

Constitutional? Perhaps. Democratic? Not so much

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2023-03-27T18:12:27

On the morning of Thursday 16 March, French President Emmanuel Macron met with his Prime Minister Elisabeth Borne and the other members of the cabinet in an emergency government meeting about the ongoing reform of retirement, which, amongst many other provisions, raises the minimum retirement age from 62 to 64. This provision has been met with fierce opposition by the [unions](#), the political opposition in Parliament and a [large part of the population](#). After a procedure of conciliation by a Joint Parliamentary Committee composed of 7 senators and 7 deputies, which was reunited Wednesday to agree on a common version of the bill, the two heads of the executive power have counted their votes. If the Senate has adopted the text without much surprise and a comfortable majority (193 yes and 114 no) on Thursday morning, the National Assembly presented more of a risk. The Government, which initiated the bill at the behest of President Macron, could only count on a tiny majority of a few votes in favor of the text, which seemed not to be enough to take the risk of a rebuke. Instead, the President decided together with the Prime Minister to activate [article 49 paragraph 3](#) of the French Constitution, allowing the Government to engage its responsibility in front of the lower chamber of Parliament on the vote of the bill. With this procedure, on the Prime Minister's request, all debates are interrupted for 24 hours. Once this delay has passed, either the opposition manages to adopt a motion of no-confidence, and the Government must resign (which also means the bill is abandoned), or the bill is "[considered as adopted](#)" without a vote by the National Assembly. In this case, the result is that the bill has passed as such, because the compromise text cannot be further amended unless the Government accepts it (as per [article 45 paragraph 3](#) of the Constitution).

After Borne's activation of "the 49.3" on Thursday afternoon, different parties have started organizing their no-confidence motions, including one across party lines, filed by a [centrist deputy](#). It has been the most popular motion out of the two, supported by 278 members, 9 votes short of what would have been needed for it to pass with an absolute majority. Other than the closeness of this vote, the most notable figure is the one third of the Republican parliamentary group, a center-right political party that is supposed to be in a [coalition with the government's majority](#), who also voted in favor of the motion (19 deputies out of 61).

A tricky combination

Article 49 paragraph 3 has existed in the French Constitution since its adoption in 1958. Charles De Gaulle had wanted it in the text to avoid the kind of parliamentary blockage he had witnessed during the previous regimes of the 3rd and 4th Republics.¹⁾ The provision is meant to force the adoption of a legislative text

initiated by the Government unless the opposition to it becomes an opposition to the Government itself. Until now, the article has worked in favor of governments: out of the 100 times it has been used in 65 years, every single time the motions of no-confidence, which have been systematically filed 24 hours later, have failed to be adopted by an absolute majority of the members of the National Assembly. This is due in part to the constitutional mechanism for the vote of those motions: only if the absolute majority of the 577 members of the National Assembly approves the motion, the resignation of government by the Prime Minister will ensue. This means that absents and abstentions are counted as votes in favor of the Government.

This does not mean, like in Germany or Spain, that the oppositions must agree on an alternative majority to govern: France does not have the same constructive vote of no-confidence as those two European countries. Still, the adoption of a motion of no-confidence is not more frequent in France, rather the opposite: only once since 1958 such a motion has passed, and never as a result of article 49 paragraph 3. In 1962, De Gaulle as President had organized a referendum to change the electoral system for his own election, from an indirect vote to a direct suffrage of the people: a change of the Constitution that avoided the proper procedure for constitutional amendments. Members of both the National Assembly and the Senate were largely opposed to this initiative, mostly because they had not been included in the procedure. Because of the impossibility to sanction the President himself (who is politically irresponsible according to article 67 of the Constitution), a majority of members of the National Assembly passed a motion of no-confidence and forced the Government to resign; as a response, De Gaulle dissolved the lower house and new elections were held. After a comfortable victory of the President's supporters, who gained 269 seats out of 482 in the renewed National Assembly, the constitutional amendment that initiated the crisis was considered democratically approved by the people, and that was that for no-confidence motions for the rest of the 5th Republic.

Since then, article 49 paragraph 3 has been used and also abused by governments in lack of majority. Socialist Prime Minister Michel Rocard used it [28 times](#) between 1988 and 1991. To avoid such misuses, the constitutional reform of 2008 reduced the number and type of bills that can be subjected to such an executive passage en force: only financial laws (including the social security budget) and one other bill chosen by the government can pass through this mechanism every year. Elisabeth Borne's Government has already used article 49 paragraph 3 ten times in the fall 2022 to pass the state budget. This more recent use relies on another article of the Constitution: Government decided to insert the pension reform in the [bill](#) rectifying the 2022 social security budget. The result is that the parliamentary debate falls into the scope of article 47-1 of the Constitution, stating that the National Assembly has 20 days and the Senate 15 days maximum to examine the bill. If the overall discussion exceeds 50 days, the Government has the right to pass the same measures through executive orders, bypassing Parliament altogether. Such strict timeframes are typical of financial laws as they are meant to ensure that both the State budget and the budget of social security are approved in time for the beginning of the fiscal year. The use of this article for this controversial reform had been criticized already as being [potentially unconstitutional](#).²⁾ Combining it with article 49 paragraph 3 is unprecedented and calls for a real reflection on the constitutionality

of the entire operation. This assessment is now in the hands of the Constitutional Council, the closest France has to a constitutional court. The Council is known as being generally [deferential](#) towards the executive power, being composed not by judges but by [former politicians](#) appointed by the three highest functions of the Republic (President of the Republic, President of the Senate, President of the National Assembly).

Democratically flawed?

The use by the executive of an article or two of the Constitution, as well as the combination thereof, is deemed constitutional until a competent organ says otherwise. And the only one who could, the Constitutional Council, will probably not say otherwise. But even if something is constitutional, that does not make it democratic.

A look into the justifications for this procedure given by the head of State and the head of Government stirs reflection on the relationship between the constitutional and democratic character of the proceedings described above.

The executive power justified the use of article 49 paragraph 3 with two main arguments.

First, as President Macron announced, a vote on the reform of retirement was in fact going to happen on Monday, it can therefore not be said that the bill would pass without a vote. Second, the Prime Minister affirmed she could not risk the compromise bill to be put aside by the lack of a majority in favor of the reform.

For both arguments, a democratic counterpoint can be raised: the vote on Monday was not on the reform but on the survival of the Government, and it 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). Also, arguably, to find a compromise on a bill and then to undertake the risk of Parliament rejecting it, can be easily described as the essence of parliamentary democracy. Such a system requires an appetite for political compromise that the institutions of the French 5th Republic do not seem to have. This hybrid regime, parliamentary with presidential features such as an elected head of State, has rarely seen minority governments. Today's political situation combines a president elected by an absolute majority of the people (with all the limits of the 2022 election, marked by the rejection of the far-right candidate Marine Le Pen rather than an actual approval of Emmanuel Macron) and a relative majority of seats in Parliament for his political party.

The French Constitution includes mechanisms to overcome this difficult situation. That does not mean that following it to the letter by using all its possibilities together corresponds to all and every definition of democracy.

Constitutionalism and democracy have a complex [relationship](#) and the two concepts do not always imply one another. Examples of constitutional populism and illiberalism in Europe have largely [shown](#) that following (or using) the constitution is

not a guarantee of democratic behavior. Constitutions have been instrumentalized, distorted or changed to please political leaders in the pursuit of their policy. The current crisis in France might not have yet resorted to this level of democratic backsliding (even if the increasingly violent police reaction to street protests is [worrisome](#)), but to conclude that all constitutional action is automatically one that fulfills the democratic promise is inaccurate. Especially within the current [crisis](#) of representative democracy, undermining the people's representation in Parliament by forcing their hand while [referring](#) to the people in the streets as a "mob" might not be the best way of solving the political situation.

References

- In fact, the idea of a confidence question on the vote of a bill appeared towards the end of the 4th Republic, but it was never adopted, and resurfaced during the constituent debate of the 5th Republic when it was approved by De Gaulle and his legal advisor Michel Debré: see Silvano Aromatario, "La genèse du 49 al. 3", *Revue générale du droit* on line, 2019, n° 43719 (www.revuegeneraledudroit.eu/?p=43719).
- Also, the use of a financial law to pass a political reform such as the one on retirement renders the recent announcement of the Prime Minister to only use the "49.3" for financial law potentially a potentially moot point: <https://www.tf1info.fr/politique/video-la-premiere-ministre-elisabeth-borne-ne-recourra-plus-au-49-3-en-dehors-des-textes-budgetaires-2252166.html>.

