

## **Controlling the government's action**

*Paper presented before the National Assembly of Burkina Faso on September 10, 2000, in the presence of Mr. José-Maria Aranaz, IDEA International Burkina Faso Program Officer.*

Controlling the government's action is a key factor of democracy and constitutes one of the essential characteristics of parliamentary or semi-parliamentary regimes. It might even be considered as the main function of contemporary parliaments, considering the influence that governments have on the function of normative production. Parliamentary opposition must especially be a watchful sentry, while parliamentary majority is bound to support the government, which is its offspring. However, whether from the opposition or the majority, Representatives must never forget the essential mission conferred upon them by the Constitution, that is, controlling the government's action.

What does control mean? To control means to check, to inspect in a careful manner the constitutionality of an act or an action. It means to control the situation in a particular sector, to exercise authority, power, etc. The government's action may be understood as all the activities that the government has to undertake as part of its general policy. Many mechanisms are available to control the government's action. However, parliamentary control may have two meanings:

- A weak meaning whereby it takes the form of an informative control. Here Representatives may request information on the government's activities or the operation of the public administration, public services or public companies placed under the authority of the government;
- A strong meaning whereby it takes the form of a political sanction. The government's responsibility may be brought into play or the government itself may be overthrown. Political sanctioning may result in the trial of members of the executive by the High Court of Justice.

Both meanings will concern us here.

### **I. Informative control**

Representatives cannot truly accomplish their missions if they have no access to information related to the acts and intentions of the government. This explains why information is a condition of the control. Paragraph 1 of Article 113 of the Constitution stipulates in that respect that it is the government's duty to provide the National Assembly with all the explanations it requires about the government's management and acts.

There are several informative procedures, among which: the government's statements, the questions of Representatives, and investigation committees. Informative control may be tagged to the legislative activities of permanent committees.

#### **A) The government's statements and the speech on the state of the nation**

The government may ask to make a statement, open or not to debate, before the National Assembly. It is up to the government to decide whether or not there should be a debate. In no case may a vote be held in the frame of the statement (Art. 126 of the regulation of the National

Assembly). Therefore, outside the general policy statement, which is the object of Article 116 C, and for which the Prime Minister may, following a decision by the cabinet, engage the government's responsibility, it is generally admitted that the government's statements before the National Assembly are by nature purely informative. The same is true for presentations made by the government in accordance with Articles 109 and 110 of the Constitution. These are Articles that authorize the Prime Minister or members of the government to have access to the National Assembly or to any of its advisory committees or structures.

In addition to policy statements, there is also the Prime Minister's speech on the state of the nation, as provided by Article 109, Paragraph 2 of the Constitution. This practice began on April 10, 1997. After the speech, Representatives may ask questions to the Prime Minister. The question-answer session has a purely informative nature since no vote may take place. The session closes after all the persons registered have asked their questions and after the Prime Minister has given his answers.

In sum, the statements, presentations or explanations made by the government or demanded by the National Assembly are the means whereby Parliament allows its members to control the government's action. The same is true for the questions that they may ask the government.

## **B) Questions**

A question may be defined as a request for information made by a Representative either to the Prime Minister or to any other member of the government. Article 111 of the Constitution states that at least one session per week must be dedicated to the questions of the Representatives and the answers of the government. This may take place, according to Article 130 of the Regulation of the National Assembly either Tuesday afternoon or Friday afternoon.

Representatives may ask the government:

- oral questions followed or not by a debate
- topical questions,
- written questions.

### **1) Oral questions**

Oral questions concern requests for information whose answers are provided by the governmental representative at the National Assembly during a public session. They are published in the Journal of Parliamentary Debates or in the form of a report. Generally there are two types: oral questions without debate and oral questions with debate. In the first case, only the author of the question and the respondent may take the floor. The Speaker of the National Assembly invites the questioner to take the floor. The minister concerned responds. Then the questioner has 10 minutes to react. The minister may decide to respond again, but in any case no other intervention is allowed. Concerning oral questions with debate, other people may intervene. Thus for instance, the Speaker begins by setting the time limit allocated to the questioner, between 5 and 10 minutes. The minister concerned responds, after which a debate opens based on a list of interventions. The minister may react, and so may the questioners. It is obvious that this formula is time-consuming.

### **2) Topical questions**

Any Representative may ask the government questions on current events during ordinary sessions. In practice these questions are similar to the questions without debate. They are asked to the Prime Minister who may answer or ask the minister concerned to respond. They have priority over the other types of questions. The questioner has 5 to 10 minutes to ask his/her question. The governmental side gives its answer and the Speak stops the process. During the second ordinary session of 2001 five such questions were asked to the government.

### **3) Written questions**

These are questions written and published in the Journal of Parliamentary Debates. Any Representative who wishes may ask as many written questions as s/he likes. In France this type of question is often used by Representatives to gather precious information on certain issues for their electors. Written questions are handed over to the Speaker who forwards them to the Prime Minister through the Minister in Charge of the Liaison with Parliament. The Ministers's answers must be published the month following the publication of the questions. However, the Ministers concerned may request a longer time period or declare that the public interest of the issue is not enough for them to answer. If a written question does not get an answer within fixed set of time, it may exceptionally be converted into an oral question. The questioner may also have a reminder published in the Journal of Parliamentary Debates.

Whether they are written, oral or topical, questions may only help to get punctual pieces of information, which, on top, are generally superficial. Moreover, this mechanism is not fully used by Representatives. During the two ordinary sessions of 2001, only ten oral questions were asked.

To obtain in-depth pieces of information, Representatives may resort to investigation committees. However, evidence shows that this possibility is largely underused by Representatives, though only God knows the number of issues, cases of malfunctioning or facts that deserve investigation by Parliament.

### **C) Investigation committees**

In accordance with Article 113, Paragraph 2 of the Constitution, the National Assembly may set up investigation committees.

The setting up of an investigation committee is done through voting a resolution proposal that determines either the actual facts justifying the creation of the committee, or the public services or national companies to be investigated. By virtue of power separation, it is forbidden to set up an investigation committee for facts that have been taken over by the judiciary, and as long as the case lasts in the hands of the justice. For that reason, any proposal for the creation of an investigation committee is notified to the Minister of Justice. Also, in case a preliminary investigation starts after the setting up of an investigation committee, the committee must immediately stop working. However, it is perfectly legal to set up an investigation committee for cases prosecuted, once the prosecution ends.

The duration of a committee is strictly limited to 3 months to avoid long investigations hampering the government's action. One may wonder if this duration is long enough to conduct serious investigations. A new committee with the same objective may be set up only one year after the previous one achieves its mission.

Concerning its mode of operation, it is noteworthy that investigation committees enjoy extended power. They appoint their own rapporteurs, who may walk into any administration or public company, question the agents and require all documents they deem important (except documents of confidential nature or that concern national defense, foreign affairs or state security). Then they may hold hearings to which all witnesses must submit, less they face sanctions. In France, the July 20, 1991 organic law stipulates the public nature of those hearings. However, a given committee may exceptionally decide for closed hearings.

With respect to the conclusions of the committee, it must be observed that investigation committees have no decisional powers. They only write reports about their investigations and make recommendations.

In Burkina two committees were created, for the first time ever, on December 21, 1995, to check the management of state grants made to administrative public services, ad-hoc structures and operations, and to control the privatization processes of public companies. These committees worked 45 days, which they considered insufficient. A closed meeting was held to decide on the publication of part or all of the report. Only a part of the conclusions was published in the journal *Democratic Culture (Culture Démocratique)* n° 003, 1996. The “appetizing” pieces of information were not made public. The reports were handed over to the President’s office in a sealed envelope. In France the law makes publication of the reports mandatory, except if the National Assembly decides otherwise. Generally the report is not subject to public debate in plenary.

In order to promote parliamentary investigations, the Vedel Committee has proposed three reforms:

- allow the creation of investigation committees under the initiative of a minority of the members of Parliament, as is the case in Germany;
- cancel the ban on investigating cases being prosecuted, provided the committee does not decide on the individual responsibility to be incurred;
- discuss the conclusions of the committee in a public session attended by the government, two months at the maximum following the handing over of the report.

#### **D) Informative control by general committees**

Beside their function of producing norms, General Committees also provide the National Assembly with the information needed to exercise its control over the government. To collect information, General Committees hear members of the government either as part of the legislative procedure or simply for informative purpose. Advisors or experts may in the process, assist the governmental members concerned. The committees may also carry out control in the field. The terms of references of the control activities are set by the steering committee of the National Assembly.

In France the permanent committees may also additionally designate one or several of their members to undertake temporary informative missions, especially, on the conditions of implementation of a given law. The permanent committees produce reports, which they distribute, just like legislative reports.

### **E) The authority of budgetary rapporteurs**

The National Assembly has authority to control the budget of ministerial departments, the accounts of national companies and semi-public companies. The documents and information needed must be transmitted to the General Rapporteur in charge of Finances, who may appoint a member of the committee to assist in carrying out the control. The conclusions of the rapporteurs may not be used as information reports and may only be used for the purpose of the reports produced by the committees working of finance and regulatory laws. With so many restrictions, the scope of this control authority is limited.

### **F) Petitions**

These allow organized citizens, civil society organizations to control the government's action through the National Assembly. Indeed, in accordance with Article 30 of the Constitution, the National Assembly may receive petitions against actions which infringe upon the public patrimony and the interests of social communities or which threaten the environment or the cultural or historical patrimony. Petitions are directed to the Speaker of the National Assembly who hands them over to an ad-hoc general or special committee which, depending on the case, may decide either to send them to the government or the Ombudsman of the nation, or to submit them to the National Assembly, or else to close the case. This simply means that the National Assembly may thwart the right to petition conferred upon citizens by the Constitution. Too, the failure of the petition initiated by MBDHP on the reform of the information code reveals that the popular initiative right is simply a decorative constitutional right.

## **II. Sanction-control**

Sanction-control may be implemented through activating the government's responsibility or through the penal responsibility of the members of the Executive.

### **A) Governmental responsibility**

Political responsibility is a condition of democracy and stands as a corollary of the representation system. The government's political responsibility before parliament (elected through universal suffrage) is the main principle of the parliament system as it has developed empirically in England. The principle is the result of a historical development originally based on the penal responsibility of ministers. The King enjoying total immunity, the House of Commons could, in compensation, accuse his ministers in the House of the Lords and have them condemned. To prevent these heavy sanctions, the Ministers then took the habit of resigning before they could be accused. This explains why usually penal responsibility is transformed into political responsibility. The mechanism of responsibility may however be reversed, and it tends to create a balance between the government and the National Assembly. If this makes the government closely dependent upon the National Assembly which may control and censor it, conversely the government may allow its head, the Prime Minister, to engage its responsibility, which is a way of blackmailing the Representatives. If the Representatives refuse to pass a vote of confidence, the government may dissolve the National Assembly, which may lead some Representatives to think twice before challenging the government.

The political responsibility criterion is ambivalent by nature, being at the same time judicial and political. It is judicial in the sense that its activation is regulated by the Constitution and it has judicial consequences. It is political in the sense that it may be brought into operation outside the formal procedures inscribed in the Constitution, depending on the political context, or it may

come into play at the political level. In fact the government's responsibility before the National Assembly is often virtual because it is rarely brought into play with a clear purpose of seeing it completed. Indeed, for a regime with a homogenous or stable government, the government's responsibility may actually be brought into play only if it loses the majority as a result of certain circumstances. In coalition regimes, more often, a government resigns when the majority that supports it dislocates, even prior to the coming into play of its responsibility before the National Assembly. Thus in practice, political responsibility is very likely to come into play outside formal constitutional procedures, namely at the level of political parties participating in the coalition government.

This said, the Constitution organizes and rationalizes the mechanisms of activating the government's responsibility before parliament in such a way as not to threaten the government's stability, by making it easy to overthrow it. There are two main mechanisms: the question of confidence and the motion of censure.

According to Article 117 of the Constitution, if the motion of censure is passed and the confidence denied, the President of the Republic puts a term to the Prime Minister's function and appoints a new one within 8 days. For that reason, some people contend that the two mechanisms are much more killing than the mechanism of governmental control. It seems necessary to explain them.

### **1) The question of confidence**

Through the question of confidence the government may engage its responsibility. In fact, according to the spirit of the Constitution of the French Fourth Republic, which inspired Burkinabe members of the Constituent Assembly, it is presumed that the government has the confidence of the National Assembly. For that reason, they did not include the issue of confidence in the Constitution; they expect the majority of Representatives to notify the government that it has lost their confidence. This may happen in two cases:

- about the government's general policy
- and about the adoption of a text

Thus, according to Article 116, Paragraph 1 of the Constitution, the Prime Minister has the option of making a statement of general policy followed by a vote, before the National Assembly. He thereby engages the government's responsibility on the statement or on his program. This is a mere option left to the appreciation of the Prime Minister, who must however have the go-ahead of the Cabinet if he decides to engage the government's responsibility. The vote may occur 48 hours after the turning in of the text. Confidence is denied if there is no absolute majority for it in the National Assembly. The government therefore runs the risk of being overthrown by a relative majority of the Representatives. As to censorship, an absolute majority must vote it.

Concerning the question of confidence in relation to a text, Article 116, Paragraph 4 of the Constitution also allows the Prime Minister, following a debate in the Cabinet, to engage the government's responsibility. This is a way of "forcing" the National Assembly to adopt a text that the government deems important but about which the National Assembly is reluctant or which it even opposes. Actually the text over which the Prime Minister engages its responsibility

will be considered as adopted, unless an absolute majority votes a motion of censure raised within 24 hours. The voting of the text is therefore tacit, and the Representatives have the following alternative: either overthrowing the government to prevent the text defended by the latter from becoming a law, or accepting the adoption of the text into a law to avoid a governmental crisis. In fact, this process, which is stipulated in Paragraph 4 of Article 116, is an efficient weapon in the hands of a government supported by an intractable majority or a government without an absolute majority in the National Assembly.

## **2) Spontaneous motion of censure**

According to Article 115 of the Constitution, the National Assembly may raise a motion of no confidence against the government. To be accepted the motion may meet the following conditions:

- it must be signed by at least one third of the Representatives in the National Assembly (one tenth in France)
- it can only be adopted by an absolute majority of the members of the National Assembly, that is, half of the members plus one;
- if the motion of censure is rejected, its supporters cannot present another one before a one-year period.

In sum, the government's responsibility before parliament seems to be more theoretical than real on account of the discipline of parliamentary majorities, except in a period of "co-habitation." It is less real than its responsibility before the head of state. Indeed, one can rarely see, as I have noted, a majority overthrowing a government that it is supposed to support. This said, the mechanisms for bringing the government's responsibility in operation before the National Assembly are far from being superfluous. Their mere existence forces the President of the Republic to appoint a government in conformity with the layout of parliamentary majority or one that enjoys the confidence of the parliamentary majority. In addition, Paragraph 4 of Article 116 helps, as explained, to keep discipline within the majority through engaging the government's responsibility in the process of voting a text.

## **B) The executive's penal sanction: the High Court of Justice**

If after being fully informed, through the process of informative control, the Representatives deem that some members of the executive are guilty of serious infractions, they may sanction them through the penal procedure. Thus the National Assembly may have to play a jurisdictional function vis-à-vis the members of the executive. This is an aspect of the political control of Representatives over the executive on the penal level. In this respect, at the beginning of each legislature, Representatives are elected to sit in the High Court of Justice. This court is competent to handle infractions committed by the President of the Republic and which may be considered as high treason, breaches of the Constitution or embezzlement of public funds (Article 138, Paragraph 1). The High Court of Justice is also competent to try members of the government for cases of crime and misdemeanor in the exercise of their function (Article 138). To be accepted, any proposition of a resolution committing someone for trial in the High Court of Justice must be signed by at least one third of the Representatives. A commitment of the President of the Republic for trial requires a 4/5-majority vote by the Representatives; for the members of the government a 2/3-majority vote (Article 139 C) is required.

Also, the members of the government may be prosecuted in ordinary jurisdictions for crimes and misdemeanors committed outside their period of office. Concerning the Head of State the issue is a subject of controversy. On December 24, 1998, when the French Constitutional Council was asked by the President of the Republic and the Prime Minister whether the authorization to ratify the treaty on the International Penal Court entailed a revision of the Constitution, it answered affirmatively and used that opportunity to state its opinion on the penal responsibility of the Head of State. According to the Council, *“in light of Article 68 of the Constitution, outside the case of high treason, the Head of State is immune for acts committed while in office. At the most, in the period of his office, his penal responsibility may be engaged only before the High Court of Justice, according to the provisions of the same article.”*<sup>1</sup> The French doctrine is divided over the matter. Dominique Rousseau and Oliver Duhamel opine that if *“the President is not responsible, the individual, that he is, is responsible,”* while Georges Vedel and Guy Carcassonne deem that *“the individual is responsible, but the office is protected [and that] as long as the individual is in office, he may be committed for trial only [in the High Court of Justice].”*<sup>2</sup> In Francophone Africa, constitutional judges are likely to side with their French colleagues by granting African Heads of states the same penal immunity. In any case, considering the dependence of judicial and legislative powers on presidents in most Francophone African countries, it is unlikely for a president of the republic to be committed for trial for crimes through the processes of common law or in the High Court of Justice. True, Madagascar has set precedence with the destitution of President Albert Zafy by the Malagasy High Constitutional Court on September 1996. However, it also remains true that African presidents do not have to fear prosecution as long as they are in office.

### **Conclusion**

In sum, it seems that the mechanisms provided for parliament's control of the government are literally jammed. This has to do with the fact that our French inherited parliamentary system is a victim of high rationalization. Burkinabe constitution makers have set very strict conditions to the use of the means of control, as a way of keeping the government stable. As a result, the control is more oriented toward mutual information than towards the activation of the government's responsibility by the National Assembly. Thus, the control is devoid of the power to sanction. Even parliamentary questions, which in essence do not constitute a direct threat to the government's stability, are severely controlled. During the first legislature, the practice revealed that parliamentary investigation committees were much more a means of reinforcing political loyalty than a means of sanctioning or drawing lessons from the failures or limitations of the government's actions.

Beside this excess of rationalization, there is the majority fact. Undoubtedly, the role of the majority is primarily to support the government, which is its offspring. The government needs support to implement its national policy. However, if parliamentary majority becomes a mechanic one, if it is too close to the government, and if the only ambition of Representatives is to please the executive for political rewards, then, we should not be surprised that the National Assembly is drifting away or is becoming impotent. Supporting the government does not mean that one should not make constructive criticism or that one should reject the demands of

<sup>1</sup> Decision n°98-408 of January 1999 about the Treaty concerning the statute of the Penal Court. See <http://www.conseil.constitutionnel.fr/decision/1998/98408:98408dc.htm>

<sup>2</sup> Quoted by Thierry Bréhier, “The Constitutional Council gives penal immunity to Mr. Chirac,” in *Le Monde*, Tuesday 26 January 1999.

information, transparency, and accountability, which are the cardinal principles of good governance. The majority should always observe the saying that trust does not exclude control.

But the opposition must also play its part. It must activate the mechanisms of controlling the government by Parliament and propose an alternative to the government's policy. If it remains lethargic on the pretext that it is a minority and therefore is beaten in advance, we should no longer feel surprised that, for the opposition, political alternation appears like a mirage.

Whether they are from the majority or the opposition, Representatives must accept the fact that their role is not to impede the government's action, to oppose all initiatives undertaken by the government systematically, or to overthrow it. Representatives must know that they are jointly responsible, with the government, for the consolidation of our democratic process, for the majority of the populations, and even for the government's policy. For that reason, they have better follow-up and evaluate the laws that they make.

I have allowed myself to make some suggestions for the reinforcement of the capacity of the National Assembly in terms of controlling the government's action.

## **Recommendations**

### **1°- In terms of controlling public expenditure**

To insure a better control of the monthly expenditure of each ministry, budgetary rapporteurs in charge of the control must play their role fully and go out into the field to collect the necessary information.

### **2°- In terms of structures and expertise**

Considering the difficulties that Representatives face in the actual execution of their role of controlling the government's action, I recommend the creation, within parliament, of an independent and multidisciplinary structure, which will be responsible for evaluating the government's policies. This mechanism could also allow Representatives to monitor the evolution and execution of their decisions and the laws they pass.

Also, it would be convenient to create a prospective cell, reflection or study groups or committees within parliament in the areas of social strategies. Like the presidents of committees and parliamentary groups, the persons in charge of those structures should be allowed to resort to outside expertise, when necessary, and be provided with substantial operational resources to carry out studies and research on the government's action and legislative projects.

### **3°- In terms of managing information**

To upgrade the efficiency of informative control and the Representatives's responsibility towards public opinion, it will be necessary to:

- institute a system of information about the environment, through for instance regular public opinion polls;
- improve communication between Representatives and civil society through a better news coverage of the activities of Representatives. Too, continued dialogue should be maintained with citizens through for instance organizing political news programs to allow citizens and journalists to ask questions;

- give citizens the possibility of asking questions to the government through their Representatives in Parliament.