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French Yearbook of
Public Law



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Presentation

The objective of the “French Yearbook of Public Law” is to narrow the gap which has tended to develop between the French and the international debate on public law. The former remains too often isolated from the latter, for various reasons, ranging from the conviction of the French model’s exemplary nature to an insufficient openness of French public lawyers to the international academic language, which English has undoubtedly become nowadays. This has two serious consequences. On the one hand French lawyers might often be unaware of developments in other legal systems, and on the other hand foreign lawyers face serious difficulties to follow French legal developments.

The French Yearbook of Public Law (FYPL) was created to mitigate precisely this mutual ignorance. This project has three main aims. On the one hand, it seeks to apprise English-speaking readers of important developments and scholarly debates in French public law. On the other hand, we wish to introduce French lawyers to key changes and academic discussions in foreign public laws. Lastly, it is our hope that the reciprocal information thus made available will foster international and comparative debates among legal scholars.

The FYPL is based at the Chair of French Public Law at Saarland University (Lehrstuhl für französisches öffentliches Recht - LFOER), headed by Professor Philippe Cossalter. Thus, the FYPL relies on the administrative and technical capacities of the LFOER without constituting a segment of it. Some of its researchers (Jasmin Hiry-Lesch, Enrico Buono, Sofia van der Reis, Lucca Kaltenecker) are especially involved.

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The Citizens' Climate Convention: A new approach to participatory democracy, and its effectiveness on changing public policy

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Abstract:

This article examines the unique characteristics of the Citizens' Climate Convention (CCC) in France in comparison to other participatory democracy models in the field of environmental and sustainable development. It also seeks to evaluate the CCC's influence on climate change mitigation policies.

Keywords:

Citizens' assemblies, Participatory democracy, Citizens' climate convention, French environmental law, Environmental democracy

¹ Delphine Hedary was in charge of the legislative committee for the Citizens' Climate Convention in 2020-2021; in the past, she was responsible for preparing the Environment Charter in 2002-2003 and chaired the Estates General on the Modernisation of Environmental Law in 2013.

The “yellow vests” movement began in autumn 2018 with protests against the increase on domestic consumption tax on energy products. Promoted as encouraging ecological transition, this tax increase primarily had an impact on the purchasing power of all those dependent on their cars.

This movement, in turn, inspired the so-called “*gilets citoyens*” (or “yellow gilets/vests”) movement² which called for a great national debate to be launched by the President of the Republic. The main aim of the movement is to combat global warming with the participation of citizens. Specifically, the group called for a citizens’ assembly chosen by lot, tasked to debate the ecological transition.

The President of the Republic took up this request and mandated the government, with the support of the Economic, Social and Environmental Council (*Conseil économique, social et environnemental*, now CESE), to organise a Citizens’ Climate Convention. Bringing together 150 citizens chosen by lot, the Convention was tasked to put forward proposals to reduce greenhouse gas emissions by at least 40% (compared with 1990 levels) by 2030 in a spirit of social justice. The French President strongly advocated to take up the resulting proposals without reservations and submit them either to a vote in parliament or to a referendum or implement them directly.³

The Citizens’ Climate Convention (CCC) was a novelty in France. This article analyses its original features compared with other forms of participatory democracy in the field of the environment and sustainable development, and aims to assess its impact on public policies to combat climate change.

I. The CCC is not the first instrument of participatory democracy in the field of the environment and sustainable development

To the contrary, this policy area seems to be a pioneer in terms of instruments of participatory democracy. In the 1970s, procedures were introduced which sought to improve information on the environmental impact of certain works or structures (such as the law of 10 July 1976 on nature protection). Equally, public enquiries have long been a central tool to access information in this field. The law of 12 July 1983 on the democratisation of public enquiries and environmental protection, known as the Bouchardeau law, sets out the precise scope of application of these procedures and covers all those operations “likely to affect the environment”.⁴ The law aims to make information more accessible and thereby allow for broader participation *in local projects*. The procedures have since been diversified, and modified.

Ad hoc bodies have also been set up on to develop regulations. It seems to be primarily unfortunate industrial accidents that triggered developments in terms of participatory democracy. Those often occur in two steps – in a first step ad hoc consultations take place, which are in a second step implemented in a more systematic participatory process. For example, after the explosion at the AZF factory in Toulouse in September 2001,

2 The *gilets jaunes* movement, a popular protest movement that lasted several months, began on 17 November 2018 and was triggered by several causes, including rising fuel prices.

3 More specifically, President Macron originally pledged to adopt 146 of the 149 forthcoming proposals (<https://www.elysee.fr/emmanuel-macron/2020/06/29/le-president-emmanuel-macron-repond-aux-150-citoyens-de-la-convention-citoyenne-pour-le-climat>). The President’s position will evolve significantly over time...

4 Law n° 83-630 of 12 July 1983 on the democratisation of public enquiries and environmental protection, article 1.

“round tables on industrial risks” were organised, bringing together local residents, elected representatives, representatives of employees and employers of the industry, as well as environmental protection associations. The recommendations that emerged from these roundtables inspired the law of 30 July 2003 which established plans to minimize technological risks related to dangerous industrial sites (commonly referred to as SEVESO, after the industrial disaster that inspired the first European directive on the major accident risks of certain industrial activities in 1982). These plans are developed in a participatory manner and aim to reduce the risks to people living close to industrial sites. Over the last twenty years, almost 400 plans have been drawn up, covering more than 800 municipalities.

Further instruments of participatory democracy have not necessarily resulted from any particular event or accident, but are rather a response to more general *concerns about the importance of the environment in the reconciliation of public interests*. When Jacques Chirac, then running for re-election in 2002, announced that he wished to propose to the French people an “environmental charter backed by the Constitution”, his ambition was nothing less than to modify the nation’s social pact, to raise the third pillar of sustainable development to the same level as the other two in the normative order, and to found a “humanist ecology” so that we would stop “looking the other way while the house burns”.⁵ The Charter of the Environment was prepared in a participatory manner as foreseen in the law of 2 February 1995 on the reinforcement of environmental protection as well as the EU treaties. With the inclusion of the Charter in the Constitution, the principle of participation became an enforceable right and thus acquired constitutional value. This meant that from then on, all projects, plans and programmes, and even regulatory texts which bring about effects on the environment, a notion understood quite broadly by the Council of State, must be open for public consultation.

Ten years later, the then elected President of the Republic largely considered the thus established processes too burdensome and harmful to the “productive recovery”. He thus called for a reorganisation of the law – an “Estates General on the modernisation of environmental law”. His predecessor, elected in 2007 in turn, who had ran under the slogan “Let’s enter the next world” advocated for a “*Grenelle de l’environnement*”. It was his politics that eventually led to the adoption of two laws containing measures relating to the protection of biodiversity, town planning, transport, energy and climate, the impact of the environment on health and governance.

The author of this article played an active part in these successive episodes of major national consultation since the AZF accident and has been responsible for the preparation of the Charter of the Environment, then for steering the Estates General on the modernisation of environmental law, and lastly for the legislative committee responsible for providing legal support for the Citizens’ Climate Convention and for transposing citizens’ proposals into legal standards. The following analysis is therefore based on this experience and focuses on tools of participatory democracy rather than the outcome of particular procedures.

5 To quote the famous opening words of his speech at the Johannesburg Summit on 2 September 2002.

II. The CCC is innovative in three respects

A. The CCC is innovative in terms of *choosing participants*. This is a fundamental difference from the predecessors mentioned above

Previously, participants in the various forms of consultation have primarily been “stakeholders” or “interested parties in the legal sense of the term, i.e. not those who might just be curious about the subject. For example, public enquiries and local consultations had often been limited to of local residents or people likely to be impacted by the project in question. Major initiatives such as the Charter of the Environment, the Grenelle Forum or the Estates General on the modernisation of environmental law, which had been subject to prior public consultation, essentially relied on consultations of those parts of the public likely to be affected – representatives of associations aiming to protect the environment, representatives of the industry, local or national elected representatives. Questionnaires were sent to legal entities so that they could respond in their capacity as experts and in view of their role (for example, the Academy of Medicine, public establishments with scientific or environmental competence, etc.). Participation was also open to all citizens wishing to make their opinions and proposals known.

While this might be a step in the right direction, participation could be even more representative if it were to combine reaching out to officials and private individuals, if it would combine several forms of consultation such as questionnaire, regional meetings, internet forum, symposiums and citizens’ panels. For the preparation of the Charter of the Environment, more than 15,000 people responded to the questionnaire, each response being counted as a single response, even if it came from a legal entity that had made a collective decision to respond.

In contrast to the above, the Citizens’ Convention is an assembly of 150 individuals without any prior knowledge of the subject on which they are consulted, who are not personally concerned by the subject matter of the consultation. Participants are selected randomly and contacted by telephone. The selection process aims to establish a panel that is representative of the French population, in terms of gender, age, socio-professional status, as well as geographic location (Paris province overseas). Citizens’ panels had already been consulted in the past, notably on GMOs in June 1998, or during the preparation of the Charter of the Environment. But they only brought together around fifteen people who were asked for their input but not necessarily given the chance to formulate concrete proposals on the matter.

Whereas the selection procedure for consultations on the CCC is clearly innovative, it is not without critique.

Firstly, the people randomly chosen to participate in a citizens’ convention are free to decide whether or not to participate, unlike those selected to take part in jury trials. Only those who interested in the subject and willing to participate will eventually be consulted. They must be available to attend all the sessions, which in the case of the CCC means seven three-day sessions in Paris, which for some people translates into logistic problems and possibly long absences from home. Transport and accommodation costs were covered, and compensation was paid for attendance as well as for loss of professional income.⁶ Depending on the professional situation, this compensation does not represent

6 For further details, see : <https://www.conventioncitoyennepourleclimat.fr/budget/> (consulted on July, 19, 2023).

the same proportion of lost income, and availability cannot be the same. So this method of selecting participants cannot be considered perfectly neutral.

Secondly, this means of participation creates a certain dynamic amongst participants which leads them to value certain subjects and to reject or marginalise others. It is not certain that surveys carried out on a larger scale, or a diversification of the methods used to gather opinions, would have produced the same results on certain proposals as the votes cast by the participants at the convention. The influence that certain expert hearings can have is not the only reason. Those who are used to collegial deliberations know that spirals of argumentation can be set in motion in which the participants support each other without considering alternatives. Of course, as in any group, some people will dominate the group, and will thus exercise more influence over the final decision. Such a phenomenon can hardly be remedied by making some of these sessions public.

This means that, while the panel is representative in terms of the population living in France, it is not necessarily representative of the concerns or majority opinions of the country as a whole. Instead, each participant can only speak on his or her own behalf, which means that effectively opinions of 150 people were gathered, who have not received any prior mandate. One may wonder whether this might not downplay the ambitions that inspired this setting up, following the Grenelle Environment Forum, of the National Council for Ecological Transition (CNTE), bringing together representatives of all stakeholders and meant to constitute a forum for “environmental democracy”.

B. The CCC’s second innovation is its *mode of governance*

Previous participatory processes relied on a steering committee made up of a small group under the supervision of the ministry responsible for environmental matters, supported by a small administrative team as well as a few external experts. The technical-administrative steering group, headed by an apolitical senior civil servant was tasked to oversee the organisation of the process. The external experts, such as Yves Coppens, and the seventeen other members of the commission he chaired for the preparation of the Charter of the Environment, ensured both representativeness and neutrality of the stakeholders.

For the Citizens’ Climate Convention, two co-chairs, well-known public figures, were appointed to head a 15-member governance committee: a general rapporteur from the CESE, experts in the field of climate, participatory democracy and the economic and social field, and two people appointed by the Ministry for Ecological Transition for their expertise in climate and participatory processes. Two citizens, different from one session to the next, attended the meetings of the governance committee.

The meetings of the governance committee were also attended by the main facilitators of the sessions, the heads of each of the consultation consultancies selected to support the process. Their role was more important than is usually the case in such processes. They determined the time to be spent on particular topics, how and when external experts would be invited to the discussion, and how the citizens could interact with these experts and with the members of the legislative committee.

Three guarantors were appointed, one by the president of the CESE, the other two by the presidents of the National Assembly and the Senate. The impartiality and neutrality of one of the guarantors, who was heavily involved in the Citizens’ Climate Convention project itself, was questioned and criticised at the end of the convention.

The governance mode chosen was thus more complex in the Citizens' Convention than in previous processes of participatory democracy, which eventually prolonged the consultation process.

C. The third difference concerns *the way in which legal standards are drawn up*

The mandate given to CCC is original in two respects. Firstly, the consultation posed a rather narrow question - "How can we reduce greenhouse gas emissions by 40% by 2030 in a spirit of social justice?" To answer this question, the precise impact of the proposed measures had to be determined. This was done with the help of experts who were members of the "support group" that accompanied the citizens throughout the convention and would rate proposals from one to three stars depending on the expected impact, or as the case may be as not assessable. But proposals were extremely diverse. Citizens proposed a total of 149 measures to reduce greenhouse gas emissions. These may be divided into five broad categories - "consumption", "production", "transportation", "housing" and "food". Furthermore proposals were made to revise the Constitution and to strengthen citizen participation.

Secondly, and this seems to be where the CCC is most innovative, citizens' group had been asked to propose measures which would be forwarded "unfiltered" to the adoption process. This, however, presupposes that these measures are formulated with sufficient precision so that they can be incorporated into the normative order, or even take the form of legislative or regulatory measures. In previous experiments, the aim of consultations was rather to identify problems, their causes and solutions, including legal solutions, but never extended to asking those consulted to draft a text that could be adopted as is. Instead, government would only subsequently draft legislation on the basis of the results of the consultations. The precedent that may seem closest to the CCC is that of the Charter of the Environment. Consultation on the latter was conducted under the slogan "participate in writing the Charter of the Environment", with a wooden pencil with buds serving as the emblem. The Coppens' Commission submitted a draft Charter to the President of the Republic, with explanations for each article and variants for some of them. Notably though, its work was the result of a combination of public consultations and legal and scientific expertise. It was also clear from the outset that if the Government were to take up this proposal to redraft the Constitution, it would not submit it "unfiltered" to the constitutional adoption process.

It may therefore seem paradoxical that only very few legal experts were involved in the process. It was equally unclear what exactly their role would be - on the one hand they seemed to have served as moderators in terms of providing expertise to the citizens, on the other it was their expertise that made the whole exercise more credible. There was hence a temptation to confine them to the role of translators, as if the law were a foreign language and one could simply give the "legal experts" proposals to be "translated" into legal standards. The Legislative Committee was not represented on the Governance Committee, nor was it consulted on methodology, despite the fact that some of its members had experience in this area that was commonly considered successful. This isolation seemed to be inspired by the fear that legal experts would have an influence on the content of the proposals which is somewhat surprising given that the legislative drafting committee was made up of academics and senior civil servants for whom impartiality is a professional duty and a personal honour. But at the end of the process, both the governance committee and the citizens themselves paid tribute to the perfect intellectual hon-

esty of the legislative drafting committee, which presented its working methodology in a transparent manner, both orally and in writing, in a note appended to the public report of the citizens' convention.

The following will shortly summarise the methods of the CCC's law making in a chronological order, leaving aside the content of the subjects on which the citizens worked.

At the first session, the Legislative Committee set out the general principles of constitutional law that all standards must respect (equality, freedom, legality, etc.) as well as the principles of environmental law (prevention of environmental harm, participation, etc.). It also explained the essentials for formulating legal standards, stressing though that citizens should try to answer these questions for each of their proposals, without worrying about drafting them in the form of an article of law or a decree, as legal experts are there to carry out this work of "formulating legislation".

Following the meetings, the members of the Legislative Committee were asked to carry out a legal analysis of certain proposals, such as possible measures to reduce the artificialisation of land, or to regulate advertising for products that emit greenhouse gases. Depending on the thematic groups (consumption; production and work; food; housing; transport) and the respective moderators, the proposals forwarded to the Legislative Committee varied in length. Some thematic grouped explicitly requested the Legislative Committee from taking recourse to sectoral experts.

Once the proposals had been approved by the citizens, the Governance Committee ordered the Legislative Committee to translate them into legal provisions -

"the Governance Committee wishes to give priority to complying as precisely as possible to the intention of the members of the convention...rather than to the strict legal rigour of the text. The support group and the facilitation team will be able to clarify the intentions of the members of the Convention".⁷

This meant that the members of the Legislative Committee would not directly interact with citizens, even though their proposals were hardly formulated with legal requirements in mind. This might be partly because the experts that had supported the citizens in formulating those proposals were not lawyers but rather experts in the respective subject matter – transport, food, etc. In this context, giving priority to the members' intentions also meant that reformulating the proposals in a manner that would make them acceptable legal standards took second place. The Legislation Committee had to argue that it was not ethically possible for its members to present drafts in the form of articles of law or decree without pointing out the underlying legal difficulties (such as a contradiction with a higher-ranking standard or with general principles), in order to alter its mandate to at least highlight these issues as "attention points".

The Legislative Committee had a great deal of work in order to ensure that the legal transcription of the proposals was both faithful to the intention of the citizens and legally correct so that it could be taken up with as few "filters" as possible. Its members, who worked in a collegial manner, sought to create the greatest possible legal leeway in or-

⁷ See : <https://www.conventioncitoyennepourleclimat.fr/wp-content/uploads/2020/03/Mandat-au-comit%C3%A9-1%C3%A9gistique.pdf> (consulted on 19 July 2023).

der to implement the citizens' proposals as concretely as possible. To some extent they therefore had to fill gaps in the proposals given that the latter were often formulated in an imprecise manner. Other proposals, on the other hand, were drafted in great detail often due to the fact that they had adopted formulations presented by experts, which were not necessarily in line with what would have been necessary from a legal point of view. The Legislative Committee sometimes proposed two or three alternative drafts for the same proposal: endeavoured to create the greatest possible legal leeway in order to implement the citizens' proposals as concretely as possible, one close to the citizens', and when necessary, an alternative which that better met the objective by using different legal procedures than those envisaged by the citizens.

These transcripts were made available to the public, first through the moderators and then during webinar sessions with members of the Legislative Committee. Citizens would often ask for specific corrections when they felt that the transcripts did not reflect their proposals. In some cases, they chose to make minor changes to the reports to bring them into line with the drafting committee's transcripts. However, to the regret of some of them, they could not rework their proposals to take account of the points of attention raised by the Legislative Committee.

The transcripts were included in the CCC's public report, and even though they are distinguished from the proposals, particularly in terms of the layout, they are obviously very similar to the citizens' proposals. This is the first time that a citizens' consultation has resulted in proposals in the form of articles of law or decree.

III. The impact of the Citizens' Convention on public policy: Can one measure its effectiveness in the fight against climate change?

A. The CCC's proposals have directly inspired laws and decrees.

It was on the basis of the citizens' proposals that subsequent laws would be adopted. After the President of the Republic would take a position on these proposals, the administration started to draft concrete decrees such as amendments to the Finance Bill for 2021, elements for the recovery plan and what formed the core of the draft law of 22 August 2021 on combating climate change and strengthening resilience to its effects, known as the "climate resilience" law.

The government followed the usual procedure given that consultations are generally required by the Constitution – such as consultations of the Council of State on a bill or certain draft decrees –, or by law such as public consultation on certain decrees or consultation of the National Council for Ecological Transition. From a constitutional law point of view, it was not possible to disregard these procedures. As a result, the proposals put forward by the public underwent several changes, whether as a result of the decisions taken by the President of the Republic or the government, in particular to take account of the consultations or as a result of parliamentary amendments to the law.

A further innovation of the CCC was that citizens were brought together once again, several months after the submission of their report, for the government to present the action taken on their proposals and the support group and the legislative committee were asked to evaluate the proposals. The former assessed the impact of the measures. The latter carried out a strictly legal analysis, and to that effect produced a table showing, on the one hand, the citizens' proposals and their transcriptions and, on the other, the

corresponding articles of the subsequently adopted law. For every article, the table would indicate whether it had an “equivalent effect” (i.e. either identical or different wording but with the same legal scope) or whether there was a “difference”. In case of a difference, the table provided further information as regards:

-
- *The purpose of the measure (information would be provided as regards the outcome of the law’s impact assessment, and whether the nature of the measure is substantially different from the underlying citizens’ proposal);*
 - *The nature of the effects (for example, the CCC wants a measure to be mandatory, but the law includes an optional, experimental or incentive measure, or an objective);*
 - *The scope of application (for example, the CCC’s proposal includes certain categories of products, while the law only refers to some of them);*
 - *Thresholds (differences in percentages, durations, etc.)*
 - *On the timetable (dates of entry into force).*
-

At the end of the session, 120 of the 150 citizens voted to assess whether the government’s decisions on their proposals would “bring us closer to the objective of reducing greenhouse gas emissions by at least 40% (since 1990) by 2030, in a spirit of social justice”. Voting on each of the themes produced a score ranging from 3.4 out of 10 for “housing” to 4 for “consumption”, with “food”, “transport” and “production and work” scoring 3.7.

B. Has the Citizens’ Climate Convention made the fight against climate change more effective?

Citizens have put forward proposals that might otherwise have never become law, either because they had ideas that might not have come up without public consultation, or because they set different priorities than experts or administrators would have done. It is hardly possible to determine whether these are the most effective measures to reduce greenhouse gases, but it is clear that the measures adopted at the very least could rely on a broad public support.

It is also certain that the measures contained in the “climate resilience” law⁸ are amongst those identified by the government as contributing to achieving the reduction targets set out in Article L. 100-4 of the Energy Code and Annex I to Regulation (EU) 2018/842 of 30 May 2018, inspired by the Paris Agreements. This is what had been argued in a dispute initiated by the *Commune de Grande Synthe* before the *Conseil d’État*, which took this into account in its contentious decisions of 1st July 2021 and 10 May 2023. It is therefore clear that the Citizens’ Convention, by influencing the content of the “climate and resilience” law through its proposals, has indirectly impacted the position of the judges and had an impact on the adoption of measures aimed at reducing greenhouse gas emissions, but in a way that cannot be quantified or assessed in detail.

In addition to its normative scope, the Citizens’ Convention also attracted broad media attention and thereby raised awareness for the issue of climate change and the urgent

8 Act no. 2021-1104 of 22 August 2021 on combating climate change and building resilience to its effects.

need to change behaviour and rules.

Ultimately, regardless of the merits and constraints of participatory democracy initiatives, it is political will that proves most influential and crucial in driving change.