A Court With Powerless Judges

The Informal Power Structures of the French Constitutional Court

Thomas Perroud

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The new appointments of judges to the French Constitutional Council, I described in an earlier post this week, are certainly important but also less decisive than one might think. The structure and the functioning of the Court are built to minimize the power of its judges. The real decisions are made by the legal department of the Court's administration.

Decision Making Without Judges

In my previous post, we saw that French constitutional judges are not experts in constitutional law. How then does the court manage to draft decisions that follow constitutional precedents?

The French Constitutional Council, unlike its foreign counterparts, is an institution where judges are sidelined in favour of the legal department, the *service juridique*. In courts, the legal department is not usually in charge of any judicial job but, for example, of drafting contracts for the supplies of the court. This is not the case with the French *Conseil constitutionnel*. It's legal administration is a key institution in the judicial functioning of the Court.

I conducted a series of interviews with judges, members of the legal department and former president of the Court, President Jean-Louis Debré, which only highlighted this point. The legal department consists of the Secretary General and his team of highly qualified lawyers. Legal competence is therefore present, simply not on the side of the judges. The composition of the legal department does not appear on the Court's website, but this is where the decisions are drafted, once a case is received at the Council. The fact that there is a draft decision shows that the legal department makes political choices.

Former president of the Court, Jean-Louis Debré, confirmed in an interview that when referrals arrive, there is a discussion between the Secretary General of the legal department and the President of the Court. According to him, this phase is crucial and "it is the Secretary General who sets the tone". For Jean-Louis Debré, what he likes to call the "presidential couple" is made up of the President and the Secretary General and maintains control over the process at all times, particularly over the outcome, the draft decision.

Then one of the judges is appointed as rapporteur. The choice of the rapporteur is made by the President and the Secretary General and they seem to avoid choosing a rapporteur specialized in the field of the specific case. This, of course, prevents him or her from taking weight in the elaboration of the decision. When the rapporteur receives the text to be examined, he or she also receives a note describing the precedents and a draft decision. His or her competence in constitutional law is limited, he or she is not specialised and has no legal assistants or clerks. Everything is set up to ensure that the position of the legal department prevails. I was told by a former justice that if a judge wishes to go in an opposite direction, he or she must do so alone and write a decision, which is not easy if you are not used to judicial drafting.

Hidden Power Structures

The refusal to provide judges with assistants has the same result as the refusal to choose specialised rapporteurs: it gives precedence to the administrative part of the Court, which is composed of high-quality lawyers. The Constitutional Council is a good symbol of French democracy, in which the administration has taken on such weight that it overshadows its democratically elected representatives. To criticize the incompetence of judges therefore somehow misses the point, as the Court's decisions are not made by judges,

but by the legal department. The judges only vote on the final decision but almost never produce it. The actual functioning is the real problem of the Council. The administrative part of the Council, which is not democratically elected or even appointed in a transparent process, interprets the law and thus gives life to the French Constitution. One can therefore read the evolution of the Council's jurisprudence according to the personality of the legal department's Secretary General. When Marc Guillaume and Laurent Vallée were heads of the institution (the second one left the Constitutional Council to become Secretary General of Carrefour, a private company), very political decisions were taken, as I argued at the time, with highly questionable outcomes tending to give precedence to contractual freedom over social rights, sanctioning the confiscatory nature of taxes, or putting a brake on the legislator's attempts to fight against conflicts of interest and tax evasion.

A Captured Court

Of course there is nothing to officially prevent judges from voting against the legal department's proposal. Judges remain free to vote as they wish. Depending on the complexity of the question posed, or the policies involved, their involvement may change. But the difficulty for them remains to be able to encode their opinions into legal reasoning and, in particular, to write a decision. And this is where the institutional setting of the Council can discourage even the most audacious. My assumption would be that a constitutional Court was accepted in France in 1958 precisely because it was set up to be captured by an administration very close to the executive.

ABOUT THE AUTHOR

Thomas Perroud
Thomas Perroud is Professor of Public Law at the University Panthéon-Assas (Paris II) in Paris.

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