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▶ **To cite this version:**

Adriano Evangelisti. ARTICLE 49.3 OF THE CONSTITUTION OF FRANCE: COMPARATIVE COMMENTS ON PARLEMENTARISME RATIONALISE. Comparative Law Journal of the Pacific / Journal de Droit Comparé du Pacifique [Anciennement Revue juridique polynésienne (RJP)], 2022, pp.213-226. halshs-03741858

HAL Id: halshs-03741858
https://shs.hal.science/halshs-03741858

Submitted on 2 Aug 2022

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ARTICLE 49.3 OF THE CONSTITUTION OF FRANCE: COMPARATIVE COMMENTS ON *PARLEMENTARISME RATIONALISE*

Adriano Evangelisti*

The recent use of art 49 para 3 (art 49.3) of the French Constitution[1] *was the first since the beginning of the 15th legislature. It gave rise once again to the classic political contest of opposing views: Those who strongly denounced the use of this instrument, and the majority who declared themselves compelled to use it to avoid the stagnation of parliamentary work. The use of this instrument during the examination of the Bill establishing the universal pension system (SUR) requires consideration of the conditions for using this process (I), its implementation (II) and the advisability of revising this emblematic instrument of rationalised parliamentarism put in place by the French Constitution of 1958 (III).*

L'article 49 alinéa 3 de la Constitution française de 1958 permet au Premier ministre français lorsqu'un projet de loi lui apparait indispensable pour la mise en œuvre de sa politique, mais que le vote en Assemblée semble bloqué voire compromis, de prendre l'initiative (obligatoirement précédée d'une délibération prise en Conseil des ministres) d'engager la responsabilité de son Gouvernement devant l'Assemblée Nationale pour faire l'impasse de débats parlementaires sur le projet de loi lui-même. En pareilles circonstances si la motion de censure est rejetée, la loi sera alors considérée adoptée, le gouvernement faisant ainsi l'économie des habituels débats parlementaires. Tel devait être le cas au début de la 15e législature du Parlement français où le samedi 29 février 2020, Edouard Philippe, alors Premier Ministre, a déclaré devant l'Assemblée nationale, engager la responsabilité du Gouvernement sur le projet de loi instituant un système universel de retraite. L'auteur analyse tout d'abord les conditions de forme qui autorisent le recours à l'article 49 alinéa 3 (I), puis les modalités pratiques de sa mise en œuvre (II) et propose les raisons qui selon

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1 87th application since 1958.

lui, sont de nature à justifier la révision constitutionnelle de cette disposition de la Constitution française de 1958 (III).

ARTICLE 49.3[2]

The Prime Minister, may after deliberation in the Council of Ministers, make the Assembly's vote on a text a matter of confidence. The text is then regarded as adopted unless a motion of censure, tabled within twenty-four hours, is carried under the conditions prescribed in the previous paragraph.

I THE USE OF ARTICLE 49.3

The tabling of more than 40,000 amendments is the main argument to ultimately justify the use of what French doctrine writing calls the *force de frappe législative.*[3] Indeed, the executive deplored the abusive use of the right of amendment by oppositions, particularly that exercised by 33 deputies belonging to the parliamentary group of the *France Insoumise*.[4]

This Bill was the one that received the most amendments during the 15th legislature. However, it is not the only case of text inundated by an excessive number of amendments. Indeed, for the energy law of 2006, 137,665 amendments were deposited, but the text was approved without resorting to art 49.3 After a parliamentary marathon, 37 sessions were devoted to the discussion of the combined project of 17 articles, which began in plenary session on 7 September 2006 and ended

2 Le Premier Ministre peut, après délibération du conseil des ministres, engager la responsabilité du Gouvernement devant l'Assemblée nationale sur le vote d'un texte. Dans ce cas, ce texte est considéré comme adopté, sauf si une motion de censure, déposée dans les vingt-quatre heures qui suivent, est votée dans les conditions prévues à l'alinéa précédent.

The 2008 amendment of the article reads:

> 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.
>
> Le Premier ministre peut, après délibération du Conseil des ministres, engager la responsabilité du Gouvernement devant l'Assemblée nationale sur le vote d'un projet de loi de finances ou de financement de la sécurité sociale. Dans ce cas, ce projet est considéré comme adopté, sauf si une motion de censure, déposée dans les vingt-quatre heures qui suivent, est votée dans les conditions prévues à l'alinéa précédent. Le Premier ministre peut, en outre, recourir à cette procédure pour un autre projet ou une proposition de loi par session.

3 Legislative strike force.

4 Far-left party.

on 3 October 3.[5] This episode led to the introduction of programmed legislative time (TLP) in order to rationalise the duration of parliamentary debates. Such an instrument offers the possibility for the conference of presidents to fix the maximum duration of a debate relating to a text by dividing the time: A minimum time allocated to each group by providing a longer time for opposition groups; additional time, part of which is divided up to 60% to the opposition groups in proportion to their workforce, the rest between the other groups in proportion to their numerical importance (art 49, para 6 of the Rules of the National Assembly (RAN)).

The TLP constitutes a case of regulatory rationalisation because this provision was the subject of the 2009 amendment the rules of the National Assembly. This type of rationalisation must be analysed as a tool making it possible to guarantee the proper functioning of parliament and thus avoid the opposition, by their right of amendment, blocking parliamentary work indefinitely.

The TLP in French parliamentary law is similar to the *contingentamento dei tempi*[6] that is present in Italian parliamentary law. This tool is used in the Italian Parliament to determine in advance, by the conference of Presidents, the duration of plenary debates. However, unlike the TLP, the *contingentamento* is the subject of an extra-regulatory approval. Indeed, this instrument is not codified in parliamentary regulations[7] but has imposed itself in the same way as a provision contained in the regulations of the two Italian chambers,[8] due to the absence in the Constitution of provisions comparable to those provided in France in art 48, paras 2 and 3.[9] The

5 Cf <http://www.assemblee-nationale.fr/12/dossiers/secteur_energie.asp>.

6 Literally "time rationing".

7 The *contingentamento* is a compromise between an exhausting parliamentary debate and a hyper-fast debate. It is not possible to provide precise details on how it is implemented. In fact, it depends on the political importance of the law under discussion and how strongly it is supported by the parliamentary majority. In fact the *contingenamento dei tempi* is a tool activated by the parliamentary majority. The general rule is that time is distributed proportionally to the size of the parliamentary groups, however trying to give opposition groups more speaking time. Once applied, the duration of the debate, set in a maximum number of hours, and the distribution of hours between the parliamentary groups is prescribed. Once the time available runs out, the law is put to the vote. In that way the contigentamento provide to avoid that the oppositions by theirs filibustering transform the Parliament in a *Wuthering heights set.*

8 Before the introduction of the *contingentamento dei tempi* in the Italian Parliament, it was possible to block parliamentary business for an unlimited duration. In fact, the former Italian parliamentary regulations gave unlimited power to the parliamentarians to completely block the Parliament. Therefore, an informal agreement was put in place between the majority and the opposition, a sort of informal Italian unanimous consent agreement: the majority forces bartered certain laws with the opposition that would have been approved if the opposition had not made filibuster.

9 With these provisions, two out of four weeks of Parliament's monthly activity is reserved for matters desired by the government.

contingentamento constitutes a tool subsidiary to the question of confidence. Indeed, the latter is excluded for certain matters: parliamentary regulations (art 161, para 4 of the Rules of the Italian Senate), constitutional laws. Thus, during parliamentary debates on constitutional revision laws, 83 million amendments were presented in the Senate. Faced with this, the *contingentamento* proved to be the only possible solution. It allowed the majority to move forward and the opposition to express themselves without paralysing the debates.[10]

The absence of codification of the quota is not a simple detail and allows a certain flexibility in the use of this instrument, in particular in the distribution of time between the groups. In practice, different models have been implemented depending on the nature – technical or political – of the texts under discussion.[11]

Unlike the *contingentamento,* the TLP foresees constraints of use. Indeed, at the request of a group President, the conference of Presidents cannot use such an instrument if the discussion of the text at first reading occurs less than six weeks after its tabling (art 49 para 11 of the RAN). The tabling of Bill n° 2623 establishing the SUR took place on 24 January 2020, its examination in committee was interrupted on 11 February 2020, the latter not being able to finish the discussion of the articles.[12]

In these circumstances, recourse to the TLP was not possible, the government's decision to use the accelerated procedure[13] allowed a derogation from the six-week period necessary for the examination in plenary session to take place at first reading (art 42, para 3), the deadlines provided in the RAN for the TLP to be usable.

We can see that the will of the executive to quickly approve the Bill at first reading has hindered the use of the TLP.

The latter would have allowed a more in-depth and more serene examination of the pension reform. Indeed, the latter has a deterrent effect on parliamentary obstruction and allows parliamentarians, due to the limited duration of the debates to focus on the provisions they consider the most important. It thus avoids clarity of discussion being drowned out by an excessive number of amendments.

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10 It is interesting to observe that during the debates on the approval of the Renzi-Boschi Constitutional Review Law (AS 1429 D, AC 2613 D) the committee responsible on the merits could not conclude its examination due to the filing of 500,000 amendments by the opposition.

11 N Lupo and L Gianniti *Corso di Diritto parlamentare* (2nd ed, Il Mulino, Bologna) 178.

12 <Http://www.assemblee-nationale.fr/dyn/actualites-accueil-hub/systeme-universel-de-retraite>.

13 Provided by art 45, para 2. It consists in reducing the back and forth between the two Chambers during the legislative procedure by the convocation of a Joint Committee after just one reading in each Chamber.

The government's will to rationalise the debates has certainly been strengthened by the use of the amendments, the purpose of which was to block the text without making any real substantive changes. However, it should be noted that the government's use of the accelerated procedure shows a desire to rationalise the entire legislative procedure and not just the first reading before the National Assembly. This desire to speed up the executive is not surprising since the latter wished to revise an already highly streamlined legislative procedure by providing for constitutional deadlines when the last word was used, which would have taken place within 23 days of the Prime Minister's declaration: 15 days for the Senate, 8 days for the Assembly (art 4[14]).

Recourse to the TLP would also have enabled Parliament to exercise its functions fully: A debate on the main thrust of the reform and ultimately a parliamentary vote which would have closed the 1st reading.

This consideration is even more valid in the case of a reform which concerns structural aspects such as pension reform which falls within the fields of economic and social policies referred to in art 11 para 1 of the Constitution. These fields constitute the major intergenerational challenges. The more than improbable recourse to the referendum provided for in art 11 para 1[15] could be a solution despite its highly convoluted procedure. Indeed, the shared initiative referendum (RIP) introduced by the 2008 constitutional revision constitutes the negation of the rationalisation contained in the 1958 Constitution and does not conform to the principle of proportionality. The support required (1/10 of the registered voters, or 4,717,396 voters) seems too high in view of the rest of the procedure: the discussion of the text within 6 months[16] by the two assemblies, failing which the text is submitted to the referendum. This is how the RIP is triggered finally only after parliamentary inactivity. It would be appropriate to revise this because it seems to be designed to never succeed, even in the event of abusive use as an instrument of opposition to government policy.

II A UNIQUE PROCEDURE

The vote of confidence provided for by art 49.3 of the Constitution constitutes a singular case of rationalisation of the question of confidence in relation to the previous discipline existing under the Fourth Republic (art 49 of the Constitution of 27 November 1946). Indeed, the mechanism was very demanding as to the

14 See <http://www.assemblee-nationale.fr/dyn/15/textes/l15b0911_projet-loi>.

15 The holding of a referendum provided for in paragraph 3.

16 Note that the six-month period is not provided for in the Constitution but is at the discretion of the organic legislator; further evidence of the timidity of the French constitutional legislator.

conditions for voting on the question of confidence which was refused by an absolute majority of the deputies of the Assembly. This implied that in the event of defeat by a simple majority the government was not legally obliged to resign even though the text on which it had asked the question of confidence and therefore engaged its responsibility, was rejected. This is how the government was not forced to resign from a constitutional point of view but could be forced to.[17]

To remedy this, art 49.3 does not alter the traditional initiative of the question of confidence (initiative of the Prime Minister, deliberation of the Council of Ministers) but acts on the voting methods by introducing the principle of silence equals acceptance: the text is considered approved if within 24 hours a motion of censure is not approved. The logic of rationalisation implies a reversal of parliamentary roles: It is up to the opposition to demonstrate the existence of an absolute majority alternative to that in place and not to the executive. In the absence of this demonstration, the text is considered approved without having been voted.

Article 49.3 represents the rationalised confidence issue of the 5th Republic. However, it should be noted that such an assertion can be criticised because in reality art 49.3 eliminates the confidence question mechanism from the 5th Republic.

As stated in part of the doctrine,[18] the question of confidence is a vote having a fiduciary scope, which is provoked in a discretionary way by the executive in place.

Three conditions must be met to give rise to this situation:

(1) an organ in an active position, the Government being able to ask the question of confidence;
(2) body in a passive position, due to its obligation to vote a certain text or one of its provisions;
(3) an objective fact which consists of a legally binding parliamentary vote and necessary for the executive to remain in office.

If this definition is accepted, art 49.3 cannot constitute a real question of confidence because the 3rd element, binding and necessary parliamentary voting, is absent.

Indeed, art 49.3 elevates the effects of rationalisation to the highest degree. Parliamentary rationalisation procedures intervene in the current procedure with the aim of speeding up parliamentary debates. The question of confidence, for example, used in the Italian parliament works in this way because it has the effect of

17 Solal Celignyj *La question de confiance* 728.

18 Giuseppe Olivetti *La questione di fiducia nel sistema Parlementare Italliano* (Giuffrè Editore, Milano, 1996) 1 and 2.

interrupting the debates in progress and of setting up an incidental and priority debate based on the text on which the government asked the question of confidence.[19] This incidental debate has the effect of suspending the debates in progress and of opening a debate on the text which was the subject of the question of confidence and thus eliminating the discussion of the amendments presented. After these debates, a vote takes place to verify the existence of the parliamentary majority or its absence. This could lead to the resignation of the government. Among other rationalisation instruments one can cite the legislative committees, allowing the adoption of texts in committee without their going through the plenary session.[20]

The issue of trust is increasingly used for political and technical reasons. First, it allows the executive to tighten its majority in the event of rebels within the majority. Secondly, it makes it possible to speed up debates because its use leads to the forfeiture of the amendments tabled. There are two reasons for the misuse of this instrument. However, it should be noted that such an instrument of rationalisation implies a parliamentary vote unlike art 49.3. In fact, the absence of a vote on a text is an effective tool because not only does it rally the rebellious deputies of the majority who would be tempted to vote against a text (which the question of confidence can also do in Italy) but above all it prevents potential dissidents from voting in favour a text to respect the majority discipline, what happens in the traditional mechanism of the question of confidence. Thus, art 49.3 constitutes an atypical French constitutional solution between the question of confidence and the blocked vote: It allows on the one hand the suspension of the legislative discussion in progress and to direct it if necessary, to a motion of censure targeting the general policy of the government. We thus observe a traditional inversion of the logic proper to parliamentary debates in the presence of a confidence question which interrupts the discussion of the current text and opens the discussion on the text which is the subject of the confidence question.

Because of the effects produced, the strong implications of the rationalisation of art 49.3 are obvious compared to another instrument, the blocked vote[21] which

19 Article 116 of the Rules of the Italian Chamber of Deputies and art 161 of the Rules of the Italian Senate.

20 As A Le Pourhiet noted during the television programme *28 minutes, Article 49-3, une bombe démocratique* It should be noted, however, that the legislative committees were originally designed to unclutter activity in plenary session and that the latter are implementing a rationalisation of parliamentary work. This however involves a vote in committee which will have the same value as voting in plenary session. In addition, this procedure, constitutionally provided for in art 72 of the Constitution since 1992, has fallen into disuse. From now on the majority of the legislation is approved according to the classic parliamentary logic: preliminary examination in committee and then in plenary session.

21 Article 44, para 3.

constitutes a kind of question of confidence: parliamentary vote on the text wanted by the government (element specific to the question of confidence) but without causing the forfeiture of the amendments tabled and therefore without saving time on the discussion[22] as is the case with the Italian confidence issue.

The introduction of this instrument which represents "the most brutal and refined form of parliamentary rationalisation"[23] is explained to compensate for the lack of majority at the start of the 5th Republic. It was indeed a mechanism that should be used in exceptional situations, as evidenced by the words of Michel Debré to the Advisory Committee on this mechanism that it "has value only if it is rarely applied".[24]

Apart from the non-use of this instrument during the 10th legislature (1997-2002), we are witnessing the trivialisation of art 49.3 because of its use by the various executives.[25] This trivialisation is due to a somewhat abusive use of art 49.3. However, concerning Michel Debré's remarks, the use of this procedure in the face of exceptional circumstances is a matter for the executive. The Constitution for its part now limits the use of this instrument without specifying the circumstances of its use. It is the political opportunity that will decide that. It is therefore difficult to see how a government can rarely apply this instrument if the Constitution remains silent. Finally, talking about abuse of art 49.3 has no legal meaning: For an abuse to take place it is essential that limits be set up. Furthermore, the concept of abuse is simply abstract.

III A PERSPECTIVE ON THE REFORM OF ARTICLE 49.3

The 2008 constitutional legislator brought significant limits to the use of art 49.3. Though art 49.3 previously was not subject to any limitations, with the exception of those the executive imposed on itself, since 2008 recourse to it is limited to the two most important government Bills (Finance Bills, Social Security Funding Bills) as well as to one other government or parliamentary private member's Bill per session, whether ordinary or extraordinary.

The revision has extended the limits on possible abuses that may have existed previously. Thus from 2008 we note that the revision wanted to frame its use

22 Recital 1, Decision 5 DC of 15 January 1960.

23 P Ardant *Institutions politiques et Droit constitutionnel* (3rd ed, LGDJ, Paris 1991) 583-584. G Sartori *Comparative constitutional engineering* 166.

24 *Documents pour servir à l'histoire de l'élaboration de la Constitution du 4 octobre 1958* (La Documentation française, 1988) Vol III p. 506.

25 Olivier Dord "Vers un rééquilibrage des pouvoirs publics en faveur du Parlement" RDFC 2009/1 n 77.

according to the texts without eliminating in toto an instrument which could have undermined the effectiveness of the policy of the executive.[26]

Though the 2008 revision limits the use of this instrument, it does not act in depth on this process, and in particular on the parliamentary implications. This constitutes a device unlike that of neighboring parliaments in Europe.

Indeed, the most questionable aspect of this instrument does not lie in the fact that the government and the majority impose themselves through rationalisation instruments, but that they do so in the absence of a parliamentary vote on the text. It is for this reason that a revision of art 49.3 could consist in the introduction of a compulsory vote having to collect the absolute majority of the components of the deputies. An engagement of responsibility must be conceived by the presence of a parliamentary vote and not by an implicit vote of approval resulting to the non-approval of a motion of censure. It is important to separate the question of confidence and the motion of censure.

The question of confidence is the instrument which enables a majority to close its ranks and to ask Parliament for a vote which will be essential for it to continue its political action. This vote makes it possible to verify the existence of a majority in relation to the overall action of the government and its evolution in the face of possible parliamentarians who would no longer recognise themselves in the policy of the executive.

For its part, the motion of censure is an instrument in the hands of the opposition which is based on a rationalising logic according to the procedure introduced by the Constitution of the 5th Republic. If it is right to put in place conditions which do not make it too easy to approve a motion of censure, it seems entirely logical to ask that an executive, when the executive engages his/her responsibility before Parliament, pass to a parliamentary vote where the executive will have to demonstrate the existence of a majority by obtaining the absolute majority. Conversely, the commitment of responsibility is atypical because it does not allow a checking of if the majority is still present. The presence of a quorum for such a commitment would be proportional to the required circumstance: In the case of a commitment of responsibility it is necessary that this vote can take place by an absolute majority of the components. Such a quorum could moreover extend globally to parliamentary work by providing at the constitutional level that the sessions require an absolute majority of the components and a simple majority in the votes. In this way, the inglorious scene of a semi-deserted hemicycle at the time of the votes is avoided. These circumstances are permitted moreover by certain regulatory provisions, in

26 Olivier Dord, above n 25,11.

particular para 4 of art 61 of the RAN which in order to rationalise interruptions of session for lack of quorum, allows after a suspension that the vote will be valid regardless of the number of those present.

To thwart the role of art 49.3 thus revised, it would be possible to envisage a process comparable to a vote on a certain date allowing the executive to put on the agenda of the National Assembly a text that he considers fundamental for the implementation of the policy of the executive in a limited time (a kind of *Manifesto Bill* as provided by the *Salisbury-Addison* convention in Westminster). This vote would have no legally binding implications for the executive. Certainly, a possible rejection of such a text would open a political problem within the majority which, however, would not be forced to resign. Thus, such a mechanism would combine the effects of blocked voting with those of deliberation within certain deadlines in order to avoid the effects present on the discussion of the amendments, which hardly limits any obstruction.

The fact that the text is considered fundamental for the implementation of the policy of the executive would have the positive effect of constituting a kind of test of the parliamentary majority. In the event of rejection of a text by a vote on a fixed date, the executive without being forced to resign would eventually be encouraged to redirect its political line due to internal divisions in its majority, or else to propose at the National Assembly a vote on which the executive would engage responsibility at his/her own risk.

In conclusion, art 49.3 creates a dilemma between the tyranny of the minority and the abuse of the government in the face of a parliamentary deadlock. It should also be noted that to avoid blockages without using art 49.3, other techniques could be implemented.

The tabling of 42,634 amendments on the law establishing SUR responds to an obstructionist logic which is based on an excessive use of a right enshrined in the Constitution: The right of amendment (art 44, para 1 of the Constitution).

In the presence of amendments drawn up in almost identical terms, it would be possible to envisage the possibility of voting by a series of identical or almost identical amendments, distinguished solely because of words which do not change the substance or because of figures placed in a progressive or quasi-progressive numerical succession (1,2,3, or 1,3,5,9). Such a justification would lie in the reasons of procedural savings necessary in order to avoid the use of the right of amendments for purposes of circumvention: Block the text, rather than modify it.

Such a technique is based on the approval/rejection logic of the amendments and allows the Presidents of the Assembly to select certain amendments according to

their content so that their approval or rejection implies the lapse of amendments having a content opposite to the amendment vote[27] in accordance with the provisions of art 97, para 2 of the Rules of the Italian Senate.

It is indeed a parliamentary technique which is based on a very refined use of the order of the votes by the President of the Assembly. We use the word kangaroo because the effects produced by the approval or rejection of an amendment make it possible to make great leaps from one amendment to another. This instrument is not based on any particular regulatory provision but on the principle of parliamentary law on the saving of votes, that is to say the manner which allows rapid progress when a disproportionate number of amendments are under discussion.

Another instrument used to fight obstruction is the guillotine motion used at the House of Commons to limit the duration of speeches by parliamentarians.[28] This instrument has been taken up by the Italian Parliament with, however, adaptations, which makes it possible to observe the adaptive nature of Italian parliamentary law in the face of other principles coming from other legal orders. The guillotine in

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27 It is thus about the "kangaroo closure" which was established in the English parliament at the beginning of the 20th century and then imported into the Italian parliament. <https://www.studiodostuni.it/index.php/sections/tecnica-parlamentare-che-cose-il-canguro/>.
The first use of the kangaroo technique dates back to the sitting of the Chamber of Deputies of December 5, 1991. In this circumstance, the President of the Assembly resorted to article 85 paragraph 8 of the rules of the Chamber of Deputies which allows voting by separate part of the amendments by retaining the common parts of the amendments presented (more than 1500). Before the vote, the President informed the parliamentarians that in the event of rejection, the amendments would have been considered to have lapsed with all the other amendments whose parties were in conflict. Cf Luigi Ciaurro, L'emendamento premissivo: un nuovo modo di legiferare? Osservatorio costituzionale, Marzo 2015, cit p12. In the Senate, the kangaroo technique appeared during the session of July 18, 1996 after the opinion given by the Rules Committee.

By the introduction of the kangaroo closure, "kangaroo amendments" have developed incidentally in the Italian Parliament. A kangaroo amendment is an amendment that summarises part or all of the law. It is formally an amendment but materially it is the law which is contained in a single article assuming the form of amendment. Kangaroo amendments are voted in advance of other suppressive, amending, adjunctive amendments. As a result, their approval automatically leads to the rejection of amendments with opposing content and in some cases leads directly to the final vote on the text. For example: a law consists of 35 articles, the kangaroo amendment (generally numbered 01) will be voted before the other amendments which concern the other articles (1.1, 1.2 for article 1, 2.1, 2.2 for article 2, etc). In case of approval and depending on the content, the amendments with opposing content will lapse.

The difference between the kangaroo closure and the kangaroo amendment concerns the initiative: presidential in the first case, parliamentary in the second. The kangaroo amendment is directly related to the content of the law and also based on the content of the law that it is drafted. It is simply a specific amendment technique based on a summary of the main points and aspects contained in the law. When it deals with several aspects in different articles, the kangaroo amendment summarises or includes in a single amendment all the provisions contained in the articles.

28 <https://www.parliament.uk/site-information/glossary/guillotine-motions/>.

Italian parliamentary law allows, in the face of an excessive number of amendments, to put an end to the discussion of these and to go directly to the final vote of a text whose deadlines are constitutionally limited (decree-laws, art 77 of the Constitution). It can be observed that the guillotine motion has some affinities with rule XXII of the regulation of the American senate. However, it must be specified that the guillotine motion, unlike the closure motion, is not subject to any quorum. In fact, this is a unilateral act of the President of the assembly motivated by the fact that a given legislative provision would lapse if it were not voted within a certain time period. The use of this tool is motivated on the one hand by filibustering, on the other it is based on specific constitutional provisions: The decree-laws which come into force immediately but must be converted into law within 60 days.

The use of the kangaroo technique would have positive effects because it would have a deterrent power on the misuse of the amendments which would be voted more quickly. As this is a technique of parliamentary law specific to voting rules, it could be put in place on an experimental basis and then be subject to constant application, which would constitute the case of a measure of internal order, outside the jurisdiction of the Constitutional Council due to the control exercised by art 61, para 1 of the Constitution: Once parliamentary regulations are approved the Constitutional Council shall rule on their conformity with the constitution.

But as an example is better than a thousand words, we will examine by way of example and for reasons of simplicity a case of kangaroo amendment whose technical name is *emendamento premissivo*.[29] Normally these amendments are voted before the other articles which make up the law – they are numbered with 01. Indeed, the *emendamento premissivo* is a special case of adjunctive amendment. It adds an article to the law but its particularity lies in the fact that it adds an article before article 1 of a law (hence the name *premissivo*) and not after as it should be.[30]

The amendment in question is 01.6000 *Marcucci, Cantini* which was presented during the approval of Law 76/2016 introducing in Italy the equivalent of the French PACS (civil union):[31]

Before article 1 add the following article thus drafted:

Art.01

29 Literally "an amendment before the others". It could be translated as "preliminary amendment".

30 Ciaurro, above n 27, 10.

31 Cf <http://www.senato.it/japp/bgt/showdoc/frame.jsptipodoc=Emend&leg=17&id=958366&idoggetto=959097>.

1. This law provides for the introduction into the Italian legal order of civil unions between persons of the same sex and also introduces new provisions concerning civil pacts.

2. The law provides that civil unions are:

   (a) a social union which is constituted by a declaration made before an official of civil status by two adults, not linked by relationships of kinship, adoption, marriage or by a civil union, according to the provisions contained by said law;

   (b) by the formation of a civil union the two parties acquire the same rights and duties, the civil union also involves the duties related to moral and material assistance, each party forming the civil union must provide according to his/her own capacities for the other's common needs;

   (c) the civil union is subject to all the provisions of the Civil Code concerning the patrimonial regimes of the family;

   (d) the provisions of the Civil Code which refer to marriage and the provisions containing the words: "spouses", "spouse" or any similar terms which appear in laws, acts having the force of law, in regulations as well as in administrative acts or contracts are also applied to each party to the civil union, with the exception of the provisions of the Civil Code not expressly mentioned by said law the provisions provided for in Title II of the law of 4 May 1983, n. 184;

   (e) the provisions of the civil code in matters of family inheritance apply to the parties of civil unions;

   (f) a party to the civil union may request the adoption of the same adoptive minor son of the other party making up the civil union;

   (g) the parties to the civil union are subject to the existing divorce legislation;

   (h) the dissolution of a civil union takes place even in the case of a court decision correcting the attribution of sex;

3. In accordance with the regulation of civil pacts, the said law regulates the rights and duties of two persons of full age who are bound by emotional ties as a couple to material and moral assistance, but are not bound by relationships of kinship, adoption, marriage or by a civil union.

This amendment contained all the main points of the law contained in the articles of the law (23 in total) which in turn were contained in two Titles (Title I relating to civil unions, articles from 1 to 10; Title II relating to civil pacts, articles from 11 to 23).

Approval of the above-mentioned amendment made all the amendments that conflicted with the content of the approved amendment void. It was basically a question of including all the provisions of the law in an amendment.

It is obvious, as evidenced by the drafting of this amendment, that the approval of this amendment does not imply approval of the law at all, but entails the approval of the directive principles to which the law should have complied. Indeed, by the approval of a kangaroo amendment the content of the text in its main axes is shielded. This is how either the text conforms to the content of the amendment previously voted, or the legislative procedure stops.[32] This results from the case law given on the subject by the President of the Senate (session of January 23, 2015) which, concerning the reception of the directive principles contained in a previously voted kangaroo amendment, affirmed that in case of rejection of an amendment attached to these principles there would be "the explosion of the entire law because there would no longer be a direct coincidence between the premises and what we write".[33]

This is how the kangaroo amendment is most often used as a formidable weapon in the hands of the majority to fight against excessive obstructionism in the face of amendments presented for delaying purposes. Indeed, it constitutes a possible weapon at the initiative of the parliamentary majority against the obstructionism of oppositions. As such, we can cite the amendment Esposito 01.103 presented when the electoral law 52/2015 was approved, which made more than 35,000 amendments obsolete.[34]

By the jurisprudence which has been identified by the Presidents of the Assembly, its use is subject to the principle of proportionality of parliamentary work, in particular when obstructionism led by oppositions prevents progress in parliamentary work. Indeed, the degree of intensity of obstructionism carried out by means of amendments is the parameter used. Thus, the use of a kangaroo amendment would not be permitted by the President of the Assembly in the presence of physiological obstructionism and limited by means of amendments which would not entail the stagnation of parliamentary work.

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32 Ciaurro, above n 27, 12.

33 Senato della Repubblica, XVII legislatura, 383 seduta, Assemblea Resoconto Senografico, 23 gennaio 2015, p13.

34 Cf <http://www.senato.it/leg/17/BGT/Schede/Ddliter/45203.htm>.