



The Majority-Opposition Pairs

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GEORGES BERGOUNOUS

THE MAJORITY-OPPOSITION PAIRS

The idea of acknowledging the opposition, of giving it its entire place in the parliamentary system, of letting it represent, legislate, or exert some control, is not as new as the recent 2008 revision to the constitution would suggest. The opposition is an integral part of parliamentary democracy, and, while its existence was not initially engraved on the constitutional marble, neither was it absent from the preparatory work on the Constitution. While institutions did not (yet) integrate the parliamentary majority system that the 1962 revision would implement durably, and the very notions of majority and opposition do not have the same “purity” as in the British regime (although their shape is blurry and evolve throughout the parliamentary term) it is not surprising, after all, that a passionate admirer of the “English-style” regime and its electoral system, Michel Debré, Minister of Justice of the last government of the Fourth Republic, stressed the indispensable role the opposition should play when he presented the project of the new constitution to the *Conseil d’État*. Arguing that the constitution should give precedence to the weekly session of questions to the government, he explained “the opposition would thus have the guarantee that its voice is heard,” and added “This provision is the key feature of the parliamentary regime and of the rights recognized to the opposition in that regime. [...] The intervention of the assemblies is a form of control and a guarantee. A government, however, should not monopolize the activities of the assemblies to such a degree that the opposition would no longer be able to make its presence known. While the opposition should not be allowed to block the legislative process, it should be able to ask questions.” Probably as much of an admirer of the Westminster

Parliament as the Prime Minister ¹, Raymond Triboulet, who would become a minister and a member of the *Académie des sciences morales et politiques*, proposed, during the first term of the National Assembly of the Fifth Republic, to separate the majority from the opposition with a hallway that would divide the floor of the National Assembly in two parts, so that all members would physically demonstrate to which side they belonged. While the “gloomy mechanization” that prevailed in the Parliament during the first years of the Fifth Republic did not give much of an opportunity to the opposition – nor to the majority for that matter – to assert its role and get it recognized, the structuring of political life around the presidential function allowed it to emerge and made it easier to identify.

II Since 1974, when members of the Parliament obtained the right to submit cases to the *Conseil constitutionnel*, politicians and specialists of the constitution have sought to enshrine this recognition of the opposition and worked tirelessly to secure its official status. After an always-vigilant *Conseil constitutionnel* blocked the attempt of 2006, ² a constitutional revision was in order. However, that revision, despite the introduction of article 51-1, did not really establish a status, if only by linking to the opposition minority groups that can belong to the majority. Once the principle of a declaration of belonging to the opposition had been posited, the revision clearly established new rights for the opposition, but parliamentary practice, and even a few texts, had already explicitly recognized a few of those rights in the political debate, on par with the majority – which essentially meant implementing a form of positive discrimination favoring the opposition, since it is, by definition, a smaller group. Thus, ahead of the 1967 general elections, new regulations of radio and television propaganda came into effect and replaced the principle of equality between all political groups presenting a minimum number of candidates to the elections with the principle of equality between the majority on the one hand, and the opposition on the other. Similarly, when the session of questions to the government were created in 1974 at the same time as the rules of the National Assembly, the time devoted to those question was divided equally between the majority and the opposition, and, in 1981, it would be divided proportionally to the size of each group, before the rules changed back again to dividing time equally.

1. Michel Debré became the first Prime Minister of the Fifth Republic.

2. CC, 2006-537 DC, June 22, 2006.

Finally, a long time before any text required it, the functions of president and reporter of inquiry committees had been divided between majority and opposition: it occurred five times during the ninth term of the assembly, and four times during the twelfth term, until the 2003 revision of the rules reserved one of the two positions to the parliamentary group that had initiated the commission, and this type of appointment had become in practice almost automatic for fact-finding missions. While majority and opposition were not treated equally, parliamentary practice also reserved positions for the latter, whether it was to seat on joint committees (*commissions paritaires mixtes* or CMP) – although at times those committees only reflected the majority of each of the two assemblies – or to appoint, beginning with the fifth term, special reporters, who are now designated in accordance with the political configuration of the Assembly. Finally, the nomination of coreporters, often appointed as a bipartisan pair, became increasingly frequent and made it possible to associate majority and opposition not only in deliberations, but to make them work together on common projects. While equality [*“parité”*] is a polysemous term, the scope of this article is limited to political equality, as gender equality only appeared briefly in parliamentary rules when the *Conseil constitutionnel* curtly blocked the attempt of the ecologist group to have two deputies of both genders as copresidents of their group in the National Assembly, rejecting the ecologist proposal on the ground that it disregarded the principle of equality as much as the hierarchy of norms.³

III

Born out of practice before it was codified in several stages, at least in the National Assembly, the system of joint pairs—that of associate majority and opposition to pacify their relations—is in line with the movement of promotion of the Parliament, the keystone of the constitutional reform of 2008. However, this system and its use prompt us to reflect both on its confinement to control activities and on the recognition that a bipartisan political situation is now dominant.

A FAVORED INSTRUMENT OF CONTROL?

The constitutional revision recognizing the opposition had a number of objectives: to make the opposition accountable; to anchor it into the system; to involve it in its regular operations, “in the smooth unfolding of the democratic debate, in the smooth operation of constitutional public

3. CC, 2013-664 DC, February 28, 2013.

authority”⁴; to bring the opposition to agree to assume the responsibilities that this participation entailed, despite its reluctance to engage in what could be construed as a form of tacit agreement with the majority. The Balladur committee that prepared the revision invited the opposition to “play a more responsible role and relinquish the uselessness of systematic critiques that discredit political discourse.”⁵ From the outset, it seems that control was the area of choice for this association of the opposition to the parliamentary function, a competence that article 24 C put on par with voting laws. The reporter of the revision project to the Assembly clearly defended that approach, when he stated without hesitation “The opposition must accept that the majority is justified in implementing its policies through law. On the other hand, however, the majority must accept that control is the purpose of the opposition. The minority must be favored and even have an equal share of the responsibilities when it comes to control activities.”⁶

First, however, we must agree on what control means. If parliamentary control must be limited to challenging the responsibility of the government in accordance with the procedures defined in article 49 and 50 C, it is clear that such an approach will necessarily lead to a confrontation, that it will not encourage collaborative efforts between majority and opposition, and will not be favorable to the development of joint pairs. As Pierre Avril points out however, the jurisprudence of the *Conseil constitutionnel* seems to support this conception of control.⁷ This explains the *Conseil*’s strict position regarding any procedure that could challenge the responsibility of the government. It also explains why the *Conseil constitutionnel* is always careful to add to its conformity declarations a traditional clause defining those procedures as limited to “a mere informative role to let the Assembly exert, during ordinary and extraordinary sessions, its control on governmental policies, within the conditions laid out in the Constitution.”⁸ This conception seems outdated today, “because, in reality, confidence and censure no longer rest with the Assembly but with voters,” and, “when the government effectively exercises its responsibilities in view of the people (and, in

4. CC, 95-370 DC, December 30, 1995.

5. Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la Ve République, *Une Ve République plus démocratique* (Paris: La Documentation française, 2007), 65.

6. Warsmann, Jean-Luc, Assemblée nationale, report 892, thirteenth term, May 15, 2008, 57.

7. Avril, Pierre, “L’introuvable contrôle parlementaire (suite)” *Jus Politicum* 3 (2009): 2.

8. CC, 59-2 DC, June 24, 1959. The jurisprudence has remained unchanged since that decision.

addition, in front of the Président de la République during election periods), declaring that the purpose of control is to allow the Parliament to challenge a responsibility that is not within its purview is tantamount to giving to that competence an illusory foundation.”⁹

If control however, means carrying out a supervising mission, verifying the due application of approved bills, and the implementation of the policies that the lawmaker decided on; and if that control is coupled with an assessment of public policies, as required by article 24 C, in order to evaluate performance by comparing results with the goals set and the means deployed, then, as a member of Parliament well-versed in this matter underscores, “to control the action of the government, simply means to verify that things are done as they are supposed to. Majority and opposition thus need to learn to work together, with two different outlooks, but based on common proposals and pursuing the same objective.”¹⁰ This is precisely the solution implemented by the National Assembly, and the Committee of Evaluation and Control, whose reports, following article 146-3 of the rules of the Assembly, are entrusted to pairs of reporters taken from both the majority and the opposition. In all instances, when such pairs were created, they reached common conclusions, except for some very rare differences of point of view on particularly political issues, such as state-funded medical assistance. The working groups that the committee put in place are also joint groups and their conclusions are agreed upon, without the need to hold a vote. The same goes for decisions to add items to the agenda and for the authorization by the committee to publicize its deliberations, which can be the object, during the week devoted to control, of a debate in a public session held in the *salle Lamartine*, a room better suited for a peaceful discussion than the hall for plenary session.

The implementation of laws – “verifying [whether] the bills that are passed are implemented in a satisfactory manner”¹¹ – is, logically, an area of choice for pairs of reporters to exercise their joint control. In 2004, after the reporter of a project had been put in charge – in accordance with the rules – of presenting the report on the implementation of its dispositions six months after they came into effect, the custom to appoint

9. Avril, “L’introuvable contrôle,” 2.

10. Dosière, René in Assemblée nationale, *Journal officiel. Compte rendu intégral, première séance du 25 janvier 2011*, 469.

11. Ibid.

a co-reporter from the opposition began in the Legislation Committee and in the Committee on Economic Affairs of the Assembly, and the practice is now codified. As for the Senate, it left the secretariats of the permanent committees in charge of exercising this control, but as a result of a decision of its bureau, it eventually created a dedicated senatorial committee in the fall of 2011, whose reports were also entrusted to bipartisan pairs.

VI Beyond those pairs of reporters on the implementation of laws, the inquiry committees, the fact-finding missions of the committees, and those of the conference of presidents, have given a lot of importance to the opposition by giving it an equal share of the positions of president and reporter as is given to the majority, with the majority claiming the reporting positions in most cases. This practice, which at first was only required of inquiry committees by the rules of the Assembly, was eventually extended to other procedures, and later on codified. The rules thus state that the position of president or reporter of a facts-finding mission of the conference of presidents should go to a deputy from an opposition group, whenever the same person does not hold the two positions, and that the mission of a permanent committee that counts two members must include one deputy from an opposition group. Sometimes, this parity principle is extended so far as to require the appointment, as in the Legislation Committee, of a president-reporter from the majority and of a vice-president-coreporter from the opposition, so that the two types of competences are exercised jointly. The rules of the Senate, as they were rewritten in the aftermath of the resolution implementing the constitutional revision, state that, from now on, the positions of president and reporter of inquiry committees and fact-finding missions must be shared.

Finally, this equality is also sought in the working groups that the organs of the assemblies establish in order to propose changes to internal procedures. The reporters of the group created in 2010 within the Legislation Committee of the Senate on conflict of interests came from all the political groups, and the deliberations of the group created within the bureau of the National Assembly to work on the same topic – and which led to the creation of a deontologist position – were reported on by a pair of deputies, one from the majority, the other one from the opposition.

However, revisited in that way, “control is everywhere,” to borrow Pierre Avril’s phrase,¹² and the distinction between control and legislation, “trotted out in text books, and sometimes repeated in articles of law” – for instance in the new wording of the first paragraph of article 24 C – “obscures the deep connection that links the two notions,” for the legislative debate cannot be detached from control given that most laws tend “to correct a specific policy and seize that opportunity to examine the action of the government and of the administration.”¹³ Thus this control necessarily has a preventive aspect in the course of the legislative process itself, and undermines significantly the relevance of the distinction between a posteriori and anticipated control. If indeed control is exercised “at the pivotal point between accountability and representation,” it cannot be confined exclusively to procedures that are specifically geared toward it, and it is also present, for instance, in the amendments “which are an abstract form of injunction since the government is required to execute the law.”¹⁴

VII

In those circumstances, the practical use of joint pairs logically spread to, although it did not yet pervade, the legislative function. Article 146-5 of the rules of the Assembly had already prescribed that, in order to allow the conference of the presidents to benefit from an expertise that could help them make useful decisions on potential misunderstandings of organic rules relating to the presentation of bills – that is, regarding the scope of the prescriptions applicable to impact studies, which is the first stage of the review of an Act – the Committee of Evaluation and Control, whose work is done by pairs of reporters from the majority and the opposition, would carry out this task, when asked by the president of a committee in charge of deciding on the merits of the law. In the end, the committee decided that the missions should carry out this task directly, but invited their presidents to appoint on their own a bipartisan pair to this end, and that is what the Committee on Economic Affairs, for instance, did.

Reflecting this osmosis between control and legislation activities, it became apparent – although in a clearly limited number of cases, of which even fewer were successful – that pairs of reporters for the Committee of Evaluation and Control presented joint amendments,

12. Avril, “L’introuvable contrôle,” 6.

13. Le Divellec, Armel, “Des effets du contrôle parlementaire” *Pouvoirs* 134 (2010): 130, available on <http://www.revue-pouvoirs.fr>.

14. Avril, “L’introuvable contrôle,” 6.

viii based on the proposals of a report (as illustrated during the thirteenth term by the series of amendments related to independent administrative authorities that were presented on the organic bill on the defender of rights) although only one of them was adopted. Indeed, this type of bipartisanship remains exceptional, as opposed to the regular public sessions of the Assembly that reflect the divides – one is tempted to say the postures – that pit the majority against the opposition. Committees, and in particular special committees, are more suitable for an approach that associates majority and opposition; for instance, the committee for the bill on bioethics, whose president and reporter were the same as those of the fact-finding mission that had researched the issue for over a year and half and turned in a report at the end of its assignment, or the committee created to review the bill that followed a report of the mission of evaluation of preventive policies to curb violence against women, authored by a pair of reporters that embodied equal representation in two respects, since a woman was the president and a man the reporter of this special committee. The same two deputies eventually presented a bill to abolish prostitution.

A final innovation, implemented at the beginning of the fourteenth term, required that a coreporter for the application of a law be appointed to the Legislation Committee at the same time that a reporter was assigned to a bill project or proposal. This new procedure highlights the link between legislation and control, plus the role that a bipartisan pair can play in it, but also the gap that can exist between the two members at the deliberation stage. When he presented this new procedure, president Jean-Jacques Urvoas explained that it would help institutionalize the idea that bills are more specifically overseen by two members of parliament, one from the majority, the other one from the opposition, and the latter would be offered a chance, “if he wanted, to express a ‘particular opinion’ – and not a ‘dissident’ one, for its purpose was not necessarily to express hostility vis-à-vis the positions of the reporter – that would be added to the report of the Legislation Committee, and given a length and a placement that would make it ‘visible.’”¹⁵ This initiative is akin to the proposal sometime made, but controversially so, to appoint a counterreporter from the opposition who would have resources comparable to those of the reporter and who would present a counterreport. The implementation of such a procedure, however,

15. Minutes of the revision of the commission of laws n° 2, July 4, 2012, <http://www.assemblee-nationale.fr>.

would require a bipartisan and binary approach that does not suit all the political situations that the Fifth Republic can produce.¹⁶

REFLECTION OF A BIPARTISAN LOGIC?

The equal participation of the opposition and the majority in parliamentary activities of control and legislation raises indeed a terminological question or, viewed differently, a question regarding qualification: who is qualified to represent the opposition? Undoubtedly, those who declare themselves as such. More precisely though, how can we distinguish between different types of opposition? What role should be granted to minority groups, who declare themselves as such following article 5 *bis* of the rules of the Senate, and which, in the National Assembly, derive this quality from the fact that, except for the group with the most members, they are not called opposition groups? Indeed, rules can conflict with one another: for instance, those stating that the position of president of or reporter of a fact-finding committee must be given to a member of the group that initiated the creation of said committee or mission, on the one hand, and those stating that one of those two positions should be reserved for a member of an opposition group, on the other. Thus, when a minority group initiates a committee or mission of this type, the positions of both reporter and president could systematically exclude the majority group. For that reason, the rules of the Assembly state that, when an inquiry committee proceeds from the lottery right granted to each group once per ordinary session, one of the two positions would be given to a member of a group that has used that right, whether it is an opposition or minority group; if it is a minority group, the opposition will not be able to claim the position of reporter or president. Thus, during the last term, the inquiry committee on the funding of employers' and employees' unions was presided over by a deputy from the majority group, while the reporter was from the Nouveau Centre group that had initiated the creation of the commission and which did not do much to ease the workload of the committee as its report was ultimately rejected. In general, as we have seen, the majority prefers to leave the position of president of an inquiry committee to the opposition, and keep the position of reporter for itself. To be sure, the president plays a critical role in giving direction to the work of the committee, since he convenes

IX

16. It is in this sense that the report of the commission "Institutions of the Jurists Club" (March 2012) – of which, by the way, Jean-Jacques Urvoas was a member – must be understood.

it and presides over its debates, but he cannot decide on his own of the roster of hearings and call witnesses.¹⁷ The reporter is the key actor of the commission; he holds specific powers that allow him to investigate based on documents and on site, and all the information that can facilitate his mission must be passed on to him. It occurred that, when the group that initiated the creation of the inquiry committee is a minority group, it was allowed to claim either the president or the reporter position, but this advantage can sometimes turn against the members who benefit from it, as illustrated by the case of the inquiry committee on the funding of unions I have just mentioned.

x When it is agreed that the opposition should play a role, how do we decide what group should represent it? It is a simple process when the rules in place specify which opposition group should be designated, as is the case with the lottery right mentioned above. However, in other cases, the task of representing the opposition almost always goes to the largest of its groups, thus establishing the practice of a bipartisan parliamentary dialogue that excludes small or minority groups within the opposition.

In that respect, the pairing of members of the parliament seems to validate a situation of bipolarization, or even of a latent bipartisan system. As in the case of the attribution of the position of president of the Finance Committee, which, in practice, goes to the main opposition group – the Socialist group in the past, today the UMP group – joint pairs are generally, if not exclusively, comprised of members of those two groups. It is necessary, however, to distinguish between the two chambers here. In the National Assembly, reports on the application of laws, facts-finding reports, the “European watch” mission within the Legislation Committee, the evaluation reports of the Committee of Evaluation and Control, are entrusted to pairs comprised of members of the two main groups. In the Senate, as it appears in the control and evaluation agenda for 2013 – eighty-six projects are on the agenda – the pairing seems to be noticeably less systematic, as the traditional fact-finding report, conducted by a single senator, prevails, and it should be

17. Mr. Pierre Moscovici thus wrote, in his foreword to the report of the investigative commission he presided on the circumstances of the liberation of the Bulgarian nurses and doctor detained in Lybia: “The UMP and Nouveau Centre group decided – in my view without any real justification – not to hear Ms. Cécilia Sarkozy, and her hearing will remain a missing piece of the puzzle, a missing like in the unfolding of the dense and sometimes chaotic events that lead to the liberation of the Bulgarian medical personnel (Assemblée nationale, report 622, thirteenth term, January 22, 2008, 7).

added that the rules, although not forbidding them, do not acknowledge their existence either. When pairs are created, the organs that establish them – committees, delegations, offices – usually reserve positions for minority groups. Those two different approaches, bipartisan in one case, pluralist in the other, should not surprise us as they correspond to the culture of each institution, grounded in their specific composition. In the Senate, the absence of monolithic majority and opposition groups (which the indirect voting system of senatorial elections encourages), and the subtle equilibrium that governs the distribution of competences—not only between the various groups, but also between groups and committees, as illustrated by the example of the distribution of parliamentary speaking time—between that of groups strictly speaking, including the majority group, and the rest of parliamentary speaking time, lead to a greater flexibility. The simplicity of the pairing system, and even more so its bipartisan nature, are not well-suited for that assembly. Thus, it would not be illogical if this procedure does not take hold in that chamber in the long run. In the National Assembly on the contrary, joint pairs are well-suited to the prevailing divides and power relations, and they are, in some way, the concretization of the condominium that the two main rival groups have established in the Assembly.

XI

Thus, one remarkable achievement of joint pairs is that, having been created to pacify parliamentary relations by associating closely the opposition to the work of the Assembly, they are also a concrete symbol of the political divide between the two main groups, and, further, between the two main governmental parties. While the content of the reports does not necessarily and systematically reflect antinomic positions, it often expresses divergent approaches. They can take the form of a foreword that an opposition president of a mission or an investigative committee can draft with a dissenting tone and scope. This is actually the reason why the majority prefers to claim reporter positions. When the report is authored jointly, both reporters can articulate different opinions on certain points. To better highlight those points, the Legislation Committee, since the last term, has made a habit, for reports on the application of laws, of calling the deputy from the majority the reporter and the one from the opposition the coreporter; thus, some conclusions are explicitly presented by one or the other only. And if, within fact-finding missions that have been created since the beginning of the current term, the committee has not made a distinction between the functions of president and reporter, it has established original joint pairs made up of a president-reporter from the majority and a vice-president-co-reporter from the opposition

– a vice-president from the majority is also appointed – which makes it easier to distinguish between them, but also highlights political divides. Naturally, the same goes, and all the more so, for when the coreporter on the application of a law has been already appointed for the review of the bill and called upon to present his observations in the context of the report drafted to prepare the reading of the bill in session, as we saw above. Thus, for bills that are particularly sensitive, such as the one that opened marriage to people of the same sex, or those regarding the election of department and city councilors and community delegates, the coreporters from the opposition presented contributions that had the tone, if only because of the topics at hand, of a dissident opinions rather than that of particular opinions in the sense mentioned above.

XII In that way, the joint pair can be viewed as the arena where the two main groups in the Assembly send their champions to fight a one-on-one duel governed by the rules of parliamentary debate and procedure. It can then be read, following the template of the trial that Carlos-Miguel Pimentel proposed¹⁸ to assess the relations between majority and opposition, as going back, “beyond Montesquieu, to constitutional prehistory, when justice and politics are still intertwined and, paradoxically, appear as a configuration somehow alternative to the separation of powers.”¹⁹ Transposed in the current context, the bipartisan pair constitutes a procedural stage of the symbolic trial in which the majority defends the law presented or the implemented policy, and the opposition challenges it, and literally accuses it. However, because in practice joint pairs only include members of the two main groups in the Assembly, which are the parliamentary expressions of the two parties that have held in turn the government for more than three decades, they are a force that is both centrifugal and centripetal.

First, the very logic behind the association of the opposition to the daily work of the internal organs of the assemblies consists in getting it to be actively involved in parliamentary work and not corner it into a systematically antagonist role and posture, thus furthering its radicalization. In that respect, the joint pair is the crucible in which the relations between majority and opposition are crystalized – and civilized – through a binary and bipartisan dialogue – which is dear to

18. Pimentel, Carlos-Miguel, “L’opposition, ou le procès symbolique du pouvoir” *Pouvoirs* 108 (2004): 45-62, available on <http://www.revue-pouvoirs.fr>.

19. Avril, Pierre, “La séparation des pouvoirs est-elle un concept opératoire?” (paper presented at the 7th French Convention on Constitutional Law, AFDC, Paris, September 25-27, 2008).

the British system – that includes them both. In this instance, based on their experience of public affairs and constrained by external demands, whether they are economic demands or the result of European norms, subjected to the “reality principle,” majority and opposition can find in the bipartisan pair a protected site where consensus can be constructed.

In that respect, the joint pair can also have an exclusionary effect, by pushing out of the “magic circle” of groups with responsibilities, the other opposition groups, and thus take the risk of encouraging them to radicalize their positions so as to better underscore their difference and the divide between parliamentary oppositions, not to mention oppositions outside the Parliament.

Those constraints, as well as the democratic relevance of a parliamentary representation that accentuates the bipartisan divide, constitute the background against which, ultimately, the legitimacy – and probably the permanence – of majority-opposition pairs will be assessed.

XIII

 A B S T R A C T

The constitutional recognition of the opposition goes hand in hand with the assertion of the monitoring and evaluation function of the Parliament. They both contribute to the renewal and revalorisation of the legislative branch, which was the main goal of the 2008 constitutional revision. Among the instruments chosen to reach this goal was the setting up of teams with equal political rights, in order to empower the opposition and normalize its relationship with the majority. This method calls for reflection regarding its limitation to monitoring tasks and the way it enshrines – and, therefore, legitimizes – a bipartisan political reality.