# The Influence of the Government and the Constitutional Council in the Legislative Procedure of the French Fifth Republic

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Introduction-Allocation of the legislative power in the Fifth Republic: a revolution that never happened?

Mény and Knapp: "the history of every country has a powerful effect on the ways in which legislative tasks are divided between parliaments and other bodies."[1]. Until the adoption of the Constitution of 1958 the French constitutional tradition remained consistent to the "classical" separation of power between the parliament and the executive and the absolutely unlimited legislative power of the parliament. The Constitution of the French Fifth Republic introduced certain innovations that limited the legislative power of the parliament. These limitations that derived from the power of the Government and the Constitutional Council in the legislative sphere seem to make the parliament "a body through which the laws are passes and not a body that passes the laws" [2].

One of the principal characteristics of the Constitution is the introduction of the original redistribution of the normative power between the parliament and the executive. The prognosis of the introduction of this constitutional innovation predicted a complete weakening of the parliament and its transformation from an "omnipotent into a powerless legislative body"[3]. With the article 34 of the Constitution "a unique legal revolution has been performed in which the roles of the parliament and the government in the creation of the general legal norms has been largely changed"[4]. In this way, instead of the assumed general normative jurisdiction of the parliament, the constitutional norm determines precisely stated normative jurisdiction of the parliament (compétence d`atribution) and general normative jurisdiction of the executive (competence de droit commun).

The differentia specifica of this constitutional change is also the manner in which the constitution-maker made a classification of the laws whose passing is in the jurisdiction of the parliament. According to this classification the constitution maker created a possibility that a part of the *materia legis* to becomes a subject of additional regulation with other regulations. The article 34 of the Constitution determines the matter that is regulated by law, but in a completely new manner and in the legislative sphere the constitution maker separates laws that "set rules" and laws that "determine basic principles". In the category of laws that "set rules", the constitution maker specifies the laws that regulate the rights and obligations of the citizens, taxation issues, criminal law issues, electoral system, nationalization and transfer of ownership from the

[1] Mény and Knapp. *Government and politics in Western Europe-Britain, France, Italy, Germany*. Oxford university press. Oxford.1998.p.187.
[2] Hejvud.Politika.Clio.Beograd.2004.p.588.
[3] Wright. *The government and politics of France*. Holmes and Meien publishers, inc. New York.1982.p.127.
[4] Јовичић.*Уставни и политички системи*. Службени гласник.Београд.2006.р.178.

public to the private sector, the guarantees for the civilian and military personnel employed by the state authorities, nationality, marital status and inheritance. In the category of laws that "determine basic principles" the constitution classifies the laws that regulate the matter of national defense, local self-government, education, environment protection, state ownership, labor law and social security[5]. The basic intention of the constitution maker for the classification of the laws into these two categories, has probably the intent to enable better efficiency and rationalization in the work of the legislator, with a tendency for the former to regulate the determined matter, and the latter to determine the basic principles, so that detailed elaboration is left to other regulation[6].

Contrary to this constitutional provision is the article 37 which determines that the matter that is not in the legislative domain has a character of a regulation[7]. This overrules the position that the sole domain of the regulation is the enforcement of the laws, and in this way the government is free not only to regulate the matter that is not specified in the article 34, but also to change the previously passed laws with regulations. These two constitutional norms seem not only to regulate the authorizations of the parliament and the executive, but also to limit the "legislative monopoly" of the parliament in favor of the government, who on the basis of the Constitution obtains the authorizations of a presumed legislator[8].

The experience from the application of the Constitution of De Gaulle does not indicate spectacular changes that would reflect on the position of the parliament as the central legislative authority, even though this Constitution provides "domaine reserve" of the legislative matter, and a conversion of the normative jurisdiction between the parliament and the government. The strength of the legal tradition for the total freedom and independence of the parliament in deciding to pass laws and the benevolent position of the Constitutional Council in cases of collision of jurisdictions, seem to have played a key part for it. Bell indicates that the complementarities of the decisions of the State Council, in relation with the real competence of the parliament and the government, enacted before the initiation of the parliamentary phase and the decisions of the Constitutional Council in relation with the collision of jurisdictions, enacted after the passing of a law in the parliament, reflect a political consensus in favor of the constitutional tradition[9]. The

[5] Constitution of the French Fifth Republic art.34.

[6] Bell states that most of the decisions of the Constitutional Council that relate to the distinction of the laws that "set rules" and the laws which "determine basic principles" relate to the social security matters. In that manner, laws regulate the categories of fees of the citizens in case of illness, while their amount and types (hospital expenses, spa treatment expenses etc) are regulated by regulations. Laws regulate the maternity leave compensations, while the regulations regulate the terms that have to be met in order to receive this right (age, interval between births etc).
Bell. *French constitutional law*. Clarendon Press. Oxford.2001.p.92.

[7] Constitution of the French Fifth Republic art.37.

[8] In favor of the thesis speak the data in accordance to which in the first years of the application of the Constitution a real "flood" of autonomous regulations enacted by the government occurred, but their number significantly decreased. The government passed 185 such regulations in 1958, while in 1976 they numbered 16. Јовичић.*Уставни и политички системи*. Службени гласник.Београд.2006.р.178.

[9] Bell. *French Constitutional law*. Clarendon press. Oxford.2001.p.98.

precedents established with the decisions of these authorities seem to enable the simple implementation of the article 34 of the Constitution.

Reviewed from this aspect, the solutions of the provisions of articles 34 and 37 of the Constitution of the Fifth Republic, represent more a "developmental trend that has existed in the past ninety years, rather than a real big change in the political power" in the country[10].

## 1. The role of the Constitutional Council[11] in the legislative procedure

The Constitution of 1958 provides a bold and extravagant solution regarding the issue of constitutional review, The French model of constitutional review provides a realization of the procedure for assessing the constitutionality in the course of the same legislative procedure. In this way, performing the normative constitutional review i.e. realizing the preventive constitutional review, the Constitutional Council of France indirectly participates in the legislative procedure. For these reasons, the Constitutional council is often referred to as the third legislative house.

Bulajić says: "In accordance with the word of the Constitution, ordinary laws are the acts passed in the form of laws, texts finally passed in the Parliament, so the Council under this term (*lois ordinaires*) subsumes all types of laws - financial, programmatique, *habilitation ordinaires* and the ones that ratify international agreements"[12]. The assessment of the constitutionality of the ordinary laws is not compulsory, and whether it will be performed depends on whether the competent subjects for its initiation will use its right. The procedure for constitutional review is instigated upon the initiative of the President of the Republic, the prime minister, the chairmen of the parliamentary houses or by a group of 60 members of parliament or senators.

The review of constitutionality of ordinary laws is preventive and it is carried out before the law enters into force[13]. If we accept the position that the preventive constitutional review implies creation of laws, while the repressive review implies destruction of laws, it will not be an error to conclude that the Constitutional Council and its jurisdiction in the

[10] Bell. *French Constitutional law*. Clarendon press. Oxford.2001.p.86.

[11] One of the more significant changes is the provision that establishes the Constitutional Council (Conseil constitutionel) as a separate constitutional authority with the mission to "protect the constitutionality and to secure undisturbed functioning of the public authorities". The constitutional provisions on the organization, competence and procedures at the council are elaborated with an Organic law passed on 07 November 1958. The authorities of the council are numerous, heterogenic and classified in three basic groups: *the review of the constitutionality of the laws, the rules of procedure of both houses and international agreements, as well as expressing its position whether a certain matter is in the legislative or regulatory domain*, *matters connected to the carrying out of parliamentary and presidential elections and referendums* and *counseling functions for the president of the Republic* - Mijanović.Gašo. *Kontrola ustavnosti zakona*. Sarajevo.1965 p. 127.

[12] Bulajić. *Čuvar Francuskog Ustava*. Službeni glasnik. Beograd.2006.p.63

[13] When a subject of constitutional review are the laws, the French model is one of two principal models of preventive review. This model provides the constitutional review of the specific law after its passing in the parliament, but prior to its promulgation. The Finish model of preventive review provides the procedure for constitutional review which is carried out prior to the passing by the parliament.

preventive constitutional review of laws that are in procedure represents a separate phase of the legislative procedure.

Unlike the constitutional review of ordinary laws, the review of organic laws is obligatory. Even though it is an obligatory constitutional review, still it does not mean that it is automatically carried out. On the contrary, the review is carried out upon the initiative of the prime minister. The deadline for initiating the procedure for constitutional review is not determined, but since it is obligatory, it is an element of the laws-legal regime and any delay by the prime minister would mean impossibility for promulgation of the law and its enforcement. The constitutional review of the organic law in the Constitutional Council has a procedural and material dimension. That means that the Council is obliged to pay attention both to the following of the determined deadlines, the necessary majority for the passing of the law in the National Assembly, and to the issues related to the human rights and freedoms guaranteed by the Constitution, the principles and constitutional values, honoring the Constitution in the part that determines the matter which is appropriate for regulation with the organic law etc[14].

There is not much information on the influence of the decisions of the Constitutional Council on the legislative process. Still, the fact that these decisions may determine unconstitutionality of specific norms of the law and the fact that the same as such may not be a part of the law, shows that the Constitutional Council comes out as the third legislator, by using its authority to review the constitutionality of the laws[15]. If the obligatory character of the preventive control of the organic laws is highlighted and the authority of the decisions of this body (no legal remedies are allowed against them), then the conclusion that the Constitutional Council is a so called co-legislator, is acceptable. Anyhow, this body may not only prevent the promulgation of unconstitutional legal provisions, but, with its decisions, it directly models bills and in that way intervenes in the legislative process. For these reasons, even though not explicitly, the government and the parliament in the course of the legislative procedure, especially in the process for reviewing the bill, consider the established practice of the Constitutional Council. Besides, it is the only institution in the system of

[14] The first decision of the Constitutional Council which determines unconstitutionality of specific legal provisions due to not being adjusted to the freedoms and rights of the citizens is the decision 74-44 DC. This decision determines the unconstitutionality of specific provisions of the Law on changing the provisions for merging private non-profit associations, with the rationale that unconstitutional provisions harm the freedom of association.

[15] On the other hand, the Constitutional Council has often taken the role of a mediator in the dispute between the opposition parties and the government. Even though, in such cases, the role of "judge of the government" has often been assigned, the Constitutional Council is today remembered for the decision in relation with the law on labor relations from 2006. The media qualified it as a political decision, as on one side it determined constitutionality of the law and, on the other hand, in its explanation, offered additional guidelines for the government which would perfect the text of the law. The subject of the specific issue is the so called "Agreement for first employment" (Contrat premiere embauche –CPE) which may be concluded by the citizens that are under 26 years of age. This agreement enabled the employer's easier dismissal of the employee in an exchange of a determined financial compensation. This legal solution and the highly controversial decision of the Constitutional Council have incited mass student protests.

organization of power of the Fifth Republic which does not report to any other body, and no legal remedies are allowed against its decisions.

### 1.1 The procedure for passing organic laws - the role of the Constitutional Council

In the attempt to define organic laws, Jovicic states: "the term organic law in the legal theory is used to mark separate laws that elaborate the constitutional principles and the laws that specifically determine the organization and functioning of the state institutions and especially the highest state authorities."[16] Until the Constitution of the Fifth republic these laws have no different status than the ordinary laws, but with the Constitution of 1958 the organic laws become a constitutional category.

The Constitution of 1958 provides a realization of a special procedure for passing of organic laws. If it is accepted that the legislative procedure is always "projected" in order not to be realized abruptly, which would enable a careful and multisided review of the legal norms, then it is understandable for the legislative procedure for passing of organic laws to be more complicated, taking into consideration the matter they regulate.

The more complex procedure for passing of these laws should provide an additional guarantee that the legal norms and other legal consequences from their implementation will be reviewed in detail before they enter into force. In that manner, the provision of Article 46 of the Constitution specifies 4 conditions whose fulfillment is directly bound to the formal side of the constitutionality of these laws. They are:

- The organic law may be subject to debate in the legislative houses and it may be put to vote not earlier than 15 days from the day when it is placed on the agenda. This 15 day deadline is expected to provide the members of parliament with the possibility to study the solutions and measures offered by the bill in detail on one hand, and to review the bill in detail before the vote on the other hand.
- In case of dispute between both houses about the text of the bill, the organic law shall be passed if the National Assembly passes it with a majority of its total number of members.
- The organic laws that relate to the Senate must be passed with the identical text by both houses. This constitutional provision represents a guarantee that the Senate's veto shall not be overridden when subject to the

[16] The reason for introducing and passing the organic laws is the wish of the constitution-maker to relieve the Constitution to ensure that the most important issues of the state system are regulated by a separate category of laws (for instance the Law of the High Court of Justice, the Law on the organization and functioning of the Constitutional Council, Law on the organization and functioning of the Economic and Social Council etc). Јовичић.*Уставни и политички системи*. Службени гласник.Београд.2006.р.186.

legislative procedure is an organic law that regulates the matter about the organization and functioning of the Senate. Namely, if the regular legislative procedure for the ordinary laws, the Senate's veto is only suspense and can be overridden; when such organic law is subject to vote, the rejection of the offered solutions by the Senate may completely block its passing.

- The organic laws may be promulgated only after the Constitutional Council has previously determined their constitutionality. Apart from the ordinary laws, the organic laws are subject to preventive, but also obligatory constitutional review which is a part of the legal regime of these acts.

All these elements provided in article 46 complicate the procedure for the passing of the organic laws. Today, the "obligation of the preventive review of these laws, as well as all other elements that complicate the procedure for their passing, strengthens the differentiation between the ordinary laws and the organic laws and the latter are promoted to the rank of relatively autonomous legal category, so they are placed de facto between the Constitution and the ordinary laws."[17]

## 2. The Role of the government in the legislative procedure

Diamel says: "Whatever criteria we accept, whatever option appears, France chooses the power of the authority called executive"[18].

The role of the government in the legislative procedure in France is not negligible. On one hand, the government influences almost all separate phases of the legislative procedure, and on the other hand it possesses two very important instruments (le vote bloqué and la motion de censure) whose use may surpass and suspend the obstruction approach of the members of parliament. Therefore, all of the mechanisms stated below make the government not only an involved subject, but a direct participant in the legislative procedure.

### 2.1 The role of the government in the separate phases of the procedure for passing laws

The government is a subject that participates in each of the separate phases of the legislative procedure. Unlike the other subjects (State Council and the Constitutional Council) whose involvement is limited only to certain phases of the procedure for passing the laws, the government directly participates in the entire legislative process. Thus:

- The government has a right to legislative initiative. The bills proposed by the government have priority and they are more

[17] Mijanović. *Kontrola ustavnosti zakona*. Sarajevo.1965.p.129.
[18] Diamel.*Уставно право-демократиите*. 1993.p.180.

passable in the parliamentary procedure in comparison to the bills by the members of parliament[19].

- The government has a constitutional authority to create the agenda of the Parliament (article 48, paragraph 1). In this way, the government secures priority in the parliament in deciding upon the specific bills.
- The government has a right to open a general session and a right to file amendments to the bills. The authority of the competent minister is the presentation in the appropriate parliamentary house of the specific bill which is in procedure. In this way "the rules of the game" enable the opinion of the government to be heard before the report of the competent parliamentary committee. The session is held as a governmental proposal, and not as a proposal of the committee.
- The established "financial guillotine" which disables the filing of amendments that increase the public expenditure and decrease the public income, indirectly deprives the members of parliament of the prerogative to file amendments and assists the government in filing the final proposals.
- The government may ask for forming of the Commission Mixte Partaire. All of the conclusions regarding the harmonized positions of both houses, before being voted in each one, are first subject to approval by the government.

Still, even though all of the cited instruments provide a comfortable position of the government as a participant in the legislative procedure, probably the most powerful instrument which has strengthened its constitutional position in relation with the parliament is the so called delegated legislation. This instrument secured the government a better constitutional position. With this instrument, the government seems to have the role of the primary legislator, even though the parliament is the holder of the legislative power.

## 2.2 Instruments through which the government may suspend the obstructive actions by the members of the parliament

The vote en block (*vote bloqué*) and the vote of confidence of the government (*la motion de censure*) are powerful instruments that the government may use in the legislative procedure, in the attempt to surpass the obstructive actions of the members of parliament. Even though their realization is followed by numerous controversies and disputes and their application "expands the borders of rationalized parliamentarism to the limits of absurd"[20], still, the

[19] In favor of this speaks the data that between 1959 and 1996 out of total passed 1484 laws only 183 have been passed upon the initiative by the members of parliament. This means that 88% of the proposed bills have been passed upon the initiative of the government.

[20] Vasović. *Savremene demokratije- tom I*. Službeni glasnik.Beograd.2006.p.513.

frequency of their application in the period of the French Fifth Republic gives them the characteristic of the cure against the paralysis of the system.

2.2.1 The article 44 of the Constitution concerning the regulating of the right of amendments provides that "the government may request the house where the procedure is taking place to decide with one vote, on the whole or a part of the text, taking into consideration only the amendments proposed by the government."[21]. If it is accepted that the filing of amendments to the bill may be an efficient instrument to prevent the passing of the law and in that way obstruct the legislative procedure, then the "vote en block" secures a comfortable position of the government protecting it from the possibility of "changing her proposal with amendments which suit the wishes of the members of parliament"[22].
In this way, even though the submitters of the amendments have a right to explain and defend their passing, the governmental instrument vote bloqué disables the separate voting on each one of them.

The use of this mechanism is often followed by loud disagreement and criticism that are based on the thesis that this instrument does not allow the detailed review of the bill and disables the preparation of a "legally perfect" law. In this way the parliament is placed in a position of a subject that a priori has to ratify the previously adopted decision and act of the government.

From another perspective, if the cyclical harmonization of the houses about the text of the bill through the shuttle procedure is taken into consideration, as well as the danger of forming a diabolical circle where the subject of the additional readings and harmonization would be the newly submitted amendments, then it seems pragmatic to use the institute vote en block. For these reasons, even though this instrument skillfully balances between the pragmatism and the efficiency of the work of the parliament, the French authors recommend bien réfléchir before each use.
2.2.2 Another instrument which the government may use to condition the parliament to pass the bill in procedure is the issue of vote of confidence (*la motion de censure*). In this way, the government has the authority upon a voting of a certain law in the National assembly, to initiate a vote of confidence. Within 24 hours the proposal for vote of confidence is not submitted, or it is submitted, but it is not adopted with the required majority, the bill shall be deemed passed even without formal voting. This institute enables the passing of the bill not only by its voting in the parliament, but through the vote of confidence of the government at the National assembly. For that reason, the law in accordance with Birdot in this case would be more "an act of resignation by the parliament, rather than an act of its will"[23].

The parliamentary history of these two, in their essence restrictive procedures, speaks about the established experience in their

[21] Constitution of the French Fifth Republic art 44.p.3.
[22] Тренеска. *Извршната власт во демократските системи*. Матица македонска. Скопје.1999.p.208.

[23] Јовичић. *Уставни и политички системи*. Службени гласник.Београд.2006.p.182.

use[24]. Still, even after half a century of the existence of the Fifth Republic, the academy remains divided about these instruments. Their comprehension as instruments that make an unacceptable foray in the legislative procedure on one side and as justified and wanted instruments against the inefficiency of the parliament and the whole political system on the other, shall remain in the literature.

[24] In the period from 1958 to 1994 the institute vote bloque was used 299 times, *la motion de censure* 77 times. See Vasović. *Savremene demokratije- tom I*. Službeni glasnik.Beograd.2006.p.513.

## Conclusion

Vasović: "The key phase of the transformation of the French society took place in the course of the fifties of the twentieth century"[25]. This transformation would not have been possible without laws whose production has changed the legislative procedure into art.

The legislative procedure in the French Fifth Republic is characterized by several elements that make a real haute couture of the legislative procedure. Even though it is absolutely exhausting and in certain situations absurdly complicated, today the legislative procedure of France is one of the must-have models for studying.

The procedural landscape of the legislative procedure provides its realization in both houses of the bicameral Parliament. In modern terms, the legislative procedure seems to be unnecessarily long. The legislative procedure in the French Fifth Republic is complex and it is realized in several stages. The provisions of the Rules of procedure of both legislative houses do not precisely determine how many readings of the bill are necessary in order to pass the law. In this way, on one hand the "shuttle[26]" procedure as a feature of the process, may enable conditions for preparation of a good and clearly formulated law, but the danger of repetition of the successive readings may fully "anchor" the bill in the parliamentary phase. On the other hand, the large number of subjects that are directly involved in the process (members of parliament, parliamentary boards, both houses, the State Council, the Constitutional Council, the Government) and the mechanisms that allow them to participate, additionally complicate the legislative procedure. Thus, the role of these participants in the legislative procedure imposes a need for planning in their actions. Contrary to the impression that today the legislative procedure is performed without any larger turbulence in the parliament, the experience of the French Parliament testifies that any "chivalrous" action of these participants may "freeze" the legislative process. Therefore, only their harmonized positions may secure the passing of a legally "perfect" law.

The fact that the government is directly involved in the legislative process, and the instruments that are available (most of so called delegated legislation) provide it a solid constitutional position of the primary legislator, makes relative the thesis that the parliament is the one who performs the legislative function.

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[25] Vasović. *Savremene demokratije- tom I.* Službeni glasnik.Beograd.2006.page.471

[26] The model of legislative procedure in the French Fifth Republic provides an obligation for passing the bill with an identical content in both houses of the French Parliament. A characteristic of this model is the delivery of the bill to the Second House immediately upon its first reading in the house in which it has been proposed. Therefore, unlike the usual solution that the bill needs to be a subject of three consecutive readings in one of houses, and even after that to be delivered to the second house for review, the French model provides successive delivery of the bill from one house to the other immediately upon its each reading. This means that in order to pass the law, an intermittent discussion and vote both in the National Assembly and in the Senate is allowed, until the consent is ensured for the text of the bill. This procedure of successive delivery of the bill from one house to the other in order to reach concordance on its contents is called "shuttle" procedure.

In favor of this claim are the arguments in accordance to which the government is the one who has the right to a legislative initiative (more than 80% of the bills come from the government); it is the one who creates the agenda of the parliament, it has the right to so called financial guillotine etc. These instruments, provide it not only a comfortable position of participant in the legislative procedure, but also make it the navigator of each of its separate phases.

On the other hand, the obligatory preventive control of the organic laws, which is in the jurisdiction of the Constitutional Council and which must be inevitably realized upon the passing of the law and prior to its promulgation, make the Constitutional Council a co-legislator. Even though through the history, the Council has not succeeded in imposing itself as the third legislator, still, the parliament and the government in the course of the separate stages of legislative procedure consider its established practice.

Finally, the legislative procedure, as it is performed today, represents a successful combination of a long parliamentary experience and solutions that follow the modern parliamentary trends. Thus, even though France attempts to follow the force of the parliamentary tradition, the endeavor for perfection and efficiency of the legislative procedure sets the new "rules". Contrary to the previous, even though today it appears that the instruments that are available to the government increase its role in the process and make it the primary legislator, the parliamentary tradition and the benevolent position of the Constitutional Council in its decisions towards the legislative body seem to quell the announced legal "revolution". Therefore, probably the most important characteristic of the French model is the unification of the conservatism on one side and the developmental course in the parliamentary life on the other.

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