

Analysis of the FISCAL MANAGEMENT BILL, 2008



SUMMARY

The Fiscal Management Act was enacted by Parliament as a private bill. The Act is awaiting Presidential assent pending revisions proposed by the President. This paper discusses the contents of the Bill, why the President has declined to assent to the Bill, the proposed changes to the Bill and the effect of implementing these changes.

The Bill establishes the parliamentary **Budget Office** as an office in the parliamentary service. The central functions of the office include providing the National Assembly with timely and objective information and analysis on the national budget.

The Bill also proposes principles of **prudent fiscal management** which the government and all public institutions must comply with as a matter of policy.

In declining to sign it into law, the President made a number of proposals on the Bill including that it should not provide for Parliament to assign unspecified powers relating to the national budget and the economy to the relevant departmental committees, functions he considers are within the realm of the Executive.

However, it is the view of this study that this clause is being used to contest the Bill on misleading advice. The inclusion or exclusion of the clause is inconsequential for the Bill. Parliament should therefore assent to it.

The President also appears to have concerns on what he sees as Parliament's intrusion into the arena of budget implementation, e.g. through the management of devolved funds such as the

CDF, which he seems to think needs to be curbed. Withholding his consent to the Bill may be his way of forcing a renegotiation with Parliament of its role in budget implementation. It may be inadvisable to link these two issues as doing so risks picking a futile political battle. Strictly speaking, it is inaccurate to say that Parliament should be excluded from the management of public resources: all the stages of the budget process, and not just the implementation stage, constitute an attempt to manage public resources, from which Parliament cannot be divorced.

The Fiscal Management Bill, and the powers that it proposes for Parliament including that the **Budget Office** be established, is critical to bridging the information gap between the Executive and Parliament in the management of the budget.

Some provisions of the Bill, such as **budget impoundment**, are not typical of the Commonwealth parliamentary system which Kenya's Parliament applies, but they are desirable in principle. Budget impoundment is an innovation which empowers Parliament to withhold the approval of line items of the vote of errant departments. Effective enforcement will take time and general strengthening of public financial management.

In order to achieve the greater goal of strengthening its oversight powers over the management of public finances, Parliament would be well advised to assent to the President's proposals where they do not alter the import of the law.

A Review of the Fiscal Management Bill, 2008

The Fiscal Management Act was enacted by National Assembly as a private bill. The Bill was sponsored by Mr. Elias Mbau, a Member of Parliament.

The President has declined to assent to the Act, meaning it cannot come into force. Presidential assent is pending awaiting implementation of revisions proposed by the President. The following therefore discusses the salient contents of the Bill and the foreseeable effect of implementing the President's proposals for its amendment.

THE BUDGET OFFICE

The Bill establishes the parliamentary Budget Office as an office in the parliamentary service.¹

The central functions of the office include:

1. Providing the National Assembly with timely and objective information and analysis relating to the national budget.²
2. Providing budget-related information to Parliament's department committee in charge of economic and budgeting matters, and also to other departmental committees and select committees of Parliament.
3. Providing services to parliamentary committees within their budgetary jurisdictions

Other functions are to:

4. Prepare specialised analyses for example on the financial risks of new financial policies
5. Carry out budgetary projections, economic forecasts and identify options for reducing budget deficits
6. Advise on appropriate organisational structures for planning, managing and coordinating policies and activities related to budgeting
7. Sponsor national and international forums where necessary
8. Study budget proposals and trends and suggest appropriate changes where necessary
9. Propose alternative scenarios for economic items with a national impact in given financial years
10. Liaise with Treasury and other national and international institutions working in budgetary and economic matters, as necessary³

¹ Clause 3

² Clause 4

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The parliamentary committee under which the Budget Office falls has a number of responsibilities including to:

1. Provide guidance and impetus for the Office to realise its objectives under the Bill
2. Study all economic and budgetary issues relevant to Parliament and make recommendations to the Assembly
3. Ensure adherence by the Minister and all public entities to the broad principles of prudent fiscal management.
4. Link the Budget Office and Parliament⁴

The Bill proposes principles of prudent fiscal management which the government and all public activities must comply with in their policy objectives. These include:

1. A borrowing policy that ensures sustainable public debt
2. A fiscal policy that will adequately cushion the state's total net worth and minimise risk on guaranteed loans, pensions and pending bills
3. A sustainable and attractive wage policy
4. A transparent national budgetary process
5. Preference of productive expenditure over consumptive expenditure in the allocation of resources⁵

Where these principles are not adhered to, the Minister must make an explanation to Parliament.⁶

THE BUDGET POLICY STATEMENT

The Minister is required to present to the Budget Policy Statement to Parliament not later than 21st March every year. This is a broad, strategic statement of budgetary issues for the coming year.

The Policy Statement contains:

- An assessment of the current financial year and the projected state of the economy for the following three years
- Targets for overall revenues/expenditures and domestic/external borrowing for the following year
- A proposal for financing any deficits for the coming year

³ Clause 4(2)

⁴ Clause 5

⁵ Clause 6(1)

⁶ Clause 6(2)

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- Statements of specific fiscal risks and liabilities including guaranteed loans, pending bills, uninsured risks, promissory notes and other internationally accepted instruments, as at the day on which the forecast is published⁷

The Budget Policy Statement is discussed by the relevant parliamentary committee after which it tables its own report to Parliament no later than 15th April.⁸

THE MINISTER'S ESTIMATES OF REVENUE AND EXPENDITURE FOR THE NEXT FINANCIAL YEAR

The Minister is required to present annual estimates of revenue and expenditure for the following year to Parliament. Alongside this, the Minister must present a Treasury report stating measures taken to implement audit recommendations of the previous year.

The proposed estimates shall be referred to the relevant parliamentary committees for deliberation. The Minister is required to take into account the reports of the committees regarding the estimates.⁹

ADDITIONAL REPORTING PROPOSED BY THE BILL

The Bill proposes additional reporting requirements as follows:-

1. Within 21 days after the end of each month the Minister must publish in the Gazette a statement of actual revenues collected by category and net exchequer issues by Ministry.
2. Also, three months after the budget is presented to Parliament, and every quarter after that, the Minister must present a compliance report in the required format. A compliance report must explain discrepancies between estimates and actual performance and also reveal action to deal with shortfalls.¹⁰

The first compliance report falling between 180 and 120 days before general elections must be styled "The Pre-election Fiscal Report" and must propose how to fund the elections. These details must include both the direct and indirect costs of the elections.¹¹

⁷ Clause 7

⁸ Clause 8

⁹ Clause 9

¹⁰ Clause 14

¹¹ Clause 15

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PROPOSALS BY THE PRESIDENT ON THE FISCAL MANAGEMENT BILL

1. *Role of the Budget Office*

In declining to sign it into law, the President made a number of comments on the Fiscal Management Bill including the following¹²:

That **Clause 5(1) (h)**, which provides for the Budget Office to perform some functions relating to the national budget and economy as may be assigned by Parliament, be deleted from the Bill.

In the view of the President, this provision empowers Parliament to assign unspecified powers relating to the budget and economy to the relevant departmental committee, which is inappropriate as these functions are within the realm of the Executive.

Comment:

Clause 5(1) (h)¹³ is an **omnibus clause** typically inserted into laws to address unforeseen matters which fall within the general scope of the law.

There are rules of interpretation which govern the meaning to be assigned to omnibus clauses. One such rule is *the ejusdem generis* rule (Latin for 'of the same kind'). Under this rule, where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed.

¹² Fiscal Management Bill, 2008: Amendments recommended by H.E. the President pursuant to Section 46(4) of the Constitution of Kenya

¹³ 5 (1) The relevant committee shall – (h) perform such other functions relating to the national budget and economy as may be assigned to it by the National Assembly.

For example: if a law refers to automobiles, trucks, tractors, motorcycles and other motor-powered vehicles, "vehicles" would not include airplanes, since the list only covered land-based means of transport.

The objection raised by the President was therefore unnecessary as this general clause would have been interpreted in the context of the specific provisions preceding it. Whether the clause is included or not does not affect the substance of the law and it is difficult to understand why the President was misadvised to reject the Bill on such a flimsy and inconsequential clause. **Given this, the wishes of the President can and should be met to ensure the Bill is signed into law.**

2. *Role of Parliament in budget implementation*

The President argues that the Bill empowers Parliament to play an inappropriately significant role in budget implementation. He proposes that an additional sub-clause be included stipulating that the doctrine of separation of powers be observed by ensuring that Parliament does not get involved in the management of public resources. This sub-clause would be inserted under clause 6 at paragraph h as an additional principle of prudent management:

“Observance of the doctrine of separation of powers by ensuring that Parliament does not get involved in the management of public resources”.

Analysis of the President's Proposals

Promoting poor governance or preserving Parliament's oversight role?

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The President provides very little rationale for the proposals that he makes on how the Bill should be revised for signing into law leaving his intentions open to conjecture. A possible point of concern may be the current debates on grand corruption, lack of transparency and accountability in the country. Specifically, the role of Parliament in implementing the budget has been raised most sharply in relation to the management of the devolved funds, notably the CDF, and the Local Authorities Transfer Fund (LATF). The mechanisms for the management of the funds involve parliamentarians and other elected personnel in expending the funds. This arrangement has been criticised as allowing Parliament to participate in implementation, thus compromising its independent oversight function.

Strictly speaking, the President is wrong in saying that Parliament should be excluded from the management of public resources: all the stages of the budget process, and not just the implementation stage, constitute an attempt to manage public resources, from which Parliament cannot be divorced.

It seems that what the President seeks to achieve is an agreement in principle that Parliament will withdraw from a further role in the implementation of laws on devolved funds. This objective can be achieved by amending the CDF Act, for example, and does not require a general principle of prudent management to be written into the Fiscal Management Bill.

The position of the President seems to be that Parliament should be excluded from the actual implementation of the budget. In

principle, because of the self-evident governance risks contained in the Kenyan arrangements, the President's position is understandable.

UNDERLYING POLICY OF THE FISCAL MANAGEMENT BILL

Since the 1980s, there has been a steady attempt to restore Parliament's involvement in the national budget process. International financial institutions have been at the helm of these efforts which are aimed at promoting greater transparency in the management of public finances.¹⁴

The renewed interest in increasing Parliament's participation in financial management was triggered by the Asian financial crisis of the late 1990s - the wave of reforms since then has focused on improving governmental financial administration and promoting greater transparency.¹⁵

The proposed reforms have however been controversial - there is a traditional view which warns against legislative activism in public budgeting and prefers the insulation of the policy making process in the executive branch, and thus the establishment of what are referred to as "hierarchical budget institutions". According to this view, this is

¹⁴Carlos Santiso and Arturo Garcia Belgrano, Legislative Budget oversight I Presidential systems: Governance of the Budget in Peru, Paper prepared for the XVI Regional Seminar on Fiscal Policy organised by the Economic Commission on Latin America and the Caribbean (ECLAC), Santiago de Chile, 26-29 January 2004, p.3.

¹⁵ Ibid.

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the only way in which fiscal discipline can be maintained. As Santiso writes:

The prevailing orthodoxy warns against the dysfunctional fiscal effects of unrestrained legislative budgetary powers and consequently favours the insulation of economic policymaking within the executive branch. It posits that excessive legislative prerogatives in public budgeting tend to lead to fiscal disequilibria, greater budget deficits and public debt; overspending and under-taxation are likely results.¹⁶

Contrary to this orthodox view however, is the realisation that without checks and balances against executive discretion in public budgeting, abuse and misuse of budget activity is likely to occur. The challenge then becomes the establishment of a budgeting process that combines political accountability and fiscal prudence.¹⁷

It is argued that there is a relationship between budgeting processes and fiscal performance. Budgeting processes that allow for greater legislative activism are more prone to fiscal dysfunction, evidenced by greater budget deficits and higher public debt. In countries where budgeting power is concentrated in ministries of finance, instead of being dispersed across government ministries, there are stronger incentives for promoting fiscal discipline and economic prudence.

It is therefore widely accepted that for the efficient and prudent management of public finances, the Executive must maintain a key role in the budget process, thus creating a hierarchical budgeting processes.

Hierarchical budgeting processes – executive discretion in budgeting

However, hierarchical budgeting processes have inherent dangers. For one, they tend to generate excessive executive discretion in public budgeting while the legislative is reduced to a mere rubberstamp. Excessive dominance by the Executive overwhelms existing mechanisms for self-restraint in budget policy making and harms or neutralises existing controls.

Secondly, excessive executive dominance undermines the credibility of the budget as a policy instrument, and hampers the development and consolidation of budgetary institutions and fiscal rules. In countries with unstable political systems, this problem is more pronounced. Unstable budget procedures undermine the development of reliable budget institutions.

Thirdly, centralised budgeting tends to lack transparency. Lack of transparency itself undermines fiscal discipline and the control of expenditure.

Fourthly parliamentary participation improves the credibility of the budgetary process. The lack of parliamentary participation therefore removes the credibility and legitimacy from the budgetary process

¹⁶ Carlos Santiso, Budget Institutions and Fiscal Responsibility: Parliaments and the Political Economy of Budgets in Latin America, The World Bank Institute,(2005) Washington D.C. p.9.

¹⁷ Ibid

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The rise of legislatures in the budgetary process

The rise of legislatures in the budgetary process must be understood as an attempt to provide a balance between fiscal discipline, and political accountability in the budgetary process. Santiso again:

More fundamentally, the key challenge of the governance of the budget in emerging economies is how to retain the advantages of strong executive authority required to ensure fiscal discipline while providing the institutional checks and balances that guarantee effective accountability. Finding the most adequate balance between executive prerogatives and legislative influence in the budget process represents an intricate dilemma for consolidating democracies seeking to strengthen political accountability while enhancing fiscal responsibility.¹⁸

By increasing the scrutiny of the budget, legislative oversight help address the information gaps between the state and society, opening up the budget to public debate and social control. Legislative scrutiny of the budget promotes greater debate on the facts and analysis underlying policy choices and budgetary allocations.

How can Parliament effectively engage in the budget process?

Four conditions determine whether parliaments can effectively engage with the budget process:

- (i) Legal empowerment to intervene in budgeting

- (ii) High technical capacity
- (iii) Requisite political incentives
- (iv) Favourable governance environment

Legal Arguments for Legislative Oversight of Budgeting

The purpose of Parliament's oversight role is to ensure that public policy is properly administered. This goes beyond enacting laws and extends to monitoring the implementation process to uncover any defects and check misrepresentation and errors in administration. Oversight is, therefore, viewed as a corollary to the law-making process.¹⁹

Historically, the development of legislative oversight over the budgeting process is traceable to developments in the United Kingdom. As the expenditure of the monarchy increased, so did the need to increase the level of taxation to cover those costs. Parliament began to demand a right to scrutinise the purposes for which the monarchy levied taxes and also to verify that money raised through taxes was used according for the intended purposes.

President Wilson of the United States emphasised the importance of legislative oversight as a tool of maintaining government activities in 1885:

"There is some scandal and discomfort, but infinite advantage, in having every

¹⁸ Ibid. p.2

¹⁹ Commonwealth Parliamentary Association, "Parliamentary Oversight of the of Finance and the Budget process", The Report of a Commonwealth Parliamentary Association meeting held in Nairobi, Kenya, 10-14 December 2001, p 1.

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affair of administration subjected to the test of constant examination on the part of the assembly which represents the nation ... Quite as important as legislation is the vigilance of administration." ²⁰

A CRITIQUE OF THE FISCAL MANAGEMENT BILL

The budget-making process: four key stages

As described above there is a move towards involving legislative bodies more in the budget-making process. In order to appreciate the measures in the Bill, it is important to understand the roles that legislatures play in the budgetary process around the world for

comparative purposes. There are four stages in the budget making process:

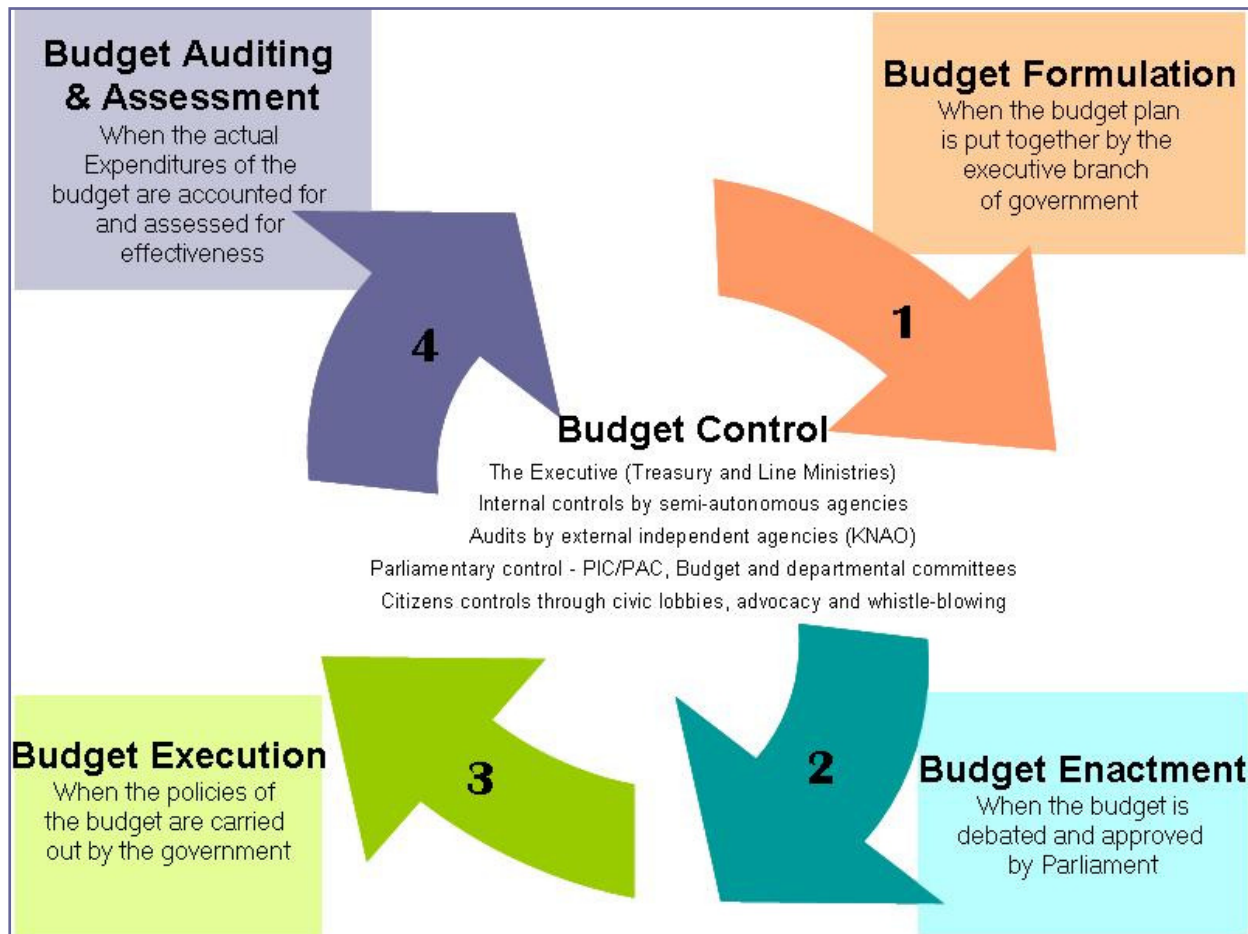
1. The budget drafting phase
2. The budget legislation phase
3. The budget implementation phase
4. The audit

This is illustrated in the figure below.

The role of legislatures in these various stages provides a useful basis for understanding the Fiscal Management Bill.

Common practices around the world in the four stages of budget making

The framework for the budgetary process is normally provided for under the basic law of a country with varying levels of detail. Usually,



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the basic law of a country only provides an outline of the rules that govern the budgetary process - detailed provisions on the process are contained in secondary legislation.

In Kenya, for example, the Constitution makes provision for central issues relating to the budgetary process including the establishment of the Consolidated Fund into which all public revenue must be paid; the responsibility of the Finance Minister in preparing the budget; provisions for raising revenue through taxes; auditing the expenditure of public funds, among others.

The Fiscal Management Bill is an example of an attempt to provide details as to the budgetary process, beyond those contained in the Constitution as the basic law. For secondary legislation such as the Fiscal Management Bill to deal with matters that the Constitution already governs, requires that does so in a manner that does not subtract from the provisions of the Constitution on the same matter. However, it is legally permissible for secondary legislation to deal with matters on which there is no constitutional provision in place and to do so would not be unconstitutional.

It is proposed that the Fiscal Management Bill be reviewed against the phases of the budgetary process as outlined above. As part of the review it is proposed that the provisions of the Act be compared with those of the Constitution of Kenya governing the conduct of matters relating to public finance. Where possible, and with a view to providing comparative examples, the provisions of other countries in relation to public finance are also reviewed.

1. Drafting the budget

The Constitution of Kenya assigns to the Minister for Finance the duty of drafting the national budget. The Constitution requires the Minister for Finance to “cause to be prepared and laid before the National Assembly in each financial year estimates of the revenues and expenditure of the Government of Kenya for the next following financial year.” Some constitutions, like that of Nigeria, confer this role on the President.

The provisions of the Kenyan Constitution follow a Westminster tradition which has influenced most Anglophone countries in Africa where the government (and not Parliament) is responsible for the actual drafting of the budget.

By contrast, a notable exception is the United States whose Constitution empowers Congress to tax, spend and borrow. Until 1921, the provisions were interpreted literally with the effect that Congress itself drafted the budget through a decentralised committee. In that year, in acceptance of the growing complexity of the process of preparing the national budget, Congress ceded this authority to the President who now assumed the role of coordinating the preparation of the budget.

The contemporary process in the United States is that the budget is prepared by the President but this is treated as a draft which Congress is free to amend. As a result, it is considered the US Congress exercises far more power over the budgetary process than that exercised by any other legislature in the world.

The Fiscal Management Bill is modelled on the United States practice in the sense that it

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seeks to allow a greater role to the legislature in the drafting of the budget. However, the formal responsibility for drafting the budget remains with the Minister for Finance and, although the Bill seeks to give a role to the National Assembly, this role is already conferred on the Minister under the Constitution, a higher law. The Minister could, arguably, refuse the Assembly's advice in drafting the Budget. However, this course could occasion a refusal by Parliament to endorse his budget proposals.

2. Legislating the Budget

The principle of legislative authority for the budget is also referred to as "the rule of law" in finance. In popular terms, it is understood as requiring that the government "cannot raise money through taxes or borrowing, or spend money already raised, unless there has been approval by the legislature.

This principle has had a long historical development. Today, it is represented in the budgetary process, by the enactment of two types of legislation which have implications for the budget. These are the Finance Act and the Appropriation Act.

Delaying tactics in passing budgets

The Finance Act is the authority by which Parliament raises, through taxation, money that is to form the resources of the budget. In the United Kingdom, before 1860, tax measures were contained in individual bills. In that year, a quarrel between the House of Commons and the House of Lords, arising from the failure of the former to enact bills bringing into force a number of tax measures, forced the Commons to bring an omnibus bill, which consolidated all the tax measures

into one draft legislation, with a view to defeating the rejectionist stance of the Lords. This practice has prevailed ever since. With regard to the spending of money, this is authorised by the Appropriations Act.

In the Westminster tradition, failure or delay to pass the budget is anticipated under the basic law and some provision on how this can be addressed is included. As an exception, in the United States, there are no interim measures to fund the operations of the government and unless Congress makes provision for this in a specific situation, there will be a shut down of government. In the Westminster tradition, delay in approving the budget was a tactical manoeuvre by the legislature, aimed at forcing the monarch to disgorge a measure of private resources to finance his own operations. In the Westminster model, therefore, delay in passing the budget is seen as the norm rather than the exception and the interim funding measures are used from year to year.

In practice, the authority of the legislature with regard to the raising of money has been provided for under permanent legislation. This significantly took away from the need for the legislature to give specific approval of all the taxation measures year in year out.

Secondly, a mechanism has been established whereby draft legislation that proposes new taxes is treated as having the force of law, even if the legislation has not been passed, thus enabling the executive to commence implementation while it awaits legislative approval.

The Provisional Collection of Taxes and Duties Act in Kenya empowers the Government to collect taxes on the basis of

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draft legislation, on the condition that if the draft legislation is eventually not enacted, the taxes must be refunded. However, if the legislation is eventually passed this has the effect of ratifying the conduct of the Executive.

Thirdly, in many countries the basic law authorises the withdrawal and expenditure of money “on account” for the needs of the forthcoming financial year if it is foreseen that the approval of the budget will be delayed.

In Kenya, for example, the Constitution authorises that an amount equivalent to half of the previous year’s budget may be withdrawn from the Consolidated Fund to meet the next financial year’s budget if a delay in approving the budget is expected.

Budget impoundment

The Fiscal Management Bill authorises Parliament to withhold approval for line items of the vote of a department which has not met the wishes of Parliament on any budgetary matter. This is referred to as budget impoundment in other jurisdictions. The practice of disallowing expenditure lines in the budget is not a well developed practice in the Westminster tradition and is more a parliamentary practice of the United States, as part of the congressional power to raise taxes, borrow money and approve its expenditure. While it promises to sharply raise Parliament’s capacity to sanction fiscal misbehaviour, the implementation of this provision will need careful consideration.

Challenges facing impoundment

Although the provision can, in principle be enforced, the mechanisms for funding the

Government on an interim basis and the fact that the budget does not have to be approved before the commencement of the financial year to which it related has the potential of undermining this provision.

The chance of budget impoundment in Kenya’s context exists but is very weak because:

- a) the Government may spend money on account before parliamentary approval is eventually obtained
- b) the budget drafting process is formally a function of the Executive and not of Parliament
- c) supplementary expenditure does not need the approval of Parliament and may be approved even after the expenditure has occurred

3. Implementing the Budget

In most jurisdictions, the implementation of the budget is seen as the exclusive domain of the Executive. In Kenya, this was the case until legislation which establishes specific funds, the administration of which involves actors outside of the Executive, was passed. The CDF, the LATF and the Constituency AIDS Fund are all mechanisms for the implementation of the budget in which, contrary to the tradition, Parliament is involved in the actual administration of the funds.

Supplementary estimates

One important issue in budget implementation is how to address shortfalls in the budgeted amounts or aligning the budget to deal with new developments. In most

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countries, the Constitution requires that **supplementary estimates** be presented before the legislature to deal with these shortfalls. In other countries, there is provision for the Minister for Finance to present to the legislature condonation legislation which, if enacted, will have the effect of correcting the situation.

In Zambia, the Minister can retrospectively introduce legislation for Parliament to endorse an expenditure that occurred without its approval.

In theory, there is the possibility that expenditure of the kind that the Fiscal Management Bill views as wasteful and which it proposes to punish, can be approved by the legislature and if this is done, the official concerned would be reprieved and not punished as proposed.

4. Audit

In the Westminster tradition, the audit of public funds has traditionally been the responsibility of the Comptroller and Auditor General. The review of the reports of the auditor is carried out by the Public Accounts Committee. Whereas the Fiscal Management Bill does not seek to change the audit function of the Auditor General, it seeks to introduce additional monitoring of the budget by the National Assembly. Whereas currently, there is an audit at the end of the financial year, the Bill seeks to introduce periodic (quarterly) reporting to the National Assembly on the performance of the budget, without interfering with the constitutional audit by the Auditor-General. In addition to these reports, it is proposed that reporting requirements

relating to the financing of elections be introduced.

ADDITIONAL REPORTING UNDER THE PROPOSED BILL

The proposal for additional reporting to the National Assembly should be supported, as it allows for early warning on any slippages on the expenditure of the budget. However, it is not clear in the Bill, how the reports of the Minister are to be processed by the National Assembly. Are they to be referred to the Public Accounts Committee or to the Auditor General for example? Will there be opportunity for a debate on the contents of the reports, especially given their frequency? Unless there is a procedure that ensures that the National Assembly engages with the reports meaningfully, it will be difficult to see what additional improvement they can effect. However, it is easy to see that self-reporting by the Government will probably induce restraint on the part of officials who might have been bent on misconduct.

QUARTERLY REPORTS: A BURDENSOME NECESSITY?

Another issue of concern is that the proposed quarterly reports impose a relatively onerous burden on government departments, if they are to comply with the Bill. The question which remains to be answered is whether it is justified to have these reports or whether it would not be more prudent to reduce the regularity and make the reporting, say, half yearly.

Increased accountability

The Fiscal Management Bill very considerably raises the bar of accountability in relation to

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the budgetary process. There would be genuine concerns as to whether this bar can be met, or how its desirable goals can be made more feasible. For example is it feasible for the Minister to lay before the House quarterly reports on the performance of the budget? There would also be genuine concerns as to the necessity for reporting to the House on such a regular basis, especially given the fact that the Bill does not establish a mechanism for processing the reports so made. In that case, what would be the end that such reporting meets?

BUDGET OFFICE LONG OVERDUE

The Fiscal Management Bill is a remarkable piece of legislation, and not just because it is one of the few successful legislating endeavours by private members. It is the

more remarkable due to the number of additional checks that it seeks to impose on the Government in the management of the national budget. The establishment of a Budget Office, as a bureaucracy that advises Parliament on an ongoing basis as to its role in the budgetary process is long overdue and is one of the greatest achievements of the Act. The establishment of such an office is in keeping with best practices in more progressive Parliaments and responds to the realisation that Parliament cannot effectively check the Executive in budgetary matters unless the information and skills gap between the two institutions is addressed. A budget office provides opportunity for the gathering, within the control of the legislature, of a set of skills with which it might be better able to interrogate the budget process.

THE POTENTIAL FOR POLITICAL MISCHIEF

There is, of course considerable political mischief that the Bill may represent. As a private member's Bill it did not originate from the Government. For privately-originated legislation to provide such onerous responsibility on the Government presents a significant political challenge by one constitutional organ, the legislature, against another, the Executive. Historically, the relationship between the two, especially over the budget, has been unbalanced, with the Executive having the upper hand. This law challenges that traditional relationship in real terms and would for this reason meet considerable resentment on the part of the government.

Need for an Accountable Parliament

One assumption that must be maintained in a review of the legislation is that Parliament is itself consolidated in its approach to the budgetary process and would not be the arena for political mischief of its own. However, as experience has shown, especially with regard to the emoluments of MPs, Parliament is capable of the most parochial view of its own role in the budgetary process and is prepared to sacrifice the common good in order to protect the interests of individual members of parliament. **In such an event, placing the authority that the Bill contains in a rogue Parliament is not an assurance that the budgetary process will be more transparent or fair.** It may only result in giving parliamentarians a greater capacity to play a rent-seeking role in relation to the budget. **These reforms must therefore be accompanied with a debate on the morality and accountability behind the positions that parliament represents in several national issues.**

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Secondly, there is also realisation that parliamentary scrutiny of the budget is dependent on Parliament's capacity to establish and maintain meaningful relationships with other institutions which are also concerned with the budgetary process, including the Treasury, the Central Bank and institutions outside of parliament, such as civil society. The establishment of a Budget Office provides a focal point for these other institutions which might wish to relate with parliament on budgetary matters but have, so far not had an obvious forum for doing so. For Parliament itself, the Budget Office provides opportunity for conducting relationships with the outside world and thus gives the House a capacity to be pro-active in the manner in which these relationships are to be conducted.

POSSIBLE SCENARIOS: WHAT CAN BE EXPECTED NEXT?

The demands by President that the omnibus clause 5(1) (h) be deleted can and should easily be met. A legal opinion on the effect of the clause may suffice to allay the fears of the President as to its effects.

LEGAL OPTIONS

The legal aspects are set out under Section 46 of the Constitution, which provides that “where the President refuses to assent to the Bill he shall, within fourteen days of the refusal, submit a memorandum to the Speaker indicating the specific provisions of the Bill which in his opinion should be reconsidered

by the National Assembly including his recommendation for amendments.”²¹

- i) The National Assembly may approve the President's recommendations with amendment and resubmit the Bill to the President for assent²².
- ii) The National Assembly may approve the President's recommendations without amendment and resubmit the Bill to the President for assent²³.
- iii) The National Assembly may also “refuse to accept the recommendations [of the President] and approve the Bill in its original form by a resolution in that behalf supported by votes of not less than sixty-five per cent of all the Members of the National Assembly (excluding *ex officio* members) in which case the President shall assent to the Bill within fourteen days of the passing of the resolution.”²⁴

CONCLUSION AND RECOMMENDATION

In keeping with the option under scenario 1 above, an amendment has now been submitted to the President's proposal on Clause (6) sub-clause (2). It proposes to delete the words “Parliament does not get involved in the management of public resources” and substitute the words “Parliament only gets involved in the management of public resources in the instances set out by the

²¹ Section 46(4)

²² Section 46(5) (a)

²³ Section 46(5) (a)

²⁴ Section 46 (5) (b)

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Constitution and any other written law”.

It remains to be seen which of these scenarios will unfold. Of the three above, the third one seems the most difficult to achieve given the difficulty of marshalling the necessary majority.

In order to achieve the greater goal of strengthening its oversight powers over the management of public finances, Parliament would be well advised to assent to the President’s proposals where they do not alter the import of the law.

ABOUT AfriCOG

Africa Centre for Open Governance (AfriCOG) is a civil society organisation dedicated to addressing the structural and institutional causes of corruption and bad governance in Kenya.

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