A View of France

Review of Mathias Möschel. *Ex-Ministers as Constitutional Judges*. Oxford University Press, 2025. ISBN: 9780198930228.

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On September 5, 2025, the president of the French Republic awarded the insignia of "Chevalier" of the Legion of Honor to Richard Ferrand, who has served as president of the French Constitutional Council (CC) since March 2025. In his speech, President Emmanuel Macron praised "the essential role [of this institution] in democracy." Above all, he honored his long-time "friend," known for having been president of the French National Assembly (2018-2022) and president of the Executive Bureau of the president's party (2021-2024, first La République En Marche!, then Renaissance party). Although his term as minister (of territorial cohesion) lasted only a month, Richard Ferrand's political career illustrates the specific continued political nature of the French Constitutional Council. This characteristic becomes even clearer when we recall that Richard Ferrand succeeded Laurent Fabius, who was president from 2016 to 2025, after having held several positions, most notably prime minister (1984-1986) and minister of foreign affairs (2012-2016). Richard Ferrand now sits alongside another former prime minister, Alain Juppé (1995-1997), in the Constitutional Council.

Mathias Möschel's book offers a fascinating and in-depth comparative academic analysis. Around the world, it is, of course, not unusual for ex- (former) ministers to join constitutional courts. But the French case is paradigmatic—a point perfectly reflected in the repeated use of the adjective "again": "The French CC again provides several examples";[1] "*Again*, the French CC stands out amongst the systems under scrutiny."[2] Indeed, in France, the participation of high-level politicians remains the rule rather than the exception. The composition of the Council is therefore one of the most debated issues in (French) constitutional law, opposing, on the one hand, those (a minority) who defend this French singularity and, on the other, those who call for an obligatory and reinforced presence of legal experts to strengthen the Council's legitimacy within the French institutional landscape.

For Mathias Möschel, it is of course not a question of resolving this French debate—his inquiry focuses specifically on former ministers, excluding former members of parliament. In France, however, the political careers of many council members often combine both positions. And, in any case, the pertinent question raised in this book can stimulate debate in France: does the practice of having former ministers as guardians of the constitution have a positive or negative impact on constitutional courts, particularly concerning the theoretical principles of separation of powers, independence, impartiality, and public trust? Focusing on France, the perspective provided is valuable in several regards.

First, it offers an opportunity to recall certain key observations in order to understand the terms of the debate. Unlike other European "courts," the French "Council" was not created as part of the judiciary, staffed by judges, but as an institution composed of "members," whose function was to support the Fifth Republic of 1958 in its effort to distance itself from the "previously existing parliamentary regimes of the Third and especially the Fourth Republics and their perceived shortcomings and dysfunctions."[3] Moreover, France had no long-standing tradition of judicial constitutional review of legislation, and the protection of rights was associated with the law itself rather than with the judge.

These political origins explain two key considerations:[4] on the one hand, the members of

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1. Mathias Möschel, *Ex-Ministers as Constitutional Judges* (Oxford University Press, 2025), 104, 106.

2. Ibid., 117-118.

3. Ibid., 73.

4. The constitutionally authorized participation of past presidents of the Republic as *de jure* members of the CC ("certes toujours dans la constitution, et très contesté as an anachronism, mais ne joue plus de role en pratique et est donc, à juste titre, peu développé dans le livre"), Ibid., 21. This issue has been discussed and critiqued sufficiently

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the French CC are not required to have any legal education; on the other hand, many former politicians become constitutional judges—and, moreover, the interviews conducted by Mathias Möschel highlight how positively the members themselves continue to assess this situation.[5] In this regard, as he convincingly demonstrates, the political culture of a given country plays an important role in explaining the path-dependency of existing practices. In France, unlike in countries such as Germany, this path-dependency stems more from an administrative culture of the state or of the general public interest than from a legal culture of the law. This also marks the difference: in Italy and Germany, even the "true politicians," in the sense of high-level and highly visible ministers,[6] have a legal education.[7]

To understand the relevance of these considerations in the context of Mathias Möschel's book, it's necessary to take a further step and highlight the contrast with the evolution of the French Conseil's powers. In short, its competences have expanded from a constitutionality review of legislation aimed at protecting the prerogatives of the *executive* to a review that also includes the protection of *rights* (since 1971), encompassing not only *a priori* constitutionality review of statutes but also *a posteriori* control (since 2008). As in Italy, France provides no direct access for individuals. The important point—heavily criticized in France[8] and addressed by Mathias Möschel—is that these changes, "which arguably transformed this body from a political to a judicial one, have not affected the overall nomination practices."[9] Apart from the introduction of parliamentary hearings (following the procedure set out in Art. 13 para. 5)—a procedure that in France has little real impact due to limited risk of a three-fifths veto and the lack of a strong culture of constitutional justice—Article 56 remains unchanged: three of the nine members are appointed by the president of the Republic, three by the president of the National Assembly, and three by the president of the Senate. Since no legal qualifications are required, these three political figures continue to appoint (not exclusively, but mainly) other political figures, particularly former ministers. As Mathias Möschel says: "It seems that once the political compromise on who shall be entitled to nominate constitutional judges was made, that fundamental decision would not be touched again."[10]

Of course, the *benefits* that ex-ministers or politicians bring to constitutional courts remain an important consideration, especially their ability to 'contribute to a specific insider knowledge of how legislative and governmental processes work,'[11] an expertise that is, as interviews conducted by Mathias Möschel demonstrate, "again" appreciated by constitutional judges themselves. By contrast, the (so-called) "diversity" argument that may be invoked in other countries does not apply to France. Quite the contrary! Consider the current composition (after the latest appointments in March 2025): there are no law professors among its members, only two of the nine are career magistrates, while six have pursued political careers, four of whom have also served as ministers.

It thus becomes clear that the French case once "again" provides a good example of the *risks* with such a composition. Two examples are particularly instructive in the case of France. The first concerns the connection between nominators and nominees. On this point, the association established by Mathias Möschel between "the Becket effect"—which "refers to the process whereby

as an anachronism in the literature, and needs no further engagement here.

5. This is a view echoed by Alain Juppé, former prime minister and current CC member, in a recent interview: "having former ministers, former MPs or former mayors is an asset that should not be sacrificed." Alexandre Pedro and Nathalie Segaunes, "Alain Juppé: « Le 'gouvernement des juges,' ça n'existe pas »," *Le Monde*, September 12, 2025, www.lemonde.fr/politique/article/2025/09/11/alain-juppe-le-gouvernement-des-juges-ca-n-existe-pas_6640390_823448.html.

6. Möschel, *Ex-Ministers as Constitutional Judges*, 69.

7. From a comparative law perspective, the ideal-typical distinction between 'the politicians' and 'the lawyers' proposed by Dominique Schnapper, sociologist and former member of the CC, is particularly interesting in that it has a distinctly French flavor. Dominique Schnapper, ed., *Une sociologue au Conseil constitutionnel* (Gallimard, 2010).

8. He quotes: Lauréline Fontaine, *La Constitution maltraitée: Anatomie du Conseil constitutionnel* (Éditions Amsterdam, 2023). See also Agnès Roblot-Troizier.

9. Möschel, *Ex-Ministers as Constitutional Judges*, 78.

10. Ibid., 185.

11. Ibid., 82.

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a newfound identification with an institution leads someone to renounce any previous personal or political allegiances that would compromise their loyalty to said institution"—and the "due ingratitude," claimed by one of the greatest (if not the greatest) presidents of the Constitutional Council (1986-1995), Robert Badinter—is worth mentioning. However, the author himself acknowledges the limit of this approach: not all the former ministers (or politicians) are strong personalities, and a strictly moral sense of duty is not enough. Some extreme cases given by Mathias Möschel are obviously not the most common cases.[12] They are, nevertheless, important to mention, as they shape the public perception of the independence and impartiality of the French institutions—the previously mentioned portrayal of CC President Ferrand as a "friend" of French President Macron has been widely discussed in the French press. The second example concerns the link between the Council's powers and its composition, and highlights the issue of objective impartiality when former politicians and ministers sit as judges on constitutional courts: the risk is that the CC may be required to review legislation that was adopted with the participation of, or under governments in which, its current members once served. Once *again*, Mathias Möschel's book provides some impressive examples. There are undeniably several rules governing in this area, some of which are quite detailed,[13] yet their application remains rather flexible and lenient—and, as in Germany, prior participation in the drafting of legislation later subject to constitutional review does not, in itself, constitute grounds for exclusion or recusal. This is probably also because the French CC decides in a single body, and the minimum quorum for valid decisions is seven members (of nine)—a strict application of recusal rules could therefore risk paralyzing the system. A particularly significant aspect of Mathias Möschel's analysis on this point is his comparison with European regulations.[14] The more firmly the French CC asserts its role as a protector of fundamental rights, the more it will have to adhere to the standards developed by the European Court of Human Rights (in particular concerning the right to a fair trial enshrined under Article 6 of the European Convention on Human Rights)—also noteworthy in this regard are the interesting comments of the European Commission for Democracy through Law (Venice Commission).[15]

At the conclusion of Möschel's analysis, it becomes clear how important the proposed solutions are in minimizing these risks.[16] Requiring a legal education as a minimum qualification is, as previously mentioned, not very new in France, and this is not a guarantee against any politicization. Yet a majority of non-lawyers constitutes an obstacle to the development of a coherent legal reasoning in addressing constitutional issues, particularly those raised in the context of concrete constitutional review. And in terms of independence, it is worth remembering that professional jurists, such as law professors and judges, have been socialized within an internal culture of independence. Greater transparency regarding the rules on abstentions and recusal, together with the introduction of a cooling-off period between the political position held by someone before becoming a judge to a constitutional court, would also be welcome. The appointment of Jacqueline Gourault in 2022, immediately after her tenure as minister (for territorial cohesion), remains a counter-example cited by those who question the Council's legitimacy.

Other critical aspects could be discussed, and comparative examples from German, Italian, and Austrian constitutional law offer additional perspectives (age limits, opening the recruitment process, etc.). One could also further emphasize the significance of Mathias Möschel's analysis on various other specific points. Yet the central point is this: in an era of democratic and constitutional backsliding—a permanent background of the book—the public perception of independence and impartiality of the constitutional courts, as well as transparency and ethics in the public eye, must be taken even more seriously.[17] The question of the Constitutional Council's legitimacy in France

12. The examples are often based on the memoirs of Jean-Louis Debré, former president of the CC (from 2007 to 2016, after having been, notably, minister of the interior (1995-1997) and a member of parliament (1997-2007). Jean-Louis Debré, ed., *Ce que je ne pouvais pas dire* (Groupe Robert Laffront, 2016).

13. Möschel, *Ex-Ministers as Constitutional Judges*, 105ff.

14. Ibid., chapter 5.

15. Ibid., 130.

16. Ibid., chapter 6.

17. See here this important book, often cited in the study: Elina Lemaire and Thomas Perroud, eds., *Le Conseil constitutionnel à l'épreuve de la la déontologie et de la transparence* (Institut Francophone pour la Justice et la

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is by no means new, and there is no simple answer for an institution that is by its nature, situated between law and politics. However, the reflections and proposals put forward by Mathias Möschel could make a valuable contribution to enriching the ongoing debate in France.

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