

The European Court of Human  
Rights and the Rights of  
Marginalised Individuals and  
Minorities in National Context

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## Chapter Four

### Protecting Individuals from Minorities and Vulnerable Groups in the European Court of Human Rights: Litigation and Jurisprudence in France

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#### 1. Introduction

The history of Human rights in the French legal order started well before the creation of the European Convention of Human Rights (hereafter, ECHR). The famous Declaration of 1789 retains full effectiveness today and forms part of the country's constitutional norms (*bloc de constitutionnalité*). The preamble of the 1958 Constitution states expressly that the 1789 Declaration and the human rights provisions enshrined in the former 1946 Constitution is part of positive law. Not all these rights and freedoms are, however, framed in a precise manner and some provisions amount more to 'declarations of intent' than to real positive rules.<sup>1</sup> Therefore, the constitutional mandatory power of the legislator to make human rights effective is crucial.<sup>2</sup>

Despite this propitious background, the relationship between France and the European Convention of Human Rights has been ambivalent. Significant resistance from political and judicial authorities towards the Convention has been one of the consequences of the long tradition of human rights protection, which amongst other things reflected in efforts deployed to promote human rights at the international level. A striking example of this confrontational French position towards the Strasbourg-based system of rights review is the late ratification of the European Convention and acceptance of the European Court of Human Rights' (hereafter, ECtHR) contentious jurisdiction. Despite the fact that France promoted and actively participated in the

<sup>1</sup> B. Stirn, *Les libertés en questions* (Paris: Montchrétien, 2006), 6<sup>th</sup> ed., p. 11.

<sup>2</sup> Article 34 of the 1958 Constitution provides that legislative action shall establish 'citizens fundamental guarantees necessary to exercise public freedoms'.

elaboration of the European Convention, it did not ratify the Convention until 3 May 1974.<sup>3</sup> The ratification of the Convention failed on several occasions and it only succeeded after strong pressure.<sup>4</sup> Along the same lines, France only accepted the jurisdiction of the European Court of Human Rights on 30 May 1981.<sup>5</sup> Nowadays, the official political position seems to have shifted and is largely supportive of the Strasbourg system.<sup>6</sup> However, the judicial and doctrinal attitudes towards the European Court's jurisprudence have not been devoid of ambiguity. At times, there have been calls for withdrawal from the system, as some of the ECHR's condemnations were considered to be 'superficial' because they ignored the French legal and judicial tradition.<sup>7</sup>

Eventually, such reluctance has not prevented France from being a source of a large number of petitions. France faces an important number of individual complaints and at times has even accounted for the biggest share of the Strasbourg institutions' case load.<sup>8</sup> To a certain extent, the 'attractiveness effect' of French being one of the two official languages of the Court and the location of the ECtHR in Strasbourg account for the large number of complaints filed.<sup>9</sup> Awareness of human rights and knowledge of the ECtHR's work are also key factors explaining why, in 2004, France was one of the five states most condemned in Strasbourg. France was a party in 10,45% out of the global number

<sup>3</sup> Decree 74-360 publishing the ECHR adopted on 3 May 1974, JO, 4 May 1974, p. 4750.

<sup>4</sup> L. Burgogue-Larsen, 'La France et la protection européenne des droits de l'homme', *Annuaire français des relations internationales* (2005), 598.

<sup>5</sup> As to the reasons explaining the long period of distrust towards the ECHR in France, see E. Lambert Abdelgawald and A. Weber, 'The reception process in France and Germany', in Keller and Stone Sweet (eds.), *A Europe of rights: The impact of the European Convention on Human Rights on national legal systems* (Oxford: Oxford University Press, 2008), pp. 107-164.

<sup>6</sup> France ratified all additional protocols to the Convention, except Protocols nos. 12 and 13, the latter being in the process of ratification. The accession of the French Jean-Paul Costa to the presidency of the European Court of Human Rights in January 2007 is likely to foster further ratifications, as it was the case under the presidency of Judge René Cassin.

<sup>7</sup> See for instance the *Kress* case (no. 39594/98) decided by the Grand Chamber on 7 June 2001 and V. Haïm, 'Faut-il supprimer la Cour européenne des droits de l'Homme?', *Dalloz* 37 (2001), Doctrine, 2988. On the same line, see the opinion of the Council of State judge, B. Genevois, quoted by R. de Gouttes, 'Les ambivalences de la jurisprudence de la Cour européenne des droits de l'homme en 2001', in CREDHO cahier no. 8, *La France et la Cour EDH. La jurisprudence en 2001* (Brussels: Bruylant, 2002), p. 19.

<sup>8</sup> For detailed figures, see Lambert Abdelgawald and Weber, 'The reception process', p. 25.

<sup>9</sup> Opinion expressed by Mrs Tissier, French agent at the Ministry of Foreign Affairs, Government agent before the European Court of Human Rights (interview held in Paris on 23 February 2007).

of judgments issued (landing in third position after Turkey and Poland, a place it left to Ukraine and Russia in 2005).<sup>10</sup> Legal reform has often followed violations of human rights highlighted by the Court and, in some cases, preceded the Court's rulings to avoid future condemnation. The right to a fair trial continues to be, as for many other countries, the most frequently invoked right and important reforms have been implemented in this area.

The case law concerning Articles 8 to 11 (combined or not with Article 14) of the ECHR is at the heart of our study. These provisions have been frequently used by claimants from minorities or other vulnerable groups to defend their views and interests. The rights enshrined in these provisions have received specific protection in the French legal order, and to some extent, in the 1789 Declaration. They are emblematic of the balance that has to be struck between the protection of human rights and other (national) interests in a democratic society.

This chapter is divided into three main parts. First, it offers background information on the status of the ECHR in the French legal order, the judicial control mechanisms aimed at protecting human rights and the binding force of the Strasbourg Court's case law. It then discusses key issues concerning minorities and vulnerable groups in France, which have given birth to an important body of case law in Strasbourg regarding the protection of foreigners, religious minorities, equality and non-discrimination, as well as the protection of 'non-majoritarian' views (part II). Subsequently, this paper focuses on litigation trends in the European Court of Human Rights in these different fields (part III) and gives an account of Strasbourg's jurisprudence.

## *2. The National Context: ECHR Status, Judicial Approaches and Academic Scholarship*

The status of the ECHR in the French legal order and its direct effect are not controversial. In accordance with the monist tradition, upon ratification, the ECHR was automatically integrated in the French legal order. Whereas it has prevailed over statutory law pursuant to Article 55 of the Constitution,<sup>11</sup> the Supreme Administrative Court (*Conseil d'Etat* – Council of State) and the

<sup>10</sup> Information obtained from the ECHR Annual survey of activities, 2005 (<http://www.echr.coe.int>).

<sup>11</sup> Article 55 of the Constitution states that 'Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party'.

Supreme Civil Court (*Cour de cassation* – Court of Cassation) have ruled that the ECHR could not take precedence over the Constitution.<sup>12</sup> The jurisprudence of the Constitutional Council (*Conseil Constitutionnel*) is more qualified, as a delicate distinction is made between essential constitutional norms pertaining to the principle of sovereignty, which prevail over international law, and other constitutional provisions which could be superseded by the latter.<sup>13</sup> Conversely, some authors have called for an ‘absolute superior status’ of international law, including the ECHR, over domestic law. This is in line with the case law of the European Court of Human Rights, which considered a piece of legislation that the French Constitutional Council had previously validated as complying with the Constitution, to be in breach of the Convention.<sup>14</sup> Besides the supremacy of the ECHR upon statutory law, administrative and civil judges recognise its direct application.<sup>15</sup> Any court is entitled to apply the Convention even *contra legem* (i.e. against the legislation in force or contrary to any administrative or judicial practice) and can hold the French state liable for a violation of the Convention. This derives from a 2007 revolutionary ruling, the *Gardedieu* case, where the Council of State for the first time explicitly decided that the mere adoption of a statute contrary to an international convention is *per se* illicit and that the state can be held accountable for pecuniary damage on this basis.<sup>16</sup>

Turning to judicial control mechanisms to protect human rights in France, submissions for a legal settlement can either be made at the level of constitutional justice, namely the Constitutional Council, or in ‘ordinary’ jurisdictions supervised by two supreme courts, i.e. the Court of Cassation for civil and criminal courts and the Council of State for administrative courts. Following a 1975 decision of the Constitutional Council,<sup>17</sup> ordinary judges are empowered to set aside legislation which is incompatible with international treaties and

<sup>12</sup> CE Ass., 30 October 1998, *Sarran, Levacher et Alij*, Rec. Lebon, p. 368; Cass. Ass. pl., 2 June 2000, *Fraisse*, Bull. no. 4.

<sup>13</sup> As pointed out by F. Hamon and M. Troper after the Constitutional Council ruling in the *Reseda* case (5 May 1998, no. 98–399 DC), in *Droit constitutionnel* (Paris: LGDJ, 2003), p. 701.

<sup>14</sup> See, for instance, ECHR (GC), *Zielinski and Others v. France* (nos. 24846/94; 34165/96; 34173/96), 28 October 1999. Cf., G. Cohen-Jonathan, preface to F. Lazaud, *L'exécution par la France des arrêts de la Cour européenne des droits de l'homme* (Presses Universitaires d'Aix-Marseille, 2006), p. 11.

<sup>15</sup> For the administrative courts, see CE, 27 October 1978, *Debout*, Rec. Lebon, p. 395; for the judicial courts, see Cass. Civ. I, 18 May 1989, Bull. no. 198.

<sup>16</sup> CE Ass., 8 February 2007 (no. 279522), *Revue Française de Droit Administratif* (2007), 361 with the observations of L. Derepas.

<sup>17</sup> CC, 15 January 1975 (no. 74–54 DC), *Interruption volontaire de grossesse (IVG)*.

can therefore efficiently defend the primacy of the ECHR.<sup>18</sup> As to constitutional justice, it should be kept in mind that the French Constitutional Council (*Conseil Constitutionnel*) is not a constitutional court modelled upon its well-known German or Spanish counterparts. The Constitutional Council used to review statutes only in abstract, prior to their entry into force and, until recently, individuals had no right to ask for a scrutiny of a legislative act.<sup>19</sup> Nevertheless, its narrow mandate did not prevent it from becoming an original and often effective human rights guardian. While it traditionally refused to exercise an explicit control of the conformity of legislative acts with the ECHR, for years it did so in a discreet manner.<sup>20</sup> The institutional reform adopted in July 2008<sup>21</sup> substantially changed its mandate. Faced with a legislative provision in breach of the rights and freedoms enshrined in the Constitution, any court, under the supervision of the Council of State and the Court of Cassation, which act as filters in the procedure, is entitled to bring a referral for a preliminary ruling before the Constitutional Council.<sup>22</sup> The practical influence of this reform remains to be seen, namely whether ordinary courts will favour the new system over the less centralised one developed in the mid 1970s. Under the latter, ordinary courts were empowered to set aside legislative provisions contrary to human rights enshrined in the ECHR or other international conventions.<sup>23</sup>

As far as the binding force of the Strasbourg Court case law is concerned, especially as regards compliance by France to judgments issued against other

<sup>18</sup> As to the first exercise of such a prerogative, see Cass. Ch. Mixte, 24 May 1975, *Café Jacques Vabre*, Bull. no. 4 (for EC law); Cass. Crim., 27 November 1966, *Commandos anti-IVG*, Bull. no. 431 (for the ECHR); CE Ass., 20 October 1989, *Nicolo*, Rec. Lebon, 190 (for EC law); CE Ass., 21 December 1990, *Confédération nationale des associations familiales catholiques et autres*, Rec. Lebon, 369 (for the ECHR).

<sup>19</sup> Traditionally, only the President of the Republic, the Prime Minister, the President of the Senate, the President of the Congress, and deputies and senators had a direct access to the Constitutional Council.

<sup>20</sup> L. Burgogue-Larsen, 'L'autonomie constitutionnelle aux prises avec la Convention européenne des droits de l'homme', *Revue belge de droit constitutionnel* 1 (2001), 62. For recent developments, see E. Bribosia, 'Dialogue entre la Cour européenne des droits de l'homme et les cours nationales: regards croisés. Un dialogue sous l'influence des terreaux juridiques nationaux', in Bribosia, Scheeck and Úbeda de Torres (eds.), *L'Europe des cours. Loyauté et résistances* (Bruxelles: Bruylant, 2009), in press, section B.1.b.

<sup>21</sup> *Loi constitutionnelle de modernisation des institutions de la Vème République* [Constitutional Act modernising the institutions of the V<sup>th</sup> Republic], 23 July 2008 (no. 2008-724), JO, 24 July 2008.

<sup>22</sup> Article 61(1) of the Constitution.

<sup>23</sup> E. Bribosia, 'Un dialogue sous l'influence des terreaux juridiques nationaux', in press, section B.1.b.

countries, the judicial attitude has changed over time. In short, it has evolved from 'neutralising interpretation' (or national resistance) towards 'casual conformity' and more recently, 'constructive interpretation'.<sup>24</sup> Condemnations do not seem therefore to be necessary to change a former practice in France, as there exists an *a priori* influence of the Strasbourg Court's case law and the development of a preventive approach by national judicial authorities at least in specific areas. The European Court's decisions and judgments have become in these cases a source of direct guidance, preventing new violations, for instance in relation to the recognition of welfare rights. There are several recent examples of this preventive effect of ECtHR case law. In the *Koua Poirrez* case,<sup>25</sup> the interaction between French domestic courts and the ECtHR went very far. The Court of Cassation, which had denied Mr Poirrez his right to a social allowance on account of his foreign nationality,<sup>26</sup> modified its case law dramatically only one year after its first ruling. In a case concerning a Turkish national who had been denied a *non contributive* allowance, the Court of Cassation declared *motum propium* a violation of Article 14 ECHR (prohibition of discrimination) combined with Article 1 of Protocol no. 1 to the Convention (property).<sup>27</sup> This was a ground-breaking judgment; the French Court of Cassation extended the right to a *non contributive* allowance in 1999, before any condemnation was issued by the Court of Strasbourg and even before the European Court had decided on this right at that time yet. The ECtHR quoted this domestic judgment in order to sustain its arguments in the *Koua Poirrez* case, producing a 'boomerang effect' and getting inspiration from national case law.<sup>28</sup>

As part of this evolution, in 2004, the Constitutional Council, traditionally the most reluctant of all French courts towards Strasbourg jurisprudence, *expressis verbis* referred to a European judgment in order to reinforce its stance: the famous *Leyla Sahin v. Turkey* case.<sup>29</sup> However, it critically 'adapted'

<sup>24</sup> F. Sudre, 'A propos du dialogue des juges et du contrôle de conventionnalité', *Etudes en l'honneur de Jean-Claude Gauthier. Les dynamiques du droit européen en début de siècle* (Paris: Pedone, 2004), pp. 207–224. Cf. L. Burgorgue-Larsen, 'La France et la protection européenne des droits de l'homme', AFRI (2005), 609.

<sup>25</sup> ECtHR, *Koua Poirrez v. France* (no. 40892/98), 30 September 2003.

<sup>26</sup> Cass. Soc., 22 January 1998, *Koua Poirrez*, JCP G (1998), II, 1011.

<sup>27</sup> Cass. Soc., 14 January 1999, *Bozkurt*, JCP (1999), II, 10082.

<sup>28</sup> Ph. Frumer: 'La discrimination à l'égard des étrangers en matière de prestations sociales (arrêt *Koua Poirrez* du 30 septembre 2003)', in CREDHO, *La France et la Cour européenne des droits de l'homme. La jurisprudence en 2003* (Brussels: Bruylant, 2005), p. 166.

<sup>29</sup> CC, 19 November 2004 (no. 505–2004 DC), *Traité établissant une Constitution pour l'Europe*. The *Conseil Constitutionnel* refers to the Chamber's ruling in *Leyla Sahin v. Turkey* (no. 44774/98, 29 June 2004) which was not definitive as it was pending before the Grand Chamber at the time (Cf. Burgorgue-Larsen, 'La France et la protection européenne', 610–11).

the ruling to the French context, so as to indirectly manifest its approval of domestic legislation forbidding students from wearing any conspicuous religious symbols at school.<sup>30</sup> The Constitutional Council had not had the opportunity to pronounce itself on the issue. In fact, it referred to the European Court's Chamber judgment *Leyla Sahin* while deciding on the compatibility of the French Constitution with the Treaty establishing a Constitution for Europe. More than an admission of the authoritative force of Strasbourg jurisprudence, the major purpose of its reference to the *Leyla Sahin* case appears to have been a reinforcement of the French secularisation principle. This makes it possible to argue that despite a growing 'positive attitude', resistance towards the European Court's case law may still arise when French legal tradition or sensitive political issues are at stake.<sup>31</sup> In such cases, persistent condemnations remain necessary for reforms to be made.

As to litigation against France before the Strasbourg Court concerning minorities and vulnerable groups, one of the main controversial fields relates to the protection of foreigners and the growing concerns stemming from the adoption of new legislation to ensure national security and fight against terrorism.<sup>32</sup> Another set of complaints concern religious minorities, which are strongly framed by one of the French Republic's founding principles: laicism

<sup>30</sup> *Loi encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*, 15 March 2004 (n° 2004-228) JO, 17 March 2004.

<sup>31</sup> Let's recall the controversial *Kress* case (ECtHR, *Kress v. France* (no. 39594/98), 7 June 2001), in which the participation of an advocate general (*commissaire du gouvernement*) during the deliberation of the Council of State was considered to be in breach of the principle of impartiality and equality of parties, enshrined in Article 6 of the ECHR. The Council of State criticised the excessive formalism required by the ECtHR and implementation of the ECtHR judgment was extremely difficult. The solution which was eventually found was to allow a party to oppose the advocate general's presence in deliberations. This arguably reconciles the Court's theory of objective impartiality with the French legal tradition. See H. Tigroudja, 'Les difficultés d'exécution de l'arrêt de la Cour européenne des droits de l'homme du 7 juin 2001 rendu dans l'affaire *Kress c. la France*', RTDH 58 (2004), 353. Following this judgment, the President of the Council of State issued two guidelines on 23 November 2001 and 13 November 2002 establishing that the advocate general (*commissaire du gouvernement*) could attend but not participate in the deliberations ('mute witness'). Legislation was adopted in this sense (Administrative Justice, Article R. 731-7). The Secretariat of the Committee of Ministers considered, however, that this was not a correct implementation of the *Kress* case (CM/Inf(2003)15E, 31 March 2003). In the Grand Chamber decision *Martinie v. France*, France was again condemned on the basis that any passive or active participation of the *commissaire du gouvernement* in the deliberations is infringing Article 6 of the ECHR (no. 58675/00, 12 April 2006).

<sup>32</sup> See *infra*, paragraph 3.

(*laïcité*).<sup>33</sup> Secularisation being interpreted as a principle very close to active neutrality or '*neutralité à la française*',<sup>34</sup> has specific implications for believers. The Act on separation of the State and the Churches of 9 December 1905<sup>35</sup> enounces the principle of separation. It means that the French Republic does not 'recognise, pay or give any kind of financial aid to any religion' (Article 2), and determines the double nature of the principle of secularisation in recruitment and in the services provided.<sup>36</sup> The impact of constraints resulting from secularisation on Muslims and other religious individuals and groups has been pointed out in the social and political science literature.<sup>37</sup> It has been highlighted that, in a fundamentally secular public space, it is more difficult for religious groups and minorities to preserve their identities and culture. The lack of visibility of religious groups in institutional space and the lack of associative structures might explain the low scale of litigation concerning religious minorities in France.<sup>38</sup> The principle of 'neutrality' also requires the absence of religious symbols in some public spaces (i.e. schools, justice chambers, etc). The controversial Act on Secularisation and Religious Symbols, better known as the 'Islamic veil Act' or the 'Stasi Act' (named after the former Republic Mediator), forbids any kind of external manifestation of religion in public schools, a measure mainly addressed to students. Professors also need to comply with neutrality requirements generally imposed on public administration.<sup>39</sup>

A second set of issues regards the scope of protection granted to freedom of expression, which is a traditional right deeply embedded in French legal culture. Recognised in Article 11 of the 1789 Declaration, the freedom of expression is a multifaceted right. The freedom of the press was not expressly and widely protected in France before the Act of 29 July 1881. Since then, any written publication is protected against censorship and 'opinion crimes' have

<sup>33</sup> See M. De Salvia, 'Liberté de religion, esprit de tolérance et laïcité dans la jurisprudence de la Cour européenne des droits de l'homme', in *Libertés, justice, tolérance. Mélanges en hommage au Doyen Gérard Cohen-Jonathan*, vol. I (Brussels: Bruylant, 2004), pp. 591–606; J.-F. Flauss, 'La Commission européenne des droits de l'homme au secours de la laïcité de l'enseignement public, l'affaire Karaduman c. Turquie', *Les Petites Affiches* 142 (1993), 11–13.

<sup>34</sup> J. Morange, *Droits de l'homme et libertés publiques*, 5<sup>th</sup> edition (Paris: PUF, 2000), p. 207.

<sup>35</sup> *Loi de séparation des Eglises et de l'Etat*, JO, 11 December 1905.

<sup>36</sup> Forbidding the refusal of candidates because of their religious beliefs or the excessive externalisation of such beliefs.

<sup>37</sup> O. Roy, *La laïcité face à l'Islam* (Paris: Seuil, 2005).

<sup>38</sup> V. Amiraux, 'Speaking as a Muslim: avoiding religion in French Public Space', in Amiraux and Jonker (eds.), *Politics of Visibility. Young Muslims in European Public Spaces* (Bielefeld: Transcript Verlag, 2006), pp. 21–52.

<sup>39</sup> Act of 15 March 2004 (n° 2004–228), referred to in footnote 30.

disappeared.<sup>40</sup> Only civil judges are competent to stop *a posteriori* the publication of a book or a newspaper based on a complaint. However, two types of publications have traditionally faced restrictions: foreign publications and publications for minors. Concerning the ban on foreign publications, France was condemned in *Ekin*<sup>41</sup> and changed its legislation subsequently, attracting the attention of many legal scholars.<sup>42</sup> On 1 July 1972, with the so-called *loi Pleven*,<sup>43</sup> provocation of hate and discrimination, slander and racial insults were criminalised. On 13 July 1990, the National Assembly adopted another piece of legislation, the *loi Gayssot*,<sup>44</sup> designed to punish any racist, anti-Semitic or xenophobic activity'. Aimed to punish those challenging the Second World War genocide against Jews, the law amended the 29 July 1881 Act on the freedom of the press and the criminal code.<sup>45</sup> The fight against the denial of the holocaust in France has led to important case law before the Strasbourg Court concerning the limits to freedom of expression, changing dramatically the jurisprudence of the Court of Cassation.

<sup>40</sup> However, in case of slander, journalists must 'apologise' and publish the corrected information stated by the courts as part of the sanction; in cases of attempt to private life, aggravated sanctions could even be decided.

<sup>41</sup> ECtHR, *Ekin v. France* (no. 39288/98), 17 July 2001.

<sup>42</sup> Professor Wachsmann has systematically studied revisionism and anti-semitic speech in many contributions, shaping the limits to freedom of expression. This author adheres to the doctrine of 'militant democracy' or 'democracy able to defend itself', which the ECtHR has welcomed. See *inter alia*, 'Liberté d'expression et négationnisme', RTDH (2001), 585; 'La jurisprudence récente de la commission européenne des droits de l'homme en matière de négationnisme', in Flauss and De Salvia (dir.), *La CEDH: développements récents et nouveau défis*, (Brussels: Bruylant, 1997), pp. 101 and ff. Other authors have also dealt with this issue, such as G. Cohen-Jonathan, 'Négationnisme et droits de l'homme', RTDH (1997), 571 and ff.; M. Levinet, 'La fermeté bienvenue de la Cour européenne des droits de l'homme face au négationnisme: obs. s/la décision du 24 juin 2003, Garaudy c. France', RTDH 59 (2004), 653; D. Roets, 'Epilogue européen dans l'affaire Garaudy: les droits de l'Homme à l'épreuve du négationnisme', *Le Dalloz* 4 (2004), commentaires, 239 or F. Massias, 'La liberté d'expression et le discours raciste ou révisionniste', RTDH (1993), 183.

<sup>43</sup> Act against racism (*Loi relative à la lutte contre le racisme*, no. 72-545).

<sup>44</sup> *Loi tendant à réprimer tout acte raciste, antisémite ou xénophobe* (no. 90-615). See M. Troper, 'La loi Gayssot et la Constitution', *Annales, Histoire, Sciences Sociales*, 54 (1999), no. 6, 1239. Against this Act, see J.-P. Feldman, 'Peut-on dire impunément n'importe quoi sur la Shoah? (De l'article 24bis de la loi du 29 juillet 1881)', *Revue de droit international et de droit comparé*, 75(4) (1998), 229.

<sup>45</sup> The Article 24bis of the criminal code qualifies as an offence the challenge of one or several crimes against humanity as defined in Article 6 of the Statute of the international military Court annexed to the London agreement of 8 August 1945. These crimes have to be committed either by members of an organisation declared criminal by this Statute or by a person judged guilty by this military Court.

As to the principle of equality and non-discrimination, recognised in the French Declaration<sup>46</sup> and developed through statutory law, EU law has had a strong influence on the provisions enacted. However, the implementation of the principle encounters serious obstacles stemming from French reluctance regarding the recognition of the concept of minorities.<sup>47</sup> For French authorities, the concept of minority contradicts the 'national republican model' and the indivisibility of the nation (Article 2 of the Constitution), in which 'minorities, religions and cultural particularities of any kind are not acceptable in the public space'.<sup>48</sup> France has refused to ratify the Framework Convention on the protection of minorities, as well as Protocol no. 12 to the ECHR. Two of the supreme judicial bodies, the French Council of State and the Constitutional Council, have actually positioned themselves against the ratification of any instrument recognising groups, which can be identified on the basis of race, religion, sex or other criteria. In the domestic case law the constitutional force of the legal concept of the 'French people', as opposed to the recognition of 'other' people, has been established.<sup>49</sup> The Council of Europe has often stressed the importance of ratifying the instruments mentioned above,<sup>50</sup> taking into account the particularities of the French societal context

<sup>46</sup> Article 1: 'Men are born and remain free and equal in rights. Social distinctions may be based only upon the general good' [*Les hommes naissent et demeurent libres et égaux en droit. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune*].

<sup>47</sup> Professor F. Benoit-Rohmer is one of the main experts on the topic of ethnic and religious minorities: see, *inter alia*, *Les minorités, quels droits?* (Strasbourg: éd. du Conseil de l'Europe, 1999); 'La Cour européenne des droits de l'homme et la défense des droits des minorités nationales', RTDH (2002), 563; 'La Cour de Strasbourg et la protection de l'intérêt minoritaire: une avancée décisive sur le plan des principes ? En marge de l'arrêt Chapman c. RU', RTDH (2001), 999.

<sup>48</sup> This is, for instance, sustained by the President of the National Assembly, Jean-Louis Debré, as pointed out by Mr Wieviorka, 'Le modèle néorépublicain', article published in the newspaper *Libération*, 13 November 2006, p. 31.

<sup>49</sup> CE, 24 September 1996, Opinion on *France's ratification of the European Charter of Regional or Minority Languages*; CE, 6 July 1995, Opinion on the ratification of the *Framework Convention for the Protection of National Minorities*; CC, 9 May 1991 (no. 91-290 DC), *Law establishing the territorial community of Corsica*.

<sup>50</sup> As pointed out by the report issued by Mr Boriss Cilevičs, see Working document of the Parliamentary Assembly of the Council of Europe (COE) on *Ratification of the Framework Convention for the Protection of National Minorities by the Member States of the Council of Europe*, 12 June 2006, §§ 16 and ff. The Working document led to the adoption of Recommendation 1766 (2006) on 4 October 2006 by the Parliamentary Assembly, which reminded of its recommendations 1492 (2001) and 1623 (2003). The Commissioner for Human Rights, Alvaro Gil Robles, also pointed out the lack of ratification of these instruments in his rapport

and the existence of different religious groups in the country. The recognition of an official minority status could sustain better integration policies and, at the same time, ensure full respect for French Republican legal and political tradition.<sup>51</sup> In spite of this, there has been no major change in position. In fact, the Senate has demonstrated reluctance regarding a recent EU proposal for a directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.<sup>52</sup> The senator in charge of the report, Mrs Muguette Dini, stated that the legal recognition of specific communities with their own rights would contradict 'the French conception of the Republic, which establishes that every citizen has the same legal rights.'<sup>53</sup>

### *3. Litigation in the ECtHR on Claims Raising Articles 8-11/14 ECHR as well as Claims Involving Minorities and Immigrants*

Besides the lack of acceptance of a legal conception of *minorities* in France, there is another factor that contributes to limiting litigation both in national courts and in the Strasbourg Court. Most non-governmental organisations (NGOs) and activist groups are reluctant to have recourse to legal means to fight against exclusion. They consider the media and political lobbying to be much more effective. While the use of judicial complaints as a way of achieving political change is a well-developed method in common law culture, it is unfamiliar to French legal tradition. Moreover, the left-wing political orientation that is widespread among associations and activists since 1960 and 1970, considers legal and judicial routes to address violations of human rights as a way of showing acceptance towards the State. They were therefore despised in the past. Associations like the Human Rights League (*Ligue des droits de*

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on the effective protection of Human Rights in France, made public on 15 February 2006 after his visit on the French territory from 5 to 21 September 2005.

<sup>51</sup> A. Nanchi, *Vers un statut des minorités en droit constitutionnel français* (Clermont-Ferrand: Presses Universitaires de la Faculté de Clermont-Ferrand, 2006).

<sup>52</sup> Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, 2 July 2008, COM(2008) 426 final.

<sup>53</sup> Draft resolution on the Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (E 3918), Report, 30 October 2008.

*l'homme*) and Amnesty International, but also workers' unions usually favour political over legal tactics.<sup>54</sup> Therefore, it is not surprising that a very high percentage of the complaints filed against France before the Strasbourg Court derives from individuals acting alone. Such perceptions are challenged today and this trend slowly changes with transnational associations pleading cases across countries and national civil society organisations challenging legislation before the judiciary, either at the national level or in the Strasbourg Court. In the case of France, such an evolution is particularly discernible concerning several vulnerable groups: foreigners, individuals discriminated because of their sex or sexual orientation, religious minorities and individuals supporting views that the majority strongly disagrees with.

Claims made by foreigners are usually based on Articles 3 (prohibition of torture) and 8 (privacy) of the Convention and involve cases of expulsion. They have also been raised in relation to other rights of the ECHR, such as Articles 5 (liberty), 6 (fair trial) ECHR or Article 1 of Protocol no. 1 (property) to the Convention.<sup>55</sup> At the national level, associations dedicated to the defence of foreigners' and asylum seekers' rights, such as the CIMADE (Ecumenical Service of Mutual Aid – *Service oecuménique d'entraide*) and the Human Rights League have pointed out the progressive *jurisdictionalisation* of complaints raised by foreigners in France. Recent legislative evolution has given birth to longer and more complicated judicial proceedings in this respect. Civil society associations often feel overloaded by the numerous complaints brought to their attention and their capacity of reaction is reduced due to budgetary limitations. The CIMADE, for instance, has had to successfully develop a leading role in assisting foreigners with regard to national authorities without having the tools or the means to represent their interests in court. To tackle the issue, it has made an agreement with some law firms to provide them with the legal files of the complaints raised by foreigners and asylum seekers, the CIMADE remaining responsible for the 'legal follow-up' of the cases. In Strasbourg, the CIMADE has never pleaded in its own name, but its lawyers have represented applicants and filed complaints.<sup>56</sup>

<sup>54</sup> The French High Authority against Discrimination and for Equality (*Haute Autorité de lutte contre les discriminations et pour l'égalité* – HALDE) points out that only 3% of the applications it receives are introduced by associations.

<sup>55</sup> See the *Koua Poirrez* ruling cited previously (in footnote 25 and ff.).

<sup>56</sup> See, e.g., ECtHR, *Skender Fiqaj and Others v. France* (inadmissibility dec., no. 53491/99), 6 April 2000; *Bamba v. France* (admissibility dec., no. 30930/96), 8 September 1997; *A.B. v. France* (dec. striking the case out of the list, no. 34795/97), 18 September 1997; *Djamel Lounis v. France* (inadmissibility dec., no. 49137/99), 25 April 2002. Most of the decisions declared the inadmissibility of the case or struck it out of the list, so the CIMADE is rarely mentioned in final judgments.

There are also a few examples of collective applications in which associations and NGOs, acting as co-applicants, claimed, in the 1980s and the 1990s, to be victims in cases pertaining to foreigners and asylum seekers. For instance, in *Elio Campopiano and other v. France*,<sup>57</sup> the GISTI (Group dedicated to the information and support to immigrants – *Groupe d'information et de soutien des immigrés*)<sup>58</sup> alleged that the expulsion and actions against the applicant harmed its collective interest in the defence and assistance of immigrants. All applications in which associations claimed the status of a victim were declared inadmissible by the former European Commission. In the light of Article 34 of the ECHR (individual applications), the Court similarly refused to recognise associations supporting applicants as proper applicants.<sup>59</sup> The negative outcome of these cases partly proved to be a deterrent for these associations to pursue litigation before the ECtHR.

Recent developments in litigation strategies should nonetheless be mentioned. Since May 2007, the requests for interim measures before the Strasbourg Court have 'exploded'. Whereas, in 2006, almost 90% of those requests were rejected, in 2007 and 2008 this percentage has been reduced to 70%. Strategic litigation before Strasbourg seems to flourish in this area, with several organisations pleading at the European level. The CIMADE and the ANAFE (National association for border assistance to foreigners – *Association nationale d'assistance aux frontières pour les étrangers*), which are allowed to intervene at the borders and in detention centres for foreigners, play a central role in the process. They have created a sort of 'alert mechanism', providing legal assistance to foreigners and asylum seekers under the threat of expulsion, so that urgent measures can be sought from Strasbourg.<sup>60</sup> The

<sup>57</sup> EComHR, *Campopiano and other v. France* (no. 18336/91), 5 May 1993.

<sup>58</sup> This association considers law as its main tool. It supports and gives legal aid to foreigners and asylum seekers in domestic jurisdictions or in Strasbourg when appropriate.

<sup>59</sup> See, e.g., ECtHR, *Michele Dayras and Others v. France*, in which the NGO *Sos Sexisme* claimed to be a victim of discrimination under Articles 8 and 14 of the ECHR because of the preference given to the father's surname over the mother's (inadmissibility dec. no. 65390/01, 6 January 2005). In *A.B. and G.I.A. v. France*, the GIA (*Groupe d'Information Asiles*), a NGO specialised in legal aid for individuals detained in hospitals and psychiatric centres, was not considered to be a victim of illegal detention. However, it also complained about a breach of Article 6 ECHR, alleging that it was not possible to meet with the first applicant, interned in a psychiatric hospital (inadmissibility dec. no. 28660/95, 20 May 1998). With respect to the same NGO, similar arguments have been advanced in *G. and M.L. and GIA v. France* (EComHR, no. 17734/91, 29 June 1994). The GIA acted as an *amicus curiae* in *Nouhaud and Others v. France* (no. 33424/96, 9 July 2002).

<sup>60</sup> Some cases in which the CIMADE intervened or acted on behalf of the applicants in front of domestic courts reached Strasbourg, even if this NGO was not directly involved before the ECtHR. See, e.g., the *Amuur case* (no. 19776/92, 25 June 1996) which relates to the conditions

development of this kind of actions only aims at avoiding immediate expulsion and presents some limitations, mainly concerning the support to the applicants during the years it usually takes to decide on the merits of their case.

Third party interventions or *amicus curiae* before the Strasbourg Court remain limited. The role of ANAFE in the *Asebeha Gebremedhin [Gaberamadhiyam]* case is an emblematic example in this respect.<sup>61</sup> In its judgment of 26 April 2007, the Court declared, for the first time, that France had violated Article 13 (effective remedy) in relation to Article 3 (prohibition of torture) ECHR, prompting legislative reform. *Rights International* and *Amnesty International* intervened with the submission of written observations in *H.L.R. v. France*, a case concerning a Colombian applicant accused of drug trafficking, but the Court found no violation of Article 3 of the ECHR. The GISTI intervened in the *Hussun case*,<sup>62</sup> which relates to the collective expulsion of foreigners arriving to Lampedusa. Finally, in the *Siliadin* case concerning forced work of a Togolese national,<sup>63</sup> although there has been no proper third party intervention, the applicant's counsel was assisted in the Court by a lawyer from the *Committee against Modern Slavery*, an NGO offering legal support to victims of modern slavery.

A second category of vulnerable groups filing complaints before the Strasbourg Court consists of individuals claiming discrimination based on their gender or sexual orientation. They usually invoke a breach of Article 8 of the Convention (privacy), either alone or in combination with Article 14 of the ECHR (prohibition of discrimination). Strategic litigation seems to have flourished recently in this area under the influence of transnational associations dealing with the rights of gays and lesbians. The first example is case *Fretté v. France*,<sup>64</sup> in which the Court ruled that the refusal to give the right to adopt to a single person because of his homosexuality was not in violation of Article 8 of the ECHR. The *International Lesbian and Gay Association, European Region* (ILGA-Europe) acted on that occasion as an *amicus curiae*.<sup>65</sup>

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of detention and deprivation of liberty of asylum seekers in the international area of an airport and where France was condemned on the basis of Article 5 of the ECHR).

<sup>61</sup> ECtHR, *Asebeha Gebremedhin [Gaberamadhiyam] v. France* (no. 25389/05), 29 April 1997. See *infra*, paragraph 4, for the details of the case.

<sup>62</sup> ECtHR, *Hussun and Others v. Italy* (no. 10171/05), 11 May 2006.

<sup>63</sup> ECtHR, *Siliadin v. France* (no. 73316/01), 26/07/2005. See *infra*, paragraph 4, for the details of the case.

<sup>64</sup> No. 36515/97, 26 February 2002.

<sup>65</sup> Although only in the admissibility decision issued by the Court on 12 June 2001.

The same association presented written observations together with three other associations<sup>66</sup> in *E.B. v. France*,<sup>67</sup> in which the Grand Chamber of the Strasbourg Court overruled its precedent in *Fretté*. Third parties presented a comparative law study on adoption by homosexuals, as well as recent legislative modifications in this area by several member states.

Two different types of complaints fall within a third category of 'vulnerable' individuals pleading in the Strasbourg Court. A first set of complaints is put forward by individuals, belonging to religious minorities and being legally banned from wearing conspicuous symbols in specific situations. Strategic litigation, primarily based on Articles 8 (privacy), 9 (freedom of religion) and Article 14 (prohibition of discrimination) of the ECHR, has recently emerged in this area. The Sikh community, with the support of the United Sikhs Association, has for instance filed several complaints at the national level, and two before the ECtHR: one regarding the ban to wear the turban at school,<sup>68</sup> the other concerning the right to wear the turban in photographs for official use.<sup>69</sup> Some Muslims have also challenged French legislation at the domestic level and in the Strasbourg Court, yet their complaints were unsuccessful.<sup>70</sup> Up to now, the Strasbourg Court has never condemned France for violating the freedom of thought or religion. The second set of complaints relates to individuals supporting views which are not 'majoritarian' and which have contributed to shape the domestic protection of freedom of expression. France was condemned several times in this respect and these cases have been of paramount importance to define the scope of domestic judicial power to restrict freedom of expression in a democratic society.<sup>71</sup>

<sup>66</sup> The FIDH (International Federation of Human Rights Leagues - *Fédération Internationale des ligues des Droits de l'Homme*), the BAAF (*British Agencies for Adoption and Fostering*) and the APGL (*Association of Gay and Lesbians' Parents and future Parents - Association des Parents et futurs parents Gays et Lesbiens*).

<sup>67</sup> No. 43546/02, 22 January 2008.

<sup>68</sup> On 30 May 2008, Jasvir Singh and Ranjit Singh filed a complaint before the ECtHR, with the support of the United Sikhs Association, against their expulsion from Michel High School in Bobigny (Paris region) for wearing a keski. Their expulsion was based on the 'Stasi Act' of 15 March 2004 (n° 2004-228) referred to in footnote 30.

<sup>69</sup> On 11 June 2007, Mr. Mann Singh introduced a complaint before the ECtHR, with the support of the United Sikhs Association, challenging a ministry order issued on 6 December 2005 (*circulaire* no. 2005-80), which bans the use of any headscarf or turban on the picture required for a driving license (no. 24479/07). The Court has declared his application inadmissible (inadmissibility dec. no. 24479/07, 13 November 2008).

<sup>70</sup> See *infra*, paragraph 4.

<sup>71</sup> See *infra*, paragraph 4.

#### 4. ECtHR Jurisprudence in the Cases Under Review

The number of complaints lodged against France has been growing steadily, although, in recent years, the rate of growth has decreased. Between the first judgment issued in 1984<sup>72</sup> and until 2008, over 700 judgments have been delivered against France. France remains one of the states with the highest number of filed complaints, and most of the judgments against it concern the right to a fair trial (Article 6 ECHR). From the total number of judgments, seventy per cent pertain to vulnerable groups and minorities. The majority of the Court's rulings concern the right to private and family life (Article 8 ECHR) in cases regarding the procedures of expulsion of foreigners and the rights of individuals belonging to sexual minorities. Private life case law is much more extensive than cases regarding freedom of expression, freedom of religion or freedom of association. Claims under Articles 8 to 11 of the Convention, occasionally combined with Article 14 ECHR (prohibition of discrimination), represent around 10% of the total number of applications lodged. Nevertheless, in cases pertaining to minorities or vulnerable groups, other Convention provisions are also invoked: Articles 3 (prohibition of torture), 4 (prohibition of slavery), 5 (liberty), 6 (fair trial) or 13 (effective remedy) of the ECHR. Four main fields of case law can be generally identified as cases implicating vulnerable individuals and minorities; cases raising foreigners' issues; cases dealing with sexual orientation and transgender issues; cases stemming from religious groups; and cases about political minority views and their freedom of expression in a democratic state.

Concerning the case law on the rights of foreigners, there are several areas of litigation which should be highlighted. Most of the jurisprudence relates to expulsion cases, involving the right to private and family life (Article 8 ECHR), the prohibition of inhuman and degrading treatment (Article 3 ECHR),<sup>73</sup> detention conditions before expulsion (Article 5 ECHR)<sup>74</sup> and procedural guarantees.<sup>75</sup> In the *Gebremedhin* case the strong security and administrative measures adopted in France have been denounced.<sup>76</sup> In the last years, there

<sup>72</sup> ECtHR, *Bozano v. France* (no. 9990/82), 15 May 1984.

<sup>73</sup> *B. B. v. France* was struck out of the list because the government did not expel the applicant. Otherwise there would have been a potential violation of Article 3 of the ECHR, as the applicant was suffering from AIDS and could not receive equivalent medical attention in his country of origin (ECtHR, no. 30930/96, 9 September 1998).

<sup>74</sup> As in the *Amuur* case cited *supra* on detention conditions of an asylum seeker in the international airport area (no. 19776/92, 25 June 1996).

<sup>75</sup> See, for example, *Maaouia v. France*, concerning the excessive length of an expulsion procedure (ECtHR (GC), no. 39652/98, 5 October 2000).

<sup>76</sup> ECtHR, *Asebeha Gebremedhin [Gaberamadhiam] v. France* (no. 25389/05), 29 April 1997.

had been a drop of 50% of asylum applications, much more restrictive summary procedures to claim asylum, the lack of suspensive effect of judicial remedies and bad practices of state agents concerning asylum seekers. The applicant alleged the breach of the *non refoulement* principle and lack of an appropriate remedy. The Court's condemnation prompted legislative changes concerning access to justice and to file asylum requests for the foreign population arriving in the country.

Other complaints in the Strasbourg Court stemmed from foreigners residing on the French territory: European citizens<sup>77</sup> or third-country nationals. Complaints by third-country nationals concerned *inter alia* torture and police brutality suffered by a Moroccan national,<sup>78</sup> racist considerations of a member of the jury in a criminal case against a French citizen of foreign origin<sup>79</sup> and discriminatory treatment on the basis of nationality in relation to the grant of social allowances.<sup>80</sup> Finally, the *Siliadin* case<sup>81</sup> raised the issue of exploitation of illegal foreigners. The applicant had served in a house for years with no salary, under the threat of denouncement and consequent expulsion of the French territory. Although the tort was committed by individuals, the Court applied the Convention's 'horizontal effect'. It ruled that there was not enough protection in French law against this type of behaviour and condemned France for 'modern slavery' under Article 4 of the Convention.

Although there are few cases concerning gender and sexual-orientation in the Strasbourg Court, these have given birth to key changes in France. Applications in this field have been carefully designed. Most of them have been lodged by foreign or transnational associations acting on behalf of gay and lesbian associations. The cases *Fretté*<sup>82</sup> and *E.B.*<sup>83</sup> previously mentioned certainly follow this pattern. In the *Fretté* case, the European Court stated that there was no European consensus on the issue of adoption rights for homosexuals and granted a wide margin of appreciation to French national authorities. No breach of Article 8 of the ECHR (privacy) was found. This however did not prevent gays and lesbians associations from pursuing litigation in Strasbourg. A judicial reversal occurred six years later in the *E.B.* case. The Court's Grand Chamber held that, in the light of French legislation permitting adoption by single individuals, any reference to sexual orientation was

<sup>77</sup> ECtHR, *Aristimuño Mendizabal v. France* (no. 51431/99), 17 January 2006.

<sup>78</sup> ECtHR (GC) *Selmouni v. France* (no. 25803/94), 28 July 1999.

<sup>79</sup> ECtHR, *Remli* (no. 16839/90), 23 April 1996 (Article 6 ECHR).

<sup>80</sup> ECtHR, *Koua Poirrez v. France* (no. 40892/98), 30 September 2003.

<sup>81</sup> ECtHR, *Siliadin v. France* (no. 73316/01), 26 July 2005.

<sup>82</sup> ECtHR, *Fretté v. France* (no. 36515/97), 26 February 2002.

<sup>83</sup> No. 43546/02, 22 January 2008.

contrary to Article 8 of the ECHR (privacy) combined with Article 14 (prohibition of discrimination).

*B v. France*<sup>84</sup> dealt with transsexuals' civil status. The issue at stake was the recognition of the new identity of a transgender person. Although this case served to modify the civil Supreme Court's jurisprudence concerning the recognition of the civil status of transsexuals, the applicant did not benefit from such a reversal in case law. The principle of *res judicata* prevented the reopening of proceedings, and the final decision remained unchallenged. The change in the domestic judicial practice triggered by this case permitted, nevertheless, a legal recognition of a new civil status for transgender individuals in France. In this respect, the Strasbourg Court issued a kind of 'pilot' case, as it had consequences for all transsexuals living in France by putting an end to the denial of the recognition of their new legal identity.

As previously emphasised, the limited number of cases on freedom of religion does not seem to be the result of a lack of problematic cases regarding religious groups in France.<sup>85</sup> Weak litigation has not precluded a few cases relating to freedom of thought to reach the Strasbourg's system. Before December 2008,<sup>86</sup> only two of those cases led to an ECtHR judgment on the merits and none of them ended with a condemnation of French domestic behaviour. Nevertheless, they both had a special weight either from a political or a historical perspective.

In *Cha'are Shalom Ve Tsedek v. France*,<sup>87</sup> the Court dealt with the question of rituals. In France, as in many other European countries, the ritual of slaughter exercised by Jews and Muslims comes into conflict with the principle according to which an animal can be slaughtered after being stunned, that is plunged into a state of unconsciousness in order to spare it any suffering. Ritual slaughter is nevertheless authorised under French law. The applicant association came into being as a minority movement, which split away from the Jewish Central Consistory of Paris and applied a strict orthodox conception of religion. According to the applicant association, the ritual slaughterers under the authority of the rabbinical court of the 'ACIP', the only body officially authorised to practice these rituals, no longer complied with the very strict requirements of the Jewish religion. The applicant association submitted that it was therefore obliged, in order to be able to make 'glatt' kosher meat available to its

<sup>84</sup> No. 13343/87, 25 March 1992.

<sup>85</sup> Amiraux, 'Speaking as a Muslim', p. 34 and ff.

<sup>86</sup> On 4 December 2008, the ECtHR issued two judgments relating to the wearing of religious symbols at school, *Dogru v. France* and *Kervanci v. France* (ECtHR (no. 27058/05) (no. 31645/04) 4 December 2008).

<sup>87</sup> No. 27417/95, 27 June 2000.

adherents, to slaughter illegally and to obtain supplies from Belgium. In this controversial ruling, no breach of Article 14 ECHR (prohibition of discrimination) was considered. The Court also dissented from the European Commission<sup>88</sup> and decided that there was no violation of Article 9 of the European Convention. The Court took into account that these ultra-orthodox members of the Jewish community could practice their rituals and that financial reasons had precluded them from concluding an agreement with the ACIP. Such a consideration seems more related to money than to the protection of religious freedom.<sup>89</sup>

*Paturel v. France*<sup>90</sup> is the second judgment on the merits involving freedom of religion. It related to the French social and public perception of Jehovah's Witnesses as a sect. The applicant, a Jehovah's Witness, had been sanctioned for the publication of a book denouncing and criticising the action of a state-funded private association fighting sects. The Court did not declare a violation of Article 9 ECHR, but condemned France for infringing freedom of speech (Article 10 ECHR), as the book was considered to contribute to public debate. As to the status of Jehovah's Witnesses, mention should be made of *Palau-Martinez v. France*,<sup>91</sup> although it did not raise any issue under Article 9 of the ECHR. The case concerned a decision taken by domestic courts to establish children's residence at their father's home after divorce, on the basis that the mother's education was inappropriate. Since part of the reasoning was based on the fact that the mother was a Jehovah's Witness, the ECtHR declared a violation of Articles 8 (privacy) and 14 ECHR (prohibition of discrimination).

There are several decisions of inadmissibility concerning applications against France lodged by religious associations and groups. Although unsuccessful, they show the willingness of religious minorities to make their voice heard in Strasbourg.<sup>92</sup> In *Fédération chrétienne des Témoins de Jéhovah v. France*,<sup>93</sup> the complaint was filed by an association linked to Jehovah's Witnesses,

<sup>88</sup> EComHR, *Report*, application no. 27417/98, 20 October 1998.

<sup>89</sup> See a critical view in P. Rolland, 'L'arrêt Cha'are Shalom Ve Tsedek v. France du 27 juin 2000', in CREDHO cahier no. 14, *La France et la Cour EDH. Jurisprudence de l'année 2000*, (Brussels: Bruylant, 2001), pp. 61–65.

<sup>90</sup> No. 54968/00, 22 December 2005.

<sup>91</sup> No. 64927/01, 16 December 2003.

<sup>92</sup> See e.g. E.ComHR, *Church of Scientology of Paris v. France* (inadmissibility decision no. 19509/92, 9 January 1995). This case concerns a complaint in order to obtain access to classified data of the State and which related to members of the Church of Scientology. The Court declared inadmissible its complaint, considering that it was not compulsory for France to give access to these data.

<sup>93</sup> Dec. no. 53430/99, 6 November 2001.

which alleged discrimination on account of its legal status. The case was arguably filed to raise awareness and fight distrust against minority religious groups.<sup>94</sup>

A few inadmissibility decisions raise the issue of religious symbols. In *Phull v. France*,<sup>95</sup> a Sikh stated that the security staff of a French airport compelled him to remove his turban for inspection. The applicant argued that there had been no need for the security staff to make him remove his turban, especially as he had not refused to go through the walk-through scanner or to be checked with a hand-held detector. The Court affirmed, however, that 'security checks in airports are undoubtedly necessary in the interest of public safety within the meaning of that provision'; moreover, 'the arrangements for implementing them in the present case fell within the respondent State's margin of appreciation, particularly as the measure was only resorted to occasionally'. Another case found inadmissible concerned the denial of access of a Muslim woman to the French Consulate in Marrakech because of her refusal to remove her headscarf. The Court took into account that the removal was required because of 'security reasons' and rejected the complaint although she was ready to show her face and hair to a female security agent.<sup>96</sup>

*Dogru v. France*<sup>97</sup> and *Kervanci v. France*<sup>98</sup> are the first cases to challenge the banning of religious symbols in schools. Both relate to the expulsion of Muslim girls from public schools because they refused to remove their headscarves during sports classes.<sup>99</sup> Together with the Sikh cases, which gave birth to inadmissibility decisions, such as the *Phull* case cited above<sup>100</sup> and the *Mann Singh* case (concerning the denial to remove the turban for a driving license picture),<sup>101</sup> they reflect the restrictive view of the Strasbourg Court when the state's margin of appreciation meets religious issues. Such a restrictive view might have a negative impact on future litigants pleading similar cases.<sup>102</sup>

<sup>94</sup> O. Rolland, 'La France et les sectes (décision Fédération chrétienne des Témoins de Jéhovah du 6 novembre 2001)', CREDHO: *La France et la Cour EDH. Jurisprudence de l'année 2001*, (Brussels: Bruylant, 2002), pp. 175–179.

<sup>95</sup> Dec. no. 35753/03, 11 January 2005.

<sup>96</sup> ECtHR, *El Morsli v. France* (no. 15585/06), 4 March 2008.

<sup>97</sup> ECtHR (no. 27058/05), 4 December 2008.

<sup>98</sup> ECtHR (no. 31645/04), 4 December 2008.

<sup>99</sup> Note that these cases occurred before the complete banning of conspicuous religious symbols in public French schools and therefore do not challenge the 'Stasi Act' of 15 March 2004 (no. 2004–228) referred to in footnote 30. Conversely, the complaint filed on 30 May 2008 by Jasvir Singh and Ranjit Singh before the ECtHR, with the support of the United Sikhs Association, directly challenges this piece of legislation (see details in footnote 67).

<sup>100</sup> No. 35753/03, 11 January 2005.

<sup>101</sup> No. 24479/07, 13 November 2008.

<sup>102</sup> For an application currently pending in Strasbourg, see the case referred to in footnote 68.

Finally, the few cases which have been lodged regarding freedom of expression have had a large impact in the media because of their social or political sensitivity. Although they cannot be classified as implicating 'vulnerable' individuals, they relate to the expression of 'non majoritarian' views and have opened public debate in the light of Article 10 of the European Convention and under Article 17 of the ECHR (i.e. abuse of law clause). Revisionism and the limits of freedom of expression,<sup>103</sup> as well as publications regarding facts and actors of the French resistance during the Second World War have been issues dealt with by the Court.<sup>104</sup> The fight against anti-semitism or hate speech has been regulated through several pieces of legislation.<sup>105</sup> In the *Chauvy* ruling,<sup>106</sup> the Strasbourg Court considered that even though the 'so called "Barbie testament" did not belong to the category of clearly established historical facts – such as the Holocaust- (...)', there was an important attempt to the reputation of Mr and Mrs Aubrac, recognised members of the Resistance movement. It concluded that there was no breach of Article 10 ECHR and supported French domestic courts' decision to ban information attempting to the reputation of these two persons.

A last set of case law is related to the right to vote. Its direct impact on democracy, and the tension it reveals between diffused and less diffused political views are the reasons why it finds a place in a contribution dedicated to vulnerable groups or individuals. In *Py v. France*,<sup>107</sup> the applicant, a professor, teaching and living in New Caledonia at the time, complained of the restriction of his right to vote on the special electoral roll on self-determination. A 10-years residence was required in order to vote, a condition that the Court considered in accordance with the ECHR. *Piermont*<sup>108</sup> is a *sui generis* case. It does not raise an issue under Article 3 of Protocol no. 1 of the ECHR (right to vote), but concerns the public expression of a political opinion in a foreign country going through a process of accession to its autonomy. The applicant, a German citizen and member of the EU Parliament, was expelled from the French Polynesian territory because she expressed her public support to the independence process and criticism against nuclear tests. The Court declared violation of Article 10 of the Convention. However, it based its ruling on the fact that Mrs Piermont could not be considered a 'foreigner' in the sense of the

<sup>103</sup> ECtHR, *Lehideux et Isorni v. France* (no. 55/1997/839/1045), 23 September 1998; ECtHR, *Garaudy v. France* (no. 65831/01), 24 June 2003.

<sup>104</sup> ECtHR, *Chauvy and Others v. France* (no. 64915/01), 29 June 2004.

<sup>105</sup> See *supra*, paragraph 2.

<sup>106</sup> ECtHR, *Chauvy and Others v. France* (no. 64915/01), 29 June 2004.

<sup>107</sup> No. 66289/01, 11 January 2005.

<sup>108</sup> ECtHR, *Piermont v. France* (no. 15773/89), 27 April 1995.

Convention. Her condition of national of an EU country and member of the EU Parliament granted her a better protection of her rights. It was indeed her political functions, which lead the Court to affirm her right to express a political opinion under the ECHR and ensured a higher protection from expulsion. This case could also have been listed among those relating to the rights of foreigners. Taking into account Mrs. Piermont's status as an EU citizen, one might doubt whether she could be considered to be a 'vulnerable' individual as long as the issue of expulsion was at stake. Should she have been a national from a third country, the Court would have had to pronounce itself on the validity of the expulsion decision.

### 5. *Conclusion*

Legal literature traditionally highlights one important feature of the French situation regarding the ECHR: France's self-perception as the 'human rights homeland' (*patrie des droits de l'homme*). It has long been considered (and it is still sometimes considered) that the highly developed domestic system of human rights protection does not need external monitoring.

Such a traditional presentation should be strongly qualified. To a certain extent, it is also outmoded. A shift in political and judicial approaches towards international protection of human rights has been taking place in France. Although France was slow to ratify the European Convention on Human Rights and to accept the jurisdiction of the European Court of Human Rights, the current political position is, to a large extent, supportive of the Strasbourg system. In addition, most French courts are no more reluctant to construe the Convention's provisions in line with Strasbourg rulings issued against countries other than France.

Furthermore, although the control mechanisms to protect human rights are deeply rooted in the French legal system, the constitutional conception of equality enshrined in the indivisibility principle of the Republic makes it very hard for vulnerable groups and minorities to be recognised as such. In their search for an established identity, religious minorities, homosexual or transgender lobbies are considering Strasbourg as an instance of paramount importance. With the growing influence of the common law approach of strategic litigation, recourse to Strasbourg is not simply taken with the objective of winning a particular case, but rather of changing the law. Finally, the high number of complaints involving foreigners also illustrates a change of attitude in this field, which is going through a growing process of transnational *judicialisation* supported by active and well-organised NGOs.