

A Male, White and Conservative Constitutional Judge

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2022-05-03T15:32:47

In February and March 2022, three new members have been appointed to the French constitutional court, the *Conseil constitutionnel* („Constitutional Council“): Jacqueline Gourault, Véronique Malbec and François Sénors will replace Claire Bazy-Malaurie, Nicole Maestracci and Dominique Lottin. [Patrick Wachsmann](#) rightly criticized [the conflicts of interests affecting the three new judges](#): Jacqueline Gourault is a former politician and will be [asked to judge laws she herself had been promoting](#). Véronique Malbec, a civil judge, was a supervisor of the public prosecutor who closed a complaint against Richard Ferrand – the very person who proposed to appoint her. François Sénors, was director of the cabinet of the president of the Senate (from 2014 to 2017) who appointed him.

A closer look at the new composition of the Council shows that France’s constitutional court is composed of a majority of male, white, elitist graduates with a right-wing tilt, drawn from the ranks of politicians and civil servants. This is the group of persons that gets to interpret the Constitution. In a broader sense, it is actually a good portrait of the current French political system, which seems to resemble some kind of oligarchy.

A new composition of the Constitutional Council

The nomination of judges to the French Constitutional Council lies in the hands of the President of the Republic, the President of the National Assembly and the President of the Senate. Each can propose three out of the nine members of the Council. The proposed names are then examined by special commissions in the National Assembly and the Senate, but their veto power is limited.

The new appointments have no significant effect on the member’s age, which remains in the high range of 66-67 and the Council is not departing from its reputation of a “pensioners’ club”, to use an expression coined by Dominique Schnapper, a former member of the Council.¹⁾ [Une sociologue au Conseil Constitutionnel](#), Gallimard, Coll. NRF Essais, 2010

The new composition of the court is a step backwards as far as the representation of women is concerned, since the ratio of men to women has gone from 5 men to 4 women to 6 men to 3 women.

The absence of ethno-racial diversity, already noted by Nicolas Bau and Liora Israël, who have carried out the most complete analysis of the Council’s sociology since its creation²⁾ Nicolas Bau and Liora Israël, „Quelques éclairages sociologiques sur la composition du Conseil constitutionnel“, in *Le Conseil constitutionnel à l’épreuve de*

la déontologie et de la transparence, Elina Lemaire, Thomas Perroud [ed.], Institut Francophone pour la Justice et la Démocratie, forthcoming – 2022 is troubling and Gaston Monnerville remains today the only non-white justice in the history of the Council.

Meanwhile, the new appointments have made the Council more diverse in terms of geographic origins. The three outgoing members were born in Paris and the new members make Parisians a minority.

A right-wing court

While in the United States public opinion is worried about a Supreme Court that is tilting to the right, the French society does not seem to realise that there is only one left-wing member remaining on the Constitutional Council: its President Laurent Fabius.

We know today that the political affiliation of Council members matters. Empirical studies by [Raphaël Franck](#) and [Romain Espinosa](#) have highlighted the Council's lack of political independence and show how much its decisions are impacted by the political affiliations of its members.

The majority of the current Council members are former politicians: Laurent Fabius (Socialist party "PS"), Jacques Mézard (President Macron's party "LREM"), François Pillet (Conservative party "LR"), Alain Juppé (LR) and Jacqueline Gourault (LREM). The Constitutional Council is thus composed of a majority of right-wing politicians. Bringing politicians to a Constitutional Court is an unfortunate French specificity, which comes with a high risk of bias. Politicians who were involved in drafting laws will now be called to judge the constitutionality of these laws. If we look at the political colour of the Council based on the political affiliation of the people who appointed the members, the situation is even clearer: Laurent Fabius remains the last man on the left, the rest of the Court being composed of people appointed by LREM or LR politicians. The person who has appointed most members because of his longevity as president of the Senate is Gérard Larcher. He is a member of LR.

A court of civil servants

Another striking point is the strong representation of civil servants, including those politicians who began their careers in the civil service. There are six senior civil servants in the new Council. Three of them from the Council of State, which is the legal advisor of the Government and the supreme administrative jurisdiction in France, two others from the judiciary and Alain Juppé from the Inspectorate General of Finance. This finding is consistent with the conclusion of the study by Nicolas Bau and Liora Israël that the share of senior civil servants has increased since the Council's creation in 1958.

The group of civil servants is not homogeneous, but what distinguishes French civil servants who become constitutional judges and could explain their promotion,

is certainly that they have had a career in the administration of justice as heads of courts rather than as prominent judges whose opinions would be known and commented. French judges do not give reasons for their judgments and always judge collectively. It is therefore more difficult for them to make a career out of their opinions than for judges in the United States or the United Kingdom, for instance.

The presence of too many civil servants is potentially problematic, as the Council could give the impression of bias if it is called to review laws imposing more ethics on civil servants, for example, [as it has been the case in the past when the Constitutional Council has quashed provisions regulating conflicts of interests of senior civil servants](#).

The increasing presence of senior civil servants at the constitutional Council represents a significant change over time. We know today about the porosity between the senior civil service and politics in France (from 1987 to 2017, 47% of ministers came from the [high civil service](#)), and the composition of the Council reflects this domination. The presence of administrative elites on the Council raises issues about the legitimacy of the institution as they do not have the necessary expertise to enforce the Constitution against acts of Parliament and have a culture of service to the executive. France is an administrative State, traditionally, so this should not come as a surprise but the grip that civil servants have gained on the Constitution is not a sign of a pluralist democracy.

A court with little constitutional expertise

Legal competence is not required to become a member of the Council and none of its members have a particular training in constitutional law. However, the Council still has some legal experience. Two of the members are judges who graduated from the *École nationale de la magistrature* (the [National School for the Judiciary](#) that trains civil court magistrates), all of whom studied law, and two other members had been lawyers before being politicians. That makes four lawyers. The three members who are also members of the Council of State (the Supreme Court for administrative disputes in France) have necessarily been led to handle public law, even if they didn't study law.

Even if age and experience might be considered important, contemporary legal knowledge would certainly also be relevant and useful.

A court of ENA graduates

Another important observation about the composition of the Council is that all of its members were educated in the French elitist *grandes écoles* (universities like HEC, École nationale d'administration (ENA), École normale supérieure (ENS) and Sciences Po Paris). The *grandes écoles* are a key to the system of power in France's private and public sectors and their recruitment is very unequal. They are almost closed to the poor, very difficult to get in for women and mostly for Parisians. Most prominent politicians in France come from ENA or Sciences Po Paris. The

French system of higher education is divided in two: a small group of *grandes écoles* educates a small minority of the population (less than 1%) while universities deal with the mass of students. The Constitutional Council is a good mirror of this power structure. Among the members of the Constitutional Council, there are two graduates of the ENS (Laurent Fabius and Alain Juppé), four graduates of ENA (Laurent Fabius, Alain Juppé, Michel Pinault and François Seners), two graduates of the ENM (Dominique Lottin and Véronique Malbec) and one from HEC (Michel Pinault). Alain Juppé and Laurent Fabius graduated from SciencesPo Paris and François Seners from SciencesPo Strasbourg. The presence of the *grandes écoles* is important, especially ENA, corresponding to the rise of senior civil servants in the Council.

Conclusion

In conclusion, the Council is composed of a majority of male, old, white, elitist graduates with a right-wing tilt, drawn from the ranks of politicians and civil servants without much expertise in constitutional law. This raises questions, but unfortunately, public debate has not picked up on this which might be the sign of a weary society, not responsive to the most blatant signs of power capture.

It is in terms of allegiance a politically right-wing council that fails to represent the diversity of French society. There is an absence of political pluralism in the constitutional court and the omnipresence of civil servants is a mark of the dysfunction of French democracy. This situation could be interpreted as the abolition of jurisdictional checks and balances and therefore as a weakening of democracy, which can only be alive through dialogue between the powers.

The Council also mirrors the deep inequality that characterizes French political elites and is the mirror of a state that is no longer representative of its society, that is no longer even concerned with representing the pluralism of interests. This is not a situation characteristic of a liberal democracy.

References

- Une sociologue au Conseil Constitutionnel, Gallimard, Coll. NRF Essais, 2010
- Nicolas Bau and Liora Israël, „Quelques éclairages sociologiques sur la composition du Conseil constitutionnel“, in Le Conseil constitutionnel à l'épreuve de la déontologie et de la transparence, Elina Lemaire, Thomas Perroud [ed.], Institut Francophone pour la Justice et la Démocratie, forthcoming – 2022

