FOR LAWYERS OF OCEANIA – A BRIEF FACTUAL COMMENT ON A MATTER OF FRENCH PROCEDURE: THE PLEDGING OF GOVERNMENT RESPONSIBILITY FOR A BILL[1]

Thanks to the recent pension reform in France and to the associated sometimes violent demonstrations, the world has discovered the procedural possibility that the French Constitution offers to have a Bill become law without there being a vote on it in the National Assembly. The author has seen Belgian television news bulletins speaking about this French procedure, and read about it in articles in the German media. The French press and televised news was also swamped for several weeks by comment on what the journalists, without pausing to take a breath, called article "quaranteneuftrois" and wrote about variously as article "49-3", "49,3", or "49.3". What they were talking about was in fact article 49, paragraph 3, of the Constitution of France.

I THE TRADITIONAL USE OF ARTICLE 49, PARAGRAPH 3 OF THE CONSTITUTION

In its original form of 4 October 1958, the date which saw the beginning of the Vth Republic, this paragraph of art 49 stated –

> The Prime Minister may, after deliberation by the Council of Ministers, pledge the responsibility of the Government to the National Assembly on the passing of all or part of a Bill or motion. In such a case, the whole of part of the Bill or motion is regarded as having been passed, unless a censure motion moved within the 24 hours which follow the engagement, is passed (…).

This provision was adopted in 1958 and was one of the instruments of "rationalised parliamentarianism". Its field of application was wide because it could be used by the Prime Minister without restriction for any Bill moved by the Prime Minister or any law proposal presented by a parliamentarian. The purpose of the provision was very clear. It was to enable a proposal which was before the National Assembly to become law without any vote on it by the Assembly. This avoided the possibility of the government's being defeated during the debate on the Bill. Further,

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1 The goal of this article is to present an overview of art 49 para 3 of the Constitution for English-speaking readers of this journal. It is in no way a legal analysis of the provision.

by enabling the government to adopt a law without the vote of the National Assembly, the Constitution ensures that the executive will have that text become law. Indeed, in the case of disagreement between the two Assemblies (the National Assembly and the Senate which constitute the Parliament), art 45 of the Constitution allows the government to "ask the National Assembly to decide the matter", where the government will therefore have the final word on the matter. Before the National Assembly itself, the government can always at the final reading resort to art 49 para 3.

It must be noted that the first government of the Vth Republic had a solid and unified parliamentary majority supporting it. It used the procedure with moderation; some later governments did not have the need to use it for long periods, such as Lionel Jospin (Prime Minister from June 1997 to May 2002) or François Fillon (Prime Minister from May 2007 to May 2012). In the period from 1969 to May 1981, which was marked by the access of the socialists and communists to power, art 49 para 3 was used 18 times: four times by Michel Debré (Prime Minister from January 1959 to April 1962), six times by Georges Pompidou (Prime Minister from April 1962 to July 1968) and 8 times by Raymond Barre (Prime Minister from August 1976 to May 1981). Following that, for about 15 years, the use of the art 49 para 3 procedure became rather common, in that it was used regularly by all the Prime Ministers from 1981 to 1997 – even if from 1992 (the Bérégovoy government), its use became less frequent: seven times by Pierre Mauroy, four times by Laurent Fabius, eight times by Jacques Chirac, 28 times by Michel Rocard (he set the all time record and was Prime Minister for only three years from May 1988 to May 1991), eight times by Edith Cresson who was Prime Minister for a little less than a year from May 1991 to April 1992, three times by Pierre Bérégovoy, once by Edouard Balladur and twice by Alain Juppé. After that, use of the procedure has been less frequent: twice by Jean-Pierre Raffarin (Prime Minister from May 2002 to May 2005), once by Dominique de Villepin, (Prime Minister from May 2005 to May 2007), six times by Emmanuel Valls (Prime Minister from March 2014 to December 2016) and once by Edouard Philippe (Prime Minister from May 2017 to July 2020). And now, Elisabeth Borne, Prime Minister since May 2022, has so far used art 49 para 3 of the Constitution 11 times. It is therefore clear that this provision is used by the head of government in order to get over a parliamentary hurdle when they are not certain of the support of a majority in a Parliament which may have doubts about the text presented or supported by the government, or when the government knows it does not have the majority necessary to have the text enacted by vote.

When the Prime Minister has recourse to art 49 para 3 of the Constitution, the choice left for the members of the Assembly is simple – there are two options. As the Constitution has provided since 1958, resort to the art 49 para 3 procedure means

the government has pledged its responsibility to the National Assembly before there is a vote taken. In this situation the deputies can, within the 24 hours which follow the decision of the Prime Minister to pledge that responsibility, move a motion of no-confidence. Therefore the first option is that the deputies (the opposition) do not move a motion of no-confidence: Once the 24 hours has passed, the Bill is deemed adopted without vote. Under the second option, the deputies move a motion of no-confidence – there is nothing to prevent several motions being moved, for example by different political groups or by ad hoc groupings of those with a common interest. Such a motion must be moved in accordance with the conditions set out in art 49 para 2: the –

> motion will be received only if it is signed by at least one tenth of the members of the National Assembly [that is to say, 58 members]. The vote on the motion may be taken only after 48 hours from its being moved. Only the votes in support of the motion of no-confidence are counted; the motion is adopted only if supported by a majority of the members of the Assembly.

What that means in concrete terms is that those who can vote on the motion are only the deputies who support it and are therefore those who wish to overturn the government. Deputies who do not want to support the motion or who prefer to abstain, do not take part in the vote.

In order for the motion of no-confidence to be adopted, it is necessary that a majority of the members of the Assembly vote for it, that is to say 289 members. In this situation, the political game changes: it is no longer a question of taking part in a vote for or against the Bill that has triggered the motion, but a vote for or against the government. Therefore deputies who might have wanted to vote against the Bill do not vote in favour of the motion of no-confidence if for various reasons they do not wish to bring down the government. To date, no motion of no-confidence moved in the context of art 49 para 3 has been successful. In the most recent use of this procedure by Prime Minister Elisabeth Borne, one of the no-confidence motions, on 20 March 2023, obtained 278 votes; the motion therefore failed by nine votes. When a no-confidence motion fails, the government stands and the Bill which was the cause of the challenge is deemed approved by the National Assembly. If a no-confidence motion succeeds, the Prime Minister must, in accordance with art 50 of the Constitution, tender the resignation of the government to the President of the Republic, and the Bill in question is considered to have been rejected by the National Assembly.

II THE REFORM OF ARTICLE 49 PARAGRAPH 3 OF THE CONSTITUTION

Article 49 para 3 was amended by the constitutional law of 23 July 2008; it now reads –

> The Prime Minister can, after deliberation in the Council of Ministers, pledges the responsibility of the government before the National Assembly in respect of its vote on a financial Bill or a Bill relating to the financing of social security. In such a case, the Bill is deemed passed, unless a motion of no-confidence which has been moved within the 24 hours which follow, is successful. (…) The Prime Minister can resort to this procedure for one project or law proposal per session.

This amendment was made to quantitatively limit the use of the procedure to texts which were essential to the operation of government: financial Bills and Bills relating to the financing of social security. In addition to those Bills, there is also the possibility of using the procedure "for one other Bill or legislative proposal per session". And thus, only one per session. That means that since this amendment, it has not been possible for the Prime Minister to pledge the responsibility of the government on as many Bills or proposals as he or she wishes. Nevertheless, the Prime Minister can pledge the responsibility of the government several times. In fact, financial Bills and those for the financing of social security identified by art 49 para 3 of the Constitution include the initial financial Bill, financial amendment Bills, the control Bill (marking the end of the budgetary exercise), a Bill for financing of social security and also, since their creation by an Organic Law of 14 March 2022 (Organic Law No 2022-354), Bills amending social security laws and Bills for approval of social security accounts. The Prime Minister can pledge the responsibility of the government at each reading of each of these texts. Furthermore, it may also be done "for one project or legislative proposal each session"; the Prime Minister can do this at each reading of the text in question and can also pledge the government's responsibility in respect of such a text at each session, and therefore at an ordinary session (which goes from October to June), and also at any special session or sessions which are called.

As a result of this reform, before Elisabeth Borne came to Matignon art 49 para 3 has been carried out very rarely and in a cautious manner. François Fillon, who was the Prime Minister right through the five-year term of Nicolas Sarkozy (2007-2012), used the procedure only once; during the quinquennium of François Hollande (2012-2017), only Emmanuel Valls used the procedure six times; and finally, during the quinquennium of Emmanuel Macron (2017-2022) it was used only once and that was in 2020 in respect of pension reform. Each time since 2008, the pledging of government responsibility by the Prime Minister has related to something other than a finance Bill or a Bill for the financing of social security. Since June 2022, the

situation has changed. The reason for that is simple: the present government does not have a solid parliamentary majority and it can only rely on a relative majority. And so the Prime Minister, in the absence of a clear majority, has had to resort more often to the art 49 para 3 procedure in order to push a Bill through. Thus, she has engaged the responsibility of the government:

- on 19 October 2022, at the First Reading on the first part of the finance Bill for 2023 (there were two no-confidence motions moved – neither was passed);
- on 20 October 2022, at the First Reading of the third part of the Bill for the financing of social security for 2023 (one no-confidence motion was moved and not passed);
- on 26 October 2022, at the First Reading of the fourth part of the Bill for the financing of social security for 2023, and on the Bill as a whole (two no-confidence motions were moved – neither were passed);
- on 2 November 2022, at the First Reading of the second part of the finance Bill for 2023 and on the Bill as a whole (one no-confidence motion moved and not passed);
- on 21 November 2022, on new reading or the third part of the Bill for the financing of social security for 2023 (one no-confidence motion moved and not passed);
- on 25 November 2022, a new reading of the fourth part of the Bill for the financing of social security for 2023 and on the Bill as a whole (one no-confidence motion moved and not passed);
- on 30 November 2022, at the final reading of the Bill for the financing of social security for 2023 (one no-confidence motion was moved and not passed);
- on 8 December 2022, at a new reading on the first part of the financial Bill for 2023 (one no-confidence motion was moved and not passed);
- on 11 December 2022, there was a new reading on the second part of the finance Bill for 2023 and for the Bill as a whole (one motion of no-confidence was moved and not passed);
- on 15 December 2022, on the final reading of the whole finance Bill for 2023 (one motion of no-confidence was moved and not passed);
- on 16 March 2023, in respect of an amendment Bill relating to the financing of social security for 2023, a Bill relating notably to pension reform (two motions of no-confidence were moved and not passed).
- This was the hundredth time that art 49 para 3 of the Constitution had been used since the beginning of the Vth Republic (relating, in total, to 55 law proposals and 67 motions of no-confidence, none of which were passed).

III A QUICK REVIEW OF THE PRESENT SITUATION

Although the pension reform in itself excited strong arguments, the use of art 49 para 3 of the Constitution to force the passage of an amendment Bill for the financing of social security for 2023 which embodied that pension reform, has strengthened the opposition to the provision, including by those who were not against the reform proposed. This opposition to the use of the art 49 para 3 procedure can have two explanations.

First, the repeated use of the procedure on 11 occasions in five months has been wearying. All the more so, because opposition to the use of this procedure has always been quite strong because it is perceived as a reduction in the rights of the National Assembly and more broadly of Parliament. Indeed, a Bill can be passed without a vote if the Prime Minister deftly pledges the responsibility of the government without any debate, or without completing the debate on the Bill in question. There is also the possibility that – only a sociologist would be able to verify this – what was acceptable to people from the end of the 1950s through to the end of the 20th century is no longer acceptable. In the growing movement of opposition to governments, citizens are perhaps no longer willing to see the government bypassing the vote of the parliamentarians who have been elected by direct universal suffrage.

Second, use of the amendment Bill relating to the financing of social security to deal with the pension reform was a surprise. And use of art 49 para 3 which is available for this type of proposal, being used in this instance, changed surprise to discontent for many.

The pension system and the legal age of retirement are matters of significant interest to society. Seeing the government avoid the difficulties and close off debates in the National Assembly by resorting to this procedure served only to engender rage in many. From a legal point of view, the Constitutional Council (decision no 2023-849DC of 14 April 2023) stated that "although the provisions relating to pension reform, which do not arise necessarily from this matter, could have been achieved by an ordinary law, the choice made by the government to place them in a financial amendment Bill does not in itself contravene any constitutional requirements". Such a law therefore can be the vehicle for pension reform. And the government can pledge the responsibility of the government in respect of it….

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In an interview on 26 March 2023, Prime Minister Elisabeth Borne stated that she did not wish to use art 49 para 3 of the Constitution any more to get Bills through the Assembly unless they were "finance laws"; this corresponds with what she had been doing since becoming Prime Minister. She seems to be saying that she renounces the use of the procedure for any other type of Bill. Naturally, this has not

prevented the reigniting of the eternal debate about whether to maintain or repeal article 49 paragraph 3 of the Constitution.

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