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## U.S.-FRANCE ANALYSIS SERIES

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### THE FRENCH CONSTITUTIONAL COUNCIL

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In the months before this spring's Presidential and Legislative elections, the Constitutional Council struck down some of the key provisions of three laws adopted by the legislative plurality that supported Prime Minister Lionel Jospin's government. Specifically, they invalidated an article of the law funding the social security system relating to financing the 35-hour work in hospitals, an amendment to the law on social modernization proposed by the communist party that would have made it very difficult for enterprises to layoff workers, and an article of the law on devolving power to Corsica that would have given that region special powers not accorded to other regions. Although these decisions were made with care and although the judges accepted other controversial provisions in these laws, the judges' actions nonetheless spawned Parliamentary denunciations, not only of the prospect of "government of the judges" but also of the excessive "right-wing" influence within the Council.

In fact, however, these decisions represent only the latest steps in what has been a long but constant evolution of the Council. Ten years ago, similar complaints emanated from the right-wing backbenchers who could not abide the decisions of a council supposed to be under socialist control. From my personal experience as a judge who served for the first half of his term within a "leftist" Council and the second half within a "rightist" one, I know that both claims are without merit. The French Constitutional Council, created by de Gaulle as an institution devoted to the Executive in 1958, has progressively become a true court, clearly independent from other powers and political parties.

The critical element in this evolution has probably been the process of appointment to the court. The nine members are selected for terms of nine years, with three members replaced every three years by the President of the Republic, the President of the Senate and the President of the National Assembly. In theory, this process is a purely personal and political one without any requisite as to previous training or experience of the nominees. In practice, however, the actual choice made by the appointing authorities has heavily favoured members with distinguished careers. Often and deservedly called "wisemen," nominees have typically had vast experience either in the legal field (judges, lawyers and professors) or in the political one (former ministers or former members of the Parliament). Indeed, such has been their stature that one may wonder whether a formal requirement of any professional specifications would actually improve rather than impoverish the recruitment of the Council.

Such distinguished nominees have enabled the Council to take on a considerably greater role than originally envisioned. The very idea of creating an institution to review legislation for consistency with the Constitution was sort of a revolution in the French tradition of absolute parliamentary control initiated in 1789-1792. In fact, legislative review was not at all the first objective of the founding fathers— de Gaulle and Michel Debré— when they introduced a constitutional council into the Constitution of the Fifth Republic. The main power devoted then to the Council was to determine the respective areas covered by the acts of Parliament— strictly limited in 1958— on the one hand and by Executive directives on the other. The Council was primarily conceived as sort of a watchdog of the Government, in charge of confining the Parliament to its lowered status. In the same spirit, the Council was to monitor elections so as prevent the members of Parliament from regulating their own elections, a power that had been much abused in the past.

The present stature of the Constitutional Council as the guarantor of the legislature's observance of fundamental constitutional rights came later, in two successive steps. The first step occurred as a result of a July 1971 decision that declared that the French constitution, and in particular the Preamble of the 1946 which had been recognized in the preamble to the 1958 constitution, upheld freedom of association as a "fundamental principle recognized by the laws of the Republic". This gave the way to the shaping of what is called in French the *bloc de constitutionnalité*, the constitutional rights "package" consisting of the Constitution proper, its Preamble, the Declaration of Rights of 1789, the Preamble of 1946 and the fundamental principles recognized by the laws of the Republic, i.e. consistently found in republican legislation enacted in pre-war France and including the main components of *l'Etat de droit* such as individual liberties and respect for due process. The second step came in 1974 when President Giscard d'Estaing initiated an amendment to the Constitution extending to sixty deputies or sixty senators the right to challenge as unconstitutional a bill just passed by Parliament. Previously, only the three appointing authorities plus the Prime minister could initiate such a challenge.

The process of decision-making within the Council is fast, simple and informal. The Council usually has just one month to hand down its decision. The required speed of action is a necessary offset of the power given to the Council to review *a priori* the acts of Parliament, which cannot be promulgated until the Council makes its decision. The whole procedure is adversarial and written (with observations by the Government as the defender of the law, replies by the authors of the challenge, and eventual rejoinders by the Government) before the court makes its decision *in camera*. The deliberations remain secret, without dissenting opinions, and the President having a deciding vote in case of a tie (seldom used in practice).

More interesting than reviewing the process of decision-making is sorting out the rationale for the decisions. Since 1971 the Council feels entitled to choose the relevant source among the documents in the so-called block of constitutionality. More specifically, that amounts to choosing between the two main packages of rights, either the one deriving from the first wave of human rights legislation, dating back to the last decades of the eighteenth century, or the second wave that came about in the immediate aftermath of World War II. The rights of the first waves are derived from natural law and consist of pre-existing rights that are "declared," not created. These are rights to "do" and to be protected against State intervention. The rights of the second wave are derived from political and social history and were created by affirmative action of

governments committed to the Welfare State. They are rights to “have,” that is to benefit from State intervention rather than to be protected against it.

In the face of this dilemma of contrasting principles, the Constitutional Council has tended to proceed in one of two ways. The first is making a choice, favoring one over the other along ideological lines, the first set of rights being primarily favored by the supporters of liberalism, the newer ones by the supporters of social democracy. The Council has never clearly chosen sides in this controversy. Working in the spirit of checks and balances, it has rather the tendency to limit the most radical shifts in favor of one package of rights or the other. Thus, the Court’s approach is in the end more pragmatic than ideological. It takes into consideration both types of rights as the contrasting ends of one spectrum, both extremes of which are to be avoided. This often leads to a certain “middle of the road” position that is viewed as too timid by the “die hard” of both parties, but has greatly helped the Council to gain legitimacy on the political scene.

What are the effects of the rising power of the Constitutional Council on the French political system? The clearest direct effect consists in setting limits or bounds on the legislative process, either formally, by ensuring that due process is observed, or substantially, by guaranteeing that legislation respects of constitutional. A survey of the case law deriving from the decisions of the Council is quite impressive. In a series of small steps, the Council has built up an important juridical doctrine with regard to the correct functioning of French political institutions and the practical scope and significance of the “immortal principles” intended to guide the legislature and the citizens.

The indirect effect of the Constitutional Council’s activism, less frequently stressed, consists in the deterring the Government and the Parliament from moving outside of the constitutional limits determined by the Council, or even too close to them for fear of the reaction of the Council. As important as the actual number of decisions taken by the Council is the number of decisions that it did not have to be taken due to legislative self-restraint. Last but not least, one must emphasize an important side effect, although perhaps a perverse one, of the rise of Council power and autonomy, which is an increasing tendency to amend the Constitution. The present Constitution was amended fifteen times in forty-four years, five times in the first thirty-four years, from 1958 until 1992, and ten times in the last ten years. The acceleration is clear and is unlikely to slow down in the coming years.

The trend might continue to be fed by various modernizing policies, such as devolution of power to the regions. But the main source of required constitutional reform will undoubtedly stem from the various legal implications of European integration. The ultimate challenge of the French Constitutional Council in the coming years will be to find its proper position, like all the other constitutional courts in the European Union, vis-à-vis the national state on the one hand and some future quasi-federal European political entity on the other. Creating the institutional linkages between the European Court of Justice and the national courts will undoubtedly be difficult, and probably highly frustrating. But, as Rudyard Kipling used to say: this is another story...