The Citizens' Convention for Climate in France:

An Introduction of Participatory Democracy into French Governance

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Abstract

In response to the 'Gilets Jaunes' movement, and the general sentiments of the elitism and illegitimacy of French government which sparked it, President Macron organised the Citizens' Convention for Climate (CCC): a participatory forum of 150 citizens, randomly selected to deliberate in a unique model of 'co-construction' with experts, which over the summer of 2020 produced 149 legislative proposals, including for constitutional amendment. The thesis explores the actual and potential impact of the CCC on French governance. It shows that, while the resulting *projet de loi* introduced by the French Government into the National Assembly resulted from the CCC's proposals—as opposed to the *Conseil d'État* which usually drafts the Government's proposed bills—the CCC did not actually replace the ordinary legislative procedure, as some proponents of citizens' assemblies would hope, but rather found its proposals thoroughly amended by it. In a deconstructive analysis, I will argue that the CCC's actual normative impact was limited by its consultative constitutional nature, within the broader context of a French Constitution haunted by the spectral traces of its colonial origins and its historical tradition of supreme executive power. However, the CCC nonetheless has the potential to impact the future of French governance, in particular due to the further institutionalisation of citizens' conventions already in progress in the polity.

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List of Abbreviations

CCC   The French Citizens' Convention for Climate

CESE   The Economic, Social and Environmental Council

CNDP   Commission of National Public Debate

EU   The European Union

OECD   The Organisation for Economic Co-operation and Development

QPC   Priority Question of Constitutionality

UK   The United Kingdom

UN   The United Nations

US(A)   The United States (of America)

Acknowledgements

It has been a very long year. While I have certainly grown from the experience, I could not have made it through without the support of so many people, for whom my profound gratitude and appreciation could never be captured by words here alone. Nevertheless, I will try my best.

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Introduction
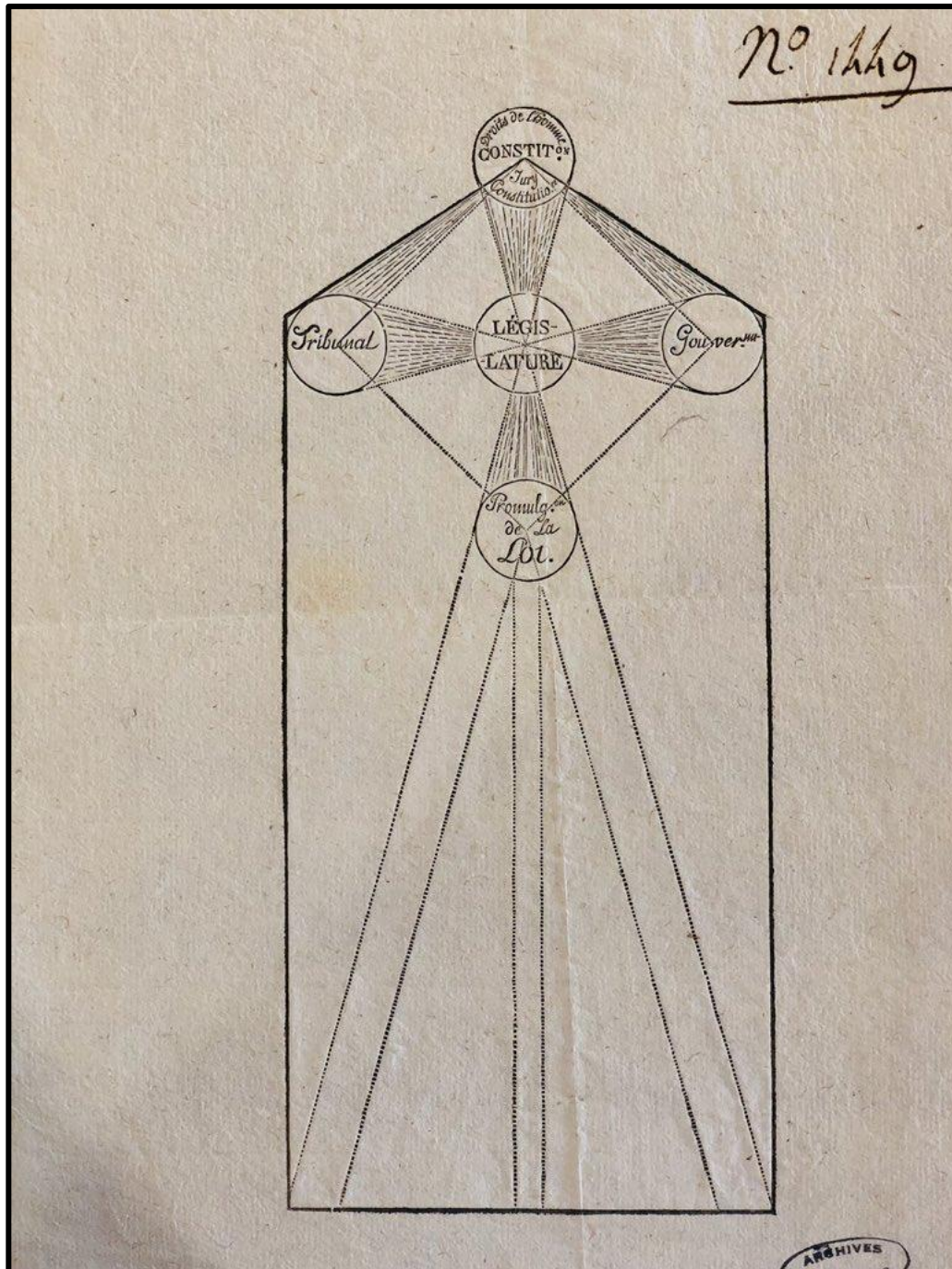
Figure 1: Abbé (Emmanuel Joseph) Sieyès, 'Illustration of Social and Constitutional Order'

(July 1789) Archives Nationales de France

In this thesis, I will be exploring the recent event of the Citizens' Convention for Climate (from here on, the 'CCC'):[1] a constitutional experiment in participatory democracy, which took place in France from 2019 to 2020. This thesis lies upon a rhizomatic quilt of the interwoven themes of legislation, governance, participation and design, which is embodied within the above sketch by Abbé Sieyès: a prominent constitutional theorist, drafter and 'founder' of the 1st French Republic. The central research question I will be exploring in this thesis is: what is the actual and potential impact of the CCC on French governance? By way of introduction to this research question, which I will be seeking to answer throughout the course of the thesis, I have drawn inspiration from the methodology for a material cultural analysis, in order to use the sketch as a prompt. Jules David Prown defines material culture as the 'study through artefacts of the beliefs-values, ideas, attitudes, and assumptions-of a particular community or society at a given time',[2] and thus through this lens, we may get a hint at the constitutional *zeitgeist* Sieyès has captured in his sketch. With Prown's assistance, I will analyse Sieyès sketch to elucidate the themes which this thesis will be engaging with.

Prown's methodological guidance suggests that a material cultural analysis of an object begin with a practical physical description. I will explore the history and context behind the sketch below, but will start by describing what I personally can see. The object in this case is substantially a yellowed aging paper containing a geometric sketch, neatly hand-drawn upon in black ink: it can be considered art, which Prown also classifies as material culture.[3] The content of the drawing seems to be a graphical visualisation of the hypothetical hierarchical

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[1] *Convention Citoyenne pour le Climat* in the original French, for translation see e.g. Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate" (*HAL* 2021) https://hal-enpc.archives-ouvertes.fr/hal-03119539/document.

[2] Jules David Prown, 'Mind in Matter: An Introduction to Material Culture Theory and Method', *Winterthur Portfolio,* Vol. 17, No. 1 (Spring, 1982), p1.

[3] Ibid.

relationships within a republican constitution between its judicial, executive and legislative branches, for a France on the cusp of revolution, as well as how legal norms are translated into society. A formal analysis of the sketch would highlight that the illustration takes up the entire length of the page, and that the external skeleton is in the shape of a vertically long pentagon. Within this exoskeleton, Sieyès has superimposed two pyramids into a diamond to form the top of the pentagon. In French, the top pyramid, and thus the tip of the pentagon shape, designates within a spheric speech bubble: 'the Constitution' as its peak, comprised of the 'rights of man' and the 'constitutional jury'. At the base of this top pyramid, the three branches of government are laid out evenly within their own respective spheres, in the following order from left to right: 'the judiciary', 'the legislature', and 'the executive'. This base serves as a border for the bottom pyramid, whose own zenith facing downwards, contains a sphere which states: 'the promulgation of the law'. Overall, the legislature is at the centre of the diamond formed by the two pyramids, and tendon-like lines connect all the spheres of text, illustrating the intertwining of each limb of government. Finally, within the exoskeleton of the pentagon below the diamond, split three distinct linear beams stretching down the infinite remaining space within the sketch.

The second phase of the material cultural analysis is that of critical deduction based off of our descriptive observations. A sensory engagement with the sketch to my own eyes has it appear visually as somewhat anthropomorphic, as if it were a skeletal inversion of the Hobbesian *Leviathan*, though with the executive overtaken by the legislative at the centre of the constitutional arrangements, presumably to indicate the republican democracy sought by Sieyès to replace the arbitrary monarchic rule of King Louis XVI he and his revolutionary

compatriots had lived under.[4] This anthropomorphism of government is reminiscent also of that ill-fated king's ancestor; King Louis XIV's earlier omnipotent declaration 'I am the state'.

My emotional response to the object is that the sketch reminds me somewhat of a ferris wheel in its shape, with each spherical constitutional cabin balanced onto a diamond of governance supported by the tripod foundation of society, and each cabin rotating in turn for its moment of sovereignty; or else perhaps I am inclined to view the drawing almost as a battery circuit, with the Constitution as generator, the three sub-ordinate institutions as circuit breakers, and the promulgation of law as the lightbulb to be powered. In either case, I cannot help but view the sketch as illustrative of the tension between the spheres to be considered the ultimate sovereign, either at the top of the structure, or in the centre of the diamond: Sieyès appears to be depicting a delicate constitutional vignette of the balance of power, within the overarching structure symbolising the State of France itself.

Finally, we see that the sketch dates back to sometime in the turbulent July of 1789, when the historical storming of the Bastille prison on the 14th of July 1789 symbolised the beginning of the French Revolution. An intellectual engagement with the object inspires me to consider Sophie Boyron, who writes on the (legal) history of the French Constitutions, and explains that in 1789, the General Estates (a Parliament of sorts for a monarchic France) were convened by the King for the first time in over 150 years due to increasing political unrest in the polity, and was constituted by representatives of three estates: the clergy, the aristocracy and the common people.[5] In response to a stalemate in the deliberations, the political theorist and Catholic Abbé

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[4] Thomas Hobbes, 'Leviathan' (Richard Tuck ed, 1st edn, Cambridge University Press 1996, originally published 1651).

[5] Sophie Boyron, 'The Constitution of France: A Contextual Analysis' (Hart Publishing, 2013).

Sieyès published a pamphlet entitled 'what is the 3rd estate?', referring to the final and least privileged estate of the common people. In it, he famously answered: 'What is the 3rd Estate? Everything. What has it been hitherto in the political order? Nothing. What does it desire to be? Something.',[6] and thus in following Thomas Paine's call to arms in the recently established United States of America against despotism in his own pamphlet 'Common Sense',[7] Sieyès introduced the general French population to the republican ideas of the Enlightenment,[8] and precipitated the revolution to come. Due to his pamphlet's viral popularity, Sieyès was elected a deputy from Paris of the 3rd estate of the common people to the General Estates, and soon afterwards he initiated the motion to merge all three estates into a single National Assembly, with equal power to the King.[9] This was the birth of the first democratic French Parliament, which famously swore an oath at the Versailles Tennis Court promising 'not to separate, and to reassemble wherever circumstances require, until the constitution of the kingdom is established and consolidated upon solid foundations', in a constitutional moment somewhat palimpsestic of the American 1776 Declaration of Independence, or even the UK's 1215 Magna Carta, both of which introduced a Parliament distinct from the monarchy into their respective polities.[10] It was not long before the Tennis Court Oath resulted in the first French Constitution towards the end of 1789, which included the 'Declaration of the Rights of Man and Citizen', both of which Sieyès helped draft, and which were adopted in 1791, officially beginning the First French Republic.

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[6] Abbé Sieyès, 'What is the 3rd Estate?' (Pall Mall Press 1963, originally published 1789).

[7] Thomas Paine, 'Common Sense' (Verso 2009, originally published 1776).

[8] Montesquieu, 'The Spirit of the Laws' (Cambridge University Press 1989, originally published 1748).

[9] Boyron, supra, note 5.

[10] Ibid.

To return to the sketch then with this historical context in mind, it would appear that Sieyès designed his vision of what would become France's first republican constitution, at the time he was helping to draft it. Sieyès was a founding member of the Girondin party along with ally Thomas Paine, which had initially been part of the original revolutionary club of the Jacobins, before that party bifurcated into the Girondins and Montagnards, who held differing views of governance: the former were analogous to modern republican and liberal legal constitutionalists, while the latter were anti-liberal and nationalist authoritarian constitutional monarchists, and would go on to install a bloody and chaotic period known as 'the Terror' under the dictatorship of Maximilien Robespierre for two years. Prior to this, Sieyès in this sketch clearly synthesizes his theory of governance, and demonstrates the central tenets of the Girondin constitutional project: that the Constitution should protect human rights and was the sovereign expression of the people, from which derived all other organs of governance, separated into three branches. Further, the legislature should be the central branch from which the law would be promulgated, but the other two branches would nevertheless retain equal power to check and balance the Parliament. His use of hierarchy and structure in the sketch indicate Sieyès' views on the spatial organisation of the French constitutional arrangements, which have inspired a plethora of republican constitutions since, including France's own Fifth Republic, as we will see later in this thesis. It is ironic, as a final note, that Sieyès would go onto the participate in the coup which installed Napoleon Bonaparte into power, and helped him to draft the 1795 constitution for his French Directory, which prophetically returned the executive to the centre of France's constitutional arrangements, and hints at a struggle between that branch and the legislature which the case study of the CCC will make clear in the course of this essay.[11]

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[11] Ibid.

To conclude my exploration of this sketch inspired by a material cultural analysis, Prown advises the imaginative speculation of theories and hypotheses one may derive from a given object, as 'speculation is essential to a democracy of ideas'.[12] Sieyès's sketch immediately reminded me of when I first learned about the separation of power in my own primary education on civics, when I was presented with a diagram showing the 3 branches of government, also organised into a pyramid, similar to the one shown below in Figure 2.
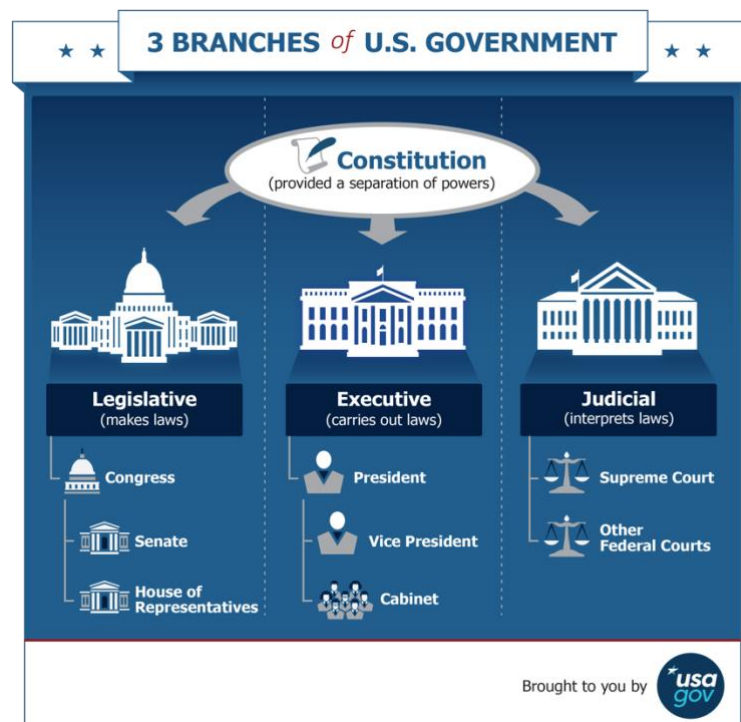
Figure 2: '3 Branches of the U.S. Government' (USAGov)
https://www.usa.gov/branches-of-government accessed 17 August 2021

The similarities between the US government's own visualisation of its constitutional separation of powers and the Sieyès sketch are apparent: both use a hierarchy to establish the constitution as what the influential positivist and constitutional jurist Hans Kelsen called the *grundnorm*, or basic norm: the text of a written Constitution, as well as any judicial decision or other convention which can be said to have a constitutional or foundational quality, and from which

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[12] Prown, supra, note 2.

flow increasingly specific norms which derive their legitimacy and authority from the ultimate law of the grundnorm.[13] Interestingly, Sieyès' sketch seems to align rather well Kelsen's hierarchical pyramid of norms shown below in Figure 3, and this merely serves to illustrate that Sieyès' inspiration from Enlightenment constitutionalism and influence on subsequent governance had a substantial influence on the constitutional theory and practice. Of course, I do not here mean to suggest that Kelsen necessarily drew direct inspiration from Sieyès; I would merely submit that the similarities between their hierarchical conceptions of governance indicate perhaps a common influence and closely shared constitutional epistemology. Another link between Sieyès and Kelsen is that both were weary of placing the executive in the centre position as the 'guardian of the constitution', as was advocated for by Kelsen's academic dissident and Nazi jurist Carl Schmitt; however Sieyès's sketch seems to indicate a preference for centring the legislature, while Kelsen tended to favour the judiciary as the guardian of the constitution.[14]

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[13] Hans Kelsen, 'Pure Theory of Law' (1967).

[14] Lars Vinx, 'The Guardian of the Constitution - Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law' (Cambridge University Press 2015).
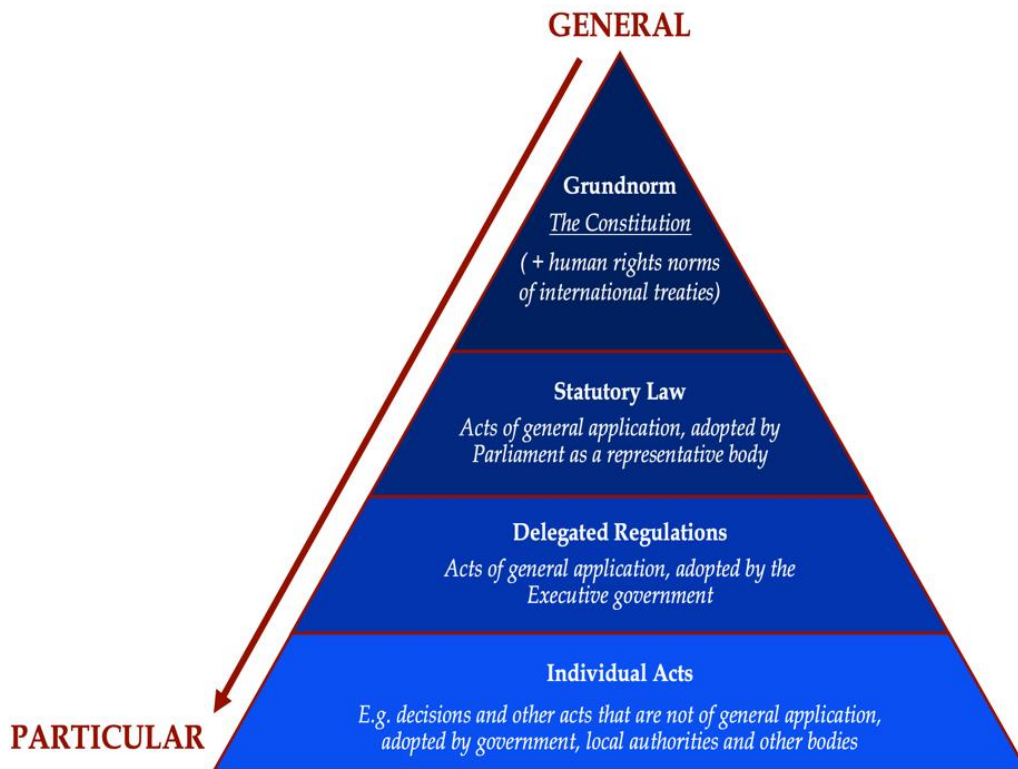
Figure 3: Hans Kelsen, Pure Theory of Law (1967) – illustrated myself from description.

My speculation on Sieyès' sketch is therefore that it represents a consolidation of the Enlightenment revolutionary constitutionalism of the US, France and UK, which became the standard templates for the majority of governments to follow.[15] This drawing nevertheless represents assumptions of his own understanding of constitutional spatial division, which he translated into his drafting of the Constitution for the First French Republic. The sovereign tension between the executive and legislative in the history of French governance that the drawing reveals, as well as its use of visual design prototyping methods both serve to introduce the themes this thesis will examine, in its exploration of the CCC as a participatory experiment sitting somewhere between the French legislative and executive branches itself. At the

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[15] Günter Frankenberg, 'Comparative Constitutional Law' in Mauro Bussani and Ugo Mattei (eds), 'The Cambridge Companion to Comparative Law' (Cambridge University Press 2012).

conclusion of this thesis, I will return to the Sieyès sketch, to reflect on his choice of constitutional organisation, and how his design assumptions may have been interrupted by the CCC.

This thesis seeks to analyse the actual and potential impact of the recent event of the CCC, an iteration of participatory democracy as has not yet been seen in French governance. The first part of the essay will explore the context behind the CCC, and thus seeks to answer the following research questions: has participatory democracy ever existed in France, and how did the CCC fit into the existing French constitutional arrangements? The second part of the thesis will seek to argue the actual and potential impact of the CCC on French governance, and therein ask whether the CCC had any normative contribution to French law, or whether it threatened ordinary French legislative procedure.

My research proposal is important to constitutional thinking because it analyses the actual and potential contribution of the French Citizens' Convention for Climate, and makes the unique argument that while it may not have had a large doctrinal impact due to the colonial and executive traces of the Fifth Republic, the CCC nonetheless may have re-introduced participatory democracy in France through its proposal to institutionalise the idea through reform CESE.

This thesis will not be an extensive exploration of the idea participatory democracy in and of itself, nor of all of its components: different institutional models, the legitimacy of sortition versus election etc., as certain collections have already explored.[16] Rather, this thesis is

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[16] John Gastil & Erik Olin Wright, 'Legislature by Lot: Transformative Designs for Deliberative Governance' (Verso 2019).

intended to be a narrow project on the impact of the CCC itself as a case study within the context of the French polity. It will be organised into two parts, as aforementioned, with three primary chapters. The first chapter will seek to introduce participatory democracy and French governance, so that the second chapter may zoom into the case study of the CCC itself and its immediate background. The final, third chapter will elaborate its argument on the actual and potential impact of the CCC: that its normative power was limited by its consultative constitutional nature under the shadow of a strong French executive, but that the CCC nevertheless managed to begin the institutionalisation of participatory democracy in France and contribute to empirical research on citizens' assemblies.

I will draw on various material available on the CCC, such as articles by academics involved in the Convention,[17] news and media which followed the event, and my own attendance at the May 2021 Yale Conference on the Convention 'Towards Citizen Legislators (Climate Change) tomorrow!', in order to answer the questions on the inception, organisation and approach to participation of the CCC.

To explain and explore participatory democracy as situated within the CCC, I will engage largely with Professor Hélène Landemore,[18] who prior to the Convention was already at the forefront of this field, but also was involved in the CCC specifically. I will also draw upon research on other models and instances of deliberative democracy, such as by the OECD.[19]

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[17] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

[18] Hélène Landemore, 'Open Democracy: Reinventing Popular Rule for the Twenty-First Century' (Princeton University Press, 2020).

[19] OECD, 'Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave' (2020) *OECD Publishing*, Paris, https://doi.org/10.1787/339306da-en.

In order to discuss the CCC as a constitutional item, I will make use of doctrinal French Law, such as the Constitution of the French Republic (1958), and the *projet de loi* (equivalent to a white paper in the UK) which was introduced by the President Macron into the National Assembly, following the CCC's proposals.[20]

My deconstructive arguments on the traces of the French Constitution will engage in literature on French constitutional history,[21] comparative legal transfer,[22] and philosophical hermeneutics.[23]

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[20] 'Projet de loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets' (Vie publique.fr) <https://www.vie-publique.fr/loi/278460-loi-climat-et-resilience-convention-citoyenne-climat> accessed 17 August 2021.

[21] Boyron, supra, note 5.

[22] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', (1998) 61 Modern Law Review 11.

[23] Pierre Legrand, 'Derrida's Gadamer' in Glanert S, Girard, Law's Hermeneutics: Other Investigations (Routledge 2017) Ch. 9.

Part 1: An introduction to the CCC

Chapter I – Participatory democracy in France

This first chapter will serve as an introduction to the themes and case study I will be analysing in this thesis. In the first section, I will present and define 'participatory democracy' for my purposes as an umbrella term for the interwoven political theories of direct democracy, deliberative democracy, sortition and open democracy. In the following section I will elucidate France's current constitutional framework, and in the final section of this chapter I will show how participatory democracy emerged within French governance, prior to our case study of the CCC.

A) Participatory democracy

'The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of members of parliament. As soon as they are elected, slavery overtakes it, and it is nothing'.[24] So said Jean-Jacques Rousseau, a notable Enlightenment-era political philosopher in his famous treatise *The Social Contract*, which served as a foundation for classical republicanism, and inspiration for the revolution against monarchy in the newly established United States of America and consequent domino effect of further revolutions for democracy in France and other royally-governed polities in the late 18th century.

Democracy, whose Greek etymology means 'rule of' (*-kratia)* 'the people' (*dēmos*), is in its contemporary republican form the dominant mode of governance in the world today, favouring elections of representatives by the general population to a parliament, to legislate on matters of

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[24] Jean-Jacques Rousseau, 'The Social Contract' (Penguin Books 2004, originally published 1762).

the State. Such is the constitution of the United Kingdom, which Rousseau cites in the above quote, where Parliament evolved from the Witenagemot, an ancient deliberative assembly of freeborn Anglo-Saxon 'wise-men', to be considered sovereign.[25] Republicanism tames democracy, whose pure form could cause a De Tocquevillian 'tyranny of the majority'[26] in a utilitarian majority vote, and today both distinct notions are often linked in what is known as 'liberal democracy'.[27] Therein, the separation of powers into the branches of executive, legislative and judiciary, as well as an entrenchment of constitutional rights, serve to protect unpopular minorities.[28] The people of a polity consent to this arrangement of governance in order to form a shared political community, and provide this consent ordinarily in the form of elections. Thus is Rousseau's 'social contract': a constitution which ensures the legitimacy of the State. It is the study of these social contracts as they live and breathe in given polities which forms the basis of the field of Comparative Constitutional Law which will underpin my thesis.[29]

Rousseau's quote is indicative of his distrust for the representative democracy that citizen electors around the world are accustomed to, as he had a notable preference instead for direct democracy. Indeed, the notion of democracy does not require the election of representatives in and of itself, but rather is defined by the principle of self-government, which can take many forms.[30] Direct democracy for example stands in opposition to the idea of representation, and instead promotes that the general population vote directly on matters for themselves, such as

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[25] A. V. Dicey, 'An Introduction to the Study of the Law of the Constitution' (10th edition, The Macmillan Press LTD, 1959).

[26] Alexis De Tocqueville, 'Democracy In America' (Penguin Books 2003, originally published 1835).

[27] Chantal Mouffe, 'The Democratic Paradox' (Verso Books, 2016).

[28] Montesquieu, 'The Spirit of the Laws' (Cambridge University Press 1989, originally published 1748).

[29] Roger Masterman and Robert Schütze (eds), 'The Cambridge Companion to Comparative Constitutional Law' (Cambridge University Press 2019).

[30] David Held ,'Democracy and the Global Order: From the Modern State to Cosmopolitan Governance' (Stanford University Press 1995).

by referendum. Rarely, however, is direct democracy seen in its full expression today, as contemporary governments will often employ referendums as temporary, and consultative instances of direct democracy, rather than as the standard procedure for legislation. To return to the British example, a now infamous example is the 'Brexit' referendum of the 23rd of June 2016 in the UK, where a vote outcome of 51.9% found in slim favour of triggering Article 50 of the Treaty on European Union to withdraw the UK from the EU.[31] In any case, this was not an instance of pure direct democracy, as the referendum was not normatively binding. It was found by the UK Supreme Court in the case of *Miller* that not only was the Government not obliged to follow the outcome of the referendum, but also that it was for Parliament to make the final decision, as sovereign.[32] This of course resulted nonetheless in the passing of the European Union (Notification of Withdrawal) Act 2017, and now the UK is indeed independent from the EU, thus showing the impact a referendum still can have, even when not binding. However, consultative referendums to another sovereign, even where that sovereign is supposedly legitimated by popular election, cannot be said to equate to the ideal of direct democracy, in which popular votes would have instant normative power.

Certain constitutions have nevertheless implemented normative, even mandatory, referendums for its citizens, such as that of Switzerland, whose tradition of direct democracy inspired the Genevan-born Rousseau.[33] Switzerland's Constitution remains in any case only 'semi-direct', as those provisions are symbiotic with a representative legislative assembly in the polity. Rousseau did not believe direct democracy to be feasible at more than a local level, as he

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[31] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[32] *Ibid.*

[33] 'Switzerland 1999 (Rev. 2014) Constitution - Constitute' https://www.constituteproject.org/constitution/Switzerland_2014?lang=en accessed 10 August 2021; Articles 140-141.

thought it 'unimaginable that the people should remain continually assembled to devote their time to public affairs' as the primary form of legislation in a given polity.[34] This instead would constitute some platonic ideal version of democracy, for Rousseau was convinced that 'were there a people of gods, their government would be democratic. So perfect a government is not for men'.[35] This dilemma is an archetypal governance debate, which constitutional drafters have long considered: how to balance the ultimate (yet logistically impossible) legitimacy of every citizen having a direct say in their democratic self-governance, with the need for an efficient government comprised of some institutional bureaucracy?[36] While we shall see towards the end of this thesis that digital technology is easing this dichotomy in ways that ancient and Enlightenment constitutional drafters could never have imagined, and may indeed allow all people of a polity to have some form of voice in government via digital media, there exists yet another age-old compromise solution to the problem: that of the paradigm of democratic sortition, falling under the concept of participatory democracy. Indeed, Rousseau concluded that 'the idea of representatives is modern. (…) In the ancient republics, (…) the people never had representatives. (…) The moment a people allows itself to be represented, it is no longer free: it no longer exists'.[37]

i. 'Early democracy' as distinctly participatory

The origins of democracy are commonly determined to be in Ancient Greece, around the 6th century BCE, in the city state *polis* of Athens, thus explaining its Greek etymology. However,

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[34] Rousseau, supra, note 24.

[35] Ibid.

[36] David Van Reybrouck, 'Against Elections: The Case for Democracy' (First US edition, Seven Stories Press 2018) p138.

[37] Rousseau, supra, note 24.

Athenian democracy did not look like democracy's modern iteration, as formerly illustrated by the UK's bi-cameral Parliament and satellite institutions. Aristotle is well known for writing that 'it is accepted as democratic when public offices are allocated by lot; and as oligarchic when they are filled by election',[38] and indeed Athenian democracy is instead thus renowned for its use of sortition: the random selection of eligible citizens to participate directly in their self-governance. Of course, it must be noted that an Athenian citizen was only a privileged adult male having served in the military, and thus excluded slaves, women, children, and any resident not born in Athens or to an Athenian citizen – so Athenian democracy, while innovative in its means of democratic inclusion, was also hypocritically exclusive.

Terrill Bouricious, who himself served as a local American congressman in Vermont's House of Representatives, explains Athenian democratic sortition as underpinned by the two fundamental principles of *isonomia* and *isegoria*.[39] Isonomia was the right to political equality, and signified that all citizens should have the same chance of being chosen by lot serve to in public office, and isegoria stood for the right of all citizens to participate in the People's Assembly, and even to initiate legislative proposals. Thus, participatory democracy in Athens meant direct contribution to government by citizens through their random selection and ever-present opportunity to deliberate. The People's Assembly, or *ecclesia*, was the equivalent of a Parliament in the Athenian Constitution,[40] with quasi-executive and judicial powers. This Assembly was representative in a sense, as it could only hold 6,000 out of an estimated 30,000 – 60,000 citizens of the Athenian *demos* in a given session. However, Bouricious highlights

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[38] Aristotle, 'Politics' (Oxford University Press 1995) Book IV.

[39] Terrill G. Bouricius, 'Democracy Through Multi-Body Sortition: Athenian Lessons for the Modern Day' (2013) *Journal of Public Deliberation* Vol. 9:1, Article 11.

[40] Aristotle, supra, note 38.

that 'a council selected by lot was the key institution in Greek democracy and may even have been more central to the Greeks' concept of democracy than the People's Assembly'.[41]

The astonishingly republican governance of Athens was thus: a randomly selected Council of 500 known as the *boule* would set the legislative agenda, and draft proposed bills. The People's Assembly would vote on these bills, but they would not become law until randomly selected Legislative Panels known as the *nomethai*, comprised of 1,001 citizens over the age of 30, approved those bills into law, similar to the UK's royal assent to Acts of Parliament. Further, the judicial branch took the form of the *dikasteria*, or the People's courts, where 501, 1,001 or 1,501 citizens were randomly selected, and had the power to strike down laws passed by the People's Assembly. The Athenian executive was found in small panels of 10 citizens chosen by lot, supplemented by the People's Assembly and the military.[42] It is clear then that Athenians exercised their popular sovereignty through sortition to all branches of its government, rather than via election, which they regarded as 'inherently aristocratic, since only those with money and status could win'.[43]

This exercise of direct democracy through participation by lot influenced political philosophers and comparative constitutionalists from Aristotle to Enlightenment thinkers such as Montesquieu and Rousseau, whose writings underpin our contemporary democratic constitutions. Examples of it can be seen throughout history, for example in the Renaissance Florence which inspired Machiavelli, whose primary organ of governance, the Signoria, also

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[41] Bouricius, supra, note 39.

[42] Yves Sintomer, 'From Deliberative to Radical Democracy: Sortition and Politics in the 21st Century' in John Gastil & Erik Olin Wright, 'Legislature by Lot: Transformative Designs for Deliberative Governance' (Verso 2019) p53.

[43] Bouricius, supra, note 39.

appointed its members through random selection.[44] However, while Athenian democracy was certainly innovative, and served to inspire future participatory experiments in sortition-suffused democracy, there is a Western assumption that there was no democracy prior to this point in our collective human history.[45] The comparative legal theory of legal *culturalism* therein reminds us legal-academics of our situatedness, and our tendency for Eurocentrism in comparative constitutional research.[46] Instead, it is important to be aware and sensitive to traditions of governance around the world, and to have 'special consideration for local oddities and differences of Law and culture'.[47]

In following this culturalist ethos, David Stasavage emphasises that despite this Western conception of Athens as the birthplace of democracy, 'democratic practices were present in many places, at many other times, from the Americas before European conquest, to ancient Mesopotamia, to precolonial Africa'.[48] Stasavage accordingly bisects democracy in a given polity as either 'early' or 'modern'. The former early democracy he identifies first in the indigenous societies of southern Africa, where there were no free elections, but tribal leaders 'had to rule collectively with assemblies and councils that constrained their actions: the people participated in governance'.[49] The latter modern democracy is therein distinguished by its representative nature, which Stasavage indicates as occurring more frequently, but

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[44] Niccolò Machiavelli, 'The Prince' (Oxford University Press 2008).

[45] Ran Hirschl, 'Comparative Matters: The Renaissance of Comparative Constitutional Law' (First edition, Oxford University Press 2014) p231.

[46] Pierre Legrand, 'European Legal Systems Are Not Converging', (1996) 45 *International and Comparative Legal Quarterly* p56.

[47] Günter Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited' (2010) 8 *International Journal of Constitutional Law* 563.

[48] David Stasavage, 'The Decline and Rise of Democracy: A Global History from Antiquity to Today' (Princeton University Press 2020).

[49] Ibid. p3.

consequentially is more superficial in terms of participation by the broader populace. Therefore, early democracy was distinctively participatory by Stasavage's definition, and can be seen for example in a French Jesuit missionary's account of the North American indigenous Huron tribe's governance, which was based on 'both central and local councils with broad participation – including for women', which was ironically more democratic than that Jesuit's own French governance at the time of his writings.[50] Stasavage does not discredit Athenian democracy, which he nonetheless classifies as perhaps the 'most extensive example of early democracy' known today,[51] but he seeks to post-colonially show that this identifiably participatory democracy existed in myriad forms well before Athens, perhaps pointing to some human instinct or archetype for democratic self-governance.

India is notable for its rich history of participatory democracy. While we saw that Athenian democracy is usually seen as originating in the 6th century BCE, there is evidence that prior to this, republics of varying forms 'flourished at the time of Buddha and Mahavira' in the Vedic period from 1750-500 BCE, or perhaps even earlier in Ancient India.[52] For instance, the North-eastern Indian Licchavis clan was governed by a *ghana sangha*, or tribal assembly, of thousands of people, like the Athenian boule. However, some academics note that those who were allowed to participate, similar as to in Athens, had to be from an elite social stratus, such as the *kshatriyas* warrior caste.[53] This tradition of early participatory democracy in India continues today alongside its modern democracy, as 'a 1992 constitutional amendment entrenched deliberative democratic practices in villages across the country', to the extent that

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[50] Ibid.

[51] Ibid. p5.

[52] T Burrow, 'J. P. Sharma: Republics in Ancient India, c. 1500 B.C.–500 B.C.xviii, 278 Pp. Leiden: *E. J. Brill*, 1968. Guilders 51.' (1971) 34 *Bulletin of the School of Oriental and African Studies* 416.

[53] Ibid.

'India has the highest deliberative democracy ever, the largest in history of civilisation affecting over 800 million people'.[54] This constitutional amendment compelled Indian states to organise village assemblies known as a *gram sabha*, with quotas for seats to be filled by women and disadvantaged castes, to govern alongside a village legislature, the *panchayat*.[55] While the *gram sabha* is criticised as suffering from 'the problem of rural illiteracy, elite domination, and gender bias', it nevertheless 'provides a vivid example of how democracy can be strengthened through greater citizen involvement'.[56]

ii.   Theories of participatory democracy

I have sought to illustrate that participatory democracy has its origins in early democracy across the world, and can be contrasted with modern representative democracy by its prominence in the governance of ancient cultures, as well as by its more outright engagement in direct, deliberative and lot-driven democracy. More contemporary epistemic origins of Participatory democracy in political philosophy begin however with Jürgen Habermas, of the continental Frankfurt Critical School, and his elaboration of the *public sphere*.[57] Habermas conceptualised deliberation of the people as the 'heart of the democratic process', and that this public dialogue should occur within the 'communicative structure' of what he called the public sphere: an abstract 'social space from where a discursive formation of political opinion can and will

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[54] Mauricio Mejia, 'Case Study: Village Democracy in India' (*Medium*, 7 April 2021) https://medium.com/updating-democracy-rebooting-the-state/case-study-village-democracy-in-india-799b7aeea2e accessed 9 August 2021.

[55] 'India 1949 (Rev. 2016) Constitution - Constitute' <https://www.constituteproject.org/constitution/India_2016?lang=en> accessed 16 August 2021; Part IX.

[56] Mejia supra, note 54.

[57] Jorge Adriano Lubenow, 'Public Sphere and Deliberative Democracy in Jürgen Habermas: Theoretical Model and Critical Discourses' (*American Journal of Sociological Research* 2012), 2(4): 58-71.

emerge', or 'the process that will permit the emergence of as many voices as possible, of alternatives for action and ways of life, ensuring their right of expression and participation'.[58] The public sphere is one of two 'deliberative tracks' Habermas identifies in a given polity's governance as an informal space for public deliberation, with the other being the formal space for decision making: the Parliament, courts and administrative government.[59]

Hélène Landemore, an academic at the forefront of current research on participatory democracy, builds her own conception of *open democracy* on this Habermasian public sphere, and explains that its focus on deliberation enriches democracy beyond the dominant 'one person, one vote' representative paradigm. She defines deliberative democracy as 'a theory of democratic legitimacy that traces the authority of laws and policies to the public exchange of arguments among free and equal citizens, rather than, strictly speaking, the moment of voting', and therein re-defines participatory democracy as 'a political system in which all the members are equally entitled to participate in the association's decisions about its laws and policies, including in the pre-voting deliberative stage'.[60] For Landemore then, participatory democracy requires more direct democracy than simple non-binding referendums, and this is reflected in her analysis of Habermas' public sphere. She explains that while for Habermas the public sphere's deliberations inform the formal track of law-making, they are not substantive or directly binding, and thus 'appear out of sync with modern democratic expectations of more immediate participation and voice, particularly as enabled by the digital revolution in almost

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[58] Ibid.

[59] Jürgen Habermas, 'Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy' (MIT Press 1996) Chapters 7-8.

[60] Hélène Landemore, 'Open Democracy and Digital Technologies' in Lucy Bernholz, Hélène Landemore, and Rob Reich (eds), 'Digital Technology and Democratic Theory' (2021, The University of Chicago Press) p65.

any other sphere in life'.[61] Indeed, as we will see later in this section, the rise of social media platforms has been linked to a return of interest to participatory democracy, due to the way the political deliberations of the public sphere has become digitalised and therein increasingly divisive.

Landemore therefore sees Habermas' work as fundamental, but not far-reaching enough, and so she argues for a public sphere with increased participatory and normative power, to the extent it may even replace or at least become equal to the formal decision-making government institutions. Taken from Karl Popper's concept of 'open society', Landemore therein proposes open democracy: 'in which the government is not just liberal but genuinely democratic and, furthermore, democratic in an "open" manner that facilitates participation of ordinary citizens'.[62] Under this paradigm, 'everyone gets a chance to directly exercise legislative power – to define the laws that govern ourselves and others'.[63] For Landemore, there are five fundamental principles which underpin the idea of open democracy: participation rights for all citizens in legislation; deliberation as a source of legitimacy and 'collective wisdom'; majority rule where there is no consensus; democratic representation; and finally transparency.[64]

The fourth principle of Landemore's open democracy, democratic representation, is fundamentally different from representative democracy. Landemore argues that elections are characterised by a fear of its own electors, as the founders of our modern enlightenment-era governments equivocated 'pure democracy' with 'mob rule'. For example, American

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[61] Ibid. p67.

[62] Ibid. p71.

[63] Hélène Landemore, 'No Time for Castles: From Closed to Open Democracy' (*Green European Journal*) <https://www.greeneuropeanjournal.eu/no-time-for-castles-from-closed-to-open-democracy/> accessed 16 August 2021.

[64] Landemore, 'Open Democracy: Reinventing Popular Rule for the Twenty-First Century', supra, note 18.

constitutional founder James Madison spoke of the need to cure the dangerous passions of majority factions in the general populace with representative government by a small group of 'enlightened statesmen', because the people on their own could not be trusted even for direct universal suffrage of their President, thus the creation of the US electoral college.[65] For Landemore, the 'popular sovereignty' that representative democracies are built on is only true insofar as citizens get to 'choose their rulers', but 'the people never get to actually rule'; instead she affirms that 'democracy, people's power, is about exercising power, not just consenting to it'.[66] Landemore further cites the frustrations people feel with their elected representatives, a phenomenon that is tied to surely every representative government: that power is given to elites by design and disadvantages minorities, as well as that the model does nothing to stimulate proper deliberation and informed voting in the Habermasian sense, but rather tends to actively suppress it, as can be seen with the notoriously racist Jim Crow laws of the American South.[67] Therein, Landemore hopes for open democracy to decentre electoral institutions, and to shift instead towards democratic representation as operating through random selection or self-selected representation. The idea is similar to the Athenian model previously discussed and recalls the concepts of *isonomia* and *isegoria*. Landemore's democratic representation avoids our inability to participate as an entire populace at once by advancing lotocratic representation in the first instance: 'representation performed by citizens selected at random or, as a close second best in theory and often an improvement in practice, stratified random sampling (which allows the targeting of minorities at risk of being underrepresented in a true random sample)', and in the second instance, self-selected representation 'in "spatially open" assemblies, namely

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[65] Alexander Hamilton, James Madison & John Jay, 'The Federalist Papers' (Oxford University Press 2008, originally published 1788) Federalist no. 10.

[66] Landemore, 'No Time for Castles: From Closed to Open Democracy', supra, note 63.

[67] Michelle Alexander, 'The New Jim Crow: Mass Incarceration in the Age of Colorblindness' (Tenth anniversary edition, The New Press, 2020).

assemblies that are accessible to all those willing to participate'.[68] The equal opportunity to participate replaces the equal opportunity to vote in this form of democratic representation, and justifies the legitimacy of the representative.

Landemore would have her vision of open democracy institutionalised in a lotocratic 'open mini public: a large body of citizens gathered for agenda-setting and law-making', which would be connected to the larger public sphere for 'deliberative exchange' and could take the place of (or supplement as a 3rd chamber) upper Parliamentary chambers such as senates in cohabitation with a representative legislative assembly[69]. In this thesis, I will be using the term 'participatory democracy' to broadly denote the spectrum of degrees to which citizens participate in legislation, with non-normative instance of direct democracy such as referendums on the lowest end, Habermas' deliberative public sphere towards the middle, and Landemore's institutionalised lotocratic open democracy at the top. Therein, participatory democracy as I understand and employ it is an umbrella term for direct democracy, deliberative democracy, sortition and open democracy. In this thesis, I will be seeking to focus on the idea of 'participation', which is key to all prior concepts in their varying taxonomies.

In the field of Comparative Constitutional Law, research on participatory democracy is still slowly gathering momentum, and tends to focus on constitutive assemblies and participatory constitution-making, as constitutions are often viewed as the zenith, or culmination of popular sovereignty in their normative foundation of the self-governance of 'we, the people'.[70] The scholars Sujit Choudhry and Mark Tushnet recently organised a symposium on the

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[68] Landemore, 'Open Democracy: Reinventing Popular Rule for the Twenty-First Century', supra, note 18.

[69] Ibid.

[70] Tom Ginsburg, Justin Blount & Zachary Elkins, 'The Citizen as Founder: Public Participation in Constitutional Approval' (2008) 81 *Temple Law Review* 361.

phenomenon and describe a recent shift from constitutional drafting by elected delegates, legitimated by popular consent and subsequent ratification of their proposed constitution, to a 'third wave of democratization (…) with direct, popular participation in the constitution-making process'.[71] Landemore expands on this third participatory wave with an entry on the recent Icelandic experiment in a 'crowd-sourced constitution', in which she confirms that 'public participation in constitution-making is now both an established international norm and a widespread practice', due to a documented sense of legitimacy felt by the constitutive people of a polity derived from not just approving their constitution, but participating in its creation.[72] Landemore's use of the Icelandic example is due to it being a first modern instance of open democracy in constitution making, as the 'Constitutional Council engaged in an iterative process of putting twelve successive constitutional drafts online, each time soliciting a new round of comments on a text modified in light of the previous round', thus truly embodying the deliberation of the public sphere and tapping into popular collective wisdom, rather than treat the people as merely a consulting body.[73] Choudhry and Tushnet remark however that the increased popularity of participatory democracy does necessarily entail a choice 'between direct and representative democracy, but rather about the role of each in the constitution-making process, and the interrelationship between the two', and further that 'the extent to which direct public participation should be increased is an important and, in our view, as yet underexplored normative question'.[74] Thus it is important to note that constitutional research in participatory democracy does not seek to necessarily abolish elections or representative

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[71] Sujit Choudhry and Mark Tushnet, 'Participatory constitution- making: Introduction' *I•CON* (2020), Vol. 18 No. 1, 173–178.

[72] Hélène Landemore, 'When public participation matters: The 2010–2013 Icelandic constitutional process' *I•CON* (2020), Vol. 18 No. 1, 179–205.

[73] Ibid.

[74] Choudhry and Tushnet, supra, note 71.

democracies as such, but rather explore how our existing governments are already experimenting with participation, and what this could mean for the future.

The Organisation for Economic Co-operation and Development ('OECD') have recently published the first in-depth empirical and comparative study analysing participatory processes in governance around the world. [75] Their report overviews participatory democracy as a new trend which they call the 'Deliberative Wave', as hundreds of citizens' conventions have been organised within the past decade; precipitating a concerted renaissance of these paradigms in ways never before doctrinally implemented.[76] The OECD report tracks twelve models of these participatory assemblies, but countless examples and research have sprung from the excitement for the trend.[77] They define participatory democracy as 'referring to the direct involvement of citizens in political decision making, beyond choosing representatives through elections', and further as 'gaining ground with the activist movements of the 1960s that demanded greater participation in government decision making (e.g. civil rights, women's liberation movements)'.[78] The OECD also identify four drivers for this deliberative wave: economic drivers, as for example the 2020 Edeleman Trust Barometer showed that 83% of people in the twenty-eight countries surveyed fear job loss; cultural drivers, in which those 'left behind' feel under-represented in decision making and reveal an 'increased division between educated, high-earning, pro-migration "globalists" and less educated, poorer, anti-migration "nativists"'; political drivers, as only 45% of citizens trust their governments in OECD countries according to a 2018 Gallup poll, and people are increasingly dissatisfied with their inability to

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[75] OECD, supra, note 19.

[76] Ibid.

[77] Citizens' Assemblies & Sortition around the World' (*Sortition Foundation*) <https://www.sortitionfoundation.org/where> accessed 17 August 2021.

[78] OECD, supra, note 19 p12.

meaningfully participate in democracy aside from through election or protest; and finally technological drivers, where social media exacerbates 'public opinion fragmentation'.[79] In a world afflicted in the past years by a global pandemic, climate crisis, and a rise in right-wing authoritarian governments, it is not surprising that there is a renewed interest in making governance more accessible and participatory in a popular hope of having more say in their self-governance in approaching these issues, to replace the distrust in government that is born from crises such as these. Thus, the OECD report states that participatory democracy is becoming increasingly used 'in solving some of the most pressing policy challenges', and that there is 'nowadays a new wave underway towards greater experimentation in their purpose, design, combination with other forms of participation, and institutionalisation'. Its authors conclude that more comparative research is needed on the paradigm in practice, as participatory democracy has 'the potential to help address some of the key drivers of democratic malaise: giving voice and agency to a much wider range of citizens; rebuilding trust in government and leading to more legitimate and effective public decision making'.[80]

Of the twelve broad models of participatory democracy outlined, the OECD report for example introduces 'Citizens' Juries': 'focused processes to advise on a specific policy issue, typically at sub-national level', and the 'G1000' or 'Citizens' Council' models for regional use, and to 'address less complex community problems'.[81] However, in this thesis, we will be focussing on one particular model of participatory democracy, that of the 'Citizens' Assembly': 'considered as the most robust and elaborate model of representative deliberative processes (…) the first Citizens' Assembly was organised in response to the need to create a platform

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[79] Ibid. p25.

[80] Ibid.

[81] Ibid. p34.

where ordinary citizens, rather than political elites (who may have been influenced by party loyalties), could contribute to the design of a new electoral system for British Columbia', and 'have been mostly used to address questions to do with institutional setup and constitutional changes'.[82] The most well-known recent example was the Irish Citizens' Assembly (2016-2018), which tackled amongst others the politically divisive issues of same-sex marriage and abortion, and historically resulted in constitutional reform to legalise both, as well as provoked the government to declare a climate emergency.[83]

This thesis focusses on the CCC, also a citizens' assembly, which occurred between 2019 and 2020 in France, in response to the 'Yellow Vests' movement and the 'Grand National Debate'. The French researchers who followed the French Climate Convention and even helped to organise it, define citizens' assemblies as 'a specific form of deliberative mini-public, one involving a critical number of representative participants and lasting long enough for participants to produce readily implementable policies', and that they are 'meant to both feed into and complement representative democracy in an attempt to overcome stalemates on issues such as family policy and climate action (…) and submit policy proposals to government executives or elected authorities'.[84] We will thus see that the CCC is thus a unique instance of participatory democracy in France.

Those researchers conclude in their report on the CCC that 'citizens' assemblies offer unique opportunities for social scientists to collect research material to begin to answer questions' such

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[82] Ibid. p37.

[83] 'About the Citizens' Assembly' <https://www.citizensassembly.ie/en/about-the-citizens-assembly.html> accessed 17 August 2021.

[84] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

as 'what is the legitimacy of a mini-public in participating in decisions involving a broader public? How does the framing of deliberation shape its outcomes? Do such assemblies produce sound proposals that are more acceptable to the population? Do they put traditional policy-making at risk?'.[85] Indeed, a common critique of participatory democracy is that 'many of the assumptions of proponents of participation remain untested, and the precise relationships between participation and desirable outcomes of interest remain underspecified. (…) Scholars have been far better at generating hypotheses than testing them'.[86] Indeed, my thesis will seek to show that if nothing else, the value of research on the CCC serves to add to the 'limited data' on and 'conceptual refinement' of participatory democracy,[87] which has seldom been implemented in modern governance to the extent seen in early democracies, until the recent deliberative wave indicated a new trend and possible paradigm shift in future.

B) France's current constitutional framework and legislative procedure

Leading on from the last section which introduced participatory democracy, this section will now provide an overview of the other crucial context in which our case study of the CCC is situated: the polity of France and its current constitutional arrangements. France has been in its Fifth Republic since its most recent Constitution was passed in 1958, though it is nevertheless built on the foundations of the Republics which came before it, right back through to its republican inception following the French Revolution.[88] Indeed, the Preamble of the French Constitution reads: 'the French people solemnly proclaim their attachment to the Rights of Man

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[85] Ibid.

[86] Ginsburg, Blount & Elkins, supra, note 70.

[87] Ibid.

[88] 'France 1958 (Rev. 2008) Constitution - Constitute'
<https://www.constituteproject.org/constitution/France_2008?lang=en> accessed 18 August 202.

and the principles of national sovereignty as defined by the Declaration of 1789',[89] with the Preamble being determined by a judgment of the Constitutional Council to have equal normative power as the rest of the constitutional articles.[90] The Constitution then goes on to list what France's cultural identity is best known for: its language is French; its national emblem is the blue, white and red tricolour flag; the French national anthem is La Marseillaise; and its maxim is 'Liberty, Equality, Fraternity'; though perhaps surprisingly, there is no mention of cheese or wine in this section (perhaps a French tradition more than a constitutional norm).[91] France's First Republic, which we saw in the introduction was based on Abbé Sieyès' republican vision and the Enlightenment political trends of the time, established the polity as an archetypal liberal democracy, with three separate branches of judiciary, executive and legislature all sharing power conferred onto them by the sovereign people – and so after a turbulent history, France's current Fifth Republic reiterates and amplifies those principles, though not without its share of controversy as we will see, for the division of power is not necessarily proportionate between the branches, but rather skewed towards the executive. Further, France cannot be characterised as an outright participatory democracy akin to ancient Athens, though the next section will go on to show that traces of participation nevertheless can be found in France's constitutional history. Rather, France is most-often characterised as having a representative, semi-presidential republican constitution.[92]

We will see that France's executive takes the form of the President, with this office currently held by Emmanuel Macron since 2017. The codified legal system in France is also notably part

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[89] Ibid. Preamble.

[90] *Conseil Constitutionnelle no 2005-514 DC* (28 April 2005), Les Cahiers du Conseil constitutionnel, Cahier n° 19.

[91] France 1958 (Rev. 2008) Constitution supra, note 88, Art 2.

[92] Masterman & Schütze, supra, note 29, Chapter 4.

of the civil law tradition,[93] presided over by an inquisitorial judicial system, whose supreme courts are divided into the Council of State for administrative cases, the Constitutional Council for public law cases, and the Court of Cassation for appeals in all other areas of law. For the purposes of this thesis however, we will be interested in the legislative procedure more so than the judicial interpretation of those laws once promulgated, as we will see that the mandate of the dissertation's case study, the CCC, was to draft legislative proposals for the government to introduce into the French Parliament.

The French Parliament is bi-cameral, meaning it consists of two chambers which are meant to keep each other in check, and prevent a despotic majority from forming. Unlike in the UK and US however, the two French chambers are not adjacent to each other in a single building. The lower chamber called the National Assembly meets in the Bourbon Palace and consists of 577 deputies elected by direct suffrage in each constituent department of France, with a term of 5 years.[94] Famously, the National Assembly takes the form of a hemisphere in keeping with a tradition established by the first National Assembly of the French Revolution, in which left wing parties took their seats on the left of the hemisphere while right wing parties sat on its right side, therein originating the taxonomy of the political spectrum of 'left-right' in common use today.[95] The upper chamber of the French Parliament meets in the Luxembourg Palace, and consists of 348 senators elected by indirect suffrage by an electoral college of sorts, to a term of six years.[96] Rarely, the President makes a speech to both houses together in what is known as the Congress of the French Parliament, where both houses forming the Parliament in

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[93] Legrand, 'European Legal Systems Are Not Converging', supra, note 46.

[94] France 1958 (Rev. 2008) Constitution, supra, note 88, Title IV Art 24.

[95] Andrew Heywood, 'Political Ideologies: An Introduction' (Macmillan International Higher Education 6th ed. 2017) p14–17.

[96] Legrand, 'European Legal Systems Are Not Converging', supra, note 46.

its entirety meet in Versailles Palace, the historical court of the French Kings of old, and sometimes discuss constitutional reform.[97] None of these aristocratic palaces however are open to the public, and so it is not surprising that the Parliament is viewed by many in the French public as untrustworthy, especially with the Senate not being open to direct suffrage; we shall see that this feeling of illegitimacy culminated in the Yellow Vests protests over a 'lack of faith in the institutions of representative democracy'.[98]

The legislative procedure in the French Parliament is analogous to many other polities with representative democracies. Any Member of Parliament has the constitutional right to initiate legislation in either chamber.[99] There are many types of law, but this thesis will focus on *ordinary* and *organic* laws. An ordinary law is, as its name gives away, any simple statute passed by Parliament and normatively subordinate to constitutional laws.[100] Any such ordinary law must be examined and approved by both houses of Parliament on the same terms, but it usually begins in one house under the inspection of a smaller relevant Parliamentary commission, who may propose amendments.[101] To be adopted, the ordinary law must be voted by a majority in both houses, but any proposed amendment in either house during this process sends the law back and forth between the houses in what is known as the 'Parliamentary shuttle', before finally becoming a law when promulgated by the French President within fifteen days of its adoption by Parliament, in which time the law can be sent back for

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[97] France 1958 (Rev. 2008) Constitution, supra, note 88, Art 18.

[98] Rachel Donadio, 'France's Yellow Vests Are Rebels Without a Cause' (The Atlantic, 18 March 2019) <https://www.theatlantic.com/international/archive/2019/03/france-yellow-vest-protesters-want/585160/> accessed 18 August 2021.

[99] France 1958 (Rev. 2008) Constitution, supra, note 88, Art 39.

[100] Kelsen, supra, note 13.

[101] Jean Gicquel & Jean-Éric Gicquel, 'Droit Constitutionnel et Institutions Politiques' (LGDJ, 2018) 32nd edition p808, para 1489.

modification by the executive, or passed onto the judiciary's Constitutional Council for verification against the Constitution itself.[102] The law is considered in force when it is published in the Official Journal.[103]

Organic laws on the other hand concern any 'organ of the state', and are used to complement provisions of the Constitution.[104] Organic laws are legislated in the same fashion as ordinary laws, except for certain special procedures such as that Parliament must wait fifteen days before it can debate the bill, to allow its Members time to understand the proposed bill and consult with constituency they represent; and further, organic laws require an absolute majority in the National Assembly to be passed, as well as the mandatory approval by the Constitutional Council.[105]

i. A deconstructive analysis of France's 'invisible constitution'

In order to truly understand France's constitutional organisation, however, for the purposes of this thesis, one must look beyond the mere text of the Constitution, and onward to its history, and its functioning in practice. Boyron so warns that 'the Fifth republic created by the 1958 constitution is on paper quite different from the regime firmly established in practice'.[106] France's Constitution, like all constitutions, is a living constitution, shaped by its society's evolving culture, identity, traditions, and unwritten norms which cannot ever be fully captured

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[102] Ibid.

[103] 'Qu'est-ce que la procédure législative ?' (*Vie publique.fr*) <https://www.vie-publique.fr/procedure-legislative> accessed 18 August 2021.

[104] France 1958 (Rev. 2008) Constitution, supra, note 88, Art 46.

[105] Ibid.

[106] Boyron, supra, note 5, p50.

by a codified constitution. A metaphor of an 'invisible constitution' encapsulates this phenomenon, and all of the aforementioned which lie beyond the written constitutional document.[107]

To begin to uncover France's invisible constitution, I will employ French post-structuralist philosopher Jacques Derrida's idea of *deconstruction* in order to reveal an enduring colonialism, as well as a surprising supremacy of the executive within France's constitutional arrangements, which would not be apparent from a doctrinal reading of the text of the Constitution alone.[108] Usually applied in the field of philosophical hermeneutics to the interpretation of texts, Pierre Legrand co-opted this methodology into the study of comparative law and legal texts, which through a Derridean analysis are composed of their visible graphic dimensions (words on a paper), and equally important, though under-appreciated; invisible yet present 'traces': the historical, sociological, cultural, traditional, economical etc. circumstances that a text was written under, and from which it can never be detached.[109] For Derrida, this *textuality*, as he calls it, has a 'spectral' or ghost-like quality, in that the invisible traces will indefinitely haunt a given (law-as-)text; and further, traces have their own traces *ad infinitum*, to the extent that the entirety of existence preceding the creation of a given text can be considered to have deterministically, or causally, led to that text's creation, so that there is truly nothing that can be said to lie beyond a text.[110]

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[107] Rosalind Dixon and Adrienne Stone (eds), 'The Invisible Constitution in Comparative Perspective' (Cambridge University Press 2018).

[108] Jacques Derrida & Peggy Kamuf, 'A Derrida Reader: Between the Blinds' (Columbia University Press 1991).

[109] Pierre Legrand, 'Siting Foreign Law: How Derrida Can Help', (2011) 21 *Duke Journal of Comparative and International Law* 595.

[110] Ibid. p613 – in Derrida's own words 'il n'y a pas de hors-texte', which can be translated to 'there is no context'.

To deconstruct a text is then to recognise its textuality and seek to reveal its invisible traces, so Legrand grounds this abstract methodology with a deconstruction of the controversial French statute banning religious dress at school,[111] to explain that beyond its graphic words the statute is haunted by traces of 'the history of the relationship between churches and state as it has developed in France since the early fourteenth century; by nineteenth-century French colonial politics in North Africa; by a contemporary conception of "Republican citizenship" prohibiting the idea of minority rights; and by an epistemological distinction between the "public" and the "private" harking back to Roman law'.[112] Legrand goes further to show that these traces can themselves be infinitely traced to other traces: 'while the text of the statute can be traced to the French political unwillingness to recognize minority rights, that unwillingness can be traced to the political philosophy of Rousseau (…) which can itself be traced to Sparta, which he adopted as model'.[113] Derrida thus neologised this phenomenon as the *différance* of texts: that they are 'infinitely-deferred' by the traces which haunt them, and 'ever-different' depending on the interpreter's own subjective understanding of a text. In this 'double bind', Derrida warns that one can never presume to discover the 'true' meaning of a text, and so agrees Legrand for legal texts.[114] With this in mind, I concede that my arguments in this thesis will inevitably be restricted to my own interpretation of the French Constitution, and the CCC's impact on it. Nonetheless, I submit that a deconstructive analysis will allow me to argue that France's invisible constitution has an implicit influence on its current events, such as the CCC.

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[111] Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics.

[112] Legrand, 'Siting Foreign Law: How Derrida Can Help', supra, note 109.

[113] Ibid.

[114] Pierre Legrand, 'The Impossibility of "Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

As we have seen, the French 1958 Constitution is 'iterative', or 'palimpsestic',[115] to use Derridean terms,[116] of the fourteen constitutions and four republics which preceded it, not to mention the occasional empire and brief constitutional monarchy in France's tumultuous history. To uncover its invisible constitution is to deconstruct its traces, which Derrida romantically described as 'death strolling between the letters';[117] an appropriate metaphor here, due to the historical bloodshed which lead to the establishment of the Fifth Republic. We briefly outlined in the introduction the Revolutionary roots of representative democracy in France, and Boyron further explains that the subsequent period of the Terror, infamous for its bloody brutality and chaotically arbitrary killings under the dictatorship of Robespierre and his ironically named 'Committee of Public Safety', began when King Louis XVI was famously executed for treason by guillotine, launching France into 'political instability for the next 200 years'.[118] However, once Robespierre in turn was himself executed for treason, a new constitution in 1795 created a government known as the 'Directory', which 'turned away from the idea of popular democracy', and 'for the first time, the Parliament was divided into two chambers, the *Conseil des Cinq-Cents* (Council of the 500) and the *Conseil des Anciens* (Council of the Ancients)'.[119] This was the beginning of representative democracy as we know it in France.

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[115] Derived from the noun 'palimpsest': a 'writing material (such as a parchment or tablet) used one or more times after earlier writing has been erased' - 'Definition of Palimpsest' https://www.merriam-webster.com/dictionary/palimpsest accessed 25 August 2021.

[116] Derrida & Kamuf, supra, note 108.

[117] Legrand, 'Siting Foreign Law: How Derrida Can Help', supra, note 109.

[118] Boyron, supra, note 5, p9.

[119] Ibid.

The Directory came to an end when Napoleon Bonaparte seized power in a *coup d'état*, from whence the term originates,[120] at the dusk of the 18th century, and declared himself as Emperor of the French Empire in 1804. We will shortly see that the Fifth Republic has a notably strong executive, and the traces of this can thus be found in Napoleon's 'establishing of a caesarean tradition, which has appeared at regular intervals in France'; legally re-enforced by the Abbé Sieyès and architect of France's first Civil Code, Jean-Etienne-Marie Portalis, who drafted the constitutions of Napoleon's Consulate and subsequent Empire 'so as to establish the supremacy of the executive over the legislature'.[121] Napoleon's regime was very influential on the current French legal system in myriad ways, but for the purposes of this thesis, I will only further point out that the Council of State can also be traced back to this time, in which it assisted the executive by 'drafting legislative proposals and resolving administrative disputes'.[122] This trace haunting France's current constitution can itself be traced back to the Roman Republic's elected magistrate with emergency powers: the *dictator*,[123] which Julius Caesar infamously extended into the Roman Empire and so inspired Napoleon, who 'believed in a strong executive legitimised by popular support'.[124]

In this section, I am seeking to demonstrate that an understanding of the history of current French governance through traces left on its invisible constitution clarifies why our case study of the CCC is bound by the French traditions of supreme executive power, and as we will now see, colonialism. The final trace haunting the Fifth Republic I will therein uncover is its origin in the Algerian War of Independence. To understand this, we must travel back in time to the

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[120] The first known printed use of 'coup d'état' in English was in Canterbury's *Kentish Gazette* (October 16th, 1804) p2, in reference to the aftermath of Napoleon's own coup.

[121] Boyron, supra, note 5, p11.

[122] Ibid.

[123] Suetonius, 'The Twelve Caesars' (Penguin Books 2007, originally published 121 CE).

[124] Boyron, supra, note 121.

Second World War, when France fell to Nazi Germany's invasion and created a collaborating 'Vichy' government lead by the decorated First World War hero, Maréchal Pétain, who worked with the Nazis to round up French Jews and send them onto concentration camps, such as in the deplorable 'Vel' d'Hiv' Roundup'.[125] During this time, the General Charles De Gaulle was exiled in London, leading the French Resistance, and eventually taking over as wartime executive of the French government after helping to liberate France in 1945, until a new peacetime 4th Republic was established in 1946.[126] This new constitution is remembered largely for its instability, and 'impotent Parliament', which so often dissolved governments through votes of no confidence that over the course of twelve years, there were twenty-one total governments in the 4th Republic.[127] During this period, decolonisation had begun around the world, and Algeria was one of France's principal colonies, 'regarded administratively and territorially as part of France, and a large French population lived there', until it too began to seek independence, and the ensuing crisis marked the end of the 4th republic.[128]

De Gaulle, who had 'saved the republic' in a time of grave crisis from Nazi occupation, was seen as a hero and implored to come out of retirement to lead the nation out of the Algerian crisis, to the extent that at that time, French 'political power was divided between the constitutional power of the Government in Paris, the factual power of the committee of national security in Algiers, and the moral power of de Gaulle'.[129] De Gaulle would only return to politics under a new constitution, and so the Constitution of the Fifth Republic was endorsed by a majority of 82.6% of the French people (with 98.9% voter turnout) in a referendum in

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[125] Robert Marrus, 'Vichy France and the Jews' (Stanford University Press, 1995).

[126] Boyron, supra, note 5, p17.

[127] Ibid.

[128] Robert Aldrich, 'Vestiges of the Colonial Empire in France: Monuments, Museums and Colonial Memories' (Palgrave Macmillan 2005)

[129] Boyron, supra, note 5, p18.

1958 which 'allowed the expression of the sovereign, the French Nation, and was the most complete seal of legitimacy that could be given' to the new social contract.[130] As we will see, De Gaulle as first President of the Fifth Republic left a strong executive imprint on the Constitution as it functions today, and would go on to seek emergency powers to suppress the Algerian War of Independence, although he was eventually forced to concede to a ceasefire and grant this independence in the 1962 Evian Accords, nevertheless steeping the Fifth Republic in colonial beginnings.[131]

It is important to read the French Constitution in a postcolonial light to properly deconstruct its imperial traces, not only within the Fifth Republic's origins amidst the arduous and begrudging decolonization of Algeria, but also to understand France's continuing colonialism in those territories which have yet to gain their independence.[132] The first article of France's 1958 Constitution lists the characteristics of the French Fifth Republic, notably as a 'unitary' state (as opposed to devolved) due to the indivisibility of its national sovereignty.[133] However, this attempt to homogenise the French State in spite of its overseas territories, colonies in everything but name, entails that 'territorially (…) a federal organisation would be unconstitutional and that territorial entities can never be granted complete autonomy'.[134]

France has thirteen overseas territories in its Republic, categorised as 'DOM-TOM' (overseas department or territory), with an estimated total population of close to 2,785,000 people as of

[130] Ibid. p37.

[131] Michele Barbero, 'France Still Struggles With the Shadow of the "War Without a Name"' (*Foreign Policy*) <https://foreignpolicy.com/2021/02/13/france-algerian-war-legacy-politics-colonialism/> accessed 18 August 2021.

[132] Edward Said, 'Culture and Imperialism' (Random House Vintage Books 1993).

[133] France 1958 (Rev. 2008) Constitution, supra, note 88, Art 1.

[134] Boyron, supra, note 5, p33.

January 2021, accounting for about 4% of the total French population.[135] Just as the 'great compromise' of the American two houses of Congress, the French Parliament equally allotted the lower house of the National Assembly to represent the population, and the upper house of the Senate to represent the territories (and socio-economic actors), and while the people of France's overseas territories are considered French and given proportionate representation in Parliament, this representative democracy does not stretch to suffrage or choice of their local executive.[136] William Miles writes on the DOM-TOM, that 'the vast majority of their inhabitants are of West Indian, East Indian, African, and Oceanic ethnicity', and the political, ideological, and moral issues that DOM-TOM politics pose to post-colonial democratization' are often ignored.[137] Therein, the indivisibility of the French state means that these overseas territories cannot choose to become independent, at least not without war as Algeria was forced to go through with, and further, the population are governed by a minister chosen by the central French Government. Miles illustrates this situation by explaining that 'Guadeloupeans can thus cast ballots for Jacques Chirac or Lionel Jospin; but they cannot vote for the one person they wish to govern their island. Nor have they the collective right to popular self- determination - to choose between remaining part of France or creating a sovereign Guadeloupean state', only for Miles to denounce these constitutional arrangements as a 'sham and (…) alien power's democracy, built on a history of colonial rule'.[138]

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[135] 'Évolution de La Population Entre 2013 et 2018 et Estimation de La Population Au 1er Janvier 2021 | Insee' <https://www.insee.fr/fr/statistiques/2012730#tableau-TCRD_044_tab1_regions2016> accessed 19 August 2021.

[136] France 1958 (Rev. 2008) Constitution, supra, note 88, Art 73.

[137] William F S Miles, 'Democracy without Sovereignty: France's Post-Colonial Paradox' (2005) 11 *Brown J World Aff* 223.

[138] Ibid.

These traces of France's colonial history can be themselves traced back even before its first Republic, as can be seen with the example of Haiti. A reprehensible decree called the 'Black Code' ratified by King Louis XIV in 1685 set out the legality of slavery in the French colonial empire, which in Haiti, then called Saint-Domingue, created 'one of the largest and most brutally efficient slave colonies'.[139] In 1791, inspired by the French revolution and its championing of human rights, Haiti launched its own revolution against France, and won its independence from Napoleon in 1804.[140] However, while Haiti was still a colony in the French empire, its 'celebrated revolutionary general' Toussaint L'Ouverture organised a Constitutional Assembly, with representatives elected from all of then Saint-Domingue's departments, to draft a Constitution for Haiti in 1801. Parallels have been drawn between the French revolutionary Jacobins drafters of the first French Republic (of which the Abbé Sieyès was considered one until he joined the subsequent Girondin faction), and the 'Black Jacobins' of Haiti, who applied the Enlightenment values praised by the French Jacobins to a more honest and radical extent.[141] For example, the Haitian Constitution of 1801 was revolutionary in its own right, in that it abolished slavery,[142] a feat that the United States only comparatively accomplished after a long civil war sixty-four years later, with its Constitutional 13th Amendment.[143] In fact, Thomas Jefferson, who was the American President at the time of

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[139] Kelly Buchanan, 'Slavery in the French Colonies: Le Code Noir (the Black Code) of 1685 | In Custodia Legis: Law Librarians of Congress' (13 January 2011) <//blogs.loc.gov/law/2011/01/slavery-in-the-french-colonies/> accessed 19 August 2021.

[140] Richard Albert, 'The First Haitian Constitution', *Int'l J. Const. L. Blog* (Jan. 21, 2013) available at: http://www.iconnectblog.com/2013/01/the-first-haitian-constitution.

[141] 'Haitian Inspiration: On the Bicentenary of Haiti's Independence' (*libcom.org*) <http://libcom.org/library/haitian-inspiration-on-bicentenary-haiti's-independence> accessed 9 August 2021.

[142] 'Haitian Constitution of 1801 (English) - TLP' <http://thelouvertureproject.org/index.php?title=Haitian_Constitution_of_1801_(English)> accessed 19 August 2021; Art 3.

[143] 'The Constitution of the United States 1788: A Transcription' (National Archives, 4 November 2015) <https://www.archives.gov/founding-docs/constitution-transcript> accessed 19 August 2021, 13th Amendment.

Haiti's early constitutional abolition of slavery, and author of the 1776 Declaration of Independence's famous assertion that 'all men are created equal', refused to recognise Haiti as a new republic for fear of the potential impact it could inspire in the US slave states.[144] In France, the Jacobins were also hypocritically silent on the abolition of slavery, and colonialism in the French colonies.[145] While slavery had been abolished in France in 1794, it was re-instated by Napoleon in 1802, and would not be definitively abolished once more until 1848, making it so that the 'Black Code' remained in force for a disgraceful 163 years, all the way through the French Revolution and up to its 2nd Republic.[146]

Boyron forewarned that 'French Constitutional law has been tainted by these difficult beginnings', of bloody Revolution, Terror, Empire, and colonial hegemony. France's imperialist history, from slavery in Haiti to desperately seeking to suppress Algerian independence by creating a whole new Fifth Republic (which continues to deny autonomy to its overseas territories), evidences traces of a muted and oppressed subaltern in the shadow of the French Constitution, which we will see continues to haunt its contemporary endeavours in our case study of the CCC.[147] This deconstructive exercise, I submit, sets the foundation for an understanding of the invisible French Constitution's notably strong executive and centralised bureaucratic administration, in contrast with a relatively weak Parliament. I have sought to deconstruct the text of the French Constitution by emphasising its textuality, and seeking to reveal certain of its infinite invisible traces: two joint traditions of colonialism and strong leadership in the polity linked by their mutually Leviathan-esque hegemony, which have

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[144] 'The United States and the Haitian Revolution, 1791–1804' <https://history.state.gov/milestones/1784-1800/haitian-rev> accessed 19 August 2021.

[145] 'Haitian Inspiration: On the Bicentenary of Haiti's Independence', supra, note 141.

[146] Buchanan, supra, note 139.

[147] Gayatri Spivak, 'Can the Subaltern Speak?' in Gary Nelson & Larry Grossberg (eds.), 'Marxism and the Interpretation of Culture' (University of Illinois Press 1988) 271.

persisted throughout the history of France before, during and after its famous 1789 Revolution up to this day as we will see in the next section, despite the democratic symbol of 'liberty, equality and fraternity' that that Revolution has become. For the purpose of this thesis and our case study, this deconstructive exercise will be useful in supporting my argument that participatory democracy is not so easily introduced, and cannot flourish, in such presidential governance under a colonial constitution.

ii. The sovereignty of the French President

The beginning of this section briefly overviewed the legislative procedure in the French Parliament, but what the text of the Constitution does not necessarily reveal of its own volition is the extent to which the Fifth Republic has become dominated by a caesarean President. We discussed how the preceding 4th Republic had attempted a Parliamentary Sovereignty, a 'souveraineté de la loi', inspired by the UK's Westminster system, but its legacy was political instability, and so Boyron describes the Fifth Republic as the 'end of Parliamentary Sovereignty in France'.[148] The new Constitution requested by De Gaulle was written to ensure that the government could function even in coalition or minority Parliament, and so legislative power was split in the Fifth Republic between the legislative branch, who could make laws on taxes, criminal procedure and other standard subjects for statutes;[149] and the executive who was granted a wider jurisdiction and broad normative power to legislate everything else not delegated to Parliament,[150] reminiscent of the American constitutional provision that 'all (legislative) powers not delegated to (the federal government) are reserved to the states'.[151]

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[148] Boyron, supra, note 5, p48.

[149] France 1958 (Rev. 2008) Constitution, supra, note 88, Art 34.

[150] Ibid. Art 37.

[151] 'The Constitution of the United States 1788', supra, note 143, 10th Amendment.

This was done to 'facilitate the speed and efficiency of the business of government', and so the government has therein found it very easy to pass legislation through Parliament under these constitutional provisions, for any Parliamentary refusal is threatened by the ever-present possibility of the President simply by-passing the Parliament and resorting to its own autonomous legislative power.[152] Further, while we have seen that Members of Parliament have the right to initiate legislation, Article 39 of the Constitution also grants this power to the Prime Minister of France in the executive branch;[153] and in practice, the French Government introduces 90% of bills, or 'legislative projects' (akin the UK white papers), to the Parliament, while only an estimated 10% of those legislative projects will survive the legislative procedure to be enacted.[154] Beyond the legislative procedure, these laws once passed remain abstract, as is standard practice in the drafting of legislation, and require implementation by Government decrees in order to be contextualised and enforced.[155]

From the outset then, the text of the Fifth Republic's Constitution granted primacy to the executive, with the President and Government listed as the 2nd and 3rd titles respectively in the Constitution before Parliament is even mentioned.[156] The President under this section has the usual powers polities tend to grant them, such as being the head of the army and foreign affairs, as well as the power to dissolve the lower house of Parliament (in this case the National Assembly).[157] The President can appoint any military and civil service positions in their Government,[158] and they also benefit from what is known as a 'majority phenomenon' unique

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[152] L Favoreu, 'Les règlements autonomes n'existent pas' (1987) *Revue française de droit administratif* 871.

[153] Gicquel & Gicquel, supra, note 101.

[154] Boyron, supra, note 153.

[155] Ibid.

[156] France 1958 (Rev. 2008) Constitution, supra, note 88 .

[157] Ibid. Art 12.

[158] Ibid. Art 13.

to France, in the National Assembly. While this benefit is not strictly codified, it has arisen out of tradition, and in 2000, the Presidential term was amended to be reduced from seven to five years, precisely in order avoid a cohabitation of opposing parties in the National Assembly, which has only happened three times in the Fifth Republic's history, and which arose when the President has appointed an opposition leader as Prime Minister rather than resign in the rare occasions that they lost their Parliamentary majority.[159] This majority phenomenon means in practice that any legislative bill a President seeks to introduce to Parliament is almost guaranteed to pass.

De Gaulle in a sense reincarnated King Louis XIV's 'I am the State', with his belief in a strong executive which he said should 'embody the spirit of the nation', and in fact Boyron points out that 'executive' is almost a misnomer, as the President does more than just enforce the law, but in France actually has the normative power to initiate legislation and 'drive decision making'.[160] De Gaulle approached the Presidency from the perspective of a war-time leader, revered as a mythical hero by his people, and so by his sheer cultural influence on France was able to 'imprint his own interpretation on the Constitution' of the Fifth Republic even after he had passed.[161] For example, the Constitution was drafted in deference to the UK system, in which the Prime Minister would head the Government under the symbolic, but not normative, power of the President who would act only as Head of State (akin to the Queen of England), and this why the Prime Minister, and not the President, was granted the power to initiate legislation in conjunction with Members of Parliament.[162] However, when De Gaulle arrived into the office of President, he interpreted the Constitution to allow him to choose his own

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[159] Gicquel & Gicquel, supra, note 101.

[160] Boyron, supra, note 5, Chapter 3 'The Primacy of the Executive' p56.

[161] Boyron, supra, note 5, p52.

[162] France 1958 (Rev. 2008) Constitution, supra, note 88, Art 49-50.

Prime Minister, who would report to him, more alike the American dynamic of President and Vice-President.[163] To legitimate this strong Presidency, De Gaulle used 'referendums to gain popular legitimacy and to have a direct dialogue with the French people', and so organised four such referendums during his two terms in office, staking his authority on the outcome and promising to resign if they did not go in his favour, which ultimately is how he ended up leaving office after the French people rejected his proposal in a 1969 referendum, and he passed away shortly after, though not without leaving the normative legacy of an authoritarian French leader behind.[164] In this same vein of seeking legitimacy, one of these referendums aimed to reform the Constitution to allow for direct universal suffrage of the President, yet De Gaulle ironically did so by by-passing the ordinary constitutional amendment procedure which would have required Parliamentary approval, and rather used his own Presidential power to organise referendums, which did not explicitly allow for constitutional reform, and thus further increased the supremacy of the executive.[165]

Earlier, I demonstrated that the Fifth Republic was born amidst the French attempt to consolidate its colonial sovereignty over a rebelling Algeria seeking independence. De Gaulle used this 'crisis', as all executives historically have from Caesar to Hitler in the more extreme well-known cases, to seek emergency powers, and so his interpretation of a Constitution which he had requested meant that De Gaulle was able to create certain Presidential prerogatives and decision-making powers for himself that were not explicitly written in the constitutional text.[166] For instance, the Constitution provided for emergency powers in case of 'war, disaster, nuclear

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[163] Boyron, supra, note 166.

[164] Ibid.

[165] France 1958 (Rev. 2008) Constitution, supra, note 88, Art 11 on the Presidential referendum power, and Art 89 for constitutional amendment procedure.

[166] Boyron, supra, note 166, p59.

accident' etc. and so granted the executive (intended once again to be the Prime Minister) to act by whatever means 'in order to restore the continuity of the political system'.[167] However, in 1961 towards the end of the Algerian Independence War, four Algerian generals had attempted a coup, and De Gaulle activated these emergency powers in response, though while the coup had ended three days later, De Gaulle held onto the emergency powers for five months, and took twenty-six decisions based on them unrelated to Algeria, without allowing for Parliamentary debate; thus seizing a 'constitutional dictatorship' justified by colonial ends.[168] In addition to the Presidential stranglehold over the French Constitution, there is very little accountability or political responsibility for the President, and no real impeachment process provided for in the Fifth Republic, as the only accountability mechanisms are a parliamentary vote of no confidence in the Prime Minister, who was intended to be the de facto leader of the executive.[169]

I have sought to elucidate then that the President of France under the Fifth Republic has an unusually large monopoly over the legislative procedure and governance of the polity. Despite the Constitution being newly drafted in the 20th century, De Gaulle was able to resurrect the monarchic traces of certain executive prerogatives from the kings and emperors of France's past, comparable to those resilient prerogative which remain available to the UK's executive, and which President Macron nonetheless retains today.[170] Similar to the Unitary Executive Theory, which interprets the vague American Constitution as granting almost unlimited authority to the President, the French executive's power derives more from an interpretation

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[167] France 1958 (Rev. 2008) Constitution, supra, note 88, Art 16.

[168] Boyron, supra, note 166.

[169] France 1958 (Rev. 2008) Constitution, supra, note 88, Art 49.

[170] Maurice Sunkin & Sebastian Payne, 'The Royal Prerogative' in Maurice Sunkin & Sebastian Payne (eds.), 'The Nature of the Crown: A Legal and Political Analysis' (Clarendon Press 1999) pp. 77-110.

that has evolved to become an invisible, yet equally normative, constitution, rather than from the written text of Constitution itself.[171] The parallel continues in the role of the judiciary, which historically in the UK, US and France has slowly risen through centuries of increasingly adamant jurisprudence from superficial institution to the final assessor of the constitutionality of a statute, in spite of the legislative or executive sovereignty in either polity.[172] However, it is worth highlighting here that the Constitutional Council in France is criticised for its provision that any past President can for life serve as an *ad hoc* judge of the Council *ex officio* whenever they see fit by virtue of their supposed 'expertise of the Constitution', to the extent that a former President is able to show up un-announced and increase the amount of judges sitting on a given case, which may very well be questioning the constitutionality of a law or decree that that former President had issued in their term.[173] The controversy around former President Nicolas Sarkozy, who only retired from the Constitutional Council after the court was set to hear a case on Sarkozy's illegal use of campaign funds, shows that the President legally retains the discretion on whether to recuse themselves or not from the supreme constitutional court.[174] Nevertheless, while the Constitutional Council retains some authority against the President in France, and the French people are constitutionally deemed as sovereign, a Schmittian reading of the Fifth Republic determines that the 'sovereign is he who decides the exception', and I have so argued in this section that the executive remains the constitutional body able to unilaterally legislate, enforce laws, seize emergency powers, even act as constitutional judge

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[171] Cass R Sunstein & Adrian Vermeule, 'The Unitary Executive: Past, Present, Future (August 3, 2020). Forthcoming, *Supreme Court Review*, *Harvard Public Law* Working Paper No. 20-32, Available at SSRN: https://ssrn.com/abstract=3666130.

[172] Eric A. Posner & Adrian Vermeule, 'The Executive Unbound After the Madisonian Republic' (Oxford University Press 2011).

[173] France 1958 (Rev. 2008) Constitution, supra, note 88, Art 56.

[174] 'Sarkozy to Resign from Constitutional Council' (France 24, 4 July 2013) <https://www.france24.com/en/20130704-sarkozy-resign-immediately-france-constitutional-council-funding> accessed 19 August 2021.

once retired, and give a voice to the people only when it so chooses by referendum.[175] The French President decides the exception, and so is sovereign.

To conclude this section, I will now introduce two constitutional bodies which act as consultants, or advisers to the executive. The first is the Council of State, which we have seen originated under Napoleon's rule. In the Fifth Republic, the Council of State has evolved to hold two functions which are paradoxical to the principle of the separation of powers. The first is its role as Supreme Administrative Court for administrative issues, yet this is criticised as creating a conflict of interest with its second role, which is as the Government legal advisor, akin to the US Solicitor General.[176] The legislative procedure established at the beginning of this section is really informed by what happens behind the curtain, before a bill is introduced into Parliament. The real beginning of the procedure is when the President decides to initiate a law, either of their own volition or on the advice of some subservient actor in the executive, for example the Council of State can itself suggest legislative reform to the Government of its own initiative. The President then has a legislative project written up, and must subsequently consult the Council of State on this bill, who highlights any incompatibility between it and the Constitution or other law, checks the quality of the drafting as well as the merits justifying the need for a new law; and even re-drafts a bill accordingly if necessary.[177] The President however reserves the discretion to accept the Council of State's advice, or simply to keep its originally drafted legislative project.[178] It is therein constitutionally counterintuitive that the same institution of the Council of State who advises and even drafts on Government legislative projects, should then be the final court of appeal for any administrative legal issues deriving

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[175] Vinx supra, note 14.

[176] Boyron, supra, note 5, p78.

[177] France 1958 (Rev. 2008) Constitution, supra, note 88, Art 39.

[178] Ibid. Section 2.

from such laws, furthering my argument that the executive has a hand in every constitutional pocket.[179] It should not be surprising then that, once returned from the Council of State either amended or not, a legislative project must then be adopted by a Council of Ministers within the Government, which the President not only chairs, but also to which they appoint members.[180] Once the proposed bill has gone through the bureaucratic, yet superficial, requirements of approval by the Council of State and Council of Ministers, it can then be introduced into either chamber of Parliament, and then once approved by the legislature is returned to the President to promulgate the bill into law.

Finally, there exists a third, lesser-known assembly in the Constitution of the Fifth Republic which complements the two assemblies of Parliament but is situated under the authority of the executive. This constitutional body is the Economic, Social and Environmental Council (abbreviated as the CESE in French): a consultative body representing civil society with its members chosen by professional organisations,[181] which advises on all programming laws (laws which determine government programmes).[182] The CESE can be consulted by the Government or Parliament on any social, economic or environmental issue, and also receives citizens' petitions.[183] The most recent iteration of this constitutional assembly stems from the 'The Constitutional law on the Modernisation of the Institutions of the Fifth Republic' enacted in 2008, which notably integrated the body's jurisdiction over issues concerning the

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[179] Dominique Rousseau « Pour déconfiner la France politiquement, il faut reconnaître la compétence des citoyens »' Le Monde.fr (23 June 2020) <https://www.lemonde.fr/idees/article/2020/06/23/dominique-rousseau-pour-deconfiner-la-france-politiquement-il-faut-reconnaitrela-competence-des-citoyens_6043817_3232.html> accessed 5 August 2021.

[180] France 1958 (Rev. 2008) Constitution, supra, note 88, Art 9-13.

[181] Ibid. Art 71.

[182] Ibid. Art 34, Section 6.

[183] Ibid, Art 69, Section 2.

environment.[184] We will see that our case study of the CCC was organised under the auspices of the CESE, and that President Macron intended for the 'CCC to serve as an experiment for a reform of the CESE that would open the institution to the general public or to enable further mini-publics'.[185]

C) Was there ever participatory democracy in France?

Now that I have introduced both participatory democracy and France's constitutional arrangements, I will be able to situate the CCC as an instance of the former, which occurred in the latter. However, in this final section of the first chapter, I would like to first explore whether there have ever been any instances of participatory democracy in French governance before.

We have seen that French constitutionalism is distinctly presidential, centralised, and bureaucratic, and so it is to be expected that the polity does not have a rich history with participatory democracy, at least not to the extent which we have observed in ancient Athens or in India. The Fifth Republic does provide for some direct democracy through referendums, and in fact was inaugurated by referendum, as per the third article of its Constitution which states that this is the means for the people to exercise their national sovereignty, as well as through the election of their representatives.[186] Indeed, we have seen in the first section that governments will often employ referendums as temporary and consultative instances of direct democracy, although this can scarcely be qualified as participatory democracy, aside from

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[184] 'Historique' (Le Conseil économique social et environnemental) <https://www.lecese.fr/decouvrir-cese/historique> accessed 19 August 2021.

[185] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

[186] France 1958 (Rev. 2008) Constitution, supra, note 88 .

viewing referendums as an opportunity for the people to directly participate in the voting of a legislative proposal in the stead of their elected representatives. However, while the article preceding the third on referendums codifies a reiteration of American President Lincoln's exalted Gettysburg Address, that the French Republic shall be a 'government of the people, by the people and for the people'; referendums have historically been used in France primarily in order to render some sense of legitimacy to an incredibly strong and sovereign executive, who reserves the final discretion to issue such referendums, not the people.[187] This direct democracy is trivial in that sense, and while France's representative system may be sufficiently appropriate to be considered a modern liberal democracy, these constitutional provisions for popular participation are nowhere near the standard by which Landemore defines true open and participatory democracy, for which the people's deliberations in the public sphere should be, at least to some extent, binding.[188]

i. The bureaucratisation of participatory democracy in France

Nevertheless, participatory democracy has been present in some form or other at a local level in France, especially since the turn of the 21st century. Boyron writes of the 2004 Charter for the Environment as representative of a recent resurgence of interest in the 'rights and political participation of the sovereign French citizens', born perhaps from a March 2003 constitutional reform aimed at improving local democracy, which 'introduced decentralisation into the 1958 Constitution, granting all territorial government the power to organise local referendums'.[189] Occasionally, at a national level, participants have been randomly selected in a one-off

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[187] Ibid.

[188] Landemore, 'Open Democracy: Reinventing Popular Rule for the Twenty-First Century', supra, note 18

[189] Boyron, supra, note 5, p251.

consultation to some Government legislative project, such as for the 'Citizens' Jury on Vaccination' in 2016, which was organised to 'propose opinions and recommendations for the new action plan on vaccination regulation'.[190] In what seems strangely prescient for our current coronavirus pandemic, the French Health Ministry then sought to legitimate its proposals to make eight vaccinations mandatory for the French people (rather than merely recommended), by summoning a panel of experts as well as this Citizens' Jury to deliberate their legislative proposal; however there is little evidence as to the impact the participants had on the final bill, although it is certain the citizens had no normative power aside from having the opportunity to voice their opinion.[191] More often, this form of participation has been seen in local municipalities in the past decade or two, where 'the stakes are less political, and it's easier to innovate', for example in the south-eastern commune of Saillans where inhabitants are regularly randomly selected to elaborate local urban planning; or in the Alsatian town of Kingerhseim, where until 2019 the mayor Jo Spiegel organised participatory councils with 40% of its members being randomly selected to 'co-construct communal projects with experts and local elected ministers'.[192] Landemore analyses these instances of participation as due to an urge by the people to resist technocratic elitism and so to diversify their predominantly white, male, university-educated local government officials; an urge which leads to 'municipalism' and manifests for example in an increase in 'citizens'' or 'participatory' parties on local election rolls, whose candidates are randomly selected.[193]

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[190] 'OECD Database of Representative Deliberative Processes and Institutions (2020)' (*Airtable*) <https://airtable.com> accessed 5 August 2021.

[191] 'Vaccination : retour sur la concertation citoyenne' <https://www.santepubliquefrance.fr/liste-des-actualites/vaccination-retour-sur-la-concertation-citoyenne> accessed 20 August 2021.

[192] Claire Legros, 'Tirage au sort, la démocratie du citoyen ordinaire' *Le Monde.fr* (12 June 2020) <https://www.lemonde.fr/idees/article/2020/06/12/tirage-au-sort-la-democratie-du-citoyen-ordinaire_6042571_3232.html> accessed 5 August 2021.

[193] Ibid.

Participatory democracy, even where introduced with the best of intentions, will inevitably be affected by the environment in which it is imported, and so this local participatory turn has tended to result in a uniquely French phenomenon that a recent paper has named the 'bureaucratisation of democratic communalism', symptomatic of the importance the Fifth Republic places on public administration.[194] Gourgues, Mazeaud and Nonjon write that 'citizen participation (has recently become) a normal practice of local democracy' around the world, but that while there is much research on the abstract concept of participatory democracy, not enough emphasis is put on the 'empirical study of what administrations, and their civil servants, actually do when they implement what they term "citizen participation", "participatory democracy" or any other expression associated with a new participatory imperative'.[195] They explain that 'citizen participation is inseparable form a process of professionalisation, which has resulted, particularly in France, in the creation of administrative services dedicated to the management of these arrangements', a phenomenon with its origins in the 'recruitment by French local authorities of the first participation professionals towards the end of the 1980s, (…) mainly drawn from the ranks of campaigners with urban action groups', further consolidated by the constitutional initiatives for increased local democracy of 2003.[196] The authors' conclusion is therein that French participatory democracy, to the extent that it exists through local randomly selected consultations, has been bureaucratised to the detriment of the ideal implementation of the paradigm. This awakening to the realities of public administration is important for any advocates of participatory democracy to bear in mind, so as to tame any

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[194] Guillaume Gourgues, Alice Mazeaud and Magali Nonjon, 'From the Participatory Turn of Administrations to the Bureaucratisation of Participatory Democracy: Study Based on the French Case' [2021] *International Review of Administrative Sciences*.

[195] Ibid.

[196] Ibid.

grandiose utopian visions of the idea being immune to the flaws of our current governance. Further, while it is interesting to note that there has been some level of participation in French local government in the past twenty years, it is self-evident that listening to a portion of randomly selected people via consultative bodies is not as demanding of municipalities as granting them the normative power to effect their proposals. To this effect, participatory democracy has struggled to flourish at a local level for the same reasons as on a national scale: because of the 'presidential and almost monarchic features of (executive) municipal power'.[197]

ii. The Paris Commune of 1871

While today's France has bureaucratised the little participatory democracy present in its local governance, therein contributing to disappointment, disillusion and especially scepticism of the idea, this has not always been the case in the polity. The political philosophy of the 18th century Enlightenment culminated in the French Revolution, and we have seen that its thinkers such as Rousseau who had a direct influence on the Constitutions of the First Republic, tended to prefer a platonic ideal of some direct participatory democracy, which they commiserated as unattainable, to the more practical representative alternative. Alexis De Tocqueville was one such thinker, who wrote famous treatises on the development of the governance in America not long after its own constitutional Revolution, and eventually had a hand in drafting the Constitution for the 2nd French Republic of 1848.[198] Incidentally, De Tocqueville had travelled to Algeria, from which he wrote his 'Travail sur l'Algérie', criticising France's colonial habits an entire century before the 'crisis' which birthed the Fifth Republic.[199] In his writings, De

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[197] Olivier Thomas, 'Participatory democracy and urban governance in France: are they still utopian views?' *Conference Paper for the 43rd Congress of the European Regional Science Association* (2003 Finland).

[198] De Tocqueville, supra, note 26.

[199] Jon Elster, 'Alexis de Tocqueville: The First Social Scientist' (Cambridge University Press 2009).

Tocqueville was 'concerned about the tendency for a communally oriented society like France to become a non-mediated individualistic society', and so suggested that 'democracy could take two forms: an atomistic despotism where citizens tend to their own self-interests such that rulers are free to centralize their power, or a participatory democracy where public-spirited institutions can serve as a check on the centrifugal forces of democracy'.[200] It is clear then that Enlightenment views on governance were favourable towards participatory democracy amidst a period of Revolutions, and De Tocqueville pre-empted Habermas' public sphere in advocating for 'civic associations as a central mechanism for transforming the atomistic form of democracy into the participatory one'.[201]

The influence of De Tocqueville's and his fellow political philosophers' meliorative writings on participatory democracy can be traced to a radical iteration of the idea in French history completely opposite to its bureaucratic local expression today: participatory democracy found a home in the 'Paris Commune' of 1871. The 2nd French Republic had fallen to Napoleon III's Second French Empire, but two turbulent decades later this too was collapsing after defeat in the Franco-Prussian war. Amidst the transition to France's 3rd Republic in 1870, which would stay in place until the 1940 Nazi Occupation and subsequent Vichy Government, an insurrectionary group known as the 'Communards de Paris' revolted against the new republic, seeking more radical reform.[202] In 1871, they were able to occupy the capitol city of Paris for two complete months, forming what became known as the Paris Commune, where feminist, socialist and anarchist currents influenced debate between various factions, such as the

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[200] Robert Putnam, 'Democracies in flux: The evolution of social capital in contemporary society' (Oxford University Press 2004).

[201] Jennifer Lynn Oser, 'Between Atomistic and Participatory Democracy' (2010) 39 *Non-profit & Voluntary Sector* Q 429.

[202] Prosper-Olivier Lissagaray, 'History of the Paris Commune of 1871' (Verso 2012).

Jacobins who sought a second Revolution, the 'Proudhonists' who desired a national French federation of socialist communes, and the more militant socialists known as the 'Blanquists'.[203] The Paris Commune came to a passionate yet violent end in what was known as the 'bloody week', where the French National Guard stormed the city and killed twenty thousand insurrectionists, arresting and deporting countless others, before the 3rd Republic was officially re-instated. Nonetheless, the legacy of the Paris Commune would live on in its profound influence on two former residents of Paris who reverently watched the radical movement from afar: Karl Marx and Frederich Engels.

Marx had been living in Paris only a few decades before the 1871 Paris Commune, as a writer for the radical-left German newspaper 'Forward!', and in 1844, he had a fateful meeting with Engels at the Café de la Régence, establishing a lifelong friendship and partnership.[204] Marx was expelled from France a year later in 1845 by the French Government pursuant to a request from the Prussian King to shut down his newspaper, but Paris had nonetheless made a profound impression on the young radical, and Marx would go on to write one of his most well-known pamphlets 'The Civil War in France' in defence of the Paris Commune, which he described as 'the first example of the dictatorship of the proletariat', after his outrage at its suppression.[205] Johnstone writes that 'the (Paris) Commune provided Marx with the only opportunity in his lifetime to discuss in any detail the characteristics of the transition period that he believed lay between capitalism and a classless Communist society', and it 'represented for him the first experience of the working class holding political power, albeit extremely briefly and under exceptional circumstances in one city'; therefore 'the Paris Commune occupies a central

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[203] Gavin Bowd, 'The Last Communard: Adrien Lejeune, the Unexpected Life of a Revolutionary' (First edition, Verso 2016).

[204] Carver T, 'The Cambridge Companion to Marx' (Cambridge University Press 2006).

[205] Ibid.

position in Karl Marx's political thought'.[206] Marx himself described the Paris Commune as the 'initiation of the social revolution of the nineteenth century (…) which would make le tour du monde'.[207]

The Paris Commune was notable for its combined advocacy for a social federation and for participatory democracy, as Johnstone elaborates: 'it entailed a thorough going participatory democracy, combining direct democracy at the base with the election at regional and national levels of delegates operating under continuous control and briefing from below', which Marx saw as a fitting form of governance 'to prepare the way for a classless and stateless society'.[208] Marx's pamphlet on the Paris Commune was 'deeply democratic, anti-elitist and anti-bureaucratic (…) reflecting his horror of giant state bureaucracies alienating man politically', and so in it he was inspired by the Communards to advance the '"self-government of the producers" with "the haughteous masters of the people" replaced by "their always removable servants . . . continuously under public supervision"'.[209] Marx's 'communism' was therein inspired in part by the Paris Commune, and notably by its principles of participatory self-governance which would ultimately obviate the need for a State and replace it with some loose federation of local participatory communes. Of course, this can be contrasted with study of the bureaucratisation of local participatory democracy in France, which perhaps Marx would have criticised as flawed for being too reliant on the existing capitalist State structure and its centralised public administration. Another point to note is that where elections were proposed by the Paris Commune, they were to be 'under continuous control' by the Communards

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[206] Monty Johnstone, 'The Paris Commune and Marx's Conception of the Dictatorship of the Proletariat', *The Massachusetts Review* (1971) 12:3 p447-462.

[207] Karl Marx, 'The Civil War in France' (Martino Fine Books 2014).

[208] Johnstone, supra, note 206.

[209] Ibid.

themselves as emphasised by Johnstone, and only would have acted as a support to the preferred paradigm of direct participatory democracy, reminiscent somewhat of the ancient Athenian's occasional use for elections to supplement their participatory governance.[210] I would further submit that this model of citizen control could be viewed as some form of inverted 'panopticism', in which the people themselves collectively and coercively hold their participatory self-governance to account, rather than being observed by some traditional Orwellian State Panopticon situated above the people.[211]

We can see therefore that despite its more modern bureaucratisation of participatory democracy, France has a history of radical movements for participation, which Marx even saw as the means towards his communist end of surpassing the State. In fact, participatory democracy has a rich history not only with communism, but also with theories of anarchism. Kinna, who also takes the example of the Paris Commune, elaborates on a theory known as 'democratic communalism', which reconciles Marxist and anarchist political thought in that advocates for socialist decentralised federalism and autonomous self-government, very much in the vein of the Proudhonist Parisian Communards.[212] Kinna explains that Murray Bookchin specifically advocated for a confederal constitution model of this democratic communalism which would shift from an 'anaemic parliamentarism' to a 'libertarian municipalism', inspired by Athenian participatory democracy, but with a greater emphasis on egalitarianism.[213] Bookchin was anti-parliamentary and anti-representational; believing that an 'anarchist democracy calls for citizens to exercise power directly in their communities while prescribing

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[210] Ibid.

[211] Michel Foucault, 'Discipline and Punish: The Birth of the Prison' (Vintage Books 1979).

[212] Ruth Kinna, 'The Government of No One: The Theory and Practice of Anarchism' (Pelican, Penguin Books 2020).

[213] Ibid. p231.

the policy that assemblies can legitimately enact (…) and creates a vital democratic public sphere, empowering citizens to regulate municipal institutions'.[214] In a clear inspiration from Habermas, while still remaining closer to Landemore's appeal for more normative participation, Kinna shows that Bookchin viewed anarcho-communism as requiring 'directly democratic, open, participatory citizens' assemblies and, above all, the idea of public space', as well as 'consensus decision-making' which 'breaks with standard electoral models'.[215] Olin Wright corroborates this Marxist analysis in a more modern assessment of participatory democracy and sortition, in which he writes:

'a sortition legislature should prove more capable than an elected one at reforming capitalism, as well as potentially pursuing a trajectory that moves beyond capitalism. If this prediction is correct, however, this reduces the likelihood that a capitalist state would permit the creation of a sortition assembly'.[216]

France, like all polities, has experienced participatory democracy to some extent, especially in local experiments in random selection for public consultations. However, despite the watering down of the grand expectations of these participatory reforms by France's inevitable bureaucracy, there is a unique germ of a more radical participatory democracy in the polity's past which originated from the Paris Commune of 1871 and went on to inspire anarcho-communist democratic communalism as a potential means for superseding the need for bureaucratic government. However, France had not yet experienced participatory democracy

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[214] Ibid.

[215] Kinna, supra, note 212, p232.

[216] Erik Olin Wright, 'Postscript: The Anticapitalist Argument for Sortition', Chapter 2 in John Gastil & Erik Olin Wright, 'Legislature by Lot: Transformative Designs for Deliberative Governance' (Verso 2019).

to a higher degree until our case study of the CCC, which may have the potential to resurrect

the more radical iterations of the notion from France's past.

Chapter II – The organisational and legal aspects of the CCC

This second chapter will seek to lay out our case study in three respective sections: the events of the 'Yellow Vests' protests and the 'Grand National Debate' which led to the creation of the CCC; the hierarchy of the CCC's constitutional governance under the Fifth French Republic; and finally how the CCC organised the selection and deliberations of its participants.

A) The circumstances leading to the CCC

As I have now established the broader context leading into our case study, I will zoom in on the more recent events which preceded the CCC. 2019 was called the 'year of global protest', where around the world we all bore witness to frequent civil disobedience and demonstrations on a plethora of varied issues such as surrounding Brexit or the #MeToo movement.[217] That year also saw the *gilets jaunes*, or 'Yellow Vests' protests in France which preceded the CCC, and similar movements such as the '*Movimento cinque stelle* in Italy, (which) express a politics that is hard to pin down'.[218] However, many of these diverse protests can be broadly seen as collectively stemming from increasing socio-economic inequalities within and between given polities, and protestors' subsequent perceived loss in legitimacy and trust in their governments to help alleviate those inequalities,[219] much of which is only furthered by continuing neo-

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[217] Keith Johnson, '2019: A Year of Global Protest' (*Foreign Policy*) <https://foreignpolicy.com/2019/12/23/2019-a-year-of-global-protest/> accessed 20 August 2021.

[218] Ibid.

[219] Alexander Somek and Michael Wilkinson, Unpopular Sovereignty? (March 18, 2020*). LSE Legal Studies Working Paper* 3/2020, *Modern Law Review*, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=3556666>.

colonial 'economic exploitation and cultural subordination' through the law.[220] In an interesting causal development, we saw in the OECD report in the first section that these causes for protest have a tendency to revive the protestors' interests in participatory democracy as a more inclusive and trustworthy alternative to what they often see as their current corrupt and neoliberal electoral governance.[221] Such was the case in the 'Occupy Wall Street' movement of 2011 which began in New York City's Zuccotti Park, in its financial district, against socio-economic inequality and a perceived deficiency of 'real democracy' in the US, which has been described as 'having an overriding commitment to participatory democracy' as it exhibited a notable use of general assemblies and democratic working groups, where 'any protestor was able to have their say', much in the spirit of Athenian *isegoria* and *isonomia*.[222]

i.   The 'Yellow Vests' protests

In France, the Yellow Vests protests began in November 2018 and peaked in early 2019, though the movement continues even to this day as the 'longest protest movement in France since 1945',[223] as can be seen for example in a demonstration 'against President Macron's introduction of a COVID-19 health pass requirement for daily activities' on the very day of my

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[220] Antony Anghie, 'Governance, Globalization, Civilization and Commerce', in 'Imperialism, Sovereignty and the Making of International Law' (Cambridge University Press 2005), p254-272.

[221] 'A World in Revolt Against Neoliberalism & Corruption: Tariq Ali on the Roots of Today's Uprisings' (*Democracy Now!*) <https://www.democracynow.org/2019/12/2/tariq_ali_on_worldwide_protests_2019> accessed 20 August 2021.

[222] 'Leaderless, Consensus-Based Participatory Democracy and Its Discontents' [2011] *The Economist* https://www.economist.com/democracy-in-america/2011/10/19/leaderless-consensus-based-participatory-democracy-and-its-discontents accessed 7 August 2021.

[223] Tamara Ehs and Monika Mokre, 'Deliberation against Participation? Yellow Vests and Grand Débat: A Perspective from Deliberative Theory.' *Political Studies Review* (2021), Vol. 19(2) 186–192.

writing this (August 21st, 2021).[224] The Yellow Vests movement began only a year after the last presidential election in France, which saw Macron win against Marine Le Pen, who nevertheless commanded 34% of the vote for her 'Front National' far-right wing party.[225] Le Pen was France's answer to former American President Trump, and the more extreme English Brexiteers: she represented and even today still advocates for conservative nationalism and stokes prejudiced xenophobia.[226] Thus, the political climate at the time was alike many other polities in the world then, and largely still today: rife with increasing division and uncertainty. A specific trigger can nonetheless be identified for the Yellow Vests protests, and that is unrest caused by government actions aimed at fighting climate change.

In 2015, the United Nations Climate Change Conference, known as the COP21, was hosted by France and resulted in the international Paris Agreement on the reduction of climate change, which committed all signatories to 'containing the temperature rise to well below 2 degrees Celsius', and so to 'formulate development strategies with low greenhouse gas emissions' in order to achieve carbon neutrality, although of course the treaty contains no provisions for its enforcement.[227] The agreement was weakened when the US withdrew from the agreement under Trump's cabinet, and tangentially many of its signatories found it difficult to locally implement and enforce its measures to reduce carbon emissions. So was the case in France,

[224] 'Protesters in France Demonstrate against COVID Pass for Sixth Weekend' (*Reuters*, 21 August 2021) <https://www.reuters.com/world/europe/protesters-france-demonstrate-against-covid-pass-sixth-weekend-2021-08-21/> accessed 22 August 2021.

[225] 'Marine Le Pen Defeated but France's Far Right Is Far from Finished | Angelique Chrisafis' (*the Guardian*, 7 May 2017) <http://www.theguardian.com/world/2017/may/07/marine-le-pen-defeated-front-national-far-from-finished> accessed 22 August 2021.

[226] Megan Galbreath, 'An Analysis Of Donald Trump And Marine Le Pen' *Harvard International Review* (2017) vol. 38, no. 3, p7–9.

[227] 'The Paris Agreement 2015' <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> accessed 22 August 2021.

where Macron's 'carbon fuel tax rises and reduction of speed limits from 90 to 80 km/h in rural areas' juxtaposed in contrast with his plan for 'tax cuts benefiting the rich' was 'deemed unfair to the poor', and so increased the momentum in the growing Yellow Vests movement which 'made the headlines of French political life for nearly six months, with aftershocks still being felt'.[228]

The movement had begun with an 'online petition to lower fuel taxes signed by over 300,000 people by mid-October', and 'a Facebook event calling for a national blockade of roads, and the proposed use of Yellow Vests for the protests', as 'all French motorists are required by law to carry yellow roadside safety vests in their vehicles', from which point the practical origin of the Yellow Vests was abstracted into an enduring homogenous symbol of French civil unrest.[229] November 17th marked the first major Yellow Vests protest with hundreds of thousands of people in attendance, and subsequent protests have gathered every Saturday since to demonstrate across the country, although especially in Paris.[230] The protests became increasingly large, and 'included serious material destructions by the Yellow Vests as well as considerable violence of the police against the protestors'.[231] While many Yellow Vests were peaceful protestors, the magnitude and ambivalence of the movement fostered an environment in which rioters known as '*casseurs* - thugs from the ultraleft and ultraright' could incite violence and vandalism, notably 'defacing the Arc de Triomphe, looting shops, vandalising

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[228] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

[229] Pierre C. Boyer, Thomas Delemotte, Germain Gauthier, Vincent Rollet & Benoît Schmutz, 'The origins of the 'Yellow Vests' movement', *Revue économique* (2020), 71(1), p109-138.

[230] Ibid.

[231] Ehs & Mokre, supra, note 223.

buildings and attacking police'.[232] In response, the French police soon adopted a 'zero tolerance policy', and 'the riot 'CRS' police (began to use) tear gas and water cannons, and some of them were authorised to carry semi-automatic weapons', to the extent that fighting between the protests and the riot police led to much violence and several deaths, for example in traffic accidents caused by Yellow Vests roadblocks, or as in the tragic case of an '80-year-old woman in Marseille (who) died from injuries she received when a tear gas grenade hit her in the face as she closed her apartment windows to protests below'.[233]

The Yellow Vests movement notably had no leader or specific demands; rather it was a melting pot of civil frustration towards the French Government, all across the political spectrum and for myriad reasons, impossible to pin down. As we saw, the protests have been identified as originating due to the anger of the working class at growing inequality, and was specifically inflamed by an increase in fuel tax in following Macron's environmental policy.[234] However, 'by the 1st of December (2018), an anti-Macron protest was organized, marking the beginning of the change from anti-fuel tax to more anti-governmental protests',[235] and so issues such as an increase in minimum wage, as well as more radical calls to dissolve the National Assembly, for Macron to resign, or even for a 6th Republic with new institutions became a focus of the Yellow Vests protests.[236]

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[232] Jake Cigainero, 'Who Are France's Yellow Vest Protesters, And What Do They Want?' *NPR* (3 December 2018) <https://www.npr.org/2018/12/03/672862353/who-are-frances-yellow-vest-protesters-and-what-do-they-want> accessed 22 August 2021.

[233] Ibid.

[234] Cihan Aksan & Jon Bailes, 'One Question Gilets Jaunes', *State Of Nature* (June 6, 2019), https://stateofnatureblog.com/one-question-gilets-jaunes.

[235] Ehs & Mokre, supra, note 223.

[236] Jeremy Harding, 'Among the Gilets Jaunes' *London Review of Books* (2019) 41(6).

A Harris Interactive poll conducted in late 2018 showed that 72% of French people supported the Yellow Vests, despite riots, although 85% were against the violence.[237] It is clear then that due to a perceived substantial lack of legitimacy and agency in their self-governance, the French people felt they had no alternative means to participate in their democracy aside from through protest, which may have started with the fuel-tax, but revealed to be more fundamentally rooted in disenchantment with their political institutions and even the Constitution of the Fifth Republic. Orford analyses this sentiment of anger at illegitimate governance, essential to the Yellow Vests protests, as stemming in part from some malady of the Habermasian public sphere, in which citizen deliberation is not only inaccessible through ordinary State institutions, but further discouraged by a new era of 'post-truth', in which misinformation propagated across social media to online factions actively increases political division and conflict, and had a role to play in the development of the Yellow Vests movement.[238] However, while some may broadly and pejoratively define this movement as 'populist', Balibar suggests that the Yellow Vests protests could be construed as a form of 'counter-populism', due to the certain groups within the movement's striking eagerness for participatory democracy as a means of resolving their democratic frustration.[239] In this sense, the Yellow Vests movement is reminiscent of the Paris Commune of 1871, in that both surpassed insurrectionist violent protest from a variety of factions by putting forward democratic participatory practices, in order to better express their disillusionment and collectively seek reform.

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[237] Cigainero, supra, note 232.

[238] Anne Orford, 'International Law and the Populist Moment: A Comment on Martti Koskenniemi's Enchanted by the Tools? International Law and Enlightenment' (2020) 35 *Am U Int'l L Rev* 427.

[239] Ettienne Balibar, 'Gilets Jaunes: The Meaning of the Confrontation', *Open Democracy* (Dec. 20, 2018), https://www.opendemocracy.net/en/can-europe-make-it/gilets-jaunes-meaning-of-confrontation.

ii.   The 'Grand National Debate'

On January 14th of 2019, President Macron responded to the Yellow Vests protests by initiating *Le Grand Débat National*, or 'the Grand National Debate', in an open letter to the French people: a series of participatory regional conferences, 'to develop (a hierarchy of) propositions on the four key topics of the Debate: Ecological Transition, Tax System, Organization of State and Administration and Democracy and Citizenship'.[240] Throughout March 2019, over the duration of one and a half day conferences, 70-100 citizens would be randomly selected in each region of the country and the overseas territories, and invited to participate in small groups where they could 'exchange, deliberate and elaborate propositions' on the four themes.[241] At first, there was scepticism regarding the Government's sincerity, and by the end of the month after the Grand Debate's announcement, some Yellow Vests had countered with their own alternative *Vrai Débat*, or 'Real Debate', especially due to anger at a law passed by the French Parliament in early 2019 which substantially infringed on the freedom to demonstrate, as well as increased police violence against protestors.[242] However, another strand of the Yellow Vests protestors known as the *Gilets Citoyens*, or 'Citizens Vests', in co-operation with the *Démocratie Ouverte* ('Open Democracy') collective, the actress Marion Cottillard and drafter of the COP21 Paris Accords Laurence Tubiana, advocated strongly for randomly selected citizens' assemblies and to ameliorate the participatory methodologies of the Grand Debate and make them 'more efficient, open and deliberative, and so more democratic'.[243]

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[240] 'Le Grand Débat National' (*Le Grand Débat National*) <https://granddebat.fr/> accessed 5 August 2021.

[241] Ibid.

[242] Ehs & Mokre, supra, note 223.

[243] 'La Convention Citoyenne : une expérience démocratique inédite initiée par les Gilets Citoyens et Démocratie Ouverte' (*Démocratie Ouverte*, 4 October 2019) <https://www.democratieouverte.org/la-convention-citoyenne-une-experience-democratique-inedite-initiee-par-les-gilets-citoyens-et-democratie-ouverte/> accessed 10 August 2021.

The *Gilets Citoyens* subdivision of the Yellow Vests protestors were hopeful that the Grand Debate would appease protestors by making a substantial impact on their grievances and so increasing the legitimacy of the Government, and ostensibly President Macron seemed to share this wish. However, Landemore writes that before the Grand Debate began, 'Macron first toured France, meeting the mayors of each of France's 18 regions in a wave of events that looked more like a political campaign than deliberation';[244] the President exhibited great showmanship, such as by 'throwing himself into spectacular hours-long, live-streamed sessions with French mayors (…) [where] he impressed and reassured many that France has an able captain at its helm'.[245] In the earlier section 'B)ii.' of the First Chapter, we have seen the strength of the executive in the Fifth Republic, which is reflected in Macron's 'top-down leadership approach', and felt by the French people to the extent that the President was accused of 'using the Grand Debate as a campaign platform for the May 2019 EU elections'.[246]

The public perception of the experiment was further worsened when the Government itself decided to organise the debate instead of the Commission of National Public Debate (abbreviated as the CNDP in French), so that the 'government's stewardship of the whole process seemed to run counter to the idea of handing power back to the people (…) casting suspicion on the process's independence'.[247] The CNDP was established in its current iteration

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[244] Hélène Landemore, 'Analysis | Can Macron Quiet the "Yellow Vests" Protests with His "Great Debate"? Tune in Tomorrow.' *Washington Post* <https://www.washingtonpost.com/politics/2019/04/24/can-macron-quiet-yellow-vests-protests-with-his-great-debate-tune-tomorrow/> accessed 9 August 2021.

[245] Renaud Thillaye, 'Is Macron's Grand Débat a Democratic Dawn for France?' *Carnegie Europe* (April 2019) <https://carnegieeurope.eu/2019/04/26/is-macron-s-grand-d-bat-democratic-dawn-for-france-pub-79010> accessed 23 August 2021.

[246] Ibid.

[247] Ibid.

by the 2003 local democracy constitutional reform discussed in the previous section, as an independent administrative authority acting on behalf of the State, though not under the mandate of the executive. In following with the right in the 2004 Charter for the Environment to public participation and consultation on environmental matters, the CNDP has competence over large environmental projects 'sponsored by the government, by local authorities, by state-owned companies or by the private sector', and has the power to 'organise a public debate' and to provide a guarantor 'responsible for ensuring that the principles of participation are respected'.[248] However, the CNDP cannot legally regulate or sanction the outcomes of its recommendations, and so merely acts as a consultative body.[249] Nevertheless, Macron would have increased the legitimacy of the Grand Debate if it has been organised and guaranteed independently by the CNDP.

In any case, Landemore explains that 'deliberative kits' were issued by the Government to encourage the French people to organise their own meetings, with instructions on how to share their outcomes to a public website, and procedural recommendations, which resulted in ten thousand such meetings taking place all over the country.[250] Further, inspired by the *cahiers de doléances* of the 1789 French Revolution, French citizens were invited to write their suggestions or proposals in 'grievance books' either online or in their local city halls. Sixteen thousand such grievance books supplemented by two million online contributions were submitted, and so Landemore estimates that if 'roughly 500,000 of France's 67 million citizens actively contributed to the Great Debate, 0.74% of the population', then this would be 'a

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[248] 'CNDP, une entité indépendante' (*CNDP*) <https://www.debatpublic.fr/cndp-une-entite-independante-671> accessed 23 August 2021.

[249] Ibid.

[250] Landemore, 'Analysis | Can Macron Quiet the "Yellow Vests" Protests with His "Great Debate"? Tune in Tomorrow.', supra, note 244.

proportion that is in the range of other known crowdsourcing experiments', such as for the Iceland 2011 crowdsourced constitutional experiment referred to in an earlier section.[251] Landemore sees the Grand Debate as flawed in its naive attempt to foster a 'genuinely equal opportunity to participate' in the deliberation on public policy, as 'it is not possible to gather millions of citizens in a common space and give them equal opportunities to participate in deliberation'.[252] Instead, Landemore would argue for future such experiments to opt for the mini public which operates by lot, with its principle of random stratified sortition ensuring equal opportunity to participate, but with the focused citizens' assembly acting as a more efficient and productive means towards an end of meaningful deliberation.

The Grand Debate, while 'celebrated as a huge success by the government', was nevertheless 'denounced by the Yellow Vests as a smoke screen and a deception', and this critique was substantiated by the large lacuna of 'minority inclusion and representation, as well as possibilities for real deliberation'.[253] Ehs and Mokre therein conclude of the Grand Debate that it was not sufficiently inclusive, not least because the 'the geographical distribution of local meetings showed a strong correlation between the number of meetings and the votes for Macron in a region, thereby, obviously, excluding inhabitants of other regions', but also due to the participation in the Grand Debate being 'a composition quite different from the socio-economic composition of the population and diametrically opposed to the one of the Yellow Vests'.[254] Under-representation of women, minorities, younger generations and unemployed people with less income were methodological flaws of the Grand Debate and undermined its participatory promise. A further methodological critique surrounds the superficial and

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[251] Ibid.

[252] Landemore, 'Open Democracy and Digital Technologies' supra, note 60.

[253] Ehs & Mokre, supra, note 223.

[254] Ibid.

unstructured nature of the deliberation itself, and the ethos of the Grand Debate as generally favouring quantity over quality, as the regional meetings and conferences took an 'open mic forum' style, with 'conclusions rarely reached or documented'.[255] Landemore derided the lack of rigour in the Grand Debates attention to the organisation and fostering of its participants' dialoguing as 'deliberation in the wild'.[256] In her analysis, the National Debate was 'an effort to structure the informal public sphere in a way that might indeed render it more effective at setting the agenda for the public sphere', however the formal sphere of the executive still retained ultimate discretion as to what to do with the citizens' propositions, and in any case Landemore's more 'radical break' of open democracy would demand the higher standard of removing the 'clear-cut separation (…) between ordinary citizens on the one hand and professional politicians on the other'.[257]

In the end, Macron did little with the proposals which arose out of the French Grand National Debate, aside from defending France's existing representative democracy and offering a reform which would see that 'the share of proportional voting could go up to 20 percent', while 'bluntly rejecting the idea of introducing a citizen-led referendum, a core ask of the Yellow Vests in late 2018'.[258] However, the most significant outcome of the Grand Debate was that it offered France to experiment with participatory democracy on a scale never before seen in the polity, despite its negligent methodological oversights, which tempted Macron to 'take a step further' in 'closing the Grand National Debate', by 'making a public commitment to a create a dedicated citizens' assembly on climate – the CCC'.[259]

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[255] Thillaye, supra, note 245.

[256] Landemore, 'Open Democracy and Digital Technologies' supra, note 60.

[257] Ibid.

[258] Thillaye, supra, note 245.

[259] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

B) The governance of the CCC

President Macron's initiative for a Citizens' Convention on Climate was proposed by the 'Citizens Vests' collective offshoot of the Yellow Vests, and the CESE, during the Great National Debate, and inspired by 'an emerging trend in participatory and deliberative democracy', in which 'citizens' assemblies are increasingly organized across the world to address difficulties inherent in climate action', such as the 'Climate Assembly UK', and previous climate citizens' assemblies in Australia and Ireland.[260] We have now seen how the history of the idea of participatory democracy in France's constitutional arrangements culminated in the Grand National Debate being prescribed as democratic medicine to the Yellow Vests protests, symptomatic of a wider perceived legitimacy deficit in French governance. We have also seen how despite the radical Paris Commune of 1871, participatory democracy in France has tended to be local and bureaucratised since the 2003 constitutional reform, and while the Grand Debate was a national project, the CCC proposed by Macron was a further step towards Landemore's vision of participatory democracy: a centralised mini-public, employing random selection for its participants, with the potential for further institutionalisation. After the Grand Debate, Landemore noted that it had cost eleven million euros to fund 'without bringing significant gains in data or generalisable and reproducible knowledge' on participatory democracy in practice, and so pleaded that the same mistake not to be made by the CCC, which would cost a further five and a half million euros of public tax-payer money to pay for the participants' and organisers' fees as well as general logistics.[261]

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[260] Ibid.

[261] Hélène Landemore & Angèle Delevoye, 'Pour Une Approche Expérimentale Dans l'innovation Démocratique' (*Libération*) <https://www.liberation.fr/debats/2019/10/03/pour-une-approche-experimentale-dans-l-innovation-democratique_1754975/> accessed 9 August 2021.

She hoped for the CCC to 'allow for the precise advancement of our knowledge on the conditions which allow for deliberation between citizens to function', and echoed Macron's own words that the CCC could lay down the foundations for a 'Republic of permanent deliberation'.[262]

i.   The constitutional authority and mandate of the CCC

Our case study of the CCC was created under President Macron's authority, granted to him by the Constitution of the Fifth Republic, which states that the President 'shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State'.[263] Of course, in theory, this authority derives from the French people themselves as sovereign, who through their referendum approved the Constitution, and through their direct universal suffrage elected their President, from whence derives Macron's legitimacy. Therein, Macron formally initiated the CCC in July of 2019, only a few months after the Grand National Debate, by instructing his Prime Minister to invite participants to 'define structuring measures to manage, in a spirit of social justice, to cut France's greenhouse gas emissions by at least 40% by 2030 compared to 1990' in a letter addressed to the head of the CESE, 'to whom the organisation of the CCC was delegated'.[264] The CESE, as elaborated in the earlier section on France's constitutional arrangements, is a lesser known consultative constitutional assembly which 'can be consulted by the Government on any social, economic or environmental issue'.[265]

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[262] Ibid.

[263] France 1958 (Rev. 2008) Constitution, supra, note 88, Art 5.

[264] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

[265] France 1958 (Rev. 2008) Constitution, supra, note 88, Art 69, Section 2.

Girard highlights that there was no legal framework facilitating or regulating the implementation of citizens' assemblies in France before the CCC, as the Grand Debate fell under the scope of the executive's discretionary power to issue decrees, by which Macron encouraged the local participatory conferences, rather than a formal constitutional citizens' assembly for the polity.[266] The CCC was not organised by the CNDP, which had already declined to organise the Grand Debate, despite the CNDP being nonetheless intended by the 2003 local democracy constitutional reform to serve as an 'independent authority responsible for guaranteeing the right to participation (…) in the preparation of public decisions affecting the environment', a right guaranteed under Article 7 of the 2004 Charter of the Environment annexed to the Constitution of the Fifth Republic. In Girard's analysis, citizens' assemblies 'limit by design citizens' participation in order to create a representative sample', and so was averse to the CNDP, thus explaining why it did not undertake supervision of the CCC.[267] However, Landemore's view on open mini-publics is that they facilitate the right to equal participation through sortition, in a more practical compromise than the Grand Debate's own weak attempt to marshal the entire country into a devolved series of regional citizens' assemblies. Landemore's view is therefore not that citizens' assemblies limit participation in order to create a representative sample, but precisely the reverse: the CCC model randomly selects a stratified sample to increase the equal opportunity to participate for all.

In this light, I must disagree with Girard, and instead submit that the CCC could well have been organised under the competence of the CNDP, but that there are three possible reasons that

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[266] Charles Girard 'Lessons from the French Citizens' Climate Convention' (*Verfassungsblog* 28th July 2021) <https://verfassungsblog.de/lessons-from-the-french-citizens-climate-convention/> accessed 9 August 2021.

[267] Ibid.

perhaps it was not. The most optimistic reason that Macron chose to delegate the CCC's organisation to the CESE over the CNDP might be that he wanted the budding participatory experiment to be seen as more legitimate than the Grand Debate, and so the CESE could grant the authority of a constitutional institution that the CNDP would not provide; in any case Macron had already stated his intention to reform the CESE into a more permanent participatory body. A more neutral and pragmatic issue with the CNDP as host for the CCC is that its mandate is merely to organise debates for environmental projects; however, to organise an innovative experiment in a participatory assembly intended to go beyond debate and draft legislative proposals, as we will see, was perhaps beyond the capacity and scope of the CNDP. Finally, a third and more cynical reason that Macron may have delegated the CCC's planning to the CESE is because strictly it is not an independent constitutional body but falls under the authority and control of the executive, in which the President would have this potentially radical experiment at an arm's length in case he felt that he needed to assert his sovereignty. In this vein, no matter Macron's intentions for the CCC's delegated organisation, I agree with Girard's conclusion that the CCC's 'purpose and impact ultimately depended on the will of the President of the Republic', and can therefore be 'described as a form of "soft constitutional law": its creation was neither regulated nor prohibited by the French Constitution, and it did not have any the power to make legally binding decisions'.[268] We will discuss this further in the next section, but my argument will be that Macron organised the CCC under the CESE rather than use the standard legislative process in which he could have easily consulted the Council of State only, prior to initiating a legislative project on climate, because it allowed him to outwardly appear to be endorsing participatory democracy while substantially retaining his executive power.

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[268] Ibid.

The CCC's mandate as an 'unprecedented democratic experiment in France, which aims to give citizens a voice to accelerate the fight against climate change' was to 'be directly involved in the preparation of the law (…) to define a series of measures that would allow to achieve a reduction of at least 40% in greenhouse gas emissions by 2030 (compared to 1990) in a spirit of social justice', and so to 'bring together 150 people, all drawn by lot; to represent the diversity of French society' to help to collectively shape these normative proposals.[269] The CCC was granted the broad scope to 'deal with issues relating to energy efficiency, thermal modernization of housing, agriculture, mobility, ecological taxation and any other mechanism it deems useful', and after the citizen participant would 'learn about, debate and prepare draft laws on all issues relating to ways to combat climate change', their legislative proposals would be 'submitted directly either to a referendum, a vote in Parliament or implementation'.[270] Importantly for our purposes and the future of the CCC, President Macron was very vocal that he was committed, and in fact promised, to bring the CCC's proposals, whatever they may be, 'to the appropriate level', 'unfiltered'.[271]

The CCC was to be extended over the length of 'seven weekends over six months, and was designed to give citizens an opportunity to propose informed policy recommendations for addressing climate change'.[272] In discussion with the OECD, Landemore praised the decision to launch the CCC as 'a particularly important deliberative exercise, comparable to other

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[269] 'Home' (*Convention Citoyenne pour le Climat*) https://www.conventioncitoyennepourleclimat.fr/en/ accessed 5 August 2021.

[270] Ibid.

[271] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

[272] Hélène Landemore & Ieva Cesnulaityte, 'A Closer Look at the French Citizens' Convention on Climate' (Medium, 27 March 2020) https://medium.com/participo/a-closer-look-at-the-french-citizens-convention-on-climate-cb21f485d808 accessed 5 August 2021.

notable examples of deliberative processes, such as the 2010–2013 Icelandic constitutional process', as it would be the first citizens' assembly of its kind in France, a 'diverse, multicultural, and populous country, and as such demonstrates the adaptability and applicability of these initiatives to a larger set of contexts'.[273]

However, the complexity of the policy issue of equitably reducing green gas emissions the CCC was tasked with has no easy solutions, myriad nuanced factors, and affects the entire planet; not to mention that the Government's attempt to enforce the COP21 Paris Agreement had resulted in the Yellow Vests protests at the origin of the CCC to begin with. It has been noted that this important political mandate to 'pre-legislate' on such an intricate matter of public policy has rarely been trusted to a group of randomly selected citizens on a global scale, and certainly never before within France, so the question asked of the CCC and the answer expected of its participants demonstrates the uniqueness of the experiment from the outset.[274] It was therein uncertain at the outset how the CCC, under the guise of a new experiment in participatory democracy, would approach and accomplish such a gargantuan task, although the hope was that its proposals would be more legitimate and better received by the French people than a direct decree made by Macron himself. In the particular, the CCC's mandate was to propose legislative projects to fight climate change, but more broadly, its implicit mandate, I will submit, was to shift blame away from the President no matter its outcome, and to return some legitimacy to a sovereign executive confronted by the insurrection of his citizens.

ii.   The devolved internal governance of the CCC

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[273] Ibid.

[274] Thierry Pech & Clara Pisani-Ferry, 'Convention Citoyenne pour le Climat: Quelques enseignements pour l'avenir' (*Terra Nova* December 7th, 2020) p10.

Once the CCC had been created and given its constitutional mandate, some structure was needed to organise and run the Convention, and give effect to that mandate. As we have seen, the CESE had been charged with this decree by President Macron, and it further delegated the task by assembling a 'governance committee' for the CCC.[275] This governance committee was a 'complex governance structure set up in order to assure neutrality and impartiality to the process', and was made up of 'several technical and legal experts as well as experts in participatory and deliberative democracy'; the committee's mission was to accompany the CCC, from its inception to its end.[276] The governance committee's fifteen members were comprised of 'representatives from various organisation (think tanks, unions, businesses), government officials and scholars with expertise in climate science, public policy and democratic practices',[277] such as the President of the CESE's Environment Department Anne-Marie Ducroux as well as Mathilde Imer, who is Co-Chair of the 'Open Democracy' organisation and an initiator of the 'Citizens Vests' collective which we discussed earlier – a branch of the Yellow Vests movement favouring participatory democracy.[278] The governance committee was further meant to ensure the independence and impartiality of the CCC, and to assist in this, two citizens from the CCC's participants were randomly selected 'between each session', to join the committee and 'set the agenda and the rules for deliberations'.[279] One of the two Co-Presidents of the governance committee and therein of the CCC itself was Laurence

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[275] 'Home' (*Convention Citoyenne pour le Climat*) supra, note 269.

[276] Martina Trettel, 'Democratic Innovations against Climate Change: The French Citizens' Convention on Climate' (*EURAC Research*) <https://www.eurac.edu/en/blogs/eureka/democratic-innovations-against-climate-change-the-french-citizens-convention-on-c> accessed 17 August 2021.

[277] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

[278] 'The Governance Committee' (*Convention Citoyenne pour le Climat)* https://www.conventioncitoyennepourleclimat.fr/en/comite-gourvernance/ accessed 5 August 2021.

[279] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

Tubiana, one of the drafters of the COP21 Paris Accords and President of the European Climate Foundation, who we saw earlier also helped to initiate the 'Citizens Vests' collective and the subsequent Grand National Debate which arose from the Yellow Vests protests.[280] Despite being a member of the governance committee, Tubiana testified directly to the citizens as an expert on the COP21 Paris Agreement in the opening session of the CCC.[281]

Thierry Pech, the General Director of the 'Terra Nova' organisation, served as the second Co-President of the CCC and its governance committee, and wrote retrospectively that the 'governance of the CCC was its second singularity' (the first in his eyes being the uniqueness of its mandate, explained in the last section), due to its large size compared to other citizens' assemblies which were presided over by a single person such as in Ireland, whose chair happened to be the President of its Supreme Court.[282] Pech reflects that the governance committee was distinctly French in its emphasis on rules and bureaucracy compared to other more spontaneously-run citizens' assemblies around the world, but that this allowed for the methodology and procedure of the CCC to be carefully pre-meditated and continuously re-evaluated.[283] The governance committee was collegial and so required a consensus on any decision it took; the citizen participants of the CCC were able to refer to the governance committee anytime via a private internet platform.[284]

The governance committee, much like the French Government, had four other committees at its disposal to help to run the CCC, although it remained at the top of the normative hierarchy

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[280] 'The Governance Committee' (*Convention Citoyenne pour le Climat*), supra, note 278.

[281] Thierry Pech & Clara Pisani-Ferry, supra, note 274.

[282] Ibid, p12.

[283] Ibid.

[284] Ibid.

of the five total committees. The CCC's second committee was the 'college of guarantors', comprised of three members named respectively by the Presidents of France's constitutional assemblies of the CESE, the Senate and the National Assembly who were charged with 'guaranteeing the independence of the Convention and its good working conditions', and similar to the CESE itself or the Council of State, would act as a consultative body to its superior, the governance committee.[285] The third committee was a 'consortium' to 'facilitate and lead debates (…) assigned by public procurement',[286] and these facilitators would simply put into effect the decisions of the governance committee by working directly with the citizen participants, and 'ensure that the work sessions functioned well'.[287]

The final two organising committees add a third point of originality to the CCC, beyond its uniquely political mandate and governance. In a term coined by the French Prime Minister Édouard Phillippe, who has since been replaced by Jean Castex as the pandemic took over France's political focus, the CCC's 'perhaps most distinctive feature (…) as compared to other citizens' assemblies, is its approach based on "co-construction" between citizens and experts'.[288] The mandate of the CCC required experts to assist the randomly selected citizen participants, who could not be expected to walk into the Convention already ably to 'pre-legislate' proposals on climate change, and so this innovative model of co-construction was procedurally 'built into the design' of the CCC's governance and operation.[289] Therein, the

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[285] 'The Guarantors' (*Convention Citoyenne pour le Climat*)
<https://www.conventioncitoyennepourleclimat.fr/en/les-garants/> accessed 5 August 2021.

[286] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

[287] Thierry Pech & Clara Pisani-Ferry, supra, note 274.

[288] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

[289] Ibid.

fourth committee to organise the CCC was a 'group of 19 experts' known as the 'support committee', who 'provided technical background on greenhouse has emission reduction technologies and policies', and provided advice on the citizens' proposals.[290] Finally, the fifth committee were a 'group of six legal experts' to 'help the citizens formulate their proposals in "juridically sound" terms, a prerequisite for them being submitted "unfiltered"'.[291] The co-construction model is interesting in that it provided not only scientific expertise, but also legal drafting advice to the citizen participants. According to the authors of the paper I cite extensively in this thesis, who themselves observed and participated in the CCC, 'such a committee is unparalleled in other citizens' assemblies'.[292]

These five committees then comprised the internal governance of the CCC, with the governance committee at the helm. As we saw, this internal mini-government was not entirely separate from the deliberations of the CCC's citizen participants, as one of the Co-Presidents provided expert testimony, and further, the researchers reflecting on the Convention noted that 'organisers were not required to observe strict neutrality (…) we witnessed a co-chair, a guarantor, and members of the governance committee give their own opinions the citizens on some measures'.[293] The internal governance of the CCC, led by the governance committee, can almost be seen as a devolved constitutional entity, with its own internal devolution of powers doled out to varying committees with different roles, and of course the citizens themselves. Perhaps necessary to the efficient structuring of the deliberation, the CCC's participants were not as autonomous as one might have imagined for an experiment in participatory democracy. Instead, they were selected and made to deliberate based on a methodology decided by the

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[290] Ibid.

[291] Ibid.

[292] Ibid.

[293] Ibid.

governance committee before they arrived, and then were simply led through the pre-planned sessions, as we will see, in order to fulfil their mandate. However, I would highlight that it is quite ironic that the fifteen members of the governance committee, effectively comprising a discretionary and unilateral executive council which equally held 'legislative' and 'judicial' functions in the 'legal system' of the CCC, are in a way reminiscent of the French Directory (equally an executive committee) which preceded Napoleon's coup; and that this long-threaded trace of France's favourable disposition for strong executives embodied even today by Macron found its way into the heart of a participatory Citizens' Convention, intended to (temporarily) return normative power to the people.

However, we cannot forget that the devolution of power does not begin at the governance committee of the CCC. Throughout the CCC's sessions, 'plenary meetings were organised with the highest executives of the French State', including the Minister of Ecological and Inclusive Transition, the Prime Minister, and President Macron himself.[294] It is fair to say that the executive branch of the Fifth Republic kept a close watch on the goings on of the Convention they had organised, and that the power of the governance committee can be traced back to all the way through to Macron. As we saw in the last section, the President organised the CCC under his executive constitutional discretion, who then delegated its creation to his Prime Minister, the Minister of Ecological Transition and importantly, the CESE. The CESE has its own President elected by its 233 members,[295] and devolved internal Cabinet comprised of delegates from various unions and federations to represent 'employees, businesses, the interests of social and territorial cohesion, and environmental protection'.[296] The President of the CESE

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[294] 'Home' (*Convention Citoyenne pour le Climat*) supra, note 269.

[295] Loi organique n° 2010-704 du 28 juin 2010 relative au Conseil économique, social et environnemental.

[296] Décret n° 2021-309 du 24 mars 2021 fixant la répartition et les conditions de désignation des membres du Conseil économique, social et environnemental.

created the governance committee for the CCC, which presides over the four other committees, all of the above culminating in an executive monopoly over the 150 participating citizens at the very bottom of the ladder of power, which as we will see in the final chapter indicates their place on Arnstein's 'ladder of citizen participation': a taxonomy developed to indicate on a spectrum how normative a participatory body is.[297] Under the ultimate authority of the President, the CCC displays a remarkable hierarchy of devolved executive power right through to its supposedly participatory Citizens' Convention, so that the CCC's own unwritten constitution was designed to keep it in check, and to a large extent, dependent on the many executive bodies of the State above it.

C) The organisational aspects of the CCC

After having explained the context leading up to the CCC, as well as its constitutional mandate and governance, this section will discuss how the CCC organised its participants' selection and subsequent deliberation.

i. Participant selection

The selection of participants in the CCC was delegated by its governance committee to the Harris Interactive Institute, in order to draw lots for the mandated 150 citizens, who were to be randomly selected while also remaining 'representative of the diversity of French society'.[298] The CCC's Co-President Pech writes that the origin of the number of citizens arose from a

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[297] Sherry Arnstein, 'A Ladder of Citizen Participation' *Journal of the American Institute of Planners* 35, no. 4 (1969): 216–24.

[298] 'How Are They Selected?' (*Convention Citoyenne pour le Climat*) https://www.conventioncitoyennepourleclimat.fr/en/how-are-the-participants-selected/ accessed 5 August 2021.

compromise between a perceived minimum of participants to be sufficiently representative, and a maximum for efficient deliberation.[299] In following with the method chosen by the guarantors of the Grand National Debate, it was decided by the governance committee that the random selection should be based off of telephone numbers rather than the electoral lists used to select juries, as the latter excludes an estimated 9,5 million French citizens who are not registered on the electoral lists either intentionally or by mistake.[300] From August to September 2019, the Harris Institute therein 'randomly generated a database of 300,000 telephone numbers, of which 85% were mobile phone numbers', which the agency would call 'during a 6–9pm time slot', ultimately contacting 96,500 phone numbers, of which 11.400 people responded.[301]

In order to ensure the representativity of the randomly selected citizens, a stratified quota sampling was put in place which helped to narrow down and refuse potential participants, thus combining the randomised lots with the following socio-demographic criteria of 'age, gender, education level, geographic origin, settlement (urban versus rural) and type of job'.[302] For these categories, the governance committee tried to balance the proportion of citizens chosen for the CCC with the proportions of the given criteria in the general population, in order to re-create a 'miniature France', and equally 'took into account the distribution of the French population over the metropolitan regions and overseas territories'.[303] Following these stratified criteria

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[299] Thierry Pech & Clara Pisani-Ferry, supra, note 274.

[300] Ibid.

[301] Adrien Fabre, Bénédicte Apouey, Thomas Douenne, Jean-Michel Fourniau, Louis-Gaëtan Giraudet, et al., 'Who Are the Citizens of the French Convention for Climate?' (*HAL* June 18th 2021) halshs-03265053 https://halshs.archives-ouvertes.fr/halshs-03265053.

[302] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

[303] Thierry Pech & Clara Pisani-Ferry, supra, note 274.

then, 700 people of the 11,400 contacted were deemed ineligible to participate, while 6,600 declined, with 4,100 remaining who expressed their interest in participating. Of that latter number, 191 citizens were selected by the same methods, with 41 who would act as substitutes to the mandated 150 for the Convention.[304] It was found that that the 'main obstacle to overcome' in the acceptance rate of the invitation to participate 'was the availability of people', and that further, acceptance was 'particularly low among people with lower degrees'.[305] Incentivisation, such as a daily allowance of '€86.04 per day (€1,462 total for the entire process)'; the   compensation of €10.03 per hour for lost professional income; and the subsidisation of travel, accommodation, meals and childcare (at €18 per hour) were all subsequently used to combat trepidation by those citizens invited, and encourage acceptance to participate.[306] The governance and guarantor committees of the CCC supervised the control of the entire process of selection described, 'to guarantee the impartiality of the draw'.[307]

Co-President of the CCC, Pech, noted that a sample of 150 citizens is far too small to be statistically representative of France's population of 67 million; however, the aim was instead to justify a 'descriptive legitimacy' of the sortition used to re-create the diverse socio-economic population of France with a mini-public.[308] Another reason for the use of the mixed method of random selection and stratified quotas was to compensate for the unstable factor of the participation being voluntary, as the 'representativity was vulnerable to the disproportionate

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[304] Adrien Fabre, Bénédicte Apouey, Thomas Douenne, Jean-Michel Fourniau, Louis-Gaëtan Giraudet, et al., 'Who Are the Citizens of the French Convention for Climate?', supra, note 301.

[305] Ibid.

[306] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

[307] Ibid.

[308] Thierry Pech & Clara Pisani-Ferry, supra, note 274.

inclination of certain people to participate' and the resulting 'selection bias'.[309] Within the final 150 citizens selected, there was an over-representation of the Ile-de-France region and an under-representation of those citizens without the secondary-school degree of the Baccalaureate, which reflected 'the difficulty in recruiting certain categories of people who may not feel concerned with the CCC or who live far from Paris'.[310] However, the views of the 150 citizens selected seemed to match those of the general population according to an external study comparing questionnaires filled out by respondents from both pools, though the CCC's sample seemed to demonstrate a positive bias in concern for climate change, perhaps because the citizens volunteered to participate in the CCC, and were thus more likely to have an inclination towards fighting climate change and therefore an affinity with the mandate of the CCC.[311]

In a webinar entitled 'Revitalizing Democracy: Sortition, Citizen Power, and Spaces of Freedom' hosted by the Hannah Arendt Centre at Bard College, Landemore stated her preference for a social-epistemological approach to citizen selection, in which the 'diversity of background, experience, and expertise in a deliberative chamber by lot means it makes better decisions than a chamber of political elites'.[312] While this methodology was indeed largely mirrored by the CCC's governance committee, Landemore commented that there nonetheless 'ought to be farmers in the room in an assembly addressing an agricultural issue', and so a true

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[309] Adrien Fabre, Bénédicte Apouey, Thomas Douenne, Jean-Michel Fourniau, Louis-Gaëtan Giraudet, et al., 'Who Are the Citizens of the French Convention for Climate?', supra, note 301.

[310] Ibid.

[311] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

[312] Oliver Milne, 'Deliberative Assemblies Are Finding Their Feet – but Also Facing Political Barriers' (Equality by lot, 17 October 2020) <https://equalitybylot.com/2020/10/17/deliberative-assemblies-are-finding-their-feet-but-also-facing-political-barriers/> accessed 26 August 2021.

stratified selection of participants should have adapted to the topic of the Convention by adding in a criteria of 'pre-existing opinions on climate change', as was done for the UK Climate Assembly.[313] A further critique of the selection method for the CCC was that it notably excluded the characteristic of ethnicity which was also included in the UK Climat Assembly's own methodology by contrast.[314]

The CCC's organisers chose to use stratified selection methods, yet the factors they decided to focus on in ensuring the representativeness of the French population could have been more intersectional, to a view of emphasising a voice, and a quota of participants in the Convention, for those who are 'discriminated against due to overlapping and interdependent systems of disadvantage created by the interconnected nature of social categorisations such as race, class, and gender'.[315] This approach was indeed taken in Ireland's remarkable participatory Convention on the Constitution 2012-2014, for which 'particular institutional design' was used 'in an effort to achieve gender inclusion (…) reflected in terms of the recruitment of members and invited speakers as well as the procedures, processes and rules'.[316] That Convention momentously resulted in Ireland being 'the first country in the world to support the introduction of marriage equality by popular vote', and also represented the 'first time a recommendation (marriage equality) from a deliberative mini-public resulted in Constitutional change'.[317] Harris, Farrell, Suiter and Brennan, all researchers involved in the Irish Convention throughout

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[313] Ibid.

[314] Adrien Fabre, Bénédicte Apouey, Thomas Douenne, Jean-Michel Fourniau, Louis-Gaëtan Giraudet, et al., 'Who Are the Citizens of the French Convention for Climate?', supra, note 301.

[315] Patricia Hill Collins, 'Intersectionality as Critical Social Theory' (Duke University Press 2019).

[316] Clodagh Harris, David M Farrell, Jane Suiter, and Mary Brennan. "Women's Voices in a Deliberative Assembly: An Analysis of Gender Rates of Participation in Ireland's Convention on the Constitution 2012–2014." *The British Journal of Politics and International Relations* 23, no. 1 (February 2021): 175–93.

[317] Ibid.

its running, note that 'the "gender gap" in deliberation should be of concern' as 'the exclusion of a significant section of society risks weakening the democratic legitimacy' of the participatory process; the gender gap 'undermines the diversity required to meet the epistemic and ethical functions of deliberative democracy'; and reduces the 'levels of respect and overall satisfaction with the process'.[318] Those researchers conclude then that 'men's and women's attitudes differ on key policy issues and that they are impacted differentially by policy decisions'; therein, the focus on reducing the gender gap in citizens' conventions 'enhances women's interest in politics and political participation', and has the potential to help 'redress the "confidence gap" in gendered perceptions of expertise and ability to engage in politics, possibly encouraging more women to run for political office'.[319]

When compared to the UK Climate Assembly and the Irish Constitutional Conventions then, the CCC does not seem to have put as much priority into ensuring that under-represented minorities in the French population were included in their stratified selection of participants. This is especially troubling in considering the continuing colonial character of the French Constitution we discussed above, with overseas territories already being at a disadvantage in their constitutional displacement from the French 'home territory'. This intersectional approach could have been extended further and included a critical disability rights focus for example, such as in following Mike Oliver's 'social model of disability'.[320] This would have ensured that the quota sampling factors also safeguarded inclusion to the participatory assembly for the disabled; an often-overlooked minority treated as impaired, whereas Oliver would advocate the more equitable approach of instead critiquing society, not the individual,

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[318] Ibid.

[319] Ibid.

[320] Mike Oliver, 'The social model of disability: thirty years on' *Disability & Society* (2013) 28:7, 1024-1026.

as dysfunctional where it is inaccessible.[321] While the CCC was still more representative than the Grand National Debate, it could have gone further to be more inclusive in its citizen selection.

Earlier we saw that the Yellow Vests protests could be seen as a form of 'counter-populism' in the emerging faction of the 'Citizens vests' advocacy for participatory democracy, which resulted in the Grand Debate and eventually in the CCC.[322] In a similar vein, Nancy Fraser combined Spivak's 'subaltern' and Felski's notion of 'counter-publics' to coin the 'subaltern counter-public': 'discursive arenas that develop in parallel to the official public spheres (…) as a response to the exclusions of the dominant publics'; 'where members of subordinated social groups invent and circulate counter discourses to formulate oppositional interpretations of their identities, interests, and needs'.[323] These subaltern counter-publics 'better promote the ideal of participatory parity', and build off of an analysis of the Habermasian 'bourgeois public spheres' as 'constituted by significant exclusions (…) referring mostly to women and to the non-proprietary male working class', which formed 'competing counter-publics', so that 'the public sphere was always composed of conflictual and antagonistic publics'.[324] Subaltern counter-publics can be seen in our case study within the public sphere of the Yellow Vests protests, which created the counter-public of the 'Citizens vests', or in the 'Real Debate' which was agonistically organised in response to the Grand National Debate. Subaltern counter-publics 'challenge the supposed inclusiveness of the informal deliberations' and are 'bound to emerge as it is impossible to insulate discursive arenas from societal inequalities'; so subaltern counter-

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[321] Ibid.

[322] Balibar, supra note 239.

[323] Ioannis Kampourakis, 'Nancy Fraser: Subaltern Counterpublics' (*Critical Legal Thinking*, 6 November 2016) <https://criticallegalthinking.com/2016/11/06/nancy-fraser-subaltern-counterpublics/> accessed 9 August 2021.

[324] Ibid.

publics are 'connected with the potential for hypothetically egalitarian societies to combine social equality, cultural diversity, and participatory democracy'.[325] Applying this theory to the CCC, we see that the governance committee in charge of the selection of citizen participants should have included more positive efforts towards inclusive stratified selection, and could have conceivably embraced a subaltern counter-public in what could have hypothetically even been a bi-cameral Citizens' Convention: one chamber with its participants randomly selected purely by lot, and the other chamber composed of specifically stratified citizens according to more rigidly intersectional factors.

In any case, it is clear that there is a link between the methodology for the selection of participants for a Citizens' Assembly, and public perception and trust of the findings of that assembly. The researchers involved in the CCC noted that 'in France, where mistrust in the governments is well established, it is particularly important to assess the public's perceptions of the CCC', and so they found that 'the population's judgment was rather pessimistic, as 49% (of those who have at least heard of the CCC) believe that the CCC was not representative (…) and among them, two thirds think that the CCC over-represents environmentalist or pro-government people'.[326] While compared to the French Parliament, 'which is neither demographically nor politically' representative, the CCC was much more diverse, yet subject to a 'widespread ignorance and mistrust' that caused a significant portion of the French people to perceive the CCC as 'a masquerade set up by the government to close the Yellow Vests' episode with a reconciliatory communication, pretending that the demands for more democracy and climate action had been met', which, as we will see, was only worsened when Macron

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[325] Ibid.

[326] Adrien Fabre, Bénédicte Apouey, Thomas Douenne, Jean-Michel Fourniau, Louis-Gaëtan Giraudet, et al., 'Who Are the Citizens of the French Convention for Climate?', supra, note 301.

broke his promise to effect the CCC's proposals 'unfiltered'.[327] The CCC's participant selection can therefore serve as a lesson for future experiments in participatory democracy in France and beyond: that there is a greater need for inclusion, diversity, transparency and education about this selection process, if it is ever to build any trust in the people it is meant to represent.

   ii.   <u>Participant deliberation</u>

Once selected, the participants of the CCC were made to deliberate, so as to meet their constitutional mandate, and 'define structuring measures to manage, in a spirit of social justice, to cut France's greenhouse gas emissions by at least 40% by 2030'. The political theory underpinning these deliberations is once again tied to the Habermasian public sphere. Habermas saw deliberation a 'normative category which underlines a procedural conception of democratic legitimacy', 'based on normative exigencies of enlargement of individual participation on deliberation and decision processes and on development of a democratic political culture'.[328] Therein, deliberation is essential to participatory democracy, as it creates the conditions for which citizens can make an informed normative decision, legitimated by dialogues within the diverse forum.

Landemore calls this phenomenon 'collective wisdom', which she uses as an epistemic argument she entitles 'democratic reason'.[329] Democracy in any direct form has always been criticised as fundamentally flawed in its utilitarianism, and therefore dangerous without some

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[327] Ibid.

[328] Lubenow, supra, note 57.

[329] Hélène Landemore, 'Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many' (Princeton University Press, 2017).

check on the power of an otherwise Tocquevillian tyrannous majority. However, Landemore subverts this pejorative connotation of majoritarianism with socio-legal epistemological research which argues that with sufficient diversity, a well-organised deliberative forum may yield more valuable and better-informed results due to the collective wisdom accrued by a larger group. The larger the group, the more cognitive diversity which ensues due to 'many connected brains seamlessly and almost simultaneously exchanging information and arguments in ways that are costless and frictionless, resulting in enlightened individuals and enhanced collective intelligence'.[330] As we have seen in the last section, 'random selection and stratified sampling bring in typically excluded categories like youth, the disadvantaged, women, or others minorities into public policy and decision making', and so participatory democracy is more likely to create a forum for diverse collective wisdom than its representative counterpart.[331] James Fishkin notably echoed this idea of democratic reason in his advocacy for 'deliberative polling' as an alternative to say a simple referendum, in which polls are taken before and after a group have been made to deliberate in a participatory forum to see how their opinions may have evolved on controversial issues.[332]

To explain how the deliberations of the CCC worked to stimulate the collective wisdom of its participants, I will rely on the accounts of the researchers who helped to organise and followed the CCC closely.[333] After the organisation phase which began in July 2019 following the Grand Debate, the CCC itself was comprised of seven sessions, each lasting a long weekend of two-and-a-half-days, spread over from December 2019 to the concluding session on June 19th,

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[330] Ibid.

[331] OECD, supra, note 19.

[332] James S. Fishkin, 'Democracy When the People Are Thinking: Revitalizing Our Politics Through Public Deliberation' (Oxford University Press 2020).

[333] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

2020, with the final sessions held either remotely or with social distancing due to the outbreak of the COVID-19 pandemic. The governance committee divided the sessions into plenary gatherings for the issues of financing and constitutional reform, whereas the citizens were randomly allotted to five thematic groups for smaller gatherings, relevant to France's greenhouse gas emissions: 'housing (*Se loger*), labor and production (*Travailler et produire*), transport (*Se déplacer*), food (*Se nourrir*), and consumption (*Consommer*)'.[334]

The sessions' organisation evolved as the CCC went on, but the first one introduced the participants to their mandate, timetable, and an overview of the science behind climate change from the experts on the Support Committee. Each session from then on would begin with the citizens launching their discussion with a revision of their proposals from the previous session, which had been re-drafted in the interim by the legal experts committee to the formal style of French statutory legislation. Afterwards, the facilitator committee would help the citizens to divide the remaining time in their sessions into either plenary or thematic group-work, in which the participants may have interrogated experts, deliberated in table gatherings, or began to expand on policy proposals. The sense is that the 150 citizens were provided with a loose atmosphere to somewhat improvise their work sessions according to how their debates and draft proposals were going, but that any of the five committees was ready to help should the citizens require anything to stimulate their deliberation. The researchers observed however that 'debates were sometimes confused, with citizens interrupting one another without intervention from the facilitators', as the latter 'seemed to avoid conflict as much as possible and instead sought to create and maintain consensus among citizens', and so they would recommend further 'training in deliberative methods' for the participants in future such Conventions, as

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[334] Ibid.

well as space to be left for the constructive expression of dissent.[335] In between sessions, the citizens were given broad discretion, even encouraged, to communicate in their hotel or online with each other, with the media, and with their local communities as well as various stakeholders.

To culminate the sessions, the citizens presented their thematic group work in a plenary assembly in Session 6, during which they debated all together, suggested amendments, and finalised their proposals, with any proposal supported by at least twenty participants put to a vote. In the final seventh session, a final simple majority vote was carried out on each proposal and funding measure. The researchers highlighted here that one flaw in this procedure was that the citizens had only had the chance to help draft through their deliberations a fifth of the proposals from their own thematic working group, and had to vote on the remaining proposals without having had as much participation in their creation. Nevertheless, the participants approved of almost every proposal they had come up with in the CCC, and so ended up with a total of 149 'pre-legislated' proposals on reducing greenhouse gas emissions. In a surprise to the researches, the citizens 'voted against submitting their policy proposals to referendum', as 'the general public would not be as "enlightened" in their voting as the members of the Convention had become, and/or a referendum would more likely become a vote for or against the President of the Republic'.[336]

Landemore notes of the CCC's deliberations that a sense of solidarity over their mandate helped the citizens to evolve throughout the sessions, to either speak up if usually shy or quiet down if one had a tendency to be loudly critical, and to grow close despite their diverse

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[335] Ibid.

[336] Ibid.

backgrounds.[337] Pech observed that 'the experience showed that citizens are capable of tackling complex mandate issues', but also cautioned that 'procedural precautions should be put in place to prevent the influence of experts on citizens'.[338] Indeed, the model of co-construction was very important to the CCC's deliberations. The researchers discerned that 'a glimpse at the 460-page report and the profusion of technical and legal details it contains is telling of the degree to which experts effectively intervened', and that 'their overall contribution can be said to have been significant'.[339] However, the co-constructive model left much room for improvement, as 'invited experts seldom had the opportunity to challenge each other's evidence (…) with very little debate among them', and 'the criteria that motivated who would be invited as an expert were never made explicit by the organizers'.[340] Therein, further 'counter-expertise' could be useful for future Conventions, where an increase in the plurality of available experts would increase their own cognitive wisdom, and go on to produce more impartial advice. Landemore nonetheless argues that 'citizen participants were quite adept at pushing back against expert arrogance, aided by facilitators tasked with amplifying their private objections to the experts' conduct'; for example 'although many of the experts pressed and pressed for a carbon tax, the Convention rejected the idea', perhaps because the controversial carbon tax had contributed to the Yellow Vests protests in the first place.[341] Landemore adds that 'while a few of the Convention's recommendations bear clear signs of

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[337] Ieva Cesnulaityte, 'A Closer Look at the French Citizens' Convention on Climate' (*Medium*, 27 March 2020) https://medium.com/participo/a-closer-look-at-the-french-citizens-convention-on-climate-cb21f485d808 accessed 5 August 2021, with Hélène Landemore.

[338] Thierry Pech & Clara Pisani-Ferry supra, note 274.

[339] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

[340] Ibid.

[341] Milne, supra, note 312.

certain experts' influence – notably the recommendation that 'ecocide' be criminalised – the majority do not'.[342]

This concludes the second chapter, which provided an overview the case study of the CCC, from the context that led to its creation, to its constitutional mandate, internal governance, and organisation in terms of the selection and deliberation of its participants. The next chapter will go on to assess the impact of the CCC, in light of its outcomes.

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[342] Ibid.

Part 2: The CCC's actual and potential impact on French governance

Chapter III – French Legislative Procedure, Interrupted?

As the CCC and its broader context have now been introduced, I will be able to answer my research question: what was the actual and potential impact of the CCC on French governance?

This chapter will first analyse the outcomes of the CCC, which saw the President break his promise to pass its proposals with 'no filter', yet Macron only recently promulgated a 'Climate and Resilience' Law nonetheless derived from the CCC. In the second section, I will argue that the CCC in any case is not a true instance of participatory democracy, and that its actual normative impact was limited by its consultive constitutional nature. Finally, the third section will pinpoint the CCC's potential impact in the beginnings of the institutionalisation of participatory democracy in France, and then conclude by reflecting on what real participatory democracy in France would require.

A) The outcomes of the CCC

    i.   The President's broken promise to legislate the proposals 'unfiltered'

In opposition to other citizens' assemblies on climate, such as that of the UK, the CCC from its very inception was 'cast a political chamber', due to Macron's promise of legislating the CCC's proposals with 'no filter' via a referendum, parliamentary vote, or executive decree.[343] Thus, we saw in the last chapter that certain provisions were put in place to ensure that the CCC's policies could be directly enacted into law, such as the creation of a committee of legal

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[343] Claire Mellier & Rich Wilson, 'Getting Climate Citizens' Assemblies Right' (*Carnegie Europe*) <https://carnegieeurope.eu/2020/11/05/getting-climate-citizens-assemblies-right-pub-83133> accessed 26 August 2021.

experts to help draft the citizen participants' proposals in the fashion of French legal statutes. So, at the culmination of the CCC, itself preceded by the momentous Grand National Debate and Yellow Vests protests; the citizen participants of the CCC, the people of France and the media waited with baited breath to see what would become of the Convention's 149 proposals to help France reduce carbon emissions. However, in a public address after the CCC's final session, President Macron greeted France with a moment of national anti-climax: he would accept 146 of the 149 proposals, but use thee *jokers* ('trump cards') to reject what many saw as three of the most significant measures: 'changing the Preamble of the Constitution, (…) imposing a 4% tax on corporate dividends to finance climate action, (…) reducing speed limits on motorways'.[344] The radical constitutional reform to the Preamble 'would have inscribed (…) that constitutional "right, freedoms and principles" "should not compromise the preservation of the environment, the common heritage of mankind"'.[345]

Despite the majority of the proposals being accepted by the President, what was surprising was that Macron had blatantly broken a promise he had repeated on many occasions to pass whatever the CCC proposed into law, without intervention. In fact, the CCC's presentation of their proposals to him was meant to be merely a formality, rather than an obstacle of legal scrutiny. Macron justified his decision by countering that the proposed constitutional amendment would threaten constitutional liberties by placing the 'protection of nature' above all other rights, and that further the tax on corporations would 'be too damaging for France's competitiveness', while he referred to the proposal to reduce motorway speed limits as 'a mistake similar to one he had made in the past, implicitly referring to one of the measures that

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[344] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

[345] Ibid.

sparked the Gilets Jaunes movement'.[346] In following the French legislative procedure outlined in the first chapter, Macron would then go on to create a legislative proposal, known as the 'Climate and Resilience Bill',[347] out of the 146 remaining measures proposed by the CCC, in consultation with the Council of Ministers and the Council of State, to then be introduced into Parliament.

Commentators initially viewed this outcome of 146 proposals being accepted by Macron as a 'political success', but were weary of whether these measures would be 'effectively implemented', as there was no guarantee of any being passed 'unfiltered', now that the President had shown himself already willing to break his promise.[348] While the measures were indicated by surveys to have 'broad support (…) among the general population', Macron gave no clear commitment to organising a referendum to gauge this popular approval.[349] A large omission thus in the CCC's mandate, whether intentional or not, was the ambivalence surrounding the promise to bring the proposals into law 'unfiltered'; and what the normative value of that promise was. Indeed, the executive as we have seen retains a large discretionary prerogative, and thus no ultimate constitutional obligation to fulfil a promise, as the '"unfiltered" commitment lacked a common understanding'; a promise which could be construed either as Macron undertaking a political duty to implement the CCC's proposals without alteration, or on the other hand as conferring a legal duty onto the citizen participants to 'produce readily implementable bills'.[350] In any case, the damage was done, and Macron's

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[346] Ibid.

[347] 'Projet de loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets', supra, note 20.

[348] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

[349] Ibid.

[350] Ibid.

bid at gaining legitimacy through the CCC was obstructed by his own counter-intuitive failure to deliver on his promise. Subsequently, the citizen participants of the CCC evaluated in a final meeting how the executive had considered their proposals, and concluded that the Government's planned implementation of their measures would not allow France to meet its goal of reducing carbon emissions before 2030 by at least 40%; they scored Macron at an average of two and a half out of ten points on a scale measuring their trust in his passing the proposals to a degree which would meet the CCC's initial constitutional mandate.[351]

In the following summer of 2021, the CCC's proposals were further abandoned, and Macron's promise proportionately crippled. Despite not accepting to amend the Preamble of the Constitution, Macron was nonetheless receptive to the CCC's proposed amendment to the First Article of the Constitution to incorporate that 'the Republic guarantees the preservation of biodiversity, the environment and the fight against climate change'.[352] However, the resulting bill was met with 'inertia' in the Senate, whose senators objected to the word 'guarantee' as creating 'an obligation of results, as well as means', and so on July 6th the Government formally abandoned the bill and planned climate referendum for the constitutional reform.[353] As we will see in the next section, the Climate and Resilience Law intended to translate the remainder of the CCC's proposals was 'criticized for having discarded or watered down many of the Convention's proposals', many of which were 'abandoned or only partially implemented'.[354]

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[351] 'La Convention citoyenne pour le climat attribue de mauvaises notes à l'exécutif quant à la reprise de ses propositions' (*Franceinfo*, 28 February 2021) <https://www.francetvinfo.fr/monde/environnement/convention-citoyenne-sur-le-climat/la-convention-citoyenne-pour-le-climat-attribue-de-mauvaises-notes-a-la-reprise-de-ses-propositions-par-l-executif_4314437.html> accessed 26 August 2021.

[352] Charles Girard 'Lessons from the French Citizens' Climate Convention', supra, note 266.

[353] Ibid.

[354] Ibid.

ii. The 'Climate and Resilience Law'

Following Macron's broken promise to pass any of the CCC's proposals directly into law in June of 2020, the 146 measures that he did not outrightly reject were sent along the traditional path of French legislative procedure. Just as with the inception of any legislative project, the President may be inspired by his own volition, or appealed to by various stakeholders or advisors such as the Council of State, though in this case the CCC served that role of proposing a new policy for the executive to legislatively pursue. Thus by December of the 2020, the Climate and Resilience bill was drafted by Government Ministers, and by the 10th of February 2021, the bill had been approved by the Council of Ministers and introduced into Parliament.[355] By the 20th of July of 2021, the legislative project had been adopted by both the National Assembly and Senate, and after being approved by the Constitutional Council on the 13th of August, it was promulgated as the Climate and Resilience law on the 22nd of August 2021 and published in the Official Journals two days later, at the time of writing this thesis.[356] The Law claims to translate 'a part of the 146 propositions of the CCC retained by the head of State' into over 300 articles and 100 resulting executive decrees for implementation, and is divided around the five themes the CCC deliberated on.[357] Among its provisions are an engagement by France to lower its carbon emissions by as much as 55% by 2030, as well as the creation of new crimes of 'ecocide' and 'endangering the environment'.[358]

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[355] 'Loi du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets' (*Vie publique.fr*) <https://www.vie-publique.fr/loi/278460-loi-22-aout-2021-climat-et-resilience-convention-citoyenne-climat> accessed 29 August 2021.

[356] Ibid.

[357] LOI n° 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043956924?r=hZugnbG83O> accessed 29 August 2021.

[358] Ibid.

Despite the Climate and Resilience Law's self-presentation as an implementation of the CCC's 146 proposals, it has been widely criticised as superficial and insufficient in reaching the original mandate of lowering carbon emissions. The CESE itself who were delegated to organise the CCC gave their opinion on the resulting Law that it is 'not in a measure to redress the climate situation and to consider social inequalities', and further that 'the annual rhythm of reducing emissions would need to be tripled' to meet the stated goal, and thus that the Law's measures are 'often limited, deferred or resigned to conditions such as that their rapid implementation is uncertain'.[359] Another institution of the executive branch, the Council of State, joined in this criticism and even 'threatened the government with a fine of 10 million euros per semester if it doesn't take more decisive action against air pollution', due its 'serious concerns regarding the government's ability to honour its commitments under the 2015 Paris climate accord'.[360] Climate activists and organisations furthered this sentiment, with the 'WWF France [calling] the final version of the law "very far removed from the climate goals and expectations of citizens" while Greenpeace described it as "hugely disappointing"'.[361] The degree of frustration at the Climate and Resilience Law was exemplified by a series of demonstrations organised by climate organisation, political leaders and the citizen participants of the CCC themselves, in which the protestors demanded a 'Real Climate Law'.[362] Laurence Tubiana, who we saw was a member of the governance committee of the CCC and drafter of

[359] 'Climat, neutralité carbone et justice sociale - avis du CESE sur le projet de loi portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets' (*Vie publique.fr*) <https://www.vie-publique.fr/rapport/278331-climat-neutralite-carbone-et-justice-sociale-avis-du-cese> accessed 29 August 2021.

[360] Huet N, 'What's in France's New Climate Law and Is It Green Enough?' (*euronews*, 20 July 2021) <https://www.euronews.com/green/2021/07/20/france-s-new-climate-law-has-just-been-approved-so-why-are-activists-so-unimpressed> accessed 29 August 2021.

[361] Ibid.

[362] 'Loi climat · La Marche d'Après !' <https://marcheclimat.fr/9mai/> accessed 29 August 2021.

the 2015 Paris climate accord joined an estimated 110,000 protestors, and urged for the Law to be rewritten with more ambition.[363] The CCC must therein be seen as a flawed attempt at participatory democracy, if its intention to appease protests though more legitimate governance resulted in further disillusioned demonstrations by its own citizen participants and organisers.

In light of Macron's broken promises, and a criticised Climate and Resilience Law, the question remains: did the CCC have a normative impact? The conclusion most have drawn is that 'the Convention's impact on public policy is seen as limited', and thus that the CCC was a 'betrayal of the Government's environmental promises, and a sabotage of a bold experiment in participatory democracy'.[364] A more positive outlook would highlight that in any case the CCC 'can be said to have created a broader political momentum in that several jurisdictions not legally responsible for implementing the CCC's measures have committed to do so, in particular a group of mayors of the largest French urban areas', and thus that the CCC was nevertheless was 'an important achievement (…) [which] sets a possible path to aggressive reductions in France's [carbon] emissions'.[365] However, as for the CCC's 146 proposals retained initially by Macron, only a staggering ten are seen to have been legislated into the Climate and Resilience Law completely 'unfiltered', such as the proposal for a 'generalisation of education on the environment' which appears unchanged in article 2 of the resulting Law.[366]

[363] 'Forte mobilisation pour une « vraie loi climat », à la veille de l'examen au Parlement' *Le Monde.fr* (28 March 2021) <https://www.lemonde.fr/planete/article/2021/03/28/nombreux-appels-a-manifester-a-travers-la-france-pour-une-vraie-loi-climat_6074759_3244.html> accessed 29 August 2021.

[364] Charles Girard 'Lessons from the French Citizens' Climate Convention', supra, note 266.

[365] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

[366] 'INFOGRAPHIE. Le projet de loi "climat et résilience" ne reprend que 10 propositions de la Convention citoyenne "sans filtre"' (*Franceinfo*, 8 March 2021)
<https://www.francetvinfo.fr/monde/environnement/convention-citoyenne-sur-le-climat/infographie-le-projet-

The reason for this dramatic dilution of the CCC's proposals has been largely attributed to the 'violent lobbying' of concerned and powerful industrial sectors such as the automobile or aviation industries, who stood the most to lose financially from the taxes and other measures the CCC's proposals would have levied on corporations to force a reduction in carbon emissions.[367] It is not surprising then the resulting Climate and Resilience Law has been dismissed as merely 'a few symbolic measures; a layer of green paint over the climate politics already in place'.[368] To that end, our conclusion too must be that unfortunately the CCC's normative impact was severely limited, and its initial promises far from lived up to.

B) A failed experiment?

i. The CCC – truly an instance of participatory democracy?

In this thesis, we began by assessing participatory democracy as an umbrella term for the interwoven political theories of direct democracy, deliberative democracy, sortition and open democracy. We have seen that the CCC built upon an existing history of participatory practices in France and the more recent Grand National Debate in order to incorporate elements of direct, deliberative and lotocratic democracy on a scale never before seen in France. However, the CCC was ultimately limited in its normative impact, and was consequently felt as an anti-climactic disappointment which failed to produce the legislative change it had been

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de-loi-climat-et-resilience-ne-reprend-que-10propositions-de-la-convention-citoyenne-sans-filtre_4309153.html> accessed 26 August 2021.

[367] Lora Verheecke & Olivier Petitjean, 'Lobbys contre citoyens: Qui veut la peau de la convention climat? (*Observatoire Des Multinationales* 2021).

[368] 'Bilan des débats du projet de Loi Climat à l'Assemblée Nationale : un RDV manqué pour le climat et la démocratie' (*Réseau Action Climat,* 19 April 2021) <https://reseauactionclimat.org/bilan-du-projet-de-loi-climat-un-rdv-manque-pour-le-climat/> accessed 29 August 2021.

nevertheless mandated. We have also seen that for Landemore's conception of open democracy, the citizens of a given participatory forum must have the direct normative power to implement their proposals into law, and in my analysis, this normativity was the key missing ingredient in what could have otherwise been a true instance of participatory democracy to its fullest extent. If participatory democracy is a spectrum, then the CCC is certainly well advanced on that scale compared to other similar experiments certainly in France and even around the world, yet Macron's potentially self-interested motives for organising the CCC and subsequent breaking of what was later revealed to be a false promises merely serves to further the disenchantment the French people feel towards their government as shown by the 'Real Climate Law' protests; the very waning of legitimacy that the CCC was supposed to alleviate. For this deceptive irony in the saga of the CCC, I submit that it cannot be characterised fully as an instance of participatory democracy, but should rather be understood as what I call a performative, or 'puppet' participatory democracy. Under this light, the ideals of participatory democracy are brandished as an illusory means to a bureaucratic end of securing its very opposite: increased executive power for the sovereign. In Landemore's analysis, the CCC was a form of 'participation-washing whereby power tries to regain legitimacy in a period of crisis by appearing to listen to the people', and example of an 'old system [which] will of course try to co-opt democratic innovations to keep things exactly the same', for which she recalls 'Lampedusa's famous line: "Everything needs to change, so everything can stay the same"'.[369]

While we have seen that participatory democracy has a history in France, so do its critiques. Röcke so reports that during the French Presidential campaign of 2006, the Socialist candidate Ségolène Royal's proposal to introduce 'randomly elected citizen juries for evaluating public policies' was met with 'a wave of protest from all political camps', and denounced the 'idea of

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[369] Landemore, 'No Time for Castles: From Closed to Open Democracy', supra, note 63.

direct citizen participation' as 'a demagogy close to populism'.[370] Röcke attributes this animosity to 'the "universality" of French Republicanism [which] also disregards the existence of ethnic communities, of regional specificities and of any kind of cultural differences in the public sphere', and thus that a tension has arisen in France between 'on the one hand, the "one and indivisible republic" which could not tolerate any sub-national rivals, and the claim to sub-national and decentralised autonomy, on the other'.[371] Indeed, participatory democracy generally tends to be caught in a conflict of legitimacy between the random selection of directly participating untrained citizens versus the (theoretically) autonomous election of trained politicians, with both paradigms inevitably relying on some form of representation, justified precisely by those opposing means to the abstract yet ultimately unattainable end of securing 'legitimate' governance: equal chance of selection versus autonomous choice.

Therein, the CCC was afflicted by criticisms stemming from common cautions surrounding participatory democracy in a broader sense: what is the legitimacy of a mini-public participating in decisions involving a broader public, and are its proposals acceptable to a broader population which does not get a voice in the shaping of those proposals? Perhaps mini-publics are too small to be sufficiently representative and diverse, and are skewered towards participation by those with the means to give up their ordinary lives and incomes. Participatory democracy is oft derided as hypocritical in that it is not truly direct, but rather just another form of representation, but by less 'trained' people in a party-less system who the general population have no autonomy in choosing, thus creating a certain oligarchy opposite to the promised democracy. It is not for this thesis to reply to these critiques, of which many are interesting and

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[370] Anja Röcke, 'France: Between "Proximity" and Participatory Democracy' in Anja Röcke, Framing Citizen Participation (Palgrave Macmillan UK 2014).

[371] Ibid.

valid, yet my point is rather to show that the CCC was limited in its normative impact by this general apprehension surrounding participatory democracy.

The perceived legitimacy of the CCC was not helped by its being under the supervision of the executive, and thus it was entirely denounced as 'an "entirely illegitimate gadget", undermining the authority of the parliament'.[372] Girard is skeptical of the CCC's claim to legitimacy due to its assertion that it was politically representative due to its participants being 'ordinary citizens', whereas he notes that 'being "ordinary" simply means not having been elected – an insufficient, if paradoxical, ground for political representation', which is only proven less convincing as the particular deliberative setting the citizens participate in 'actually increases the difference of perspectives between the participants and the "ordinary" citizens', which Girard says is proven by the CCC's own stated preference to not submit its proposals to referendum for fear that the general population would not understand how those measures were reached.[373] Further, the CCC did not allow the deliberation of 'ordinary citizens without mediation', due to its emphasis on 'the role of the organisers as well as the significant input from the technical experts and jurists'.[374] Girard concludes that the framing of a citizens' convention as more legitimate 'can only pit the citizens' assembly against the parliament, as their rivalry is then not only about the accomplishment of a particular task, but also about the representation of the people', and importantly warns that 'such a competition is bound to weaken both institutions, to the potential benefit of the executive power'.[375] This rings true to the analysis of this thesis, that the CCC's ultimate aims at its outset were undermined by the executive nature of the French Fifth Republic, which perhaps intentionally designed the CCC

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[372] Charles Girard 'Lessons from the French Citizens' Climate Convention', supra, note 266.

[373] Ibid.

[374] Ibid.

[375] Ibid.

as a receptacle for the frustrations of the protesting French people, to divert their attention and feelings of illegitimacy.

Further critiques of the CCC lay for example in the broad mandate it was given, and the 'major limitation [of] the cruelly insufficient 40%-target set [to reduce carbon emissions]', which led to the participants 'self-censoring' and 'avoiding thorny issues such as the role of nuclear power in the French energy mix, or a truly comprehensive carbon tax which was left unaddressed after some strongly opposed discussing it for fear of cautioning the government'.[376] Paradoxically then, a mountainous task was handed upon the citizen participants with the inhibition of a confined target, whereas clearly as has been shown by the critiques of the Climate and Resilience Law, a problem as global as climate change will require solutions equally as important. Finally, as is unsurprising following the analysis throughout this thesis, the CCC was impeded by its lack of 'legal grounding', as Denz quotes 'environmental law scholar Arnaud Gossement, who stressed that (…) "the whole architecture of this convention, all its credibility, rests on trusting the word of Emmanuel Macron (…); it is profoundly monarchical"'.[377] Denz therein situates the CCC on the previously discussed Arnstein's ladder (which ranks the normativity of a participatory exercise), at the level of 'consultation' as it 'offered no assurance that citizen concerns and ideas will be taken into account', and he notes that the Citizens Vests specifically warned the President against such 'tokenism' in an open letter following the CCC.[378]

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[376] Robin Denz '"End of the world, end of the month, same struggle": On depoliticized transitions and emancipatory sustainability transformations: A case study of The French Citizens' Convention on Climate' Lund University International Master's Programme thesis (May 11th 2021).

[377] Ibid.

[378] Ibid.

However, in my view, this determination may be too generous. Arnstein defined citizen participation as 'a categorical term for citizen power', which 'enables the have-not citizens, presently excluded from the political and economic processes, to be deliberately included in the future', with an emphasis on direct normativity akin to Landemore's conception of participation in an open democracy.[379] Arnstein's ladder is thus a spectrum of participation, from the lowest non-participatory rung of 'manipulation' to the highest degree of participation she entitles 'citizen control', where the 'have-nots handle the entire job of planning, policy making and managing a programme (…) with no intermediaries'.[380] Kelty elaborates on Arnstein that participation tends to 'formatted in ways that cramp and dwarf it', and thus emphasises that 'inclusion is not participation'.[381] As we have seen, the CCC's internal governance was in and of itself a ladder of participation, with the 150 citizen participants at the bottom of a normative chain below the five organising committees of the CCC, themselves organised by the CESE, accountable ultimately to the President. My assertion in this section is that the CCC was not truly an instance of participatory democracy, because it was a performative participatory forum puppeteered by the sovereign Macron, with the latter ladder of normative power corresponding to the puppet strings by which he maintained ultimate control over the outcomes of the CCC, which as we saw were ultimately diluted due to their perhaps unforeseen ambition. Therein, I would not class the CCC as merely consultative on Arnstein's ladder, but also as exhibiting elements of manipulation and placation, where the Government 'allows citizens to advise or plan ad infinitum but retains for power holders the right to judge the legitimacy or feasibility of the advice'.[382] In assessing the CCC's actual

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[379] Arnstein, 'A Ladder of Citizen Participation', supra, note 297.

[380] Ibid.

[381] Christopher Kelty, 'The Participant: A Century of Participation in Four Stories' (The University of Chicago Press 2020).

[382] Ibid.

impact on French governance, I argue that the CCC 'failed' normatively because the citizen participants were used by greater powers, rather than truly granted power themselves, in order to make the executive seem more legitimate. Thus, in my view, the CCC was not authentic and substantive participatory democracy, but performative and puppet participation.

ii.   A consultative constitutional nature

Socrates famously warned against the Athenian model of participatory democracy, that a trained captain rather than a randomly selected citizen should helm the 'Ship of State'.[383] It is my principle argument in this thesis that the CCC's actual normative impact on French governance was limited due its intentional organisation under the CESE as a consultative constitutional body, wherein the executive ultimately retained sovereign control at the helm of the French Ship of State. The tension between legislative and executive branches, and further between representative and participatory democracy, stretch back to the origins of early democracy, and this tension inevitably arose after Macron's perhaps initially well-intentioned creation of the CCC began to challenge his own power. Macron is facing re-election in the next 2022 Presidential race, and perhaps so organised the CCC to shift anger at him exhibited by the Yellow Vests protests away to a puppet institution. He perhaps did not expect for the CCC to take its role seriously, as it has been given a ridiculously broad mandate, and so when the President retreated and broke his promise to pass any CCC proposal 'unfiltered', Macron countered his critics by 'complaining that some members had gone too far and exceeded their advisory role', angrily commenting 'you can't say that just because 150 citizens wrote

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[383] Plato, 'The Republic', (Penguin Classics 2007, originally published 375 BCE), book 6.

something, it's the Bible or the Koran'.[384] The CCC was intended not to normatively reform the law, despite the initial promises by Macron to the CCC that 'you're not here to be used (…); you're here to create collective intelligence and help me decide things together'.[385] Rather, he likely was literal in his word choice of 'help me', as the CCC was indisputably a consultative assembly by the end of its run, although there had been sufficient ambiguity throughout to increase the trust of the citizen participants and the people.[386]

In my analysis, I submit that Macron paid lip-service to the idea of participatory democracy in order to appear more legitimate without substantially needing to make any constitutional change. This is consolidated by his *modus operandi* for similarly performative attempts to regain his legitimacy, such as his tour during the Grand National Debate which we saw was criticised as a participatory front for a political campaign with local mayors. After the CCC had finished, Macron made another performative gesture of closing down his own *alma mater*, the National School of Administration (ENA), which is infamous as a technocratic training ground for 'the country's ruling class since 1945', including three of the last four French presidents.[387] Similarly to the performance of the CCC, Macron did not reform the arguably more elitist 'selective entrance process (…) criticized by many as biased against students from

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[384] Welle D, 'France's Citizen Climate Assembly: A Failed Experiment?' (*DW.COM*) 16.02.2021 <https://www.dw.com/en/frances-citizen-climate-assembly-a-failed-experiment/a-56528234> accessed 26 August 2021.

[385] Hurst A, 'France Turns to Citizen-Legislators to Craft Climate Reforms' (*The American Prospect*, 18 February 2020) <https://prospect.org/api/content/f45e8ca8-51ad-11ea-8c1c-1244d5f7c7c6/> accessed 5 August 2021.

[386] Benoit Delooz, 'Challenges and Political, Institutional and Normative Perspectives of the Citizens' Assemblies: An Approach Based on the Example of the Citizens' Climate Convention' (2020) 10(3) *Brazilian Journal of Public Policy* 636.

[387] 'Macron Closes Elite School in Reformist Push' (*POLITICO*, 8 April 2021) <https://www.politico.eu/article/macron-closes-elite-school-in-reformist-push/> accessed 26 August 2021.

poorer backgrounds', but found the gesture of shutting down his old university sufficient to appear more legitimate against the common critique of him by the Yellow Vests protestors, that he is part of an aristocracy out of touch with average French problems.[388] Chwalisz and Van Reybrouk, both proponents of participatory democracy and the former respectively involved in the running of the CCC as well as the OECD report cited in this thesis, have commented on this shallow participation advocated by Macron they call a 'sham democracy'.[389] Macron proposed a citizens' convention at a European level, but in a model which they denounce as characteristically 'archaic, elitist, and out-of-touch' , where the 'result of these gatherings will be a wish list of unrealistic demands — easily ignored after the box of "citizen consultation" has been ceremoniously ticked'.[390]

Girard therein analyses the impotent outcome of the CCC as resulting from three interrelated ambiguities, the first of which concerned the 'advisory or binding nature of its proposals', where despite the 'political rhetoric' that Macron had promised to pass the CCC's proposals 'unfiltered'; 'the Convention only had an advisory role', and 'the Government had only committed to "give a public response"'.[391] Girard views the second ambiguity as concerning 'the kind of proposal to be produced', where the 'procedural indeterminacy was presented by the Government as a proof of the leeway given to the assembly', whereas in reality it knew that 'to leave open the procedural outcome is to disconnect the institutional features of the assembly from its function'.[392] Finally, the third ambiguity resulting in the executive's purposeful

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[388] Ibid.

[389] Claudia Chwalisz and David Van Reybrouck 'Macron's Sham Democracy' (POLITICO, 12 February 2018) <https://www.politico.eu/article/macron-populism-sham-democracy-plans-to-revamp-decision-making-disappointing/> accessed 26 August 2021.

[390] Ibid.

[391] Charles Girard 'Lessons from the French Citizens' Climate Convention', supra, note 266.

[392] Ibid.

diminishment of the CCC's normative impact concerned 'the nature of the task given to the convention', which as we have seen, was so broad so as to 'make participants heavily dependent on the advice of experts (…) [and] also 'invites them to produce a long list of heterogeneous measures, allowing the government to cherry-pick'.[393] It is clear then that Macron in a sense gaslighted the CCC's participants into believing they had the normative power to propose legislative reform, when in reality the CCC was structurally designed to manipulatively inhibit that very power. Girard concludes that:

'These ambiguities are interrelated, as the appropriate scope of a political body's mandate depends on its normative power and on the proposals it has to produce. Together, they created uncertainty regarding the role the Convention, weakened its ability to impact public policy, and set expectations that could hardly be met. But they are in no way intrinsic to citizens' assemblies per se. Rather, they result from the way the Convention was set up'.[394]

The question relevant to this thesis is: did this infiltration of the executive into the CCC truly have a muzzling effect on its participatory efforts? We saw in the first chapter that participatory democracy in France since the 21st century has a tendency to become bureaucratised, due to the Fifth Republic's deep emphasis on centralised public administration, and it should have been evident that any attempt at participatory democracy under the auspices of the CCC, especially when organised by the executive, would also inevitably be affected by the traces of France's constitutional arrangements. This in some sense reveals Derrida's phenomenon of *différance*: that the two entities (or metaphysical 'texts') of participatory democracy on the one

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[393] Ibid.

[394] Ibid.

hand, and the French Constitution on the other, would necessarily be infinitely different and ever-differed in a double-bind when brought together to be mutually interpreted.

Derrida disagreed with his intellectual rival Hans-Georg Gadamer that in a dialogue of meanings, 'two horizons could melt into one', and that a mutual understanding could be reached, but rather saw any attempt at this dialogue as an 'act of totalisation' which does 'hegemonic violence' to the object of interpretation, thus rendering all dialogue to be 'characterised by an untranslatability or interruption which serves to infinitely multiply new (mis)understandings'.[395] Legrand, who we saw in our earlier deconstructive analysis employs Derridean hermeneutics to his culturalist theory of comparative legal transfer, applies Derrida's pessimism regarding dialogue to assert that a legal dialogue of sorts between two cultural-legal contexts or polities results in the 'impossibility of legal transplants', which many theorists such as his own intellectual rival Alan Watson have asserted are nevertheless functionally responsible for a perceived 'uniformization of law'.[396] Essentially, in following Derrida's post-structuralist analysis, the introduction of one idea, legal or otherwise, into a new context, cannot in Legrand's opinion operate as a simple transplant, where the new body either takes or rejects the input and then goes on with its ordinary functioning. Rather, the process of legal transfer is more nuanced, and to an extent, impossible. For example, as we have seen, France attempted to implement a Westminster system into its Fifth Republic by placing the Prime Minister as the head of the executive, accountable to Parliament. However, the French history of caesarean executives and the immediate background of the Second World War and the Algerian War of Independence meant that this attempted 'transplant' immediately transfigured under De Gaulle's strong leadership, in which he returned prerogative power to the President.

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[395] Pierre Legrand, 'Derrida's Gadamer' supra, note 23, p. 160.

[396] Ibid, p162.

Gunther Teubner has proposed an alternate metaphor to that of 'legal transplant' for this Derridean interruption caused by a legal transfer: that of the 'legal irritant'.[397] Teubner explains that 'when a foreign rule is imposed on a domestic culture (…) it is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events (…) and forces them (the domestic culture) to reconstruct internally not only their own rules but to reconstruct from scratch the alien element itself'.[398] To return to the internal governance then of the CCC, it reveals that an attempt at incorporating participatory democracy into the French Constitution inevitably permeated that new 'alien element', as Teubner put it, with the traces of a supreme executive and tendency towards bureaucratisation inherent to the context of the Fifth Republic. The CCC represents the product of legal irritation caused to both the French polity and the idea of participatory democracy, as they attempted a metaphysical dialogue through the Convention, and were forced to adapt themselves, with one inevitably doing hegemonic violence to the other. It appears in the case of the CCC, the French Constitution had the upper hand as the domestic culture, and was little affected by the alien element of the participatory experiment.

However, perhaps this phenomenon of resistance to participatory democracy is not unique to France, as Choudhry and Tushnet note that there is an 'inescapable need within a participatory process for the delegation of some decision-making authority regarding constitutional drafting to a smaller group of individuals—experts, politicians, and/or "ordinary" citizens—means that direct democracy cannot completely supplant representative democracy'.[399] This was indeed

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[397] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', (1998) 61 *Modern Law Review* 11.

[398] Ibid, p12.

[399] Choudhry and Tushnet, supra, note 71.

the case with the legal expert committee to the CCC, whose devolved internal governance perhaps revealed a flaw within participatory democracy as it is currently implemented in various Citizens' Conventions across the world: that when introduced to a non-participatory constitution, an intermediary constitutional body will be created to keep a participatory assembly in check.

My argument in this thesis has been then that the executive supremacy and colonial origins of the French Fifth Republic were constitutionally opposed to fostering the CCC in an authentic way, but rather forced it into a subservient performative mutation of an irritated participatory democracy. This failure of participatory democracy in encounters with unreceptive host constitutions has been noted by Choudhry and Tushnet, who in commenting on the failed Icelandic constitutional crowdsourcing experiment noted that this failure 'resulted largely from the refusal of established political elites to buy in to the constitutional draft, [which] might suggest a different lesson from the Icelandic process—that it failed because it did not take elite concerns seriously enough'.[400] They aptly describe our French scenario with by warning that political elites are 'concerned in part with preserving their ability to compete about control over those institutions' and 'demonstrate little concern for expanded rights or direct democracy'.[401] To return to a Habermasian analysis, Macron retained sovereignty of the formal decision making sphere by not allowing the CCC to exit the public sphere: he maintained control of the 'sluice': 'systems of water channels controlled at their heads by a gate (…) [whose] image is used to characterize the intermediary bodies and procedures between official decision makers and the public'.[402]

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[400] Sujit Choudhry and Mark Tushnet, 'Participatory constitution- making: Introduction', supra, note 71.

[401] Ibid.

[402] Landemore, 'Open Democracy and Digital Technologies', supra, note 60.

To conclude this section, I would like to briefly speculate on the tension between the President's promise to pass the CCC's proposals 'unfiltered' and his eventual executive decision to go back on that promise, which he never may have intended to be binding in the first place, as we have seen. There is a tension then in the Habermasian spheres to which the CCC belongs, in a sort of Schrödinger's Habermas' spheres, if you will: the CCC was at once normative and consultative, in the time period between Macron's promise and breaking of his promise. We saw that the CCC was granted a constitutional mandate by the President to produce proposals which were ready to be codified, and yet we have also seen that the President retains ultimate sovereignty in the French Constitution. However, if the President used this authority to grant the CCC power, then perhaps the CCC's mandate must take precedence over the President's own power. I submit that this constitutional tension is an example of the classic 'God paradox': if there is a God, and it is omnipotent, then can it weaken or even destroy itself? To weaken itself would prove that it can be less than omnipotent, but to not weaken itself would prove that there is something not within the God's power. Perhaps then some form of constitutional promissory estoppel could be retroactively applied to Macron's promise, which itself was a delegation of constitutional executive power to the CCC, a new institution not accounted for by the French Fifth Republic, to normatively bring its proposals to law. If Macron could delegate this executive power in this sense, then he is compromises his sovereignty, but if he cannot, then he is not truly sovereign either. In any case, it is clear his broken promise had a damaging effect on the citizen participants of the CCC, and all those who trusted it would be a legitimate experiment in 'unfiltered' participatory democracy.

In this thesis, I have neglected the judicial branch of the French Constitution, which I noted in the first chapter nevertheless has an increasing power of judicial review, as in many

contemporary liberal democratic polities. In France, there was a constitutional reform in 2008 which granted the Constitutional Council the power to be seized by any citizen to judicially review the constitutionality of a law or government action in the course of an ongoing case, called the *question prioritaire de constitutionalité* ('priority question of constitutionality' or QPC).[403] I mean here to speculate that perhaps such a judicial review could be undertaken against Macron's decision to break his promise to pass all the CCC's proposals 'unfiltered', ultimately resulting in a Climate and Resilience Law reproducing only ten of those 149 proposals. One could imagine perhaps a civil suit regarding a legal issue of the Climate and Resilience Law, maybe in an attempt to enforce one of its provisions restricting corporate carbon emissions. In the midst of that case, a QPC could be requested, regarding he specific matter of legitimate expectations of the citizen participants of the CCC and the people of France that the promise to pass the proposals 'unfiltered' would be constitutionally respected. That promise could be seen as a prerogative created under De Gaulle's presidential imprint on the Constitution, in the vein of the famous UK *GCHQ* case, where the UK Supreme Court found that a breach of legitimate expectations created by the executive could be judicially reviewed.[404]

There are two French precedents for this hypothetical judicial review, which of course is inspired by the common legal tradition and may not have any place in France's continental courts. Nonetheless, the Constitutional Council in 2008 decided that the Charter for the Environment of 2004 should be considered as being constitutionally normative.[405] We have seen that Article 7 of that Charter enshrines the right 'to participate in the public decision-

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[403] Michel Verpeaux, 'Le Conseil Constitutionnel' (Documentation Française 2nd edition, 2014) p140.

[404] *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9.

[405] *Conseil Constitutionnelle no 2008-564 DC* (19 June 2008), Les Cahiers du Conseil constitutionnel, Cahier n° 25.

taking process likely to affect the environment'.[406] Further, when the Constitutional Council was seized on the 13th of August 2021 to review the constitutionality of the Climate and Resilience Law resulting from the CCC, it was argued by sixty Members of Parliament and various organisations such as Greenpeace in *amicus curiae* briefs that that law was not sufficiently ambitious so as to meet France's objectives under the Paris accord of 2015 to reduced its carbon emissions.[407] In fact, while this argument did not persuade the Court to overturn the Climate and Resilience Law which has since been promulgated, a similar argument was made to the German Constitutional Court which in that case did find the insufficient German Climate Law as unconstitutional.[408]

The purpose of this speculation was merely to suggest that, despite the consultative constitutional nature of the CCC which limited its actual impact, this could in theory be hypothetically challenged at a judicial level, which is one of the few institutions in France to retain the power to contradict the sovereign caesarean executive.

C) *The institutionalisation of participatory democracy*

i.   The CCC's proposals and institutional reform of the CESE

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[406] Ibid.

[407] 'Décision n° 2021-825 DC du 13 août 2021' *Conseil constitutionnel* <https://www.conseil-constitutionnel.fr/decision/2021/2021825DC.htm> accessed 6 September 2021.

[408] Hugues de Saint-Pierre & Lou Welgryn, « Le projet de loi Climat et résilience constitue une double occasion manquée : respecter l'accord de Paris et faire confiance à la science »' Le Monde.fr (12 June 2021) <https://www.lemonde.fr/idees/article/2021/06/12/le-projet-de-loi-climat-et-resilience-constitue-une-double-occasion-manquee-respecter-l-accord-de-paris-et-faire-confiance-a-la-science_6083846_3232.html> accessed 29 August 2021.

Now that we have analysed the actual impact of the CCC on French governance, I would like to briefly conclude this final chapter by speculating on the potential impact of the CCC. My argument here is that the CCC nonetheless led to the beginnings of institutionalisation of participatory democracy in France, and may have inspired other citizens' assemblies beyond in other polities.

On the 15th of January 2021, an organic law was published in the Official Journals which would reform the CESE that had organised the CCC into the 'chamber of citizen participation'.[409] This new reform would see the consultative body retain its consultative constitutional nature, yet increase its participatory methodology, in that it can be seized by public petition as well as the Government to organise participatory forums. This reform to the body stemmed in fact from one of the CCC's own proposals, and is one of the few to have been implemented.[410] Of course, this was likely allowed by Macron because the body would remain explicitly consultative, but there is a hope by participatory researchers that nonetheless this will result in further steps towards more open, normative, participatory democracy, perhaps even someday replacing the Senate entirely with a participatory chamber.[411]

Further, there is a 'Citizens' Assembly for Paris' in the works: a local permanent participatory forum to the municipality of Paris, which would only the second of its kind to have agenda-

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[409] 'Réforme du Conseil Économique, Social et Environnemental' (Convention Citoyenne pour le Climat) https://propositions.conventioncitoyennepourleclimat.fr/objectif/reforme-du-conseil-economique-social-et-environnemental-axe-de-reflexion/ accessed 5 August 2021.

[410] Louis-Gaëtan Giraudet, et al. "Deliberating on Climate Action: Insights from the French Citizens' Convention for Climate", supra, note 1.

[411] Claire Legros, 'Tirage au sort, la démocratie du citoyen ordinaire' Le Monde.fr (12 June 2020) <https://www.lemonde.fr/idees/article/2020/06/12/tirage-au-sort-la-democratie-du-citoyen-ordinaire_6042571_3232.html> accessed 5 August 2021.

setting normative power after the Ostbeglien model, and was likely inspired by the recent events of the CCC, however little detail is yet available on the project aside from a recent job post listing by the Government of Paris looking for a Secretary General to run the Assembly.[412]

Finally, there is evidence that the Conference on the Future of the European Union, organised by EU Commissioner Von Der Leyen, which will incorporate several Citizens' Conferences across the EU to discuss constitutional reform, was inspired by Macron's (perhaps performative) calls for an EU Citizens' Assembly, which researchers such as Landemore equally hope may take permanent institutional form.[413] On a related note, a Global Citizens' Assembly is being organised on Climate to deliberate the upcoming COP26, and is being organised in part by 'Open Democracy' team we saw helped to organise the Grand National Debate and CCC in France.[414]

It is clear then that the CCC's potential impact may be far further reaching that its limited actual normative impact: the CCC itself and subsequent research on it may inspire and help to refine further participatory experiments around the world, and contribute to further institutionalisation of more normative open participatory democracy in France.

However, I conclude in a warning that real participatory democracy in France may likely require a new 6th Republic, with a constitution explicitly committed to participatory

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[412] 'Secrétaire Général.e de l'Assemblée Citoyenne H/F | RDV Emploi Public' <https://www.rdvemploipublic.fr/BourseEmploi/pages/site/OffreSite.seam?idOffre=222366&conversationRech ercheId=2243615&blBasketBack=false&actionMethod=pages/site/OffreAccueilSiteList.xhtml:agentAction.init Offre()&conversationPropagation=begin> accessed 6 September 2021.

[413] Landemore, 'No Time for Castles: From Closed to Open Democracy', supra, note 63.

[414] About' (Global Assembly) <https://globalassembly.org/about> accessed 10 August 2021.

democracy, and disentangled from the executive and colonial past of the current Constitution of the Fifth Republic, and even perhaps founded by a constitutional citizens' assembly.

Conclusion

This thesis has sought to analyse the recent event of the CCC, in order to determine what its actual and potential impact on French governance have been.

In the first chapter, I used a postcolonial critique and deconstructive analysis to introduce participatory democracy as an idea which stems from beyond ancient Athens, and which found itself bureaucratised in the French constitutional context due to the Fifth Republic's deep-rooted traces of colonialism and caesarean executive power.

The second chapter used this background exploration in order to zoom in on the case study of the CCC, and explain how it arose from the Yellow Vests movement and the experiment of the Grand National Debate. In critically laying out the CCC's constitutional mandate, internal governance and the methodology behind its participants' selection and deliberation, I argued that the CCC too was nonetheless limited by the same bureaucracy as participatory democracy had been in the early 21st century at a local level in France, and that the CCC could have benefited from further intersectionality.

The final third chapter concluded with my arguments on the impact of the CCC on French governance. I found that its actual normative impact was limited due to its consultative constitutional nature in the shadow of a colonial and presidential Fifth Republic. President Macron, I submit, used the CCC as a performative, or puppet, participatory democracy, to attempt to increase his own legitimacy. However, the potential impact of the CCC can be seen

through its causing the institutionalisation of the CESE, thus the CCC can be seen as having re-introduced participatory democracy into French governance. In the end, I reflect that real participatory democracy in France may require a new 6th Republic.

My arguments have been limited by the proximity of the writing of this thesis to the promulgation of the Climate and Resilience Law which arose from the CCC, so it may have been pre-mature to assess the impact of the CCC only a year after it has finished. Further, I did not engage in depth with the many orbiting theories and critiques of participatory democracy, as I wished to narrow the thesis down specifically onto the CCC case study. In any case, more research is needed on participatory democracy in practice, in order to better understand citizens' conventions from a socio-legal point of view.

Future research in this field may go on to explore further consequences of the CCC or instances of participatory democracy in France, or compare the CCC to the many other emerging citizens' conventions around the world. Further, research on how to include theories of intersectionality, anarcho-communist democratic communalism, postcolonial and subaltern counter-publics, and critical disability rights could all be interesting to explore in relation to making participatory democracy even more inclusive and accessible. Relatedly, there is much exciting new research on digitalisation, technology and participatory democracy which could help to increase its diverse collective wisdom.

There is an exciting field on the rise known as 'legal design', defined as 'the application of human-centred design to law to make it more accessible and innovative to users'.[415]

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[415] Margaret Hagan, 'Legal Design as a Thing: A Theory of Change and a Set of Methods to Craft a Human-Centered Legal System' *Design Issues* Volume 36 Issue 3 (2020) p.3-15.

Theoretically, design-thinking promotes 'structured-yet-free' spaces and encourages being 'critical, imaginative and practical' in approaching design.[416] Methodologically rich, 'legal design promotes the use of model-making, prototyping and visualisation.[417] Legal Design applies design to legal research and issues, with an ethos that centralises user experience in the creative process, focusses on creating quick prototypes to solve a problem, and then tests them until they meet a particular need.[418] Future research could perhaps explore the relevance of this field, which has its own strand of participatory (design) research,[419] to the themes in participatory democracy which this thesis has explored, such as the epistemological value of diverse 'collective wisdom' or participant selection and deliberation methodologies. Constitutional research in any case tends to either employ the term 'design', but without the substance of design theories, or engages in design but not intentionally, so the two fields may have many unexplored parallels which could be revealed if an explicit dialogue was fostered between the two.[420]

To conclude, I wish to return to Sieyès' sketch for a final reflection. This thesis has shown that participatory democracy as embodied by the CCC challenges the traditional Kelsenian hierarchical pyramid of constitutionalism represented by Sieyès, and may even seek to replace the pyramid with a public sphere of open democracy. Nevertheless, a more accurate iteration

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[416] Ezio Manzini, 'Design, When Everybody Designs - An Introduction to Design for Social Innovation' (MIT Press, 2015).

[417] Helena Haapio & Thomas D. Barton, 'Business-Friendly Contracting: How Simplification and Visualization Can Help Bring It to Practice' published in Kai Jacob, Dierk Schindler and Roger Strathausen (eds), 'Liquid Legal: Transforming Legal into a Business Savvy, Information Enabled and Performance Driven Industry' (Springer 2017), pp. 371–396.

[418] Ibid.

[419] Carl DiSalvo, 'Participatory Design for Learning - Perspectives from Practice and Research' (Routledge 2017).

[420] Michael Salward, 'Democratic Design (Oxford University Press 2021).

of the sketch for the Fifth Republic would place the executive squarely at the centre instead of the legislative branch. Whether or not it is desirable to have participatory democracy is a tangential question which I will not answer here, but the sketch is more interesting to me because it represents a series of design choices and assumptions made about the constitutional spatial organisation for France's First Republic. In my eyes, the CCC asks us to ponder: what if Sieyès had organised his sketch differently? How has design influenced Sieyès' and other drafters constitutional choices? What if the governance of our polities were other to the way they exist now?

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