

COUNTRY REPORT

FRANCE



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Country Background¹

France is probably the country that has had the greatest number of constitutions: 15 in a little over two centuries² - a figure to be compared to the only American constitution - the first being that of September 3, 1791 establishing a constitutional monarchy, and the last being the constitutional law of July 23, 2008 on the modernization of the institutions of the Fifth Republic.

The Constitution currently in force was adopted by referendum on 28 September 1958 and promulgated on 4 October 1958. It is partly a response to the crisis resulting from the events in Algeria, since De Gaulle had set a constitutional change as a precondition for his return to power. Written by his close associates, and in particular by Michel Debré, it is also marked by the will to react to the abuses of parliamentarianism as it was practiced under the Third and Fourth Republics. Thus, concerning the organization of public powers, it retains a balance between powers that is completely different from that which prevailed in previous texts, the executive being largely revalued to the detriment of the legislative.

Nevertheless, "to understand the regime of the Vth Republic implies then to break with the constitutional fetishism, that is to say with the belief, constitutive of the legal way of thinking, in the decisive character of the prescriptions of the Constitution in the structuring of the political life." (François, 2011, p. 6-7).

Thus, from the first months of the new regime in 1958, De Gaulle would profoundly change the original conception of the institutions of the Fifth Republic, concentrating power in his hands in a way that no head of state (he was elected President in the elections of December 21, 1958) had done in France under a democratic regime. In practical terms, De Gaulle was to impose from the outset the figure of an all-powerful president, a true head of the executive branch, maintaining a direct relationship with the people through the repeated use of referendums and the systematic use of television to address the French people. The possibility of a referendum is a true institutional innovation of the Fifth Republic: the President can consult the people for the adoption of certain laws, the ratification of international treaties and the approval of revisions to the Constitution.

In 1962, the method of electing the President of the Republic was changed to such an extent that a semi-presidential regime was introduced. The head of state is elected by all citizens and thus is supposed to represent all French people, regardless of their political leanings.

The predominance of the Head of State within the institutions is thus consecrated. It is indeed clear that the legitimacy of the Head of State is now superior

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² The Constitution was amended to allow equal access of men and women to electoral mandates (1999); The reduction of the duration of the presidential mandate from 7 to 5 years (2000); The prohibition of death penalty (2007).

to that of the deputies, since the latter are elected within the framework of limited constituencies and are divided into different political groups.

Also, the parliamentary character of the regime has become less important. Indeed, the President of the Republic appears to be the true head of the executive but is not accountable to Parliament. Similarly, while the government is legally accountable to the National Assembly, it is in fact accountable only to the President of the Republic.

The parliamentary majority (legislative elections were held on November 23 and 30, 1958) is now primarily responsible for supporting presidential politics. The legislative election has thus become an election confirming the result of the presidential election and whose main function is the election of a majority loyal to the president, giving him the means to govern.

Ultimately, the Fifth Republic is conceived as a parliamentary regime in which the powers of the executive are strengthened. Since the 1962 referendum that established the election of the President of the Republic by direct universal suffrage, it has become a semi-presidential regime.

The Fifth Republic thus appears to be a hybrid regime with characteristics of both the presidential and parliamentary regimes at the same time.

In terms of operating principles, two aspects in particular can characterize the Fifth Republic: the rationalization of parliamentarism and the double-headed nature of the executive (ie: the President and the Prime Minister).

Formal Constitution-Making

Article 89 of the Constitution defines the procedure for revising the Constitution. The initiative for the revision comes either :

- to the President of the Republic after the proposal by the Prime Minister. This is referred to as a revision project;
- or to the members of Parliament. In this case, it is a proposal for revision.

In both cases, the text of the revision must be voted in identical terms by the National Assembly and the Senate. In the case of a proposal for a constitutional revision, the revision must be approved by referendum. This can be explained by the will of the 1958 constitutional writers to prohibit Parliament from being able to change the institutions on its own.

Revisions initiated by the President of the Republic may be approved by referendum or by a three-fifths majority of the votes cast by the two chambers of Parliament meeting in Congress.

However, Article 11 of the Constitution allows the President of the Republic to submit to a referendum any bill relating to the organisation of public authorities. General de Gaulle has used it twice. Successfully in 1962 to introduce into the Constitution the direct election of the Head of State, and unsuccessfully in 1969, for his reform of the Senate, and regionalisation. Such a procedure is advantageous for the

Head of State since it allows him to bypass the possible opposition of the Assembly and the Senate, whose agreement is mandatory (article 89). However, it has sparked much controversy.

Thus, in principle, the Head of State can only take the initiative to revise the Constitution following the proposal by the Prime Minister, which therefore presupposes an agreement between these two persons. In a situation of "cohabitation"³, and therefore of potential disagreement, the revision can only take place following a compromise. In practice, several amendments to the Constitution have taken place during a period of cohabitation, reflecting de facto political consensus (Bedock 2018); for example, in the case of the adoption of the Treaty of Amsterdam in 1997 (Jacques Chirac, a right-wing politician, was then President of the Republic, while Lionel Jospin - representing the plural left - was Prime Minister).

Moreover, when the President chooses the parliamentary procedure (he avoids a referendum), this requires a three-fifths majority, which is sometimes difficult to obtain. The prospect of probable failure may lead the president to abandon his project, as in 1973, over the revision of the presidential term of office. More generally, since the 2008 reform, no revision has taken place precisely because of this assumption.

At the same time, every parliamentarian has the right to initiate a constitutional revision. In practice, many proposals have been attempted since 1958 but none has reached the stage of being voted on in Congress, reflecting the difficult implementation of a revision of parliamentary origin.

Between 1958 and 1990, the revision of the Constitution was a rare step. However, from 1992 and the bringing of the Constitution into line with the Maastricht Treaty, revisions followed one another at a frantic pace: 17 revisions were carried out between 1993 and 2008. Not all of them were on the same scale. Some concerned technical adjustments (e.g. the revision of 30 December 1963 on the date of parliamentary sessions), others related to bringing the Constitution into line with international treaties, particularly European Community ones, and still others made substantial changes to the organisation of institutions and public authorities. In the latter category, we can classify the revisions of 2000 (presidential term of office) and 2008. The latter, which dates from 28 July 2008, under the presidency of Nicolas Sarkozy, was the 24th modification of the 1958 text. It was striking in its scope (39 articles amended, creation of 9 others) and in the process of its elaboration. Indeed, it was preceded by a committee of experts chaired by former Prime Minister Edouard Balladur⁴, followed by high-quality parliamentary debates on the entire constitutional

³ Cohabitation consists of the coexistence of a head of state elected by universal suffrage on a political programme and a prime minister relying on an elected parliamentary majority to support an opposing policy.

⁴ This was not the first time that a committee of experts had met to propose changes in the functioning of the institutions. In 1992, the President of the Republic François Mitterrand convened an "advisory committee for the revision of the Constitution" chaired by dean Georges Vedel. On the basis of the committee's opinion, President Mitterrand drew up a vast draft, of which only the provisions on the judiciary and the criminal responsibility of ministers were to be adopted in 1993.

text. However, the debate was not consensual between majority and opposition, which led to a very close vote in Congress.

At the same time, the Fifth Republic is regularly criticised by politicians and academics. Some believe that the regime of the Fifth Republic is deeply unbalanced in favour of the executive, and in particular the President of the Republic, elected by direct universal suffrage. The latter is both very powerful and, at the same time, unaccountable and politically irresponsible. Moreover, the spectacularization and personalisation of the democratic exercise is reinforced by the role of the media and opinion polls, which portray political activity mainly as a competition between opposing camps, the political actors being therefore in permanent campaign.

Also, several authors (Dominique Bourg, Bastien François, Loïc Blondiaux,...) and political left-wing leaders (Benoît Hamon, Jean-Luc Mélenchon, Arnaud Montebourg,...) plead for the establishment of a Sixth Republic, in order to put an end to the presidentialisation of the French political system and to give back to Parliament the power to truly control government activity. It would also involve relying on citizen participation in the drafting of laws, the implementation of public policies and the management of local authorities. Referendums could be initiated through petitions.

In any case, a rich reflection has been developing in recent years, particularly in political philosophy, on the possibility of making representation more democratic. This could lead to an 'open' democracy in which the actual exercise of power is entrusted to ordinary citizens (Landemore, 2020).

France has a complex history with referendums. Prior to 2008, referendums were initiated by the President, following the “plebiscite” tradition, ie: consultation at the initiative of charismatic leaders like Napoleon or De Gaulle, in order to get more legitimacy. The referendum is less and less used after De Gaulle. In 2005, French citizens were allowed to vote in a referendum for the last time in their history so far. After an intense debate, the “no” to the European Constitutional Treaty (TCE) is massive, despite a campaign for the “yes” gathering most of the political, mediatic and economical elites. Shortly after, under the presidency of Nicolas Sarkozy, the Congress will cancel the vote of the citizens and ratify the same treaty under a different name. This act leads to a deep trauma and fosters a defiance of the citizens towards the politicians and vice-versa, which still impacts politics nowadays. Indeed, French citizens are currently among the most defiant people towards politicians among advanced industrial countries.

Nevertheless, the 2008 reform introduces a so-called “shared initiative referendum” in the Constitution. Some analysts claimed that the initiative was shared between the members of parliament (MPs) and the citizens. Actually, only the MPs have the power to initiate the procedure, if 1/5 of them backs the bill, ie: 185 MPs, potentially combining members of the National Assembly and of the Senate. After securing this already high number, the bill then needs to receive the signatures of 1/10 of the electoral body, ie: 4,5 million citizens, in just 9 months; which means an average of 16 000 new signatures per day. Then the initiative needs to be validated by the Constitutional Council. After this incredibly difficult process, a victorious initiative

does not trigger a referendum directly but is granted the right to be examined by the Parliament under 6 months; Parliament can decide to reject the proposition after a short debate. If, and only if, the Parliament does not debate the initiative at all, even for a rejection, then the President puts the initiative to a referendum. Designed on purpose to be impossible to implement, France has never witnessed a “shared initiative referendum”. Only one initiative, against the privatisation of Paris airport, managed to gather 1/5 of MPs support, only to fail at reaching the 4,5 million signatures afterwards.

At the local level some cities have experimented with local referendums. However, in Grenoble, the prefecture forbade the municipalities experimentation allowing a referendum if an initiative gathered 2 000 signatures, and needing 20 000 votes to be approved.

The Yellow vests social movement's main claim was the “RIC”, citizen initiative referendum, at bottom-up process in total opposition to the top-down plebiscite of the Presidentially initiated referendum currently allowed by the Constitution. This proposition was also supported by various NGOs and political parties.

Incremental Constitution-Making

The Constitution of 1958 has given significant powers to the President of the Republic, and subsequent practice by the various persons who have held the office has confirmed this presidential pre-eminence. In addition to the attributions precisely fixed by the Constitution, the President has broad prerogatives in certain areas, such as international relations.

Moreover, one of the consequences of the election of the President by direct universal suffrage - which pits two candidates against each other in the second round - is the bipolarisation of political life. Each party then decides in favour of one of the two candidates. This gives the Government a stable majority throughout the President's term of office. However, this generates a direct link between the Head of State and the parliamentary majority. This leads to the submission of the latter and makes the head of state a “captain” rather than a “referee” over the parties (Ghérardi, 2013). Concomitantly, this leaves the prime minister in the background.

The revision of 23 July 2008 recognises the “question prioritaire de constitutionnalité” (QPC). This allows any people subject to trial to challenge the constitutionality of a law that applies to his case because it infringes the rights and freedoms guaranteed by the Constitution. Thus, constitutionality review is no longer solely at the initiative of the political authorities⁵. Moreover, it is no longer carried out *a priori* (before the promulgation of a law) but can be carried out afterwards (Arkwright, 2013)..

⁵ In France, the Constitutional Council, which control the constitutionality of laws, may be referred to by the President, the Prime Minister, the Presidents of the Assembly or the Senate, 60 deputies or 60 senators.

The incorporation of European treaties into national law may have required the implementation of constitutional revisions. Some of these supranational texts have been the subject to a referendum. Although not always approved, they have sparked broad debates in society, and have sometimes been able to emerge from deliberations outside the restricted circle of political professionals.

For example, the referendum of 20 September 1992 aimed at ratifying the Maastricht Treaty. Although difficult, the subject fascinated the French (only 30.30% abstained) : the "yes" narrowly won with 51.04% of the votes.

More recently, even more intense was the debate on the Treaty establishing a Constitution for Europe (TCE) which was proposed in the referendum of 29 May 2005. While the majority of the political class had chosen for a position in favour of the TCE and this was largely expressed in the mass media, the supporters of the "no" vote expressed themselves very widely on the web and formed a closely intertwined and extremely heterogeneous community (Fouetillou, 2008). Although it was not possible to establish a direct link between the strength of the "no" community, which was highly mobilised on the web, and the final negative result of the referendum, the latter acted as a catalyst of opinions whose dynamics went against the media and partisan discourses of the time. From then on, the web was able to appear as a privileged space for the emergence of counter-discourses, but failed to promote deliberative processes of an equivalent quality to that observed in precisely organised minipublics.

Deliberative Events And Incidents

In France, there is no specific deliberative democratic device either specified within the Constitution, nor used for Constitution-making. However, several democratic innovations and deliberative events have been experimented. Overall, most of the participatory and deliberative practices have been carried out at the local level, few at the regional level, and even more rarely at the national level. It would be too tedious to detail every single one of them, but it is possible to get an idea of the phenomenon by consulting the scientific journal *Participations*, as well as the following networks: GIS Démocratie & Participation, L'Institut de la Concertation, and Décider Ensemble. Furthermore, at the local or regional level, various democratic innovations can be found, such as: participatory budgeting (Pradeau 2018; Sintomer, Röcke, and Herzberg 2016), civic tech (Monnoyer-Smith and Wojcik 2014; Mabi 2017), citizens' advisory councils (Demoulin and Bacqué 2019), consultative procedures connected to urbanism or ecology, etc. (for an overview: Blondiaux 2008). We will leave those aside to focus on what we view as the most important French deliberative devices and events of the recent years.

We first must point out the existence of an independent administrative authority, the National Commission for Public Debate (Commission Nationale du Débat Public, CNDP), set up in 1995, whose purpose is to guarantee the implementation of participatory democracy procedures provided for by law or promoted by public authorities (Revel et al. 2007). However, its scope of action is limited to projects and public policies that have a strong economic and environmental impact. It is therefore

not intended to supervise participatory or deliberative procedures aimed at the organisation of institutions. In fact, the CNDP's action is essentially at a local or regional level when a wide variety of land use and infrastructure projects are envisaged (motorway projects, high-voltage lines, wind farms, waste recycling plants, etc.)⁶. In recent years, however, it has been seized on broader themes such as agriculture in 2019 for the elaboration of the national strategic plan of the CAP (Common Agricultural Policy). It also produces methodological recommendations to improve existing participatory procedures, such as the mission on citizens' advisory councils⁷ in priority neighbourhoods carried out in 2018.

The CNDP was asked in December 2018 to be the guarantor of the "Great National Debate" (see below) wanted by President Macron, which was to be based on four major themes (democracy and citizenship, taxation, organisation of the State and ecological transition). However, the CNDP was pushed aside, and the Great National Debate was finally organised by the Government itself.

Second, under the leadership of Axelle Lemaire, Secretary of State for Digital Affairs, and under the authority of the Minister of the Economy, the bill for a "Digital Republic" illustrates the political interest in methods of drafting the law that directly take into account the opinions and expertise of ordinary citizens. The latter were consulted in two stages. Upstream of the project, the National Digital Council (CNN)⁸ launched a four-month online consultation (October 2014-February 2015) which elicited 4,000 contributions from professional unions, associations, businesses and ordinary citizens. With the help of these contributions, the CNN submitted its report to the government on 18 June 2015, entitled "Ambition numérique - Pour une politique française et européenne de la transition numérique" (Digital Ambition - For a French and European policy for the digital transition), which was a source of inspiration for the bill.

The bill itself was the subject of a three-week online consultation. Citizens were thus able to comment on the articles of the law, express a "for", "against" or "mitigated" opinion, and propose amendments - themselves submitted to the opinion of other Internet users. More than 21,000 people took part in this consultation, with the platform registering more than 150,000 votes and 8,500 contributions. The government finally added five new articles to the draft, directly resulting from these contributions (Barraud, 2016). The final text was adopted in 2016.

Third, France has hosted few deliberative minipublics compared to other countries, like the United Kingdom or Denmark, but several citizens' panels have been experimented nonetheless (Courant and Sintomer 2019). Without being exhaustive we can mention, at the national level: the citizens' conference on GMO's held by the

⁶ For a detailed study of the modalities of deliberation of a CNDP debate, devoted to an old waste treatment facility which included an incinerator, see Monnoyer-Smith, Wojcik, 2012.

⁷ Established in 2014, mandatory in each district defined as a priority by the City Policy, citizens' councils are composed of citizens drawn by lot and local actors. Their aim is to stimulate citizens' initiatives and to co-construct city contracts.

⁸ A body reporting to the Secretary of State for Digital Affairs and responsible for studying digital issues, particularly in line with the economy, organisations, public action and territories.

Parliament in 1998 (Boy, Donnet Kamel, and Roqueplo 2000; Reber 2011); the citizens' jury on climate change in 2002 (Testart 2015); the citizens' jury on the "end of life" ("fin de vie") initiated by President Hollande in 2013; the panel on big data in healthcare (Gourgues and Mazeaud 2017); and a consultation on the pluriannual program for energy. At the regional and local level we can mention citizens' juries and citizens' conferences on: waste (Barbier, Bedu, and Buclet 2009), wealth indicators (Lefebvre 2013), budget (Sintomer and Talpin 2011), or nanotechnology. All of those deliberative forums were advisory or consultative, as is the vast majority of cases in the world. Surprisingly, France is also home to the first minipublic ever and to the first permanent and institutionalized randomly selected assembly in modern history, the High Council of the Military Function (Courant 2019a). For an overview of those minipublics and others, one can consult the synthesis by Courant and Sintomer (2019) and the databases created by the Université Libre de Bruxelles and the Technische Universität Berlin. The main research result is that deliberative minipublics are increasingly used and with an ever growing media attention, without producing clear political uptakes nonetheless.

Fourth, in the end of 2018 a strong and popular social movement rose against Emmanuel Macron's policies. The Yellow vests ("Gilets jaunes") articulated claims for social justice with constitutional demands. Indeed, the two main demands of the movement were the introduction of the right to popular initiative, that is to say referendums triggered by petition, and the convocation of a randomly selected assembly for writing a new Constitution. Neither of those requests were met by the Government which organized the Great National Debate ("Grand Débat National") instead.

This Debate spread during three whole months through several channels: local public meetings, written requests in rural town halls, an online platform, thematic national conference with NGOs and stakeholders, and finally randomly selected citizens' regional conferences (Courant 2019b). In terms of breadth, the Great National Debate is quite impressive: 16 000 townhall notebooks, 1 932 881 online contributions and 10 452 local meetings. However, in terms of "output", the Great National Debate did not lead to major political reform or change, but during the conclusion of this process, the President announced he will launch the Citizen Convention for Climate.

Aside from its weak political impact, several shortcomings can be identified regarding the Great National Debate (Courant 2019b). First, his organisation was led by members of the Government, lacking the impartial status of the CNDP. Second, the online platform was not deliberative, but a mere survey with pre-determined questions and no option for the participants to discuss with one another. This is contrasted with the Yellow Vest competing initiative called the "Real Debate", with a full deliberative and open online platform. Third, a survey investigation reveals that the sociology of participants in the Great National Debate is quite different, if not opposite, from the one of the Yellow vests. Participants in the local meetings were in majority old, wealthy, educated males. Fourth, in the local meeting the quality of the deliberation was very low, and the regional minipublics were only lasting one and a half days with no expertise input. Finally, the Great National Debate was, in a way, a strategic PR operation, allowing Macron to occupy the media and public space, making him look

like a democrat, while his police forces were violently repressing the Yellow vests protests. The Debate did “construct an alternative public”, an alternative image of “French citizens”, to the one proposed by the Yellow vests male (Courant 2019b).

Fifth, the Citizen Convention for Climate (CCC) is one of the most ambitious deliberative minipublic worldwide. Indeed, its size, length, position in the system, funding, and mandate are all very impressive. This democratic innovation was called for by a group of activists, the Citizen Vests (“Gilets citoyens”), some of whom negotiated with governmental advisors during closed doors private meetings in Winter 2019. The organization of the CCC was given to the Economic Social and Environmental Council (Conseil Economique Social et Environnemental, CESE) but the actual Governance Committee of the CCC was composed by various actors. The CCC was bringing together 150 randomly selected citizens, broadly representative of the larger population thanks to six demographic criteria: sex, age, education, wealth, region, and residence. However, nothing was done to verify their representativeness in terms of opinion, political preferences or views on climate change (Courant 2020b). The mandate of the CCC was given by the Prime Minister: “How to reduce greenhouse gas emissions in France by at least 40% (in relations to 1990’s levels) by 2030, in a spirit of social justice?”.

Deliberating during seven weekends and two additional meetings online spread over nine months, the goal of the CCC was therefore to select, refine, and propose policies to reach those objectives, an impressive total of 149 recommendations, often very detailed, were finally put in its final report. Interestingly, the assembly voted in favor of constitutional modifications, especially in order to introduce the fight against climate change in the Constitution; this measure might be put to a referendum soon.

However, in terms of deliberative organization and quality the French CCC is somewhat of a setback vis-à-vis the Irish citizens’ assemblies, from which the CCC claimed to draw its inspiration (Courant 2020a). The Irish minipublics were more respectful of certain principles of deliberative democracy such as equality and impartiality. Nevertheless, the Irish process is also a complex one and faced some shortcomings of its own (Courant 2021). Indeed, the CCC did not function as one assembly but as an addition of five thematic groups of 30 citizens each, therefore limiting its collective and representative aspect, as well as the potential of “collective intelligence”. Table discussions were not assisted by a professional facilitator nor a note-taker, leading to inequality in speech pattern among participants. Experts were very often stakeholders rather than researchers, and did give their personal opinions and suggestions on many topics instead of presenting facts and data. Some experts had access to the minipublics in a disproportionate manner compared to others; some being allowed to speak 50 minutes while some only had 5 minutes. Furthermore, most of the time the panel was not presented with competing alternatives, as experts or stakeholders were agreeing on the public policies to be proposed (ie: not about climate itself, but about energy policies, housing, mobility, etc.). Finally, a fair share of the organizers themselves were pushing their own policy agenda, suggesting reforms to the citizens, very insistently at times. All that pose a problem in terms of fairness and of impartiality (Courant 2020a).

Finally, beyond organizing the CCC, the Economic Social and Environmental Council (CESE) is currently undergoing important changes. This institution is home to representatives of the organized civil society, i.e.: representatives of unions, NGOs, associations, etc. The CESE is a constitutional assembly, considered as the “third chamber”, and recently went through a reform to make it the “chamber of citizen consultation”. Besides the CCC, the CESE also organized three citizens’ panels, one during the Great National Debate, one on the topic of “New generations”, and one on the vaccination strategy against Covid 19. Moreover, the CESE can be requested to deliberate on a topic through petitions. This chamber is supposed to be the institution in charge of organizing most deliberative procedures in the future.

Conclusion

Overall, France’s situation is a contrasted one. On the one hand, the French institutional system is very vertical, most powers being given to the President; a trend that has increased throughout the successive constitutional reforms. On the other hand, France has recently witnessed a burst of democratic innovations, even if some participatory experiments were already carried out since the 1990’s. There is still some resistance of the political class against deliberative procedures, but due to the level of defiance of the population, they might not have much of a choice. In this spirit, it was announced that future citizen conventions, following the “model” of the one on climate, might be called each year on different topics. The CCC has already inspired two local deliberative minipublics sponsored by the region Pays de la Loire and Occitanie. What remains uncertain is whether the future democratic will actually foster a democratization of the very vertical French democracy, or be limited to a simple communication strategy. A deliberative and participatory reform of the French constitution, wanted by several parties, activists and scholars, might open a way forward to render the political system more inclusive and democratic, but remains unlikely.

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