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Article 49.3 of the French Constitution: bringing Parliament to heel, whatever it takes?

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Article 49.3 of the French Constitution enables the government to pass bills without the consent of the National Assembly, something regularly commented upon. Traditionally of rare occurrence, the number of its uses has skyrocketed in the past year, and even got wide media coverage when it was used to pass a controversial pension reform last spring. This issue of the Blickpunkt takes a deeper look into what this procedure actually is, where it comes from, how it was used historically, and explains the reasons of its newfound relevance in nowadays French political configuration, as well as its risks for parliamentary democracy.

In March of 2023, the French National Assembly was debating a heavily controversial reform of the pension system when the Prime Minister, Elisabeth Borne, decided to use a specific tool of the parliamentary procedure, planned in the third paragraph of article 49 of the French Constitution, often referred to as simply "49.3". Most of the chamber erupted in outrage and thousands of Paris citizens immediately gathered in front of the National Assembly to express their discontent at the use of the procedure. Spontaneous gatherings like this one, sometimes turning to street fights with the police, lasted for days and were widely reported upon in German and international media, alongside more classic protests against the pension reform. Since then, this procedure has been used eleven more times, lastly on December 16th – a total of 22 times in 18 months.¹

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What does article 49.3 do? Where does it come from? Why is it so controversial? And how come it has gained new-found relevance in French politics in the past year?

1 – 49.3: genesis and proceedings

Contrary to what is sometimes assumed considering how central French Presidents seem to be, the French political system is a parliamentary one. This means in this case that the power of the Prime Minister and the government comes from the Parliament, and more specifically the National Assembly, which has the power to withdraw its confidence at all time, then triggering a change of government².

In former times, before and shortly after World War II, France struggled with governmental instability, as a very fragmented party system made it hard to get bills approved or to form any stable coalition for too long. When the constitution for the Vth Republic was drafted in 1958, one of the goals of its authors was to give government some tools to fight back against the Parliament, and bring it to cooperate, forcibly if that is what it took.

The third paragraph of article 49 is one of those tools³. It allows the Prime Minister to tie the passing of a bill with the survival of their government. When the article is triggered, parliamentary debate on a bill will immediately stop. The MPs have then 24 hours to table a motion of no-confidence against the government – it needs to be signed by at least 10% of them. If they do, the motion will be voted on 48 hours later. If at least half of the MPs plus one vote in support of the motion, the bill is rejected and the government has to resign. Currently and since the mid-80s, that requires 289 MPs. If not, or if a motion of no-confidence is not tabled within 24 hours, then the bill is passed, without the MPs being able to vote on it, or debate it any further. The figure below summarizes the process. So far, no government has ever had to resign because of a failed 49.3, meaning that, in practice, using article 49.3 has historically enabled governments to pass bills without the explicit consent of the Assembly with a 100% success rate.

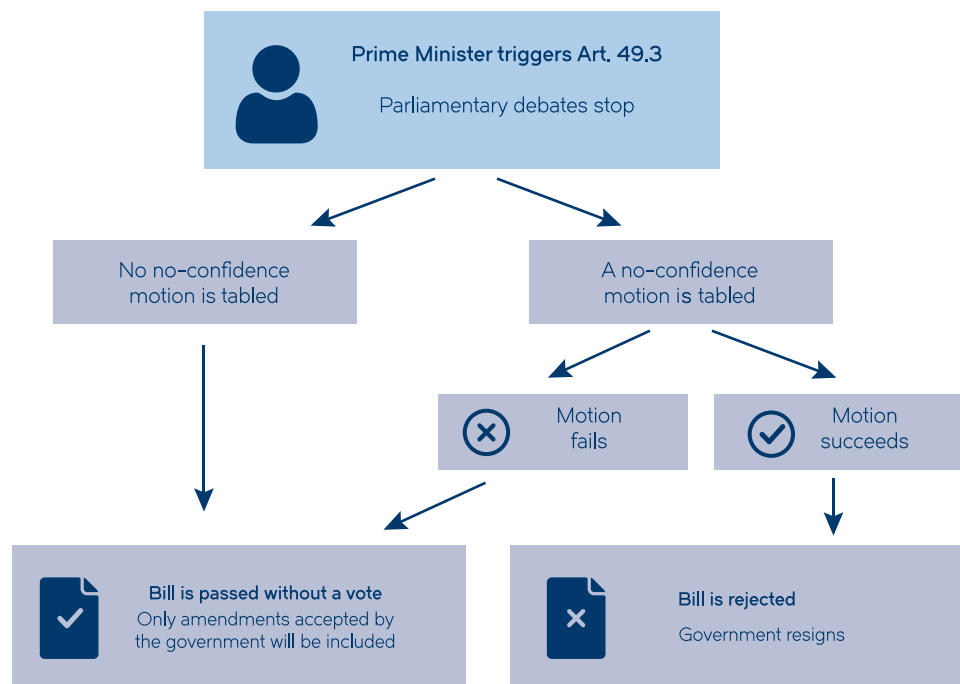
¹ Date of writing: 18th December 2023.

² This principle is stated in article 50 of the Constitution: "When the National Assembly passes a resolution of no-confidence, or when it fails to endorse the Government programme or general policy statement, the Prime Minister shall tender the resignation of the Government to the President of the Republic."

³ The paragraph reads as follow: "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 resolution 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 article has been designed to solve a potential gridlock that could arise between the government and an Assembly that would be unwilling to cooperate with it by asking the MPs one question: are their issues with the bill currently being debated deep enough to change government over? One could argue that it stems from anti-parliamentarianism views: the idea that parliamentary debate (and politics in general) is, by nature, potentially frivolous and that MPs might be collectively incapable of taking decisions for the common good of their own volition, therefore needing to be coerced into it. Theoretically, it is indeed supposed to allow differentiating between "legitimate" and "illegitimate" opposition to the government, between deep-rooted issues about goals, priorities and ideology on the one hand, and details being overblown and dramatized to appeal to the voters on the other. The idea is that article 49.3 would dispel the latter, while allowing the former to find resolution in a government change. In practice however, it often has the consequence of silencing legitimate concerns inside of the majority.

Figure 1: The article 49.3 procedure



Source: Own illustration.

Indeed, withdrawing their confidence to a government⁴ of their own party does not come without consequences for the MPs: if they might just be handed another government, hopefully one more closely aligned with their political goals, this is no guarantee, as the President might also decide to dissolve the National Assembly in response. Dissolution is neither mandatory nor certain in this case, and would be a very risky move for everybody involved, but there are no limiting conditions for it (art. 12) and there has been a precedent. In 1962 indeed, after the National Assembly decided to withdraw its confidence to the government – not following the use of article 49.3 – then-President Charles de Gaulle dissolved the Assembly and triggered new elections. His bet was a success: the elections returned a far-larger and way more

⁴ It is not customary for MPs, even of the majority party, to be involved in government formation. The positions of MP and member of government are also constitutionally incompatible.

4 Article 49.3 of the French Constitution: bringing Parliament to heel, whatever it takes?

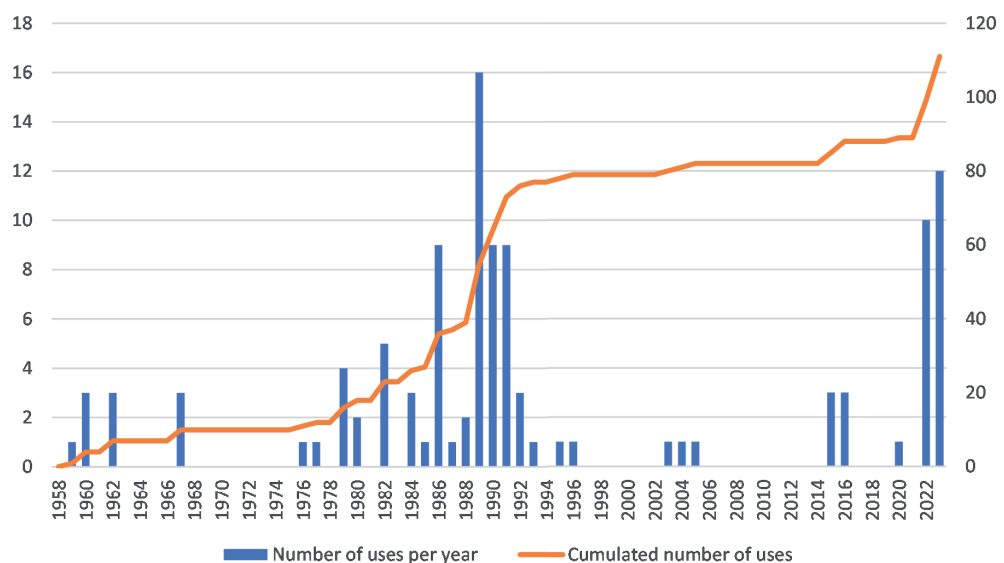
disciplined pro-De Gaulle majority, and the dissidents from his party mostly disappeared from Parliament. The threat therefore exists, and tends to shape the behavior of MPs like in a game of chicken. The question article 49.3 asks to them is indeed not really "are the issues with the bill currently being debated deep enough to change government over?", it is "are those issues deep enough that you would be willing to run for election again, risking both to personally lose your seat and to collectively lose access to power should a different party win a majority?". This is a very different risk-benefit calculation, and the likely conclusion is that some access to power, even skewed, is probably always better than sitting in the opposition, keeping therefore governments safe – even in the face of deep-rooted political issues.

2 – History of a controversial tool

The article was designed with the context of the IVth Republic in mind, where proportional representation was accompanied with fragmented parties and volatile coalitions, but this is not what the Vth Republic has been like. Quite the contrary: from the very early days on and with the help of a majority system of election, the trademark of the Vth Republic has been governments supported by very stable majorities, built around one or two parties holding an absolute majority of the seats in the National Assembly and displaying really high levels of party unity and discipline. Under those conditions, a government should virtually never need to resort to 49.3, as it would then be a sign of strong tensions and inability to find agreements inside their own party – an issue arguably much worse than trouble in maintaining a coalition.

Looking at how the article has been used across time tends to confirm this. During the first twenty years of the Vth Republic, the article was used very seldom: a few times very early on, as the new system, parties and political culture established themselves, then almost not at all in the late sixties and through the seventies.

Figure 2: Yearly and cumulated uses of article 49.3 over time – 1958 to 2023



Source: National Assembly⁵

⁵ The data can be found here: <https://www.assemblee-nationale.fr/dyn/decouvrir-l-assemblee/engagements-de-re-sponsabilite-du-gouvernement-et-motions-de-censure-depuis-1958>

The decade spanning from the early eighties to the early nineties was drastically different. A new majority took power in 1981, elected in the wake of socialist President François Mitterrand on an ambitiously left-wing platform. In March 1983 though, François Mitterrand entirely shifted the economic strategy in what came to be known as the "turn to austerity", and the government tabled several bills related to topics like the de-regulation of work time or wage freezes. This drastic, mostly un-debated shift away from the party platform was not welcome by every socialist MP, and article 49.3 was used to pass some of the most controversial bills of the period. Between 1986 and 1988, the short-lived conservative government also made heavy uses of the article 49.3, this time to actively coerce Parliament as an institution, rather than just its own MPs: passing bills to change the voting system in the National Assembly, re-design electoral constituencies or allow the government to rule by decree – all of which really sensitive topics for MPs in general, directly affecting their status as elected representatives. From 1988 on, the socialists took back power, this time a few seats short of an absolute majority in the National Assembly and having to result to a minority government, informally supported in practice by the communist MPs. The five subsequent years saw the highest amount of uses of article 49.3, as the government used it as a tool to create itself a de facto supportive coalition that did not exist in numerical terms.

In all three of these periods from 1981 to 1993, it is reasonably clear that the argument according to which the article allows to discard only non-constructive disagreement does not actually hold. Quite the contrary, the uses of article 49.3 have tended to happen in contexts in which the party in power was going through significant, political crises, during which core party values and orientations were debated. But article 49.3 was never a tool designed to solve internal party-crises, the way party conferences for example would be for.

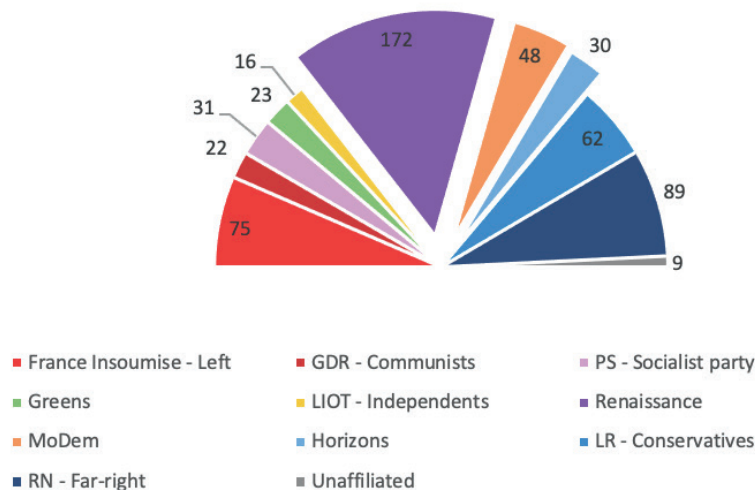
The situation normalized again after the 1993 legislative elections, and the use of article 49.3 went back to being a marginal event. At the same time in the public eye, the tool grew increasingly unpopular, being used on several occasion to pass bills that were not only controversial among MPs, but rejected by the general population as well. In 2005 for example, conservative Prime Minister Dominique de Villepin decided to use article 49.3 to pass a bill containing, among other measures, a new type of work contract with fewer legal protection for younger workers. After the bill was, unsurprisingly, passed without a vote when the motion of no-confidence failed, the strikes and protests across the country were so massive and unrelenting that then-President Jacques Chirac had to announce he would delay application of the law until a new bill would be passed to correct it and remove the controversial measures. They were indeed stricken without ever having been enforced. The two bills on which article 49.3 was used under socialist President Francois Hollande with Prime Minister Manuel Valls in 2015 and 2016 were also both times topics of incredibly heated, long-lasting, nation-wide waves of protests. Both have arguably been instrumental on what can be described as a de facto split among the socialists that triggered a near-total party collapse at the end of the term in 2017.

The increasingly controversial article was reformed in 2008, in the context of a broad reform of the constitution, which aimed – among other things – at strengthening the Parliament against the executive. The new writing of the article severely limits the number of occasions a government can use the article, making it possible only for one bill per parliamentary session, in addition to any budget bill or bill related to the financing of the social security system. For each bill the article is used on, it can be used to adopt any portion of the bill, or the bill in its entirety, for any and all readings in front of the National Assembly, so it is fairly common that the article will be used several times for a single bill. Nevertheless, the idea was that it should remain a tool for exceptional cases, when there are virtually no other choices, and not a normal way of governance. But since last year, the trend has been going upwards again.

3 – Article 49.3 after 2022: what now?

2022 was an election year in France. It saw President Emmanuel Macron be re-elected in May for a second term. During his first term, he enjoyed a situation in which his party held on its own a quite comfortable absolute majority of the seats in the National Assembly. Since then, the once reasonably stable party system has fragmented at a very rapid rate, and the legislative elections of 2022 returned very different results: the now three-party coalition (Renaissance⁶, MoDem, Horizons) supporting Emmanuel Macron only managed to gain 250 seats in the National Assembly, 39 short of an absolute majority. It tried – and failed – to convince the conservative party to join them to establish a government, therefore having to resort to govern with a minority government – their placement at the center of the political game making it mathematically impossible for any other coalition on the left or on the right to come even close of outnumbering them.

Figure 3: Composition of the National Assembly - June 2022



Government parties represented as separate fragments.

Source: National Assembly.

The situation is highly unusual for the institutions of the Vth Republic, and is close to being unprecedented. While Emmanuel Macron promised to handle it by building a majority agreement on each bill on a case-by-case basis, this strategy encountered its limitation very quickly in reality when compromises failed to be reached.

Article 49.3 was first used to decide on the budget for the year 2023 – both for the general budget bill and the specific budget bill related to the social security system. It was then used, much more controversially and prominently, to modify the French pension system. One of the issues came from the bill that was chosen. Indeed, instead of tabling a bill which purpose would exclusively have been to reform the pension system, the government chose to table a bill “modifying the budget for the social security system of 2023” – a budget bill, not a “normal”

⁶ La République en Marche (originally “En Marche !”), the party founded by Emmanuel Macron, was renamed “Renaissance” in September 2022.

one, therefore not counting towards the "one bill per session" rule, despite having little to do with the specific budget of the year 2023. The government also decided to use block-voting (art. 44.3), preventing article-per-article votes, and relied on a specifically hasty kind of accelerated procedure, specially designed for budget bills that can need to be approved hastily before the next year begins, despite the debate occurring in March and presenting no arguable character of urgency. This succession of circumstances, combined with a very high rate of rejection of the bill by the population and doubts over the impact of the reform in general, led almost every opposition group to vote on a motion of no-confidence tabled by an independent center-right MP. The government was eventually saved by the conservative party group, whose members split between supporting the motion (19) or opposing it (42). The motion was nine votes short of being adopted.

If the Constitutional Council did not deem this combination of tools to be a violation of the Constitution, it did flag it as "unusual"⁷. The Venice commission, which informs the Council of Europe on constitutional matters, was not as kind: in a decision rendered in June of 2023, it found article 49.3 to be "a significant interference by the executive in the powers and role of the legislature", "seemingly unique in European comparative experience" and "problematic". It also called the potential uses "excessively broad", and the possibility to combine it with other control tools as potentially "disproportionate"⁸. In this case, one of the counter-arguments brought by the French government to the Venice commission was that nothing would prevent the MPs to table and adopt another bill later on modifying this one, if they so wished. In practice though, this does not hold, specifically in the case of finance bills – where MPs do not have the initiative – or finance-related bills – the Constitution also prohibits MPs to introduce measures that would increase spending or decrease financial resources (art. 40), making it effectively impossible for them to come back to a more generous version of the pension system. MPs tried to circumvent this obstacle, and failed earlier in November 2023⁹.

Another controversial use of the article happened even more recently. The article as it is written after the 2008 constitutional revision specifies it can only be used on one non-financial bill per parliamentary session. France only has one ordinary parliamentary session per year, but the Prime Minister is free to plan extraordinary parliamentary sessions to discuss a specific agenda. The number of them is not limited, meaning that, in practice, the limitation introduced by the 2008 revision can be rendered pointless if Prime Ministers start opening extraordinary sessions with the purpose of using article 49.3. This is what happened on September 2023, when Prime Minister Elizabeth Borne called on an extraordinary parliamentary session to examine a planification bill and used article 49.3 to have it passed. The bill failed to complete its examination in front of the Senate and back to the Assembly during the timeframe of the extraordinary session though, and was adopted during the ordinary session – through the use of article 49.3 again – mid-November. The government now argues that because the examination of the bill started during the extraordinary session, it does not count

⁷ Decision n° 2023-849 DC, 14th April 2023, point 70. The decision can be read, in French, here: <https://www.conseil-constitutionnel.fr/decision/2023/2023849DC.htm>

⁸ European Commission for Democracy through Law, "Interim opinion on article 49.3 of the Constitution", 135th Plenary Session, Venice, 9-10 June 2023, p.12-14. The piece being an interim opinion, and not a definitive one, has no legal consequences.
Accessible here: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2023\)024-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2023)024-e)

⁹ For a detailed explanation of what happened from a parliamentary procedure point of view – in French: Denis Baranger, "La querelle de l'abrogation de la loi « Retraites » : retour sur l'éclipse d'une convention parlementaire", Jus Politicum, 22nd November 2023.
Available here: <https://blog.juspoliticum.com/2023/11/22/la-querelle-de-labrogation-de-la-loi-retraites-retour-sur-leclipse-dune-convention-parlementaire-par-denis-baranger/>

count as its one use for the ordinary session, and has hinted at using it again in the same ordinary session before spring, this time on a bill on migration. Constitutionalists have argued this would constitute a clear violation of the Constitution¹⁰. Over recent weeks, the article was also used again for several parts of the general budget bill of 2024, as well as for the specific social security budget bill.

4 – All losers in the end?

Using article 49.3 is obviously efficient: it enables bills to go quickly through Parliament and has never let any Prime Minister down. But the democratic risks of using it should appear just as obvious. The routinisation of its use on all budget-related bills does not encourage MPs to have any kind of constructive attitude towards the project: they will not vote on it in the end, and will not be able to introduce amendments to it that the government would not have written itself. In this context, civil discussion becomes a waste of energy, and loud and disruptive opposition appears as the only other way to have an impact, as it might then be reported in media. But this impact itself is also double-edged, as it gives more ground to the idea that the National Assembly is an un-serious circus, and therefore more credibility to the conclusion that coercion is needed to achieve anything. It feeds into feelings of distrust towards politics and politicians, already high in the case of France, blurs the separation of powers, and threatens the core concept of democratic decisions being supported by a majority. Just how deep the damage currently being inflicted to democratic representation runs will most likely take time to grasp in its full extent.

¹⁰ For a detailed explanation – in French: Mathieu Carpentier, “49.3 sur 49.3 ne vaut. Spéculations sur une étrange session extraordinaire”, Jus Politicum, 5th October 2023. Available here: <https://blog.juspoliticum.com/2023/10/05/49-3-sur-49-3-ne-vaut-speculations-sur-une-etrange-session-extraordinaire-par-mathieu-carpentier/>

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