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Will the *Money Bills Amendment Act* enhance the power of the purse in South Africa?

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Abstract

In the administration and management of public money the separation of powers takes a specific form. This is expressed in the phrase 'the power of the purse'. It is a policy goal of democracy to put public money in the hands of the legislature.

The aim of this article is to investigate the extent to which the *Money Bills Amendment Procedure and Related Matters Act*, 2009, is likely to promote this policy goal. The article involves ex ante policy evaluation and the method followed is partly hermeneutical. The Act is analysed in detail in terms of its mechanics and rhetoric against the context and ideology in which it functions to determine its probable outcomes. The article concludes that, owing to the onerous nature of its stipulations and the fact that treasury dominance is written into the fabric of the Act, the power of the purse will not be fundamentally enhanced.

Keywords: Power of the purse, parliamentary budgeting, separation of powers, treasury influence

1 OVERVIEW AND BACKGROUND

The power of the purse is the historic bulwark of legislative authority
– Richard F. Fenno

Good intentions can be evil,
Both hands can be full of grease
– Bob Dylan

South Africa has a parliamentary system of government. In 2009 Parliament passed an Act purporting to enhance its powers in budgeting (Jenkins 2010; Verwey 2009;

Wehner 2010: 119–126). This article deals with the question whether the Act is likely to meet its supposed objective with regard to the balance of powers between the legislature and executive. In this article, I investigate the extent to which the *Money Bills Amendment Procedure and Related Matters Act*, 2009 ('*Money Bills Amendment Act*') is likely to promote the power of the purse as policy goal. The *Money Bills Amendment Act* gives effect to the second part of section 77 of the Constitution of the Republic of South Africa, 1996 ('the Constitution'), which stipulates as follows: 'An Act of Parliament must provide for a procedure to amend money Bills before Parliament'. A money Bill is just what the words say: a Bill that either authorises the spending or the compulsory collection of public money by way of taxes, duties and levies, and which includes changes to taxes, duties and levies.

I assume that the power of the purse is good and should be pursued. Contrary to much of the literature, I do not assume without qualification that fiscal discipline is good and that 'activist' legislatures should be frowned upon – the position on these issues is for the legislature to determine. The assumption in this article is that fiscal discipline is good, but should be balanced with the power of the purse.

This article involves *ex ante* policy evaluation. It is critical and practical rather than theoretical – not unlike the work of Critical Theory (*Stanford Encyclopedia of Philosophy* 2005). The method followed is mostly hermeneutical. The Act is analysed in detail in terms of its workings and rhetoric against the context in which it functions to determine its probable outcomes. I therefore do two things. The first is to critically examine the background against which the Act was written, and the second is to investigate the mechanics of the Act with a view to its workability. I then explore the ideological tendency surrounding the promulgation of the Act and predict that it will not promote the power of the purse significantly. The context includes the concrete institutions, arrangements, processes and customs around budgeting. Before this article was written, I discussed the context of the Act with a number of experts and parliamentary officials (personal interviews).

Importantly, the Act's context also covers an ideological milieu with standard ways of thinking and paradigmatic arguments. Capitalism is the taken-for-granted view of things that inspired the *Money Bills Amendment Act*. The validity of the finding for each of the two issues of the article, namely ideology and workings, stands on its own. However, the results of the investigation into the background of the Act may explain the unwieldiness of the Act itself: why it was written in the way it was written.

It will be shown that the attempted solution that the Act brings to the policy problem is bureaucratic. The Act prescribes onerous processes to legislators and detailed policy on how Parliament should legislate. It lays down norms and standards for Parliament. The first steps in the prescribed procedure were planned to occur in

October 2010 with a view to the 2011/2012 budget. However, Parliament was not then ready to apply the Act because, among other reasons, it had not yet established the Parliamentary Budget Office (this Office has still not been established). Delays in the implementation of the Act cast doubts on its practicability. In fact, on 27 February 2011, SECTION27, a civil society body, expressed its ongoing concern about the delays in the proper implementation of the Act (SECTION27 2011).

1.1 Separation of powers

The doctrine of the separation of powers – often ascribed to Montesquieu – is a well-known cornerstone of democracy. In the administration and management of public money the separation of powers takes a specific form. This is expressed in the phrase 'the power of the purse' that was already current in the 19th century (Wehner 2010: 129; this is also the title of Fenno 1966). It is a policy goal of democracy – at least in theory – to put public money in the hands of the legislature (Wehner 2010: 43), not forgetting that the separation of powers requires a strong executive as well as a strong legislature. It may even be said that in public financial administration the legislature fulfils executive functions by, among other things, taking expenditure decisions (Pauw, Woods, Van der Linde, Fourie and Visser 2009: 36–44). The legislature rather than the executive should manage public money given its claims that it is more representative than the executive, more transparent and less 'hands-on'. The last characteristic means more 'hands-off' as far as public money is concerned. In the debate about the *Money Bills Amendment Act*, Parliament was perceived, by various bodies in civil society, to be more transparent than the executive. These bodies argued that a lack of parliamentary amendment powers reduces civil society's ability to participate in budget debates (Naidoo 2007; also see Jenkins 2010).

In theory, then, democratic budgeting requires that the legislature rather than the executive take the reins in the management of public money. This, in fact, does not happen in many countries (including South Africa) – hence the title of a book by Joachim Wehner: *Legislatures and the budget process: The myth of fiscal control* (Wehner 2010; see also Wehner 2006).

Sections 213 and 226 of the South African Constitution seem to give the power of the purse to legislatures by providing that money may only be withdrawn from the national and provincial revenue funds by means of appropriation Acts. (The only exception is the so-called direct charges – for example, for the payment of state debt – but Parliament also authorises these payments by enabling legislation. Bills making provision for direct charges are money Bills.) Withdrawing money to pay for your expenses is an executive action in the normal course of things. I suggest the same applies to a state. The opposite is also true. An executive with

a clear majority – as in South Africa – also governs by its members in Parliament initiating laws. There are two issues here. Strong legislative powers in budgeting are an indication of the strength of the separation of powers in a state, albeit in reverse form. Secondly, strong legislative powers in budgeting are a modification of the *trias politica* due to the specific nature of public finances.

Not all legislatures have the power of the purse. A simple classification of legislatures in this regard is provided by Philip Norton (as quoted in Johnson and Stapenhurst 2008: 141), when they refer to budget-approving, budget-influencing and budget-making legislatures. A strong interpretation of the power of the purse as a policy goal certainly lies more to the budget-making side of the spectrum. The American House of Representatives, for example, can be regarded as a budget-making legislature (Wehner 2006 and 2010: 54).

According to Alta Fölscher, writing in 2006, 'a greater demand for strengthening the role of the legislature in the budget process has become evident world-wide: more than a quarter of countries have revised their constitutions over the past 15 years to give Parliament more powers' (2006: 133). The new constitutional dispensation in South Africa was initially not part of this trend. In fact, Joachim Wehner (2006) ranked South Africa the lowest out of 36 countries on an index of legislative power over the purse. By 2010 parliamentarians had not made a single amendment to any of the money Bills after more than a decade of democracy (Wehner 2010: 105). The expectation was that the legislation adopted by the South African Parliament in 2009 (discussed here) would change this (see Verwey 2010).

The power of the purse includes oversight over public spending. A more fundamental issue, however, is that the legislature is responsible for the allocation of public money to the various spending entities in government mainly by means of an annual appropriation Act. As already mentioned, South African public money may only be withdrawn from the National Revenue Fund either in terms of an appropriation Act of Parliament or a direct charge. In other words, the Constitution seems to guarantee the power of the purse – if it were not for section 73(2), which stipulates that only the Minister of Finance may introduce a money Bill, and section 55(1), which curtails the powers of the National Assembly by excluding money Bills from their powers to initiate or prepare [sic!] legislation. (The concordant provisions with regard to provinces are ss 119 and 120(2).) There is tension between the intent of section 213 on the one hand and sections 73(2) and 55(1) on the other. One interpretation of section 77, providing that an Act of Parliament must prescribe a procedure to amend money Bills, is that the Constitutional Assembly inserted it to balance sections 213 and 73(2)/55(1) and to ensure a measure of power for the legislature in budgeting. Where a procedure to amend money Bills is lacking, the provision that only Parliament can authorise a withdrawal from the National

Revenue Fund has little practical impact. Without the powers to at least amend money Bills, Parliament is a rubber stamp – as has been the case in South Africa.

This led to the adoption of the Money Bills Amendment Act. The fact that it took Parliament 12 years to pass this Act is significant. One probable cause of this long delay is the unwillingness of National Treasury to submit itself to a body apparently without technical expertise in economics and public financial management.

2. CONTEXTS

2.1 Statutory context

Three legislative facts are important determinants of the management of public money with regard to the separation of powers between the legislature and executive in South Africa.

One: Only the Minister of Finance (or, as this person is termed in the Constitution: 'the Cabinet member responsible for national financial matters') may, according to section 73(2) of the Constitution, introduce a money Bill in the Assembly. Let us call this the *exclusivity of initiative*. This provision is logically equivalent to a prohibition on any Member that is not the Minister of Finance to introduce a money Bill. It may be logically equivalent, but is rhetorically different. Perhaps the reception of the constitutional provision as well as the discourse about it would have been different if the prohibitionary formulation had been followed.

The exclusivity of initiative of the Minister (or something similar) is interestingly also found in three provisions of the *Public Finance Management Act*, 1 of 1999 (PFMA): sections 4, 11(2) and 13(3). Section 4 prohibits the introduction of amendments to the PFMA by other members of Parliament, and if a law should be introduced providing for subordinate legislation that could possibly be in conflict with the PFMA, the Minister must be consulted. A Bill providing for direct charges or exclusions of revenue due to the National Revenue Fund can only be introduced once the Minister has consented.

Section 77 of the Constitution, which necessitates the *Money Bills Amendment Act*, does not take away this exclusivity of initiative. The exclusivity of initiative relates to an old constitutional convention originating from British constitutional law, where controls were needed to prevent members of Parliament from passing appropriation Acts to corruptly favour their constituencies (*Early Canadiana Online*: 545; Fölscher 2006: 137; Wehner 2011: 22; Wiechers 2010).

The current provision establishing the exclusivity of initiative comes from section 60(3) of the 1993 Constitution – known as the 'Interim' Constitution. Previously,

section 39(b)(2) of the *Constitution of the Republic of South Africa*, Act 110 of 1983 (the 'Tricameral' Constitution), provided that Parliament must be dissolved if each house 'rejects any bill which appropriates revenue or moneys for the ordinary annual requirements or services of the departments of State controlled by members of the Cabinet'.

The Constitution does not give this exclusive right in the field of lawmaking to any other member of the executive – not even to the President. In fact, the President is not even a member of the legislature. Whereas the members of the executive for all other disciplines are not constitutionally protected against lawmaking initiatives that may encroach on their field of responsibility, if not expertise, the Minister of Finance is the only member of Parliament who is trusted with money Bills. The *Money Bills Amendment Act* has not changed this. It deals with section 77 of the Constitution and not section 73. As a footnote, I would like to add that a member of Parliament who is directly involved with this legislation, and with whom I discussed this Act, was under the impression that the Minister's exclusivity of initiative was curtailed by the *Money Bills Amendment Act* (personal interview).

Two: The second legislative fact that goes hand in hand with the exclusivity of initiative is found in section 5 of the PFMA, where the Minister of Finance is made Head of the National Treasury. Section 5(2) provides that the Minister, as the Head of the National Treasury, takes the policy and other decisions of the Treasury, save those decisions that have been delegated. This puts the Minister of Finance, in comparison with his or her peers, in a unique position as not only political but also functional head of a government department. This adds to his or her privileged and unique position among the legislators (assuming of course, that this Cabinet member is a member of Parliament!). The Constitution provides that the President may select a maximum of two members from outside the Assembly (s 91(3); see s 54 also). If the Minister of Finance is one of these members, he or she retains the exclusivity of initiative in terms of section 73(2) of the Constitution. In fact, this very Cabinet portfolio is the reason for the existence of section 91(3) as the continuation of sections 88(1)(b) and 88(6A) of the Interim Constitution. Christo Ferro Liebenberg, a banker, was Minister of Finance from 19 September 1994 to 4 April 1996 in the government of national unity led by Nelson Mandela. The Constitution was amended on 18 September 1994 to allow this (*Constitution of the Republic of South Africa Fourth Amendment Act*, 14 of 1994). This shows the hegemony of a certain ideology in government affairs.

The position of the Minister as head of a state department is further remarkable, given the view expressed in the literature on the institutional mitigation of the common resource pool problem (Wehner 2010: 10–15). From the interviews conducted I know that this view is used by Treasury officials to justify the special

position of their Minister. Wehner (2010: 14) explains that centralising budgetary decision-making in the hands of an actor (usually a minister without portfolio) who is more likely to consider overall costs than a spending minister may contain free-riding and improve fiscal discipline. In South Africa the Minister of Finance is not in this position. The Minister of Finance and his department (National Treasury) do have a budget vote. Their appropriation for 2011/2012 is a hefty R50 billion. The National Treasury and their Minister are not disinterested referees – they are players in the budget maximising game.

The third legislative fact goes in the opposite direction. The need to pay special attention to the relationship between the National Treasury and Parliament is encapsulated in another Act, the passing of which went hand in hand with the passing of the *Money Bills Amendment Act*: the *Financial Management of Parliament Act*, 10 of 2009. This Act came into operation on 19 April 2009 within a week of the *Money Bills Amendment Act* – also after a long gestation period. The basic idea necessitating this Act is that Parliament should not be subservient to the National Treasury in the control of its own financial affairs and should therefore act as its own treasury control institution – a confirmation of the separation of powers doctrine, in other words.

2.2 Historical context

The Constitution requiring the *Money Bills Amendment Act* was approved by the Constitutional Court on 4 December 1996 and took effect on 4 February 1997. The *Money Bills Amendment Act* was assented to on 14 April 2009. That is a gap of 12 years and two months. During this time the other members of Parliament were not only incapable of amending money Bills, but could not even introduce them.

The 12-year gap is quite interesting when compared with the passing of other pieces of legislation also required by the Constitution to complete the constitutional project. These Acts were passed at the beginning of the parliamentary session of 2000, namely the *Promotion of Access to Information Act*, 2 of 2000; *Promotion of Administrative Justice Act*, 3 of 2000; *Promotion of Equality and Prevention of Unfair Discrimination Act*, 4 of 2000; and the *Preferential Procurement Policy Framework Act*, 5 of 2000.

There was an attempt by National Treasury in 1997 to submit a money bills amendment Bill to Parliament that was rejected because of the lack of powers provided to parliamentarians (Development Bank of Southern Africa 2010:4). The draft Bill was never formally tabled, because it was angrily opposed by some members of the ruling party, the African National Congress (ANC), on the relevant parliamentary committee (Personal interview 2010). This fact is a hermeneutical

key to understanding the story of the *Money Bills Amendment Act*, because it signals ideological tensions within the ruling party. These tensions were between the fiscally conservative ANC executive on the one hand and some parliamentarians of a more populist persuasion on the other (left) hand. (Some ideological issues are discussed in the next section.)

Tensions between various tendencies in the ANC came to a head ten years later at the 52nd National Conference of the ANC at Polokwane, Limpopo, from 16 to 20 December 2007. This was the Conference that elected Jacob Zuma and his supporters to the party's top leadership and National Executive Committee (NEC), representing a significant defeat for Thabo Mbeki, then the party's incumbent president and President of the country (Wikipedia 2011). Although Zuma was elected President of South Africa only on 6 May 2009 after the *Money Bills Amendment Act* had been passed, the victory of the Zuma camp at Polokwane speeded up the adoption of the *Money Bills Amendment Act* (Personal interview 2010). Whether this really was a victory of the 'Left' is the question this article seeks to answer.

Noteworthy in this context is the reaction to arguments in favour of extending Parliament's amendment powers by the Chairman of Parliament's Portfolio Committee on Finance, Nhlanhla Nene, as late as February 2007. Nene was reported to believe that it was 'not proper' for Parliament to be involved in the drafting process of the budget. 'Parliament has an oversight responsibility with regard to the budget so [our effectiveness] depends on how well we use the parliamentary process' (Naidoo 2007). Mr Nene was subsequently involved in the drafting of the *Money Bills Amendment Act* as the Chairperson of the Portfolio Committee on Finance. He was elevated to the position of Deputy Minister of Finance on 5 November 2008 and has remained (according to my sources, whom I consulted in 2010) a champion of the *Money Bills Amendment Act*.

2.3 Cultural context

The meaning of any text, including an Act, is found in a context. The application of any Act is not mechanical, but depends on various contexts, including culture. The exclusivity of initiative is significant from a cultural point of view. The fact that a strong version of an 18th century British constitutional convention that was only applicable to spending in excess of government estimates (Wehner 2010: 22) emerged in South Africa in 1993 (like a condition borne by a recessive gene) requires an explanation. As I have already suggested, the exclusivity of initiative is a symptom of the hegemony of a worldview where money is the highest good. In the South African public understanding, the Minister of Finance presenting the annual budget is, next to the state of the nation address by the President, the most important event

in the parliamentary year (and may, in fact be more important than the President's address). The ideological position of South African Ministers of Finance and their treasury officials can be compared to national political commissars in the systems of, say, Zimbabwe or Uganda. One also imagines such exclusivity of initiative to be proper in a theocratic state where only theologians would be allowed to introduce legislation regulating religious matters. In the Islamic Consultative Assembly ('Parliament') of Iran there is the Guardian Council consisting of theological lawyers. They have much stronger powers than merely the exclusivity of initiative, but the principle of ideological hegemony is the same (Iran 1979, Article 96). They must test the compatibility of the legislation passed by the Islamic Consultative Assembly with the laws of Islam. My thought experiment illustrates one of the reasons why the convention from a different place and time could survive. Bills dealing money are sacred in our society because money is our god and consumerism is our religion (see Goodchild 2007). This makes treasury officials in all spheres of government a priestly order.

This would also be how the drafters of the Iranian constitution understand the dominant cultural context of a society such as that of South Africa. In the preamble under the heading *The economy is a means, not an end*, they write: 'This principle contrasts with other economic systems, where the aim is concentration and accumulation of wealth and maximization of profit. In materialist schools of thought, the economy represents an end in itself, so that it comes to be a subversive and corrupting factor in the course of man's development' (Iran 1979, Preamble).

2.4 Risk environment

If it can be shown that the exclusivity of initiative is not necessary in the South African situation, it would be an indication of ideological motives that inspired lawmakers. The same motives could then have been influential in the drafting of the *Money Bills Amendment Act*. Legislative mistakes due to the absence of sufficient technical input are seemingly permissible in all fields except where public money is concerned. This is less than reasonable on at least two counts. Firstly, technical inputs do not exclude technical mistakes – and definitely not in the field of the economy, as the recent international credit crisis has shown and, secondly, amateurish populist views impregnating legislatures giving birth to legislation in other fields can be just as harmful to the country as would be the case in finance and economics: in South Africa, Aids-denial and support for outcomes-based education may be cases in point.

The exclusivity of initiative in the South African constitution may be defended because it is simply prudent risk management. It would be a mistake to think of it in,

as it were, metaphysical terms. How serious are the risks really? The higher the risk in allowing the other members of Parliament to draft and submit money Bills, the more reasonable the exclusivity of initiative; the lower the risk, the more reason to seek ideological or other less rational reasons for the occurrence of this arrangement.

It can be seen as a measure to prevent riders (attaching spending authorisations to non-financial Bills) and the use of such riders in exchanging favours among legislators, known as 'logrolling' (Von Hagen 2007: 30). Unlike Von Hagen, I think that riders can be managed by the distinction between money Bills and other Bills without exclusivity of initiative. The critical question that should be asked is: in discussions in this context, why are lawmakers treated as persons whose misbehaviour (riders, logrolling and porkbarrelling) must be prevented while treasury officials are not the objects of the same distrust?

Current voting patterns under party discipline make logrolling in the South African Parliament extremely unlikely. South Africa does not have a constituency system. Instead, members of Parliament are placed in their positions based on their ordinal position on a party list. The risk that a member will use a money Bill to promote parochial interests is very low. Party lists also ensure a high degree of party discipline. 'When party discipline is strong, an executive that commands a legislative majority is unlikely to face a fundamental challenge to its budgetary proposals during the parliamentary stage' (Wehner 2010: 67–68). In other words, single members cannot disrupt fiscal discipline. What was a cause of concern for fiscally conservative members of the ruling party and the main opposition, though, was the possibility of a strong group of MPs rallying around populist issues such as a basic income grant and a people's budget as advocated by the People's Budget Coalition. The last-mentioned is a coalition of trade unions, churches, civil society organisations and NGO groupings under the auspice of the Congress of South African Trade Unions (COSATU), the South African Council of Churches (SACC) and the South African NGO Coalition (SANGOCO) (Sangonet 2011).

There is no risk of ordinary MPs in the South African Parliament introducing money Bills for 'corrupt' reasons – not that a Bill passed by Parliament can be corrupt. The only real risk – if one can call it a risk – is that a coalition of left-leaning parliamentarians votes a fiscal measure outside the bounds of mainline macro-economics. This is not beyond the bounds of possibility, given the composition of the Tripartite Alliance led by the ANC. (The Tripartite Alliance consists of the ANC, the Congress of South African Trade Unions and the South African Communist Party.) The point to make here, of course, is that a Bill passed by Parliament is valid, whether it 'interferes' with fiscal policy-making or not. It is also highly unlikely that a budget not prepared by a treasury would be submitted to Parliament.

The probability of the Minister of Finance not subscribing to mainline macro-economics is low (but not negligible), and the probability of National Treasury officials not subscribing to mainline macro-economics can be disregarded. Therefore, there is no reason consistent with democracy for section 73(2) of the Constitution. A risk analysis of the political environment in the South African Parliament thus shows that the exclusivity of initiative was probably motivated by ideology. My hypothesis is that the insertion of section 73(2) was the result of a coalition between fiscally conservative elements in the ANC and parties from the old order in the Constitutional Assembly.

3 RHETORIC

The preamble of an Act does not normally have legal force. It can, however, reveal much about the thinking that went into the composition of an Act. In the case of the *Money Bills Amendment Act*, which is an Act regulating Parliament itself, the MPs working on the drafting of the Act in committee were, in many cases, the same people who were conceivably destined to apply the Act, namely members of the Parliamentary committees dealing with public finance. The preamble tells us what these MPs had in mind and therefore provides clues to determining the eventual effectiveness of the Act in claiming the power of the purse. The Preamble to the *Money Bills Amendment Act* provides us with an understanding of the context and therefore the meaning of the Act. It consists of five of the usual 'whereases'. The first four deal with the spheres of government not encroaching on each others' powers and refer to the constitutional need for the legislation *vis-à-vis* sections 73 and 77. The fifth one I would like to quote in full because it sets out the reason for amending money Bills: 'And whereas the purpose of amending money bills is to give effect to resolutions on oversight of the National Assembly and the National Council of provinces …' (South Africa 2009). It did not occur to the South African Parliament, it seems, that the point of the power of the purse is the power over the allocation of public money. If the preamble is anything to go by, the aspirations of this legislature are limited. Parliament does not see itself as a budget-making legislature (as does, for example, the American House of Representatives).

Section 2(b) of the *Money Bills Amendment Act* provides further rhetorical evidence of the lack of ambition on the part of Parliament. It provides for the interpretation of the Act and stipulates that the Act must always be interpreted or applied in order to take into account the relevant fiscal framework that was adopted by Parliament. The fiscal framework as defined in section 1 of the Act means the framework for a specific financial year that gives effect to the national executive's [sic!] macro-economic policy. Here, again, we have the exclusivity of initiative in

that it is the national executive that draws up the fiscal framework and submits it to Parliament. There are practical disincentives for Parliament rejecting the fiscal framework built into the Act.

Section 2(a) provides that every person interpreting or applying the Act must do so in a manner that gives effect to the constitutional authority of Parliament in 'passing legislation and maintaining oversight'. This provision is vacuous and could be padding around section 2(b). I say this because it is simply not necessary to insert a clause into a law that the Constitution must be adhered to. That said, this provision does insinuate that the true role of the legislature in budgeting is oversight.

4 THE WORKINGS OF THE ACT

The way that an Act is written determines its efficiency and contributes to its effectiveness. In our evaluation of the likelihood of the Act reaching its policy objective, we must now analyse how it will work in detail.

The Act has 15 detailed sections. In the paragraphs that follow I describe a number of the notable features of the workings of the Act relevant to the power of the purse. The first of these is the meticulous prescriptions in connection with the annual budget cycle. Instead of prescribing a simple procedure for the amendment of money Bills from time to time as the need may arise, the Act creates a rigorous, involved and onerous sequence of steps that both Parliament and the Minister of Finance, as head of the National Treasury (see for example ss 7(4), 10(1)(b) and 12) must undertake every year. One of the biggest problems of the Act is that the activities it prescribes are simply too time-consuming (personal interviews). Not one of my interviewees disagreed with this point. Some also indicated that, in this deadline-driven process, compliance rather than substance could become the norm (own interviews). This is especially the case where parliamentarians must comply with a system which is not their system, but the system of all-knowing technocrats.

The literature is not silent on the fact that sufficient time in the legislature is necessary for the legislature to play its proper part (Wehner 2010: 39–40). Time is a crucial aspect of the transaction cost of the power of the purse. A member of Parliament's time is limited and the budget competes for attention with other legislative and oversight duties, especially in a country such as South Africa, where there is a paucity of expert support. Wehner writes that in 'a budgetary context, decision-making costs may prevent legislators from fully exploiting their formal powers to shape the budget' (2010: 39). On the next page he notes that a committee system can mitigate some of the transaction costs incurred by the involvement of the legislature in the budgeting process.

The Act creates two committees in each house of Parliament to drive the process. The committees that are established are: a Committee of Finance (s 4(1)) and a Committee on Appropriations (s 4(3)) for each house. Note that the functions of these committees mirror the functions of the erstwhile departments of Finance and State Expenditure before they were merged in the National Treasury. The first committee deals with macro-economic policy and revenue and the second committee deals with spending.

Sections 9 to 11 deal with the passing of the primary money Bills in a logical order. First the Division of Revenue Bill makes available, among other things, the amount to be allocated to national departments; then the Appropriation Bill divides that amount; and then the revenue Bills provide the money to be spent. These sections contain detailed requirements that Parliament must comply with should it wish to amend the proposals emanating from the national executive. For example, section 10(10) sets out the onerous requirements that reports of the appropriation committees must meet if they propose amendments to the Appropriation Bill. It appears from the wording of, for example, section 9(5) to section 9(7) that the procedures are put in place to ensure than amendments to money Bills are reasonable. The provisions of sections 10(5) and 10(6) contain an interesting innovation in that money can now be voted conditionally to a sub-programme or be ring-fenced in a programme subject to certain procedural steps. This implies more reports and meetings. Section 12 contains directives on the handling of the national adjustments budget – a reading of these directives reveals that, once again, this involves another spate of meetings and reports.

Section 5 of the Act is entitled 'Procedure prior to introduction of the national budget'. Assuming that this is an accurate indication of the section, this would be the first of the sequence of steps mentioned above. It also embodies the second notable feature that characterises the Act, namely prescriptions regulating the activities of all portfolio committees of the National Assembly. The National Assembly, through its committees, must now annually assess each department comprehensively with regard to five items that fall within the ambit of the interest of a treasury and its mindset. These items are: (1) the medium-term estimates of expenditure of each department and its strategic priorities and measurable objectives as contemplated in the PFMA; (2) prevailing strategic plans as submitted according to Treasury regulations; (3) the expenditure report published by the National Treasury in terms of the PFMA; (4) financial statements and annual report; and (5) the reports of the Committee on Public Accounts relating to the department. I think that some parliamentarians would be a little intimidated by this. What previously were internal procedures and part of the regulations have now become obligatory by law. This section of the Act gives portfolio committees a lot of work and offsets the efficiency

gained by the creation of the two specialist committees just mentioned. Committees must submit a budgetary review and recommendation report (already acronymised as BRRR, pronounced *Brrrr!* by Parliamentary officials) for the departments under their scrutiny. The BRRR is a performance assessment of a department from a financial management point of view. It must be adopted by Parliament. It must be submitted to the Minister of Finance and the line Minister *after* the adoption of the Appropriation Bill (s 5(4)). This is significant: it means that a BRRR cannot influence the main allocation for the department, which is the object of its oversight, for the year following the year reported on. The Act is designed so that the executive considers these reports for the budget to be tabled the following year without any statutory bounds. However, these reports will be used when applications for rollovers and virement are considered later in the financial year. This is how the member of Parliament I spoke to understood the situation (Personal interview 2010). Apparently, the parliamentarians who drew up the Act did not have their eyes on amending the main budget, but seemed to be satisfied with adjustments later in the financial year. Furthermore, the fact that all portfolio committees of Parliament must now, after the adoption of the *Money Bills Amendment Act*, report to the Minister of Finance, even if indirectly *via* Parliament, is ironic. The BRRR provision does not deal with the amendment of money Bills. Why is it in the Act? In practice, though, it may influence the adjustments appropriation Bill.

The third notable feature of the Act and second step in the sequence is the submission, by the Minister of Finance, of a medium-term budget policy statement (MTBPS). This must be done at least three months before the submission of the national budget to Parliament. In other words, every year, usually in October, the Minister of Finance releases the MTBPS. This sterling piece of administrative technology is well established in South Africa and provides the economic and strategic basis for the budget that follows five or six months later. With the passing of the *Money Bills Amendment Act*, the MTBPS has now been written into law. This can do no harm to the power wielded by the National Treasury. Section 6 provides the particulars. It must contain such information and policy explanations as is required by a reasonable budget. The MTBPS must include the following: (1) a revised fiscal framework for the current year and one for the next three years; (2) an explanation of the macro-economic and fiscal policy position, along with economic projections and assumptions; (3) the spending priorities of national government for the next three years; (4) division of revenue proposals for the next three years; (5) proposed adjustments to conditional grants; and (6) a review of actual spending of national departments and provincial governments for the current fiscal year. The committees on finance and appropriations must then report to their respective houses on the issues of the MTBPS in their purview and, after these reports have been adopted,

they must then be submitted to the Minister of Finance within seven days. These reports may contain recommendations to amend the fiscal framework, but the Act does not oblige the Minister of Finance to deal with such recommendations in a specific way – except that he (or she) is obliged to submit a suitable report together with the budget documentation explaining how the Division of Revenue Bill or the national budget give effect to, or differ from, the recommendations in such reports. Subsection 6 of section 6 (see s 6(11) also) contains peculiar wording which requires careful interpretation: 'The report may include recommendations to amend the fiscal framework *should it remain materially unchanged when submitted with the national budget*' (emphasis added). Committees cannot know what will happen three or four months hence (i.e. when the Minister of Finance submits the budget). So the words state the obvious counterfactual that a recommendation to amend would not apply to a materially changed fiscal framework. Economic circumstances may require a treasury to amend the framework between the report and the submission of the budget (Jenkins 2011). There is a less obvious meaning – the words also say that the National Treasury may materially amend the fiscal framework as it wishes, and that the finance and appropriation committees may have to start their work all over again when considering the fiscal framework and revenue proposals in terms of section 8. Another revised fiscal framework can be submitted again later, together with the adjustments budget.

The fiscal framework is then the fourth feature that characterises the Act. The fiscal framework is the macro-economic policy plus the fiscal policy for a specific year. It is defined in section 1 as the national executive's macro-economic policy that includes estimates of all revenue, expenditure, borrowing, interest and debt-servicing charges as well as an indication of the necessary contingency reserve. The fiscal framework is the key that unlocks the logic of the Act in that it is the creation of the executive. Parliament can recommend amendments to the Minister of Finance, but cannot effect these amendments. Section 8 of the Act brings us to the crux of the matter. This section sets out the procedure that must be followed for accepting or amending the executive's fiscal framework and revenue proposals. The committees on finance of the two houses must submit reports on the fiscal framework and revenue proposals within 16 days of the tabling of the national budget (s 8(3)). These reports must contain a clear statement accepting or amending the fiscal framework or revenue proposals (s 8(4)). One can read *rejecting* as part of *amending*, but the fact that this option is not mentioned has rhetorical force. If a report includes amendments to the fiscal framework or revenue proposals, the Minister of Finance must be given two days to respond prior [sic!] to the submission of such a report to the Houses (subsection 6). Once the fiscal framework has been adopted, it acts as a restriction on amounts that may be contained in proposed amendments to

money Bills (subsection 9). This does not promote the power of the purse. Parliament must consider and by resolution adopt the reports of the committees (s 8(7)). When dealing with macro-economic policy Parliament therefore follows the executive. Once the fiscal framework and revenue proposals have been adopted, amendments by Parliament to the division of revenue Bill, the appropriation Bill and revenue Bills must be consistent with the fiscal framework (ss 8(9), 9(4) and 10(4)). Once Parliament has adopted the fiscal framework by resolution it is trapped – and so are the provincial legislatures according to the schedule to the Act.

Fiscal rules (see Siebrits and Calitz 2004) are the fifth feature that we must emphasise. Subsection 5 of section 8 provides a framework of considerations that Parliament and its committees must follow when amending the fiscal framework, a money Bill or taking any decision in terms of the *Money Bills Amendment Act*. Parliament and its committees must ensure: (1) a balance between revenue, expenditure and borrowing; (2) reasonable debt levels and cost; (3) that the cost of recurrent spending is not deferred to future generations; and (4) adequate spending of a capital nature. They must further consider and take into account: (5) the economic and developmental implications of proposals; (6) cyclical factors in the economy; and (7) public revenue and expenditure in its entirety. (A similar framework applicable to the provinces is found in the schedule to the Act; also refer to PFMA 22(3).) These principles or rules that are augmented by the provisions of section 11(3) apparently enunciate sound (if very conservative) economic principles that any legislature should take into account when it draws up a budget (which requires expertise in economics). However, no legislature can make provision for unforeseen situations that may require deviations from some of these principles in the future. What we have here is another instruction to Parliament on how it should legislate. This brings the *Money Bills Amendment Act* on a par with the Constitution, as is the case with sections 26 and 35 of the PFMA. I have my doubts whether this was what the Constitutional Assembly had in mind when it inserted the word ‘procedure’ in section 77.

This automatically leads us to the sixth notable feature of the Act, namely the degree to which the Act regulates the National Treasury. The Act binds Parliament to fiscal rules, but does not bind the National Treasury when it draws up the budget. The directions to the Treasury in the Act, onerous as they are, deal with the content of the Treasury’s submissions and reports and not with the way in which it makes decisions. This includes prescribed items to be contained in the fiscal framework (s 1), the MTBPS (s 6(2)) and the budget (s 7(2)) that differ from the prescriptions provided to Parliament. The items applicable to the Treasury do not contain verbs: in other words, they do not contain references to things that the Treasury is required to do. The items applicable to Parliament include verbs such as ‘ensure’, ‘indicate’,

'demonstrate', 'set out' and 'consider'. When they amend money Bills, Parliament and provincial legislatures are directed on how to think by means of the fiscal rules. Again, the assumption is that Parliament, but not the National Treasury, needs to be regulated as to its inner workings. A further example: no law requires the National Treasury to hold hearings when conducting fiscal tasks, but this law requires Parliament to conduct hearings.

Hearings and consultation are then the seventh notable feature or meaning indicator. Section 8(2) provides that the finance committees of both houses of Parliament must conduct joint public hearings on the fiscal framework and revenue proposals and section 11(4) provides that standing rules of Parliament must regulate this. Further provisions providing opportunities to civil society are sections 9(5)(b) and 13(2)(a). Section 10(8) envisages consultation obligations for appropriation committees. Consultation is required with, among others, the Financial and Fiscal Commission and other parliamentary committees. Jenkins (2010) pays particular attention to opportunities for public involvement created by the Act. This degree of transparency is probably the reason why bodies in civil society, such as Idasa, are still positive about the legislation – see Verwey 2009. However, it adds to the Parliamentary workload.

Number eight is a positive sign as far as the power of the purse is concerned. In line with international best practice and recommendations by theoreticians (Johnson and Stapenhurst 2008; Wehner 2006: 770–771) the Act establishes budgetary capacity in the form of a budget office (s 15). The main objective of the Parliamentary Budget Office is to provide independent, professional and objective advice to Parliament on matters related to the budget and other money Bills. The budget office will work under a director appointed in terms of the Act. This person can only be removed from office on the grounds of misconduct, incompetence or incapacity after an open and elaborate process – comparable to the removal of the Auditor-General – has been followed (s 15(8)). This person must report any improper political or executive interference to Parliament.

The exposition of the workings of the Act given in the above paragraphs makes it clear that the *Money Bills Amendment Act* does not made it easy for Parliament to amend money Bills introduced by the Minister of Finance. The detailed and onerous provisions of the Act – all in the name of responsible government – will act as a disincentive for the amendment of money Bills. The rhetoric of the Act may intimidate many members of Parliament, because it affords decisions by the executive and its bureaucracy and existing administrative procedures and instruments a dignity and importance that may not be appropriate in the context. The Act will add to parliamentarians' workload. Time is a resource and, as such, is just as important as money. One wonders whether the time that this legislation will

require in a legislature that takes the power of the purse seriously was calculated (budgeted for) when the Act was written.

5 CONCLUSION

The power of the purse is a valid policy goal in a democracy. In South Africa this power is limited by the Constitution. The *Money Bills Amendment Act* is meant to make more room for legislative control over the fiscus. The *Money Bills Amendment Act* as a policy document has been evaluated in this article using a hermeneutical method consisting of a close reading of the Act within various contexts. It was found that the Act will make it difficult for Parliament to apply the power of the purse, and one hopes that his legislation can be simplified. At the same time the gains that have been made in the legislation by setting up a supporting committee system and a Parliamentary Budget Office should be retained.

When Parliament drew up this legislation it interpreted section 77(2) of the Constitution to require an annual bureaucratic type process of involvement in the budget by the legislature. I think that was a mistake at this stage of Parliament's history. A procedure should have been prescribed to allow Parliament to amend a money Bill if and only if extraordinary circumstances require it. The procedure that emerged will be very time-consuming and energy sapping if followed conscientiously. The danger is that Parliament will, in order to preserve energy and time for more pressing matters, just 'go through the motions'. The spiritual hold of a treasury on Parliament has not been broken.

BIBLIOGRAPHY

Bohman, J. 2010. *Stanford Encyclopedia of Philosophy.* Spring edition. S.v. Critical Theory, ed. E.N. Zalta. http://plato.stanford.edu/archives/spr2010/entries/critical-theory/ (accessed 11 November 2010).

Calitz, E. 2010. Personal communication, 14 November.

Development Bank of Southern Africa. Development Planning Division. 2010. *Proposal for a South African Parliamentary Budget Office*. Midrand: DBSA.

Early Canadiana Online. n.d. http://www.canadiana.org/view/9_03421/0557 (accessed 19 September 2010).

Fenno, R.F. 1966. *The power of the purse – appropriation politics in Congress.* Boston, MA: Little and Brown.

Fölscher, A. 2006. A balancing act: fiscal responsibility, accountability and the power of the purse. *OECD Journal on Budgeting* 6(2): 133–152.

Goodchild, P. 2007. *The theology of money.* London: SCM Press.

Iran, Islamic Republic of. 1979. Constitution of the Islamic Republic of Iran. http://www.iranonline.com/iran/iran-info/government/constitution.html (accessed 20 March 2011). Also see http://www.servat.unibe.ch/icl/ir00000_ html

Jenkins, F.S. 2010. The budget process and strategic civic interventions. In *Mobilising social justice in South Africa: perspectives from researchers and practioners*, ed. J. Handmaker and R. Berkhout, 41–70. Pretoria: Pretoria University Law Press.

_____. 2011. Personal interview with the author, 1 April.

Johnson, J.K. and R. Stapenhurst. 2008. Legislative budget offices: international experience. In *Legislative oversight and budgeting – a world perspective*, ed. P. Stapenhurst, O. Pelizzo and L. van Trap, 241–258. Washington, DC: The World Bank.

Krafchik, W. and J. Wehner. 1998. The role of Parliament in the budget process. *The South African Journal of Economics* 66(4) (December): 512–541.

Naidoo, P. 2007. The budget: Do we have enough say? *Financial Mail*, 23 February. http://free.financialmail.co.za/budget2007/policy/bud24.htm (accessed 21 March 2007).

Sangonet. 2011. http://www.sangonet.org.za/article/peoples-budget-coalition-comments-201112-budget (accessed 27 March 2011).

SECTION27. 2011. http://www.section27.org.za/2011/02/24/section27-and-the-treatment-action-campaign-welcome-the-increased-budget-for-health/ (accessed 21 March 2011).

Shah, A., ed. 2007. *Budgeting and budgetary institutions.* Washington, DC: The World Bank.

Siebrits, F.K. and E. Calitz. 2004. Should South Africa adopt numerical fiscal rules? *South African Journal of Economics* 72(4) (December): 759–783.

South Africa. various dates. All legislation including previous constitutions. www.gov.za at http://www.info.gov.za/view/DynamicAction?pageid=544

Stapenhurst, R., R. Pelizzo, D. Olson and L. von Trapp. 2008. *Legislative oversight and budgeting – a world perspective.* Washington, DC: The World Bank.

Verwey, L., ed. 2009. *Parliament, the budget and poverty in South Africa: a shift in power.* Pretoria: Idasa.

Verwey, L. 2010. Personal communication, 3 November.

Von Hagen, J. 2007. Budgeting institutions for better fiscal performance. In *Budgeting and budgetary institutions*, ed. A. Shah, 27–51. Washington, DC: The World Bank.

Wehner, J. 2002. Parliament and the power of the purse: the Nigerian constitution of 1999 in comparative perspective. *Journal of African Law* 46(2): 216–231.

_____. 2006. Assessing the power of the purse: an index of legislative budget institutions. *Political Studies* 54: 767–785.

_____. 2010. *Legislatures and the budget process – the myth of fiscal control.* Basingstoke: Palgrave Macmillan.

Wiechers, M. 2010. Personal communication, 18 September.

Wikipedia. 2011. 52nd National Conference of the African National Congress. http://en.wikipedia.org/wiki/52nd_National_Conference_of_the_African_National_Congress (accessed 21 March 2011).