



Ambank House, 13th Floor
Utalii Lane, Off University Way
P.O. Box 44564-00100 Nairobi

Tel: +254(020) 2219757/0714 838894
Fax: +254 (020) 2223188
Email: admin@icpcafrica.org
icpc.afric@gmail.com
Website: www.icpcafrica.org

International Center for Policy and Conflict

Sen. Billow Kerrow
Chairman, Committee on Finance, Commerce and Budget
Parliament Buildings
P.O. Box 41842-00100
Nairobi, Kenya.

Hon. Mutava Musyimi, M.P.
Chairperson, Budget and Appropriations Committee of The National Assembly
Parliament Buildings
P.O. Box 41842-00100
Nairobi, Kenya.

22nd April, 2015

Dear Sirs,

REF: Unconstitutionality of allocating Kshs. 38 Billion To Constituency Development Fund (CDF) for Financial Year 2015-16

Greetings from International Center for Policy and Conflict.

International Center for Policy and Conflict (ICPC) is a non-profit and autonomous human rights public policy research, advocacy and education institute. ICPC espouses a vision of a free society with dignity, equality and justice for all. The Institutional mission is to create, promote and engage platforms that transform societies.

We write this letter in reference to the recent allocation of Kshs. 38 billion to the Constituencies Development Fund (CDF).

If you recall, the High Court of Kenya, in a judgment delivered on Friday 20th February 2015, held that the Constituencies Development Fund (CDF) is unconstitutional. The Constituencies Development Fund is a matter concerning County affairs. In making the ruling, the High Court gave the government one year to make the necessary arrangements to bring the fund into conformity with the Constitution and ensure it does not infringe on the principle of separation of powers and public finance. The court allocated the grace period of one year to also allow for the completion of the ongoing projects but **not to initiate new projects and/or allocate more funds to CDF.**

Under the Constitution, county governments should get at least 15 per cent of “all revenue collected by the national government.” **Constitutionally, neither Parliament nor the National government is allowed to set aside any fund from the total annual revenues before the money is split between the national government and the county government.** The CDF does exactly that by reducing the overall



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revenue available to be shared between the two spheres of government. It affects the amount available to the counties.

There is **NO** provision in the Constitution that contemplated that a constituency and/or any other entity would be “one of the beneficiaries of the national revenue before it is divided between the national and the county government.” The CDF purports to appropriate what the Constitution has neither permitted nor contemplated. The CDF fund and the spending unit- the constituency- are unknown to the Constitution in as so far as public finance is concerned.

The CDF violates the division of functions between the national and county governments. It dismembers the system of shared powers and co-operative government established under the Fourth Schedule of the Constitution. That Schedule enumerates the powers of the county governments, those of the national government and also delineates the powers that are shared by the two. The Fourth Schedule establishes no other unit of government.

The constituency is a sub-unit of the county. Consequently, the administration of development projects in the constituencies fall, in the first place, under the competence of the county government. The CDF, which is funded to undertake “unspecified” projects in constituencies, is interfering with the constitutional functions and mandate of the county governments. The CDF is a third entity “grafted from the national government that operates within the county governments but outside their structures”. It threatens the division of functions between the national and county governments.

The drafters of the Constitution did not create a three-tier system with operational governments at the national, county and constituency levels. Counties are distinct and self-governing units. If the national government wants to make grants to them, it must leave it to them to execute the projects according to their integrated development plans, which are developed in full participation of all stakeholders in the county. **The High Court decision affirmed the autonomy and competence of county governments to oversee and execute functions in their jurisdiction.**

The CDF offends separation of powers. It is illegal and illegitimate for those who vote for money and provide oversight in one capacity and yet become implementers and executors in another capacity. This fundamentally infringes on both oversight and execution functions. The CDF conflates the executive and legislative functions. It saps and undermines the accountability mechanism envisaged under the Constitution. Further, it fundamentally violates the basic structure of checks and balances established by the Constitution.

Members of the National Parliament are expected to uphold, respect and defend the Constitution by sticking to the core roles they are elected for of representation, legislation and oversight. Consequently, it is our humble submission that the proposed allocation of Kshs. 38 billion for the financial year 2015/2016 is unconstitutional ab initio. Failure to respect the Constitution and court decisions will lead to further legal action.



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Sincerely,
Ndung'u Wainaina

Executive Director, International Center for Policy and Conflict

Cc:

Hon. Henry Rotich, Cabinet Secretary, The National Treasury

Hon. Isaac Ruto, Governor County of Bomet and Chairman, Council of Governors