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**THE ELUSIVE QUEST OF THE DEMOCRACY OF COMPROMISE. NOTE ON  
THE VENICE COMMISSION'S INTERIM OPINION ON ARTICLE 49.3 OF THE  
FRENCH CONSTITUTION**

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Between March and April 2023, France witnessed a surge of protests concerning the proposed changes to the pension system. These protests were not limited to social unrest in the streets; they also involved a significant and highly legal aspect, and led to a considerable number of press articles, authored by jurists (and not only constitutional legal scholars), in major national or local newspapers. Most of these articles primarily questioned the legal instrument that the government had chosen to use to implement its reform, namely a social security funding bill rather than an ordinary bill. These press articles also sought to convince the Constitutional Council to carry out a detailed prior examination of the law after it was voted on, following the announcement by parliamentary opposition that they would subject it to scrutiny.

As debates progressed in the National Assembly, it became clear that the government aimed to speed up the process and surpass opposition from obstructive parliamentary factions. The widespread anticipation was that the government would resort to the procedure of Article 49.3 of the Constitution, along with other simplified parliamentary methods outlined in the same constitution, to advance its agenda.

However, there was an unexpected turn when the President of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested the opinion of the Venice Commission regarding Article 49 of the French Constitution. This request, made on April 28, 2023, was part of the regular reviews conducted by the Parliamentary Assembly to ensure member states' compliance with their obligations upon joining the Council of Europe. The opinion of the Venice Commission adopted during the session on 9-10 June 2023 is all the more nuanced and cautious as it is an "interim" opinion, with the commission conditioning its conclusion on "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".

The absence of a definitive conclusion, however, does not prevent one from forming a fairly clear idea of the Commission's general opinion, as indicated by the formulation of the initial question which is whether "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" (§30).

The interpretation that the commission gives to Article 49.3 also leads it to immediately reformulate its description: "by triggering Article 49.3, government may bypass the vote *in the plenary* of only *one chamber* (the National Assembly)." (§31).

We are at the heart of the issue raised by Article 49.3, about which the commission states that:

- a) Its scope is too broad;
- b) It can be combined with other instruments, including the "guillotine" of Article 47.1;

c) It can be viewed as “freestanding law-making power in the hands of the executive” and also “represents a significant interference by the executive in the powers and role of the legislature”;

d) It bypasses the vote in plenary session;

e) It prevents voting confidence on a text;

f) It freezes the text of the bill preventing any further discussion;

g) It leaves no other option for parliamentary opposition than to vote for a motion of no confidence against the government;

h) Its use is subject to strict procedural control by the Constitutional Council with respect to the principle of clarity and sincerity of parliamentary debates.

If there is a conclusion, it is found in §44 when the Commission writes that it “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.”

In a way, the Commission appears to be uncovering the rationalization of French parliamentarism, which is indeed the result of a regime whose “nature” has been controversial since its inception: parliamentary, presidential, semi-presidential. In reality, the classification of this regime is secondary, especially since the classification of regimes itself lends to multiple interpretations<sup>1</sup>.

First and foremost, I must say that I broadly agree with the Commission. I will proceed in three points. Firstly, I would like to examine the Commission’s proposal that we could achieve the same outcome with a vote of confidence on the text itself, and for that, I will emphasize

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<sup>1</sup> R. Moulin, *Le présidentielisme et la classification des régimes politiques*, Paris, LGDJ, 1978, *passim*.

the constitutional context of the famous Article 49.3. Secondly, I will examine the proposal made by the Commission that the Constitutional Council conducts a substantive review of the uses of Article 49.3 in light of the principles of clarity and sincerity in debates. Finally, I will share some reflections on the democratic nature of Article 49.3.

### ***1. The rationalization of French parliamentarism***

This rationalization is neither new nor unknown. Its historical and conceptual origins are well established: the aim was to put an end to the domination of Parliament that the Third and Fourth Republics had experienced. Therefore, it is useful to put Article 49.3 in its context, that of Title V of the Constitution which organizes the relationship between the Government and Parliament.

On one hand, in addition to Article 49.3, the Government has numerous tools against Parliament, including: Article 44.3 allows the Government to request a vote on all or part of the text by only retaining the amendments it proposes or accepts; the Government also has the power to oppose amendments proposed by parliamentarians, either because they encroach upon regulatory matters (Art. 41) or because they would have the effect of reducing public resources or creating or aggravating a public burden (Art. 40). Furthermore, the Government has the power to decide the time allotted for the examination of a legislative text, either by requesting the application of the "accelerated procedure" – where each chamber conducts only one reading of the text – or by setting a maximum duration for the examination of the entire text (Art. 47 and 47-1), and the power to set the agenda of the assemblies (Art. 48).

On the other hand, the repeated use of Article 49.3 has long been denounced by legal doctrine, whether French or foreign, as this article has over time become a means to cut

short parliamentary debate even when the government has a comfortable majority. Since 1981, only one government has never used this article (Jospin, 1997-2002). The restriction introduced by the constitutional amendment of Article 49.3 in 2008 reflects that its use had come to be seen as abusive by the parliamentarians themselves. The new wording indeed distinguishes between budget and social security financing bills, for which the use is unlimited, and ordinary bills or proposals, for which the government is only entitled to one use per parliamentary session. The middle ground of this latter concession is generally considered unsatisfactory and perhaps betrays a lingering mistrust of parliamentary discussion. This restriction introduced in 2008 explains why the government headed by Élisabeth Borne as Prime Minister was forced to include its pension reform in a social security financing law, which was also criticized by both parliamentary opposition and several legal experts.

The paradox is that experience has shown – and still shows – that a vote of no confidence against the government remains very rare, if not impossible, given what is named the “majority fact.” Some have even referred to it as an “instrument of communication”<sup>2</sup> or a “derisory ritual”<sup>3</sup>. Certainly, the current government only having a relative majority (245 deputies whereas the absolute majority is 289), it is more exposed to it. But since a vote of no confidence against the government can lead, in return, to the dissolution of the National Assembly by the President of the Republic, every deputy is well aware of the potential cost of such a vote.

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<sup>2</sup> B. François, “Un parlementarisme ‘rationalisé’”, *Le régime politique de la Ve République*, Paris, La Découverte, 2011, p. 29-62, p. 41.

<sup>3</sup> P. Avril, “Le Conseil constitutionnel est-il toujours le bras armé du Gouvernement dans le parlementarisme rationalisé ?”, *Les Nouveaux Cahiers du Conseil constitutionnel*, vol. 50, n°1, 2016, p. 39-49, p. 47.

Furthermore, the President's ability to use dissolution as a response to parliamentary censure is strengthened by the fact that he was elected by direct universal suffrage and that it is clearly accepted that the government, although accountable to Parliament, is subordinate to it. This was reflected in the resignation letter that Élisabeth Borne addressed to Emmanuel Macron on January 8, 2024: "You informed me of your desire to appoint a new Prime Minister" (...) "As I must submit the resignation of my government, I wanted to tell you how passionate I have been about this mission...". Some might think that the letter of Article 8 of the Constitution, which states that "the President of the Republic appoints the Prime Minister," "he terminates his functions upon the presentation by the latter of the resignation of the government," gives the Prime Minister decision-making freedom, but this would not only be believing in a literal interpretation of legal provisions but also attributing to the text a binding force that it obviously does not possess.

While it is true that by losing the power to engage the government's responsibility on any bill at any time, the Prime Minister has been deprived of an important prerogative, the government is far from paralyzed as it has numerous instruments at its disposal. Furthermore, thanks to Article 37 of the Constitution which grants it broad regulatory powers – with its scope defined residually in relation to Article 34 which delineates the domain of law – the government has a great capacity for action outside the legislative realm. Additionally, considering the ongoing denunciation of legislative inflation and the poor drafting of texts that accompanies it, one could hope that this situation of fragile majority encourages virtuous behavior, including not succumbing to the temptation of using the law to address alleged urgent social demands. These demands are often merely the result of

collective but fleeting emotions, and sometimes nothing more than allegations by a government making a more symbolic than legal use of legislation (and thus of law)<sup>4</sup>.

However, the broader framework of which it is a part is similarly unique. This framework reflects the clear original distrust of the founding fathers, if not toward parliamentarism in general, then at least toward pre-1958 parliamentarism. One could argue that the historical reasons for this (very) strong rationalization are no longer relevant and that an adaptation of the Constitution is now necessary. Recently, deputies have proposed a constitutional bill aiming to “reparliamentarize” the system by imposing on the Prime Minister the obligation to engage the Government’s responsibility on its program (Article 49.1) as in the United Kingdom or Germany and by removing Article 49.3<sup>5</sup>.

The Venice Commission’s proposal is more modest, merely considering a vote of confidence on the text. Taken individually and in the abstract, these mechanisms would contribute to rebalancing the forces in favor of Parliament. Nonetheless, one must also reason concretely and consider various other parameters, among which is the fact that such a revision requires the current majority to vote for a weakening of the powers of a Government that it has decided to endorse – yet, we know how difficult it is for the incumbent power to vote against its own prerogatives or for a reduction thereof. Additionally, since 1958, the effects of rationalization on the culture of parliamentary debate, the weight of the President’s election by direct universal suffrage, the adopted mode of voting for legislative elections, and the constant strength of the argument drawn from the failure – real or presumed – of past experiences must be taken into account. Not to mention

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<sup>4</sup> M. Garcia Villegas, “Efficacité symbolique et pouvoir social du droit”, *Revue interdisciplinaire d’études juridiques*, vol. 1, n°34, 1995, p. 155-179 ; M. García Villegas, *La Eficacia Simbólica del Derecho. Examen de situaciones colombianas*, Bogota, Uniandes, 1994.

<sup>5</sup> Constitutional Bill from MP’s, Recorded at the Presidency of the National Assembly on March 9, 2023.

the symbolic advantages that parliamentary opposition gains from even repeated uses of Article 49.3, which serve as opportunities to denounce the “brutality of the Government against the national representation.”<sup>6</sup>

## **2. The Conseil constitutionnel on 49.3, clarity and sincerity**

Undoubtedly, originally intended to maintain the divide between the legislative and regulatory realms, the Constitutional Council has crafted legal precedents indicating a significant shift towards broadening the legislative scope on this matter.

On the other hand, concerning the relationship between the Government and Parliament (Title V of the Constitution), the Constitutional Council has consistently upheld the government’s prerogatives. It would be too lengthy to list all the relevant decisions, but let’s highlight the key points<sup>7</sup>. Since 1959, it has rejected parliamentary resolutions on the grounds that they might lead to questioning the government’s responsibility outside the explicitly defined cases in the Constitution (Articles 49 and 50). In 1992, it ruled that resolutions, authorized by a constitutional law of June 25, 1992 (Article 88-4) regarding European policy, should be considered mere opinions and cannot be used to question the government’s responsibility. It also limited Parliament’s power to oversee government action as outlined in Article 24, which introduced the possibility of “evaluating public policies” by Parliament. However, the Constitutional Council held that while oversight of government action could lead to questioning under Article 49, evaluations of public policies cannot lead to a debate that might question the government’s responsibility.

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<sup>6</sup> Constitutional Bill from MP’s, Recorded at the Presidency of the National Assembly on March 9, 2023, p. 4 : “As a matter of fact, Article 49, paragraph 3, will consistently be viewed as a resort to brutality against national representation, representing a form of disdain towards the French populace. This perception persists and fuels doubt among our citizens regarding the actual authority of their elected representatives.”

<sup>7</sup> P. Avril, “Le Conseil constitutionnel est-il toujours le bras armé du Gouvernement dans le parlementarisme rationalisé?”, *Les Nouveaux Cahiers du Conseil constitutionnel*, vol. 50, n°1, 2016, p. 39-49.

Regarding the various prerogatives of the government allowing it to control parliamentary deliberation and, if necessary, neutralize it, the Constitutional Council has naturally adopted a rationalizing interpretation in line with the spirit of the 1958 constitutional framers. Thus, in 2006 as well as in 2023, it ruled that all the prerogatives granted to the government by the Constitution in the legislative procedure (such as putting its responsibility before the National Assembly, using the “vote bloqué” mechanism, accelerating procedures, giving the final say to the National Assembly, etc.) can be used cumulatively to facilitate the adoption of a bill<sup>8</sup>. Therefore, a bill can be considered adopted by Parliament even if the National Assembly has never debated it and the Senate has rejected it<sup>9</sup>. The only caveat expressed by the Constitutional Council in 2023 was noting that “the combined use of the procedures implemented had an unusual character, in response to the debate conditions,” but, it concluded, “this did not render the legislative procedure unconstitutional.”

Some had hoped that the Constitutional Council would invoke the respect for the “requirements of clarity and sincerity of parliamentary debates” that it claims to monitor since 2005<sup>10</sup>, drawing 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”). The Venice Commission itself would like to see it exercise more substantial oversight in the future.

There is serious doubt about whether it will ever be taken into account. On one hand, these “requirements” have never to date been used to restrict the prerogatives enjoyed by

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<sup>8</sup> Cons. const., 30 mars 2006, n° 2006-535 DC, cons. 9 et 14 avril 2023, n° 2023-849 DC, cons. 69.

<sup>9</sup> P. Brunet, F. Hamon et M. Troper, *Droit constitutionnel*, La Défense, Lextenso, 2024, §759, p. 767.

<sup>10</sup> This was notably the case with the numerous contributions from constitutional law experts in national and regional newspapers, for which an exhaustive list cannot be provided.

the Government in the legislative procedure. Their scope is very limited: they primarily serve to regulate parliamentarians' right to amend, including the deadlines for submitting amendments or the speaking time allotted to these parliamentarians, which, unlike that of the government, can be limited<sup>11</sup>.

On the other hand, one must consider the perception of the balance of powers established by the revised 1958 Constitution, profoundly altered in 1962 by the direct election of the President. Jurists often justify this election based on the powers vested in the President: it is because he is powerful that he is elected, not the other way around. However, this justification has its limits rooted in the presupposition that the Constitution's text determines institutional practices. Yet, what we see every day is the opposite: the text of the Constitution is actually used to justify institutional practices; it does not dictate them. Consequently, this election significantly contributes to increasing the President's power to the extent that he himself justifies all his actions by this election and does not hesitate to assume the role of the entire Government.

Under these circumstances, challenging the government's prerogatives in its political relationship with Parliament would not only weaken the rationalization of parliamentarism but also diminish the role of the President, as well understood by the Venice Commission, who acts through the government. Furthermore, it doesn't matter that the text of the Constitution states that it is the government that "determines and conducts the nation's policy" and that the Prime Minister "directs its action." It also doesn't matter that this same involvement of the President in governmental action effectively nullifies the role of arbiter

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<sup>11</sup> Cons. const., Décision n° 2005-512 DC du 21 avril 2005, cons. 4 ; Décision n° 2005-526 DC du 13 octobre 2005, cons. 5 ; Décision n° 2006-537 DC du 22 juin 2006, cons. 10 ; Décision n° 2010-607 DC du 10 juin 2010, cons. 2 à 6 ; Décision n° 2014-703 DC du 19 novembre 2014, cons. 6 ; Décision n° 2018-775 DC du 10 décembre 2018, cons. 4 et 9 ; Décision n° 2021-820 DC du 1<sup>er</sup> juillet 2021, cons. 26 ; Décision n° 2023-854 DC du 28 juillet 2023, cons. 11.

and guarantor of institutions attributed to him by the Constitution (Article 5), which is sometimes used to justify his direct election by universal suffrage.

Finally, one must also consider the “interpretative ideology” that translates into the style of reasoning adopted by the Constitutional Council. The Council only relies on textual arguments and strives to eliminate any form of justification that is not explicitly and strictly “legal” (based on a naively “positivist” representation of law, which is in reality purely textualist) – to the extent that its decisions are often deemed incomprehensible since they merely consist of citations from constitutional and legislative texts, as if these texts had a literal meaning and spoke for themselves.

This writing style is regularly criticized by French jurists and often mocked by foreign jurists. It may be explained by the highly political composition of the Constitutional Council: sticking to the supposedly literal sense of the text means disappearing behind it, avoiding any risk of being caught in the act of making political or axiological choices. The choice of this interpretive ideology is obviously itself highly political. And this ideology sometimes gives way to necessity as was the case in the “Covid case” (2020), when the Constitutional Council, referring to the “particular circumstances of the case”, agreed to rule that an organic law was in accordance with the Constitution while the law had been enacted in blatant violation of the letter of the Constitution<sup>12</sup>. That choice has the merit of remaining invisible because it is upstream of the legal decision rendered. And it is always this ideology that raises doubts about whether the Constitutional Council could ever change the nature of the control it exercises over the government’s prerogatives.

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<sup>12</sup> Cons. const., Décision n° 2020-799 DC, 26 mars 2020 (Loi organique d’urgence pour faire face à l’épidémie de covid-19). See P. Brunet, “La confusion des circonstances. Sur le Conseil constitutionnel et l’urgence sanitaire”, *AOC*, May 13, 2020, <https://aoc.media/analyse/2020/05/12/la-confusion-des-circonstances-sur-le-conseilconstitutionnel-et-lurgence-sanitaire/>

Furthermore, there's a democratic concern at play here: given the asymmetry of Title V in the 1958 Constitution, should the Constitutional Council address this issue? If so, what justification would they have? Can we argue that the "clarity and sincerity of debates" carry enough weight on their own to warrant neutralizing Article 49.3 or at least preventing its combination with other rationalization mechanisms? Wouldn't this effectively be a constitutional revision led by judges rather than through the democratic process?

Two arguments are conceivable. The first argument in favor of an active intervention by the Constitutional Council is to attribute to the Constitution a purpose – a spirit – that justifies in advance a modification of its literal interpretation by the judge. This is how one could invoke a "critical function"<sup>13</sup> of the Constitution, which would impose limits on power to prevent it from ever slipping into arbitrariness. However, the argument presupposes what it seeks to demonstrate, namely that the combined use of articles of the Constitution is arbitrary, excessive, in a word unjust, and should therefore be prohibited, even if this prohibition is not expressly stated in the text of the Constitution.

Along the same lines, a second argument could also invoke a gap: the text of the Constitution may have failed to introduce a limit on the accumulation of mechanisms rationalizing parliamentarism, a gap that the constitutional judge would have the duty to fill in order to conform to the nature of things or to the requirements of clarity and sincerity in parliamentary debate. This argument could be based on a statement by Michel Debré, then Minister of Justice, during the preparatory work for the Constitution, responding to

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<sup>13</sup> L. Fontaine, "Bilan et réflexions sur une éthique de la justice constitutionnelle à la lumière de ce qu'en font et de ce qu'en disent ses acteurs. Que doit-on attendre d'une réforme – nécessaire – du conseil constitutionnel?", in E. Lemaire et T. Perroud (eds.), *Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence*, Bayonne, Institut francophone pour la justice et la démocratie, 2022, p. 151-197; L. Fontaine, "Activer la fonction critique de la Constitution", *AOC*, June 16, 2023 Available: <https://aoc.media/analyse/2023/06/15/activer-la-fonction-critique-de-la-constitution/> [Accessed 22/01/2024].

objections from Paul Reynaud regarding Article 49.3, where he acknowledged “that the repeated application of this paragraph 3 every month and for several years would not only destroy the system but also governmental authority.”<sup>14</sup> However, this would be an axiological gap, the existence of which would depend solely on the interpreter of the Constitution.

On the other hand, can one argue that a constitutional court claiming to act in the name of the rule of law can deem the cumulative use of all instruments rationalizing parliamentarism as not excessive?

Here again, two arguments can be put forward.

The first argument is based on the assertion that what is not prohibited is permitted – and this is likely how the Constitutional Council reasoned in 2006 and 2023: with no norm expressly prohibiting the cumulative use of rationalization mechanisms, it believed it could infer that such accumulation was implicitly allowed. The logical problem is that from the absence of a norm, one cannot deduce anything unless one presupposes that there is a general norm according to which the silence of the Constitution implies authorization. However, in this case, such a norm does not exist in the Constitution and has not been established by the Constitutional Council either. One might see this as a technical gap, but it remains a matter of interpretation. This inevitably leads back to the self-limitation of the Constitutional Council’s jurisdiction: the norm underlying its decision is that it is not within its competence to prohibit the Government from using the various rationalization mechanisms at its disposal as it sees fit.

A second argument, which can support the first, could be that the rule of law aims to protect the fundamental rights and freedoms of individuals rather than parliamentary

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<sup>14</sup> Quote from the statement of reasons for the constitutional bill (PPLC).

groups, so the concept does not have to intervene in parliamentary debates. Given that the political opposition has a recourse against laws before the constitutional court, whose conditions for exercising this recourse are very flexible in France, there is no inherent conflict between the rule of law and the government's use of its prerogatives.

### **3. On Article 49.3, compromise and democracy**

The compatibility of Article 49.3 with democracy invites at least two responses that are not mutually exclusive because they address different aspects of the issue, unless one assumes there is a singular definition of the word "democracy."

When arguing for the compatibility of Article 49.3 with democracy, two main points can be made: first, this article is entrenched in a constitution endorsed by the people; second, it secures governmental stability, a vital aspect of democracy, as it allows the majority-based government to function without undue hindrance from opposition members. These arguments are occasionally amalgamated into a single line of defense.

Here, democracy is characterized by popular will. The challenge arises from the fact that this will is expressed in two distinct and conflicting manners: the "people" that voiced its will during the Constitution's adoption differs from the one represented in Parliament. So, how can it be justified that the former supersedes the latter? Furthermore, the parliamentary majority, from which the Government emerges, may not align with the majority of the population.

Both arguments are not so much met with an objection as they are with the conception of democracy held by the Venice Commission.

The arguments supporting the incompatibility claim are those reiterated by the Venice Commission: the use of Article 49.3 denies deputies a debate on the legislative text and,

through a consequentialist line of reasoning, suggests that it shifts the confidence question from the text to the Government itself. This grants the Government what's termed "autonomous legislative power," which conflicts with the principles of pluralism, separation of powers, and legislative sovereignty. These principles, derived from a definition of democracy attributed to Anthony Grayling<sup>15</sup> and cited by the Venice Commission, reject the notion of identifying democracy solely with majority rule and elevate equality as the foundational principle of democracy, ensuring that no voice holds greater weight than another.

According to the Venice Commission's opinion, in a democratic state, general norms are passed by the parliament through a legislative process that involves at least two readings, intervals between readings, and deliberations within a committee. This process, typical in bicameral systems with symmetrical powers, prevents rushed adoption of laws. Additionally, the decision-making process must be inclusive, engaging all political groups in Parliament.

The challenge is that these three "principles" lack precision and objectivity themselves; due to their nature as principles, they embody ideals rather than empirical realities. Depending on how they are defined, they can also contradict each other. For instance, if legislative sovereignty is understood as the absolute freedom to create laws without constraints, it might conflict with the principle of separation of powers. Alternatively, if legislative sovereignty implies the freedom of a majority to enact laws as desired, it could clash with the principle of pluralism. Conversely, defining pluralism as the obligation to respect every viewpoint might challenge legislative sovereignty. Therefore, achieving a

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<sup>15</sup> A. C. Grayling, *The Good State: On the Principles of Democracy*, Oneworld Publications, 2020, chap. 1. It's worth mentioning that the book primarily critiques the single-round majority electoral system adopted in Great Britain and the United States ("first past the post" or FPTP system).

balance or degree of harmony among these principles necessitates multiple value judgments. Additionally, these three principles must be reconciled with other considerations such as safeguarding fundamental rights and ensuring free elections.

It clearly emerges from the various opinions of the Venice Commission, as well as from its interim opinion on Article 49.3 in France, that its members advocate for a concept of democracy that aligns more closely with consensus democracy than with majoritarian democracy (or Westminster democracy), as categorized by Lijphart. According to him, “the majoritarian model of democracy is exclusive, competitive, and adversarial, whereas the consensus model is characterized by inclusiveness, bargaining, and compromise”<sup>16</sup>.

Based on this classification, it is straightforward to classify the French political system as a majoritarian democracy.

Yet this classification is subject to debate. While the rule of the majority and compromise may seem to be in total contradiction with each other, they are also often closely interconnected.<sup>17</sup> On one hand, the majority rule itself is the outcome of a compromise, as Bellamy puts it.<sup>18</sup> For the minority to accept the majority decision, it must anticipate becoming the majority itself in the future. On the other hand, the majority rule can itself

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<sup>16</sup> A. Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries*, New Haven, Yale University Press, 2012, p. 2.

<sup>17</sup> P. Overeem, “Compromise and Majority Rule: How Their Dynamic Affects Democracy”, in S. Baume et S. Novak (eds.), *Compromises in Democracy*, Cham, Springer International Publishing; Palgrave Macmillan, 2020, p. 47-68, p. 49: “Both notions, majority rule and compromise, are generally believed to be core elements of democracy, but they also seem to be squarely at odds with one another (...) they are fundamentally opposed to each other, cornerstones of two different kinds of democracy even (majoritarian and consensus democracy, as Lijphart has called them), but also that they are often closely related”; R. A. Dahl, *A Preface to Democratic Theory. Expanded edition*, Chicago, The University of Chicago Press, 2006, p. 4; A. Gutmann et D. Thompson, *The Spirit of Compromise: Why Governing Demands It and Campaigning Undermines It*, Princeton, Princeton University Press, 2012, p. 152-160.

<sup>18</sup> R. Bellamy, “Majority Rule, Compromise and the Democratic Legitimacy of Referendums”, *Swiss Political Science Review*, vol. 24, n°3, 2018, p. 312-319, p. 316: “Compromises arise either through some convergence on a mutual second-best (...) or by trade-offs that allow groups (...) to concede in areas they care less about to achieve more in areas closer to their heart”.

generate compromise, and numerous majority decisions stem from compromises being made. This is indeed the function, even the virtue, that Kelsen attributed to the parliamentary system whose procedures, based on the exchange of arguments, tend to achieve compromises.<sup>19</sup>

As Marvin Rintala pointed it out: “Compromise is indeed the rule and the art of the game of politics.”<sup>20</sup> However, many compromises go unnoticed. Rintala suggested a classification of political systems based on their predominant attitude towards compromise. He was contrasting a positive conception according to which compromise “is interpreted to mean adjustment to the views of others with the aim of common action” with a negative conception according to which compromise means “betrayal of one's principles”.

While the Venice Commission wishes for the French system to eventually align with the former, it's undeniable that this is currently far from reality. Undoubtedly, it would have been ideal to have a discussion on each amendment and a definitive vote on the text rather than resorting to a “forced passage.” However, can we strive for an ideal, or must we accommodate it within political realities, where parliamentary debates can sometimes lead to obstructive actions?

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<sup>19</sup> H. Kelsen, *The Essence and Value of Democracy*, ed. Nadia Urbinati and Carlo Invernizzi Accetti, transl. Brian Graf, Lanham, Rowman & Littlefield, 2013, chap. VI, p. 69: “After all, the entire parliamentary process, whose dialectical procedures are based on speech and counterspeech, argument and counterargument, aims for the achievement of compromise”; M. Schwartzberg, “Uncompromising Democracy”, in Jack Knight (ed.), *Compromise*, New York, New York University Press., 2018, p. 167-185, p. 172-173: “Paradoxically, majority rule may be more likely to generate compromise, at least in the long run, than consensus seeking institutions. Compromise neither depends upon a shift in mindset nor the motivation to achieve agreement as such; instead, it may result from majoritarian bargaining”.

<sup>20</sup> M. Rintala, « The Two Faces of Compromise », *The Western Political Quarterly*, vol. 22, n°2, 1969, p. 326-332, p. 327. Il opposait, à l'époque, l'Angleterre et l'Allemagne. Sans doute que les jugements seraient aujourd'hui plus nuancés.

While it's true that Article 49.3 is sometimes used to stifle debate and is combined with other articles, it doesn't always function in this manner and doesn't consistently prevent discussions altogether.

Take, for instance, the pension reform law proposed by the government. There was indeed a debate on the text: it was introduced in the National Assembly's law committee on January 30, 2023, accompanied by 20,000 amendments. Parliamentary deliberation commenced on February 6 and was halted on February 17 when the Government invoked Article 47-1. Discussion resumed in the Senate, which passed the text on March 11 after the Government employed Article 44.3, allowing a single vote on the entire bill while bypassing amendments opposed by the government (4720 amendments were submitted). As the Senate approved a different version from the Assembly, the government called for a joint committee meeting. This committee agreed on a unified text, which was promptly voted on by the Senate on the morning of March 16. Finally, in the afternoon, the government turned to Article 49.3 at 3 p.m. and the law was definitively passed.

Regardless of the definition of democracy that one chooses, it remains quite challenging to argue that the political system of the Fifth Republic favors parliamentary discussion or a positive conception of compromise. Furthermore, it is even more challenging to imagine that a compromise could emerge to abolish or significantly alter the current constitution.

It is not for lack of proposals from parliamentary ranks in this regard. Very recently, the Senate's working group on institutions presented 20 proposals<sup>21</sup>. The latest of these proposals consists precisely of a combination of changes aimed at "reaffirming the need for an efficient parliamentary procedure that respects Parliament's rights." However, it is

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<sup>21</sup> Sénat, May 7, 2024 available at <https://www.senat.fr/salle-de-presse/dernieres-conferences-de-presse/page-de-detail-1/conclusions-du-groupe-de-travail-3011.html>

symptomatic to note that the removal of Article 49.3 is not included—even though some members (Ecologists) of the working group were calling for it. In the end, the key question remains whether it's possible for member states of the Venice Commission to reach a compromise on the fundamental concept of democracy. The answer lies with the states and requires another paper.

#### SUMMARY:

The Venice Commission's interim opinion concerning the implementation of streamlined parliamentary procedures in France reveals a distinct contrast in both institutional and cultural viewpoints regarding the functions of Parliament and the constitutional court within a democracy. Despite offering a substantial foundation for contemplation, several reasons could explain why it is hardly taken into account by current or future French governments.