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Powers and Limits of the Unelected Federal Government in Germany

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1. How can Germany maintain Regierbarkeit under a stable democratic government?

The Government is a complex organ and institution, but not a permanent one. German often compared its own "Regierbarkeit" with Italy's duration of governments, but nowadays Italy learned political alternation and could be more worried about Germany's instability. Germany is proud to have excellent scores under the World Bank Governance Indicators for "government effectiveness", with a very high percentile rank of 94,2 (2016), and for "voice and accountability", with another very high percentile rank of 94,6 (2016), but it has to be aware also that today scores of "political stability and absence of violence" have decreased from 95,2 in 2000 to 71,0 in 2016.[1] Considering the election of a seven-party parliament, the failure of the so called "Jamaica-coalition" and the negotiated renewal of a coalition that can no more be named "great", can political destabilization be stopped and reversed under the existing rules?[2]

The last time when Germany elected a 7-party parliament was in 1932, with a paralyzing majority of right- and left-wing parties that could not be excluded from political competition. The unsuccessful procedures of prohibition of the NPD and some reluctance of the secret service for constitutional defense (Verfassungschutz) to assess the potential of unconstitutional radicalism within the new AFD are part of the new instability.[3] But the republic Bonn and Berlin desired not to repeat the trauma of rapid political

* Text of the speech at the International Conference *""Which Germany after the Vote? Post-electoral Reflections on the Largest European Democracy"*, Rome, February, 9th, 2018.
[1] For more detailled analysis see S. JÄCKLE, *Determinanten der Regierungsbeständihgkeit in parlamentarischen Systemen*, Berlin, LIT, 2011.
[2] Skeptical on reform proposals K.-A. SCHWARZ, *Neuregelung der Regierungsbildung?*, in *Zeitschrift für Rechtspolitik*, 2018, 24-25.
[3] For the decision to make no prohibition of the NPD see BVerfG, Urteil des Zweiten Senats vom 17. Januar 2017 - 2 BvB 1/13 - Rn. (1-1010), http://www.bverfg.de/e/bs20170117_2bvb000113.html. The possibility to exclude

destabilization suffered under the republic of Weimar and the trend towards instability and increasing political violence could be a more common European experience due to the weakening of both the national State and the European Union. Larger coalitions have been practiced in Austria and Italy, smaller even in UK, a minority government is running Spain and the acting government of Belgium (544 days) was one of the longest of European constitutional history. After 1989, political ideologies and parties have been fragmented in eastern and western Europe. Politics are more and more personalized and presidentialized, meanwhile terrorism shocked the democratized northern constitutional monarchies as well as the southern republics. Nevertheless acting governments seem to have produced incredibly increasing GNP (Belgium 2%, Spain 3,2%, Netherlands 3,3%) and need further studies.

To what extend the new instability of political governments in Europe is a sign of post-democracy and could or should be prevented under the existing constitution? Under a parliamentary democracy, the demos has not only the ultimate decision over the constitution (Art. 146), but even a periodical decision over continuity or discontinuity of parliament and government. Democratic changes in parliament and government are possible and can be desirable for the people, but the "demos" of a democracy needs always stable institutions of government for its "kratein". Effective discontinuity in policies and politics can be needed, but should not be detrimental for the formal continuity of the State and its "robust constitution".

The rules governing the building and the crisis of a government have to render possible a political discontinuity with institutional continuity. From a point of view of comparative constitutional law, the head of a Government can therefore be

1) elected by the people (USA, Israel),
2) elected by the Parliament (Germany, Sweden, Finland, Estonia, Spain, Hungary, Switzerland),

the NPD from public financing – already practiced in the Greek case of Alba Dorata – has been examined in https://www.bundestag.de/blob/503052/11c6c575b60d9911fadd7e0f195f7ad6/wd-3-029-17-pdf-data.pdf. The administrative tribunal of Munich prohibited the publication of a decision to put under observation the leader of the Bavarian AFD: https://www.journalistenwatch.com/2017/07/28/gericht-verbietet-innenminister-herrmann-die-nennung-von-afd-chef-bystron-im-verfassungschutzbericht/ On the experiences of "parliamentarisation" of the AFD at regional level see P. RÜTTGERS, *Parlamentsfähig? – Die Abgeordneten der AFD in den Landtagen und Bürgerschaften*, in *Zeitschrift für Parlamentsfragen*, 2017, 3-24.

3) nominated by the head of State, being a monarch (UK[4]) or a directly (Austria) or indirectly elected President (Italy), under confidence or non-confidence powers of the elected parliament, attributed only in Italy and Romania to both chambers.[5]

Learning from history, the German Basic Law (*Grundgesetz, GG*) decided to avoid any "government of the President", preferring a government of the people "made in parliament", upon request of the Federal President. Under Art. 63 GG, the responsibility for the creation of the government is given to the Bundestag which "*shall elect*" the Federal Chancellor without debate on the proposal of the Federal President. The procedure can have up to three different types of ballot. In the first ballot, the proposed Chancellor needs the absolute majority of members of *Bundestag*, in a second ballot another Chancellor not proposed by the President can be elected within 14 days. (4) "If no Federal Chancellor is elected within this period, a new election shall take place *without delay, in which the person who receives the largest number of votes shall be elected. If the person elected receives the votes of a majority of the Members of the Bundestag, the Federal President must appoint him within seven days after the election. If the person elected does not receive such a majority, then within seven days the Federal President shall either appoint him or dissolve the Bundestag*." There is no specific time limit for the Federal President in order to start the election mechanism, but the duty to do it in reasonable time could be, if necessary, enforced through the Constitutional court. The rules leave to the Federal President the final decision whether to hold in office a minority government or come to a dissolution of a freshly elected Bundestag. The wording of the norm seems to give a clear preference to a minority government that has already been experimented by Willy Brandt in 1972 and by red-green coalitions in Sachsen-Anhalt and Nordrhein-Westfalen with external toleration of the party of "the left".[6] The decision of the president to ask the people to go to new elections is only an *ultima ratio,* because the people should not be forced to change their votes just because the political parties don't fulfil their duty to form a government coalition.

Under a parliamentary democracy with a moderated proportional electoral system and a more and more differentiated multiparty system, the creation of a government of coalition is the normal case. The German style of democratic coalitions tends to increase formality of negotiations and agreements, the institutionalization of a permanent conference committee (*Koalitionsausschuss*) as a guarantee of

[4] As a matter of convention, the Crown decides only over the output and refrains from any input to the political decision making related to the government building. The Swedish constitution delegates the responsibility explicitly to the President of the parliament.
[5] D. CLASSEN, *Nationales Verfassungsrecht in der Europäischen Union. Eine integrierte Darstellung von 27 nationalen Verfassungsordnungen*, Baden-Baden, 2013, 184ss.
[6] G. KRINGS, *Die Minderheitsregierung*, in *ZRP*, 2018, 2-5.

sustainability of the coalition and transparency of the agreements as a means for moral sanctions of in a public sphere empowered by free public opinions under conditions of constitutionally secured permanent pluralism. The parties are not legally compelled to declare the coalition options before the election day, but they need to have sufficient internal democracy in coalition making decisions that can include internal referenda but no imperative mandate. Since 1967, great coalitions have been experienced at federal and regional level even with supermajorities used for constitutional reforms. The reforms outcomes, although criticized harshly, have not changed the constitutional fundamentals.

The German "democracy of the chancellor" is therefore still constitutionally based on the election of the Chancellor in parliament (art. 63) and on his powers to recruit or dismiss the other ministers (art. 64) to make binding policy guidelines (*Richtlinienkompetenz)* (art. 65 GG) , with a rule of "constructive non-confidence" (art. 67, 68), that aims to personalize the confidence and to prevent a merely destructive opposition. Customs and conventions added further rules[7],first of all, the union of party- and government-leadership. This personal union is based on the one hand on the expectation of the so called *Kanzlerbonus*, that is the fact that a good Chancellor – like a good President - takes more votes for the party. On the other hand, it is based on the democratic ideal that the leader of the party that gains the relative majority of votes within the coalition has a right to be elected Chancellor even if the electoral law does not oblige political parties to designate an official candidate. Another custom and convention is that the Chancellor has full power over European and foreign politics, but not over military affairs (art. 65a). Furthermore, by virtue of the principle of election, the "Chancellor in parliament" faces a clear separation of government majority from the opposition that has to offer alternatives for government. This separation might *de facto* hinder a frequent use of the question of confidence, but also the acceptance of great coalitions as well as minority governments.

2. The full power theory for the "unelected" acting federal government

Art. 69 sect. 2 of the Basic Law of 1949 establishes therefore that "*the tenure of office of the Federal Chancellor or of a Federal Minister shall end in any event when a new Bundestag convenes. At the request of the Federal President, the Federal Chancellor (…) shall be obliged to continue to manage the affairs of his office until a successor is appointed*." Similar clauses – without the duty of request of the Federal President - can be found in the constitutions of Baden-Württemberg (art. 55 (3)), Berlin (art. 56 (3)), Brandenburg (art. 85 (2)), Bremen (art. (107 (3)), Hamburg 37 (1), Mecklenburg-Vorpommern (art. 50 (4)), Niedersachen (art. 33 (4)), Nordrhein-

[7] See K. KÖNIG, *Operative Regierung*, Tübingen, Mohr, 2014, 172ss

Westfalen (art. 62 (3)), Rheinland-Pfalz (art. 99), Saarland (art. 87 (5)), Sachsen-Anhalt (art. 71 II), Schleswig-Holstein (art. 27 (2)) and Thüringen (art. 75 (2)). Only the constitution of Bavaria of 1946 opted for an interim government headed by the president of the regional Landtag (art. 44), a solution that has been adopted even in France in 1954 when the French constitution of 1946 was revised.

Looking at the official website of the Federal Government in January 2018, a citizen can find the following explanation of the powers of the acting federal government (*Geschäftsführende Regierung*): *"The acting government has the same powers of a "regular" government that is in office. So far, the current practice of State is not to take far-reaching decisions that could bind the subsequent federal government. This regards inter alia decisions of grave financial and personal consequences, but also the deliberation of initiatives for legislation*".[8]

There is a gap between the theoretical claim for full powers even without confidence and a more restrictive practice inspired by a principle of non-interference of the unelected acting government in the policy making power of the following elected government.

A clear majority of the constitutional law book authors hold that there is no general temporal or substantial restriction of the powers of an acting government or, in the case the Chancellor has good reasons for deny the request to continue, of an interim government (headed by the Vice-Chancellor).[9] They argue that no such general limitation is provided in the text of the Basic law that omitted the restriction to "current affairs" made under art. 59 (2) of the Prussian constitution of 1920 and under art. 113 (3) of the Constitution of Hessen, 1946.[10]

From this point of view, it is just a question of political convenience or political correctness whether to make full exercise of powers or to defer them to the next elected government. Nevertheless, the quasi uniform academic interpretation admits that the ratio of specific constitutional power clauses could justify a prohibition to exercise the following powers regarding the constitutional relations to other institutions:

[8] Transl. J.L.

[9] V. BUSSE, *C Art. 69, n. 19*, in K. FRIAUF – W. HÖFLING (eds.), *Berliner Kommentar zum Grundgesetz*, Berlin , 2017; R.-W. SCHENKE, *art. 69 n. 80*, in W. KAHL – C. WALDHOFF – C. WALTER (eds.), *Bonner Kommentar zum Grundgesetz*, Heidelberg 2010; U. MAGER, *art. 69 n. 28*, in I. v. MÜNCH – P. KUNIG (eds.), *Grundgesetz Kommentar*, München, 6a ed., 2012; G. HERMES, *art. 69 n. 23*, in H. DREIER, *Grundgesetzkommentar*, 3a ed., 2015, vol. II, Tübingen 2015. V. EPPING, *art. 69 n. 46*, in C. STARCK (ed.), *Kommentar zum Grundgesetz*, 6a ed., München 2010; M. OLDIGES – R. BRINKTINE, *art. 69 n. 38ss*; in M. SACHS (ed.), *Grundgesetz Kommentar*, 8a ed., p. 1497s.; R. HERZOG, *art. 69 n. 62*, in MAUNZ et al (eds,) *Grundgesetz Kommentar*, München 2008; H.-P. SCHNEIDER, *art. 69, n. 11*, *Alternativkommentar Grundgesetz*, Darmstadt 2002; S. MÜLLER-FRANKEN – A. UHLE , *art. 69*, in B. SCHMIDT-BLEIBTREU – H. HOFMANN – H.-G. HENNEKE, *GG. Kommentar zum Grundgesetz*, 14a ed., Köln 2018, 1871s.

[10] See H. GÜNTHER, *Hessische Verhältnisse. Die geschäftsführende Regierung in der Landesverfassung*, in *LKRZ*, 2008, 121-127. The question whether the „current affairs"-clauses implies an enforceable limitation was left of in the decision of the Staatsgerichtshof Hessen of 4.4. 1984, NVwZ 1984, 784-786.

a) the power to ask the Federal President to nominate new ministers (art. 64) and – with some dissenting positions[11] – to ask the discharge of existing members of the cabinet to be substituted by others,
b) the power of the acting Chancellor to ask for a vote of confidence (art. 68),
c) the power to declare a state of emergency in legislation (art. 81).

The opposite position argues with the principle of democracy transformed in a rule of deference to the elected parliament and recognizes legal binding force to the previously mentioned political practice as constitutional customary and/or conventional law. This is controversial for the French and the Italian case, where no specific clause in constitution can be retrieved, but governments resign when a new parliament or president has come into office and remains in charge only for the "current affairs".[12] The dismissed Government of Mr. Prodi adopted a specific self-binding directive dated 25th of January 2008: "the Government remains engaged in the management of affairs, in carrying out the determinations already given by parliament and in adopting urgent decisions. It has to ensure the continuity of administrative action, especially regarding the problems of unemployment, public investments, procedures of liberalisation and containment of public spending."

Other European constitutions have explicitly codified similar restrictions. The Austrian Constitution of 1920, reinstated in 1945, restricts the powers of the acting government to the "continuation of administration".[13] Art. 15 sect. 2 of the Danish Constitution of 1953 establishes the following limitation of the duty of a dismissed ministry to "continue in office": "*Ministers who continue in office as aforesaid shall do only what is necessary for the purpose of the uninterrupted conduct of official business.*" Art. 115 of the Slovenian Constitution of 1991 used the "current affairs" clause and Art. 110 sect. 4 of the Romanian Constitution of 1991 tried to define them as "only those functions which are necessary for taking care of public business". Finally, Art. 22 sect. 1 of the Hungarian Constitution of 2011 specified the limitation rules more in detail more in detail: "*From the termination of its mandate until the formation of the new Government, the*

[11] G. HERMES, in H. DREIER, *op. e loc. cit.*
[12] For Italy see A. D'ANDREA, *art. 92, par. 2.3*, in: R. BIFULCO et al., *Commentario alla Costituzione*, Torino, Utet, 2006, 1782; G. SALERNO, *Sui poteri del governo dimissionario e delle camere in regime di prorogatio*, in *federalismi.it*, n. 5/2008; for the French "republican tradition" see the discharge of the government Cazeneuve in https://twitter.com/Elysee/status/862366872993497091/photo/1?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.leparisien.fr%2Fpolitique%2Fqui-pilote-le-gouvernement-d-ici-la-passation-de-pouvoir-avec-macron-11-05-2017-6939075.php.
[13] "Should the Federal Government have left office, the Federal President shall entrust members of the outgoing Government with continuation of the administration and one of them with the chairmanship of the provisional Federal Government. A State Secretary attached to an outgoing Federal Minister or a senior civil servant in the Federal Ministry concerned can likewise be entrusted with continuation of the administration. This provision applies analogously if individual members of the Federal Government have left office. Whoever is entrusted with continuation of the administration bears the same responsibility as a Federal Minister (Art. 76).

Government shall exercise its powers as a caretaker government, but may not express consent to be bound by international treaties, and may adopt decrees only on the basis of authorisation by an Act and in cases of urgency."

These limitations can be described with the common-law metaphor of the "lame duck" and are inspired by the idea that the traditional "*prorogatio imperii*" accorded under roman law needs to be restricted by some "*diminutio potestatis*" caused by a loss of legitimacy.
The German full power option has another specific historic background in the constitutional history of Weimar. The "current affairs" clause of the Prussian Constitution of 1920 was considered unenforceable by a decision of the *Staatsgerichthof für das Deutsche Reich* of 25. 11. 1925. The judgment argued that if the constitution would have intended an enforceable limitation, it should have established more clear and detailed rules and the following decisions translated this in the full power rule.[14] The beneficiary was the acting Social Democratic government of Prussia that lost its majority in the 1925 elections but could still defend in court its own power in 1932 against the decision of the President of the Reich, represented by Carl Schmitt, to nominate a commissioner for the acting Prussian government.

The question whether the limitations of the powers of an acting federal government are 'unenforceable political wills' or 'enforceable legal constraints' has not yet been decided by the Federal Constitutional Court established under the Basic Law of 1949. In the decision to reject a request for injunction against the social-democratic party referendum on the coalition agreement of 2013, the judges explained that the agreement itself and the party referendum cannot be considered exercise of public power and is no violation of the free mandate of the members of parliament during the election of the Chancellor.[15] The controversial question of the compatibility of the party referendum with the principle of representative democracy was submitted again not to a civil court,[16] but to the constitutional judge. 4 constitutional complaints and a further request of injunction have not been admitted to trial.[17] -, the agreement would be considered at any case not enforceable, neither in the constitutional nor in civil courts.

[14] See LAMMERS – SIMONS (eds.), *Die Rechtsprechung des Staatsgerichtshofs für das Deutsche Reich und des Reichsgerichts auf Grund des Artikel 13 Absatz 2 der Reichsverfassung*, Berlin 1929-1933, I, 267, IV, 372, VI 144. See W. HIERONYMUS, *Die Stellung der geschäftsführenden Regierung im Reich und in Preussen*, Diss jur., Marburg 1932; 17ss. H. DOWIE, *Die geschäftsführende Regierung im deutschen Staatsrecht*, Diss. Jur., Marburg 1933, 34ss.: E. Huber, Die Stellung der Geschäftsregierung in den deutschen Ländern DJZ 1932, 194ss.
[15] http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/2013/12/qk20131206_2bvq005513.pdf?__blob=publicationFile&v=1
[16] See only the public discussion in https://www.lto.de/recht/nachrichten/n/bverfg-soll-spd-mitgliederentscheidung-pruefen-basisdemokratie-freies-mandat/
[17] https://www.tagesschau.de/inland/spd-mitgliederentscheid-103.html.

Therefore, the disobedience of the will expressed through the referendum could be sanctioned through a mass exodus and loss of electoral consensus, the breach of the agreement could have only de facto consequences of loss of confidence. At any case, the negotiation and the respect of the agreement can be considered necessary for the election of the Chancellor under art. 63 and therefore not only allowed, but even "respectable" for the acting Government.

When the exploratory talks for a new Great coalition were concluded with a signed document (12.1.2018), the document was interpreted as a preliminary coalition agreement. The Federal government seems to consider itself politically obliged to not hinder the implementation of the already agreed policies.[18] From the point of view of government, the virtue of political self-restraint is of course preferable to a legal constraint based on constitutional customs and conventions. Nevertheless, the members of parliament and of government as well as the constitutional judge have always to take seriously the fundamental constitutional principles of democracy and republicanism, political freedom and pluralism when they fit the margins of political appreciation in case of arbitrary breaches of customs and conventions with irreversible damages for the constitutional order.

3. The perception of a limited budget power of the acting government

During the Weimar Republic it was controversial whether the acting government of the Reich could decide the raise of public loans and present a budget proposal to the parliament. In January 1927, after the end of the third and before beginning the fourth cabinet Marx, the Cancellor remarked that even the acting minister of finance was authorized to negotiate new loans. This was challenged by Richard Hilferding, social-democratic expert and former minister of public finances, in the budget commission of the Reichstag (28. 3. 1927) and in 1928 the plenum passed a resolution according to which "acting governments should not decide public loans".[19] For that reason, it was held that public loans could be authorized only by law and not by emergency decrees, and that the budget law could not be proposed unless the building of the new government was not predictable.[20] The latter position was not shared by

[18] Compare Regierungspressekonferenz 19. 1. 2018 (only agreements between members of the Government are valuable) https://www.bundesregierung.de/Content/DE/Mitschrift/Pressekonferenzen/2018/01/2018-01-19-regpk.html with Regierungspressekonferenz 22. 1. 2018 (the Government doesn't make at this moment decisions on authorizations for exportation of arms that are in harmony with the results of the exploratory talks) https://www.bundesregierung.de/Content/DE/Mitschrift/Pressekonferenzen/2018/01/2018-01-22-regpk.html

[19] „1 a) Eine Auflegung von Reichsanleihen soll durch geschäftsführende Regierungen nicht erfolgen; b) die Hinaufsetzung der Zinssätze einer Reichsanleihe kann nur durch Gesetz erfolgen" (RT-Bd. 422, Drucks. Nr. 4158; RT-Bd. 395, S. 13861. "See http://www.bundesarchiv.de/aktenreichskanzlei/1919-1933/0pa/ma3/ma31p/kap1_2/kap2_174/para3_4.html?highlight=true&search=geschaeftsfuehrende Regierung &stemming=true&pnd=&start=&end=&field=all#highlightedTerm

[20] W. Hieronymus, op. cit.., 21.

the Prussian government in 1932 that enacted the proposed and not approved budget through an emergency decree.

The problem is much less dramatic under the new art. 111 of the later German Basic Law of 1949, unofficially entitled "Interim budget management":

"(1) If, by the end of a fiscal year, the budget for the following year has not been adopted by a law, the Federal Government, until such law comes into force, may make all expenditures that are necessary: a) to maintain institutions established by a law and to carry out measures authorised by a law; b) to meet the legal obligations of the Federation; c) to continue construction projects, procurements, and the provision of other benefits or services, or to continue to make grants for these purposes, to the extent that amounts have already been appropriated in the budget of a previous year.

(2) To the extent that revenues based upon specific laws and derived from taxes, or duties, or other sources, or the working capital reserves, do not cover the expenditures referred to in paragraph (1) of this Article, the Federal Government may borrow the funds necessary to sustain current operations up to a maximum of one quarter of the total amount of the previous budget."

The interpretation given by academic comments excludes any restriction for the power of an acting government to propose a budget to be approved in parliament through formal legislative act.[21] Contrary to this position, the website of the Federal Government (!) made a very short comment that seems to suppose a strong limitation of the acting government regarding the budget: "*Being the budgetary power in the hands of the parliament, the acting government can deliberate no "ordinary budget". The interim budget management establishes strict limitations for the acting government.*"[22]

The Federal Budget Orders (§ 30 *Bundeshaushaltsordnung* - BHO) prescribe that the proposal of the Federal Budget has to be presented before September 1st. The proposal of Federal Budget 2018 has been decided by the Cabinet in June and presented in August 2017 to Bundestag and Bundesrat. At the end of the 18th legislature, by virtue of the principle of discontinuity of parliamentary works, this procedure of legislation is legally presumed to have an end. The former Federal Minister of Finance Wolfgang Schäuble was elected member and in the first session even President of the new Bundestag (24.10.2017). He was therefore discharged as a minister and the office was transferred to another Minister, Peter Altmaier, head of the Chancellery. The proposal of Federal Budget 2018 was not immediately represented to the new Bundestag. A few days after the election, the Great Chamber of the Federal Court of Auditing

[21] U. MAGER, in: v. MÜNCH – KUNIG, II, *art. 69 n. 28*; M. OLDIGES – R. BRINKTINE, *art. 69 n. 39*, in M. SACHS (ed.), *Grundgesetz Kommentar*, 8a ed., p. 1497s.

[22] https://www.bundesregierung.de/Content/DE/Artikel/2017/10/2017-10-24-faq regierungsbildung.html?nn=694676#doc2273622bodyText7

(Bundesfinanzhof-BMF) rendered a guideline on the principles for the control over the "interim budget management 2018" (!).[23]

The 19th Bundestag and the Federal Finance Ministry on their own websites (!) explained that the rule of discontinuity of legislation proceedings should apply even to the budget proposal, probably because the acting ministry of the former great coalition CDU/CSU/SPD) was expected to be replaced by a new coalition of CDU/CSU/FDP/GRÜNE. From a legal point of view, this could be challenged if we consider that the principle of substantial discontinuity has been weakened over the last legislatures and that it is just established by the Standing Orders of the Bundestag (§ 125 *Geschäftsordnung* Bundestag, GO-BT: "*At the end of legislature, all submissions are considered to be settled. This is not applied to petitions and to submissions that need no deliberation*."). A similar internal rule, has been argued, could not apply to external submissions from other permanent constitutional organs.[24] Nevertheless, the interpretation of the Standing Order could be inspired also by more general considerations in favour of a substantial discontinuity even of legislative initiatives of the federal government. In fact, democracy is not just election of persons, but even of parties that are obliged by the electoral law to present "written programs" (§ 18 (2) *Bundeswahlgesetz* (BWahlG)) to be notified to the electors. If the people decide over the continuity and discontinuity of the policies that are basis and object of the negotiations of a coalition agreement, the parliament has to give an interpretation to that decision and if substantial discontinuity prevails, even the new government should be not bound by the submissions of the preceding Government.

Finally, the budget law is considered since Weimar not just an act of administration in the form of a legislative act, but a complex act of joint guidance of the State deliberated by a majority in Government and in Parliament that guides economy and politics and gives a program to the executive power.[25] It has therefore an eminent political function and is subject to negotiations that can be interdependent with the

23 https://www.bundesrechnungshof.de/de/bundesrechnungshof/rechtsgrundlagen/beschluss-des-grossen-senats-des-bundesrechnungshofes-vom-10-oktober-2017-zur-vorlaeufigen-haushaltsfuehrung

24 L. MICHAEL, *Folgen der Beendigung: Elemente der Diskontinuität und Kontinuität*, in: M. MORLOK – U. SCHLIESKY – D. WIEFELSPÜTZ (Hrsg.), in *Parlamentsrecht: Praxishandbuch*, Baden-Baden 2016, 1596s.
The position was already outlined in an internal paper of the scientific service of the Bundestag of 2007 https://www.bundestag.de/blob/423384/8640b5a2cef428fcab386076e9eda5c1/wd-3-014-07-pdf-data.pdf

25 J. HECKEL, *Einrichtung und rechtliche Bedeutung des Reichshaushaltsgesetzes*, in *Handbuch des Staatsrechts des Deutschen Reichs*, Berlin 1932, II, 389: „„Es ist ein im Wege der staatsgestaltenden Gesetzgebung erzeugter staatsleitender Gesamtakt der Regierung und des Parlaments; sein Gegenstand ist ein staatliches Gesamtprogramm für die staatliche Wirtschaftsführung und damit zugleich für die Politik des Landes während der Etatperiode, ein Programm, das zur Ausführung durch die Exekutive im Rahmen des exekutiven Gewaltverhältnisses bestimmt ist."

coalition negotiations. The duty of the parliament to elect a stable government justifies to postponing the decisions of the budget to the decision on the political agenda of the government.

Consequently, when the first negotiations for discontinuity failed and the second negotiations for a new great coalition with a specific need of discontinuity were opened, the scientific service of the *Bundestag* prospected as a constitutionally legitimate alternative the presentation of a specific interim budget law (6. 12. 2017).[26] The acting Minister of Finance signed a circular letter containing general administrative rules (§ 5 BHO), a guidance for the interpretation of art. 111 of the Constitution (7. 12. 2017). This source of law makes nevertheless not simply reference to the budget of 2017, but mainly to the above said proposal of budget 2018 deliberated by the preceding great coalition and established a general 45% limit for the interim management of procurements and of subventions.[27] This choice could facilitate a representation of the budget 2018 proposal with substantial modifications and the approval of a retroactive budget law in the first half of 2018, but the substantial conformity to the budget 2017 shall in any case be object of further strict scrutiny.

Nevertheless, the acting federal government can always defend financial sovereignty by new expenditure under art. 112 of the Basic Law: "*Expenditures in excess of budgetary appropriations or for purposes not contemplated by the budget shall require the consent of the Federal Minister of Finance. Such consent may be given only in the event of an unforeseen and unavoidable necessity. Details may be regulated by a federal law.*" The Parliament has to be informed immediately on all expenditures over 5.000.000 € and, authorisations for debts over 10.000.000 €, except for those under existing legal obligations up to 50.000.000 €. On all lower expenditures, trimestral information will be given.
Actually, the new parliament discussed immediately questions relevant for the German position in the EU-policies of consolidation of the monetary union submitted by the acting minister for finance, but they were not accessible to the general public (22.11.2018).

4. The parliament's control over the acting "unelected" federal government

Meanwhile the unelected federal government, being the acting Government from the beginning of the legislature until the election of the Chancellor, has power to ask a vote of confidence, it has no power to start the mechanism of constructive vote of non-confidence that would neutralize the power of the

[26] https://www.bundestag.de/blob/538844/a82ecf492cba7ebeec475f6d6b138151/wd-4-102-17-pdf-data.pdf
[27] https://www.kkr.bund.de/SharedDocs/Downloads/DE/VV-HH-Mittel/Haushalsf%C3%BChrung/RDS_vorl_HF_2018.pdf?__blob=publicationFile&v=1

Federal President to start the election mechanism. As seen before, any acting government is a government that has "no more" or "not yet" confidence of the elected parliament, but in the prevailing German interpretation tends to pretend full powers.

This does not mean that parliament has no powers and duties of control and influence over the acting "unelected" government. The new elected parliament has all the other powers of legislation, control and influence, but not the ultimate arm of no-confidence vote. From a legal point of view, any violation of the legal obligations of the acting government, including information duties, could be object of investigation and resolutions of censorship as well as of specific procedures of *Organstreit* in the Federal Constitutional Court. Nevertheless, even the Federal President has no specific power to remove the acting government unless there is a majority in Parliament for the election of a new Federal Chancellor "ad interim".

At the end of the Weimar Republic, Hans Nawiasky held that the acting government in the interest of the stability of government should have not less but even more powers than the ordinary government depending on parliament.[28] Today there is no similar situation of political instability and conflict, but one could argue that the power of an acting government can *de facto* expand if the parliament lowers the control intensity.

At the beginning of the second plenary meeting of 19th Bundestag, the plenum deliberated the institution of a "*Hauptausschuss*", a principal commission of 47 members for the time necessary for the negotiations of a new coalition agreement together with a commission for petitions and commission for the internal rules, electoral affairs and immunities (19.11.2017). The official motivation was that the parliament always designs the framework of its own permanent commissions taking as a model the organisational structure chosen for the Government and negotiated in the coalition agreement. Only one group of the opposition objected that the immediate constitution of permanent commissions and their modification subsequent to the creation of the new government would grant a better control over the acting government. Three months later, 23 permanent commissions have been created (30. 1. 2018).

Paradoxically, the control over the unelected government could has been more effective by the political parties that negotiate the coalition agreement than by the parliamentary opposition. Two examples could

[28] Das Geschäftsministerium in Bayern, BayBVl. 80. 1932, 33 ss; Geschäftsregierungen in den Ländern und Reichsverfassung, Deutsche Juristen-Zeitung 37.1932, 518 ss;

help to understand this paradox. The first example is offered by a study of the scientific services of the parliament of 2009 highlighted that the acting government might be involved in the negotiations, especially the staff of the ministries of finance could be involved in a preliminary assessment of costs of future government decisions. This has been criticised as an unjustified identification of state and party affairs.[29] The negotiating acting minister could have in this case a conflict of interest, but only the question time could serve for facing similar problems.

The second example has been given by the Glyphosate scandal when Angela Merkel was obliged to criticise the order given by the acting minister Christian Schmidt's to vote in EU in favour of a renewal of the controversial weedkiller and against the position of the social-democratic minister of environment, without a prior decision of the cabinet. "As for the vote of the agriculture ministry yesterday on glyphosate, this did not comply with the instructions worked out by the federal government." (28.11.2017). In the parliamentary follow up, the government answered very shortly a question of one negotiating party (FDP) and most groups criticised the decision but didn't find a majority for an alternative position, meanwhile a removal was requested by the other negotiating party (GRÜNE) and supported by a clear majority of a poll (12. 12. 2017). It can't be excluded that the fact contributed to the failure of the coalition negotiations in a climate of "not reciprocal confidence". The final coalition agreement between CDU/CSU/SPD opted for a specific Glyphosat-exit and the ministry was transferred from CSU to CDU.

From a legal point of view, the minister's violation of the internal regulation of the Government (§ 17 *Geschäftordnung der Bundesregierung* – GOBreg) was considered not sufficient for the removal, a not from all academics recognized power of the acting chancellor. A paper of the scientific service of the parliament holds that at least in case of crimes, a removal should be not controversial, but by virtue of the so-called principle of "petrifaction" a removal of ministers could imply a not compensated loss of working capacity of the government.[30]

Further research on the effectivity of parliamentary control over the unelected government, especially in foreign and EU-affairs, could be needed. As a general conclusion one could add that a new elected

[29]https://www.bundestag.de/blob/529210/2b950af0bd9fb1b1ee4c10c459ba3a5b/kw40_aktueller_begriff_koalitionsverhandlungen-data.pdf

[30] https://www.bundestag.de/blob/538932/13ffed70082d328048cc3c21b01bda0b/wd-3-240-17-pdf-data.pdf
The metaphor of petrification is used by V. EPPING, *Art. 46 n. 46*, in: MANGOLDT – KLEIN – STARCK, *Grundgesetz*, Band 2, 6. ed. 2010.

parliament with new political parties and new members always needs to learn how to get a strong control over the acting unelected government and that the general call on political self-restraint by the governmental websites could be suspected of hypocrisy.
An open question for political science remains whether the more and more fragmented political landscape in Germany and the no more appropriate denomination of "great coalition" is weakening the institutions of parliamentary democracy. From the point of view of constitutional law, the "full power" theory seems to be more realistic, but the idealism of the legal and political limitations of the power should be defended as the best teaching of constitutionalism.

5. How a veto of the SPD-members could weaken the acting government

Some final considerations have to be made for the hypothetical case of a veto decided by the SPD members through internal referendum. The Federal constitutional court decided to not accept complaints against the party referendum, a decision that will not even be published on . its internet side. As seen before, it decided already in 2013 that such a veto would have no legal binding force for the members of parliament. Another question is whether the distrust and will of discontinuity expressed by a majority of party members could be a sufficient reason for the acting ministers of SPD to ask for being discharged from their duties in the acting government.

At any case, the veto could have some effect for the Federal President that has to indicate a candidate for the election of the Chancellor. First of all, it is convenient to acknowledge whether a) the veto could render possible an alternative coalition pact, b) the acting Chancellor and leader of the most representative party would accept an election even without a coalition pact and c) as a leader of a minority government. When starting finally the election procedure, could the Federal President present as a candidate for election the acting Chancellor as the leader of the party of relative majority even if she would not accept neither to be elected without a coalition agreement, nor to head a minority government?

Meanwhile the charge of acting Chancellor can't be refused for reasons of contingent political interest, the leader of a political party has to be always free to refuse the nomination as a candidate for the election of a Chancellor and ask to the members of parliament of her group to not vote her. The Federal President could therefore opt for the indication of another Chancellor as the head of an interim government. In that case, the Bavarian model as well as some Greek and Italian experience could be of interest. There has been already a majority within parliament for the election of a President of the Parliament. This elected President of the Parliament could be a good candidate for an interim government sustained by all

parties or at least by the parties of both failed coalitions. After all, an "elected" interim government at least for half legislature could give more stability and have more legitimacy than an "unelected" acting government for the same time.

Otherwise even the election procedure provided by the German constitution would be just a formal ritual needed for new elections. This is of course a scenario that constitutional lawyers could consider a speculation incompatible with politically correctness. Nevertheless some more fantasy could be needed.