



INTERNATIONAL BUDGET PARTNERSHIP
Open Budgets. Transform Lives.

Budget Brief

Year 04, No. 12, 2011

THE OPINIONS EXPRESSED IN THIS BRIEF ARE THOSE OF THE AUTHOR
AND DO NOT NECESSARILY REFLECT THOSE OF THE IBP

Constituency Development Funds: Are They Constitutional?

by Christina Murray, Professor of Constitutional and
Human Rights Law at the University of Cape Town

Since the mid-1980s an increasing number of developing countries have adopted programs to promote development in individual constituencies (electoral districts). Commonly called Constituency Development Funds (CDFs), these programs share two key characteristics: 1) funds raised by the national government are disbursed at the constituency level, and 2) individual national legislators have influence — often sole discretion — over how these funds are spent.

This brief examines one particular criticism of CDFs: they infringe upon the doctrine of separation of powers. It also discusses whether CDFs adhere to other important constitutional principles that are essential for maintaining democracy and good governance, specifically the rule of law and the need for public officials to avoid conflicts of interest. While taking no position on the constitutionality of any particular country's program, the brief concludes that CDFs, in general and by their very nature, foster the concentration of power in the hands of individual politicians and lead to inevitable conflicts of interest, thus undermining aspects of the separation of powers and compromising good governance.

Why CDFs and What Do They Look Like?

Funds allocated to CDFs are almost always earmarked for development projects that reflect local needs, and these programs often represent an attempt to address a real problem in many developing countries, the inequitable distribution of public funds across constituencies based on political affiliations. In the case of the Philippines, two senior members of the House of Representatives have argued that CDF programs are an improvement on the "pork barrel" politics common in presidential systems in which the most powerful and well-connected legislators get special benefits for their constituencies, while constituencies with less powerful representatives are overlooked.¹ A similar argument can be made in those parliamentary systems with single member constituencies in which it is not uncommon for

¹ Hon. Prospero C. Nograles and Hon. Edcel C. Lagman, "Understanding the 'Pork Barrel,'" undated paper http://www.congress.gov.ph/pdaf/news/pork_barrel.pdf, accessed 6 November 2010.

the government to manage programs so as to concentrate benefits in those constituencies that voted for it. CDFs arguably are an improvement over these practices in that they ensure that all constituencies receive some funding, not only those favored by powerful politicians or the government. However, they do not displace these practices entirely, and they bring with them other serious problems.

It must be noted that the design of individual CDFs differ significantly across countries and not all of them threaten constitutional principles in the same way.

- *How are CDF funds regulated?* Some countries clearly define in policy or law the types of projects that may be funded from the CDF (Kenya), while others place no restrictions on the types of projects for which CDF funds may be used (Sudan and Malaysia).
- *Who identifies projects?* In some countries, as long as some basic guidelines are followed, the choice of projects is entirely at the discretion of individual legislators (India); in others, committees constituted by legislators make the decisions (Kenya and Uganda). There are also hybrid systems in which the composition of CDF committees is prescribed by law but the legislator chairs his or her constituency's committee (Tanzania).
- *Who manages project implementation?* In many countries, CDF implementation is managed outside any regular government structures and thus largely unconstrained by government regulations. In others, local administrative authorities may be responsible for implementing the chosen projects (India).
- *What accountability mechanisms are in place?* In most countries, CDF spending is usually subject to the regular national auditing processes. Audit reports may be reviewed by the legislature, and in some cases the CDF law requires that information about projects and their implementation be made publicly available. In countries with access to information legislation there is generally greater transparency and, therefore, greater accountability for the use of CDF money.

CDFs and Constitutional Governance: The Separation of Powers, Checks and Balances, and the Rule of Law

While individual countries have their own constitutions that establish the legal framework within which governments operate, there are some broadly accepted principles and tenets of what can be called constitutional governance. One of the most important of these is the doctrine of the separation of powers — state power should not be concentrated in one person or institution. The greatest danger posed by such a concentration of powers is that it can threaten to overturn the democratic processes of the state. The most likely outcome is that governing will be partisan, unfairly favoring some and neglecting others, or worse, will be carried out entirely in the interests of those in power. In such a situation, holding government to account would be difficult or impossible.

To prevent this, the doctrine of separation of powers requires that:

- each branch of government be limited in what it can do without the approval or support of at least one other branch to restrain its ability to adversely affect the lives of citizens and gain too much power; and
- each branch of government should perform only the functions that it is designed to fulfill, to the extent possible.

Governing based on the separation of powers is usually complemented by a system of “checks and balances” that ensures that power does not become concentrated by giving

each branch some say in the functions of the others. For example, the executive in presidential systems typically has the power to veto laws passed by the legislature, and the courts, like the United States Supreme Court, often have the power to declare both laws and acts of the executive unconstitutional. Another example is the role of the legislature in auditing (overseeing) executive performance.

In looking at CDFs, the most important elements of a system that adheres to a separation of powers with checks and balances are that there is:

- a separation of personnel, e.g., individual legislators pass laws through the legislature's enactment process but are not involved in implementing them; and
- a clear delineation of oversight roles in which the legislature checks the executive by monitoring and evaluating how laws are implemented and money is spent.

Some say that there is no separation of powers in parliamentary systems like Canada, India, and Germany because cabinet ministers are also members of parliament. However, although the line is less clear, in these systems cabinet ministers do not sit on the all-important parliamentary committees. Also, members of the departments of the executive are completely separate from the legislature.

In addition to established checks and balances, principles of the rule of law complement a system of separated powers. The rule of law is the antithesis of the exercise of arbitrary powers in that it defines a system of governance under which there is a system of clear and publicized law that is administered impartially and equally to all. Many constitutional principles are drawn from the idea of the rule of law, but for our purposes here, the most important aspects are that:

- no one in a position of public trust should make decisions on matters in which they have a private interest — public office should not be used for private gain; and
- everyone is entitled to impartial decisions by public officials.

Constitutional Principles and CDFs

The self-interested decision making of CDFs leads to conflicts of interest

Under the doctrine of separation of powers, the role of legislatures should be to pass the laws necessary to implement policy decisions. Legislatures tend to be large bodies that make decisions collectively, usually by a majority vote following procedures that allow for public scrutiny. Of course, much legislative decision making involves compromises, bargaining, and trade-offs, but all decisions are approved by the legislature acting as a whole. The process is legitimate because legislatures usually represent a wide range of views and interests and follow agreed upon democratic procedures.

CDF programs, on the other hand, allow for policy decisions to be made by individual legislators. The legislature approves the overall CDF budget and may set parameters for its expenditure but, within these broad constraints, individual legislators, or their committees, have a free hand.

This is a problem because legislators have a personal interest in the way the CDF money is spent in their constituency, i.e., to support their reelection prospects. This is not an illegitimate interest — the job of representatives is to make decisions that serve the interests of their constituents and thus win approval from likely supporters to help secure

their reelection. But when the legislators can make decisions on their own about how and where to spend public money in their constituencies, there is a conflict of interests.

Usually the immediate personal interests of individual legislators in providing benefits to their constituents are mediated by normal legislative process, in which the particular interests of each legislator compete with those of others. In the case of CDFs, by removing the mediating, collective approval process, an important restraint on legislators who would use public resources to serve their personal political interests is lost. Legislators are often free to use CDF funds to woo their most likely supporters and ignore those who will not make a difference.²

CDFs have no credible accountability mechanism

The ability of one branch of government to provide a check on the others is a critical part of the separation of powers and essential to maintaining an appropriate balance of power. No credible check exists in the case of CDF programs.

Formally, the legislature retains an oversight responsibility for CDF spending, in that the spending may be monitored and audited in the same way as other public spending. However, there is a built-in disincentive for legislatures to scrutinize CDF projects carefully, as each member has an interest in unimpeded spending.³ If you want to shield your projects from scrutiny, you have a personal interest in *not* subjecting the projects of fellow members to proper scrutiny. Moreover, regardless of how well the legislature controls the spending of individual members, control by legislatures of their own members will suffer from perceptions of illegitimacy.

MPs should not decide on projects for their constituencies

Some will argue that the constitutional problems raised by CDFs can be resolved by placing the actual implementation of funded projects in the hands of the executive. However, doing so will not eliminate the conflicts of interest or lack of accountability characteristic of CDFs because, while oversight of the *implementation* of projects might be secured, the *choice* of projects will still escape proper scrutiny.

As noted above, the two main ways that CDFs that give the authority for choosing projects to individual legislators undermine the separation of powers and the rule of law (and thus democracy and good governance) are that they:

- allow for self-interested decision making and thus conflicts of interest; and
- lack credible accountability mechanisms.

² Indeed, Philip Keefer and Stuti Khemani conclude that in India MPs put considerably less effort into disbursing CDF in safe seats (“party strongholds”) than in less secure seats in “When do legislators pass on ‘pork’? The Role of Political Parties in Determining Legislator Effort,” World Bank Policy Research Working Paper No. 4929. 1 May 2009 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1405160, accessed on 6 November 2010).

³ A Kenyan judge puts the problem slightly differently asserting that parliament’s scrutiny of the use of CDF money would violate the principle that no one may be a judge in his own cause (*John Onyango Ooyo v. Zadock Syongo* [2005] eKLR, p 8).

What Do the Courts Think?

Although this brief looks at the impact CDFs have on constitutional governance broadly, it is useful to look at some examples of how courts in specific countries have tested these programs against the country's constitution. In one such case, the Mongolian Constitutional Court held that the addition of CDF grants to the national budget by the legislature was unconstitutional. This decision was based on the Mongolian Constitution, which establishes that the executive determines the budget and implements it, and the only role of the legislature is to approve it. In an argument that raised the concern of partisan decision making through CDFs, the Court found that the CDF "created conditions for unequal competition in the next parliamentary elections for candidates and political parties."⁴

The only issue with CDFs that the Philippines Supreme Court raised in its 1994 decision in *Philippine Constitution Association v Enriquez* was whether the CDF program (called the Countrywide Development Fund) involved "an encroachment by the legislature on executive power." It was argued that the program infringed the doctrine of separation of powers as enshrined in the Philippines Constitution.

The Court's decision was brief, noting that the Philippines Constitution gives Congress the "power of the purse" and that "[t]he power of appropriation carries with it the power to specify the project or activity to be funded under the appropriation law. It can be as detailed and as broad as Congress wants it to be." In other words, in the view of the Court, there is no constitutional constraint on the Congress in granting funds to its members to spend as they wish on constituency-based projects.

The Philippines Supreme Court emphasized that the authority given to the members of Congress under the Countrywide Development Fund is "merely recommendatory" — the president must determine whether proposed projects fall within the parameters of the law and whether they are in line with other local projects. However, the reassurance of the Court that the legislators only make recommendations is not entirely accurate. The grounds on which the president can reject "recommendations" are limited under the provisions of the program, and there appears to be no space for an inquiry into the fairness of the spending choices.

The most recent judgment on CDFs was handed down by the Indian Supreme Court on 6 May 2010.⁵ Again, the case hinged on specific provisions in the Indian Constitution, but the Court also addressed the central questions of separation of powers, accountability, and devolution. As in the Philippines, the Indian court emphasized that the role of members of parliament (MPs) under the Indian CDF is limited to recommending projects, which are to be implemented by local authorities. The Court was satisfied that the MPs are not given an executive responsibility and satisfied that there are adequate checks and balances in the program — within parliament, and through project guidelines and annual reporting requirements. Moreover, the Court said that in India the separation of powers doctrine is weak: "the constitutional principle of separation of powers will only be violated if an

⁴ Resolution of the Constitutional Court of Mongolia on final ruling of the dispute whether granting of 250.0 million Mnt to each electoral constituency at the time of approving the Law on Budget of Mongolia 2007 violated related provisions of the Constitution, 22 June 2007 (translation by the Open Society Forum (Foundation) Mongolia).

⁵ *Bhim Singh v U.O.I and Ors* [2010] INSC 358 (6 May 2010).

essential function of one branch is taken over by another, leading to a removal of checks and balances.”⁶

The Court’s emphasis on the recommendatory nature MPs’ role in project selection and confidence in the CDF’s accountability mechanisms seems misplaced. First, although it is clear that proposals must be approved by local authorities, they can only be rejected by failing to comply with standards. Second, though there is accountability for project implementation, like most other CDFs, there is no accountability for project selection.

As in Mongolia, the questions about self-interested decision making and conflicts of interest were raised indirectly in India. It was argued that the CDF gave incumbent MPs an unfair advantage in future elections as they had funds at their disposal which they could “spend or promise to spend.” The Court rejected this argument for lack of empirical support and because no principle of fair elections is violated if “good use” of the funds leads to support for the incumbent.

Can the Constitutional Problems with CDFs be Resolved?

Since the introduction CDFs, they have been refined in many ways. In many countries, the law now prescribes quite precisely the type of project for which the funds may be used and requires spending to adhere to standard public finance procedures. Legislators do not necessarily manage the spending themselves.

The Indian Supreme Court considers such provisions governing the way CDF funds are used adequate to rebut concerns that CDFs breach the principle of separation of powers or give incumbent MPs an unfair advantage at the polls. But, the Court’s view that accountability mechanisms are adequate overlooks the implications of the role of individual MPs in choosing projects. The court offers no answer to the most common problem raised by critics of CDFs — they allow legislators to assign themselves a pot of money to spend on their political supporters.

The rule of law is compromised by the conflict of interests that legislators face when choosing projects, notwithstanding measures that require spending to meet certain criteria. And, the separation of powers is infringed by the lack of any credible mechanism for ensuring that project selection is not self-interested or partisan.

From a constitutional perspective, CDFs are the wrong answer to the very real problems of the underfunding in areas that are in need of development, the failure of national governments to address needs on the ground, and the practice of withholding funds from areas controlled by opposition parties. But the solution is not to give individual legislators money to spend. It is to devise more effective ways of devolving resources to local areas and involving communities directly in decisions about how to use these resources. The Philippines Supreme Court may have been correct in asserting that an MP will know more about what is needed in his or her constituency than the executive or other MPs, but it is the people who are best placed to make those decisions.

The best solution to CDFs’ problems of accountability and conflicts of interest is to remove legislators entirely from the administration of these programs (including the choice of

⁶ Ibid, Para 76 (5).

projects). CDFs would then be funds that are spent *in constituencies* on projects identified *by members of the constituency* through local government structures.