devolved to the constituency level with the expenditure thereof determined by communities within the guidelines set by the NG-CDF Act, the National Government Constituencies Development Fund Board, and the Regulations. It is also clear that the objects of the NG-CDF Act are purposed towards achieving several constitutional dictates including the elevation of the status of women, youth, persons with disability, and marginalised persons.

From a reading of various literature about the NG-CDF, it is clear that it is well appreciated nationally, however, it is not without criticism for issues such as corruption and lack of transparency in the management of the Fund at constituency level, poor decision-making over which projects to be undertaken, incomplete projects, lack of or poorly undertaken public participation in the choice of projects, poor execution and low standards in the implementation of projects, etc. There is also a wide perception that members of Parliament, who chair the constituency oversight committees, significantly influence the selective use of tax payers' monies to undertake projects at constituency level that will endear them to voters in order to influence their re-election.

In addition, in July 2021, the NG-CDF Board proposed changes to the NG-CDF cash distribution formula in order to ‘improve the basis of sharing the Fund and close the poverty gap index among constituencies’ based on needs and levels of poverty as opposed to the disbursement of a flat rate to the constituencies despite variations in their population size, land and infrastructure¹. The Board stated that the latter has an implication on the real outcomes of the monies expended because of their capacity to affect project costs; the further a constituency from the source of raw materials the more expensive the costs of transportation of the material to the project site. Overall, reports from the constituencies indicate that the needs outstrip the resources allocated. The NG-CDF Bill, 2021 is therefore a response to the need for increased resources at constituency level and it does this by raising by 2.5% the minimum share of all the national government’s share of revenue appropriated to the NG-CDF up to 5%.

Notably, while the National Government Constituencies Development Fund Act makes provision for inclusion of women, youth and persons with disability in the National Board and Constituency Committees, it does not extend the same disaggregation to the identification (Section 27) and criteria of projects (Section 35) of the projects to be undertaken at constituency level. This means that projects at constituency level may fail to achieve the intention of national government to promote the wellbeing of women, youth, persons with disability and marginalised persons through deliberate and intentional programmes such as the affirmative action funds established so far by the national government to increase the economic wherewithal of the stated beneficiary categories. While Section 48 of the NG-CDF Act allows for the funding of social security programmes, education bursary schemes, mock examinations and continuous assessment tests to the tune of not more than 35% of the total funds allocated for the constituency in any financial year, it does not make it mandatory for Constituency Committees to spend on these items. Clearly, social security programmes are quite important in enhancing the wellbeing of women, youth and persons with disability as are bursary schemes. For this reason, it would be extremely important for the NG-CDF Board to commission a study to establish the percentage of projects that are

¹ See Article by Victor Raballa in the Daily Nation Newspaper dated 8 July 2021 at URL <https://nation.africa/kenya/news/ng-cdf-board-wants-changes-in-cash-sharing-formula-3465178> [accessed on 27.09.2021]

targeted towards elevating the status and wellbeing of women, youth, persons with disability and marginalised persons so that the actual data can inform the future uses to which this fund is put.

Thus the following brief comments on the NG-CDF Bill, 2021, which although increases the amount of monies to the constituency development funds, does so against the lack of a framework that would ensure the realisation of the following stated objects of the NG-CDF Act namely;

3(e) “promote the national values of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized pursuant to Article 10 (2) (b) of the Constitution;”

(3g) provide a legislative and policy framework pursuant to Article 21(2) of the Constitution for the progressive realization of the economic and social rights guaranteed under Article 43 of the Constitution... [and]

3(i) “provide for a public finance system that promotes an equitable society and in particular expenditure that promotes equitable development of the country by making special provisions for marginalized groups and areas pursuant to Article 201 (b) (iii) of the Constitution;”.

RECOMMENDATIONS REGARDING THE AMENDMENT OF THE NG-CDF ACT TO PROMOTE THE MEANINGFUL AND IMPACTFUL INCLUSION OF WOMEN, YOUTH, PERSONS WITH DISABILITY AND MARGINALISED PERSONS AT THE CONSTITUENCY LEVEL

1. Amendment of the Interpretation Section to make the NG-CDF Act and Regulations more Inclusive

AWSC proposed that the following be included and mainstreamed throughout the Act where relevant. Doing so will highlight the objects of the NG-CDF Act

“Affirmative Action Beneficiary Groups” means women, youth, persons with disability and marginalised persons.

2. Proposed Amendments targeting the Elevation of the Status of the Affirmative Action Beneficiary Groups

- i. Section 27(2&3) be amended to include the words inserted in bold:

27(2) “The Constituency Committee shall deliberate on project proposals from all the wards in the constituency, **the affirmative action beneficiary groups**, and any other projects which the constituency committee considers beneficial to the constituency, including joint projects with other constituencies, consider the national development plans and policies and the constituency strategic development plan, and identify a list of priority projects, both immediate and long term, out of which the list of projects to be submitted in accordance with the Act shall be drawn from.

27(3) The list of proposed constituency based projects to be covered under this Act **including those targeting the affirmative action beneficiary groups and comprising at least 30% of the total constituency development fund** shall be submitted by the Constituency Committee to the Board.

- ii. Section 35(2) be amended to include the words inserted in bold:

It shall be the responsibility of the Constituency Committee to ensure that the list of projects submitted for funding **including those targeted at the affirmative action beneficiary groups** comply with the provisions of the Act and their total cost does not exceed the allowable ceiling for the particular constituency or is not below that ceiling.

3. Development and/or Amendment of the Regulations to provide a Framework to Guide Public Participation, Un-packaging of Social Security Programmes; and Prudent Allocation of Resources,

- i. Where **public participation** is not guided, it may result in meaningless proposals from the public that cannot be implemented or that may yield little in terms of determining an impactful way forward. The Objects of the NG-CDF Act already circumscribe the parameters within the constituency funds should be expended. It would therefore be useful that during public participation the public is guided to make proposals that necessarily bring to life the Objects stated in Sections 3(e, g & i) already stated above, as well as Section 48 (social security programmes, education bursary schemes, etc.)
- ii. Given their importance to the elevation of the status of the affirmative action beneficiary groups, which when put together are statistically the majority in the constituency, the importance of social security programmes cannot be under rated. The NG-CDF Act and the Regulations do not state particularly the nature of these programmes except to point to the realization of Article 43 of the Constitution on economic and social rights as an objective. In this regard, guidance to the public on the **types of social security programmes** would be useful in eliciting the support of the public in funding core issues that affect the lives and livelihoods of the inhabitants of the Constituency. Clearly, the suggestions must be based on the role of the national government and may include such things as:

- a) food and nutrition security;

- b) quality housing and sanitation;
- c) education;
- d) cash transfers for senior citizens and full time carers of persons with disability or persons who are chronically ill;
- e) payments towards the National Hospital Insurance Fund for the very poor; Notably, Ministry of Health Data for the year 2019 shows that less than 20% of Kenyans have access to health insurance i.e. approximately 39 Million Kenyans do not have medical cover². In line with Article 43 of the constitution of Kenya 2010, it is proposed that NG-CDF could provide NHIF coverage as a part of the social security to as many households as the fund can accommodate taking into account the various uses to which it needs to be put during any given financial year.

iii. The proposed framework would be much more useful if it contained percentage apportionments of what thematic areas should feature in the **allocation of funds**, with the precise type of projects left to the public to propose. For instance the following could be themes:

- a) Social Security Programmes (food security, cash transfers for senior citizens and full-time carers of persons with disability or the ill, payment of National Hospital Insurance Fund monies for a designated number of the very poor, etc.) – x%
- b) Education bursaries (provided for in the Regulations – 25%)
- c) Funding of operations of the CDF Office – x%
- d) Funding of programmes targeted at the Affirmative Action Beneficiary Groups – 30%
- e) Etc.

² Further MOH (2019) observes that 12.7 percent of sick Kenyans do not seek health care when they are ill and the main reason for this is high cost of services. Further, 2.6 million Kenyans (6.2 percent) of households were found to be at risk of impoverishment as a consequence of out-of-pocket expenditure on health care depleting household savings and were at risk of falling into poverty.