

**Decentralizing without Accountability: The Kenya Constituency Development Fund
And
Separation of Powers**

By

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DEDICATION

To the Almighty God, for this far You have brought me and to Carol, my mother and the rest of the family, for their love and diligent support which made this work possible.

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List of Abbreviation

CBF	Constituency Bursary Fund
CDC	Constituency Development Committee
CDF	Constituency Development Fund
CDTF	Community Development Trust Fund
DDGP	District Development Grant Program
DDP	District Development Planning
DFRDP	District Focus for Rural Development Program
FPE	Free Primary Education Fund
HCIA	HIV/Aids Community Initiative Account
LATF	Local Authority Transfer Fund
NACCSC	National Anti-Corruption Campaign Steering Committee
PELF	Poverty Eradication Loan Fund
RAMLF	Road Maintenance Levy Fund
REPLF	Rural Electrification Program Levy Fund
RTPC	Rural Trade and Production Center
SRDP	Special Rural Development Program
WSTF	Water Services Trust Fund

Abstract

Decentralizing without Accountability: The Kenya Constituency Development Fund And Separation of Powers

By Henry Macharia Karanja

This study examines fiscal decentralization and accountability and suggests that there is a gap in the body of knowledge pertaining to accountability in fiscal decentralization. It appears that there is no current literature on Separation of Powers and maintenance of government checks and balances in the process of decentralization. Fiscal decentralization in Kenya through the Constituency Development Fund is our case study. A scheme established through an Act of Parliament in 2003 with the Members of Parliament as its implementers- in contravention to the Kenyan Constitution¹. This breach of Separation of Powers in decentralizing has resulted in a porous scheme with a weak accountability regime therefore leading to large scale abuse and mismanagement in the Fund. The author concludes that fiscal decentralization through CDFs provides promise for Kenya and other countries; however, special attention must be given to implementation issues, especially methods of dealing with Separation of Powers and constitutionalism.

November 17, 2010.

¹ In August 2010, Kenya- through a popular vote got a new Constitution. This study is based on the pre-2010 Kenyan Constitution.

CHAPTER 1

Introduction

Today, fiscal decentralization has become part of a world-wide reform agenda, implemented, supported and promoted by both developing and developed states and a cross section of major multilateral organizations like the World Bank, USAID, the African Development Bank, and many others (Kee, 2003). It has especially become an integral part of economic development and governance strategies in developing and transitional economies (Bahl, 1999a, World Bank, 1999).

According to Kee (2003), this reform agenda (fiscal decentralization) can be defined as the “devolution by the central government to local governments (states, regions, municipalities, constituencies, etc) of specific functions with the administrative authority and fiscal revenue to perform those functions.”

The existence and necessity of this policy strategy is derived from three main reasons:

1. Recognition of the central governments’ impossibility to meet all of the competing needs of its various constituencies
2. The need for grassroots assistance in national economic development strategies
3. Regional and local political leaders’ demand for more fiscal autonomy to meet constituents’ needs (Kee, 2003)

This research examines the underlying theory of fiscal decentralization; conducts a critical literature review on fiscal decentralization and accountability; presents a case

study of Kenya's Constituency Development Fund; discusses and analyses it; and then concludes and gives general and specific recommendations and guidelines for policy. The Literature Review in Chapter 2, through identifying the existing and *non-existent* issues of accountability in fiscal decentralization, prepares ground for the presentation of our case study in Chapter 3. In Chapter 4, the Doctrine of Separation of Powers is used to conduct a critical discussion and analysis of the case study (Kenya's Constituency Development Fund). Chapter 5 concludes the research work through a summation and review of the study's specific objectives and how each was met, provision of future directions of research as well as policy recommendations.

The guiding/ordering principle in the carrying out of this research is its central thesis which states that: *the unconstitutionality (In terms of Separation of Powers) of the fiscal decentralization scheme in Kenya (the CDF) diminishes accountability in its management and implementation.*

1.1 Statement of the Problem

Combining and vesting the roles of oversight and implementation of Kenya's Constituency Development Fund into individual Members of Parliament removes important checks and balances in the governance of the decentralized Fund. This has reduced the accountability of the Members of Parliament to the public in the implementation of the CDF and as such resulted in massive corruption and embezzlement of resources from the Fund.

1.2 Objectives

The general objective of this study is to explore the options and strategies on how sustainable accountability, a key development factor, can be fostered in the management and implementation of the Kenya Constituency Development Fund.

More specifically, this work will:

1. Examine the existing literature and debates on fiscal decentralization and accountability and try to situate Kenya's Constituency Development Fund within this larger framework of fiscal decentralization and accountability theory.
2. Examine the overlapping functions of the Executive and Legislature in the CDF Act relative to the Kenyan Constitution, the consequent undermining of checks and balances in implementing fiscal decentralization and the resultant effects, specifically on the CDF.
3. Show the necessity of restructuring the management design of the CDF in order to, together with existing mechanisms, ensure sustained and viable accountability in the CDF.² Restructuring the Fund will involve moving the Fund's implementation responsibility from the Legislature, to the Executive together with maintaining, strengthening and re-focusing the Legislatures' watchdog role over the fiscal decentralization scheme.

² Without this, the fund can never achieve its stated objectives efficiently and sustainably as corruption inherently breeds poverty and inequality

4. Posit interim measures that could be instituted to bolster the effectiveness of existing mechanisms for accountability in CDF in the process, and/or even after removing the Members of Parliament from the Fund's implementation/management.

1.3 Research Methodology

This study was developed using literature on fiscal decentralization and accountability. The *descriptive* research methodology was adopted in identifying and discussing the issues on fiscal decentralization and accountability both theory and practice. This methodology was selected in view of its flexibility- it can use either qualitative or quantitative data or both. This option provided a broad choice of tools for data collection.

The qualitative approach was integrated as the main approach in this research process because of its potential to generate rich and well grounded descriptions and explanations on the aspects of fiscal decentralization in Kenya as well as generating unseen findings for new theoretical and practical considerations.

Predominantly, the research techniques used in this research work are desk-based. The data needed was sourced from library materials and online content. This is in the form of books, journals, archived newspapers, periodicals and in limited instances, raw data from websites of relevant organizations and institutions.

After gathering this information and data, it was broken down into thematic and relational categories to provide for analysis. This process of content analysis helped to effectively analyze all collected materials on fiscal decentralization and accountability and use them to sufficiently (hopefully) meet the specific objectives of this study in a reliable and consistent way.

1.4 Significance of Study

In Kenya, the expectations and demands of the public for transparency and accountability in the CDF are growing faster than the existing machinery for accountability can handle. Bottom-up (demand-side) accountability has easily become hampered by patronage politics and wide spread corruption. For example, in conducting a Social Audit in the Kasarani constituency, members of the CDF Accountability Project questioned the head teacher of Chandaria Primary School, a beneficiary of CDF funding. Even after lengthy introductions, he offered them little information on the project details, suggesting that they first go to the CDF office. He did, however, agree to show them the classrooms built as part of the project.

According to the researchers, his reticence to cooperate may have resulted from fear of losing the support of the CDF office, because as he said, “We don’t receive much funding from the Council or the Central government. We therefore need to be careful not to be seen to insult the [CDF] office that we will still go back to for more funding” (CDF Case File, 2008).

Many Non-Governmental Organizations (NGOs) and Community Based Organizations (CBOs) try to advocate the use of e.g. Social Audits and Community Score Cards by the community members to evaluate CDF projects and their implementation.³ However, this might not fully address and correct the problem of lack of accountability in the CDF as it does not impinge on the salient structural problem of the Fund- broad discretionary powers vested in the Members of Parliament.

This study is uniquely important because of two major reasons: first, is the currency and urgency of the issue it seeks to address. Kenyans are today grappling with the issues of dire and rampant waste and mismanagement of most of the country's decentralized funds. The harsh realities of Kenya's poverty and inequality as seen in Chapter 3 demand for attentive research and thorough reform of this (CDF) viable public resource. The CDF interfaces closely with local communities; this not only guarantees a sharp scrutiny from community members but creates the need for strategic and tactical accountability.

Secondly, there is lack of a systematized study on the effects of Members of Parliament being the managing directors of Kenya's Constituency Development Fund. As of the writing of this paper, there were no specific studies done pertaining to this issue, and therefore there is minimal related literature- especially on the Kenyan context. This study attempts to fill this knowledge gap as well as generate lessons on best practice that Kenya

³ With the support of donors, a number of NGOs and CBOs in Kenya have sprouted which seek to engender accountability and good practices in the CDF through advocating for transparency and accountability in project selection, planning, implementation. Organizations like MUHURI, National Taxpayers Association, and ACTION Kenya have gone a step further in their advocacy and have developed various instruments to empower communities to demand and evaluate the transparency and accountability in the use and management of CDF funds, such instruments include use of Social Audits, Community Score Cards, and the like.

can adopt in the implementation and reform of its fiscal decentralization scheme in order to garner high levels of efficiency and effectiveness and foster accountability in its administration.

It is believed that this study will positively contribute to- and inform policy efforts by the Kenyan government, and by other African states similarly situated, to comprehensively promote transparency and accountability in the management and administration of fiscal decentralization schemes.

1.5 Scope of the Research

The scope of the study is admittedly limited. This research work does not look at issues and debates on concepts such as corruption, poverty, development, etc. The author feels more justice can and have been done to them in dedicated studies than could be done here and so this work delves directly into the subject matter of the study but with a few and brief working definitions. It concentrates in particular on accountability issues in fiscal decentralization programs specifically in maintaining or reinforcing democratic norms and the rule of law in fiscal decentralization to further achieve poverty alleviation goals and good governance. Certainly other public sector issues, such as the role of accountability in poverty reduction, and governance are being increasingly studied elsewhere and are not a prime focus of this study.

1.6 Outline of the Thesis

The remainder of the study is divided into four chapters. Chapter 2 discusses current literature and the theoretical underpinnings of fiscal decentralization and accountability. Chapter 3 looks at the implementation of fiscal decentralization in Kenya- specifically, the Constituency Development Fund, its constitutional status and effects thereof. Chapter 4 provides an in-depth discussion and analysis of the data provided in Chapter 3. Finally, Chapter 5 provides some concluding comments, offers some broad recommendations, and identifies areas where further research is needed. This is then followed by the research's Bibliography which lists the references utilized in the conduct of this study and Appendixes which includes the map of Kenya, list of sample constituencies used in this study and Kenyan Government Devolved Funds and their average popularity as derived from a National Taxpayer's Association Survey.

CHAPTER 2

Literature Review

2.1 Introduction

This Chapter tries to achieve the first and partly the second objectives stated in the previous Chapter through a close analysis of literature on fiscal decentralization and poverty alleviation (local resource allocation efficiency); and fiscal decentralization and accountability. The main attempt here is to develop a conceptual framework for reviewing and analyzing the case study presented in Chapter 3 as well as generate a critical understanding of the ways in which fiscal decentralization theory relates to poverty alleviation and public accountability (as presented in the conceptual framework).

The Chapter is organized as follows: it opens with a brief background on fiscal decentralization (Section 2.2), then goes on to develop the conceptual framework in Section 2.3 which puts fiscal decentralization as used in this study in perspective. A review of literature on fiscal decentralization and poverty alleviation (Section 2.4), and then fiscal decentralization and corruption/accountability in section 2.5 and Sub-section 2.5.1 follows.

Section 2.6 concludes the chapter by identifying existing gaps in current literature on fiscal decentralization and accountability. It shows that current literature does not fully illustrate accountability in fiscal decentralization schemes. It (current literature) fails to stipulate the necessity of constitutional checks and balances in government as a factor

that affects accountability in fiscal decentralization. Having one arm of the government dominant in the implementation of any decentralization scheme reduces accountability by contravening the Doctrine of Separation of Powers.

Being a key element in fiscal decentralization, supply-side accountability (through, for example, checks and balances) is an assumed given in the fiscal decentralization and accountability literature, even while it represents a vital norm of democracy and rule of law. A deficiency or separation of this element from any decentralized program consigns it to possible failure and limited effectiveness.

2.2 Background

Decentralization entails the transfer of power and decision making authority either downwards (vertical decentralization) or to other units or organization (horizontal) (Oates, 2007). These can be organs of government or non-governmental bodies, such as Community-Based Organizations (CBOs), ‘third party’ Non-Governmental Organizations (NGOs) or private sector actors (Crook and Manor, 1998: 6–7; World Bank, 2000a: 3).

This process involves the implementation of the following elements (in singular or combined form): de-concentration, which is where political, administrative and fiscal responsibilities are transferred to lower units *within* central line ministries or agencies. Devolution- involves the process in which subnational units of government are either created or strengthened in terms of political, administrative and fiscal power. Finally,

delegation- responsibilities are transferred to organizations that are *outside the regular bureaucratic structure* and are only indirectly controlled by the central government (Oates, 2007).

While decentralization mainly involves moving or sharing certain political powers from the center to the periphery, fiscal decentralization generally refers to the decentralization of revenue and spending powers from the control of central government authorities to government authorities either at subnational levels (regional, provincial, constituency, etc). In a very decentralized system, local governments have considerable power to mobilize resources, through taxing authorities accompanied by strong tax bases. However, as local regions within a jurisdiction may not be equally endowed with resources, intergovernmental grants and transfers rather than local taxes are important instruments for allocating resources within a decentralized structure (Gramlich 1993; Devas, 2008).

Today, the concept and practice of fiscal decentralization is a major element of governance and development in Less Developed Countries⁴ (LDCs)⁵ (Bardhan, *et al*, 2005; Kolstad, *et al*, 2006; Oates, 2007). This has been because of dissatisfaction with the results of centralized economic planning and a need to induce broader participation in development, governance and poverty reduction.

⁴ In higher income countries, the pressure comes from the need to squeeze greater 'value for money' from existing fiscal revenue and central government transfers (Bardhan, *et al*, 2005; Devas, 2008).

⁵ In sub-Saharan Africa, however, where colonial and post-colonial political dynamics favored highly centralized systems of government, fiscal decentralization has proceeded slowly and with limited success than in other regions.

On one hand, decentralized (local) development institutions are assumed to have better information as well as higher incentives than the central government to design and implement policies that respond to local needs and preferences (Oates, 1972; Steiner 2007). Pushing revenue and expenditure decisions to the local level is therefore expected to reduce the power of those with less knowledge of local needs and preferences and increases that of those with more knowledge (Tanzi, 2002).

On the other hand, because monolithic governments are perceived to breed high levels of rent-seeking, corruption and lack of accountability of government officials (for an in depth treatment of this issue, see Bardhan and Mookherjee, 2005), fiscal decentralization is also considered as a means to achieve good governance in terms of stimulating high levels of local participation, accountability of public officials and low corruption, which are crucial condition for poverty alleviation (Steiner, 2007).

Despite the sound theoretical arguments in favor of fiscal decentralization, in developing countries, fiscal decentralization schemes have produced mixed results (see Crook, 2003) and have not cured all the ills associated with centralized service delivery and development planning. According to Crook (2003), several studies examining the evidence of decentralization outcomes among countries in sub-Saharan Africa have failed to document any significant effect of decentralization on poverty reduction or improved local development performance.

Moreover, it has also brought about other problems in many cases. In some countries, for example, the poor capacity of local structures for delivering services has lowered efficiency and effectiveness, and local elites have captured the decision-making process (Usui, 2007).

Prud'homme (1995) adds that fiscal decentralization has sometimes sacrificed economies of scale in service delivery and national government control over scarce fiscal resources producing greater regional inequality and macroeconomic instability as well as making policy coordination among levels of government more difficult.

In the case of Kenya, this study seeks to establish that fiscal decentralization through the Constituency Development Fund (CDF) has and will continue to be less than effective largely because of the concentration of government powers and functions (Legislative and Executive) into one arm of government- the legislature, in implementing the decentralized fund scheme. This is in such a way as conventional constitutional checks and balances for democratic governance and rule of law have been ignored and neglected. In so doing, the CDF's design and management structure has turned it into a corrupt and inequality propagating contraption and its existence in this unconstitutional form, to a greater extent, maintains and promotes its status and function as an entity for power and patronage brokerage among the wealthy and the ruling élites at the constituency level.

This unconstitutionality and disregard of democratic norms is rampant in Kenya, as it is elsewhere in Africa.⁶ The introduction of these tendencies into the CDF consigns the fiscal decentralization scheme to irrelevance as a policy tool for combating poverty; and corruption as a vehicle for disbursing public monies. This theme will be further explored and discussed in the Chapters that follow.

2.3 Conceptual Framework

The modern case for fiscal decentralization was articulated by Wolman (cited in Bennet, 1990). Wolman divided the arguments under two headings: Economic Efficiency Values (for example local economic growth and poverty alleviation) and Governance Values (for example accountability). This categorization makes it more amenable to analyze the concept of fiscal decentralization within a given political jurisdiction in that, by a review of the success of fiscal decentralization regime in, for example, alleviating poverty, and a review of its success in promoting public accountability, one can confidently substantiate and outline the successes and/or failures of fiscal decentralization.

The main focus of our current study is on the ability (or lack of it) of fiscal decentralization to promote public accountability, however, the ability of fiscal decentralization to alleviate poverty will be briefly reviewed also.

⁶ For example, undemocratic amendments extending presidential terms beyond what was originally prescribed in the constitution in Namibia (under Sam Nujoma), Senegal (under Abdou Diouf) and Cote d'Ivoire (under Henri Konan Bedie), or those banning Alassane Quattara (Cote d'Ivoire) and Kenneth Kaunda (Zambia) from contesting in presidential elections in their respective countries, the unconstitutional passage of the 2007 Gratuity Bill in Kenya which made provision for the payment of a Kshs 1.5 million (US \$ 22,000) gratuity to each Member of Parliament and to the ex officio Members, including the Attorney General, a constitutional officer with security of tenure, etc

2.3.1 Economic Efficiency Values (e.g. Poverty Alleviation)

Generally, the economic dimensions of a public finance policy in a given country are macroeconomic stability, equity and efficiency (Musgrave and Musgrave, 1984). The efficiency aspect of the economic dimension is the economists' *raison d'être* for fiscal decentralization. It is an economic value seen as the "maximization" of social welfare.

Because the public sector lacks the same price signals as the private sector to regulate supply and demand, public sector allocation of goods and services is inherently political. But this notwithstanding, tax and service packages ought to, as closely as possible, reflect "the aggregate preferences of community members" (Wolman 1997, p. 27 cited in Bennet, 1990). However, the difference of people's quantity and/or quality of needs within a political jurisdiction leads to a "divergence between the preferences of individual community members and the tax and service packages reflecting the aggregate community preferences" (Ibid). This can theoretically be corrected by local governments, which, by virtue of being closer to community members, are able to meet different preferences of people and allocate resources more efficiently than a central authority.

In 1972, Oates formulated the decentralization theorem as "each public service should be provided by the jurisdiction having control over the minimum geographic area that would internalize benefits and costs of such provision". This decentralization theorem is based on the assumption that central government can only provide goods and services uniformly across jurisdictions. Therefore, according to the argument, there are potential efficiency gains from fiscal decentralization.

Efficiency gains from decentralization can be categorized into the following (Yilmaz, 2001):

- *Efficient Allocation of Resources*: decentralization will increase efficiency because local governments have better information about their residents' needs than the central government. Therefore decisions made at this level on public expenditure are more likely to reflect people's choices than decisions made by a higher up government.
- *Competition among Local Governments*: with free and ease of mobility across different jurisdictions, people will shop around for the community that best fits their preferences (Tiebout, 1956). In doing so, they will vote with their feet. Therefore fiscal decentralization will increase competition among the local governments for better use of public resources.

Fiscal decentralization is also associated with reduced inequality.⁷ When resources are distributed based on an agreed upon formula, all local jurisdictions are guaranteed a

⁷ Inequality is a measure of the welfare of a society. It describes the differences between individuals or households in terms of opportunities and outcomes. In addition to the income gap between the rich and the poor, inequality entails differences in access to education, health, land use, land ownership, and other welfare enhancing assets and services. Inequality is an important issue in economic development as it can hinder economic growth, and it can result in social instability (for more see SID, 2004). To examine inequality within a given region, the Gini-coefficient is commonly used. It varies from a value of zero, indicating perfect equality (i.e., that all households have the same income), to a value of 100, indicating perfect inequality (i.e., that one household holds all income in the society). Most countries in Africa have Gini-coefficients that ranging from 40 (0.4) to 50 (0.5), while most developed countries fall between 20 (0.2) and 30 (0.3); many countries in Latin America have Gini-coefficients of above 50 (0.5). These figures indicate that developed countries typically have less inequality than countries in Africa, while Africa is typically less unequal than Latin America (Irungu *et al*, 2009; UNDP Human Development Report, 2009). According to SID (2004), in Africa, Kenya is the fifth most unequal country (and in the top ten globally).

certain minimum level of per capita expenditure for essential services (World Bank Report (1999\2000)).⁸

2.3.2 Governance Values (e.g. Accountability)

Institutions of accountability and participation are the key to the success of decentralized decision making (Yilmaz, 2001). In decentralized systems, local governments' proximity to their constituents is expected to enable them to respond better to local needs and efficiently match public spending to private needs. This entails establishing institutions and mechanisms for citizens' voice and exit. Regular elections, local referendums, permanent councils and other institutional structures are some of the tools that may improve the ability of local governments to identify and act on citizen preferences in a decentralized setting.

Together with shortening the distance between people and elected representatives and widening the scope for greater transparency about how and where money is spent locally, decentralization makes accountability a more tangible issue. Public accountability of elected officials to voters is expected to ensure that government services are responsive to people's needs. If officials are not responsive, the citizen has the choice of either voting out the offending officials and/or migrating to other jurisdictions (to "vote with one's feet") (Yilmaz, 2001).

⁸ However, in many countries, intergovernmental transfer systems are not formula based and the central government decides on the amount of transfer on a discretionary basis. Some of these systems are therefore not transparent and are subject to political manipulation, which leads to uncertainties on the part of sub-national governments. Such uncertainties discourage fiscal planning and effective budgeting.

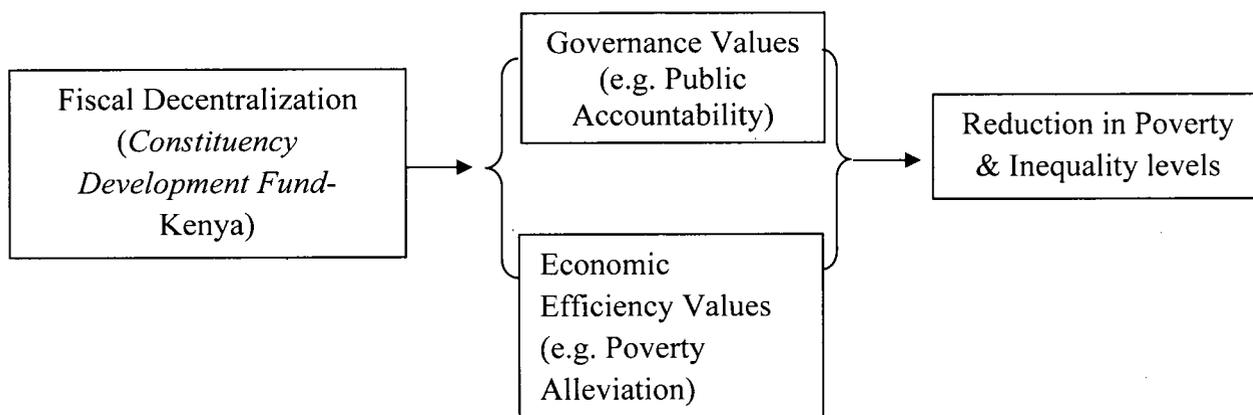
Accountability is here viewed as the obligation⁹ of public officials to explain and justify their conduct to the public (Pollitt, 2003). This not only involves the provision of information about performance, but also the possibility of debate and questioning by the constituents and provision of answers by the public officials or civil servant (Member of Parliament in our case), and eventually of judgment of the official by the constituents. Judgment implies the imposition of formal or informal sanctions on the official in case of malperformance or of rewards in case of adequate performance (Bovens, 2006).

The process of public account giving therefore can be seen to involve three stages:

1. Obligation of a public actor to inform the citizenry about his/her conduct by providing data on performance of tasks, outcomes, and procedures; explanations and justifications
2. Possibility for the citizenry to interrogate the actor and to question the adequacy of the information or the legitimacy of the conduct
3. Passing judgment on the conduct of the public actor e.g. approves an annual account, denounce a policy, publicly condemn the behavior of an official or agency, etc.

⁹ The obligation that lies on the actor can be both formal and informal. Public officials are under a formal obligation to render account on a regular basis to specific forums such as supervisory agencies, courts or auditors. Informal obligations take the form of press conferences and informal briefings, or even self-imposed audits.

Figure 1: Conceptual Framework



2.4 Fiscal Decentralization and Poverty Alleviation¹⁰

Poverty is a multi-dimensional phenomenon, which can be defined and measured in many different ways. Usually, it is defined and measured in economic welfare terms such as income or consumption. An individual is regarded as poor if s/he falls below a predetermined level of economic welfare deemed to constitute a reasonable minimum in an absolute level or by the standards of a given society (Lipton and Ravallion, 1995).¹¹ In this study, being poor is defined as living below the poverty line of US \$ 1.25 a day as defined by the World Bank (2008).

In combating poverty, fiscal decentralization provides an effective strategy for improving the living standards of the poor by accelerating growth (capacity improving) as well as

¹⁰ In this Section, the study only points out and discuss the relationship between fiscal decentralization and poverty alleviation. For a more thorough undertaking of how fiscal decentralization can be used to alleviate poverty, please see UNDP, 2005.

¹¹ Though many poverty-related studies, have been done using this approach, there exist other dimensions and measurements of poverty, for example, the UNDP's Human Development Index (HDI) (Amoako-Tuffour and Armah, 2008).

directly enhancing their immediate consumption entitlements (safety net). In being able to constrain the overhead and administrative costs as well as taking advantage of local information on specific community needs and preferences, the implementation of fiscal decentralization policies is deemed to be cost efficient and effective. Also, the institutions and structures established to implement these policies are seen to complement the policy direction of fiscal decentralization, and therefore ensure that the policies benefit the targeted groups (Rao, 1998).

Constituency Development Funds¹² are institutions established to implement pro-poor fiscal decentralization policies. By being decentralized and relatively autonomous from the central government, they are able to skirt the bureaucratic hassles which weaken the efficiency and effectiveness of centralized government development programs and send funds directly to local constituencies thus enabling communities to identify and implement their own local development priorities. This way, funds are theoretically spent more effectively and efficiently, as they are spent on the right things and ideally in the right (or close to right) amounts.

Compared to central government, CDFs are better fitted to combat poverty and inequality because they are more readily able to;

¹² The CDF concept was first adopted in India, but gained prominence when Kenya established a CDF in 2003. Based on the perceived success of the Kenya model and various political and historical drivers, the trend has spread to other African countries and across the world in recent years to countries such as, Southern Sudan, Jamaica, Zambia, Uganda, Ghana, Pakistan, Malawi, Namibia, India, Honduras, Philippines, Nepal, Solomon Islands, Malaysia and Papua New Guinea

- i. Identify the poor and know their characteristics as they are closer to them
- ii. Understand the reasons and factors that cause poverty through utilizing local information
- iii. Design and implement a set of well informed and targeted policies through local participation in project selection, design and implementation (Rao, 1998)

There are a number of strategies that CDFs employ in combating poverty, for example, they can be given responsibility for managing or funding projects in certain pro-poor priority sectors at the constituency level such as education, health, transportation, agriculture, etc. Studies examining who benefits from local public services show sectors, such as education and certain public health services, are indeed among the most pro-poor areas of public spending (Martinez-Vazquez, 2001).

A number of studies, however, (see Moore and Putzel 1999; Crook and Sverrisson 1999) have underlined that fiscal decentralization is not synonymous with economic growth and poverty reduction.¹³ Blair (2000); Crook and Sverrisson, (2001); Moore and Putzel, (1999: 15) have pointed out that one of the dangers of devolving authority is that instead of mitigating poverty and inequality, it simply empowers local élites and perpetuates existing poverty and inequality.

¹³A wide range of “external” factors (e.g. central government’s political commitment to poverty reduction, the strength and effectiveness of central government institutions and functions, etc.) determine whether the outcomes of fiscal decentralization are successful or not.

It also can enhance corrupt tendencies because where the kick-backs from government involvement are particularly good, the costs of ensuring equitable distribution and discouraging local corruption are inevitably high. This is more so in, for example, rural infrastructure projects, such as road building (Rao, 2000) or irrigation (Wade, 1985), in which markets for primary inputs, labor and public regulation are strong.

Corruption in decentralized fiscal programs is worth highlighting because it is this misallocation or ‘corruption’ of public resources that, in the first place, often justifies the strongest calls for decentralization (see World Bank, 2000d). Whether in centralized or decentralized governments, poor accountability regimes and bad governance can undermine the interests of poor and marginalized groups in society, therefore stringent mechanisms for accountability should be instituted in the establishment of any fiscal decentralization scheme to keep such abuse and misappropriation in check.

2.5 Fiscal Decentralization and Corruption

That corruption adversely impedes development is no longer an issue of debate. Cross country empirical work has confirmed its negative impact on institutions, growth and productivity, policy processes, property rights, and consequently development (Kpundeh, 2000).¹⁴ Therefore, controlling corruption is one of the greatest challenges in the

¹⁴ Empirical studies have shown that corruption, for example, undermines governance, democracy and the rule of law, intensifying injustice and conflict; hurts the poorest most and erodes development, adding to basic daily costs and taking money away from fighting poverty and delivering services; destroys investor confidence in a country, raising the costs of doing business, driving investors and employers away and

establishment and consolidation of democratic systems and a pro-poor governance environment.

The capacity of widespread corruption to erode the legitimacy of regimes and pose a profound threat not only to democratic systems but to all systems of governance is closely linked to the fact that corruption is anti-developmental: it diverts resources and efforts away from productive activities into rent-seeking, fosters negative incentives to investment, consolidates patronage networks as a principal form of influence on state economic management, and suppresses civil society and civil liberties.

A majority of CDFs have porous accountability mechanisms; research indicates that, among other issues, the major challenge that besets and links all these schemes is corruption (Tshangana, 2010). This might be because most CDFs give the Members of Parliament blanket powers over vital elements in the management of the CDF at the constituency level. In Kenya, for example, they have blanket powers to appoint committee members of their choice to manage the funds in their respective constituencies; to approve local projects before forwarding the list to Parliament for compliance checking and release of funds; to oversee the implementation of local CDF projects, among others.

Such broad powers and influence concentrates too much discretion in one arm of government (the Legislature) and more so, encroaches and absorbs the station of the

reducing economic growth; and also increases crime and seriously threatens security providing an attractive environment for terrorists, drug traffickers, money launderers and other criminals

Executive at the Constituency level. This state of affairs therefore not only affects the processes of project selection and implementation but also removes the necessary checks and balances from the engine of governance at the Constituency level and in the process reduces transparency and accountability in the implementation of the CDF.

Thomas Jefferson (as cited in Bondy, 1967 p.17) too concurs with this, that, “the concentrating of these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands and not by a single one. One hundred and seventy three despots would surely be as oppressive as one.”¹⁵ According to John Adams (as cited in Bondy, 1967, p.17-18), “it is by balancing each of these three powers against the other two, that the efforts in human nature toward tyranny can alone be checked and restrained and any degree of freedom preserved.”¹⁶

However, merely balancing these powers is not enough, there remains possibilities of encroachment by one branch of government onto another’s domain (usually, it is the legislature that have these tendencies to encroach upon the jurisdiction of the other branches of government); there is therefore need for a safeguard to prevent this. The solution to this according to Madison (as cited in Bondy, 1967, p.37-38), is to permit each department to participate in the functions exercised by the others, so as to check but not control them.

¹⁵ Notes on Virginia, p.195 Bondy, 1967

¹⁶ Works of John Adams, p.186 Bondy, 1967

For example, the Executive in Kenya holds his station not only by reason of his separation from and independence of the Legislature, but also by reason of his participation in legislation. By means of his veto power, the President cannot control, but may with limited effect check legislation. This is vested in the President as a guard against hasty and inconsiderate legislation, and against any acts inadvertently passed which might seem to encroach on the just authority of the other branches of the government (Bondy, 1967).

Any act of any branch of government, beyond the scope of its constitutionally delegated power, must legally be regarded as a void act. The Judiciary retains this power to declare statutes unconstitutional and void. This power gives it a shield of protection from other branches of government as well as enabling it to maintain its station as the coordinate branch of government. The exercise of this power is to the Judiciary, what the veto is to the Executive (Bondy, 1967).

Considering the Doctrine of Separation of Powers and the role of each arm of the government in ensuring such independence and constitutionality is maintained, the constitutional and policy failure of the CDF can not only be attributed to an over-ambitious Legislature, but also to a non-vigilant and ineffective Executive and Judiciary. By implication, the unconstitutional nature of the CDF and its consequent abuse is as a result of collusion between the ruling elite in Kenya- the Executive, Legislature and Judiciary, upon whose watch the fund was legislated, implemented and continues to exist

as is. This is also evidenced in the apparent weakness of *enforcement* of accountability in the CDF.

Weakness in enforcement (that is rewarding good and punishing bad behavior- a vital element of accountability), or lack of it thereof constitute too a major contributing factor to the deepening of corruption in the CDF. For rules to be effective, they must be accompanied by mechanisms of monitoring that ensures that violation of rules is detected. But they must also be complemented with mechanisms for enforcement that “get the incentives right” by keeping acts of cheating from going unpunished. The CDF Accountability Project reports that despite numerous complaints, only three cases of CDF corruption have been prosecuted in Kenya over the past six years (The CDF Accountability Project, 2009).

2.5.1 Fiscal Decentralization and Accountability

In the classical argument in favor of decentralization (Tiebout, 1956; World Bank, 2004) there are several ways in which decentralization is seen to stimulate and improve local accountability.

According to Breton (1996), competition between levels of government leads to less corruption related to the provision of public services for which officials can demand kickbacks. If factors of production are mobile between given political jurisdictions then different local governments can compete with one another to attract them. This reduces the monopoly power enjoyed by government officials with regard to local laws,

regulations, and bribes: poor governance manifested by high level of corruption and low provision of necessary infrastructure can cause mobile factors to exit to alternative jurisdictions with better services and less predatory local governments. This view is also supported by Weingast (1995), who argues that a federal state structure contributes to more honest and efficient government by providing for competition between sub-jurisdictions. However, Cai and Treisman (2004b) point out that the argument for benign effects of competition depends on the implied assumption that the jurisdictions are homogenous in regard to the productivity of the factors concerned. With sufficient heterogeneity across jurisdictions the race for mobile factors can be highly uneven, and the worse endowed regions can end up with less business-friendly policies and higher corruption.

The other mechanism for ensuring accountability of governments is through democratic pressure for re-election. This is particularly relevant in the supply of public consumption goods, social services and antipoverty programs in developing countries because mobility costs are high for households and workers, and residents of one region are not usually entitled to public services in other regions.

Local governments are in closer proximity to citizens than central governments, and that fact may make them more accountable to ordinary people. Thus, Seabright (1996) argues that local citizens are often able to make accurate inferences concerning the accountability of local government officials, owing to their knowledge and observation of local conditions and behavior of these officials and would therefore vote accordingly.

Electoral accountability, by definition, exists in every democracy, even the most minimal, as long as the political system provides both widespread opportunity to cast a ballot, and real choice to voters. However, elections tend to be easily rigged and bastardized as incumbents are keen to rig elections to the extent that they can get away with it (Boadi, 2004). In Africa's multiethnic and multinational states, elections have at times caused or aggravated social tensions and exacerbated fragility. Serious instability has followed multiparty polls in Burundi, Sierra Leone, Togo and most recently, in Kenya.

The inherent limitations of individuals' votes as a means of enforcing accountability upon elected leaders are well known and expected. This is because opportunities to cast a ballot are infrequent, arising for President or Parliament only once every four or five years. Moreover, elections force voters to compress myriad preferences – of political identity, competing policies, and retrospective evaluations and future expectations of performance – into a single choice (Boadi, 2004). This makes elections to constitute a blunt instrument for enforcing accountability.

Prud'homme (1995) and Tanzi (2000a), also argue that there are probably more opportunities for corruption and unaccountability at the local level because of the higher chances for 'state capture'. State capture refers to "actions of individuals, groups, or firms either in the public and/or private sectors to influence the formation of laws, regulations, decrees and other government policies to their advantage through the illicit and

nontransparent provision of private benefits to politicians and/or civil servants” (World Bank 2000: xv).¹⁷

State capture distorts the chain of accountability between politicians, service providers, and constituents through asymmetries of political influence (Bardhan and Mookherjee, 2000). State capture thrives in an environment where highly concentrated interest groups (especially powerful firms and families) dominate the market for political influence, and where political competition is weak. Local economies tend to be more homogeneous, more concentrated, and less competitive than the national economy, creating fertile ground for dominant economic actors to engage in state capture. This is particularly true in resource-rich regions in developing countries, where local economies depend on a particular state monopoly or powerful firm. In such cases, the boundary separating the interests of the region and the firm can be murky at best, and local political and economic elites are closely intertwined in promoting state capture (Campos and Hellman, 2005).

2.6 Conclusion

Fiscal decentralization literature appears to be largely silent on how the design and implementation of fiscal decentralization programs can affect their accountability—specifically how their constitutionality or lack of it thereof determines the extent to which they are accountable to the local citizenry. The literature, to a large extent focuses on the effects of the ‘outputs’ of decentralization (localization of development and policy, inter-

¹⁷ More specifically, the possibility of obtaining rents drives influential groups and individuals to bribe politicians and high-ranking civil servants, who introduce and maintain bad laws, policies, and regulations to perpetuate their illicit earnings. Note that in this context, corruption causes bad governance.

jurisdictional competition, etc) on accountability, rather than the effect of the 'inputs' (structural design and systems for implementation) on accountability. It focuses on demand side accountability more than supply side accountability. It does not address, for example, how inbuilt constitutional checks and balances between the different arms of government can be used (or abused) within a given political jurisdiction to stimulate and promote accountability or undermine the same in a decentralized fiscal program.

Kenya's main fiscal decentralization scheme- the Constituency Development Fund, is both monitored and implemented by the country's Members of Parliament, what effects would that have on accountability? Would it be necessarily negative or positive? There are currently no systematic theoretical and empirical studies under fiscal decentralization that can be used to analyze this.

Fiscal decentralization and accountability literature assumes that there are democratic systems already in place and that democratic norms and rule of law is respected in government devolution schemes. This is not always the case, as in the case of Kenya (this is further discussed in the next Chapter). It fails to review the impact such a deficiency would have on the fiscal decentralization scheme itself as well as on accountability levels at local and national levels.

Bardhan and Mookherjee (2005) and Treisman (2002) to some extent discuss the role of checks and balances but only between different government levels rather than government branches within a decentralized polity, this, they exemplified by having a

national representative body interacting with a local representative body to provide back and forth oversight and accountability. They do not discuss how the relationship between the different branches of government can be regulated to generate accountable local fiscal decentralization schemes, for example, how the Legislative branch can be empowered (or disempowered) to provide stronger and proactive oversight over fiscal decentralization at the constituency level or other lower jurisdictions.

The lack of specific studies in this area is significant because it leaves a sizeable knowledge gap for not only academic purposes but also for policy-informing and guiding the practice of development.

Another important reason of including constitutionalism in the research on fiscal decentralization and accountability, especially in Africa, is the ongoing constitutional and democratic contradictions in the continent in the face of increasing decentralization initiatives (Boadi, 2004). In spite of liberal democratic constitutions being promulgated in a number of countries such as Benin, Mali, Ghana, Malawi etc, standards of democratic performance have largely tended to be low, with still a relatively high proclivity towards unconstitutional legislating and implementation of national policies (Boadi, 2004).

For example, newly installed democratic regimes insist on, being such, they only have to perform slightly better or no worse than a previous autocratic regime. This causes these governments and public officials to comply with the laws and constitutions only in the most minimal way and in disregard of the democratic spirit in which such laws had been

formulated; incumbent regimes use their majority control over parliament to push through amendments and enact laws that contravene democratic norms, then rationalize such undemocratic actions on the untenable and backward grounds of consistency with what prevailed in a previous undemocratic regime.¹⁸ How can these constitutional inconsistencies affect the accountability of decentralized development schemes?

In a democratic state, a well-functioning Parliament promotes development and the rule of law. Representative institutions and participatory processes of democracy offer the most effective means of addressing poverty (Sharkey *et al*, 2006). As Matlosa, Elklit and Chiroro (2006) have rightly observed, “Democracy is a fundamental prerequisite for development, peace and security in Africa.” Involving the elected representatives of the people in the process of poverty reduction is necessary for the sustainability of the process and its legitimacy. Greater parliamentary involvement in the poverty reduction process helps to ensure that a country’s poverty strategy is generated, implemented and evaluated through national institutions with adequate political legitimacy to ensure ownership and sustainability. However, what happens when parliament overdoes itself to the extent of stepping out of its constitutional boundaries?

In Kenya, this has resulted in rampant corruption and misuse of public funds and resources. The unconstitutional dominance of Members of Parliament in the Constituency Development Fund has distorted accountability in the Fund, and created opportunity and incentive for abuse with impunity- a legislature that is involved in introducing and

¹⁸ See footnote no. 10 above

implementing spending proposals compromises its own ability to question these initiatives and therefore to hold the Executive to account.

This predicament has in turn emasculated the CDF of its capacity to combat poverty at the constituency level and reduce regional inequalities in Kenya as a whole. Since the Fund's inception in 2003, much of the CDF funds have been plundered, misappropriated, or stolen by the MPs, contractors in cohorts with the MPs and other actors party to the politician's patronage or individuals exploiting the inefficient administration and oversight of the fund. Most of the projects that get financed are either abandoned before completion, of mediocre quality or inadequate/irrelevant in meeting constituency development needs and mitigating regional inequalities. This will be further explored in the next Chapter.

CHAPTER 3

Case Study: Kenya's Constituency Development Fund (CDF)

3.1 Introduction

In the previous Chapter, fiscal decentralization and accountability literature was looked at in a bid to find a fitting theoretical conceptualization of the impact on accountability of Separation of Powers or lack of it in a fiscal decentralization scheme. In this Chapter, the study now looks at the case of fiscal decentralization in Kenya (the Constituency Development Fund) and corruption in the management and implementation of the Fund.

The Chapter provides a background overview of the phenomenon of Poverty, Inequality and Kenya's continued efforts to combat these two challenges through various fiscal decentralization initiatives that has spanned several decades- 1966 to date (In Section 3.2 and subsequent Sub-sections). Section 3.3 of the Chapter examines the context and establishment of the CDF, its purpose, structure, implementation, and the role of the Members of Parliament in the Fund as derived from the CDF Act of 2003. The last Section (Section 3.4) goes on to discuss corruption in Kenya and specifically in the management and supervision of the CDF by the Members of Parliament.

3.2 Background

3.2.1 Poverty in Kenya

According to the 2006 Kenya Integrated Household and Budget Survey, (KIHBS) 46% of the total Kenyan population is poor, that is, living below the poverty line (Kenya National Bureau of Statistics, 2007). In 2003, the country's per capita income was at US \$ 360- lower than in 1990 (which was US\$ 350) and poverty incidence rose from 49% in 1990 to 55% in 2001. As the economy was declining, so did the country's social indicators. For example, infant mortality rose from 63 (per 1000 births) in 1990 to 78 in 2002. In the same period, life expectancy declined from 57 to 46 years, in part due to the HIV/Aids epidemic. The persisting hunger of children is evident in the 19% under fives who are underweight and almost one in three (31%) who are irrevocably malnourished (Central Bureau of Statistics, 2004).

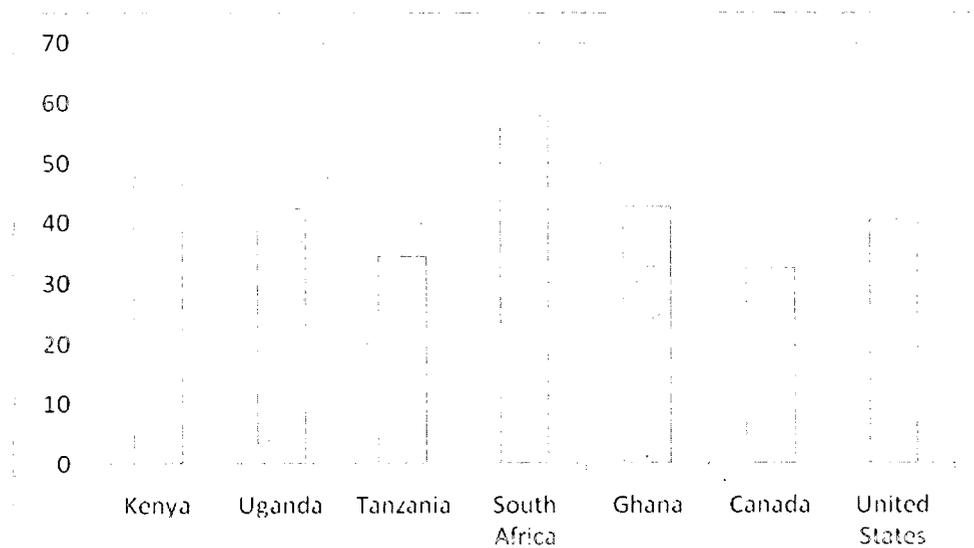
3.2.2 Inequality in Kenya

A recent report by Society for International Development (SID) (2004) indicates that Kenya is a highly unequal country. The richest 10% of Kenya's households control more than 42% of the country's total income, while the poorest 10% under 1%. Regionally, more than twice the number of children die in the first year of their lives in Nyanza province compared to the Rift Valley (133 versus 61 deaths per 1000 live births), a person born in Nyeri district can expect to live 17 years more than one born in Siaya, while a person born in Meru district can expect to live twice as long as one born in Mombasa (67 versus 33 years) (SID, 2004).

The proportion of landless rural poor households differs widely across the country's provinces with the highest being in Central province (15.8%) and the lowest in Western province (6%). Access to education is also skewed with an attendance ratio in primary schools of 86% for the rich and 61% for the poor. Central province had the highest gross enrolment rate in primary and secondary schools at 106% and 38% in 2000 as compared to 18% and 4.5% in North Eastern province according to Irungu (2008).

In the Eastern Africa region, Kenya compares unfavorably with Uganda and Tanzania in inequality levels. This is also the case compared with other Western countries, for example United States and Canada. It is however better than South Africa, going by Gini Indices in figure 2.

Figure 2: Gini Index of Kenya and select countries, (*in percentage %*)



Source: UNDP Human Development Report, 2009

3.2.3 Decentralized Strategies used to Combat Poverty and Inequality in Kenya

Over the years, the Kenyan government has formulated and implemented diverse decentralization programs to target and mitigate these twin problems (poverty and inequality). In 1966, it formulated the District Development Grant Program (DDGP), this was followed three years later by the Special Rural Development Program (SRDP) of 1969 to 1970, and in the following year (1971), there was the District Development Planning (DDP). The District Focus for Rural Development Program (DFRDP) ran between 1983 -84 and four years later, the Rural Trade and Production Center (RTPC) was instituted, it ran from 1988 to 1989. Inevitably, this alphabet soup of programs suffered the same fate – a lack of funding and excessive bureaucratic capture by the central government (for a closer examination of these programs, please see Ogotu, 1989; and Khadiagala & Mitullah, 2004).

Over the last decade, Kenya has renewed its interest in devolved development programs as a way to reverse regional inequality in the country and tackle poverty. This has seen the establishment of several funds, for example, the Constituency Development Fund (hereafter referred to as CDF)¹⁹- under our current study, the Poverty Eradication Loan Fund (PELF), the Rural Electrification Program Levy Fund (REPLF), the Road Maintenance Levy Fund (RAMFL), the Community Development Trust Fund, the Free Primary Education Fund (FPE) and the Local Authority Transfer Fund (LATF). The Constituency Bursary Fund (CBF), the Water Services Trust Fund (WSTF) and the HIV/Aids Community Initiative Account (for a more detailed discussion, please see Centre for Governance and Development Report, 2007).

So strong is the trust in the devolved funds system- and especially the CDF that an increase in funding for CDF was earmarked as part of the stimulus package to help the country pick up from the 2008-2009 global financial crises. Together with this, the government in its 2009/10 Budget moved to boost the CDF kitty allocations (Odhiambo, 2010).

3.3 Kenya's Constituency Development Fund (CDF)

The Kenya Constituency Development Fund was established in 2003 through an Act of Parliament. The core purpose of the fund was reducing regional inequalities in economic development brought about by patronage politics (CDF Act, 2003). This was to be

¹⁹ Constituency Development Fund (CDF) is the generic name for a fiscal decentralization policy tool that dedicates a fraction of public moneys to benefit lower level political subdivisions (e.g. constituencies) through allocations and/or spending decisions influenced by their representatives in the national parliament.

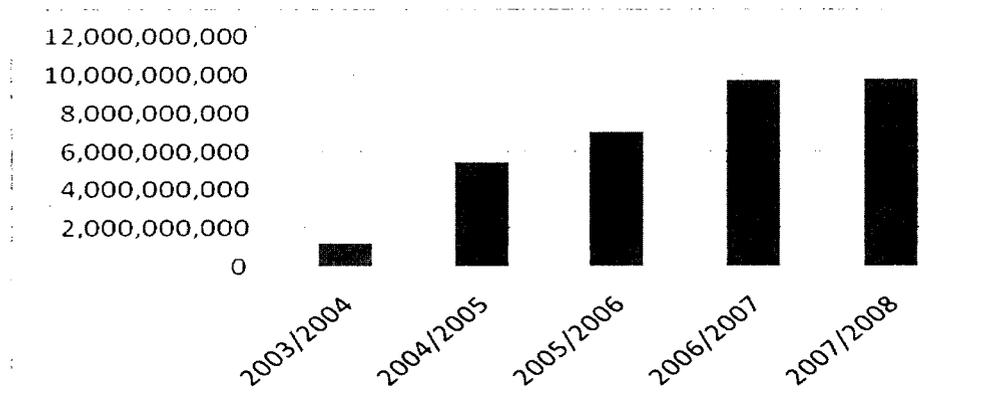
achieved through disbursing a certain percentage of the national revenue to the CDF scheme and through it, to the constituencies to fight poverty. According to the CDF Act, poverty was to be combated through the implementation of development projects that provide basic needs such as education, healthcare, water, agricultural services, security and electricity.

3.3.1 Allocation and Distribution of the CDF funds

Since its inception, the CDF fund has grown from Kshs 126,000,000 (US \$ 16,546,766.60) for the 2003/2004 fiscal year, to Kshs 9,797,000,000 (US \$ 128,657,676.48) in the 2007/2008 fiscal year (CDF Allocations, 2008) - this is a whooping increase of 678% in 4 years.

Figure 3: Growth of the CDF allocations from 2003 – 2008, data from Kenya

Constituency Development Fund, Ministry of Public Planning



Initially (in the financial year of 2003/2004), the funds were distributed equally among the 210 constituencies (CDF website) but since 2004 the Central government developed and implemented the use of a formula for determining the distribution of allocations and as such also guarantee funding for CDF unlike previous social programs. The formula instead of aiming at equal distribution, aims at equitable distribution based on poverty levels, population and constituency size.

Through this formula, 75% of the *net* available funds²⁰ are distributed equally among all 210 constituencies, whilst 25% of the net available funds are distributed according to a weighted value of a constituency's contribution to national poverty. The weighting factor of a constituency's contribution to poverty is the ratio of urban-rural poor population

²⁰ The net available CDF fund is the total CDF allocation after netting out 3% for an administrative budget and 5% for a Constituency Emergency Budget.

derived from the 1999 population and housing census.²¹ This weight favors rural areas by a factor of 0.23 to urban areas.

Figure 4: Formula for the allocation of CDF in each constituency

$$\text{CDF Allocated} = \left[\frac{0.75 \times \text{Total CDF Allocation}}{210} + \left(\frac{0.25 \times \text{Total CDF allocation}}{\text{Weighted Contribution to Poverty}} \right) \right]$$

Source: Section 19 (1) of the CDF Act 2003

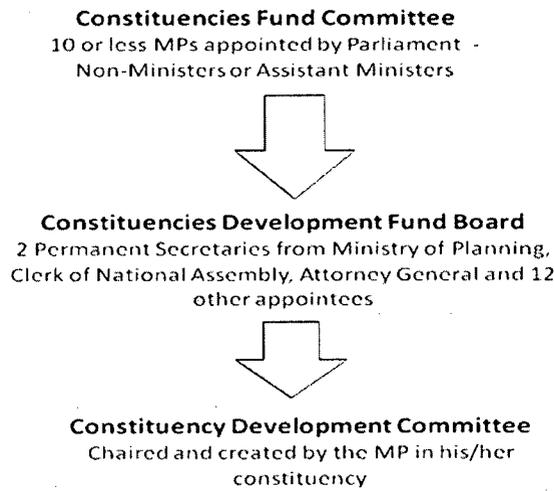
This allocative bias against urban areas is based on the fact that the majority of the poor population lives and derives their livelihoods from rural areas. According to the 1999 census, the rural areas had 81% of the country's poor while the urban areas had 19%.

Another aspect for this bias is to deter migration from rural to urban areas. Kenya is home to the second largest slum in Africa, comprised mainly of migrants from the rural areas, this movement of people and growth of slums is indicative that living conditions and economic opportunities, in the migrants' respective rural areas of origin, were probably worse. The rationale here is that if rural areas are better developed and more capable of absorbing a growing population, then fewer people might be attracted to migrate into urban slums.

²¹ According to Section 19 (1) the total amount allocated to each Constituency is computed through –(a) three quarters of the amount specified in Section 4(2)(a) divided equally among all constituencies; and (b) an amount equal to quarter the amount specified in Section 4(2)(a) divided by the National Poverty Index multiplied by the Constituency Poverty Index.

3.3.2 Management and Supervision structure of CDF

Figure 5: Flow diagram of CDF management



In order for the sitting Member of Parliament to make use of the CDF funds s/he must first form a local committee – Constituency Development Committee (see figure 5 above) which invites project proposals from members of the constituency- for projects that are in line with local needs and the CDF Act. The Committee headed by the Member of Parliament is to be formed within the first sixty days of a new Parliament and be composed of at most 15 non-paid local people with four reserved seats (for a woman, a religious leader, a representative of an NGO and a young person) to ensure broad representation.

According to Section 17, *the allocation of funds to various projects in each constituency is the responsibility of the Constituency Development Committee to be exercised at its own discretion within the provisions of [CDF] Act.* Therefore, this committee receives and lists all the projects suggested by the constituents, it prioritizes and recommends

projects that could tackle poverty in the constituency for funding. The prepared list of these priority projects is then sent to the Member of Parliament for final approval and forwarding to Parliament²² which scrutinizes and approves for funding those projects proposals that are consistent with the Act. The submission to Parliament is through the Constituencies Development Fund Board (See figure 5 above) which is a corporate body accountable to the Constituencies Fund Committee – made up of the Members of Parliament. The Board, among other things, is required to submit monthly reports on projects approved, funded, budgetary projections etc to the Parliamentary Committee- Constituencies Fund Committee (See figure 5 above)

In the Constituencies, the Constituency Development Committees have the discretion to use the CDF funds to finance any kind of development project(s) outside of political parties and/or religious bodies. Development projects may include the acquisition of land, vehicles, machinery or equipment. The number of projects that each Constituency can get approved per financial year is a minimum of five and a maximum of twenty five.

Although the CDF takes a relatively small amount of national resources its impact has been significant. Joseph Kinyua, the Permanent Secretary, Ministry of Finance and chairman of the National Management Committee has commented that: “The constituency Development Fund has had a major bearing on the development and rehabilitation of the socio-economic infrastructure in the entire country”. (CDF National News, 2006)

²² CDF Act 2003 Section 12 (1)

CDF has helped provide services to communities that for many years had been politically and economically marginalized or received minimal levels of public services. The poor, who have in the past experienced many obstacles accessing basic public services, have in particular benefited significantly as these services have now been brought closer and are more accessible through CDF.

A study conducted by the Institute of Economic Affairs (IEA Kenya) and the Kenya National Commission on Human Rights (KNCHR) indicates that beneficiaries of the fund were very positive about the outcomes and impact of the CDF projects despite reservations about how they were identified and managed (Kenyan's Verdict, 2006). The study notes that some of the contributing factors to this positive outcome are:

- The opportunities created have improved their livelihoods by creating jobs- unskilled labor where they are compensated
- The opportunities created for nurturing supportive activities- evidenced by mushrooming village trading centers and revival of projects situated in village shopping centers affords them the opportunity to trade their wares hence creating market
- The direct development of human resource as a result of massive investments in human capital either in the health or education sector

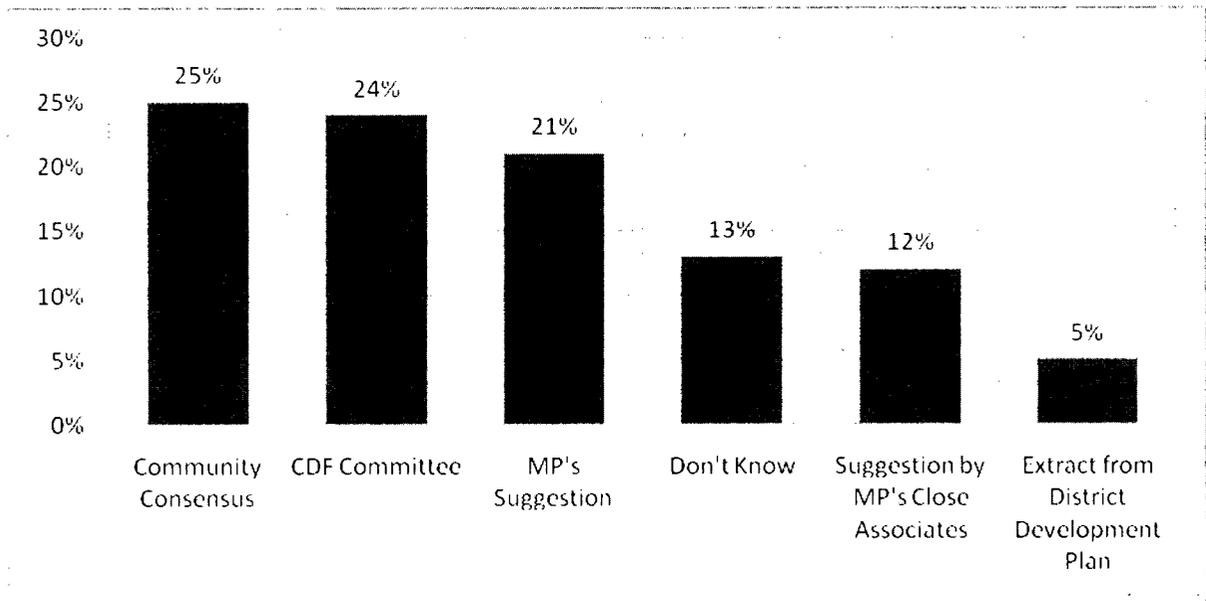
Discretionary resources given to constituencies to spend on priority areas like water, education, health, infrastructure and/or agriculture would, according to decentralization theory, inevitably makes this possible. However, for sustainable and effective decentralization to occur, the incremental economic benefits of fiscal decentralization

ought to be realized in tandem with incremental political benefits like accountability and transparency in local governance and administration of public resources. This would empower ordinary citizens to have a stronger stake in deciding their local priorities and monitoring funds and resources allocated to meet these priorities. The constituents become participants rather than subjects of/for local development.

CDF like all other decentralization programs was established on the belief that the community at the local level has better understanding of its needs and how to meet them. The Fund was therefore implicitly expected to increase community participation in local decision making, enhance transparency, speed up government responsiveness and improve quality of service delivery.

However the Fund has over the years being characterized with low/non-involvement of local communities in project identification and selection. This is evidenced by data from the National Anti-Corruption Campaign Steering Committee (NACCSC) report of 2008: the report showed that nearly 60% of Kenyans are not given the opportunity to be involved in project selection or prioritization. Approximately 25% of respondents only were involved in CDF projects in some manner (project identification or prioritization, project management, project monitoring) (NACCSC, 2008).

Figure 6: Methods used in project Selection and Prioritization in the CDF

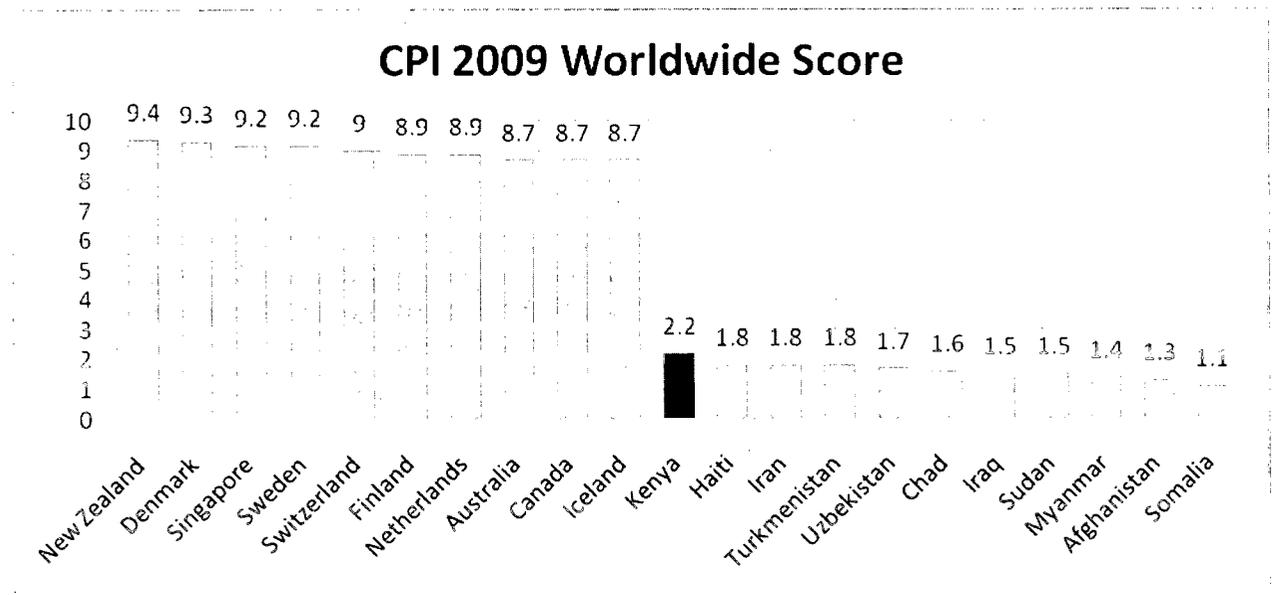


Source: National Anti-Corruption Campaign Steering Committee (NACCSC, 2008).

The degree and manner of public participation in project selection/prioritization appears to vary between constituencies. However the MP and CDC committee are key drivers of project selection as seen in Figure 6.

3.4 Corruption in Kenya

Figure 7: Kenya's Corruption Perception Index position relative that of the top 10 and bottom 10 Countries worldwide. Data from Transparency International, 2009.



The graph in figure 7 above, as well as the one below (figure 8) attempts to provide a visual snapshot of corruption levels in Kenya vis á vis those of other countries- globally and in the African continent (using the top and the bottom ten countries in both instances). Kenya's CPI performance is dismal. Globally and in Africa, the country's CPI is skewed more to the bottom level- being a mere 1.1 (as shown in figure 7 above and also in figure 8 below) points from parity with a country like Somalia- which is a poster child of a failed state. This highlights the dire urgency and need to address corruption in all forms and sources in Kenya.

Corruption has occupied a prominent place in Kenya's governance discourse for a long time; however, the issue came to a head in the 1990s, when Kenya's development

partners suspended aid to the country because of a slew of massive corruption incidences both in public and private sectors and at times the two sectors working cohorts.²³

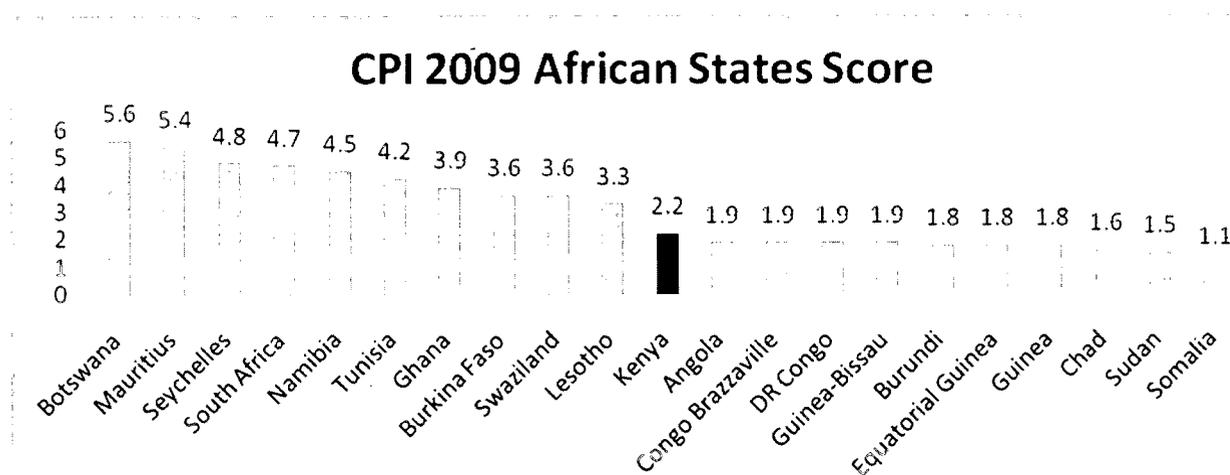
Kenya's Poverty Reduction Strategy Paper (K-PRSP, 2003-2007) cites this problem as the singular factor responsible for poor governance in the country, and a major impediment to Kenya's economic development. It notes that: "Pervasive corruption has slowed growth and deepened the poverty levels in the country. Eliminating corruption will free significant resources for investment in infrastructure and in programs that deliver services to the poor."

Kenya's Economic Recovery Strategy for Employment and Wealth Creation (ERSEWC) furthers this issue along by noting that: "The poor management, excessive discretion in government, appointments of people of dubious characters and political interference and lack of respect for professionalism led to widespread corruption, gross abuse of public office in many government departments and incorrigible tolerance...For these reasons the solution of the current national crisis is to be found in our ability to reclaim professionalism and confidence in public officers, and guaranteeing efficiency".²⁴

²³ On 30th June 1997, the International Monetary Fund (IMF) suspended its enhanced structural adjustment facility (ESAF) program to Kenya. The IMF cited poor governance and corruption in the public sector as one of the reasons for suspending its lending program. It required the Kenyan government to speed up the prosecution of government officials involved in a major corruption scandal in the country, and to set up an independent anti-corruption agency among other reforms before its lending program could be resumed.

²⁴ See Chapter 3.1 of Kenya's Economic Recovery Strategy for Employment and Wealth Creation. Available at < <http://siteresources.worldbank.org/KENYAEXTN/Resources/ERS.pdf> > (Accessed on 1st May 2010)

Figure 8: Kenya's Corruption Perception Index position relative that of the top 10 and bottom 10 Countries in Africa. Data from Transparency International, 2009.



The fact and trend of corruption in Kenya as a matter of grave concern is further evidenced by the country's dismal performance in the various indexes that have been developed to measure governance and corruption. A look at Transparency International's Corruption Perception Index (CPI) reveals that Kenya has set itself apart as one of the countries perceived to have one of the highest incidences of corruption, in 2009, it ranked 146 out of 180 with a CPI score of 2.2- on par with war-torn Sierra Leone and Zimbabwe- which is almost a failed state.²⁵ The 2008 Kenya Bribery Index (KBI) reveals that Kenyans encounter bribery in 56% of their interactions with both public and private institutions, up from 54% in the previous year. Both of these figures are significantly

²⁵ A listing of all of the Corruption Perception Indexes can be found at: http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table > (Accessed on 1st June 2010)

higher than those obtained from the 2006 and 2005 KBI surveys (47% and 34%, respectively).²⁶

In the 2009 Ibrahim Index of African Governance (IIAG), the country ranked 22nd out of 53 African states with an average score of 53.7 out of 100, and was ranked 3rd in the East Africa region- Seychelles came on top in the region with a score of 77.1 out of 100 – the region as a whole was 2nd from the last of the five African regions.²⁷ Closer scrutiny shows that Kenya had a score of 50 out of 100 in transparency and accountability, a 20 out of a 100 in corruption in government and public officials and a paltry 14 out of a 100 in general corruption.²⁸

Solid research from Kenya clearly documents prevalence of corruption and mismanagement in CDF operation in many constituencies, (see for example the National Anti-Corruption Campaign Steering Committee Report of 2008 (NACCSC), IMF Report on Observance of Standards and Codes: Fiscal Transparency Module- Kenya, 2008, etc. Public surveys have also recorded constituent perceptions of corruption on the part of CDF management (The CDF Accountability Project CDF Case File Report No. 1,

²⁶ See Transparency International, Kenya: Kenya Bribery Index 2008, available at <http://www.tikenya.org/documents/KBI_2008.pdf> (Accessed 19th February 2009). The survey captures corruption as experienced by ordinary citizens in both public and private organizations. Respondents provide information on their experience with bribery in the previous year— in which organizations they encountered bribery, where they paid bribes, how much they paid and what they paid for.

²⁷ See Ibrahim Index of African Governance. Available at <http://www.moibrahimfoundation.org/en/media/get/20091004_kenya.pdf> (Accessed on 1st June 2010) The Index is a measure of governance in Africa based on five categories of essential political goods: Safety and security; Rule of Law, Transparency and Corruption; it measures these using 84 different sets of qualitative and quantitative data Participation and Human Rights; Sustainable Economic Development; Human Development. Each country is assessed against 58 individual measures, capturing clear, objective outcomes

²⁸ See Ibrahim Index of African Governance- Rule of Law, Transparency and Corruption, available at <http://www.moibrahimfoundation.org/en/media/get/20091004_kenya.pdf> (Accessed 1st June 2010).

September 2008 and MUHURI Report on Social Audits in Kenya: Budget Transparency and Accountability).

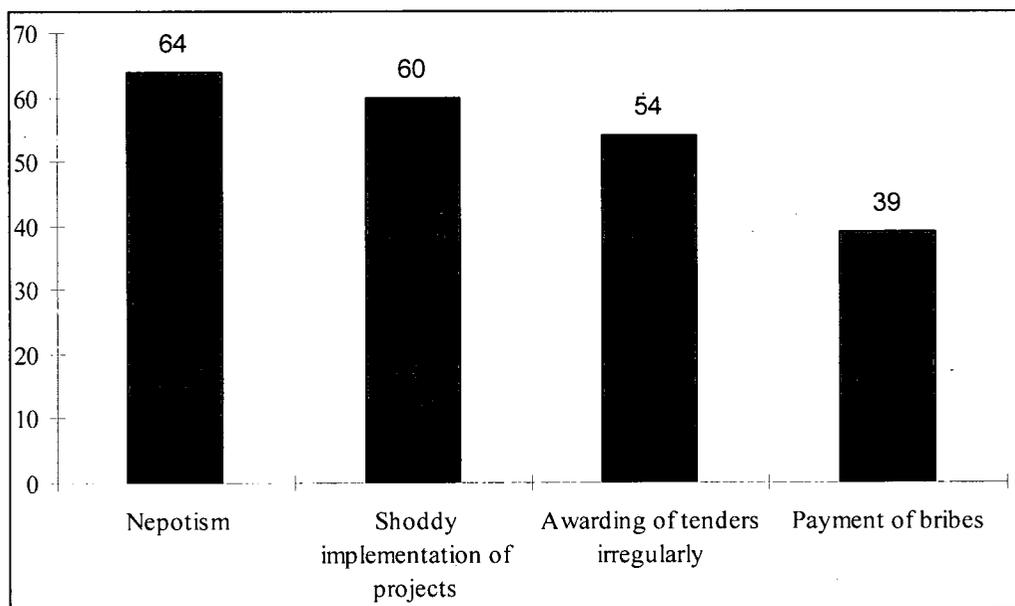
The issue is also acknowledged by the Government of Kenya which identified corruption as one of the key problems to be investigated by the Constituency Development Fund Task Force.²⁹ According to NACCSC (2008) and Gikonyo (2008), the various forms of corruption reported in Kenya's CDF include:

- Funding of non-priority projects which benefit a particular few, or are 'quick-wins' as opposed to more long-term development projects which are difficult to implement
- Favoring of particular geographic areas of MP support in selecting projects
- Collusion in the awarding of tenders and committee officials/MPs acting as suppliers
- Bribery in order to secure contracts
- Double-funding of projects
- Starting new projects instead of following through on the implementation of existing ones, in order for an MP to tie their name to particular project and accredit to themselves the projects' impact
- Unclear tendering and procurement procedures as well as non-advertisement of tenders resulting in single sourcing and irregular expenditure
- Poor or little contract management, leading to contractors being paid for incomplete work or sub-standard work

²⁹ At the launch of the Task Force in May 2009, the Planning Minister admitted that at least 20% of funds go to waste. Kagira, Anthony. "New Team to Review CDF Laws", Capital News, 22 June 2009.

The NACCSC report gives data on the frequency of different forms of corruption and found that nepotism and sub-standard delivery by contractors were predominant:

Figure 9: Frequency of different forms of corruption in the CDF (*In percentage (%)*)



Source: NACCS, 2008

The International Monetary Fund (IMF) has also pointed out that the utilization of devolved funds in Kenya; especially the CDF remains a major challenge (IMF, 2008). In its 2008 Report on Observance of Standards and Codes (ROSC) for Kenya, the IMF concedes that in the implementation of CDF, there have been various concerns such as lack of coordination between those in charge of CDF, local planning and central government planning.

For example, the Bretton Woods institution points out that while the CDF Act requires that spending on e.g. Health facilities be coordinated with parent ministries in this case

the District Medical Officers to ensure compliance with standards; the country has witnessed the construction of some 1,000 dispensaries, without such consideration. This has led to a stalemate between the Health Ministry and the CDF as there are no provisions for staff or running costs in the Ministry's budget for those dispensaries, leaving these facilities unused and therefore a waste of public money. "Projects are poorly chosen with some having widespread spill-over benefits to some constituencies often being ignored. There seems to be a fiscal illusion that CDF is free. This tends to demotivate beneficiaries especially in monitoring the fund's efficient utilization."(IMF, 2008)

Further, whereas the Public Procurement & Disposal Act, 2005 Section 43, expressly provides that where there is a conflict of interest the affected person shall disclose ones interest and not take part in the procurement proceedings. It fails to expressly outlaw engagement as a supplier. This provision has widely been interpreted to mean that CDC members may act as suppliers/contractors to CDF as long as they disclose their interests and do not sit in the tender proceedings. Thus all over the country CDC members act as suppliers to CDF in full knowledge of the authorities.

According to a 2009 report by The Institute for Social Accountability (2009), the tendering and procurement procedures have become conduits through which some contractors, Members of Parliament and their political cronies through the complicity of CDC members are fleecing hundreds of millions of shillings from the constituency kitties through skewed processes. More critically the subversion of CDF procurement processes

in this way, pushes out genuine entrepreneurs and professionals, undermines standards and wealth creation prospects for the constituency. Common abuses range from establishing personal fronts or ghost companies which are awarded CDF project tenders un-procedurally and use the opportunity to inflate prices of goods and services.

A case in point is Mwatate Constituency in Taita Taveta where the former CDC Treasurer was also doubling up as a contractor. In Nakuru Town, the Constituency Development Fund Committee members were allowed to provide labor and materials like ballast and timber creating a conflict of interest (Ibid).

In 2009, a report released by the National Taxpayers Association revealed that during the 2007/2008 fiscal year, nearly half a billion Kenya shillings (about US\$ 6.46 Million) belonging to CDF went missing in 17 Constituencies. The previous year's (2006-2007) loss of Kshs. 300 Million had widened up loopholes that led to the loss almost doubling in 2007/2008 and tripling in 2008/2009 fiscal year (Muchuma, 2010).

In using sample data³⁰ of 11 randomly selected constituencies,³¹ this study found that in the financial year of 2006/2007, out of the total amount of Kshs. 505, 565, 013 awarded to the group constituencies, 16% of the funds (Kshs. 82, 237, 617) was spent on badly implemented projects, 4% of the funds (Kshs. 21, 544, 500) was spent on projects that

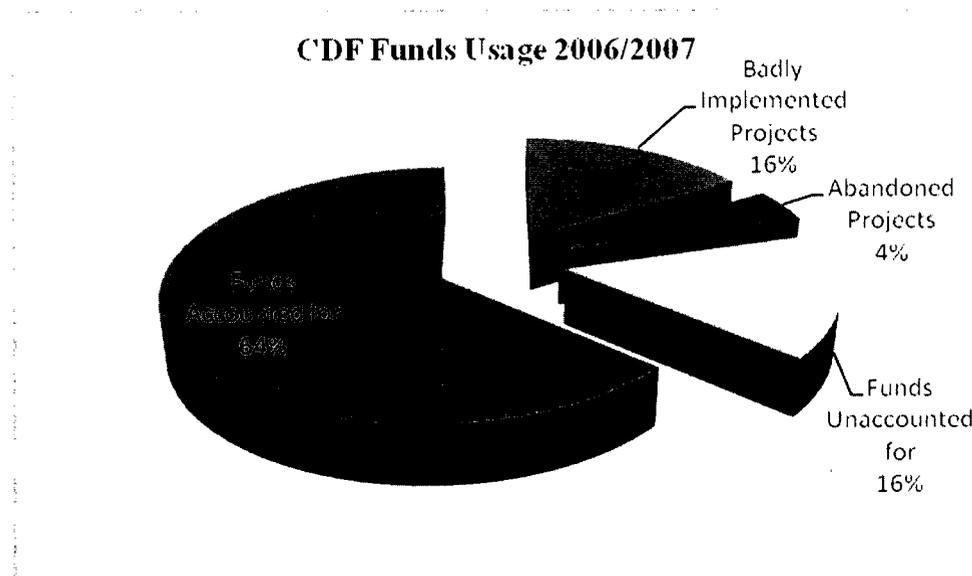
³⁰ Data from National Taxpayers Association Reports and the CDF website – <www.cdf.go.ke> (Accessed on 20th February 2010) see Appendix 2

³¹ Bondo Constituency, Embakasi Constituency, Gem Constituency, Kamukunji Constituency, Kangema Constituency, Makadara Constituency, Ganze Constituency, Amagoro Constituency, Budalangi Constituency, Matungu Constituency and Mumias Constituency – for further breakdown of details please see appendix 2

were started but abandoned before completion, and another 16% of the funds (Kshs. 80, 206, 002) was unaccounted for.

Many projects were either incomplete, or badly implemented e.g. construction projects were built using poor quality construction materials, hence the money wasted. Others were abandoned projects which were incomplete and not funded in the subsequent years, and others were ghost projects where funds were allocated but projects do not exist physically.

Figure 10: 2006-2007 usage of CDF allocation in eleven sample constituencies. Data source- <http://www.nta.or.ke>. See Appendix 2 for table of data.



Corruption in the CDF is as a result of weaknesses in the Fund's management- mainly that of poor accountability from the Members of Parliament who manage the Fund at the Constituency level. There is a dire lack of- to use Andreas Schedler's (1999) two-dimensional definition of accountability- *answerability*, which is the obligation of public

officials to inform about and to explain what they are doing, and *enforcement*, the capacity of accounting agencies to impose sanctions on power holders who have violated their public duties. Stringent accountability measures in the Fund would drastically mitigate irresponsible behavior such as lack of reporting, weak contract management, and poor oversight.

The frequent and recurrent refusal and/or incapacity of Members of Parliament to follow the fundamental tenets of participatory governance and to account for their actions and expenditures is a major reason why corruption has grown and maintained a strong grasp on the CDF. The Members of Parliament are constitutionally assigned the watchdog role over government expenditure and policy implementation, however, they are- through the CDF Act of 2003, vested with the unconstitutional responsibility of implementing the Fund- this conflict of interests have weakened and consequently made ineffective the structures for monitoring and oversight of the CDF and therefore the general answerability from the Fund managers- the Members of Parliament. Institutions such as Parliamentary oversight committees and watchdog groups are present but again, because of this conflict of interests, their effectiveness is questionable.

The notions of strict/partial Separation of Powers and real checks and balances are not entrenched in the practice of governance in this fiscal decentralization scheme. Consequently, the nominally autonomous agents of horizontal accountability (the Parliament, which ought to provide oversight) are incapable of demanding answers as they are both the implementers and watchdogs of their own legislation. “When the

Legislative and Executive powers are united in the same person or body”, says Montesquieu, “there can be no liberty, because apprehensions might arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner”.³² Blackstone also reaches the same conclusion that; “wherever the right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no public liberty.” (Ibid)

3.4.1 Effects of Corruption

The effects of corruption can be gauged through both its direct impact (through, for example, increasing the cost of public services, lowering their quality and restricting poor people’s access to such essential services as water, health and education) and the indirect impact (through, for example, diverting public resources away from social sectors, and through limiting development, growth and poverty reduction).³³

Empirical evidence indicates that corruption not only undermines the legitimacy of a state by eroding its real and perceived authority and ability to govern for the common good, but it also aggravates poverty levels by disproportionately impacting the poor (due to their powerlessness to change the status quo, and inability to pay bribes) and in its due

³² Commentaries, Vol. I, p.146 as cited in Bondy, William (1967). *The Separation of Governmental Powers in History, In Theory, and in the Constitutions*, AMS Press, Inc

³³ A report by the African Development Bank Group (2003), presented to the African Union estimated that corruption costs African economies in excess of US\$ 148bn a year. This figure, which includes both direct and indirect costs of corruption, i.e. resources diverted by corrupt acts and resources withheld or deterred due to the existence of corruption, is thought to represent 25% of Africa’s GDP and to increase the cost of goods by as much as 20% deterring investment and holding back development.

course, creates or enhances existing social, economic and political inequalities (Ogwang, 2007).

According to the Kenyan Urban Bribery Index Report (2001); households with low-income levels are more vulnerable to corruption than those with higher income levels. Those on the lowest income reported a 74.4% incidence of bribery encountered and those on the highest income reported a 61.9% incidence. Similar comparisons exist for other social-economic categories, such as, for example, education and employment. The findings indicate that those likely to be poor (i.e. unemployed, those with low education, etc.) are more vulnerable to corruption than the better off socio-economic groups. Respondents with primary education and below encounter bribery in 75% of their interactions with public organizations, as compared to 67% for those with secondary school education and 63% for those with tertiary education. The unemployed encounter bribery the most (in 71% of their interactions), self- or family employees 68% of the time, the business and non-profit sector 61% of the time, and the public sector employees report encountering bribery in just over half (52%) of their interactions, significantly lower than all the other groups.

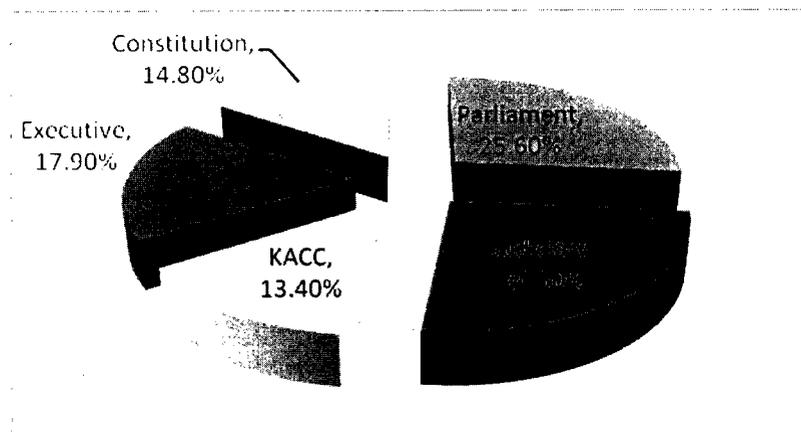
3.4.2 Where are the Corrupt?

According to the 2006 African Peer Review report, in Kenya, “corruption still pervades the Executive, Legislature, Judiciary and military, as well as the Civil Service. The

general public perception is that corruption is endemic in [the country], public confidence in government's commitment to fighting corruption has waned.”³⁴

In 2009, this was further developed by Transparency International through a research that sought to establish the public institutions that the respondents thought were contributing the most to the failure in the war against corruption. Respondents were presented with the five options of Parliament, Kenya Anti-Corruption Commission, Judiciary, Executive and the Constitution, and asked to pick the three that they thought were contributing the most to the failure of the fight against graft. On aggregation, 25.6% of responses indicated Parliament, 24.5% indicated the Judiciary, 17.9% indicated the Executive, 14.8% indicated the Constitution and 13.4% indicated the KACC (Transparency International-Kenya, 2009).

Figure 11: Distribution of Corruption in Kenya, 2009



Source: Transparency International- Kenya, 2009

³⁴ See Chapter 7 (contains a discussion of issues in Kenya which the Report considered critical due to their impact on governance and are in urgent need of action) of the APRM Country Review Report of the Republic of Kenya, May 2006, available at < <http://www.nepadkenya.org/Documents/KenyaCountry%20Review%20Report.pdf> > (Accessed on 1st June 2010)

After the 2003 general election, the government and especially through the national representative body- Parliament was widely expected to play a central role in the fight against corruption and facilitate economic recovery in the country. The national mood and desire of the nation was aptly captured by the then President elect in his inaugural speech where he asserted that; “corruption will now cease to be a way of life in Kenya ... there will be no sacred cows under my government. The era of “anything goes” is gone forever. Government will no longer be run on the whims of individuals (Mars Kenya, 2010).

However, this agenda was quickly abandoned, together with the other arms of government; Parliament gave up its national interest and converted its legislative authority and goodwill to the private interests of its Members. It failed to live up to its promise of being open, transparent and accountable.

After the Members of Parliament were sworn-in on January 9th 2003, Parliament’s very first piece of legislative work was to move, in March 2007, an amendment to the National Assembly Remuneration Act (Act No 9 of 1975) by introducing the National Assembly Remuneration (Amendment) Act (No.2 of 2003). The amendments went through all four legislative stages in under a month and were assented by President Mwai Kibaki on April 16th 2003. They brought the total emoluments for each Member of Parliament to just

below Kshs 900,000 per month (US \$ 12,000) for backbenchers (Mars Group Kenya Report, 2007).³⁵

The effective date of the new salaries and allowances was stated to be January 1st 2003; 8 days before the Members of Parliament were sworn in, and became eligible for allowances and salaries at all. The effect of this retrospective act was to defraud the Kenyan taxpayer of 8 days of salaries and allowances for all the 224 elected, nominated and ex-officio Members of Parliament. With monthly emoluments, at that time, running to about Kshs 877,000 per month, this meant that a total of Kshs 52,386,136 (USD 748,373) was paid by Treasury to persons who according to the Constitution of Kenya were not Members of Parliament (Mars Kenya, 2007).

In addition, the 2007 Gratuity Bill embedded in the Statute Law (Miscellaneous Amendment) Act, which amended the National Assembly Remuneration Act of 1975, made provision for the payment of a Kshs 1.5 million gratuity to each Member of Parliament and to the ex officio Members, including the Attorney General, a constitutional officer with security of tenure.

The Gratuity Bill was heavily opposed by civil society and the general public because first, the gratuity was unwarranted and undeserved in view of the Parliament's poor work

³⁵ Members of the 8th Parliament (1997-2002) were paid Kshs 336,000 (US\$ 4412.47), still a large sum of money in a country where the 2008 GDP per capita is about Kshs 62, 998.67 (US\$ 827.32) see United Nation's Statistics Division <<http://data.un.org/CountryProfile.aspx?crName=Kenya>>

record,³⁶ secondly, it was not clear whether a gratuity can be paid under Kenyan law to MPs who are on pensionable terms. Thirdly, the unconstitutional process that was used to pass the Bill, for example, when the Statute Law (Miscellaneous Amendments) Bill 2007 was published by the Attorney General, on May 27th 2007, it did not indicate that the National Assembly Remuneration Act (cap 5) was one of the statutes whose provisions would be amended. Accordingly the proposed amendments were not carried in the bill as published.

Voting on this amendment without the consent of the President, moreover, was in itself un-procedural and unconstitutional. The amendment would end up costing the Kenyan tax payers Kshs 333 million and for such an amendment to be voted for, the consent of the Executive is by law required, according to section 48 of the Constitution and Standing Order No. 132.³⁷

³⁶ Between 2003 and 2007, Parliament passed 67 laws, an average of 13 laws per year; this in today's standards is very meager. Some parliaments e.g. South Africa Parliament, are known to make over 40 statutes in one year. It is noteworthy too, that in the same period, over 25 Bills were rejected and turned back to the House for being un-procedural or constitutionally unsound.

³⁷ "Except upon the recommendation of the President signified by a Minister, the National Assembly shall not - (a) proceed upon a Bill including an amendment to a Bill that, in the opinion of the person presiding, makes provision for any of the following purposes - (i) imposition of taxation or the alteration of taxation otherwise than by reduction; or (ii) the imposition of a charge on the Consolidated Fund or any other fund of the Government of Kenya or the alteration of any such charge otherwise than by reduction;..."

CHAPTER 4

Discussion and Analysis

4.1 Introduction

This Chapter conducts an analysis of the corruption/unaccountability of the CDF. It uses the Doctrine of Separation of Powers to explain why the CDF has continued to hemorrhage public moneys and mismanage its resources through corruption and patronage. The central argument is that the unconstitutionality of its foundational tenets is the core causation of this predicament.

4.2 Parliament and Accountability

In the majority of modern day states, parliaments are one of the key checks and balances institutions, along with supreme audit institutions, ombudsmen, anti-corruption commissions, the judiciary, a free press and democratically accountable local institutions.

Checks and balances institutions, according to World Bank, play three key roles: first: they establish the rules of the game for political competition; second: they provide the rules of the game for the broader working of civil society and the operation of the market economy; and, third: they limit the influence of politicians on the bureaucracy (World Bank, 2006).

Parliaments have a distinctive and pivotal role in good governance. This pivotal role is due to the fact that parliaments are involved both in vertical accountability mechanisms

and horizontal accountability mechanisms. Their function is, in effect, to transmit and translate vertical accountability issues into horizontal ones and vice-versa. That is, Parliaments are the point in a governance system where citizen-state relations (vertical accountability) come into contact with executive-legislature relations (horizontal accountability). An effective parliament is one which performs its horizontal accountability functions in a manner which is in tune with the wishes of the citizen-voters on whose behalf it acts.

It is through playing this pivotal role that parliaments can contribute to effective and democratic governance. By legislating, they can contribute to state capability. By providing oversight, they can contribute to transparency and accountability, which in turn can facilitate learning and improved performance. And by representing and responding to the citizens, they can contribute to sustainable economic development and poverty reduction as well as enlarge the national democratic space (World Bank, 2007).

In its African Governance Report for 2005, the United Nations Economic Commission for Africa (UNECA) found that: “In terms of enacting laws, debating national issues, checking the activities of the government and in general promoting the welfare of the people, these duties and obligations are rarely performed with efficiency and effectiveness in many African parliaments (UNECA, 2005).”

4.2.1 Management of CDF by Members of Parliament

The Kenya Constituency Development Fund was a brainchild of the Kenyan Parliament in 2003. In Africa, this fiscal decentralization scheme was the first of its kind. It held much promise and was, as mentioned earlier, not only quickly adopted by other countries like Tanzania, Uganda, etc but also received significant approval from other governments and multilateral organizations. However, in spite of the Fund's potentiality, its faulty design and implementation by the Kenyan Parliamentarians has transformed it into the latest system for patronage and divergence of public funds for private gains. The fund has missed achieving its intended purposes due to top-bottom mismanagement, corruption and poor workmanship.

A recent study (May 2009) by a consortium of researchers under the umbrella of Oxford University's Department of International Development (Gutiérrez-Romero, 2009) points out that "The current institutional arrangement of the CDF and political context are particularly prone to abuses. Not only because people use ethnicity perhaps as a way to express grievances or economic interests, but also because the fact that the MPs are legislators, implementers and watchdogs of the CDF activities imposes a major constraint on effectiveness and transparency of the fund."

4.2.2 The Unconstitutionality of the CDF Act and Accountability

The unconstitutionality of the CDF Act of 2003 acts as a source of political patronage and corruption in the CDF because it compromises the integrity of inbuilt checks and

balances of power in the management of national resources in Kenya. This becomes a central hindrance to effective social auditing, creation and implementation of a functional/pertinent Freedom of Information Act³⁸ and overall accountability in the administration of CDF funds.

4.3 CDF and Separation of Powers

The CDF Act of 2003 (and its 2007 addendum) grossly reneges on the principle of Separation of Powers. This principle has emerged over the centuries as the bedrock of democracy and constitutionalism. It operationalizes requisite checks and balances in government to ensure transparent and accountable governance.

The principle, as seen in the previous chapters requires that the government be divided into different branches each with its clearly defined and independent powers and functions but also interacting in the domain of other branches minimally enough not to control but optimally enough to 'check and balance' them. Each of the three arms of government (Judiciary, Executive and Legislature) is accorded specific functions, entrenched in the basic law of the land³⁹ and each to be limited to the exercise of its proper function. The balance is completed by allowing each arm a limited right of

³⁸ Lack of Freedom of Information legislation negatively affects information access. Since 2005, Parliament has debated this legislation and even introduced a Bill 2007, but the legislation is yet to be passed. Amendments to the 1998 Communications Bill which were approved by the President in January 2009 have further complicated public access to information. Section 88 of the amended act gives the Minister responsible for Internal Security the power "to take temporary possession of any telecommunication apparatus or any radio communication station or apparatus within Kenya," upon "the declaration of any public emergency or in the interest of public safety and tranquility."

³⁹In this case, the Constitution

interference in the functions of the other in order to prevent the encroachment of any one of them upon the functions of the 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 Judiciary chapter IV.

The Constituency Development Fund Act unabashedly defies this principle. It not only allows a sitting Member of Parliament to be a member of the Constituency Development Committee (CDC)⁴⁰, but it also makes them automatic chairpersons to the Committee.⁴¹ It in addition gives them responsibility to constitute and convene the CDC⁴² which for all intents and purposes is the key driver of the Constituency Development Fund, and so by extension, the Member of Parliament becomes the Executive in the management and implementation of government policy.

The CDC, in terms of Section 23 (4) deliberates on project proposals from all locations and any other projects which it considers beneficial to the constituency, including joint efforts with other constituencies. It then draws up a priority projects' list – for both short

⁴⁰ Under Section 23 (1), it allows a sitting Member of Parliament to be a member of the CDC: “there shall be a Constituency Development Committee for every Constituency, which shall be constituted and convened by the elected Member of Parliament...”

⁴¹ Under Section 24 (5) of the CDF Act; “The elected Member of Parliament for every Constituency shall be chairperson of the Constituency Development Committee...”

⁴² This Committee should be put in place within the first sixty days of the new Parliament and have a maximum of fifteen members who, in terms of Section 23 (1), comprise of: the elected Member of Parliament, two Councilors in the Constituency, one District Officer in the Constituency, two persons representing religious organizations in the Constituency, two women representatives from the Constituency, one person representing the youth in the Constituency, and one person nominated from among the active NGOs in the area.

and long term, which are to be submitted to Parliament in accordance with Section 12. According to this Section, the shortlist of the project proposals is given to the Member of Parliament who submits it to Parliament for approval of funds disbursement.

Notably, there are no checks in the Act to prevent a Member of Parliament from hand picking the members of the CDC, as there are no procedural rules and guidelines as to who ought and ought not to be a member.⁴³ The Act gives MPs unbridled power to select a cabinet of his/her own to manage the CDF during his/her term, this gives a sitting MP total control, management and oversight of the CDF, in effect creating an adverse conflict of interest and undermining the proper functioning of the different arms of government.

The Doctrine of the Separation of Powers requires that the role of Parliament, as pertains to the CDF, be that of an independent watchdog. The functional role of the Members of Parliament in CDF was to debate upon and pass the CDF Bill into law in 2003, after its passage, their role now is oversight and monitoring of the Executive's implementation of the fund.

On the contrary, Parliament enacted the CDF, a publicly funded local development agency. Parliamentarians control the fund through either chairing it or hand picking those to run the fund. Parliament approves the budget estimates for the CDF.⁴⁴ Parliament vets the final list of all proposed projects. Moreover, it is the Parliamentarian for a particular

⁴³ This is a legitimate interest because there are incompetent persons overseeing development projects in the constituencies.

⁴⁴ The CDF Amendment Act, 2007, did away with printed estimates allowing parliament to draw funds from the Consolidated Fund in contravention of Section 100 (1) of the Constitution of Kenya.

constituency who is expected to raise questions regarding the manner in which funds in the constituency are applied. Then Parliament through the Parliamentary watchdog- the Public Accounts Committee⁴⁵- is expected to question the governance systems of the fund in each constituency, whose governance system is headed by their fellow Parliamentarian. This equivocation of roles and functions is a mockery to the Legislative Institution, an affront to democracy and the rudimentary principles of transparency and accountability in governance.

For more than ten years, the inspection and examination work of both Public Accounts Committee (PAC) and Public Investment Committee (PIC) have fallen behind schedule by at least four years.⁴⁶ This points to an obvious handicap of relevance of rulings, decisions and recommendations of the Committees on examining public accounts which are four years late. Records, exhibits, officers, offices, circumstances become outdated quickly and evidence might be lost, destroyed or rendered unavailable within such a long period of time, making the examination an exercise in futility and of no consequence. This predicament fuels corruption and a culture of impunity among the corrupt public managers who are well aware about this state of affairs.

⁴⁵ The parliamentary watchdog roles on expenditure and public accounts are done by the Public Accounts Committee (PAC) under Standing Order No. 147 and by the Public Investment Committee (PIC) in respect of public owned or funded institution under Standing Order No. 148. The work of PAC, according to Standing Order No. 147 is “for the examination of the accounts showing the appropriation of the sum voted by the House to meet the public expenditure and of such other accounts laid before the House as the Committee may think fit.” And the work of PIC under Standing Order No. 148 is “the examination of the working of the public investments.”

⁴⁶ The Case Against the Members of the 9th Parliament: A Critique of the 9th Parliament of Kenya, 2003-2007, A Mars Group Kenya Report, 2007

The recommendations of the two Committees are hardly acted upon and public officials who have been found involved in malpractices and corruption, remain in office as if nothing happened. Some move on at their pleasure and even seek elective public office, which leads to the propagation of corruption in public affairs (Mars Kenya, 2007).

4.4 Conclusion

Through the implementation of the CDF, the Legislative arm of government has clearly usurped Executive powers and functions which include the management and utilization of government funds for public good, while it (the Legislature) is constitutionally supposed to monitor such use.

This has not only taken up the time and resources of Parliament from its core functions, but more importantly, it has become the root cause of the wastage, mismanagement and unaccountability that continues to dog the Constituency Development Fund today. It creates an accountability vacuum by combining the powers of two distinct stations in government into one, the maker of law and its watchdog, becomes its implementer too, this creates an environment conducive for corruption and abuse to thrive in, corruption, like water, follows the route of least resistance- where there is a carcass, the vultures gather. This CDF Act (2003 Act, as well as the 2007 amended Act), as is, will always breed corruption, as surely as stagnant waters (e.g. in Africa) will always provide breeding ground for mosquitoes.

CHAPTER 5

Conclusions and Recommendations

5.1 Introduction

In the previous Chapters, this study has examined fiscal decentralization in theory and practice through the lenses of accountability. A critical gap was found in the fiscal decentralization literature. It was found that the majority of the literature assumed the observance of democratic norms of constitutional Separation of Powers in the implementation of fiscal decentralization schemes; therefore it is silent on how neglect of these principles can affect accountability in fiscal decentralization.

In Kenya's decentralization scheme, our case study discussed public accountability in the management and implementation of the Constituency Development Fund by the Members of Parliament, this was found wanting and the Doctrine of Separation of Powers was invoked as an explanation to this gap in accountability. Through this, the unconstitutional CDF Act of 2003 and its amendment of 2007 was seen as a cause of the Fund's quagmire as it has undermined important checks and balances in governance through awarding unproportionate powers to the Parliament and the Members of Parliament.

In this Chapter, summary and conclusion of the research work is provided. Together with this, a comparison is also done between the Objectives that the study began with- both

specific and general to gauge to what extent they have been met. The Chapter concludes with a section on ‘Policy Implications and Recommendations’.

5.2 Comparison of Stated Research Objectives and Research Findings

This study commenced with the general objective of exploring the options and strategies on how sustainable accountability, a key development factor, can be fostered in the management and implementation of the Kenya Constituency Development Fund.

More specifically, it sought to:

Examine the existing literature and debates on fiscal decentralization and accountability and try to situate Kenya’s Constituency Development Fund within this larger framework of fiscal decentralization and accountability theory. This was extensively done in the Second Chapter. In Chapter 2, the study found that current literature does not seem to address the specific issues of constitutionalism and accountability in fiscal decentralization.

This came out as a significant gap in the body of knowledge in fiscal decentralization because of, among other factors, the speed with which these schemes are being implemented across Africa and in the developing world coupled with the high incidence of undemocratic and arbitrary governance especially in Africa. The long term implications of unconstitutionality in implementing decentralized programs, to date, is not well researched.

Examine the overlapping functions of the Executive and Legislature in the CDF Act relative to the Kenyan Constitution, the consequent undermining of checks and balances in implementing fiscal decentralization and the resultant effects, specifically on the CDF.

Chapter 4 was entirely dedicated to this examination. The Chapter concluded that indeed, CDF is an unconstitutional contraption and moreover, this area of its irregularity is vital as it affects the Funds accountability mechanisms- the Members of Parliament having Executive powers together with their default legislative powers over the CDF creates a dangerous governance system devoid of checks and balances and high in its propensity to abuse power and misappropriate public resources.

Other mechanisms for generating accountability from the CDF have and are expected to always have a limited effect because the Members of Parliament can easily get away with abuse of office as no legitimate watchdog body with the adequate enforcement power can bring them to task. Their position in the Fund can and has been used to stifle investigation and even manipulate, restrict or prevent the public's access to pertinent CDF project information.

This state of affairs in the Kenyan CDF depicted the *necessity of restructuring the management design of the CDF in order to, together with existing mechanisms; ensure sustained and viable accountability.* This has been shown to be only feasible by *moving the Fund's implementation responsibility from the Legislature, to the Executive and restoring, strengthening and focusing the Legislatures' watchdog role over the fiscal decentralization scheme.* This was the third objective of the study.

The fourth and final objective of proposing *interim measures that could be instituted to bolster the effectiveness of existing mechanisms for accountability in CDF in the process, and/or even after removing the Members of Parliament from the Fund's management* is met in the last section in this Chapter titled 'Policy Implications and Recommendations'.

5.3 Conclusions

In Kenya today, the theoretical case for local participatory development is increasingly strengthening due to the failure of conventional development strategies.⁴⁷ In many regions, the poor are politically marginalized and have little opportunity to influence the policies that impact their lives. Several studies suggest that civil and political rights are intimately associated with higher rates of economic growth, lower corruption and poverty reductions.

The CDF is a bottom-up development strategy that is targeted on the poor and the politically marginalized in order to give them 'voice' and an active role in local development planning and implementation. The Fund is built on the assumption that poverty in Kenya is a macro phenomenon which needs to be tackled with a macro-development strategy, the Fund's assumed contribution therefore is to increase participation of the population in public decision making and mitigate distance, social exclusion and resource scarcity which constraints the poor people's ability to access and use public services and other poverty reducing goods and services.

⁴⁷ Participatory development: Towards Liberation or Co-optation, Muhamad Anisur Rahman in Community Empowerment by Cary Craig and Marjorie Mayo.

In this light, the Constituency Development Fund is meant to bring about increased opportunities for broad-based participation in development in the constituencies. It is meant to make it easier for local people to see the direct links between project priority setting, planning and the actual implementation of local projects as well as giving them a greater stake on the pace, form and content of local development through their representative (Member of Parliament) and direct involvement. The CDF therefore targets to mitigate poverty not only in its economic form but also in its political dimension through engaging direct involvement of constituents in local development.

Involving the elected representatives of the people in the process of poverty reduction is therefore necessary. Parliamentary involvement in the poverty reduction process helps to ensure that the country's poverty strategy is generated, implemented and evaluated through national institutions with adequate political legitimacy to ensure ownership and sustainability.

The major challenge for Parliamentarians, however, is to build an inclusive system of governance that facilitates equitable growth, mitigate poverty and at the same time enshrines integrity, good governance and non-tolerance of corruption.

In designing and structuring the CDF, Kenya's Parliamentarians succeeded on the level of creating a powerful poverty reduction program but emphatically failed in embedding proper governance structures within the Fund. The CDF Act is markedly inconsistent with the current Constitution of Kenya and the requirements for Separation of Powers.

This makes it incapable of being a vital tool for poverty reduction and equity in Kenya's constituencies as envisioned by its formative objects. Instead, this incongruence has driven the Fund into the quagmire that it finds itself in today, with mismanagement and corruption being the rule rather than the exception. There is need therefore for a general amendment of the Act to reflect constitutionality and provisions for accountability in the poverty reduction program. Without this change, government statements of reforming the Fund, strengthening its transparency and accountability and reinventing its management remains mere rhetoric.

5.4 Policy Implications and Recommendations

For the war on corruption to succeed in Kenya and especially in the CDF, it needs the consistent drive and determination of all stakeholders. Integrity is a culture, and as such must be cultivated and promoted in every facet of the society. To weed out corruption in the CDF will require sustained pressure, will and leadership from both bottom-up and top-down with the civil society and the media playing a watchdog role to subject government to the light of intense public scrutiny.

Solving the unconstitutionality problem of the Fund's Act will go a long way in weeding out corruption from the Fund and boosting its effectiveness. Separating the implementation of the Fund from its oversight, removes the narrow self-interests of the Members of Parliament in the Fund and replaces it with a broader interest for the welfare of their Constituents/Constituency in the use and management of the CDF. This promotes

objective, responsible and accountable oversight of the fund by the Members of Parliament and the relevant Parliamentary Committees.

Therefore, the CDF Act ought to be amended in order to change the membership of the Fund, with a clear intention of doing away with the Members of Parliament from its implementation, and at the same time, strengthen Parliament's supervisory role- a well-functioning Parliament can promote development and the rule of law in the country.

In the interim, however, the Kenyan government must make the price of corruption in the Fund very high by inserting a clause in the Anti-Corruption and Economic Crimes Act that bans any person convicted of corrupt activities or found to have abetted corrupt activities from ever holding a public office in the country. Government must actively blacklist and ban all companies and individuals that abet, participate or collude to defraud the Fund, from ever transacting with it or the government at large. Those companies and individuals who are blacklisted must then be publicized widely.

It is also important for the government to invest heavily in the institution of justice to ensure certainty of arraignment in court, independent prosecution and conviction for individuals and entities that engage in corrupt practices.

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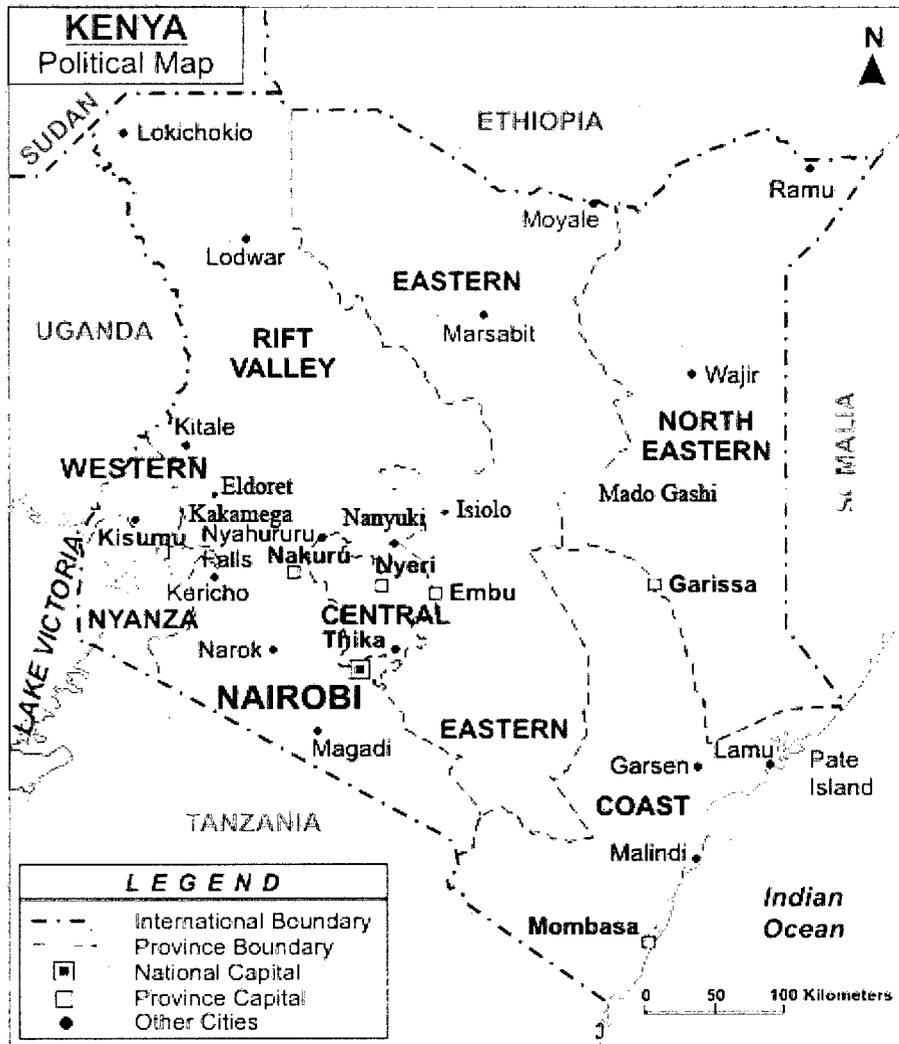
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Appendix 1

Map of Kenya



Source: Mars Group Kenya, 2010

Appendix 2

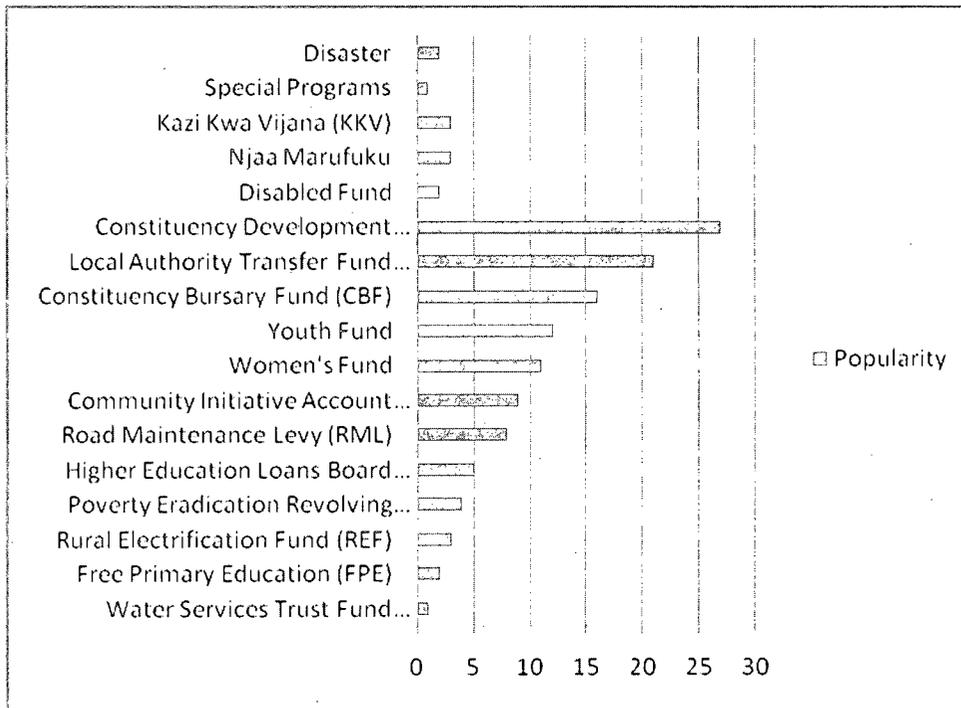
List of Sample Constituencies used in study

		FY 2003/04	FY 2004/05	FY 2005/06	FY 2006/07	FY 2007/08
Bondo						
	Allocated Funds	6,000,000	27,843,769	36,010,779	49,886,310	50,194,434
	Badly Implemented Projects				3,790,970	3,179,666
	Abandoned Projects				1,500,000	1,350,000
	Unaccounted for				760,000	1,220,335
Embakasi						
	Allocated Funds	6,000,000	23,545,780	30,451,677	42,185,197	42,445,755
	Badly Implemented Projects				4,011,630	962,109
	Abandoned Projects					
	Unaccounted for				22,017,424	15,846,136
Gem						
	Allocated Funds	6,000,000	28,696,380	37,113,562	51,414,013	51,731,573
	Badly Implemented Projects				8,920,000	6,740,000
	Abandoned Projects				700,000	
	Unaccounted for				1,090,000	1,240,000
Kamukunji						
	Allocated Funds	6,000,000	21,656,627	28,008,210	38,800,223	39,039,874
	Badly Implemented Projects				4,092,394	600,000
	Abandoned Projects					
	Unaccounted for				2,448,056	2,626,980
Kangema						
	Allocated Funds	6,000,000	21,531,327	28,664,574	39,709,494	39,954,760
	Badly Implemented Projects				5,328,589	3,640,202
	Abandoned Projects					
	Unaccounted for				10,891,951	11,821,878
Makadara						
	Allocated Funds	6,000,000	22,227,573	28,764,684	39,823,243	40,069,212

	Badly Implemented Projects				3,100,000	2,600,000
	Abandoned Projects					
	Unaccounted for				23,318,847	6,745,000
Ganze						
	Allocated Funds	6,000,000	28,788,762	37,233,051	51,579,543	51,898,126
	Badly Implemented Projects				18,487,113	24,703,436
	Abandoned Projects					
	Unaccounted for				13,090,524	28,381,733
Amagoro						
	Allocated Funds	6,000,000	28,361,188	36,680,019	50,813,419	51,127,270
	Badly Implemented Projects				14,540,030	2,750,200
	Abandoned Projects				3,749,500	
	Unaccounted for				657,200	734,500
Budalangi						
	Allocated Funds	6,000,000	23,202,015	30,007,045	41,569,241	41,825,994
	Badly Implemented Projects				14,724,241	1,550,000
	Abandoned Projects				8,970,000	
	Unaccounted for				4,982,000	3,400,000
Matungu						
	Allocated Funds	6,000,000	25,924,322	33,528,129	46,447,054	46,733,936
	Badly Implemented Projects				14,016,891	9,899,277
	Abandoned Projects				1,925,000	
	Unaccounted for				950,000	1,000,000
Mumias						
	Allocated Funds	6,000,000	29,769,752	38,501,883	53,337,276	53,666,715
	Badly Implemented Projects				5,950,000	14,470,000
	Abandoned Projects				4,700,000	
	Unaccounted for					2,030,000

Appendix 3

Government Devolved Funds and average popularity in a National Taxpayer's Association Survey



Source: National Taxpayers Association (2009). Baseline Scoping Study: Citizen's Perception of Public Accountability and Potential for Public Action