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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

FRANCE

INTERIM OPINION

ON

ARTICLE 49.3 OF THE CONSTITUTION

Adopted by the Venice Commission
at its 135th Plenary Session
(Venice, 9-10 June 2023)

On the basis of comments by

Mr Nicos ALIVIZATOS (Member, Greece)
Mr Richard BARRETT (Member, Ireland)
Ms Paloma BIGLINO (Substitute member, Spain)
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Mr Philip DIMITROV (Member, Bulgaria)
Mr Christoph GRABENWARTER (Member, Austria)
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I. Introduction

1. By letter of 28 April 2023, the Chairman of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested an opinion of the Venice Commission on Article 49 of the Constitution of France, and the established practice allowing the government to force the adoption of a bill without a vote in the National Assembly, unless the latter adopts a motion of censure. This request was made within the framework of the regular periodic reviews by the Parliamentary Assembly of the compliance of the obligations entered into upon their accession to the Council of Europe by member states.

2. Mr Nicos Alivizatos, Mr Richard Barrett, Ms Paloma Biglino, Ms Marta Cartabia, Mr Philip Dimitrov, Mr Christoph Grabenwarter and Mr Dan Meridor acted as rapporteurs for this opinion.

3. On 22 and 23 May 2023, a delegation of the Commission composed of Ms Biglino and Messrs Alivizatos, Barrett, Dimitrov and Meridor, accompanied by Ms Simona Granata-Menghini, Director and Secretary of the Commission, travelled to Paris and held meetings with representatives of the National Assembly (both the majority and the opposition) and of the Senate, with the Minister in charge of the relations with the parliament, with the Secretary General of the Government, and with the Secretary General of the Constitutional Council. The Commission is grateful to the French authorities for the excellent organisation of this visit. On 7 June, the Commission received some observations from an association.

4. In the light of the very limited time available for the preparation of this opinion, it was decided to proceed with an interim opinion at this stage.

5. This opinion was prepared on the basis of comments by the rapporteurs and the results of the meetings on 24 and 25 May 2023. It was examined at the meeting of the Sub-Commission on Democratic Institutions on 8 June 2023. Following an exchange of views with Mr Thomas Godmez, Representative, Secretary General of the French Government, it was adopted by the Venice Commission at its 135th Plenary Session (Venice, 9-10 June 2023).

II. Scope of the opinion and background

6. Article 49 of the French Constitution reads:

> *The Prime Minister, after deliberation by the Council of Ministers, may make the Government's programme or possibly a general policy statement an issue of a vote of confidence before the National Assembly.*
>
> *The National Assembly may call the Government to account by passing a motion of no-confidence. Such a motion shall not be admissible unless it is signed by at least one tenth of the members of the National Assembly. Voting may not take place within forty-eight hours after the motion has been tabled. Solely votes cast in favour of the no-confidence resolution shall be counted and the latter shall not be passed unless it secures a majority of the Members of the House. Except as provided for in the following paragraph, no Member shall sign more than three motions of no-confidence during a single ordinary session and no more than one during a single extraordinary session.*
>
> *The Prime Minister may, after deliberation by the Council of Ministers, make the passing of a Finance bill or Social Security Financing bill an issue of a vote of confidence before the National Assembly. In that event, the bill shall be considered passed unless a motion of no-confidence, tabled within the subsequent twenty-four hours, is carried as provided for in the foregoing paragraph. In addition, the Prime Minister may use the said procedure for one other Government or Private Members' bill per session.*

The Prime Minister may ask the Senate to approve a statement of general policy.

7. The request of the Monitoring Committee refers to the procedure whereby "the government may pass a bill through the National Assembly without its vote, unless the latter adopts a resolution of no confidence in the government". The request therefore refers more specifically to Article 49.3 of the French Constitution.

8. This procedure was introduced in 1958 Constitution following the failure of the government in the III and IV French Republics, which led to the crisis of 1958 and the advent to power of General de Gaulle. The coalitions in the National Assembly were so fragmented and uncontrolled that the government could not pass crucial legislation in the legislative branch. Article 49.3 was the response to such negative experiences of deadlocks and parliamentary blockage.[1] Other vehicles to "rationalize" the parliament were introduced in the Constitution, with the aim, in the words of General de Gaulle, to restore the authority of the State ("restaurer l'autorite de l'Etat"). Originally, there were no limitations to the scope of application of Article 49.3. Due to an excessive use of the provision and wide criticism, the legal framework was amended in 2008.[2] Since then, the Prime Minister can only engage the responsibility of the government (activate the procedure) for Finance or Social Security financing bills, and "no more than one other Government or Private Members' bill per session". The French Government in its observations underlines that during the latest constitutional reform, the amendments aiming at removing Article 49.3 were rejected by a large majority.

9. The aim of this mechanism – closely related to the concept of "rationalised parliamentarism"[3] – was to make Government stable and strong and sustainable vis-à-vis the National Assembly, especially in times where there is no clear majority in parliament. Therefore, the main aim of Article 49.3 was to maintain the functioning of the law-making process and to avoid parliamentary blockage, [4] potentially to some extent at the cost of parliaments' powers.[5] It therefore serves to compel the entry into force of laws which do not have enough support in parliament but are important for the political orientation of the government.[6]

III. Analysis

A. European standards on the role of parliament and its relations with the executive

a. The involvement of Parliament in legislation and the relation between parliamentary majority and minority

10. The foundation stone of democracy is the involvement of the population of voters in the design and enactment of laws through their representatives.[7] That process of designing and enacting laws is in principle carried out by the representatives through an assembly or congress

[1] *Aromatario*, La genèse du 49 al. 3, Revue générale du droit on line 2019, n° 43719.
[2] In his report to the President of the Republic of 1993, Georges Vedel proposed amongst others to limit the application of Article 49.3 to the laws on finances and to a small number of texts per session" (*Limiter l'application de l'article 49, alinéa 3, aux lois de finances et à un petit nombre de textes par session*). Vedel explained that Article 49.3 « issu de l'expérience de la IVe République […] donne au Gouvernement une arme contre l'indiscipline de sa majorité en ne laissant à celle-ci d'autre alternative à l'acceptation d'un texte que la censure ».
[3] *Harmsen*, Michel Debré and the constitution of the Fifth Republic: the theory and practice of rationalised parliamentarism, Modern & Contemporary France 1995, 275.
[4]Francesco Natoli, "Le recours à l'article 49 al-3 dans le cadre de la réforme des retraites : les limites constitutionnelles à la rationalisation parlementaire", La Revue des droits de l'homme, [Online], Actualités Droits-Libertés, para. 9, http://journals.openedition.org/revdh/8972,.
[5] *Aromatario*, La genèse du 49 al. 3, Revue générale du droit on line 2019, n° 43719.
[6] Laurèn Audouy, "La révision de l'article 49 alinéa 3 de la Constitution à l'aune de la pratique", *Revue française de droit constitutionnel* 2016/3 (N° 107), p. e.2, https://www.cairn.info/revue-francaise-de-droit-constitutionnel-2016-3-page-e1.htm&wt.src=pdf.
[7] See Article 25 ICCPR and the General Comment on the Right to Participate in Public Affairs.

or parliament with opportunities for debate and consideration of amendments. Exceptionally, voters may enact laws directly through a referendum.[8]

11. The European Court of Human Rights has held that "*democracy constitutes a fundamental element of the "European public order", and that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see, among many other authorities, Ždanoka v. Latvia [GC], no. 58278/00, §§ 98 and 103, ECHR 2006-IV). Thus, the Convention establishes a close nexus between an effective political democracy and the effective operation of Parliament. Accordingly, there can be no doubt that the effective functioning of Parliament is a value of key importance for a democratic society and therefore the exercise of free speech in Parliament may have to yield on occasions to the legitimate interests of protecting the orderly conduct of parliamentary business as well as the protection of the rights of other members of parliament. Orderly debate in Parliament ultimately serves the political and legislative process, the interests of all members of the legislature, enabling them to participate on equal terms in parliamentary proceedings, and the interests of society at large. […] In a more general vein, the Court reiterates that pluralism and democracy must be based on dialogue and a spirit of compromise (see United Communist Party of Turkey and Others v. Turkey, 30 January 1998, § 45, Reports 1998-I; Leyla Şahin v. Turkey [GC], no. 44774/98, § 108, ECHR 2005-XI; and Tănase v. Moldova [GC], no. 7/08, § 178, ECHR 2010*)".[9]

12. The process of designing and enacting laws is not only an exercise of power by the majority block. A C Grayling identified that the precept "*… democracy is not mere majoritarianism - … underlies the necessity, if the state is to be a democratic one, of having a system of representation that will capture the diversity of views and interests among all the enfranchised. It entails that government, once formed, must as far as possible transcend politics in the sense of transcending political divisions so that it will serve the interests of all and not just a section (however large) which has been successful in capturing the organs of government*."[10] The Parliamentary Assembly of the Council of Europe in Resolution 1601 (2008) has affirmed that the existence of "a political opposition inside and outside of parliament is an essential component of a well-functioning democracy". The Venice Commission has repeatedly warned against the "winner takes all" mentality.

13. The system should allow for efficient decision-making. The majority should be able to pursue its political agenda and the opposition, on its side, should not indulge in a deliberate obstruction of the normal work of Parliament.[11]

14. Sufficient time should be allocated to parliamentary debate, both in committee and in plenary meetings, in the light of all relevant circumstances, and in particular the complexity and importance of the bill. Laws changing fundamental institutional arrangements […] need more time than ordinary legislation. Complex and controversial bills would normally require particularly long advance notice, and should be preceded by pre-drafts, on which some kind of (internet-) consultation takes place. By contrast, for the passage of minor and uncontroversial legislation shorter timeframes and simpler procedures (for example, not involving a separate examination in a relevant committee) may be designed. However, such cases shall be clearly defined and tightly circumscribed in the regulations.[12]

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[8] For France see Articles 3§1 and 11 of the Constitution.
[9] ECtHR (GC), 17 May 2016, Karácsony and Others v. Hungary, para 141.
[10] A C Grayling , The Good State, 2020
[11] Checklist on the Relationship Between The Parliamentary Majority and the Opposition In A Democracy, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e, § 27
[12] Report on legislative initiative, §§ 73 ff, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)035-e

b. The legislative power

15. The Venice Commission's Rule of law Checklist, 1.4.i, provides for the supremacy of the legislature. It refers to the need for Parliament to be "supreme in deciding on the content of the law".[13] Exceptions should be limited in time, exercised within the limits of the Constitution and subject to the control of parliament and the judiciary. [14]

16. In its Report on legislative initiative,[15] the Venice Commission has underlined that States have developed throughout history various concepts and methods of separation of power. The parliamentary functions have even been subject to a variety of conceptions. Different systems and regimes are experienced, from presidential to parliamentarian systems, which have consequences on the holders and on the process of legislative initiative. However, it is worth noting that in practice the complexity of the decision-making process in modern democracies along with the multiplicity of the actors in democratic life tend to blur the strict approach of the principle of the separation of powers. In parliamentary democracies, the exercise of the power of legislative initiative by the executive power is regarded as a necessary manifestation of the political leadership of the Cabinet, provided the latter has the confidence of the Parliament. This situation, which prevails in parliamentarian regimes, is usually explained and grounded by the fact that the implementation of governmental policy should be as efficient as possible and by the recognition of the government as the leader of the assembly majority which is supposed to support the governmental action. [16] Even though the prevalence of the executive power cannot always be observed in the terms of the constitutions, it remains valid in the reality of constitutional life and, more largely speaking, in political life.[17]

17. In devising its rules on delegation of power, each state balances different factors. The most important of these is democratic legitimacy (of the parliament, but also of elected local authorities). In a democratic state, general norms are adopted by parliament through a legislative process which - in bicameral systems with symmetrical powers in the two chambers - requires at least two readings, intervals between readings and deliberations in a committee, which all prevent a rushed adoption of laws. The decision-making process should be inclusive, i.e. involve all political groups in Parliament. Rules on quorums give additional legitimacy to the decisions taken by Parliament. Certain political processes – such as the amendment of the Constitution – require the broadest political support, through a genuine all-inclusive and open debate in which the media and civil society can also participate[18]. For a "deliberative democracy" the legitimation process is in the discussion in itself, not simply the authoritative "stamping" that the legislature provides when it transforms a government legislative proposal into a law. A legislative proposal should provide a well-prepared basis for the parliament to adopt a law. The proposal should be well drafted (technically speaking). The procedure in parliament should follow a clear and predictable pattern (no unexpected procedural maneuvers etc).[19]

18. A common trend may be observed to reverse the relationship between governments and parliaments in favor of the former: the executive power is no longer subordinated to the legislative one and must be able to promote laws in accordance to its policy. In the most recent experiences of parliamentarism the governments have been endowed with and have made use of the power

[13] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e
[14] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e.
[15] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2008)035-e
[16] ibidem, § 23.
[17] Ibidem, § 34
[18] https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e, § 27, §§ 66-67
[19] Venice Commission, Report respect for democracy, human rights and the rule of law during states of emergency :reflections, § 66, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)014-e

to compel a reluctant majority to pass a legislative text, and also to accelerate the legislative process, and in particular to end any obstruction from the opposition.[20]

19. In the classic separation of powers model there will be a formal constitutional relationship between the law-making parliament as legislature and the executive. The dividing line between the different arms of government is not rigid and the executive will be a major participant in parliamentary procedure with a power to guide or even control the law-making process. The involvement of the executive in the legislative process may in some systems turn the executive into part of the legislature.

20. Examples of the executive intervening into the act of legislating include:

a) delegated law-making under statute in accordance with the constitution.

21. The benchmark of the Rule of Law checklist on supremacy of the legislature further provides that when legislative power is delegated by Parliament to the executive, the objectives, contents, and scope of the delegation of power should be explicitly defined in a legislative act (Rule of Law checklist1.4.iii). In its 2019 *Checklist on the Relationship Between The Parliamentary Majority and the Opposition In A Democracy,* the Venice Commission expressed skepticism with respect to the idea a general legislative power being given to the executive directly by the Constitution. It stressed that *"/a/t the least, such powers should be limited in time and in scope /…/ and may only be used for good reasons, such as a state of emergency /…/, and should be phased out as quickly as possible"*.[21]

b) special law-making powers in financial areas

22. It is a basic democratic rule that especially the decisions of finance and use of taxpayers' money should belong to the representative body. It was precisely the principle that there can be "no taxation without representation" that was at the origin of the English, American and French revolutions. Parliaments are the protagonists of the law-making process, of the budgetary decisions and – in the parliamentary forms of government – also of the "confidence" relationship with the Government. Most constitutional systems contemplate that the executive will have an enhanced lawmaking role in relation to financial laws.[22] The collection of taxes and the laws directing public expenditure are often designed in a special way with parliamentary involvement but a stronger executive role.[23] However, this role does not go as far as substituting the government for the legislature.

c) special law-making powers in a situation of emergency

23. During the state of emergency, the executive may, temporarily, exercise certain powers that would be otherwise reserved to the legislative. The exercise has to have a clear and prospective legal basis. The power of the executive to issue legislative acts in times of emergency should be limited both in terms of content and of time: such acts should only relate to issues related to the exceptional situation and they should not remain in force beyond the state of emergency (unless

[20] In its observations, the French Government stress that since the constitutional amendment of 2008 that trend has been reduced in France.
[21] CDL-AD(2019)015, Parameters On The Relationship Between The Parliamentary Majority And The Opposition In A Democracy: A Checklist, Opinion No. 845/2016, 24 June 2019, paras 119-121.
[22] Posner/Park, Role of the Legislature in the Budget Process: Recent Trends and Innovations, OECD Journal on Budgeting 2007, 1. In Austria, there are specific rules for budgetary laws laid down in the Austrian constitution: Article 51 para. 7 allows the executive under certain circumstances to exceed the budgetary caps.
[23] The special role of the executive in the preparation of laws in financial issues is analysed in Report on legislative initiative, §§ 24 ff.

confirmed and prolonged by the legislative). Appropriate “sunset clauses” should also include clear time limits on the duration of these exceptional measures.[24]

d) powers to initiate a parliamentary ‘guillotine’ and cut short a parliamentary debate.

24. Such a parliamentary mechanism (probably to be found in parliaments’ internal rules rather than the constitution or statute) allows parliamentary debates to be summarily brought to an end at the initiative of the executive to close part of the parliamentary process and proceed with the draft law. This may break a filibuster or a procedural deadlock even when the majority to pass the law may not be in doubt. The democratic credibility of such guillotine powers has long been questioned. Most notably, the biggest critiques of the guillotine are that it is fundamentally contrary to democracy as it curtails parliamentary debate, ultimately affecting the scrutiny of legislation. Some critiques focus on the balance of power between the executive and legislative branch, specifically that the ability of the executive to steamroll the parliament is contrary to the democratic process and does not incorporate the views of represented citizens. However, this critique is nuanced as parliament, in theory, usually has the ability to stop this executive steamroll, but at a great cost – the potential toppling of the government and loss of political career.

B. Article 49.3 of the French Constitution

25. Article 49.3 of the French Constitution is not a form of delegation but is best viewed as a freestanding law-making power in the hands of the executive.

26. This mechanism must be seen in the context of the constitutional setup of France. The Constitution of the fifth republic has set up a semi-presidential system, which incorporates within it instruments to rationalise parliament such as Article 49 para. 3 and Article 44.3 which allows government to insist that its bill be voted upon as a block, rather than by individual article. The basic innovation of the semi-presidential régime lies in the place and role of the President of the Republic. Elected directly by the people, s/he presides the Council of Ministers (Article 9); it can therefore be considered that s/he plays a direct political role, which, in practice, is not limited to external affairs but extends to almost all political issues. Formally, the power according to Article 49.3 is vested in the Government and not in the President. However, it may also be pointed out that, the Ministers, being appointed by the President, admittedly on the proposal of the Prime Minister (Article 8 of the Constitution), except in relatively rare periods of "cohabitation", when the President and the Ministers belong to different parties, are also responsible to her/him. Consequently, it has been widely interpreted that the President effectively exercises these powers through the ministers.

27. Formally, Article 49.3 is invoked by the Prime Minister. However, it does not seem that this initiative can be adopted without the participation of the President of the Republic. Indeed, the President of the Republic presides over the Council of Ministers (Article 9 of the French Constitution), which is consulted before the Prime Minister may activate article 49.3 and s/he is also the one who promulgates the law (Article 10 of the French Constitution). Under these conditions, the intervention of the President of the Republic is crucial in this decision. It has been

[24] Report respect for democracy, human rights and the rule of law during states of emergency: reflections; https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)018-e, § 64. For an analysis of the features of emergency legislation in Venice Commission member states see: Report on emergency powers, https://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(1995)012-e; Report respect for democracy, human rights and the rule of law during states of emergency: reflections; https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)018-e Interim Report on the measures taken in the EU member States as a result of the Covid-19 crisis and their impact on democracy, the Rule of Law and Fundamental Rights. In the EU legal order Art 122 TFEU enables the Council to bypass the European Parliament in certain emergencies. It allows the Council to use qualified majority voting to break a deadlock.

asserted that the direct election of the President confers legitimacy on legislation adopted under the procedure established in article 49.3.

28. Article 37 of the Constitution provides that the executive may regulate by decrees all matters that Article 34 does not explicitly enumerate as falling under the *domaine de la loi*. In other words, the executive may legislate without prior authorization by Parliament in all domains other than the ones which the Constitution places under the authority of Parliament, subject to potential challenges through the Constitutional Council but also of the scrutiny of Parliament, which is responsible for "controlling the action of the Government and evaluating public policies" (Article 24.1 of the Constitution). The French authorities stressed in this respect that in practice, the legislator has encroached more and more on the Government's regulatory domain, without the Constitutional Council objecting, whereas the opposite is severely sanctioned by the Council.

29. In the Westminster system the motion of confidence is an expression of the natural competition (sometimes conflict) between the executive and the legislature. The executive (the Cabinet) comes from and belongs to the legislature and, in order to be able to maintain its institutional independence and active role in dealing with the public agenda, it needs to have weapons to defend its positions, if not strictly similar at least comparable to those of the legislature. The legislature can pressure the cabinet with a threat to pass a vote of no-confidence when it finds it convenient. The Cabinet should be able to pressure it with the threat of a confidence vote that may lead to the dissolution of parliament, when for the legislature this may be inconvenient. This is not exactly the situation under the French Constitution. The legislature has the instrument of a motion of no-confidence according to article 49.1 and, if it is successful, the Prime Minister should present the resignation of the Government to the President (article 50). However, the legislature is not menaced by dissolution and the more powerful part of the executive (the president) stays. The Prime Minister can use this instrument only on a programme, a declaration of general policy (article 49.1) or on a vote of a finance or social security financing bill (or one more law per session) (article 49.3). In other words, this is hardly the weapon designed in the Westminster system and its main purpose is to facilitate the passing of some legislation which is faced with resistance or reluctance in the National Assembly.

30. The question arises if the use of Article 49.3 insofar as it allows passing a law without final parliamentary approval and, in some cases, without a real and thorough discussion of its contents violates the principles of pluralism, of separation of powers and of the sovereignty of the legislature.

31. The Venice Commission underlines at the outset that the description of Article 49.3 should be more accurately qualified: by triggering Article 49.3, government may bypass the vote *in the plenary* of only *one chamber* (the National Assembly).

32. In fact, pursuant to Article 43 of the Constitution, "*Government and Private Members' bills shall be referred to one of the standing committees, the number of which shall not exceed eight in each House*." Pursuant to Article 45, "*Every Government or Private Member's bill shall be considered successively in the two Houses of Parliament with a view to the passing of an identical text. Without prejudice to the application of articles 40 and 41, all amendments which have a link, even an indirect one, with the text that was tabled or transmitted, shall be admissible on first reading. If, as a result of a failure to agree by the two Houses, it has proved impossible to pass a Government or Private Member's bill after two readings by each House or, if the Government has decided to apply the accelerated procedure without the two Conferences of Presidents being jointly opposed, after a single reading of such bill by each House, the Prime Minister, or in the case of a Private Members' bill, the Presidents of the two Houses acting jointly, may convene a joint committee, composed of an equal number of members from each House, to propose a text on the provisions still under debate. The text drafted by the joint committee may be submitted by the Government to both Houses for approval. No amendment shall be admissible without the consent of the Government. If the joint committee fails to agree on a common text, or if the text*

is not passed as provided in the foregoing paragraph, the Government may, after a further reading by the National Assembly and by the Senate, ask the National Assembly to reach a final decision. In such an event, the National Assembly may reconsider either the text drafted by the joint committee, or the last text passed by itself, as modified, as the case may be, by any amendment(s) passed by the Senate." This means that any text is always examined and, in principle, has to be voted in a standing committee before it is sent to the Plenary for debate. Article 49.3, which freezes the text of the bill preventing any further discussion or amendment, may be activated at any moment *after* the opening of the debate in the plenary, not before, so it does not affect the discussions in the committee. It should be noted that it is more likely that the MPs will participate in the discussions and vote of a text in a standing committee than in the debate and voting in the plenary. Indeed, as the French representatives have argued, votes in the plenary, especially in favour of the government's budget or other financial measure, tend to be seen – and Plenary debates tend to be watched much more than committee sittings which are also broadcast - as in support of the executive, that is to say the President. This is a result of the electoral system (majoritarian with two rounds) coupled with the alignment of the duration of the mandates of the President and of parliament, with the presidential elections taking place before the parliamentary ones: the majority and the opposition are formed with reference to the support for or the opposition to the President, not around political programmes. The rapporteurs' interlocutors have argued that there is no culture of political coalition in France.

33. Further, Article 49.3 may be triggered by the Prime Minister in any phase of the parliamentary procedure, after the examination by a standing committee, not necessarily during the first debate before the National Assembly; the only requirement under the Constitution is for the Prime Minister to consult the Council of Ministers prior to declaring to resort to Article 49.3; the deliberation of the Council of Ministers does not relate to one specific phase of the parliamentary procedure, but covers the procedure as a whole. Article 49.3 thus may be activated for the first time during the second reading or during the debate of a text agreed by the Joint committee, or in during the reconsideration of a text in the final phases. Conversely, however, its activation in the initial phase will almost inevitably entail its subsequent activation in the following ones.[25] Each use of Article 49.3 will bypass only one of the votes of the Plenary in the National Assembly.

34. It follows that even when Article 49.3 has been invoked already in the first reading, the National Assembly has necessarily had the possibility to discuss and amend the text in a sitting of a standing committee; if it is invoked during the second reading only, it has had the possibility to discuss it in the previous phase of the procedure and has this possibility again in the sitting of the standing committee which precedes the new debates in the plenary.[26]

35. Moreover, while the government may submit a bill in the first place to either the National Assembly or the Senate (with the exception of Finance bills and Social Security Financing bills which must be submitted to the National Assembly first - see Articles 47 and 47.1 of the Constitution), every bill must necessarily be adopted by both chambers (Article 45.1 of the Constitution). Article 49.3 may only be invoked before the National Assembly, not before the Senate. The Senate has the power to discuss, amend, approve or reject the text when it receives it subsequent to the activation of Article 49.3. The relations between the executive and the Senate are very different: the President may dissolve the National Assembly but may not dissolve the Senate. The Prime Minister and the government are appointed and dismissed by the President and are therefore *de facto* responsible towards him or her. The government may be voted down by the National Assembly, not by the Senate.

[25] For example, the 100 cases in which Article 49.3 has been invoked by the current government have concerned 54 laws. The current Prime Minister has used Article 49.3 11 times in relation to 3 laws.
[26] The law on the pensions adopted in 2023 through three activations of Article 49.3 was subject to almost 9,000 amendments by the National Assembly.

36. Following the activation by the Prime Minister of Article 49.3, the bill is passed to the Senate for adoption without further discussion and without a vote. In this respect it should be noted that the Prime Minister therefore acquires control over the content of the law, to a larger extent than when s/he exercises delegated legislative power under Article 38 of the Constitution, because in the latter case the governmental ordinances need to be explicitly ratified by parliament within the time-limit set in the enabling act, failing which they lapse. The Prime Minister may block the further amendment of the text by the National Assembly. The Prime Minister, however, has no power over the amendment (or the reject) of the text by the Senate.

37. The activation of Article 49.3 therefore does not result in the obliteration but in a significant reduction of the parliament's control over the content of the law. Its rationale is to allow the Government to guide – if not control – on some crucial decisions the policy of the majority in power, overcoming party divisions in Parliament, whenever the executive (i.e. the President of the Republic and the Government, acting together) deems it necessary for the adoption of measures it considers important, even if such measures fall within the *domaine de la loi*. It is also a powerful tool against obstructionism.

38. To assess whether the necessary balance of powers between parliament and the executive is maintained, it remains to be seen to what extent its use by the executive is constrained, i.e. what safeguards exist against its excessive use and to prevent its abuse.

a) The motion of no-confidence

39. The Commission observes that the only way in which the National Assembly can regain power over the bill – but it is limited power, as it may reject the bill, not amend it - is to submit a motion of no confidence in the government within twenty-four hours, pursuant to the procedure established in Article 49.2 of the Constitution (the motion must be presented by one-tenth of the members of the National Assembly and must be voted by the absolute majority of the members of the National Assembly within forty-eight hours, with only positive votes counting). On the other hand, the French government underlines that the legislator may, by means of a subsequent bill, come back to the law that would have been adopted by means of Article 49.3. Opposition parties may also refer the matter to the Constitutional Council if they consider that procedural rules have been disregarded or that the provisions of the bill on which the Government's responsibility is engaged are contrary to the Constitution.

40. Motions of no-confidence presented at the initiative of the executive are common in comparative constitutionalism. In parliamentary systems they serve to confirm that the government has a sufficient majority to remain in power. Sometimes they are also used when the parliamentary majority supporting the government is in crisis. The vote of confidence in these cases is used to oblige members of parliament to make a decision and decide if they prefer to support the government or to face the consequences of the executive's dismissal. J. D. Huber, in an article published in 1996, distinguishes between different types of confidence motions.[27] According to this author, in some countries the Prime Minister must receive a formal vote of confidence at the time of government investiture.[28] Many countries also permit prime ministers to request a general vote of confidence in the government, without attaching a specific policy declaration to the vote. Furthermore, in other countries, "the confidence vote procedure is used after the formation of the government is complete and in the context of legislative debates on specific policy issues or specific aspects of the government's programme". This is the case of eighteen democratic systems analysed by Huber.[29] Because of the time constraints, the Venice Commission has not had the opportunity to carry out an extensive comparative analysis of the

[27] John D. Huber, "The vote of Confidence in Parliamentary Democracies, The American Political Science Review, Jun. 1996, Vol 9', no 2 (Jun., 1996) p. 271, https://www.jstor.org/stable/2082884.
[28] Belgium, Greece, Ireland, Israel, Italy, Portugal, Spain, Sweden, and Switzerland.
[29] Austria, Belgium, Canada, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Luxembourg, Netherlands, New Zeeland, Norway, Portugal, Spain, Sweden, United Kingdom.

relevant constitutional and legislative provisions on this matter, but it considers that it would provide added value to do so.

41. However, in a seemingly unparalleled manner in comparison with other European countries, Article 49.3 does not provide for the possibility for the Prime Minister to request the confidence of the National Assembly in order to incite the approval of the law. Instead, it reverses the burden of the initiative, by providing that the members of the National Assembly must submit a motion of no confidence, and this motion must be approved by an absolute majority within 48 hours, in order to reject the bill. If the motion is voted, the government falls. If no motion is presented or if it does not reach the absolute majority, the bill is considered approved without the vote of the National Assembly. [30]

42. In Italy, the "question of confidence" (*questione di fiducia*), (to be distinguished from the "motion of no-confidence" regulated by Article 94 of the Italian Constitution) has developed in the praxis without an explicit constitutional basis and has later been regulated by the parliamentary regulations and by law n. 400 of 1988. It is a decision of the Council of Ministers to consider that the vote on a governmental draft law or on a governmental amendment is to be interpreted as a vote on the confidence in the Government: if the draft law or the amendment is approved, the Government stays in office; if not, the Prime Minister has to resign. The "question of confidence", which is often used by the Government to force the parliament to approve a bill, entails three main procedural effects: first, the application of the roll-call vote, as in all the other confidence procedures; second, the chronological priority of the bill; third, most important, the non-emendability and indivisibility of the text on which the Government has posed the question of confidence. However, even when the question of confidence is raised, a vote in the parliament is anyway necessary to have the bill approved.

43. The Venice Commission is of the view that Article 49.3 in this respect calls for several considerations: first, in the motion of no-confidence the National Assembly does not vote for or against the law in question, but for or against the staying in office of the government. Second, "[I]t is not the same thing for members of parliament to oppose a bill and to topple the Government, with all the potential consequences (including early legislative elections)".[31] The motion of no-confidence comes at a very high cost: it might bring down the government, which is not what members of parliament – especially those who otherwise support the government as members of the coalition – may wish to do. It also entails the risk of dissolution of the parliament itself by the President of the Republic. In France, only one motion has been passed since 1958, and it was not a result of Article 49.3, whereas the procedure was activated more than 100 times. The adoption of a motion of no-confidence in March 2023 was short of 9 votes, one in 1991 was short of 5 votes and one in 1986 was also short of 5 votes. According to the French government, these figures show that a vote of no-confidence is "neither impossible, nor unlikely".

44. In addition and in particular, the Venice Commission finds that removing the final vote of one chamber of parliament for the adoption of a statute represents a significant interference by the executive in the powers and role of the legislature, is seemingly unique in European comparative experience and is problematic. While acknowledging the necessity for the government to dispose of effective tools to carry out its programme, including in case of a minority government, by uniting the parliamentary majority and countering filibustering and boycott, the Commission is not

[30] The Venice Commission, in the limited time at its disposal for the preparation of this opinion, has not had the possibility of carrying out an extensive comparative analysis of the features of motions of no-confidence in its member states. Article 49.3 does not appear prima facie to have strict equivalents in Venice Commmission member states. A similar provision of the Spanish Organic Law on the General Electoral System (Article 197.bis.5) regulates the motion of confidence at municipal level: mayors can link the question of confidence to the approval or modification of annual budgets; in such a case confidence will be granted and the project will be understood to be approved if a motion of no-confidence with an alternative candidate for mayor is not approved within a month.

[31] *Bottini*, Constitutional? Perhaps. Democratic? Not so much: On the French Government's Maneuver to Pass the Law on Retirement, VerfBlog 2023/3/27.

persuaded that it would not be possible for the government to achieve the same goals by linking the question of confidence to the positive vote of the National Assembly, thereby preserving the formal requirement of adoption of the law by both chambers.

b) The material limitations

45. The Commission observes that since 2008 the Constitution contains a limitation of the subject matters in which Article 49.3 may be used to financial matters, including financing social security. It may be argued in this respect that the sphere of public finances is particularly complicated and specialized, and the executive expertise is more sophisticated; furthermore, the specialised members of the relevant standing committee do discuss the bill. The French authorities also argued that, as explained above, while it is true that the decisions of finance and use of taxpayers' money should belong to the representative body, such decisions are crucial for the implementation of the President's programme and therefore voting in their favour amounts, in the French system, to express support for the President. Several MPs would be ready to, and indeed do vote for parts of the budgetary laws in the standing committees, but finally abstain in the plenary vote. The Prime Minister, by invoking Article 49.3, avoids that MPs who support the budget and have negotiated it in the committee, feel subsequently obliged to reject it for partisan reasons.

46. In the Commission's view, the limitation of Article 49.3 to these subject matters may be understandable, subject to the considerations below on the time of triggering it. It notes, however, that Article 49.3 may be triggered also "for one other Government or Private Members' bill per session". This clause gives the Prime Minister the discretion to use it in relation to any kind of law (even though there is a doctrinal discussion as to whether it can be invoked also for organic laws or constitutional amendments, which has however never occurred in practice), on any topic. Furthermore, the limitation to one time *per session* does not exclude extraordinary sessions, which may be convened by the Prime Minister to debate a specific agenda (Article 29 of the Constitution). This means that in theory the Prime Minister may convene an extraordinary session of parliament to use 49.3 if s/he has already exhausted the constitutional possibilities to use it during the ordinary parliamentary session. The former president of the Conseil constitutionnel *Robert Badinter* said in 2019 that Article 49.3 was "*indispensable for finance and budgetary matters. For the rest it has to disappear*." The Venice Commission agrees that this clause is excessively broad.

c) The moment of activation

47. The Commission further notes that the Constitution does not limit the moment of activation of Article 49.3: as confirmed by the Constitutional Council,[32] the Prime Minister, once s/he has consulted the cabinet, may invoke the procedure of Article 49.3 at any moment after the opening of the debate in the plenary of the National Assembly; from this moment, the discussion is terminated, that phase of the procedure is terminated, the text of the bill is frozen and the bill is passed to the Senate. Even if there has necessarily been a discussion in the standing committee, the members of the National Assembly are thus deprived of the possibility to continue to debate; this may notably affect the opportunity for the members of the opposition to present their arguments. The Commission was informed that in practice the Prime Minister triggers Article 49.3 only after the general discussion at which all political groups present their statements: this is welcome, but is nevertheless not an obligation, which in the Venice Commission's opinion it should be.

d) The control by the Constitutional Council

[32] Decision No. 2015/715, https://www.conseil-constitutionnel.fr/decision/2015/2015715DC.htm.

48. Respect for Article 49.3 is subject to control by the Constitutional Council, which has limited jurisdiction on the question of whether the formal conditions were respected. The Constitutional Council has established that the use of Article 49.3 is not subject to any further conditions than those set out in that article. As for the need for "deliberations by the Council of Ministers", the Council has considered that the press release issued by the Secretary General of the government after the Council of Ministers' meeting is sufficient, as the constitution requires the mere consultation, and not also the authorisation of the cabinet. The Constitutional Council has also held that Article 49.3 may be triggered at any time after the opening of the sitting in the plenary. It appears all in all that, even though it has used the constitutional requirements of "clarity and sincerity of the parliamentary debate",[33] the Constitutional Council has been examining only the strictly procedural requirements of the activation of Article 49.3, which limits the guarantee of supremacy of the legislature,

e) The combination of the "guillotine" and Article 49.3

49. Article 47 provides for an expedited procedure of adoption of Finances bills by the National Assembly (40 days from the tabling of the bill by the government) and by the Senate (15 days); parliament then disposes of a term of 70 days for approving the bill, failing which the government is empowered to pass it through an ordinance. Under Article 47.1, the terms for the adoption of Social Security Financing bills are even shorter (20 days for the National Assembly, 15 days for the Senate, 50 for the final adoption). There is no rule preventing the combination of these guillotines with Article 49.3, as the Constitutional Council has recently held. Yet, such combination risks imposing an even heavier limitation the parliamentary debates, which may appear disproportionate, if the executive is free to characterize any bill as falling under these two constitutional provisions. The control of the Constitutional Council of the "clarity and sincerity" of the parliamentary debates, however, may represent a guarantee against excess.

IV. Conclusion

50. Before reaching its conclusions on this matter, the Commission resolves to carry out a comparative analysis of the manner in which motions of no confidence and other means by which the Executive may intervene in the legislative powers of parliaments are regulated in the constitutions and legislations of its member States.

51. The Venice Commission remains at the disposal of the French authorities and the Parliamentary Assembly for further assistance in this matter.

[33] The Constitutional Council has drawn these requirements from Article 6 of the Declaration of the Rights of Man and of the Citizen of 1789 ("The law is the expression of the general will") and the first paragraph of article 3 of the Constitution ("National sovereignty belongs to the people, who exercise it through their representatives").