

Transparency International Anti-Corruption Helpdesk Answer

Overview of international standards related to separation of powers, conflicts of interest and abuse of functions by parliamentarians in national budget processes

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Date: 12 January 2021

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Members of parliament play an important role in the approval and oversight of the national budget presented by the ministry of finance. However, questions arise when parliamentarians create a budget line for their own private interests instead of the public's interest. Various international standards make it clear that, in terms of the principle of separation of power, the task of drawing up the budget rests with the executive and the role of the parliament includes scrutinising the already drawn-up budget. A conflict of interest arises when the parliamentarians officially vote to approve a financial scheme for their own private interests, which is discouraged by most anti-corruption conventions and parliamentary guidelines. Where the private interest has compromised the proper performance of a public official's duties, this is known as abuse of functions – which is criminalised by major anti-corruption conventions.

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The Anti-Corruption Helpdesk is operated by Transparency International and funded by the European Union.



Query

Please compile international standards related to the separation of powers, conflicts of interest and abuse of functions by parliamentarians in national budget processes

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Introduction

It is a common practice for the ministry responsible for finance to present the national budget to parliament for approval and oversight (Lienert 2010; OECD 2019). However, the active engagement of the legislature in budget processes carries its own risks. For instance, the International Monetary Fund's (IMF) report on the Role of the Legislature in Budget Processes points out that "in countries where the legislature has unrestrained budget amendment authority, parliament is prone to introduce changes that increase spending or reduce taxes" (Lienert 2010: 2).

Parliamentarians may also abuse their entrusted powers to create budget lines for self-enrichment instead of for the benefit of the public. A case in point is the Gambian parliament which recently

Main points

- Several international standards such as the High Level Principles of Fiscal Transparency and the IMF's Fiscal Transparency Code provide that the separation of powers between executive and the legislature is important to ensure budget transparency.
- The United Nations Convention against Corruption (UNCAC) and Economic Community of West African States Protocol on the Fight against Corruption provide measures on regulating conflicts of interest.
- UNCAC and the African Union Convention on Preventing and Combating Corruption criminalise any abuse of functions for private gain.
- In countries like Kenya, members of parliament apply for loans, such as car and mortgage loans, similar to other public officials, rather than creating a loan scheme from the national budget.

introduced and approved a loan scheme worth 54 million Gambian dalasi (approximately US\$1.04 million) into the 2021 national budget. The loan scheme was designed to benefit members of parliament in building their own houses given by the government (Jawo 2020).

According to reports, the public as well as the Minister of Finance and some parliamentarians have raised concerns that it was not ideal for members of parliament to award themselves such a loan scheme into the budget already drawn by the executive (Bah 2020; Jawo 2020).

In other circumstances, parliamentarians can abuse their powers to divert allocated public resources for private gains. In 2018, Mongolia's anti-corruption authority investigated reports that parliamentarians and senior government officials had channelled more than US\$1 million to their families and friends (Bayartsogt 2018). According to the report, 49 out of 75 parliamentarians allegedly directed the funds to their beneficial or controlled businesses instead of intended small- and medium-sized enterprises (Transparency International 2019).

The following section outlines the international standards related to the separation of powers, conflicts of interest and abuse of functions by parliamentarians in national budget processes.

International standards for parliamentarians

Separation of powers in budget transparency

The separation of powers between the three branches of government – legislative, executive and judicial – promotes good governance, human rights and the rule of law (World Bank 1997: 100; Alt and Lassen 2008: 33). It provides mechanisms for checks and balances without which the standards of accountability, transparency and integrity are difficult to uphold. As such, there are international standards to ensure the separation of powers in budget transparency.

The [High Level Principles of Fiscal Transparency](#) were developed by the Global Initiative for Fiscal Transparency (GIFT)¹ and were endorsed by the United Nations General Assembly in 2012 ([Resolution 67/218](#)). According to Principle 7, roles and responsibilities related to collecting revenues, incurring liabilities, consuming resources, investing and managing public resources “should be clearly assigned in legislation between the three branches of government, between national and each subnational level of government, between the government sector and the rest of the public sector, and within the government sector itself”.

According to GIFT's [Detailed explanation of the High-Level Principles](#), it is important to be clear about responsibilities and who is accountable to whom to ensure the effective and efficient governance of fiscal policy. Any contested, unclear or overlapping mandates reduce transparency,

¹ GIFT was established in 2011 as a multi-stakeholder action network to advance fiscal transparency,

participation, and accountability in countries around the world.

decrease meaningful participation and make it harder to hold public officials to account. As such, it is recommended that the branches of government follow roles and responsibilities as set out in national constitutions and acts of parliament (Global Initiative for Fiscal Transparency 2018: 53).

Similarly, principle 2.2 of the [IMF's Fiscal Transparency Code](#)² provides that “the powers and responsibilities of the executive and legislative branches of government in the budget process should be defined in law, and the budget should be presented, debated, and approved in a timely manner”. The legal framework should define: i) the timetable for budget preparation and approval; ii) the key content requirements for the executive's budget proposal; iii) any parliamentary powers to amend the executive's budget proposal (IMF 2019: 9).

The common roles and responsibilities of the executive and legislature in national budgeting is pointed out in the Inter-Parliamentary Union's [Guide on Parliament and Democracy in the Twenty-First Century](#). According to the guide, the tasks of the executive include drawing up detailed annual budget proposals for the raising and expenditure of revenue by government. The central role of the parliament includes budgetary scrutiny and financial control (Inter-Parliamentary Union 2006: 140).

Budgetary approval and oversight by the legislative branch of government reflects the constitutional division of responsibilities, promotes transparency and encourages fiscal responsibility within government (OECD 2019: 82). It ensures that elected representatives of the people approve and monitor government spending to the benefit of the public. The [2017 Global Parliamentary Report](#) also points out that the scrutiny of government's budget is a top priority on the financial calendar for many parliamentarians around the world (Inter-Parliamentary Union and United Nations Development Programme 2017: 18).

Hence, it is important for the branches of government to respect the principle of separation of powers to increase budget transparency. According to principle 2.3 of the [Recommended Benchmarks for Codes of Conduct Applying to Members of Parliament](#), established by the Commonwealth Parliamentary Association,³ “parliamentarians must give effect to the ideals of democratic government and abide by the letter and spirit of the Constitution and uphold the separation of powers and the rule of law”. In addition, the principle places an obligation on parliamentarians, as public officials who exercise public trust, to refrain from misconduct that involves a breach of their powers and duties entrusted for the public benefit (Commonwealth Parliamentary Association 2016: 6).

² The *Fiscal Transparency Code* is the global standard for disclosure of information regarding public finances. It was first adopted in 1998 and the latest revision was released in 2019. See <https://www.imf.org/external/hp/fad/trans/>

³ The Gambia joined into the Commonwealth in 1965. It left in 2013 but re-joined in 2018. See

<https://thecommonwealth.org/our-member-countries/gambia>

Conflicts of interest by parliamentarians

Citizens expect public officials such as parliamentarians⁴ to perform their duties and responsibilities with integrity and in a fair and unbiased manner. As such, there is an expectation for public officials to avoid any conflict between their private interests and their official duties and responsibilities (OECD 2003: 22; Jenkins 2015: 4).

A conflict of interest is defined as follows:

- “A conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities” (OECD 2003: 24).
- Transparency International (2009:11) also defines a conflict of interest as “a situation where an individual or the entity for which they work, whether a government, business, media outlet or civil society organisation, is confronted with choosing between the duties and demands of their position and their own private interests”.

The [OECD Guidelines for Managing Conflict of Interest in the Public Service](#) clarify that “private interests” are not limited to financial or pecuniary interests that generate a direct personal benefit to the public official but extends to any other interest “that could reasonably be considered likely to

influence improperly the official’s performance of their duties” (OECD 2003: 25).

It is important to note that a conflict of interest is not *ipso facto* corruption, as most officials at some point may find themselves in an unavoidable situation where private interests get in the way of their public duties. However, where such conflicts of interest are inadequately mitigated or managed, there is a heightened risk of abuse of power for private gains (Oldfield 2015:2).

The problem of conflicts of interest is widely acknowledged, and a number of legally binding instruments contain provisions regulating such situations. For instance, Article 7 (4) of the [United Nations Convention against Corruption \(UNCAC\)](#),⁵ requires that state parties “endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest”. Article 8(5) provides that state parties should establish, where appropriate and in accordance with the fundamental principles of its domestic law, measures and systems that require public officials to make declarations of their financial interests to appropriate authorities which may result in a conflict of interest with respect to their functions as public officials. According to the [Legislative Guide for the Implementation of the United Nations Convention against Corruption](#), any conflict of interest, or even perceptions of such, undermine public confidence in the integrity and honesty of civil servants and other officials (UNODC 2012: 33)⁶.

⁴ Article 2 of the *United Nations Convention against Corruption* defines a public official as including “any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority”.

⁵ UNCAC is the only universal anti-corruption legal instrument. Gambia acceded to UNCAC on 8 July 2015. See <https://www.unodc.org/unodc/en/corruption/ratification-status.html>

⁶ See also *Handbook on Parliamentary Ethics and Conduct* (2016: 22), and *OECD Guidelines for Managing Conflict of Interest in the Public Service* (2003: 22).

Article 5(a) of the [Economic Community of West African States Protocol on the Fight against Corruption](#) obliges state parties to “establish and consolidate national laws, ethical guidelines, regulations and codes of conduct that would eliminate conflicts of interest”, among other issues. In addition, sub-article (j) places an obligation on states to adopt policies that ensure that public officials do not make official decisions related to private businesses in which they have an interest.

Article 4(1)(a) of the [Southern African Development Community Protocol against Corruption](#) requires member states to establish, maintain and strengthen “standards of conduct for correct, honourable and proper fulfilment of public functions as well as mechanisms to enforce those standards”. Though it did not specifically refer to conflicts of interest, such standards of conduct usually cover conflicts of interest. For instance, article 3 of the [Inter-American Convention against Corruption](#) provides that member states will consider creating, maintaining and strengthening standards of conduct for the correct, honourable and proper fulfilment of public functions. It goes on to provide that “these standards shall be intended to prevent conflicts of interest and mandate the proper conservation and use of resources entrusted to government officials in the performance of their functions”.

European Union bodies have also adopted measures to prevent and mitigate conflicts of interest, such as the following:

- Article 1 of the [Rules of Procedure for the European Parliament \(Annex I: Code of conduct for members of the European Parliament with respect to financial interests](#)

[and conflicts of interest](#)) provides that as a guiding principle, members of parliament must act with “disinterest, integrity, openness, diligence, honesty, accountability and respect for parliament’s reputation”. Article 3 places an obligation on members to address any potential conflict of interest or to report it in writing to the president of the European Parliament, or to the seek advice in confidence from the Advisory Committee on the Conduct of Members.

- Article 8(1) of the [Council of Europe Model Code of Conduct for Public Officials](#), which was adopted in 2000, prohibits public officials from allowing a private interest to conflict with their public position. In addition, it clearly points out that it is the responsibility of the public official to avoid such conflicts of interest, whether real, potential or apparent. Article 9 places a duty on public officials to always conduct themselves “in a way that the public’s confidence and trust in the integrity, impartiality and effectiveness of the public service are preserved and enhanced”.

The Group of States against Corruption (GRECO), which is the Council of Europe’s anti-corruption monitoring body, released a report in 2017 from its fourth evaluation titled [Corruption Prevention: Members of Parliament, Judges and Prosecutors](#). The report emphasises the importance of parliamentarians’ duty to self-regulate as individuals and as a group. It recommends ad hoc or “case by case” declarations of interest, which means that parliamentarians “have to regularly evaluate their (and oftentimes their family’s) personal professional interests with

respect to their public duties and ensure they respond appropriately when these affect, or could be seen to affect, their official actions” (GRECO 2017: 12).

The OECD has published international standards pertaining to conflicts of interest for its 37 member countries. In the [OECD Guidelines for Managing Conflict of Interest in the Public Service](#)⁷, public officials are expected to conduct themselves in a manner that will bear the closest public scrutiny. This obligation does not only include acting within the letter of the law but extends to “respecting broader public service values such as disinterestedness, impartiality and integrity”. In addition, any private interests and affiliations that could affect the disinterested performance of public duties must be disclosed properly to ensure adequate control and management of a resolution. Public officials are therefore required to ensure consistency and openness, and to promote scrutiny of their management of conflicts of interest situations in accordance with the applicable legal framework (OECD 2003: 26).

The OECD recommendation also requires public officials “to act at all times so that their integrity serves an example to other public officials and the public”. When a conflict of interest arises, public officials are expected to accept responsibility for identifying and resolving the conflicts in favour of the public interest. In addition, public officials are “expected to demonstrate their commitment to integrity and professionalism through their

application of effective conflict-of-interest policy and practice” (OECD 2003: 26).

Other relevant international standards include the following:

- The [OECD Recommendation of the Council on Public Integrity](#) advises countries to establish high standards of conduct for public officials, including setting clear and proportionate procedures to assist in preventing violations of public integrity standards and to manage actual or potential conflicts of interest (Recommendation 4c, OECD 2017).
- Principle 2.2 of the Commonwealth’s [Recommended Benchmarks for Codes of Conduct applying to Members of Parliament](#) provides that “members of parliament should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends”. In addition, parliamentarians’ acts or decisions must be impartial, fair and based on merit, using the best evidence and without discrimination or bias. Principle 3.1.2 prohibits parliamentarians from voting in a division regarding a matter, other than public policy (government policy, not identifying any particular person individually and immediately) in which the member has a particular direct financial interest above a threshold (if specified).

⁷ According to the OECD, the guidelines apply to central government officials, including public servants/civil servants, employees and holders of public office who work in the national public administration. However, they can

also provide general guidance for other branches of government, sub-national level government and state-owned corporations (see page 23 of the guidelines).

- According to the [Handbook on Parliamentary Ethics and Conduct](#), produced under the auspices of the Global Task Force on Parliamentary Ethics, “one of the underlying principles of any ethical regime should be that MPs should not behave in a way that they would find difficult to justify in public” (Power 2016: 22)

The various international laws and guidelines discussed in this section set good standards for national governments to develop and adopt systems that promote transparency and prevent conflicts of interest in public office. These standards are clear on the fact that parliamentarians should not get involved in decisions that will potentially or actually benefit their private interests instead of those of the public.

Abuse of functions

Where a private interest has compromised the proper performance of a public official’s duties, “that specific situation is better regarded as an instance of misconduct or ‘abuse of office’ or even an instance of corruption, rather than as a ‘conflict of interest’” (OECD 2003: 25). Such use of entrusted powers for private gain fits the definition of corruption.⁸

Most anti-corruption legal instruments criminalise any abuse of power for private gain:

- Article 19 of [UNCAC](#) provides that state parties should consider criminalising the intentional abuse of functions or position by public officials in the discharge of their functions, for the purpose of obtaining an undue advantage for themselves or for another legal or natural person. According to the [Legislative Guide for the Implementation of the United Nations Convention against Corruption](#), this provision encourages criminalisation of public officials who abuse their functions, by act or omission, in violation of laws to obtain an undue advantage (UNODC 2012: 83).
- Article 4(1)(c) of the [African Union Convention on Preventing and Combating Corruption](#)⁹ criminalises any conduct in the discharge of official duties by public officials or any other person for the purpose of illicitly obtaining benefits for themselves or any other person.
- Likewise, article 3(1)(c) of the [SADC Protocol against Corruption](#) criminalises any act or omission in the discharge of official duties for the purpose of illicitly obtaining private benefits.

According to the UNODC’s [State of Implementation of The United Nations Convention Against Corruption](#), most countries have already established national laws which contain such an offence but may be known by other terms including “abuse of authority and failure to discharge official

⁸The most widely used definition of corruption from Transparency International is “the abuse of entrusted power for private gain”, see <https://www.transparency.org/en/what-is-corruption> UNCAC does not define corruption, but rather specifies acts of corruption, such as abuse of functions (article 19)

⁹ The African Union adopted the Convention on 1 July 2003 and it later came into force on 5 August 2006. The Gambia ratified the convention on 30 April 2009, see <https://au.int/sites/default/files/treaties/36382-sl-AFRICAN%20UNION%20CONVENTION%20ON%20PREVENTING%20AND%20COMBATING%20CORRUPTION.pdf>

duties”, “abuse of public office”, “criminal breach of trust”, “abuse of official position” or “misconduct in public office”. In some circumstances, relevant provisions have gone a step further by dropping reference to a particular act or omission, and covering any use or abuse of office or position for the purpose of obtaining some kind of advantage (UNDC 2017: 40).

In Europe, article 1(b) of the [Rules of Procedure for the European Parliament \(Annex I: Code of conduct for members of the European Parliament with respect to financial interests and conflicts of interest\)](#) provides that, as a guiding principle, parliamentarians “must act solely in the public interest and refrain from obtaining or seeking to obtain any direct or indirect financial benefit or other reward”. In addition, article 5.5 of the [Code of conduct for members of the Parliamentary Assembly of the Council of Europe](#) prohibits members of the parliamentary assembly from using their public office for their, or anyone else’s, private gain. Article 12 of the code states that parliamentarians must refrain from using their position as a member of the parliamentary assembly to further their own or another person’s or entity’s interests in a manner inconsistent with the code. Also, article 8(2) of the [Council of Europe Model Code of Conduct for Public Officials](#) clearly stipulates that a public official “should never take undue advantage of his or her position for his or her private interest”.

Other international standards or principles which discourage any abuse of functions for private gain include the following:

- principle 3.1 of the [Common Ethical Principles for Members of Parliament](#),

developed by the Open Government Partnership’s Legislative Openness Working Group, provides that parliamentarians must “exercise proper stewardship of public resources in a responsible, transparent, participatory, and accountable manner”. They also have a responsibility to work diligently “to avoid waste and inappropriate uses of public resources, as well as ensure that public resources are not used to advance a private, rather than a public interest”. Principle 3.2.2 goes on to state that members of parliament must refrain from using their conferred influence for private gain or in a way that creates the appearance of doing so.

- The IMF’s report on [Role of the Legislature in Budget Processes](#) specifically discourages parliaments from abusing their powers by increasing parliament’s operating and investment expenses so that they become out of line with other national constitutional entities.
- Principle 2.2 of the [Recommended Benchmarks for Codes of Conduct Applying to Members of Parliament](#) provides that members of parliament should behave in accordance with the principle of selflessness, which entails acting solely in terms of the public interest.

Loan schemes for parliamentarians from other jurisdictions

In other countries, parliamentarians apply for loans in a similar way as other public officials. For instance, in Kenya, members of parliament are entitled to a mortgage and car loans similar to

other officials. The loans are granted to parliamentarians with interest and are payable within their five-year term of office. Like any other public official, the interested member of parliament can only be granted the loan upon application and subject to the member's ability to service the loan facility (Republic of Kenya Parliamentary Service Commission 2019: 2).

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