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Remembering Stefano Rodotà

FUNDING GAP AND "BUDGET-ORIENTED CLASSIFICATION" OF FORMS OF GOVERNMENT

Luigi Testa

TABLE OF CONTENTS

The essay proposes a study of a selection of the most popular forms of government from the perspective of the funding gap in the public budget process. A distinction between an assembly-dominated model and an executive-dominated model is proposed, which may be useful for a deeper understanding of the functioning of the forms of government. Finally, the analysis offers some useful insights into the relationship between budgetary decision-making and the real state of democracy in a country.

I. INTRODUCTION

Right since the issue first arose, decisions concerning public finance have provided the terrain for the most intense (and heated) dialectical engagement between governments and parliaments. On some occasions, this engagement has led to important clashes, not only the past but also in the present day within our contemporary democracies.[1] This study will focus specifically on these clashes, which in some sense constitute a "state of exception" in public budgetary processes. The way in which states regulate this "state of exception" (in technical terms, the so-called "funding gap" arising in situations in which parliament is not willing or able[2] to approve a budget proposed by the government) will point towards a "budget-oriented" classification of systems of government. This will (in all likelihood) be useful in arriving at a deeper understanding of the dynamics operating within contemporary democracies and at a closer understanding of how specific systems of government operate.

[1] This can alternatively be read as a sign of good health of the democratic system, or as a symptom of some problems of the political system. However, this is not properly the aim of a legal analysis. Legal studies are primarily responsible for analysing the "skeleton" of the budget process, i.e. its normative structure, in order to verify how it conditions or is conditioned by the "musculature" of political, economic and social conditions.

[2] In the case of bicameralism, as we will see.

In actual fact, the law by which parliament approves the public budget[3] lies at the heart of the relationship between governments and representative assemblies, more so than any other parliamentary measure.

The historical roots of parliamentary government are closely linked to the issue of public finance, and thus to budgetary decisions. The first claims made by assemblies representing interests different from those of the sovereign related to financial resources, including their management and allocation. It could be said, from a historical point of view, that parliamentary budgetary processes in some sense constitute a prototype for the ordinary legislative process.[4]

One of the milestones in the initial development of parliamentary government – if not even the moment of its official birth – was the approval by the English Parliament of so-called 'appropriation clauses'.[5] These clauses constrained the sovereign when choosing how to allocate the resources granted by Parliament: the King was no longer able to dispose of them at his discretion, and was only allowed to use them for purposes authorised by the House of Commons.[6]

Moreover, even today, under some parliamentary systems the rejection by parliament of budgetary legislation is considered to be equivalent to a vote of no confidence, with

[3] Some notes are needed in order to clarify what we are speaking about when we talk of "public budget". As is well known, indeed, in the continental experience there is *an unique law* approved by Parliament containing an unified "budget", i.e. the representation of the whole of the cash flows in public finance. On the contrary, in the Anglo-Saxon model there is separation between appropriations and so-called 'Ways and Means'. In the U.S., for instance, we should distinguish an appropriation parliamentary cycle and the 'reconciliation process'. In this paper, we will use "public budget" with regard to *the whole of the Parliament's decisions about estimates and appropriations*.

[4] You will not be surprised in funding out that in the first volumes of Cobbett's Parliamentary Debates relationship between Crown and assemblies in taxes' field is specifically attentionated, since it represents the beginning of the long story towards Parliament's sovereignty (W. Cobbet, *Parliamentary History of England* (London, 1808)).

[5] There is no consensus in the exact dating of the appropriation clause. According to H. Hallam, *The constitutional history of England from the accession of Henry VII to the death of George II* (London, 1827) it was proposed for the first time in the parliamentary debate in 1665. On the contrary, R. Gneist fixs its birth in 1668, maybe when it had begun to be more easily accepted also by the Crown (*Gesetz und Budget. Constitutionelle Streitfragen aus der preussischen Ministerkrisis von Maerz 1878*, (Berlin, 1879)). Actually, there is no verified continuity until the Glorious Revolution: there is no appropriation clause, for instance, in 1685, due to a momentaneous weakness of Commons. That's why some Authors date it 1689, when relations between the House and the Crown had become clear (J. Hatsell, *Precedents of Proceedings in the House of Commons: Relating to lords and supply* (London, 1818)).

[6] It is no longer just a 'green light' for the Executive, but somehow a precise instruction binding the autonomy of the Government (or of the Crown).

the result that the government is obliged to resign. This is for an extremely simple reason. The budget in fact is the "transcription in accounting terms" of the executive's political programme[7]. The government needs resources in order to achieve its political agenda and, in contemporary democracies, these resources must be authorised (or technically speaking "appropriated") by parliament.[8]

A good example of this is provided by Article 1 of the United States' Constitution: «No money shall be drawn from the Treasury, but in consequence of appropriations made by law». Although other constitutions do not contain similar provisions, this is a universally accepted principle. In contrast to what might have happened in the 19th century and before, if a parliament chooses not to appropriate the resources requested by the government (and hence parliament chooses not to approve the budget proposed by the government), it can effectively bring the administration to a halt.

This article will proceed as follows with the aim of setting out a "budget-oriented classification" of systems of government:

a) First, I shall briefly demonstrate that a *budgetary state of exception* is a much more tangible possibility than a mere academic hypothesis. Budgetary law in its modern sense in actual fact arose in relation to a funding gap; however, all governments (or at least, all democratic governments) have frequently been obliged to engage with this spectre, irrespective of political colour. The risk obviously manifests itself in different ways: it may be higher or lower, and may have different consequences, depending upon the impact of a variety of factors, as section 2 will attempt to show.

b) Section 3 will seek to clarify how the adoption of rules to govern funding gaps is a genuine prerequisite for a democratic system.

Crises within the budgetary system are not only possible but also lawful. Indeed, where a parliament is not allowed to reject a budget proposed by the government, it is no longer possible to say that it is a parliamentary democracy.

But this is not all. It is possible to assert that, if no express provision is made for the consequences of such a rejection by parliament, it is possible to legitimately doubt the

[7] The definition is borrowed from a masterpiece in Italian literature in this field: S. Buscema, *Bilancio*, in *Enciclopedia del Diritto* (Milan, 1959) 379.

[8] We assume here that if there is no parliamentary control about appropriations, there is not democracy properly. Not *parliamentary democracy*, at least.

essentially democratic nature of the political regime. Some specific examples will help us to clarify this aspect.

c) Section 4 will then compare the rules applicable in certain countries with the aim of resolving the funding gap (or at least try of stemming the risk). The key issue is to establish *who has the last word under such a state of exception* – in other words: who is really *sovereign* in relation to the budgetary decision.

I shall try to propose a classification that identifies two models that reflect different traditional systems of government: an assembly-dominated model and an executive-dominated one, each of which can manifest itself internally in different ways.

The final section will set out some remarks on the validity and usefulness of this *budget-oriented classification*.

II. THE FUNDING GAP: ANYTHING BUT ACADEMIC

Posing the question as to who is sovereign under a state of budgetary exception is not a merely academic exercise. A funding gap is in actual fact a scenario that has arisen in the recent past – or that has risked arising – across a number of different legal systems. This is all the more the case against the backdrop of the deterioration in political debate which contemporary democracies have been experiencing.

Ultimately, modern budgetary law was born precisely out of a funding gap. In fact, studies by Laband[9] as well as, amongst others,[10] Gneist[11] and Jellinek,[12] were triggered by the Prussian crisis from 1860 until 1866.[13] During these six years, Minister President Bismarck obtained the financial resources necessary for his military operations without obtaining the approval of the Reichstag – and indeed against the specific wishes of the House of Representatives [*Abgeordnetenhaus*].

[9] P. Laband, *Das Budgetrecht nach den Bestimmungen der Preußischen Varfassungs-Urkunde unter Berücksichtigung der Verfassung des Norddeutschen Bundes* (Berlin – New York, 1871).

[10] A. Haenel, *Das Gesetz im formellen und materiellen Sinne*, in *Studien zum Deutschen Staatsrechte* (Leipzig, 1888); P. Zorn, *Das Staatsrecht des Deutschen Reiches*, vol. I, *Das Verfassungsrecht* (Berlin, 1895); C. Rotteck, *Lehrbuch des Vernunftrechts und der Staatswissenschaften* (Hamburg, 1835); C. F. von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts* (Leipzig, 1865).

[11] R. Gneist, *Gesetz und Budget. Constitutionelle Streitfragen aus der preussischen Ministerkrisis von Maerz 1878* (Berlin, 1879).

[12] G. Jellinek, *Gesetz und Verordnung. Staatsrechtliche Untersuchungen auf rechtsgeschitlicher und rechtsvergleichender Grundlage* (Aalen, 1887).

[13] To know more about the Prussian crisis, it is useful to read E. R. Huber, *Deutsche Verfassungsgeschichte seit 1789*, vol. I, *Reform und Restauration 1789-1830* (Stuttgart, 1957), and Id., vol. II, *Der Kampf um Einheit und Freiheit 1830 bis 1850* (Stuttgart, 1960).

The crisis broke out in 1860 when the Government issued provisional decrees adopted under a state of exception in order to finance certain military operations. As a result, the Government was able to classify new spending as excess spending over and above the previously approved budget, for which it subsequently sought approval from the elected chamber on an exceptional basis. However, the House of Representatives did not have any intention of approving it, which resulted in its dissolution on two occasions until Bismarck was appointed as Minister President two years later.

Bismarck no longer bothered himself with seeking approval from the House of Representatives for exceptional spending that had already been approved, and changed strategy over three subsequent steps, none of which was formally legal under the Constitution.

The first step taken by the new government was to ask the House of Representatives to grant an exceptional derogation from the obligation laid down by the Constitution to present a state budget each year. Bismarck's intention was that this would be an exceptional measure, considering the military operations underway, with a view to avoiding any exacerbation of internal political tensions. However, this was not accepted by the House of Representatives, which claimed the right to receive a public budget each year from the Government for approval.

Bismarck's next step was to attempt to bypass the representative chamber with the support of the House of Lords [*Herrenhaus*]. According to Article 62 of the Prussian Constitution, the unelected chamber was only able to approve or reject as a whole a budgetary law previously approved by the lower chamber. However, the Minister President was able to convince the House of Lords to reject the amendments approved by the House of Representatives, and to pass the text in the original wording proposed by the Government. This choice was evidently not to the liking of the House of Representatives, which immediately passed a resolution declaring the vote taken by the House of Lords null and void.

In 1863, an attempt was made to break the deadlock by dissolving the House of Representatives; however, it was unsuccessful as the newly elected House confirmed its intention not to approve the excess spending authorised by the Government. Bismarck's next move involved making a clean break: the Government chose to ignore the will of Parliament, and continued to govern without a validly approved budget. The Minister President's words were damning: "Theory is of no value where necessity commands". The "theory" was Parliament's right to approve public spending; the "necessity" was the need to pursue the Government's military policies.

A turn of events only came in 1866 (six years after the original governmental decrees) when, following a new dissolution, the majority in Parliament changed, whilst Bismarck had in the meantime also reinforced his position also due to his military victories. Indeed, the shift marked a definitive victory for the Government, which was able to obtain approval of the budget and the endorsement of all off-budget spending ordered during the crisis.

That episode – a genuine funding gap that was resolved by a decision of the Government that departed from the Constitution as in force – came as a shock for contemporary legal commentators, who were forced to engage with a basic question: can the government dispose of resources without parliamentary approval? (Considered the other way around, the question can be formulated in the following terms: is it lawful for parliament to refuse to approve a budget proposed by the government?).

This was not a new question for legal debate during those years. The view endorsed by C. Rotteck had already had some resonance precisely in Prussia, in asserting the lawfulness of a parliamentary refusal as the most powerful weapon for asserting the rights of the people before the monarch.[14]

On the other hand, a number of authoritative voices had argued the opposite, or attempted to arrive at a kind of mediation. One may consider, for example, the study by C.F. von Gerber (which was published in the midst of the Prussian crisis), which took the view that Parliament was vested with a milder (and not precisely defined) "right of review", although its exercise could not go so far as to threaten the paralysis of the State.[15]

However, the view that would make the strongest mark on the literature in this area, which would have extremely important consequences also during subsequent centuries, would be the almost parallel stance proposed by Laband, Jellinek and Gneist. It is only possible to group together the three authors (and hence to classify their theorising as being "parallel") because they arrived at the same conclusion (and this is no minor issue). However, the routes they used to arrive at it were not entirely similar. It is therefore important to start first of all from their point of arrival. It may be noted that their conclusion is one which might have been expected from three authors operating within the ambit of *parliamentary government*, although not yet *democratic* parliamentary government. In fact, all three ended up asserting that it was lawful for

[14] C. Rotteck, *Lehrbuch des Vernunftrechts und der Staatswissenschaften* (Hamburg, 1835) 445.
[15] C. F. von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts* (Leipzig, 1865) 175.

Parliament to refuse to approve a budget proposed by the Government: this is the essence of *parliamentary government*. And yet, none of the three ended up arguing that this refusal would force the government into paralysis (i.e. that it would prevent the Government from exercising spending powers nonetheless): in order for this to be the case, *parliamentary government* would need to be *democratic*.

The argument used in order to redach this conclusion, above all in Laband, might at first sight appear to be eccentric bearing in mind the initial question. This is why an answer was found using the instruments provided by the continental theory of legal sources, even though the results of that debate definitively sought to resolve a problem of the separation of powers.[16]

For Laband in fact, it is important first and foremost to engage with the issue of budgetary legislation from the standpoint of the theory of sources, and to establish that *it is indeed law* (even if only a formal law, according to the phrase coined by E.A.C. von Stockmar[17] as it does not give rise to any changes to reality). According to Laband, it is a law because law constitutes the result of the combined will of the Crown (i.e. of the executive) and the representatives of the people, irrespective of its specific substantive content.

Having asserted this, Laband was able to make the next step, which moved the discussion on to the issue of the separation of powers (and hence the system of government). For him, since under the Prussian constitutional system the law was the product of *the combined will of Parliament and Government*, the refusal of either of them to cooperate (which is always possible) would not prevent the free exercise of legislative power. To a certain extent (at any rate in the financial field), the Constitution was supposed to vest legislative authority not in Parliament and the executive *jointly*, but rather *equally* in Parliament and the executive.

In this way, Laband asserted two things, first the *ordinary* necessity of parliamentary involvement and approval. However, he also argued that it should be possible for the Government to take *full responsibility*, if Parliament had deliberately failed to act. In some sense, the choice by Parliament over whether or not to cooperate did not condition the Government's executive power, but ensured a kind of joint responsibility with it.

[16] Maybe it would have been more difficult to justify it on the field of the form of Government: saying something on the *subjective* field of Parliament and Government's powers and roles would have been accepted with more difficulties than something on the *objective* field of sources of law.

[17] E.A.C. von Stockmar, 'Studien zum preussischen Staatsrecht', *Aegidis Zeitschrift*, (1867) 201.

This joint responsibility would then lapse should Parliament refuse to cooperate, although without preventing the Government from acting on its own.

Although they reached the same conclusion, the arguments proposed by Jellinek and Gneist departed from Laband's in two different respects.

Gneist did not accept the classification of the budget as a law, an aspect that was by contrast decisive for Laband and Jellinek. For him, the fact that the House of Lords in the United Kingdom (as was the case also in Prussia during those years) was substantially excluded from the approval procedure necessarily led to the conclusion that the budget was not a legislative act. By contrast it was, so he argued, a kind of enforcement order (*Ausführungsverordnung*) of the lower house, in other words an authorisation, or mere consent to an administrative act carried out by the Government alone.

If this is the case, then the Government is even more entitled to act, irrespective of any parliamentary refusal. He thus arrived at the same conclusion as the other two authors, but at the cost of relinquishing a fundamental plank of his argument: that of the ordinary need for parliamentary involvement, which is more efficiently saved from the assertion of the legislative nature of the budget.

On the other hand, Jellinek's criticism of this choice by Gneist is very relevant. In his view in fact, the theory of the *Ausführungsverordnung* places too much weight on the law in action, over-hastily dismissing the law in books.[18] His argument is essentially that Gneist allowed himself to be over-influenced by the most recent parliamentary practice at the time of writing, and inferred from it a general rule that was in itself incompatible with the UK structure of parliamentary government (and of parliamentary government in general). This is not to mention the fact (which is still today a common error) that Gneist ended up generalising from the UK experience, inferring a universally applicable rule.

As regards Jellinek's argument, it does not overlap entirely with that of Laband, and the difference between the two is important for the purposes of comparison with the contemporary reality of today.

For Laband, and also for Gneist who agrees in this respect, any consequences of a refusal still lie within the confines of the law. According to Jellinek on the other hand,

[18] It is well known that the distinction is more recent than the debate about the Prussian funding gap, and it can be found in R. Pound, 'Law in Books and Law in Action', 44 AM. L. REV. (1910) 12. See also: K.H. Neumayer, '*Law in the Books, Law* in Action et les méthodes du droit comparé', in: M. Rotondi (ed.), *Buts et méthodes du droit compare* (Padova, 1973) 507.

the choice by the House of Representatives opens up a classic state of exception, which is a *de facto* situation and no longer a legal situation in a strict sense.

For Laband and Gneist, the fact that a decision is taken by the Government alone is a legal consequence of the choice made by Parliament; for Jellinek on the other hand, the outcome is not a legal solution to a dispute, but is rather born out of the *de facto* need not to leave the state without the ability to govern. This is not massively different from the fiction of assumed royal assent during the madness of King George III:[19] this was clearly an act that fell outside the legal order, and was dictated by a state of necessity.

Jellinek's theory matches up very well with the narrative proposed by Bismarck during the Prussian crisis. In fact, on various occasions the Minister President decisively invoked the dictates of "necessity" in his speeches to the House of Representatives. However, it is clear that this is an interpretation that may raise some perplexity within the context of contemporary democratic parliamentary government. In this sense, Laband and Gneist are more modern than Jellinek.

The history of the budgetary state of exception does not end with the Prussian crisis of 1860-1866, but recurs frequently in the chronicles of our times. Just to give a few examples, the US Congress was unable to approve President Obama's budget for fiscal year 2014[20]. The White House was therefore forced to proclaim a sixteen-day administrative shutdown, placing 850,000 civil servants on furlough and resulting – according to OMB estimates – in a loss equivalent to 0.3% of GDP.[21]

President Trump also had to deal with similar crises, for the first time in fiscal year 2018, and then again in the following fiscal year[22]. However, the longest shutdown is still the one under President Clinton in fiscal year 1996.

The USA is of course not the only place where crises of this type have arisen. Whereas other countries have not reached the crunch point, funding gaps frequently arise. Most of the time, parliaments approve budgets at the last minute, after exhausting negotiations.

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[19] G. Jellinek, *Gesetz und Verordnung*, 251.

[20] See L. Testa, 'The President and the «regular disorder» of the Budget process', in: G.F. Ferrari (ed.), *The American Presidency after Barack Obama (2009-2016)* (The Hague, 2017) 109.

[21] Executive Office of the President of the United States, *Impacts and Costs of the October 2013 Federal Government Shutdown*, 2013, 4. But also M. Labonte, B. Momoh, *Economic Effects of the FY2014 Shutdown*, Report del Congressional Research Service, 2015.

[22] See L. Testa, 'Appropriation of public funds in Trump era (or «Trump vs. Congress»)', in: G.F. Ferrari (ed.), *The American Presidency after Trump* (Eleven, 2021).

Where this occurs, it is nonetheless important to know the rules applicable to a state of exception: if they are not applied as occurred in the American shutdown, at least *they decisively influence the outcome* of the stalemate between government and parliament.

If the relevant rules provide the government with the option of proceeding even without parliamentary consent,[23] or if they provide for a form of provisional spending authorised by parliament but leaving considerable discretion to the government,[24] it can readily be predicted that parliament will not much of an interest in persisting in any clash with the executive, and may even pursue a more conciliatory approach. On the other hand, the legislative assembly has nothing to fear if the rules applicable to the budgetary state of exception exclude or limit any such unilateral powers of the government.

This is clearly apparent, for example, in France (an example which has been chosen not by chance, but rather as it represents the diametric opposite to the United States within the classification that will be proposed below).

In France too the budgetary process has frequently ended in stalemate also in recent times and, although the nuclear option has never been triggered (which would essentially involve governmental administration without any budgetary law approved by Parliament,[25] which is the exact opposite of what happens in the USA), the mere threat of this has been useful in order to force the National Assembly in one direction or the other.

The French budget is thus always approved right at the last minute at the end of a quite exhausting procedure involving: substantial disagreement between the two Houses (with the Senate rejecting *in toto* the law approved by the National Assembly, or otherwise approving it with substantial amendments); the calling by the Government of a conference committee, which is charged with agreeing on a compromise text; the failure of the conference committee, followed by the Government's choice to allow the National Assembly to definitively approve the budgetary law on its own, thus excluding the Senate.

All of this is compounded by the delays compared to the deadlines provided for under constitutional law, which are inevitably accumulated from one stage to the next, as well as last-ditch attempts by the opposition to turn the tables by filing a question of

[23] As it happens, for example, in the extreme case represented by France.

[24] As it happens in Argentina, for instance.

25 As will be seen below, if the Houses of Parliament are unable to approve the budget by the beginning of the new financial year, the Constitution provides that it may be enforced directly by the Government by ordinance..

constitutionality with the Constitutional Council (which occurs on an *ex ante* basis and thus further delays the entry into force of the legislation approved).

Naturally, the risk of a funding gap often increases in line with two factors. The first is due to the fact that the Government is not obliged to secure the confidence of Parliament, as occurs within parliamentary systems. In fact, due to the absence of such a requirement of confidence, it is possible for political imbalances to arise between the legislature and the executive (something which is not possible in a parliamentary system), which may result in disagreement in relation to budgetary issues.

The second is the existence of a bicameral system under which: 1) both houses have budgetary powers; and 2) the upper house and the lower house may reflect different political majorities.

Whereas the former is an exogenous factor – parliament vs. government – the latter is an endogenous factor – one house of parliament vs. the other house. When both factors operate in parallel, the combination is explosive.

For this reason, contemporary parliamentary systems envisage a largely subsidiary role for the upper house within the budgetary process. An extreme example is the exclusion of the House of Lords in the United Kingdom,[26] whilst less strict arrangements involve (only) a veto power (as is the case for the German Bundesrat[27]) or the right for the

[26] Parliament Act (1911) – about which see *Halsbury's Statutes of England*, London, IV, 1028 – , but there is a more ancient practice in this regard. See, for example, a resolution adopted by the House in 1671: «in all aids given to the King by the Commons, the rate or tax ought not to be altered by the Lords»; and in 1678: «That all aids and supplies, and aids to his Majesty in Parliament, are the sole gift of the Commons; and all bills for the granting of any such aids and supplies ought to begin with the Commons; and that it is the undoubted and sole right of the Commons to direct, limit, and appoint in such bills the ends, purposes, considerations, conditions, limitations, and qualification of such grants, which ought not to be changed or altered by the House of Lords». Along its history, the British Parliament has known several crisis between the two Houses in this matter – before the last crisis of 1909 (about which see among others R.M. Punnett, *British Government and Politics* (Aldershot, 1987) 301). According to the *Cobbett's Parliamentary Debates*, in 1671, there was a «Great Controversy between the two Houses» whit regard to an additional imposition on several foreign commodities. You can read from the transcription of the parliamentary debates: «A hard and ignoble choice is left to the lords, either to refuse the crown supplies when they are most necessary, or to consent to ways and proportions of aid, which neither their own judgement or interest, nor the good of the government and people, can admit» (W. Cobbett, *Parliamentary History of England* (London, 1808) vol. IV, 480-495).

[27] German Fundamental Law, Article 77.4. Once the Bundestag has given its approval, the territorial House may propose an opposition, which triggers the convening of a bicameral conciliation committee. If this conciliation fails, the lower House has the final say. It can overcome the Bundestrat's opposition by a majority vote (or by qualified majority, if the upper House has vetoed it by a two-thirds majority).

lower house to force through its position in the event of a persistent disagreement (as is the case in France).[28]

By contrast, the US system features both exogenous and endogenous risk factors. First of all, there is no requirement for the President to enjoy the confidence of Congress. Moreover, both the House of Representatives and the Senate have equal standing in relation to the President's budget, and the two houses may (and in fact often do) have different majorities, and thus take different positions concerning the President's proposed budget. This is why the USA has seen some of the most extreme outcomes in this area.

III. FUNDING GAPS AND DEMOCRACY

At this stage it is however necessary to make a preliminary clarification of a methodological nature in order to guard against an objection that may reasonably be anticipated.

The analysis and classification set out below will hold good as long as the strictly position under constitutional law (or rather, the formal position according to the Constitution) is not distorted by external factors – including first and foremost by political factors.

On the other hand, any aspect that is objectively intended to characterise a system of government risks falling prey to the same fate.

However, if no reference is made to the objective provisions of the formal Constitution, and the analysis focuses instead almost exclusively in favour of the political system, this will be tantamount to giving up on a study of the system of government as impracticable, and leaving the field open to political science.

In effect, the – as it were – 'formal' aspect nonetheless maintains some performative capacity over the system and if nothing else it remains (or should remain) a permanent parameter, which can thus be permanently invoked in order to re-establish the proper equilibrium. It is no coincidence, in all likelihood, that legal systems in which the process of democratic stabilisation has not been clearly resolved do not end up regulating a budgetary state of exception through specific rules, but rather allow

[28] French Constitution, Article 47: if a joint conciliation committee does not resolve the disagreement between the Houses, the Government may ask the National Assembly to take a final decision. It should be noted that other elements of predominance of the Lower House are present in the French system. Just think, for example, of the constitutional rule of the *priorité* of the National Assembly in the examination of the financial law.

sovereign authority to lie with the body that the political facts identify as the strongest operator.

This is the case, to provide one example, in Mexico. In 2008, a constitutional amendment enhanced the powers of the house with spending power, amending the previous wording of Article 74 under which the Chamber of Deputies had competence to "approve, examine and discuss". Moreover, since 2004 the Chamber has had more time for discussion and approval, whereas previously the mid-November deadline for the tabling of the budgetary law by the Government significantly shortened the time available for discussing the budget.

However, no provision within either constitutional or ordinary legislation directly or indirectly regulates the scenario of a funding gap, even though the Constitution contains a provision that is entirely analogous to Article 1 of the United States Constitution. Article 126, one of the few provisions still in the original form adopted in 1917, provides that «no payment may be authorised that has not been stipulated by the public budget or by a subsequently enacted law».

It should be noted that power to approve the budget lies with the Chamber of Deputies alone, and not also with the Senate,[29] which reduces the risk of a funding gap for the reasons mentioned above. However, under the Mexican constitutional system, there is nothing to prevent the Chamber of Deputies having a majority different from the governing party, and this mismatch may give rise to disagreements, which may in turn result in a funding gap. This is clearly a matter of law in books. The law in action on the other hand tells us that, within a system in which political pluralism is not yet mature, such a mismatch remains merely an academic hypothesis, and hence the funding gap is not something that it has been considered necessary to regulate.

[29] This exclusion is quite unusual. Generally, the role of the upper House in the budgetary process is limited in a certain measure due to two factors. The first is the non-elective nature of part or all of the chamber. The second is the exclusion of the upper chamber (which generally has territorial, not general, representation) from the relationship of confidence with the government, in systems that provide for it. In the Mexican case, neither of these reasons applies. The House of Deputies and the Senate have the same popular legitimation, and neither of them has a relationship of confidence with the government, which is not provided for in that system. Moreover, the Deputies and Senators share the legislative function on an equal footing, which makes it even more difficult to justify an anomalous monocameralism in the budgetary function. In fact, this is a historical legacy. When the bicameral system was reintroduced in 1874 (after a single-chamber system had been adopted in 1857), it was feared that this would lead to a weakening of the Deputies, which would once again be flanked by a Senate representing the naturally more conservative classes. For this reason, some measures (including the adoption of the budget) were reserved for the lower House alone. But this is clearly no longer the case and could be challenged in the future by the option for full bicameralism.

A similar (deliberate) omission allows the respective executives to play the part of the sovereign under a state of exception, despite the absence of any express rules establishing this definitive hegemony. If this is not accompanied – as it is not – by adequate checks and balances, it clearly runs contrary to the stated democratic process.[30]

It is interesting to note that legal systems in which the need for a public statement of democratic process is felt less intensely have not by contrast encountered any particular problems in regulating funding gaps according to mechanisms that expressly allow the government's position to prevail.

Perhaps the most interesting of these systems is the Cuban one, where the relevant constitutional amendment, adopted in 2019, failed to take the opportunity to align the budgetary process with a real democratic paradigm. Apart from the requirement of Government initiative and the rule mandating approval by the National Assembly of People's Power, the new Cuban Constitution does not dedicate any further attention to public budgets, leaving the matter for regulation at sub-constitutional level. The task is thus performed by the Law on the Financial Administration of the State which, in the event of a funding gap, provides for an automatic extension of the previous budgetary law approved, "subject to the appropriate adjustments made by the Government". Accordingly, this not only leaves open the option of extensions without any limit in time, but also leaves the Government the broadest freedom possible, turning it into the *de facto* master of the situation.

On the other hand, the choice made in Mexico is more underhand from this point of view as it allows the leaves the system open *de facto* to definitive dominance by the executive, without however enacting any specific provision to regulate the issue, as this would contrast with the stated democratic process.

On the contrary, a literal provision to the opposite effect – in the sense of safeguarding the role of the elected assembly – would if nothing else provide a certain point of reference for assessing the legitimacy of the actual equilibrium reached in relations between the Government and Parliament, which confirms (as if there were any need for it) the relevance of formal constitutional rules in this area. *Vacuum iuris* is often a perfect bedfellow for executive dominance. This is also the case in the area of public budgets.

[30] If not accompanied, as it is not, by adequate counterbalances.

IV. A BUDGET-ORIENTED CLASSIFICATION OF SYSTEMS OF GOVERNMENT

As we have already said, not only a budgetary state of exception is something that recurs fairly frequently "in the wild", but it is a fully legitimate parliament's choice.

The legitimacy of a refusal by parliament (whether expressly asserted, or merely as a consequence of an internal division that prevents agreement being reached between the two houses) is clearly established within the original literature written after the Prussian crisis. For Laband and (most) others, a refusal by parliament is entirely legitimate: quite simply, it leaves the government with full and exclusive responsibility for adopting the budget. Moreover, under the Prussian system this was not a particularly unusual outcome (in the sense of constituting a break with the constitutional order): indeed, government and parliament were *jointly* vested with legislative power and if – so Laband explains – the latter withdraws from the fray, then the exercise of legislative authority is entirely the responsibility of the government.

Naturally, even more so than in Laband's times, there is no doubt nowadays that, within a contemporary parliamentary democracy, any rejection of a budget by parliament will be legitimate.

However, this assertion may also be expressed in different terms: within a contemporary democracy there is no doubt that specific legislation needs to be enacted in order to regulate funding gaps (i.e. to regulate the consequences of the rejection of a budget by parliament). In fact, due to the very nature of a decision by parliament concerning a budget within a parliamentary democracy (i.e. necessary authorisation without which no financial resources can be allocated), the consequences of its rejection must be regulated.

This is naturally the case if we take the view that it is formally possible (and hence legitimate) and materially possible to reject a budget. If we have any doubts regarding either of the two possibilities, it does not make any sense to regulate something that is not possible. This means that it is possible to make the following assumption: if the funding gap is not regulated it is because it is not considered possible (either formally or materially) for parliament to reject a budget; and if it is not considered possible for parliament to reject a budget, the system is not a genuine parliamentary democracy.

It does not therefore come as any surprise that, adopting a comparative perspective, it is possible to identify some not fully mature democratic systems in which (whilst the formal possibility of the rejection of a budget by parliament is not denied) no provision is made for the consequences of such rejection (because rejection is materially

impracticable within that political context). This is an indication of the fact that, in substantive terms, these democracies are still not genuine democracies.

This issue has already been touched on in the previous section. At this juncture by contrast, we shall focus on those systems that have made provision to regulate funding gaps. Based on a study of these regulatory frameworks, it is possible to distinguish between two scenarios: an "assembly-dominated" model and an "executive-dominated" model.

4.1. The assembly–dominated model: the USA

The purest example of an "assembly-dominated" model is the United States of America,[31] where Congress in actual fact enjoys *double predominance.*

It is predominant first of all by virtue of the mechanism of temporary budgetary authorisation under a "continuing resolution", which temporarily extends the last approved budget.

This is a mechanism which, albeit with some differences, is incorporated into almost all systems (and without doubt into all systems with "assembly-dominated" models). However, in the USA, choices concerning it are completely in Congress's hands, much more than that in other similar systems. It is not surprising therefore that the United States has used it practically every year since 1977, with only a few of exceptions[32].

The purpose of these decisions is twofold: 1. to preserve congressional prerogatives to make final decisions on full-year funding levels; and 2. to prevent a funding gap and a corresponding government shutdown.[33]

Three features of these resolutions have been identified in practice as being essential. They are adopted following negotiations involving all stakeholders[34] with the aim of setting "spending levels ... high enough to let agencies function but not so high that

[31] A. Schick, *The Federal Budget. Politics, Policy, Process*, Washington, 2008; H.M. Robert, *Robert's Rules of Order Newly Revised* (Reading, 2011); P. Mason, *Mason's Manual of Legislative Procedure* (St. Paul, 2010). About the OMB, see S. L. Tomkin, *Inside OMB: Politics and Process in the President's Budget Office* (New York, 1998).

[32] P. Winfree, *A History (and Future) of the Budget Process in the United States*, (London, 2019), is fundamental in order to understand how balances between Congress and White House changed throughout history.

[33] C. T. Brass, *Interim Continuing Resolutions (CRs): Potential Impacts on Agency Operations*, Report of the Congressional Research Service, 2011.

[34] J. Tollestrup, *Continuing Resolutions: Overview of Components and Recent Practices*, Report del Congressional Research Service, 2012.

they removed the incentive for Congress and the President to agree on regular authorization and appropriations bills".[35]

a. The first necessary aspect is legislative coverage. In fact, temporary financing is only permitted for those activities that are already covered by an appropriation act relating to previous financial years (or at most an Appropriation Bill already being debated before Congress). For the sake of clarity, the resolution must in each case provide an ordered list of the Acts to which it refers, according to a pre-determined formula. A "prohibition on new starts" hence applies, which requires that a reference be made to legislation that is already in force (even though in practice there has been no lack of exceptions).[36]

On the other hand, continuing resolutions are very attractive for those seeking to introduce non-financial measures as the legislation will (almost) certainly be approved. Moreover, this poor practice is to some extent facilitated by parliamentary regulations. For example, in the House the rule that prevents legislative provisions from being included within appropriation acts specifically fails to refer also to continuing resolutions; the Senate[37] on the other hand does have a provision to this effect, although in practice it has largely ended up being applied in a liberal manner.

b. The second structural aspect that the temporary resolutions in question must feature is the quantity of budget authority under the continuing resolution. According to this perspective, an appropriation does not occur of a precise amount for each budget account. On the contrary, the continuing resolution provides "such sums as may be necessary" to avoid interrupting financing with reference to a "rate for operations" which, until a few years ago, could be defined in a variety of ways, largely with reference to past spending. The current tendency on the other hand is to refer to the ratio between the total available budget authority for each fiscal year and the portion of the year that the continuing resolution is intended to cover. This is no longer based on past spending, but rather on the spending proposals made by the President for the next fiscal year.

[35] J. White, 'The Continuing Resolution: A Crazy Way to Govern?', *Brookings Review* (1988) 30.
[36] Although there are exceptional cases in practice.
[37] Senate Rule XVI, 2-6.

c. The third aspect is the duration of the resolution, and hence of the temporary financial coverage. In reality, it should be pointed out that these acts are not always temporary in nature. In practice, some continuing resolutions in fact offer cover to activities throughout the whole of the following fiscal year ("full-year continuing resolutions").

In the event that a regular appropriation act is approved for the activities in question before the continuing resolution expires, the budget authority of the former immediately replaces that of the temporary resolution, which thus lapses. On the other hand, if there is any delay in the adoption of the definitive measure, Congress will be faced with the same alternative previously avoided on a temporary basis: either to proceed with a new continuing resolution in order to delay the spectre of a funding gap or alternatively to accept the risk of a shutdown.

However, the predominant status of the assembly is not based solely on the full availability of the emergency remedy of a continuing resolution. Congress can in fact definitively prevail if it is not willing or able approve a continuing resolution because, in such an eventuality, the Government is unable to take any initiatives, but is forced to declare a shutdown of any administrative operations that do not have legislative cover.

The dominance (or predominance) of Congress is clearly apparent within the constitutional provision that «no money shall be drawn from the Treasury, but in consequence of appropriations made by law».

The constitutional prohibition has been tightened up by the Antideficiency Act of 1982, which tried to put a halt to a lack of rigour in applying Article 1[38]. In fact, the

[38] Until the 1980s, most federal Agencies gave flexible application of the the Antideficiency Act. As matter of fact, they used to continue providing their services and activities, minimizing all non-essential operations and obligations, believing that Congress did not intend that agencies close down. Between 1980 and 1981, the Attorney General Benjamin R. Civiletti, in two opinions, argued that the Antideficiency Act should be given a strict interpretation, also in light of the constitutional provision it was intended to implement, so as to demand the effective interruption of any federal service, unless «some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property» (U.S. GAO, Funding Gaps Jeopardize Federal Government Operations, PAD-81-31, March 3, 1981). Although it had not obtained universal sharing, Civiletti's thesis has entered officially in force. In 1990, indeed, Congress statued that «the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property» (31 U.S.C. § 1342). On the other

1982 Act expressly prohibits – under threat of criminal sanction[39] – any federal official or employee from disposing of or even simply authorising obligations or other forms of economic commitments *in excess of the funds allocated by legislative act*.

Therefore, any failure to approve appropriation leads to a cut in non-discretionary public spending and therefore an interruption of the related federal services, except for «emergencies involving the safety of human life or the protection of property», with "unnecessary" civil servants being furloughed.[40]

In order to deal with such extraordinary circumstances – which are however not always entirely unforeseeable – Circular No. A-11, which is issued by the Office of Management and Budget at the White House at the start of the administrative phase involving preparation for the Presidential Budget, requires individual administrations to draw up a shutdown plan, and to submit it to the Office of Management and Budget in order to assess its sustainability and, where necessary, to implement it.

The plan must identify in particular the staff who are to continue working and those who are to be placed on furlough, along with any activities that must be guaranteed in order to protect human life or private property.

A shutdown is definitely a drastic option, which not only involves institutional friction. It also has a considerable impact on the national economy. It is therefore no surprise that some authors argue that the Antideficiency Act is unconstitutional.

Specifically, it has been asserted that «if ... suggestion of the operation of the laws through denial of funding is essentially legislative in effect, any device that permits a single house of Congress to accomplish this result is unconstitutional for violation of the Constitution's provision that the concurrence of both houses is needed for the enactment of legislation».[41] However, the argument is perhaps a little specious. In

hand, the OBM Circular No. A-11, asking agencies for preparing a shutdown plan, adopts the restrictive interpretation of relevant legislation given by Civiletti.

[39] What is more, in order to avoid circumvention of the regulations, the Antideficiency Act adds the prohibition to accept the offer of voluntary work to replace the personnel on leave, providing for the eventual infraction the same criminal sanctions provided for officials or employees who make payments or assume commitments without legislative appropriation.

[40] Only: Members of Congress; the President of the United States and his trustees; certain federal employees who engage in emergency activities involving the protection of human life or property, or for whom specific exceptions are provided; employees of Congress paid by the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives in cases where the competent authorities of the House consider that the exemption is being invoked. In 1990, Congress clarifies «the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property» (31 U.S.C. § 1342).

[41] A. Hill, 'The Shutdowns and the Constitution', *Pol. Sc. Quarterly* (2000) 276-277.

providing that "All legislative Powers… shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives", Section 1 of Article 1 of the 1789 Constitution vests the exercise of legislative powers collectively in the two houses of Congress. Thus in all circumstances – and accordingly not only for financial budgetary decisions – they may also be exercised in a negative sense. According to Section 1 of Article of the Constitution, the failure by the two houses to adopt a joint position constitutes an exercise of legislative powers.

4.2. Other examples of assembly-dominated models

Amongst the systems examined in this comparative study, the USA is a *sui generis* one even amongst "assembly-dominated" systems. Its uniqueness lies in the fact that the system makes provision not only – as other systems also do – for a temporary and provisional emergency remedy (through continuing resolutions), but also the situation that arises where this remedy is not adopted.

By contrast, the other "assembly-dominated" systems that we shall examine do not go as far as this second stage: they regulate forms of temporary budgetary cover, but go no further. This is simply because "going further" is extremely difficult to imagine within a parliamentary system premised on a requirement of confidence. In fact, where a requirement of confidence applies, temporary cover is necessary in order to gain time for negotiations between the government and parliament. Albeit after some delay, such negotiations will certainly have a positive outcome, given that the government and (a majority in) parliament represent the same political forces.

Naturally, this is only entirely the case within monocameral systems, or alternatively within bicameral systems in which the government must have the confidence of both houses or where the upper house is essentially excluded outright from financial decision making.

The last two scenarios are those prevailing respectively in Italy and the United Kingdom. Specifically, the Italian and UK systems may be considered to be "assembly-dominated" because temporary spending power is entirely a matter for the House of Commons; however, this predominance ends here and does not go any further, as is the case in the USA.

In fact, the very nature of the system of government in the UK and Italy prevents things from going any further. The grant of temporary authority thus amounts to a mere delaying tactic in order to arrive at a political agreement which will certainly be

concluded, given that Government and Parliament – in Italy – and the Government and the House of Commons – in the UK – are backed by the same political forces.

For the sake of completeness, we should point out that Italy and the UK differ as regards the structure of temporary budgetary cover. Although there are many similarities (the main ones being: reference to past spending, with resources only being appropriated in advance for services that have already been authorised by Parliament through the enactment of legislation),[42] the structure is reversed from a temporal perspective.

In Italy in fact, the Constitution provides that Parliament must authorise a temporary budget by enacting legislation, which may not have a (total) duration in excess of four months. It therefore amounts to an emergency instrument, which operates *ex post*.

In the United Kingdom on the other hand, a temporary budget is adopted *ex ante* under so-called "votes on account". These are special forms of "Estimates", which are not adopted following any delay by Parliament in approving the budget, but rather occur in advance[43], providing a guarantee of the cover necessary for essential administrative activities until Westminster has approved the definitive spending authorisation (known as "Main Estimates").

Therefore, before the start of the new fiscal year, the Government presents the votes on account to Parliament along with a request that it allocate "resources, capital and cash to allow existing services to continue operating during the early months of the coming financial year, pending Parliament's consideration of the Main Supply Estimates in July".

Aside from this difference in temporary structure, *interim* financial measures are very similar in Italy and in the UK.

These two countries, therefore, share with USA the fact that provisional authority lies entirely with Parliament – which decides on its own initiative both whether to adopt it as well as the relevant amount. However, in contrast to the USA, there is no legislation in Italy or the UK governing the (improbable, due to the requirement of confidence) scenario under which Parliament fails to adopt the *interim* measure.

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[42] E. May, *Treatise on The Law, Privileges, Procedings and Usage of Parliament (Parliamentary Practice)* (London, 2011) 731.

[43] Except in exceptional circumstances, the advance requested for the new financial year (Required on Account) is generally calculated at 45% of the amount of resources already voted for each Request for Resouces for the previous year (so-called "Total to date on which provision on account is based"). Of course, in the Main Estimates the resources requested by the Administration will be allocated net of the figures already granted with the Votes on Account.

It can be said, therefore, that there is a sub-hierarchy within the assembly-dominated model due to differences in systems of government: *a strong* assembly-dominated model, such as the USA; and *a soft* assembly-dominated model, such as – among others – Italy and the UK.

The choice of classifying two systems of parliamentary government – the Italian and UK systems – that are so different from each other as assembly-dominated models might attract an important objection. While the skeleton budget process, under which parliament has the authority to approve a temporary budget, *de facto* ensures its predominance, it is also the case that the requirement that the government enjoy its confidence ends up, in practice, being decisive for the vote in parliament.

This is especially the case if the government has control over any instrument that is capable of "institutionalising" a dispute with parliament, confronting the latter with a choice that can potentially trigger a formal crisis. An example of this is the ability under Italian law to attach a confidence vote to any measure discussed in Parliament. In doing so, the Government undertakes to resign in the event that its proposal is rejected by Parliament. This is a kind of – as it were – moral blackmail against Parliament, which is confronted with a choice: either to approve the measure, or to risk bringing down the Government. In fact, the blackmail is particularly blatant since, in attaching a confidence vote to a measure, it is not possible to amend any aspect of the government's proposal: either the wording is approved *as is* or the government resigns. This formidable instrument has been used frequently in Italy and, as is apparent, has attracted significant criticism. It must in fact be considered that the pressure that this mechanism exercises on Parliament is even stronger if the Government engages it – as has happened on some occasions – within a timeframe that does not enable Parliament to carry out a more relaxed examination, given the need to approve the budget by a certain date.

The issue of confidence is therefore an aspect (characteristic of the system of government) that interferes with the budgetary process from the outside, *de facto* overturning its natural/structural assembly-dominance.

This objection certainly has its merits. However, the comments made above (which will be returned to below) concerning the significance for the research issue addressed in this paper of factors that are external to the essential structure of the budgetary process are also relevant here.

In fact, the fact that the Government's choice to invoke the responsibility resulting from the relationship of confidence results *ipso facto* in parliament endorsing the executive's proposal is a consideration more pertinent to political science. A parliament with a political majority that is more independent from the government might in fact object to being blackmailed. Indeed, a parliament can be prevented from giving in to the government's blackmail simply by opposition (not from the entire majority, but only) from a certain segment of the majority. It is even hypothetically possible to create a different political majority for such a vote from the majority that initially supported the government. On the other hand, once the government has been thrown into crisis after losing the confidence vote, there is nothing to prevent parliament from examining, amending and approving the finance bill initially presented.

Ultimately, any refusal by parliament to accept the government's proposal and a return to the ordinary terrain of parliamentary debate is entirely legitimate. Although this might not be *politically practicable* on some occasions, it is still *legally possible*. And it is what is *legally possible/impossible* (and not what is *politically practicable/impracticable*) that is the definitive and ultimate criterion for establishing the democratic nature of the system. That's why when conducting this analysis (at least from the perspective adopted here), the structural configuration of the budgetary process is more important than the effect that the intervention of an element external to the system might have.

This is first and foremost because such effects can vary in line with contingent political equilibria: as noted above, there is nothing to prevent the political majority in parliament from departing from the government's line.

Secondly, and perhaps more importantly, the structural configuration can always be invoked in support of the legitimacy of robust debate and disagreement on a political and institutional level. In other words, the structural assembly-dominance over the budgetary process (even if it is specifically altered or even negated as a result of the use of other mechanisms, such as association with a confidence motion) is always a criterion for assessing the specific state of equilibrium between government and parliament. This is especially the case given that the option of constitutional review is always available where that assembly-dominance is tangibly compromised or excluded. Moreover, the ability, as a last resort, to trigger such review (which would not be possible were the structure of the budgetary process different) in order to safeguard that dominance tells us something definitive about the extent to which the system conforms to the paradigm of representative democracy.

4.3. The executive–dominated model

Other systems regulate funding gaps by arrangements that shift the balance of power more in favour of the executive. Naturally, this "executive predominance" can be achieved in different ways, which can be situated along a sliding scale.

Simply put, these mechanisms are, from the weakest to the strongest: extension of the previous budget; temporary substitution by the government; and the definitive predominance of the government.

a. The first mechanism (extension) is distinct from temporary legislative budgetary approval under "assembly-dominated" systems due to the automatic nature of the extension, whereas temporary legislative budgetary approval is a discretionary option – both in terms of its actual adoption as well as the amount involved – for assemblies. Consider for example the position in Spain.[44] A temporary budget is automatically ordered, in the form of a *prórroga presupuestaria*, at the start of the year without any legislative cover. This *prórroga presupuestaria* can apply indefinitely until Parliament has reached agreement concerning the approval of the new budget.[45]

Under a system of parliamentary government such as the Spanish system, the open-ended nature of the extension saves the system from the need to dissolve parliament, which risks being the only possible exit strategy[46] (where dissolution is possible) when the limits on the temporary budget over a set period of time are exceeded (as can occur in Italy).

Naturally, such cases do not involve the absolute predominance of the executive. An extension still has to be approved (albeit not at the relevant time) by Parliament. Moreover, even if in practice an extension occurs in parallel with a government decree, such a decree does not have constitutive effect, but rather only declaratory (as well as providing details of provisional cover, for example by regulating the new revenues provided for under fiscal legislation enacted since the last finance act, or for instance services for which the cost ceiling has been exceeded) [47].

[44] M. Giner, L. Alfonso, *Manual de Derecho presupuestario y de los gastos públicos* (Valencia, 2013) 9.

[45] Spanish Constitution, Article 134.4.

[46] Where dissolution is possible.

[47] J. Pascual García, *Régimen Jurídico del Gasto Público. Presupuestación, ejecución y control* (Madrid, 1999).

Provision is also made for extensions in Argentina. However there, since the political system is presidential and not parliamentary, the Government has a more significant role. In fact, the General Accounting Act provides for an automatic extension of the last budget approved by Parliament; however, the Government may make changes "en los presupuestos de la Administración Central y de los Organismos Descentralizados".[48] Moreover, in practice these changes are very significant.

b. The situation in Germany does not involve an extension of the previous budget[49] and the Government's role is more important. In fact, Article 111 of the Basic Law rather provides that the executive may act in place of Parliament (considered as a collegiate body). Moreover, this power of substitution is in actual fact quite general in scope as far as public spending is concerned. Specifically, the constitutional provision authorises the Government to carry out all fiscal operations necessary in order to continue the provision of service that have already been authorised (subject to the spending limits in the last approved budget), and above all to comply with all legal obligations and "to maintain institutions established by a law and to carry out measures authorised by a law".[50] Essentially, it appears that the Government has authority to conduct any spending that is necessary in order to exercise its general executive powers.

The only true limit on the German Government is imposed – essentially *de facto*, rather than *de iure* – by the availability of financial resources. However, this is also a limit that can in some sense be set aside. In fact, Article 111(2) provides that if the Federal Government has exhausted existing resources in order any expenditure referred to above, in the event that a new budget has not been approved, it is authorised "borrow the funds necessary to sustain current operations up to a maximum of one quarter of the total amount of the previous budget". Here therefore (and only here) a type of extension of the last parliamentary decision takes place.

c. After extensions and substitute action by the executive, the most radical form of "executive predominance" is the definitive predominance by the government over parliament. Provision to this effect is made, as a last resort, under French law.

[48] Ley No 24.156, Ley de Administración Financiera y de los Sistemas de Control del Sector Público Nacional, Article 27.

[49] See T. Knörzer, *The Budget System of the Federal Republic of Germany* (Berlin, 2008); and S. Linn, F. Sobolewski, *The German Bundestag: Functions and Procedures*, (Rheinbreitbach, 2015).

[50] German Fundamental Law, Article 111.

In fact, Article 47(3) of the 1958 Constitution[51] provides that should Parliament fail to reach a decision[52] within seventy days of the tabling of a finance bill, the relevant provisions may be brought into force by ordinance. This is however a special ordinance which, in contrast to the *ordonnances habituelles* provided for under Article 38 of the Constitution, do not require parliamentary authorisation. As a matter of fact, in the event that parliament refuses or fails to reach a decision ("ne s'est pas prononcé") it is entirely deprived of any financial function, whereas it does not appear possible for an ordinance to be adopted if it has expressly voted against the budget.

It is necessary to make two comments regarding the mechanism laid down by the French Constitution. The first is that it could probably only arise under a parliamentary system under which the government is required to obtain the confidence of parliament. In fact, it is only under a system of this type that any abuse of that mechanism could be sanctioned by parliament in forcing the government to resign. In fact, a democratic system cannot tolerate such an over-bearing role for the government within a system characterised by the separation of powers – such as the USA or Argentina – without any ability to withdraw confidence from the government.

On the other hand, a budget adopted by governmental decree is an extremely drastic outcome – and indeed is perhaps the most drastic – even if one considers only parliamentary systems of government. It is thus no coincidence that, whilst situations involving temporary budgets or extensions are extremely frequent in other legal systems, since 1958 the French Government has never invoked its special power to approve budgets by decree. This is now because there have never been decision making deadlocks or other problems in relation to the approval of budgets. Indeed, within more recent practice, deadlocks involving the two houses of parliament have been frequent; however, they have always been resolved through the choice (provided for under the Constitution) to give the last word to the lower house.[53] Perhaps therefore, the option of a special government ordinance was incorporated into the Constitution

[51] P. Avril, J. Gicquel, J.-É. Cicquel, *Droit parlamentaire* (Montchrestien, 2014); and J.-L. Albert, *Finances publiques* (Paris, 2017).

[52] It should be noted that government ordinance is legitimate only in the case of Parliament's inaction («si le Parlement n'est pas prononcé»): it is not, therefore, if Parliament has rejected the executive's proposal with a negative vote. See F. Brigaud, V. Uher, *Finances publique* (Paris, 2017) 144.

[53] French Constitution, Article 45.4: «The Government may, after a new reading by the National Assembly and the Senate, request the National Assembly to take a final decision. In this case, the National Assembly may take over the text drawn up by the Joint Committee, or the last text voted by it, possibly as amended by one or more amendments adopted by the Senate».

as an instrument of dissuasion. Indeed, if one looks at what has happened in practice, this dissuasion appears to be entirely effective.

V. CONCLUDING REMARKS

Having concluded this work of classification, it is possible to make three concluding remarks, which arise in logical order.

a. Considering the systems addressed above in the order in which they have been addressed, a rising intensity (importance) in terms of the state of budgetary exception is immediately apparent, which parallels the rising intensity of the weight of the government in the general equilibrium under the system of government. For the sake of clarity, we shall refer to this direct parallelism as a "fundamental correlation".

Naturally, the reference to the "weight of the government" needs to be clarified in order to avoid misunderstandings. Nobody would dream of saying that the President of the United States does not have a significant role under the American system of government. The position is however different if the weight of the government's role is understood as *the capacity of the executive to dominate the assembly*, and it is clear that the existence the requirement of confidence facilitates this dominance. In fact, it initially arose out of an attempt to ensure parliamentary dominance over the government, rendering the latter an emanation of the former; however, things quickly changed. Within the more general context of the crisis within political representation, what might have been a weapon in the hands of the legislature (i.e. the threat of forcing the government to resign) can turn into an instrument of executive hegemony, due to the effect that its resignation can have on the legislature. It is thus clear that this assessment cannot avoid considering those mechanisms that are intended to rationalise the parliamentary system, i.e. the mechanisms that seek to guarantee executive stability. These mechanisms can vary in terms of their type and intensity, which explains why the system of parliamentary government cannot be treated as a monolithic whole, but manifests itself in various ways. (However, the consequences of this will be considered below.)

It may nonetheless be said that the ultimate "fundamental correlation" confirms the comments made in section one concerning the close correlation between budgetary decisions and the general form of government.

The first result of our analysis, therefore, is not so surprising. It consists in a readily predictable confirmation of an assumption that has never been seriously questioned.

However, it needs to be clarified in two respects in order to bring into focus the utility of a budget-oriented classification of systems of government.

b. The first clarification is that the classification of legal systems with reference to the criterion proposed in this paper is valid across all types of system, irrespective of their classification under the relevant traditional type of system of government. It may in fact be noted that – within the sample of systems focused on – "assembly-dominated" systems include (from the perspective of the classic types of system of government) US presidentialism, a weakly rationalised system of parliamentary government such as Italy as well as the *generis* model of the United Kingdom (Westminster model).
At the same time, "executive-dominated" systems encompass different systems of government, not all of which constitute different manifestations of the general category of parliamentary government: alongside Spain and Germany – and even these two represent different forms of parliamentary government – we have discussed the semi-presidential model in France and, moving even further, Argentinian presidentialism.
In actual fact, each system considered above is unique in its own way. Any classification that sought to provide a perfect reflection of the truth would perhaps have had to identify a separate isolated model for each case studied.
A less ambitious approach involves embracing the least imperfect classification, i.e. the one that betrays reality the least.
And yet, if this is indeed the case, it would appear in the light of the above that budget-oriented classification offers a more exact representation of the reality than that provided by classification according to the traditional types of system of government.[54]

However, perhaps a clarification is in order here in order to counter an objection that might potentially be raised. A budget-oriented classification does not fail to take account of the aspects taken into consideration by the more classic type of systems of government: on the contrary, it faithfully incorporates them.
Although there is not sufficient space here to revisit the well-known discussion concerning the identifying features of systems of government, we limit ourselves to

[54] Let's think, for instance, that in traditional classification the U.S. and the Argentine case receive the same tag of presidentialism, whereas in the budget-oriented classification they belong to two models that are opposed.

considering the one aspect that, out of all of these features, is probably the only that has not been addressed when defining the shifting boundaries of the types system of government. This aspect is the requirement of confidence.[55]

Under a parliamentary model, a focus on a potential funding gap and a contemplation of the political equilibria engaged in such an eventuality under a parliamentary model naturally implies also a consideration of the ease with which a motion of no confidence in the government can be adopted, and the potential consequences of such actions for parliament. It is in fact clear that this consideration also helps to assess how sovereignty is allocated within a budgetary crisis.

The more difficult it is a vote of no confidence (or rather: the more a parliamentary system is rationalised), the more a country shifts towards an executive-dominated model.[56] This is why, under our classification, systems in which the choice of no confidence lies in the hands of political parties, without any particular procedural constraints, fall under the assembly-dominated model. On the other hand, systems in which it is more difficult to pass a vote of no confidence due to procedural limits fall under the executive-dominated model (and the more difficult it is to obtain Government's resignation, the more the system is characterised by executive predominance)[57].

c. At this point, a second clarification is needed. We can assert the "fundamental correlation" proposed under point (a), subject to a methodological condition: that we remain free from the cognitive biases that the classical types of systems of governments risk engendering, even if unintentionally.

It is also instructive to offer an example of cognitive bias in this field. One might perhaps be tempted to believe that parliamentary systems are naturally characterised by a significant prevalence of executive power, due to the requirement of confidence. However, this idea is not entirely accurate, as we shall attempt to explain below.

[55] Therefore, the discourse concentrates the field of observation on those systems where a confidence vote is constitutionally provided, with the exclusion therefore of the United States and Argentina.

[56] Since relationship of confidence can be regulated in many different ways, it is possible to find a greater "plurality of possible worlds" among forms of parliamentary government than in relation to other traditional forms of government.

[57] In sequence: Spain, Germany and France (where maybe voting against the Government is simpler than Spain and Germany, but – on the other side – the direct election of the President of the Republic and the two-headed nature of the executive "compensates" considerably in terms of rationalisation of the parliamentary system).

Indeed, in the particular field we are interested in, some of the traditional parliamentary systems discussed – such as Italy and UK – are actually more characterised by predominance of the assembly, which has full discretion to adopt temporary measures to avoid a funding gap.

Moreover, there is no doubt that the opposite is not the case for countries that are traditionally branded as 'presidentialist', as there are major differences between these systems: consider, for example, the differences between the United States (assembly-dominated model) and Argentina (executive-dominated model).

In actual fact, it must nonetheless be pointed out that there are undoubtedly other aspects in this area of research for which the traditional classification of systems of government still hold good.

In fact, the distinction between the presidential system of government and the parliamentary system of government (in its various manifestations, after making the necessary approximations) can be endorsed with a good degree of accuracy if one considers the stability/fluidity in the allocation of sovereignty under a state of budgetary exception. Although the two forms of presidential government (as addressed in our sample) fall into two opposing camps, they are stable in this respect. Thus, both assembly-dominated and executive-dominated systems are subject to oscillations, whereas by contrast parliamentary models appear to be more fluid from this perspective.

This fluidity is apparent not only from a comparison *among* systems of parliamentary government: there is no need to repeat a discussion of the variety which may be encountered within the range of systems of parliamentary government, which is so great that some of them must be classed under the "assembly-dominated" model and others under the "executive-dominated" model. We use the former label for United Kingdom and Italy, and the latter for Spain, Germany, and France (assuming semi-presidentialism to be a variation of parliamentary government).

Moreover, the fluidity that characterises each system considered is also endogenous in a certain sense. Indeed, it does not appear possible to identify any clear and definitive rule enabling a branch of government to prevail (either one way or the other) in any of the systems that can be classified under parliamentary government, in contrast to the two examples of presidential government considered. Even where one branch appears to have ultimate power to impose its will – as is the case in France, where the government can ultimately impose its position by adopting an ordinance – systemic

factors nonetheless intervene in order to rebalance the positions, thereby rendering less stable the position of the branch which, owing to the system's closure rules, has ultimate sovereign authority over funding gaps.[58]

In the light of the considerations set out above, we can therefore assert that it is possible to propose a classification of systems of government that turns on the effective balance of power within the budgetary process – or indeed, more specifically, the effective balance of power during a crisis affecting the budgetary process.

In fact, it is the dynamics of this state of emergency that make it particularly clear which, between the executive and the legislature, is the real body with decision making power, and thus which has genuine sovereign powers over the process. Accordingly, the rules governing funding gaps actually conceal – in some cases burned under various layers of political considerations, which are more contingent than structural – a valid criterion for understanding the real state of parliamentary democracy within a given country.

This aspect is so crucial that the manner in which these crises are settled (along with academic commentary on them) has changed over time in parallel with developments in parliamentary democracy; moreover, differences are also apparent between contemporary systems characterised by incomplete or in some sense cumbersome democratic processes if one considers a snapshot at any given time.

Thus, the distinction between an assembly-dominated model and an executive-dominated model (with all the specifications and internal distinctions that this study has attempted to highlight) certainly does not seek to replace the more traditional classifications of systems of government, with which it does not overlap. On the contrary, it may be used as an auxiliary instrument for various reasons.

First of all, the distinction is useful in order to establish the approach – endorsed in this study from the outset – involving the identification of a fundamental relationship between the system of government and decisions concerning public finances. In other words, it is difficult to dispute that, if one detaches all contingent factors, the essential and original core arrived at, when classifying a system of government, is the

[58] Let's consider, for example, the French case. As we know, Constitution provides that the Government can adopt the budget by ordinance, if the two Houses do not find an agreement. It is the more radical prevalence of executive power provided *per tabulas*. However, since 1958 to the present, the Government has never made that choice.

relationship between government and parliament in terms of disputes concerning the allocation of public resources.

It is precisely the original – and hence foundational and in all cases necessarily formative – nature of this relationship that enables us, in some cases, to resist the temptation to engage in the excessive simplification that the current use of traditional classifications of systems of government (much more than those classifications in themselves) can potentially entail.

Thus, a budget-oriented classification can be a useful instrument for arriving at a more sincere and accurate understanding of the reality of each legal system – at least with reference to the category of parliamentary democracies. In this field, going back to the bare essence of the original core, shorn of any contingent embellishment, can offer a criterion both for valid interpretation as well as for proper practice.