

Existing Budget Transparency Mechanisms and the Effect of the New Constitution in Kenya

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Abstract

The paper examines the provisions of the new Constitution and the organic budget law and their adequacy in enforcing good practice requirements for participation and transparency in public sector budgetary processes. It contextualizes the state of budget transparency by evaluating existing participatory mechanisms and the extent to which they are entrenched in law. Drawing from international best practices, it was concluded that there is little prospect that promise of the Constitution to provide the opportunity for citizen participation in budgetary processes will be fully realised through legislation. The organic Budget Law fails to mandate the State to disclose core budget documents and guarantee free access to relevant and useful budget information. Case studies show that existing avenues for participation developed through informal processes of active citizenship and civil society pressure. Along with the strengthening of legislative and institutional frameworks, increasing budget literacy through citizen education is necessary to ensure effective participation and disclosure.

INTRODUCTION

This paper covers three main aspects:

- a review of existing transparency mechanisms in public financial management in Kenya
- an evaluation of the extent to which such mechanisms are currently entrenched in law
- an evaluation of the extent to which the entrenchment in law will affect the level of transparency and overall participation of the public.

It is argued that participatory mechanisms in Kenya have tended to develop informally through active citizenship rather than through the introduction of formal laws. Such practices have been limited however, to social audit of public financial management at the local level rather than demanding greater overall budget transparency. Active citizenship with the support of civil society has led to greater accountability and participation. The practice has developed outside the formal laws as the current legal framework does not adequately require public officers to provide budgetary information and to involve the public in decision making.

In 1999 an important series of events in Porto Alegre, Brazil, led to the development of the concept of budget transparency which has since received wide application globally. There are several definitions on what budget transparency means. A transparent budget process is one that provides clear information on all aspects of government fiscal policy. The Economic

Commission for Africa defines transparent budgets as those that are easily available to the public and participants in the policy making process and that present comprehensive information (UNECA 2005). Budget transparency is considered as a fundamental pre-condition for public participation and accountability in the budget process. The benefits of making budgets open and available to the public are well documented. Budget transparency is associated with:

- lower public debt and deficits as voters want competent politicians in office to provide more public goods through efficient use of available finite resources
- a better informed debate about the design and result of fiscal policy
- accountability of governments in implementation and strengthens public understanding of policies and priorities.

Budget transparency may also result in curbing corruption and misuse of public resources.

EXISTING PARTICIPATORY MECHANISMS AND THE EXTENT TO WHICH THEY ARE ENTRENCHED IN LAW

By coincidence, changes in the governance of public finance in Kenya were taking place around the same time that the concept of budgetary transparency was gaining recognition in Brazil. From independence up to the end of 2000, national and sub-national budgetary processes were to a great extent opaque and inaccessible to the public. The formulation, planning, implementation and auditing processes were exclusive to government officials, with nominal involvement of the parliament. The government was not required to disclose any budgetary information to the public. Citizens had no access to budget information and were only informed of the government's plans through televised proceedings of the annual budget speech to parliament. The establishment of Local Authority Service Delivery Action Plans in 2001 marked the introduction of the requirement for disclosure of information and citizen involvement in budget planning. Although the requirements for disclosure of budget information were minimal, the rationale was to ensure that local authorities involved citizens in budget planning by receiving their input on sector development plans. In practice however, the extent of disclosure of information has been contingent upon demand for such information through active citizenship and advocacy by civil society organizations rather than strict adherence to provisions of the law by government officials (TISA Report 2011). In other words, local government officials released information about development plans for respective county councils not because they were required to by law, but due to the pressure applied by civil society groups demanding the information. Further, the legal foundation of the Local Authority Service Delivery Action Plans was weak as it was established through a ministerial circular rather than an Act of Parliament

Three years later, the government enacted Constituency Development Fund Act 2003 to provide for management of public funds at the constituency level with the intention of further reforming public finance management. The Constituency Development Fund Act provides that the government should set aside 2.5% of its ordinary government revenue for disbursement to the constituencies under a Constituency Development Fund. The objective was to ensure that greater economic and social development is achieved by situating developmental activities at the

constituency level. By so doing it was anticipated that constituents would be equipped with the necessary information to enable them to participate fully in determining the use of the resources in their respective constituencies. Although the constituency development fund (CDF) was established with noble intentions, it has been an ineffective vehicle for greater transparency in decision making and spurring development at the local level. The Act vests immense powers with Members of Parliament (MPs) in the management of the funds, which have been subjected to abuse (IEA Report 2006). Although the Act requires disclosure of information to the public, empirical research has shown that there has been low compliance, hence compromising the quality of disclosure.

Further major reforms to public finance management have been undertaken through the enactment of laws to regulate the budget processes, including the enactment of the Government Finance Management Act in 2004 and the Fiscal Management Act in 2009. The changes introduced by these two pieces of legislation were focused on enforcing fiscal responsibility on public revenue and expenditure. Fiscal responsibility was applied to regulating spending and management of resources prudently. In this sense it was narrowly defined to exclude transparency and accountability requirements that would have enhanced greater disclosure to the public. Of the two pieces of legislation, the Fiscal Management Act provided some recognition of the importance of participatory mechanisms in the budget process. Parliament passed the Fiscal Management Act in 2009 to enable it to play an instrumental role in the national budgetary process. Dissatisfied with a mere rubber-stamping role in budget making, MPs agitated for a more active role. They designed the Act to include positive provisions intended to infuse transparency and strengthen Parliament's oversight role. In seeking to strengthen Parliament's role, the Act contained provisions that required the Ministry of Finance to publish detailed expenditure and revenue statements within specified timelines. Firstly, every public body is now required to prepare its budget each year and submit it to the parent Ministry by 28th February for onward transmission to Treasury. Secondly, by 21st March each year the Minister of Finance was required to present a Budget Policy Statement to the National Assembly. The Act also empowered Parliament to withhold funds for budget line items and emoluments where Treasury fails to satisfy audit queries raised by the Controller and Auditor General (Kenyan Supreme Audit Institution).

Until the promulgation of the new Constitution, avenues for citizens to obtain budget information and to participate in budget processes were limited to Constituency Development Fund and Local Authority Service Delivery Action Plans. Even then, where certain elements of budget transparency have been provided for, they have been loosely defined in law. There have been no comprehensive definitions in statute that clearly set out specific requirements to make the budgetary process transparent. The institutional framework in place is also weak and uncoordinated. The entrenchment of transparency as a principle for guiding decision making would be a strong foundation for imposing a duty on public officials to open up the budget process to the public. However, budget transparency has not been embraced as a key aspect of public finance management and it has therefore not been protected adequately under the law. It is argued below that even with the passing of the new Constitution the realization of budget transparency would take time without an effective organic budget law. Therefore, existing participatory mechanisms which have proved to be effective have developed outside the law. Where the law has been weak in defining transparency and requiring the release of documents by

public officials, citizens with the help of civil society have organized themselves into groups with aim of obtaining budget information on public finance. A detailed account of how effective active citizenship has been in agitating for increased disclosure of information is provided in the case studies in Annex I to this paper.

EFFECT OF THE NEW LAW AND ORGANIC BUDGET LAW

The Constitution

Under the old order, issues concerning public finance were not well articulated in the Constitution which had been operational since independence. In the new Constitution, adopted in 2010, public financial management is an important aspect of government that needs to be entrenched in the text of the Constitution rather than being regulated through the discretion of the Minister of Finance and bureaucrats at the Treasury (Kirira, 2011 at p.4). The new Constitution envisages transparency as a national value and principle and that the exercise of state power must be guided by it. In order to be transparent, the Constitution requires that state organs must open up decision making to the public. Budget management constitutes an important part of governmental decision making. However, entrenchment of transparency in the Constitution, in itself will be inadequate, if existing laws, institutions and their practices are not reformed to reflect the shift of democratic governance which envisages the involvement of citizens in decision making by providing them adequate information. Existing mechanisms provide little room for disclosure of budget information as evidenced under the Constituency Development Fund and the Local Authority Service Delivery Action Plans regimes. Citizens' hopes for greater access to budget information are dependent upon the enactment of a comprehensive organic budget law. Such a law would give full effect to the constitutional requirement for transparency in budget processes by giving elaborate provisions on entitlement of citizens to budget documents, details on procedures for obtaining such documents, at what cost, deadlines for release of such information and sanctions where information is not provided.

Such an organic budget law, envisaged by the Constitution, was recently passed amid a backdrop of confusion by the Treasury over the version of the bill to be presented to parliament. Ultimately the government published the Public Finance Management Act 2012. However, its enactment fails to bring about the much needed clarity and certainty on issues of public finance and in particular participation of citizens in the budgetary process.

Public Finance Management Act

The enactment of the new law marks progress in providing a framework for implementation of good budgetary management practices and fiscal responsibility. However, the provisions are not comprehensive enough to address pertinent issues and to ensure greater transparency and disclosure of sufficient information.

The Public Finance Management Act breaches key aspects of sound budgetary transparency mechanisms which have recently been developed as international best practices. (De Renzio and Kroth, 2010) The Act ignores the requirement to publish the eight core budget documents. Of these key documents, Keynan state officers are only compelled to release three documents. The Act only mandates the release of a pre-budget statement (budget policy statement), the mid-year review (economic and fiscal update) and the quarterly expenditure reports (in-year reports). The

law does not expressly provide for a citizen's budget which would be another key budget document. A citizen's budget is a simplified version of the government's budget which enables citizens to understand how government plans to raise revenue and its plans for spending public money. There is also no statutory requirement for the release of other key documents like the enacted budget, the executive's budget proposals, the year-end report and the audit report. Disclosure would be effective if citizens were guaranteed, as a minimum, that all eight specific key documents are provided in a timely manner and at no cost to the citizens obtaining the documents.

For the three documents mentioned in the Act, the law only provides a statutory deadline for the in-year reports. There is no statutory time limit for the release of the pre-budget statement and mid year review. The public is not granted a reasonable time and opportunity to comment on the process of budget formulation and implementation. While *transparency* is mentioned in the Act, it is not comprehensively defined and there are no detailed provisions to define the term, leaving room for narrow interpretations by government officials. The lack of clear and detailed provisions may result in minimal or no disclosure. Further, the law is wanting in regard to incorporation of enforcement mechanisms to realise effective disclosure.

There is also a lack of comprehensiveness in the institutional framework under the Public Finance Management Act. The Act does not expressly state the institutions that are charged with specific responsibilities in overseeing fiscal discipline in public finance. The provisions of the law allow too much discretion to the Treasury to design an institutional framework through subsidiary legislation. This means that with no minimum standards set in the parent Act, the Cabinet Secretary of Finance has wide powers to determine the implementation of the Act. Such powers may be abused to detriment of the public.

The Act does not define sanctions for public officers for non-disclosure of budget information. The public is effectively prevented from participating in oversight of the budget. The Act fails to provide for the publication of an Annual Audit Report to allow the public to scrutinize the implementation of budget for the previous financial year.

It seems that new Constitution will have little effect on widening the scope of participation of the public in public finance management. There is a mismatch between constitutional provisions requiring decision making be guided by participation and implementation of citizen's right to participate.

In the drafting stage of the Public Finance Management Act, participatory mechanisms were continuously watered down by the government and the courts have interpreted its provisions rather narrowly.

JUDICIAL ATTITUDE TOWARDS PARTICIPATION IN THE BUDGET PROCESS

As was underlined in the judgment in the case of *Jayne Mati and Davis Odieno v Attorney General and Minister for Finance*, early indications are that the court's approach to interpretation of constitutional imperatives is unlikely to broaden the scope and content of existing participatory procedures.

The facts of the case are briefly as follows; On June 30th 2011, civil society activists, filed a petition against the Attorney General and the Minister for Finance seeking a declaration that Parliament violated the Constitution by authorizing the issue of half the total estimates of the estimated budget for 2011 without the introduction or passing of an Appropriation Bill, as provided in Articles 206, 221 and 222 of the Constitution. The petitioners also submitted that the constitutional principle of public participation was violated as provided in Articles 201 (a).

The judgment in the *Jayne Mati and Davis Odieno v Attorney General and Minister for Finance* raises more questions than answers in relation to important aspects of public finance and how they are defined in the law. The judgment addresses itself more fully to the first issue about budget procedure than the second issue about participation. It elaborates the fundamental concepts of constitutional law and the place of constitutional law in our legal system. The ruling was clear on supremacy of the constitution and separation of powers.

However, it may have been a missed opportunity for the Judiciary to set out the scope and content of participation as contained in the new Constitution. The judgment focuses on the legality or illegality of Minister's actions in drawing funds from the Consolidated Fund, but although the decision contains a section entitled "Public Participation", it does not, in my view, adequately address the issue.

What comprises participation or non-participation as provided in our laws is still not clear. With the devolved system expected to be in place and the increased role played by the public in decision making under the new constitutional dispensation, the public is uncertain in which circumstances it can access the court to ensure that the right to participation is enforced.

To be fair, the court only deals with the case presented and matters of evidence before it. The issue of participation may have been understated during the proceedings of the case. Nevertheless, this case should have opened a broader discussion on what we mean by public participation in finance. Does the absence of evidence that a citizen was denied access to a parliamentary committee in itself absolve the Legislature from responsibility for establishing mechanisms to enable public participation in the budget process? Should participation be overlooked during the transitional period? To answer these questions in the affirmative would indicate an adoption of a conservative approach to "participation" where consultation is minimal.

The fact that the public was invited to present written memoranda to a parliamentary committee does not in itself constitute effective public participation and transparency. On ruling whether the requirement for public participation and transparency were satisfied, the judge accepts that transparency was observed where: Departmental Committees were allowed to scrutinise estimates of the budget in the Speaker's ruling of 7th June 2011; and procedures communicated by the Speaker on 15th June 2011 conforming to Article 221 (5) were followed by departmental committees. The judge concluded that public participation had been effected because there was no denial of access of the public from the departmental committee proceedings. Rather than placing a negative duty on the Legislature, the judge should have made a decision on the basis of the meaning of participation in public finance, to what extent it applies and in which situations it does not apply.

The judgment indicates that the existence of procedures for receiving submissions from citizens is a sufficient way of involving the public in the budget process. It is not certain however, whether the court would conclude that public participation was not observed, if the whole procedure or an element of the procedure or one of the scheduled events was not followed. This would have brought a desirable certainty to citizens about the circumstances in which they have the protection of the court when they feel their rights to contribute to the budget process has been denied. In turn, it would also place a positive duty on both Executive and the Legislature to involve citizens in the decision making process for the government's annual budget.

Further, certain important aspects of accountability and openness like making information public and providing citizens with feedback were not included in the committees' guidelines on procedure. In my view, these aspects of accountability, if included, would have enabled the public to engage with the departmental committees in a more meaningful way. A decision on whether these aspects of accountability have a place in our laws would have been covered well in a definition of public participation in the budget process.

In the absence of transparent procedures for receiving, evaluating and dispensing with written memoranda and oral representations, the process cannot be said to have been transparent or adequately consultative. Further, there are no minimum assurances that citizens' views will be considered and may influence how the annual budget will be implemented, which is a requirement under the Constitution. However, all is not lost judging from the Executive's record in upholding provisions of the Constitution. Another opportunity may arise for the Judiciary to delimit the scope and content of public participation in the budgeting process.

CONCLUSION

Several provisions of the new Constitution outline the right to participate in budgetary matters. However, to date, there has been little progress in terms of realising this right due to the minimal legal protection provided in the Public Finance Management Act. Early political and judicial attitudes seem to have a dismal view of citizen involvement in national budgetary matters. Constitutional promises of increased transparency and participation in decision making have been narrowly interpreted by both parliament and the judiciary. Parliament has failed in providing clear provisions while the judiciary has also failed to provide an interpretation that gives effect to participation. The existing participatory mechanisms though, not fully protected by law remain the best avenue for citizens to engage the government on budget transparency. The law lags behind existing social practice and has embraced international best practices half-heartedly and therefore the law needs to be reformed to meet such standards. In the intervening period, civil society organisations should strengthen direct engagement with government by continuing to support citizen initiatives.

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