

PUBLIC FINANCE MANAGEMENT IN KENYA:

A REVIEW OF THE DRAFT BILL OF THE CONSTITUTION OF KENYA REVIEW COMMISSION

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1 INTRODUCTION

This paper reviews Chapter 13 of the Draft Bill of the Constitution of Kenya Review Commission on public finance management and makes recommendations of proposed amendments to the Bill as well as legislation that would be required to implement the provisions of the chapter. To be able to situate the commentary and proposals, the paper reviews the rationale behind improved public finance management and expectations of legislation and constitutional principles that apply themselves to this subject.

The state has basic functions for which it must raise resources (via tax and other means e.g debt) and spend them in the delivery of the required services. Some of the responsibilities of the state include, the provision of basic services (health and education), security, infrastructure, and proper regulatory and facilitator frameworks for the conduct of enterprise and maintaining conducive external relations.

The manner in which the State does is (how it raises money and spends it) is very critical and underlines the basic relationship between the citizen and the state. In this relationship, the citizen is the principle and the state, the agent that undertakes this function on behalf of all its citizens. Sadly the principle of the state as an agent of the citizen has not been respected sufficiently in the past. Nowhere is this more evident than in the case of the public money.

One of the mandates of the Constitution of Kenya Review Commission was to “examine and make recommendations with regard to the management of public resources”. This was in response to various concerns that had been expressed in the past with regard to among other things, public finance management in the country. The CKRC discharged this mandate and its proposals are contained in chapter 13 of the draft Bill.

2 CURRENT CONSTITUTIONAL AND LEGAL PROVISIONS

The current constitution has provisions with regard to public finance management. Several Acts of Parliament augment this. Provisions in the current constitution with explicit regard to public finance management are found in articles 48 and 99-105,

Section 48: This article provides for the introduction of money bills into parliament. Section 48 makes it clear that only the President though a Minister can present money bill to Parliament on matters of:

- i) Imposition of and increase of taxation or rates
- ii) Imposition of a charge on the Consolidated Fund, or any other government fund
- iii) Payment/withdrawal of money from the Consolidated Fund or any other fund
- iv) Composition or remission of debt
- v) It also provides that the national assembly cannot proceed on a motion or an amendment which would make provisions for any of the purposes stated in i) to iv). Which means that MPs cannot increase on taxation proposals or budgetary allocations.¹

Section 99: Provides for the establishment of the Consolidated Fund and other funds for the deposit of all moneys raised for the purposes of the government. Withdrawal should only be as per the constitution, an act of parliament and a vote on account. The Exchequer and Audit Act guides the administration of such withdrawals.

Section 100: Provides for the preparation of the estimates by the Minister for finance and presentation to parliament. On receipt of parliamentary approval, he shall prepare an Appropriation Bill, which will then provide authority for withdrawals from the consolidated fund. Should the money requested from parliament be insufficient to meet the needs, or there is need for reorganization of expenditures, he/she must present supplementary estimates and a supplementary appropriation Bill on receipt of parliamentary approval. Standing Order of National Assembly No. 133 sets the timing of presentation of the estimates to parliament i.e. by 20th June. Debate on the estimates of revenue (ways and means) and on appropriations (supply) must be concluded by 31st October (SO 142).

The grounds on which supplementary estimates (budget revisions) should be made are:

- i) Amount appropriate for any purpose is insufficient

¹ The section implies they can decrease it. Acting on this in the past, MPs have undertaken reductions in allocations – though not by much.

- ii) A need has arisen for expenditure for a purpose to which no amount had been appropriated
- iii) Moneys have been expended in excess of the amount appropriated
- iv) For a purpose to which no amount has been appropriated.

These provisions enable the Minister:

- i) Spend more money on a purpose than that appropriated
- ii) Defer or suspend expenditure on any item in the budget
- iii) Introduce new expenditure items after budget is approved
- iv) Spend money first before getting authority of the National assembly and regularize this with supplementary estimates.

Section 101: Provides for Vote on Account: - where parliament gives approval for 50% of budget pending debate and approval before Appropriation Act comes into effect. Standing Order 142 (6) provides that this must be done by the end of parliamentary day on 26th June.

This provision enables the government access a substantial part of the resources even before parliament has commenced review of the estimates. Therefore should parliament wish to influence decisions; it does not have much time. In addition even were the Executive willing to accommodate the proposals of parliament, it would not be able to as the framework would already have been set and expenditures commenced. Simply put within this provision parliament neither has the time nor framework to substantially influence the budget.

Sect 102: provides for the establishment of contingencies funds with authority of parliament. Through this provision, parliament provides the framework for the government to anticipate emergencies and to prepare for them.

Sect 103: provides that **debt** is a Constitutional charge - a charge on the consolidated fund. The Constitution however does not put any obligation on the Minister to first seek parliamentary approval or conditions for contracting debt. The External Loans and Credit Act provide that the Minister should report on outstanding amounts periodically to parliament.

Section 104: Provides that salaries and related allowances of constitutional officers are a charge on the consolidated fund. Such offices include high court judges, appeal court judges, PSC members, Electoral commission, attorney general and auditor general. Charges on the consolidated fund have first call

on public resources. The provision here is intended to safeguard the operational autonomy of these offices and to prevent budget interferences that can hamper the work of such critical institutions.

Section 105: Establishes the Controller and Auditor Generals Office. The CAG needs to satisfy that withdrawals from the consolidated fund have parliamentary authority, that money was spent as requested and as per authority given. The CAG performs audit on the Government of Kenya, courts, commissions and the national assembly.

The CAG has both a control and audit function. The control function has been weakened substantially in the past by provisions in the Exchequer and Audit Act, which limit it to confirmations of legality i.e. if there is a vote and authority of parliament. While this is needful, it does not require the CAG to satisfy himself that the expenditure is reasonable i.e. in terms of cost of services etc.

The CAG's audit function is compromised by:

- Late accounts preparation by government
- Staff shortages and competencies within his office.

Consequently audits are at least 2 years late and sometimes even more. By the time parliament is reviewing the reports within the Public Accounts Committee it is at least 3 years late!

Sections 16, 19,22, & 24: deal with the structure and size of government. They provide for the creation of Ministries, ministers, assistant ministers and permanent secretaries and public offices. Such institutions provide an avenue for expenditure of public resources. In all these functions, it is the President who determines the size and structure of government as well as the tenure of senior public officers without oversight or reference of any other public body.

These constitutional provisions are given further elaboration and institutional arrangements for their exercise in other legislation, which includes the following:

- Exchequer and Audit Act – cap 412 – The Act, which was first enacted in 1995, and therefore predates the Constitution, provides that the Minister for Finance has management of the Consolidated fund, supervision, control and direction of all matters relating to financial affairs in the country. This also provides for the CAG to authorize withdrawals and perform annual audit. The E&A Act is concerned principally with administration of public money.

Needless to say, it has been overtaken by events. As indicated here, the Act was enacted before the Constitution and has remained unchanged for long. Government officials have flouted its provisions in the past. In addition, citizen expectations of public resource management have changed markedly.

In response to this the Government of Kenya has published two Bills intended to amend the Exchequer and Audit Act. These are: *The Public Audit Bill, 2003*; and *The Government Financial Management Bill, 2003*. These two Bills are intended to improve the conduct of those charged with the management of public money as well as improve the audit process. At the time of preparation of this paper, the Public Audit Bill is being debated in parliament.

- Paymaster Generals Act – cap 413: Establishes the paymaster who issues money to ministries following parliamentary approval of the budget.
- Internal Loans Act- cap 420. This legislation authorizes the government to borrow money in Kenya. Does not obligate the Minister to report to parliament the purpose for which debt is required or report on the use. The Act assumes that this blanket authority is given via authorization of a deficit budget and approval of the Ministers financing plans. This is usually provided in the Financial Statement that accompanies the Budget Presentation, which presents the financing plan and the level of intended domestic borrowing.
- External Loans and Credit Act – cap 422: Provides authority to borrow externally to finance approved estimates and to provide to parliament detailed reports including the parties involved, circumstances leading to the transaction, amount of transaction and currency, attendant terms and conditions and the credit to date. The Act limits the total sum of the external debt to Kshs 500bln. The reason behind this ceiling is not established. It is equivalent to 52% of 2002 GDP of Kshs. 969bn. The link between it and the country's ability to carry the debt, or government revenue is not established.

Other legislations deal with various revenue matters. These are Customs and Excise Act – Cap 472, Value Added Tax Act – cap 476, Income Tax Act – cap 470, Kenya Revenue Act – cap 469, Provisional Collection Taxes and Duties Act. – Cap 415. Other related legislation is the Central Bank of Kenya Act – 491, which establishes the Central Bank and grants it responsibility over

monetary policy and indirectly over fiscal policy as well as it manages internal debt.

All these sections confer upon government authority to **tax, borrow and spend**. The constitution does not prescribe principles and other guidance to government in the discharge this authority. It is silent. It probably assumes that government will behave honourably in discharge of this authority or that the principles. Such faith in government discretion has proved rather fatal – both in Kenya and other countries.

An examination of the often-raised complaints about the management of public money suggests that these provisions are not enough in and of themselves to ensure the best management of public money. Increasingly citizens are raising various concerns with regard to this. This includes but is not limited to the following.

- Government tendency to get parliamentary authority to collect revenue as well as incur debt and use it without providing reports on what it used the money for – hence citizens do not see a link between the taxes and services received.
- The politicisation of public expenditure decisions in the past – no investment unless in return for support of government.
- Parliament does not have sufficient time to debate the budget or influence decisions regarding the allocations – except symbolic gestures like £1 reduction.
- The public feels isolated from decision making – it is the preserve of the executive
- The audit process has not served the intended purpose given more than 4-year delays.
- No reports provided on public expenditure outcomes – i.e. what did the money buy?
- Though obligated by law, the executive does not report regularly to parliament regarding external debt.
- The establishment of ministries without parliamentary approval leads to expansion of government without due check on the need of functions
- Public expenditure decisions not reflective of agreed national priorities – e.g the low priority of social expenditure and other anti-poverty expenditures.

It is therefore clear that there is need to review and revise the framework for management of public money to ensure that:

- It is spent according to the authority given by the constitution and parliament,
- It purchases and distributes required public goods for the welfare of citizens,
- That parliament is able to exercise necessary oversight and confirm that public money was spent according to its authority,
- That public money is not misused or wasted and reaches the service delivery points as intended.
- That citizens are able to participate in prioritising what public money should buy

We must therefore see proposals on improved public finance management from this perspective. In recent times, citizens around the world have moved to provide more guidance to government on the exercise of this authority. This has arisen out of concerns that governments practice with regard to taxation, debt and public expenditure do not always reflect the aspirations of the citizens and there is a desire to match this better.

3 FISCAL TRANSPARENCY,

This has been captured in moves towards fiscal transparency: Fiscal transparency means being open to the public about the structure and functions of government, its intentions on fiscal policy, the public accounts and projections. It is, so to say telling the full story and not being economical with the truth, but putting out as much information that indicate the government's fiscal stance as is as possible. Fiscal transparency leads to a better-informed public debate. It makes governments more accountable for the design and implementation of their fiscal policy.

“Fiscal transparency strengthens accountability and increases the political risk associated with maintaining unsustainable policies. It can therefore enhance credibility, the benefits of which will be reflected in lower borrowing costs and stronger support for sound macroeconomic policies by a well-informed public. Non-transparent fiscal management can be destabilizing, create inefficiency, and foster inequity.

The call for transparency is not unique to Kenya. In a large fraction of the world,

transparency and openness in government decisions became more common in the past few years. International trends in public management have pushed transparency to the fore as an operational necessity while the increased adoption of democratic systems of government created a political environment of greater openness and participation.

Another sometimes related set of economic challenges might have contributed to the growing support for transparency. At the same time that many countries have been adopting democratic forms of governments, frequently these same countries such as those in Eastern Europe & Africa; have been experiencing economic turmoil that produced widespread poverty. This has led citizens and non-governmental organizations (NGOs) to focus on the budget for solutions to poverty, creating pressure for transparency and participation.

Transparent institutions and decision-making processes can permit countries to address these economic challenges while at the same time maintaining the support of their citizens. Good governance dictates that government operations and decisions should be made openly, and with the active participation of those people influenced by them. Meaningful participation can only be ensured by transparency and access to public information. As the budget is the primary economic policy document of any government, transparency and participation in the budget is particularly important.

Pillars of Fiscal Transparency

Transparency can only be ensured if there are instruments and institutions to safeguard this. Internationally it is increasingly being accepted that there are institutions and instruments critical for ensuring transparency with regard to fiscal matters. These are the legal framework, clarity of roles and responsibilities, public availability of information, independent assurances of integrity on budget execution and government data and the Budget Decision-making process.²

- i. **Legal Framework**: provides that comprehensive laws and openly available rules should govern any commitment of public funds. In addition all taxes, duties, levies and charges should have an explicit legal basis and such laws should be easily accessible and understandable and any discretion should be guided by clear criteria.

² See Manual on Fiscal Transparency, <http://www.imf.org/external/np/fad/trans/manual.htm>

- ii. **Clarity of Responsibilities:** The government needs to be clearly distinguished from the rest of the economy. Therefore the structure and functions of government should be clearly specified (i.e. what should government do...and hence what is permissible for government to spend money on). In addition the establishment of clear roles and responsibilities between arms and levels of government with regard to the budget is indispensable to transparency. This should also clarify the roles of and relations between government and other public sector agencies e.g the central bank and public financial institutions for budget decisions.

- iii. **Public Availability of Information:** A fundamental requirement of fiscal transparency is that comprehensive budget information is made available. This information should be provided in a timely fashion and in accessible formats. Information is of little benefit if it cannot be understood by none except the most excellent minds. In addition such information should be comprehensive and allows for comparisons of past and future periods. Such should also include information on assets and debts of governments, as well as that of sub-national governments. In addition the government should be obliged to make public fiscal and related information in a timely manner

- iv. **Open budget preparation, execution and reporting.** Another fundamental requirement for fiscal transparency is that the basis on which projections and decisions are made should be well known and available to the public and legislatures. Budget documentation, which specifies fiscal policy objectives i.e. what does government seek to achieve...not just how much it intends to spend. Such documentation also include the macro-economic framework, the policy basis for the budget, and identifiable major fiscal risks assumed within the budget should be made publicly available. This information needs to be presented in a way that facilitates analysis, comparisons and promotes accountability. In addition procedures for execution and monitoring of expenditure and revenue should be clearly specified (i.e. the administrative structures for tracking receipts and payments should be set out). Finally there should be regular fiscal reporting to the legislature (at least a mid-year) and the public (at least quarterly). There should be also timely presentation of final accounts and results of expenditure.

Open budget processes imply participation. Besides the availability of the information on which executive decisions are made, it is important that civil society has access to and input into the actual decision-making process prior

to presentation to the legislature for approval and within the legislative processes.

- v. **Independent assurances of integrity:** The integrity of fiscal information should be subject to public and independent scrutiny. A critical requirement of fiscal transparency in the context of democracy is the opportunity for legislatures and civil society to assess whether government undertook what it planned in the budget. A national independent audit body should provide timely reports to the legislature on the financial integrity of government accounts.

These pillars of integrity are broad but they cover the fundamental aspects of the law, the responsibilities of government, the availability of information, the process of budget preparation and participation and the assurance that the budget has been implemented in the intended manner.

Government has a duty to act in a manner that promotes national principles and aspirations. Public finance decisions should therefore be undertaken in a transparent manner, promote stability and predictability, promote efficiency, and be undertaken with responsibility and accountability. An underlying principle is that of equity and fairness both in the context of current citizens and future citizens.

3.1 FISCAL TRANSPARENCY IN KENYA

Effective transparency and accountability in Kenya are hindered by a number of factors. Some of this issue from the legal framework, others from the conduct of budget management and yet others from the weakness of oversight mechanisms and ability of society to fully participate in the process utilize and scrutinize public information on the budget. A recent study by the Institute of Economic Affairs indicates that on average fiscal transparency in Kenya is considered low.³

Legal Framework: As discussed above, the legal framework is quite robust. It is outlined in the constitution and various Acts of parliament. However it is quite old and out of date and does not cover critical areas such as extra budgetary funds. This framework is quite procedural and does not build in robust mechanisms for oversight and accountability. The legislature, which approves the budget, does not have sufficient time or resources that enable it to influence

³ Institute of Economic Affairs, 2003, Budget Transparency: A Kenyan Perspective, IEA, 2003

the outcomes. The CAG undertakes his Control function in a purely routine manner – confirming that payments being made have authority. He does not have sufficient space to judge whether the expenditures are reasonable or reflect efficient use of public resources. The government adopted the Medium Term Expenditure Framework in 1999/2000 intended to guide budgeting and introduce multi-year focus, but this does not yet have the force of Law. The legislation does not provide for sufficient reporting on the budget and hence there is infrequent disclosure or it is undertaken as per administrative decisions for which there is no penalty to the executive.

Clarity of Roles and Responsibilities: The roles of different departments with regard to the budget process are becoming a little clearer. However these have been specified via administrative rationalization rather than in law. For instance the law does not state who is responsible for budget preparation and how they relate to other spending units or the collectors of revenue. These have been worked out via administrative orders and circulars. However these leave certain challenges e.g where the responsibility lies for debt planning or costing spending proposals or divisions of revenue sources between the local authorities and central government.

Besides this, the public sector has in the past taken on many responsibilities for which it is ill suited to deliver. While several of these have been reduced via privatisation and liberalization, the governments budget still consist of expenditure lines that do not advance the main duties of the state e.g management of the Bomas of Kenya, essentially a conference facility and cultural centre which can be autonomised.

Public Availability of Information: Although the government regularly discloses a substantial amount of statutory information, it is not quite useful or easy to analyse. The information e.g the estimates come in much bulk and without sufficient summary – not user friendly at all and indeed quite intimidating. Parameters used in forecasts and the fiscal framework are not published and the few that become available are only published via the budget speech – by which time it is too late to influence it. The assumptions in the models are not published, which makes it difficult for interested civil society organizations to interrogate it.

In addition though the government adopted the MTEF in 1999, information presented to parliament since then does not come in the multi year framework anticipated then and hence it is hard to judge the information thus presented. It is hard to vouch for the accuracy of the information presented as it often

grossly unrealistic. In the financial year 2002/2003, the fiscal deficit was off target by 84%!⁴

Information is rarely available during the implementation phase and the bit that is, e.g the quarterly reviews are very late and not very useful in that they track only expenditure disbursements and not progress in implementation. NGOs that try to track expenditures during implementation complain of lack of access.

Participation in the Budget Process: Though there is a history of consultation and participation, there is no legal basis for participation within the budget process. The consultation that takes place has been dictated over time by the close links between the State and some civil society formations e.g the private sector and those with organic links to the State. There is therefore no institutional framework for doing this, except that which has evolved in response to pressure and demand by CSOs for participation. Invitation to budget meetings is still considered quite selective. Several participants are also frustrated because of the unwillingness of the government to take on their proposals into the budget.

While participation in budget preparation is increasing, it is almost absent in the approval, implementation and audit stages of the budget process. There is no time and provision for parliament to receive public submissions. The only CSO that participate in implementation are those engaged in service delivery in partnership with international NGOs and some government departments. There is very little participation in oversight and audit and that which exists is currently confined to expenditure tracking.

Independent Assurances of Integrity: The responsibilities for oversight of the budget in Kenya lie with the Controller and Auditor General and the legislature. However without doubt, this is one of the weakest functions. A weak legal framework and institutional agreements with regard to the budget by parliament have encouraged the weakness. The CAG does not have sufficient capacity to carry out his work and consequently audits are at least 2 years late. Therefore the resulting reports are rather forensic and not useful for in-year action. The rules of parliament prevent reference of the budget to departmental committees, which mean that there are no provisions for greater scrutiny of proposals and coordination of action by parliament. In addition the government itself is unable to track and monitor the budget carefully, and there are leaks in the system.

⁴ IEA, 2003, pg 11.

The budget process in Kenya is not sufficiently transparent. While it might be so in comparative terms (other countries could be lots worse), it is clearly inadequate to meet the challenges that have taken place in the country or the demands for more scrutiny. It is also no longer enough to assume that the government of the day will do well in respect of this.

It was therefore with such background that it was demanded of the CKRC to include in its work, a focus on public expenditure management. In reviewing the proposals included in chapter 13 of the Draft Bill, we shall reflect on the ills it is meant to be correcting.

4 THE DRAFT CONSTITUTION & BUDGET TRANSPARENCY.

The draft under review goes a long way in answering the concerns of citizens with regard to the performance of the government as agent of the people in managing their resources. Many of the articles reflect the desire to institutionalise the principles of fiscal transparency that have been discussed above. The provisions of the article however still stress procedures in conduct of public officials dealing with money rather than the core principles that it outlines at the beginning. The risk is that this might expand the constitutional proposals rather than narrow them. Much of what is included in this section could conceivably be included in legislation that can provide more flexibility for both the legislature and the executive.

Be that as it may, we are now confronted with a detailed chapter which should it survive in present form should be strengthened substantially. In this section I shall comment on the articles and suggest additional amendments intended to improve them.

1. **The principles (art 243).** The Draft bill introduces a section on principles for public finance management. In keeping with the rest of the draft constitution, while this section is not judiciable as such, it is anticipated that the principles would be useful in interpretation.

In this regard this section on principles is important. However, it is noted that there aren't explicit principle guiding public expenditure and observation of equity of burden. This could be expanded to include principles that capture the spirit intended below i.e.

- 1.1 Promote efficient utilization of public money in the pursuit of national objectives and goals as stated in the constitution
- 1.2 Promote equitable share of tax burden in the country
- 1.3 Promote intergenerational equity (especially with regard to debt burden)

- 2 **Operationalising the constitutional principles and the objectives of fiscal transparency.** The draft does not provide explicit directions for legislative framework governing public finance in the manner for instance of the Exchequer and Audit Act. As argued earlier, this Act has placed emphasis on procedures. There is inadequate focus on outcomes of public expenditure, or transparency and participation. There is need for a new legislation on all this. New legislation provides opportunity for incorporation of practices of fiscal transparency and greater disclosure. The constitution ought to give explicit instructions to parliament on outlining the legislative framework governing public finance management in the country. It is important for the constitution to state this.

As mentioned earlier, there are already two Bills before parliament whose intentions are to amend several sections of the Exchequer and Audit Act. However, read together the two pieces of legislation will not go far enough in promoting fiscal transparency and addressing the concerns that Kenyans have with the current budget framework. It is therefore important that the Constitution clearly directs the enactment of legislation that can give life to the principles and the provisions of Chapter 13.

Proposal

- 2.1 *Within(number) months of the coming into force of this constitution, parliament shall pass legislation that provides for the financial management in the national government and devolved levels of government, to ensure that revenue, expenditure, assets and liabilities of that government are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those government and provide for matters connected to efficient public finance management.*
- 3 **Public Finance Management in the context of devolution - Equitable shares and allocations of revenue.** The constitution outlines extensive devolution. This will need to be funded and it raises questions on revenue sharing between the different levels of government. This has been captured in 243 e,

but it will need to be given more direction. It is important to establish by law revenue sharing guidelines between the centre and devolved units.

3.1 *Proposal: An Act of Parliament must provide for*

- *The equitable division of revenue raised nationally among the national and devolved units of government;*
- *The determination of each devolved units equitable share of that revenue; and*
- *Any other allocations to devolved governments from the national government's share of that revenue, and any conditions on which those allocations may be made.*

4 **Article 244 on Imposition of Tax:** The Executive has in the past abused tax waivers a lot. The rationale for discretion is not widely shared. The criteria for discretion should be outlined in legislation. Therefore any report to parliament on the exercise of the discretion should be clearly understood. Several proposals are made here.

4.1 Add an additional section i.e. 244 (4). *Parliament will enact legislation to govern discretion on tax waivers and that specifies limits for such waivers.*

5 **Article 245 on the Consolidated Fund:** This article exempts some funds from being deposited in the Consolidated Bank. These can create many extra-budgetary funds and the constitution needs to guard against this. The Rural Electrification Fund, the Petroleum Development Levy and the Sugar Development Levy as well as Harambee Funds, are all examples of collections from the public, which are not deposited in the Consolidated Fund but for which there is no parliamentary accountability. It would therefore be important for the constitution or the proposed Public Financial Management Act to provide guidelines on management of such extra-budgetary Funds.

6 **Article 246 Withdrawals from the consolidated Fund:** Article 253 introduces the post of a budget controller. This is achieved by splitting the functions of the Controller and Auditor General in present constitution. The budget controller is responsible for in-year monitoring. This is welcome. As developed in the constitution this is an officer of parliament.

A few comments on the provisions of this section.

6.1 In Reference to sec 246 (4). In this section, the Draft Constitution provides that should the Budget Controller conclude that parliament will not finalise debate on the Appropriations by the beginning of the financial year, he/she will authorise releases not exceeding 20% of the previous years budget for a purposes of meeting expenditures of the first 4 months of the Financial Year. 20% of the budget is too low an amount for the Executive to function properly. Much of the delay in approval of the Appropriation will lie with parliament. The current provision is for 50% (section 101 of the Constitution under a vote on Account by Parliament). If considered too high, maybe a limit of 33% - 40% should be considered, as the period it ought to cover is at least 33% of the financial year.

6.2 The second issue is to do with the authority over Issue of Public Funds - Who provides the authority for advance expenditure? Currently this is provided by parliament under the provisions of Vote on Account in Section 101 – on or by the 26th June. However the Draft in this section gives authority to the Controller rather than parliament. Authority to charge the consolidated Account in whatever portion ought to be provided by parliament. Institutions that can take the political consequences for them should make such decisions.

7 Art 246B on Financial Year Estimates: - This section provides for the manner in which the Estimates are presented to the house. It answers several concerns that have risen in the past about time for presentation and participation. For instance it provides that the Financial Year estimates need to be presented to parliament at least 2 months before the beginning of the Financial Year. A Medium Term Economic Framework which parliament may amend should accompany such. The section provides for participation by parliament and the public as well as the Economic and Social Commission in budget preparation. Finally the section provides for operational autonomy of constitutional commissions by giving them charge to make own budgets, which the Executive may not interfere with.

This section seeks to deal with a large slate of issues regarding budget preparation. A closer reading suggests that this expansion of responsibilities could be a recipe for much confusion and inertia. Participation of the legislature in budget preparation will cloud the traditional separation of powers. The legislatures role is in budget approval and oversight. Whatever responsibilities it has with regard to the eventual outcome, it ought to confine the exercise of those powers and function to the approval stage rather

than participate in the preparation of a budget for which it has to proceed on for approval.

The demand that a medium term economic framework accompanies the budget is welcome. However strictly speaking this provision need not be in the constitution. It should instead be included in a robust public finance legislation, which should be made more versatile to reflect the principles of open budget preparation and participation.

This section will need to be harmonized with eventual decision on the structure of government – whether presidential or parliamentary. In addition the sections on presentation of Bills in the house needs to be reviewed to provide direction on the presentation of money bills in the house (budget, appropriations, finance and revenue sharing). It needs to be explicit where it is presented and by who. In all systems budget preparation is principally an executive affair. In Presidential systems, the president presents this to the national assembly. In parliamentary systems, this is the preserve of the Minister for Finance. This would require clarification and amendment to section on introduction of Bills i.e. 130 & 138.

7.1 Proposed Section on Introduction of money bills appended as Section 138 (3). *Only the Cabinet member responsible for national financial matters or the Prime Minister/President may introduce a Money Bill in the National Assembly.*

7.2 *In the case of a Revenue Sharing Bill⁵, it must be introduced in a joint session of the National Assembly and National Council.*

7.3 Provision for amendment of Money Bills. One of the frustrations of parliament in the past is that it has not had the space to make an impact on the budget. Many previous commentators have argued that for Parliament's engagement with the budget to be meaningful, the legislature must have amendment powers. Many interested parties may not submit proposals to parliament if, they conclude that parliament is powerless over the budget. In an effort to balance the power of the executive, the legislature should have power and procedures to amend the budget. Such power needs to be spelt out clearly so as not to hobble

⁵ The Revenue Sharing Bill indicates how the national revenue will be shared among the regions. It might be useful to introduce it in a joint forum as the National Council has final oversight over the proposed devolution.

Executive's initiative over the Budget which is the right of every party that has won a mandate enough to be able to form the government.

Section 246B 3 suggests that parliament may amend the forward plan presented by the Minister. It is silent on whether amendment powers also extends to the estimates and *should it do so, what guidelines should guide this – i.e. can amendments be restricted to votes and sub-votes and by what percentages?* Should this have been the intention, it raises questions regarding separation of responsibilities in budget making and the distance between the executive and the legislature regarding budget making. Should it be considered necessary to grant parliament amendment powers, the exercise of these powers needs to be spelt out more comprehensively.

7.3.1 **Proposal:** *All money Bills must be considered in accordance with the procedure established by section 246 B and 248. An Act of Parliament must provide for a procedure to amend money Bills before Parliament.*

- 8 **Article 247: Charge on the Consolidated Fund:** This article provides for the prescription of offices for which salaries shall be a charge on the Consolidated Fund. Read with the Section 246B (4), it can be concluded that the constitutional commissions established under the constitution represent some of these charges on the CF. This has potential to decrease the amount of discretionary expenditure available to the Executive. While it is wise to safeguard the operational autonomy of constitutional offices, the expanse of their budget unchecked by the Executive could cause some friction and conflict in the country. There will be need to harmonise this within the public finance management legislation and other conduct. One of the pillars of fiscal responsibility is clarity over responsibility over budget matters. These sections start to offend that principle – especially the wording of art 246B (4-5).
- 9 **Articled 248: Appropriation Bill:** This section provides for the preparation of an Appropriation Bill on conclusion of the Budget debate for the purposes of authorising releases from the Consolidated Fund. Unfortunately the section still permits the Executive to spend without authority (248 2 (b) and to correct this through supplementary estimates. The only guideline is that supplementary estimates will not exceed 10% of the total approved amount. In a budget that totals say Kshs. 340bln, the supplementary estimates

should not exceed Kshs 34bln! This is a large percentage. It is anticipated that given the trends so far, the Kenyan budget is incremental and we will therefore be dealing with higher figures in future. This ceiling should be revised downwards to 5%. Should higher amounts be required e.g in an emergency or war, this should be spent only with the authority of parliament. In such a situation, parliament could be requested to consider the need with the urgency it deserves. The argument here is that parliament should have final say in matters of authority over public spending rather than the Executive in keeping with the intention of overall oversight captured in Article 256 (4) "*Parliament shall monitor all expenditure of public funds*".

In addition, 248 2, gives the Executive more latitude than the current one in normalising supplementary expenditures. The current constitution provides that once parliament gives approval to supplementary estimates, the supplementary appropriation Bill must be introduced in the House. This section of the Draft constitution requires the Executive to only introduce the supplementary Appropriation Bill in the following Financial Year. This is an unwelcome introduction of laxity and will promote unauthorised expenditure.

10 Article 249 and 250. Power of the Government to Borrow. These two articles guide the behaviour of government with regard to debt. In order to meet the programmes approved by parliament, the government may need to borrow from internal and external sources. Kenyans are concerned about the level of government borrowing and would like a limit set in the legislation that governs government borrowing and links it to specific expenditures etc. This section emphasizes procedure intended to ensure that law authorizes borrowing and that there are reports to parliament regarding loan management. Given the impact of debt on the economy, it is important to maintain a link between debt and national expenditure principles. This could be captured in a section on fiscal responsibility, which obligates government to situate its requirements of debt in the national framework and provide reports on expected outcomes (positive and negative).

10.1 Fiscal Policy (proposal) *The constitution recognizes that the practice of fiscal policy is the preserve of the Executive. However, parliament will pass legislation to provide for the fiscal responsibility and the orderly conduct of fiscal policy that reflect agreed standards of fiscal policy which include:*

- 10.1.1 *Principles of responsible fiscal management (which include reduction of national debt, maintaining prudent levels of debt, achieving levels of national net worth, achieving inter-generational equity, pursuing policies that are consistent with reasonable predictability of level and stability of tax levels).*
- 10.1.2 *Provide guidelines for preparation of financial reports with regard public moneys*
- 10.1.3 *Refer all fiscal policy reports required to a parliamentary committee.*

11 **Article 253. Controller of the budget.** This section introduces a budget controller to take over the in-year control function of the Controller and Auditor General's functions. This is an independent office intended to improve compliance with parliament's intentions with regard to the budget. This section emphasises legality of action rather than reasonableness and the application of other qualitative judgements. One of the frustrations in the past is that while some expenditure might have parliamentary authority – it could be unreasonable and not reflect value for public money. The law that effects this should expand the grounds on which the controller might stop a payment.

The controller should also have power to stop unlawful expenditure or that for which authority has been received without full disclosure to parliament in the estimates. This is intended to Improves in-year compliance and gives the Director of Budget real teeth as it confers injunctive powers. This is implied in 253 (3) a, but it could be made more explicit.

11.1 **Proposal:** *The controller of the Budget shall have authority to stop any expenditure during the financial year if he/she is convinced it does not comply with the authority of parliament.*

12 **Article 254. The Auditor General:** This section creates an independent officer of the Auditor General. This office will focus on end year reports and audits of government performance. The main complaints in the past have been to do with the lateness of audits and reports to parliament. In this regard the constitution should improve timelines and avoid the late audits.

12.1 -Parliament should enforce timeliness by ensuring that by the time it reviews proposals for appropriations for any financial year it has received and reviewed audits of previous completed financial year. This way parliament will only be one year behind the executive instead of the

current 4 years. It is still difficult to be current i.e. the immediate preceding financial year, as the budget will be presented 2 months before the end of the financial year.

12.1.1 Therefore Proposed additional bit: *Parliament shall not proceed on any debate on appropriations proposals before receiving and discussing the report of the auditor general of the previous completed financial year for all offices listed in 254 (3) c.*

12.2 In ref to Sec 254 (3) c: This section says that the audit shall be performed “once a year” In view of delays in the past, it must be stressed that the audit should be timely and should be undertaken immediately after the end of the financial year. It is therefore to amend this section to read “at the end of each financial year audit and report on ...”

12.3 The auditor general should conduct value for money audits in addition to tracking authority and applications of public money thus made. Therefore Sec 254 (3) b could be strengthened– *Ensure that all money that has been appropriated by parliament and disbursed have been applied to the purpose to which they were so appropriated, that the expenditure conforms to the authority that governs it, and reflects value for money.*

13 **Safeguarding the independence of the Controller of Budget and Auditor General: Removal of Office of the Auditor General and Controller of the Budget.** There are no provisions on procedures of removal from office of the two unlike in the case of the current Constitution. In the case of other constitutional officer, this is done via the establishment of tribunal as outlined in section 272 6-9 on removal of members of constitutional commissions. As these are parliamentary offices, the tribunal might either be established by parliament or some of the members should be appointed by parliament in addition to those appointed by the president.

14 **Article 256: Responsibility of Accounting Officers and those who misuse public money.** This section provides for the responsibility of accounting officers and the authority they account to – parliament. In addition the section imposes a duty of care on the accounting officer and any interfering politician by making them personally liable for any losses arising out of expenditures that do not comply with parliamentary authority.

5 LEGISLATIVE PROPOSALS TO OPERATIONALISE THE PROVISIONS OF THE CONSTITUTION

As mentioned above, it will be necessary to develop additional legislation to effect the proposals included in the constitution. So far at least 4 pieces of legislation are anticipated.

5.1 ANTICIPATED LEGISLATION

Type/Name of legislation	Purpose and Contents
1. Public Financial Management (seen as an overall framework law for budget management)	To give life to the principles and overall framework for this chapter. Parliament shall pass legislation that provides for the financial management in the national government and devolved levels of government, to ensure that revenue, expenditure, assets and liabilities of that government are managed efficiently and effectively to provide for the responsibilities of persons entrusted with financial management in those governments and provide for matters connected to efficient public finance management.
2. Revenue Sharing Legislation (in the context of devolution)	This legislation should provide for the sharing of revenue between the national and devolved units of government, the determination of each devolved units equitable share and other allocations to devolved units
3. Parliamentary Budget Amendment Powers	To provide for procedures for budget amendment by the legislature
4. Fiscal Responsibility and Budget Management	To provide for orderly conduct of Fiscal Affairs

5.2 CONTENTS OF EACH PROPOSED LEGISLATION

This section contains elements of proposed legislation or rather issues that the proposed legislation could include. It is by no means exhaustive, but an attempt has been made to capture the main elements that the law must apply itself to. For all the proposed legislation, we introduce a working title and purpose and provide for some of the main provisions. The generic provisions in laws e.g "miscellaneous" or "Transitional" are not included here. That can be developed

a little bit later.

5.2.1 PUBLIC FINANCE MANAGEMENT BILL

Sections	Contents Of Section
1. Title and commencement	<ul style="list-style-type: none"> ○ To provide for the financial management in the national government and devolved levels of government, to ensure that revenue, expenditure, assets and liabilities of that government are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments and provide for matters connected to efficient public finance management ○ When it commences ○ How it relates to the Exchequer and Audit Act and other legislation (i.e. that under discussion in parliament in 2003) – should replace them ○ Definitions ○ Application of the legislation (to which public bodies does it apply)
2. Overall National Management of Public Money	<ul style="list-style-type: none"> ○ Expressly establish a Treasury and provide its duties (e.g a <i>(national) Treasury is established consisting of the Minister, who is the head and the Ministry responsible for financial matters.</i> ○ Duties of the Treasury. This should be both administrative as well as policy. Should include policy development, budget preparation and implementation, coordination with local government, promotion of budget transparency, establishment of procedures for management and accounting of public resources, supervision of expenditure and preparation of accounts and monitoring implementation of the Law establishing it. ○ Establishment of a national consolidated Fund ○ Revenues that go into the Consolidated Fund ○ Withdrawals from the Fund ○ Management of CF bank accounts ○ Use of CF funds in emergencies

Sections	Contents Of Section
3. Establishment of Regional Treasuries and Consolidated Funds	<ul style="list-style-type: none"> ○ Establishment of Regional Treasuries (who forms it) ○ Functions and duties of the Regional Treasuries ○ Establishment of Regional Consolidated Funds ○ Control of the Regional Consolidated Funds ○ Withdrawals from the Regional CFs ○ Management of Regional CF Bank Accounts ○ Use of RCF funds in emergency
4. Managers of Public Money and Receivers of Revenue	<ul style="list-style-type: none"> ○ Denotes who is considered and Accounting officer and revenue officers at national and regional level and in public entities ○ Duties and responsibilities of such officers ○ Obligations of such officers ○ Dealing with offences (commissions or omissions) by such officers and provisions for penalties ○ Imprests and cash advances to public officers ○ Delegation of duties by Accounting and Revenue Officers

Sections	Contents Of Section
5. National Budgets	<ul style="list-style-type: none"> ○ Annual appropriations (duration of appropriations) ○ Format of budget preparation (could include the following) <ul style="list-style-type: none"> ▪ Estimates of all Revenue expected to be raised in the financial year to which the budget relates ▪ Estimates of expenditure by vote and main division within vote for the financial year to which the budget relates ▪ Estimates of interest and debt servicing charges and loan repayments ▪ Estimates of capital expenditure per vote and main divisions and implication of the expenditure for future financial years ▪ Proposal for financing any deficits for the financial year ▪ Indication of the intention regarding borrowing and actions that will increase public debt ▪ Projected Revenue for the previous year ▪ Projected Expenditure for the previous year by vote and main divisions ▪ Borrowing ▪ Measurable objectives for each main division within a Vote. ○ Multi-Year Budget projections (in keeping with Section 246B of constitution) ○ Format for Regional Budgets ○ Supplementary budgets (including conditions under which supplementary budget should be prepared) ○ Expenditures before budget approval ○ Withholding of appropriated Funds (under what conditions may the Treasury not issue Appropriated Funds) ○ Non- Budgetary public Funds ○ Regional Budgets <ul style="list-style-type: none"> ▪ Timing ▪ Formats of budgets ▪ Supplementary regional budgets
6. Reports on the Budget	<ul style="list-style-type: none"> ○ Report on Annual Budget Performance ○ Time Frame for presentation of Reports ○ Publicity of Reports ○ Other Reports (Pre-budget report, Pre-election report, long term (5 year) report etc)

Sections	Contents Of Section
7. Controller of the Budget	<ul style="list-style-type: none"> o Functions of the Controller o Powers of the Controller o Content of Controllers Reports to parliament (should be as useful as possible for parliamentary oversight) o Frequency of controllers reports
8. Auditor General	<ul style="list-style-type: none"> o Functions of Auditor General o Format of Accounts for Audit o Application of Auditor Generals Mandate (which offices and levels of Government) o Scope of Audit o Time Frames of Audit o Freedom to contract independent auditors o Reports to be prepared by the Auditor General o Management of Auditor General Reports o Audit of National Assembly Accounts
9. Financial Implications of Legislation	<ul style="list-style-type: none"> o Any legislation at national and regional level to give provide projection of financial implications
10. Executive Authority	<ul style="list-style-type: none"> o To provide for how Ministers (Executive Authority) exercise power in relation to Accounting officers o Executive directives to be accompanied by financial implications o Reports to parliament
11. General Treasury Matters	<ul style="list-style-type: none"> o Treasury regulations o Offences o Audit committees o Financial misconduct o Etc

5.2.2 REVENUE SHARING BILL/ INTERGOVERNMENTAL FISCAL RELATIONS BILL

Sections	Contents Of Section
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Sections	Contents Of Section
1. Title and Commencement	<ul style="list-style-type: none"> ○ To provide for the allocation and divisions of revenue between the national level and devolved levels and working out entitlements between different levels
2. Revenue Sources	<ul style="list-style-type: none"> ○ List of revenue sources in the country ○ Classifications of which ones are allocated to regional levels and which ones to be allocated to national levels
3. National Fiscal Council	<ul style="list-style-type: none"> ○ Membership of the National Fiscal Council (heads of the National Treasury and Regional Treasuries) ○ Functions of the National Fiscal Council – iron out/ coordinating forum for intergovernmental fiscal relations – body for consultation on Financial matters ○ Powers of the Council
4. Commission on Local Government Finance	<ul style="list-style-type: none"> ○ Membership of the Commission ○ Duties of the Commission (advise the Government on revenue sharing, prepare formulas for revenue sharing, conduct reviews/analysis on revenue collected, propose shares for different regions etc) ○ Establishment of Commission offices and secretariat ○ Reports of Commission to Executive and National Council and timing of reports
5. Revenue Sharing Bill	<ul style="list-style-type: none"> ○ Share to be reviewed annually ○ Revenue sharing Legislation and conduct within parliament (a money bill that must be presented by Executive) – ○ Presented in both Houses because of role of National Council in safeguarding devolution.

Sections	Contents Of Section
6. Revenue Administration	<ul style="list-style-type: none"> ○ Collection of Revenues (mostly centralised and joint administration of revenue collection) ○ Collection by National Authority (e.g Kenya Revenue Authority) ○ Collection by Regional governments
7. Appeals against Decisions of CLGF/ Fiscal Council	<ul style="list-style-type: none"> ○ Provides for appeals by national or regional governments who may be aggrieved by decision of Executive and Commission on its share
8. General Revenue Sharing Matters	<ul style="list-style-type: none"> ○ Regulations ○ Obligations of officers

5.2.3 MONEY BILLS AMENDMENT PROCEDURE BILL

Section	Content of provisions
1. Title and Commencement	<ul style="list-style-type: none"> ○ An Act of Parliament to provide for the procedures of amendments to Money Bills by parliament ○ Legislation to which procedure applies
2. Definition of Amendments	<ul style="list-style-type: none"> ○ Defines acceptable amendments within the money bills (extent to which amendment may be made)

Section	Content of provisions
3. Amendment powers	<ul style="list-style-type: none"> ○ Application of amendment powers. Needs to be agreed e.g <ul style="list-style-type: none"> ▪ Applied to whole budget, departmental vote or sub-vote? ▪ Cross vote guidelines (e.g can parliament switch money from one vote to another) ▪ Applied to expenditure only or does it cover taxation matters ▪ If applied to taxation measures, is it applied to a specific tax measure or whole schedule? ▪ Criteria governing amendments (e.g balanced budget, constructive tax amendment (if legislature reduces a tax, same amendment must include proposal for making up revenue shortfalls ○ Application of amendment powers at National and regional level

Section	Content of provisions
4. Procedures for amendment	<ul style="list-style-type: none"> ○ To provide for movement of amendment motions <ul style="list-style-type: none"> ▪ To be moved by an individual member or moved by a committee of the House? ▪ To issue from caucus or matters referred to committee by House ○ Timings of amendments (provide for suitable/comfortable timing) ○ Coordination of Amendments (is it the responsibility of all departmental committees, the Budget Committee, or a joint budget committee of the National Assembly and National Council) ○ Can committee receive public submissions? ○ Does committee have requisite capacity to process amendments ○ Can committee access information with the Executive in order to make amendments. (This is important as the Executive usually has more information than the legislature. Unless it makes it available as anticipated in the Public Finance Management Bill, it can leave the legislature with little information on which to base amendment proposals).
5. Resolving Conflicts	<ul style="list-style-type: none"> ○ Procedure for resolution of conflicts between proposals of legislature and Executive
6. Changes to Standing Orders	<ul style="list-style-type: none"> ○ This legislation will necessitate changes to the Standing Orders of the National assembly especially with regard to procedure on debate of Money Bills and on the committees.

5.2.4 FISCAL RESPONSIBILITY AND BUDGET MANAGEMENT⁶

Sections	Content of Provisions
1. Title and	<ul style="list-style-type: none"> ○ An Act of Parliament to strengthen the Institutional

⁶ The proposals of contents of this legislation will go hand in hand with the proposals on the Public Finance Management Bill. The legislation can get quite long, but it might be useful to merge the two together

Sections	Content of Provisions
Commencement	<p>Framework for the conduct of prudent fiscal policy and promotion of macro-economic stability</p> <ul style="list-style-type: none"> ○ Objectives of the Act: Provision of legal and institutional framework for reduction of fiscal deficit and containing the growth of public debt ○ Application of the Act - both Central and Regional Governments
2. Principles of Fiscal Responsibility	<ul style="list-style-type: none"> ○ State the principles of fiscal policy e.g. <ul style="list-style-type: none"> ✓ Reduction of national debt to manageable levels through reduction of budget deficit including targets for achievement ✓ Maintenance of acceptable debt levels ✓ Building national net worth ✓ Promotion of intergenerational equity
3. Debt	<ul style="list-style-type: none"> ○ Parliamentary authority required for external loans ○ Guidance on foreign borrowing by regional governments and local authorities (cities and municipalities) - can they or can they not incur foreign debt? ○ Regulations on borrowing by public entities (parastatals etc) ○ Purposes of borrowing ○ Who may borrow on behalf of government ○ Who may sign debt instruments
4. Reports	<ul style="list-style-type: none"> ○ Required Reports to Parliament and the timing of submission e.g <ul style="list-style-type: none"> ✓ Medium Term Fiscal Policy Statement (to accompany budget documents) ✓ Long Term Fiscal policy strategy (strategy to contain deficit and reduce debt) ✓ Economic Forecasts ✓ Fiscal Forecasts ✓ Quarterly reviews of revenues and expenditures ✓ Variance Report – Disclosure of policy decisions that may influence future fiscal situation

Sections	Content of Provisions
5. Statement of Responsibility	<ul style="list-style-type: none"> ○ A statement signed by the Minister on the integrity of the information contained in reports and disclosures as well as consistency of actions with requirements of the legislation
6. Review by the legislature of information contained in the Reports and Fiscal Responsibility Statement	<ul style="list-style-type: none"> ○ Treatment by House on Government Statements – referred to a committee of the House, or Joint committees and opinion presented to House ○ Publication of Statements for public review ○ Additional information sought by public or parliament