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### **Bring Kenya's Budget Law into the Light**

by Jason M. Lakin

International Budget Partnership

The Government of Kenya, with support from the International Monetary Fund (IMF), is currently in the process of drafting an Organic Budget Law (OBL) that will establish a new system of financial management at both the national and subnational level in Kenya. So far, this process has occurred largely in the dark, with civil society and even other donors unable to access information about the evolving draft. While it is natural for a government to produce an initial draft internally before sharing it, little information has been provided about the timetable for releasing and receiving comments on the bill, or about its contents.

This brief argues that efforts to develop Kenya's budget law should be brought into the light, and the OBL should build on the new Kenyan Constitution by incorporating provisions that augment transparency, accountability, and citizen participation in the budget process. Although this brief focuses on Kenya's OBL, the principles described are relevant for most countries, and they should constitute a point of departure for future debates around the content of OBLs in Africa and beyond.

### **Who Cares About Organic Budget Laws?**

Organic Budget Laws are comprehensive pieces of legislation that describe how public money should be allocated, distributed, and monitored. They determine how much formal discretion the executive branch of government has, whether and how the government should consult with the legislature or with citizens about public spending, and how government officials will be held to account for mismanagement of public funds. The OBL is also important because it establishes the roles of the central, provincial, and local governments and, therefore, is critical to determining what decentralization will look like in a given country.

According to Salvatore Schiavo-Campo, an OBL should describe four things:

- the objectives of public spending (e.g., effective service delivery),
- the process by which that spending occurs (e.g., first formulation, then legislative approval, then monitoring, etc.),

- the principles governing the process (e.g., transparency, participation, etc.), and
- who is responsible for what within the system (e.g., role of the legislature, supreme audit institution, local government, etc.)<sup>1</sup>

Like other laws, contracts, and treaties, an OBL provides one tool for citizens, various branches of government, and the judiciary to hold government to account. Of course, an OBL is not the only factor that determines how governments spend the public's money. Sometimes an OBL may establish particular processes and principles, which are in practice flouted by the government. In this sense, it is no different from any other law: in order to serve its purpose, the law must be actively utilized once it is passed. Therefore, the creation of the OBL in Kenya is only among the first steps toward greater transparency and accountability of public spending. Much hard work will be needed to ensure enforcement after the law is passed.

### **Why is Kenya Drafting an Organic Budget Law Now?**

Last year, Kenya adopted a new constitution.<sup>2</sup> This document, particularly Chapter 12 on public finance, outlines a radically different approach to public financial management from that contained in Kenya's previous Constitution. The new approach reduces the powers of the executive, increases the powers of the legislature, and elevates transparency as a core principle of the system. In particular, Article 201(a) provides that "there shall be openness and accountability, including public participation in financial matters."

While Kenya's Constitution is quite comprehensive, it also wisely leaves many details to be legislated by Parliament. There is even a timetable in the constitution (Fifth Schedule) that outlines the speed with which Parliament should adopt the implementing legislation. In the case of Chapter 12, there are six additional laws that Parliament must pass within the next one to four years. In addition, some of the provisions of the Constitution are at a very general level, and these will also need to be clarified by further legislation or regulation.

Therefore, Kenya has undertaken the drafting of a new Organic Budget Law in order to fill in some of the details that were not fully worked out in the Constitution itself. The OBL is a critical opportunity for civil society in Kenya to ensure that the key principles included in the Constitution are fully embodied in the detailed implementing laws and regulations.

It is imperative that citizens and civil society articulate a set of principles, and even some specific language, that will ensure that the OBL enshrines transparency and public participation in Kenya's new system of public finance management. The rest of this brief is intended to kindle a discussion about the types of principles that should be incorporated into the law.

### **Principles for an Open Budget in Kenya**

There are at least three key principles that should be incorporated into the new OBL if it is to ensure that Kenya's public financial management aligns with the new Constitution and

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<sup>1</sup> Salvatore Schiavo-Campo, "The Budget and Its Coverage," in Anwar Shah, ed., *Budgeting and Budgetary Institutions* (Washington, DC: World Bank, 2007).

<sup>2</sup> The new constitution, to which I will make reference using article numbers, can be viewed at: [http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Constitution\\_of\\_Kenya\\_\\_2010.pdf](http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Constitution_of_Kenya__2010.pdf)

international good practice standards. These principles are transparency, accountability, and public participation.

### *Transparency*

The first principle in Chapter 12 of the new Constitution is “openness” (201(a)). The Constitution gives Parliament a much more significant role in managing the country’s finances than it previously commanded. This means that Treasury will be required to share more information with Parliament. While this is a first step toward greater transparency, it is insufficient on its own to ensure that Parliament can exercise its proper role, or that citizens are provided with the information they need to understand government’s decisions and hold it to account.

The Constitution requires that the budget contain estimates of revenue and expenditure, a breakdown of development and recurrent spending, and information on the deficit and debt. The OBL should require much more than this. First, Kenya’s current, somewhat artificial, division of spending into development and recurrent spending is inadequate because donor funds are always considered development funding, even if they are spent on recurrent items. **Thus there is a need for a clear definition in the OBL of the meaning of “development” spending.**<sup>3</sup>

The Constitution is largely silent on transparency at the implementation stage of the budget; it includes no requirements for the government to report to the public or oversight institutions on actual expenditure during the year. In contrast, the South African PFM (public finance management) law requires that actual spending must be reported on a monthly basis.<sup>4</sup> **Good practice in public financial management requires governments to produce ongoing expenditure reports as one of 8 key documents covering the formulation, implementation, and evaluation phases of the budget, and this should be reflected in the OBL.** In addition to In-Year Reports like those published by South Africa, these implementation documents include a Mid-Year Review of the budget, and a Year-End Report. These documents should describe in detail actual revenues and spending and discuss reasons for variance from projections.<sup>5</sup> **The OBL could lay out the timeline for the release of each of these documents, not only the In-Year Reports.** This would ensure that budget information is not only made available to the public but also released in a timely fashion.

It is worth highlighting the eighth document on the list of good practice reports: the Citizens Budget. A Citizens Budget is a nontechnical presentation of the national budget designed to reach and be understood by as large a segment of the population as possible. This type of document promotes budget transparency and accountability, as well as enables broader

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<sup>3</sup> Republic of Kenya (Ministry of State for Planning), *Public Expenditure Review: Policy for Prosperity 2010*.

<sup>4</sup> South Africa National Treasury, Public Finance Management Law No. 1 1999, updated 2010, Sec. 32:1. <http://www.treasury.gov.za/legislation/PFMA/act.pdf>

<sup>5</sup> Whether governments produce and publish the eight budget documents is monitored in detail on a biennial basis by the IBP’s Open Budget Index. For more information on these documents, please refer to [www.openbudgetindex.org](http://www.openbudgetindex.org). The full questionnaire is available, as well as Kenya’s scores on the full survey from 2010. Guidelines for the content that key documents should contain may also be found at [http://www.internationalbudget.org/files/Government\\_Transparency\\_Guide.pdf](http://www.internationalbudget.org/files/Government_Transparency_Guide.pdf).

participation, by making budget information more accessible to the public.<sup>6</sup> Citizens Budgets are at the cutting edge of public finance reform: in 2007 the IMF revised its Fiscal Code to urge governments to produce these documents. Sixteen countries produced them in 2010, including Uganda and South Africa, but not Kenya. **Timely production of a Citizens Budget should be required by the proposed OBL.**

In addition, Kenya's budget should be made more comprehensive than it is currently by including a number of items that have tended to be excluded. For example, a key budget transparency issue in many countries around the world is the lack of available public information on "tax expenditures," which include tax exemptions, deductions, credits, or other special treatment for certain classes of taxpayers. These provisions are called "expenditures" because, just like direct expenditures, they result in a real cost to government in terms of foregone revenues. However, they are often not captured in the budget and are frequently not debated publicly. Good practice around the world is to provide comprehensive information on tax expenditures. Traditionally, Kenya has performed poorly on transparency of tax expenditures (it earned a grade "C" in the 2010 Open Budget Index). **The OBL could require government to produce and publish a comprehensive report on tax expenditures.** Kenya could set a new standard for transparency in Africa by requiring and producing such a comprehensive document. Even South Africa's tax expenditure reporting is not fully transparent, though it currently provides more information than Kenya.

**Kenya's budget also does not currently provide information on contingent liabilities – expenditures, like loan guarantees, which government may have to incur in the future (or not, depending on circumstances). A report on these provides essential information about the riskiness of the budget and so should be required by the OBL.**

A final key issue in public finance is to ensure consistency between planning documents and budgets. It is common for the presentation of spending, including how spending is categorized within sectors, to be different in planning documents (e.g., the medium-term expenditure framework) and the budget. This makes it difficult to know whether the budget reflects the planning documents, and if not, how it diverges. Transparency demands a consistent set of expenditure heads across planning and budget documents that can be linked back to the information system (IFMIS) used to manage expenditure. **The Kenyan Constitution does not contain this level of detail, thus it is appropriate that the OBL dictate that a common set of spending categories be used across national government reporting, and that these also be consistent with those used at county level** (the Constitution does give the Parliament the right to determine the form of county budgets and plans).

#### *Accountability*

The second principle (also in article 201(a)) of Chapter 12 of the Constitution is accountability. The first check on the accountability of public spending rests with internal controllers and the Auditor General. The Constitution already prescribes the creation of an Auditor General office, and, in line with best practice internationally, requires audits for each financial year to be released within 6 months of the year's closing (229(4)). The

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<sup>6</sup> <http://internationalbudget.org/what-we-do/open-budget-survey/research-resources/?fa=view&id=2493&hd=1>

Constitution also mandates that Parliament shall consider audit reports within 3 months of being tabled (229(8)).

While the Constitution requires Parliament to consider reports from the Auditor General within a reasonable time frame, it is silent on the process of enforcing recommendations that result from parliamentary consideration. **The OBL should specify a process for following up on the actions recommended by Parliament. This could take the form of mandatory reporting by the Attorney General to Parliament on actions taken within a specified time frame, or on a regular (quarterly or semi-annual) basis.** All reporting during this process should be made public, including recommendations from Parliament and any reports from the Attorney General on implementation of the same.

Another key area of concern is to limit the executive's discretionary power to spend funds outside of the budget process. The Constitution mandates the creation of a Contingencies Fund for "urgent and unforeseen" expenditure needs that are identified by the executive during the year (208(1)). **While such a fund is proper, the OBL should specify some limits on the share of spending that may be exercised in this fashion, in order to prevent abuse.** The South African PFM law, for example, sets a limit of 2 percent of the annual budget that may be spent for emergencies without proper scrutiny by parliament in advance. There is already a precedent within the Kenyan Constitution itself, which specifies a limit on the size of supplementary budgets during the year with parliamentary approval (less than 10 percent of the total appropriations for the year) (223(5)).

**The OBL can also specify limits on the power of the executive to shift funds between sectors after the budget has been approved, a power known as virement.** In some cases, it may make sense to shift unspent funds in a particular area to other areas of the budget. However, if these shifts are too large, they undermine the process of legislative approval of the budget. The South African PFM law limits the size of virements to 8 percent of the budget category from which the money is being withdrawn.<sup>7</sup>

### *Public Participation*

The third principle of Chapter 12 is public participation. The Constitution states that the budget committee in Parliament shall "seek representations from the public" regarding the budget estimates presented to the legislature by the executive (221(5)). The Constitution does not specify *when* the estimates must be made available to the public, *how long* the public will have to deliberate on these estimates before making their "representations," *how long* the window for making representations will be open, or whether "representations" means *public hearings or only written comments*. Article 221(1) only provides that the process of scrutiny by Parliament shall be done at least two months before the end of the financial year. **The OBL should ensure that sufficient time is given to the public to consider budget estimates before responding, that sufficient time is given for public representations, and that space for both public hearings and written comments are guaranteed.**<sup>8</sup>

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<sup>7</sup> South Africa National Treasury, Public Finance Management Law No. 1 1999, updated 2010, Sec. 43:2. <http://www.treasury.gov.za/legislation/PFMA/act.pdf>.

<sup>8</sup> Good practice in PFM requires public hearings on the overall budget, as well as departmental budgets, as per the Open Budget Index 2010. See questions 75-78 in the survey instrument.

**The OBL should mandate that whenever the government or Parliament requests representations from the public they publish clear and explicit guidelines for these representations, allowing the public to understand what they are being asked to comment on, and why. The OBL should also guarantee nondiscrimination in the opportunities provided for public representations.**

Another principle of public participation is that government or Parliament should provide responses to public comments. This may take a number of forms, not all of which require an individual response to every comment. **The OBL should require that reports be published detailing comments received. These reports should contain some indication that the comments were considered; it is essential that a justification for the choices made is presented, especially where these differ from the comments received.** This will give life to the constitutional imperative that public “recommendations shall be taken into account when the committee makes its recommendations” to the broader Parliament.

The Constitution also leaves it to Parliament to determine “the form and manner of consultation between the national governments and the county governments in the process of preparing plans and budgets.” **The OBL is the vehicle for ensuring that decisions about the preparation of plans and budgets at county level also make space for public comment.**

The Constitution guarantees public participation at the estimates (or formulation) stage (221(5)). But the public should also be guaranteed opportunities to participate in the implementation and evaluation stages. **During the course of the year, the OBL should provide for mandatory and regular public hearings to help Parliament monitor budget execution.** Because the OBL would also mandate the release of In-Year Reports on budget implementation, these hearings could be scheduled after the public has had a reasonable time to review the reports and formulate comments.

Furthermore, at the evaluation stage, the Constitution is silent on the relationship between the Auditor General and the public. It does not mention whether audit reports should be made public or when, and it does not describe any mechanism for engagement between citizens and the Auditor General. The Constitution only mandates that audit reports be submitted to Parliament (229(7)). This is an area where the OBL can put Kenya at the cutting edge of PFM developments. In a number of countries around the world, including most recently Liberia, the supreme audit institution (SAI) is setting up structures to engage with citizens. Liberia’s SAI publishes findings from audits immediately, conducts regular public forums with citizens, and has a hotline that citizens can call to convey their concerns about financial management.<sup>9</sup> These kinds of structures allow SAIs to receive information from citizens about implementation of public projects and service delivery and provide citizens with information about areas of potential mismanagement. These new practices can increase the accountability of government and the effectiveness of the Auditor General. **Kenya’s OBL should specify a mechanism for consultation between the Auditor General and citizens.**

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<sup>9</sup> [http://internationalbudget.org/files/2010\\_Full\\_Report-English.pdf](http://internationalbudget.org/files/2010_Full_Report-English.pdf)

## Conclusion

According to the timetable laid down by the IMF for continued support to Kenya under the Extended Credit Facility, a draft of the Organic Budget Law should be completed by the end of April 2011. It is possible that at that time the Government of Kenya will seek some input into the law, either through consultations with citizens or through tabling the bill in Parliament, where it will be subject to public hearings. However, it is not known what will be in the bill, or how much time will be given to citizens or Parliament to react before there is pressure to pass it.

**Kenya's government should immediately provide a timetable for the release of the OBL draft to Parliament and civil society, and this timetable should also include opportunities for public comment, redrafting, and further comment. The draft itself should be brought into the light as soon as possible.**

Meanwhile, the best antidote to uncertainty is preparation. **The time is now for citizens to agree on some common principles that should be in Kenya's Organic Budget Law.** The OBL is one of the first and most important opportunities for citizens to ensure that the spirit of Kenya's Constitution is embodied, rather than betrayed, in the implementing legislation. This brief has provided a starting point for discussions about the law; Kenyan citizens should take the discussion forward.