JUDICIAL COMPARATIVISM IN HUMAN RIGHTS CASES

Edited by
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question (is it legitimate?). None of these basic questions, I fear, has been adequately answered.

The empirical question requires more consistently gathered evidence than the somewhat anecdotal evidence presented here.

The jurisprudential question requires a more thorough examination of how the phenomenon is illuminated by current debates on the theory of judicial interpretation.

The normative question requires a closer study of the relationship between the phenomenon and the universality of human rights.

This is not an issue that is likely to go away. At the very least, we should attempt to understand it better.

Chapter 2

Comparative Law and the European Convention on Human Rights in French Human Rights Cases[1]

Luc Heuschling

I. INTRODUCTION

The study of the use of comparative law by courts is of growing interest.[2] As Koopmans puts it, comparative law is no longer a simple 'matter for academic research, difficult and, surely, very interesting; beautiful to know something about, but not immediately relevant to the daily life of the law'.[3]

[1] I would like to express my gratitude to Etienne Picard, Professor at the University of Paris I, for his kindness and his support.

The following abbreviations will be used in this chapter:
AJDA—Actualité juridique. Droit administratif; Cass.—Cour de Cassation; CC—Conseil constitutionnel; CE—Conseil d'Etat; D—Dalloz; Gaz. Pal.—Gazette du Palais; ICLQ—International and Comparative Law Quarterly; JCP—Semaine juridique; JSLC—Journées de la Société de législation comparée; Lebon—Recueil des décisions du Conseil d'Etat; R.—Recueil des décisions du Conseil constitutionnel;RFDA—Revue française de droit administratif; RFDC—Revue française de droit constitutionnel; RIDC—Revue internationale de droit comparé; RTDH—Revue trimestrielle des droits de l'homme.

[2] P Widmer (ed), *Le role du droit comparé dans la formation du droit européen* (Zurich: Institut suisse dedroit compare/Schulthess, 2001); M Kiikeri, *Comparative Legal Reasoning and European Law* (Dordrecht: Kluwer, 2001), cf U Drobnig and S. van Erp (ed), *The Use of Comparative Law by Courts, 14th International Congress of Comparative Law* (Athens 1997), (The Hague: Kluwer, 1999); T Koopmans, 'Comparative Law and the Courts', *ICLQ*, 1996, vol 45, 545 et seq; F Werro, 'La jurisprudence et le droit comparé' in Institut suisse de droit comparé (ed), *Perméabilité des ordres juridiques* (Zürich: Schulthess, 1992), 165 et seq; P Pescatore, 'Le recours par la Cour de justice des Communautés européennes à des normes déduites de la comparaison des droits des Etats membres', RIDC, 1980, 337. See also *L'avenir du droit comparé. Un défi pour les juristes du nouveau millénaire*, (Paris: Société de législation comparée, 2000). On the French situation, cf R Legeais, 'L'utilisation du droit comparé par les tribunaux', RIDC, 1994, 347 et seq; P Bézard, 'Les magistrats français et le droit comparé', RIDC, 1994, 775 et seq; D Breillat, 'L'influence de la doctrine et du droit comparé sur la jurisprudence française: droit international public', JSLC, 1994, vol 16, 135 et seq; E Picard, 'Le rôle de la doctrine et du droit comparé dans la formation de la jurisprudence en droit administratif français', JSLC, 1994, vol 16, 201 et seq; M Moreau, 'Rôle de la doctrine et du droit comparé dans la formation de la jurisprudence: aspects de droit privé', JSLC, 1994, vol 16; 235 et seq; R Legeais, 'Le rôle de la doctrine et du droit comparé dans la formation de la jurisprudence pénale française', JSLC, 1994, vol 16, 261 et seq, cf also n 80.

[3] Koopmans, n 2 above, at 545.

Comparative law is becoming at last a practical science whose usefulness (if this is the criterion of a true science of law)[4] can no longer be contested.

This phenomenon should however not be overestimated. French judges, even in higher courts, are very often occupied, if not overburdened, with day-to-day affairs that will be resolved according to traditional national criteria; in most cases courts do not feel the need, nor even have the time to look overseas.[5] Yet, several factors have brought about important changes: (i) globalisation has increased the interdependence of national economies and societies; (ii) the European integration process has created a dynamic of unification or harmonisation of national laws; (iii) rapid changes due to the tremendous progress of science and technology on fundamental human questions such as biomedical ethics, for example, have encouraged judges to enquire about foreign legal solutions in order to cope with these new challenges: comparative law, expressing a kind of consensus between civilised nations, is called upon to help to replace or support dwindling moral certainties on such complicated issues that are common across countries.[6] Thus, according to several authors, the twenty-first century may become the 'era of comparison'.[7]

The aim of the present work is to scrutinise that claim. Indeed, what are exactly the importance and the functions of comparative law arguments in judicial proceedings? Two original features of the issue to be debated here should be underlined. First of all the field of research is restricted to human rights cases. This raises the question whether the weight of comparative law is more or less important according to the various branches of law. Some authors have advanced the idea that, because of their specific transnational nature, some legal matters are more open to exterior influences than others. In a famous article, Zweigert put forward the areas of contract and commercial law;[8] but his hypothesis has not proved to be entirely true in judicial practice.[9] More recently, various authors stressed the appropriateness of comparative methods in human rights cases given the universal nature of these rights.[10]

[4] This view is strongly criticised by R Sacco, *Einführung in die Rechtsvergleichung*, transl. from Italian by J. Joussen (Baden-Baden: Nomos, 2001), at 13 et seq.

[5] Cf the opinion of Bézard n 2 above, judge at the *Cour de Cassation*.

[6] Koopmans, n 2 above, at 549 and 556. See also below the use of comparative law by the *Conseil d'Etat* in its decision on abortion.

[7] P Legrand quoted by E Örücü, 'Critical Comparative Law. Considering Paradoxes for Legal Systems in Transition' (2000), *Electronic Journal of Comparative Law* <http://law.kub.nl/ejcl>, ch 8. See also Koopmans, n 2 above, at 556. In France, this view is defended, although in more prudent terms, by Picard, n 2 above, at 149 et seq.

[8] K Zweigert, 'Rechtsvergleichung als universale Interpretationsmethode', *Rabels Zeitschrift*, vol 15, 1949/50, 12 et seq.

[9] Cf U Drobnig, 'The Use of Foreign Law by German Courts', in id and van Erp (ed), n 2 above, at 140.

[10] Cf P Häberle, Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat—Zugleich zur Rechtsvergleichung als fünfter Auslegungsmethode', in id, *Rechtsvergleichung im Kraftfeld des Verfassungs-staates*, (Berlin: Duncker & Humblot, 1992), 35 et seq. In France, cf the writings of E Picard. The idea appears also in Art 39 § 1 of the 1996 Constitution of South Africa: '*When interpreting the Bill of Rights, a court, tribunal or forum—a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; b) must consider international law; and c) may consider foreign law.*' (See also Art 35 of the interim Constitution of 1993.)

The second original feature of this work consists in the definition of its object. The concept of comparativism can be understood in different ways. The editor defends a broad concept, which includes not only the recourse to legal material from *foreign* law, but also the use of the European Convention on Human Rights (ECHR) which is an *international* treaty. This approach is justified by the particular situation of UK law, at least until the Human Rights Act 1998 came into effect: at the time the ECHR was not incorporated into British law and shared almost the same extra-legal status as comparative law.[11] Therefore this chapter will look at both aspects although French legal writers would generally adopt a stricter definition of comparativism. In France, the ECHR has indeed been part of domestic law since its ratification in 1974, whereas comparative law *stricto sensu* is not considered to be a formal source of law. The application of international law by French courts is obligatory, and has become a most important element in the French legal system; on the contrary comparative law is only an optional method of interpretation whose effective role in France seems to be feeble if not marginal.

Despite all these differences, the analysis of both aspects reveals a common feature: European and comparative law form part, at various levels, of the same dynamic which is the broadening of the perspectives of the domestic legal system. The formal and material sources of French law are no longer exclusively national, but are more and more receptive to external influences.[12] In 1909, Mr Denis, judge at the *Cour de cassation*, could say: '*J'aime mieux la loi française que la loi étrangère* (I prefer French law to foreign law)'.[13] In 1991, the First President of the *Cour de cassation* and the General Attorney at the same court wrote: '*L'ordre juridique, à l'élaboration et à l'amélioration duquel nous travaillons tous, ne se forge plus exclusivement à l'intérieur des frontières.* (The legal order whose elaboration and improvement is our sole mission, is not created any more exclusively inside

[11] Cf E Örücü, 'Comparative Law in British Courts', in Drobnig and van Erp (ed), n 2 above, at. 269 et seq.

[12] Comparative law and European law arguments are mixed up on various occasions. Courts may, eg, rely on foreign judicial decisions as guidance for interpretation of international rules (cf concl B Stirn on CE ass 21 Dec 1990, *Confédération nationale des associations familiales catholiques et autres*, *RFDA*, 1990, 1065 et seq). Sometimes national courts resist international legal norms which are suspected of reflecting excessively the spirit of a foreign law system (eg, English conceptions in regard of Art 6 ECHR).

[13] Quoted by Legeais, n 2 above, at 271

the borders.)'[14] To quote a famous article of Lord Bingham, French lawyers also have to be aware now that 'there is a world elsewhere'.[15]

In France, this new phenomenon meets however two major obstacles. The first concerns the 1789 tradition of the *'légicentrisme'* (S Rials), ie the legalist definition of law. Although it is strongly contested in theory and practice today, it is not yet entirely dead and buried. Its spirit, especially the distrust of judicial power, still haunts the French debate, making some brief appearances from time to time. According to the *'légicentrisme'*, the law (*droit*) is entirely contained in the statutes (*lois*) expressing the general will (*volonté générale*) of the sovereign nation. Thus, law and legal science were fundamentally national in the nineteenth century;[16] knowledge of foreign law was neither necessary nor useful, either because judges were not supposed to have the power to interpret the law (as the statutes were thought to be clear and complete) or, if they had such a power, they were not supposed to look abroad for guidance.

The second barrier to a wider acceptance of comparative law is precisely the conviction of the perfection and superiority of French law. France being the *'patrie'*, the birthplace of human rights, and having invented legal monuments such as the *Code civil* and the judicial review of administration by the *Conseil d'Etat*, comparative law could only be an export, but never an import.[17] This nationalist pride was one of two arguments used by French governments to delay the ratification of the ECHR: if the situation of human rights is already perfect in France due to a long-standing tradition, why should there be a need to adopt the Convention and, even more, to submit to the review of the Strasbourg Court?[18]

Since those days, the situation has of course very much changed; a new generation of lawyers and judges who are more open to external influences has emerged. As a result, the ECHR plays a major role in the growth of the judicial safeguards of human rights. On the contrary, the importance of comparative law, although one may not neglect it, is much more difficult to discern.

[14] Quoted by J-F Burgelin and A Lalardrie, 'L'application de la Convention par le juge judiciaire français', *Mélanges Pettiti* (Bruxelles: Bruylant, 1998), 158.

[15] Lord Bingham, 'There is a World Elsewhere: The Changing Perspectives of English Law', *ICLQ*, 1992, vol 41, 515 et seq.

[16] On this nationalistic paradigm of the nineteenth century, which has been progressively counterbalanced by the emerging comparative law science, cf H Coing, *Europäisches Privatrecht*, vol II (*19 Jahrhundert*), (München: Beck, 1989), 1 et seq, and 56 et seq; J-L Halpérin, *Histoire du droit privé français depuis 1804*, (Paris: PUF coll. Quadrige, 2001), 45 et seq.

[17] Picard, n 2 above, at 213.

[18] Cf the press release of the cabinet in 1973, when having decided to give way finally to the ratification of the ECHR: *'La France n'a certes pas grand-chose à apprendre dans le domaine des droits de l'homme qui sont garantis par ses lois nationales, mais nous considérons qu'il s'agit d'un geste européen* (Although France has not much to learn in the field of human rights, which are guaranteed by national statutes, we consider it to be a gesture towards Europe)' (quoted by B Pacteau, 'Le juge administratif français et l'interprétation européenne', in F Sudre (ed), *L'interprétation de la CEDH*, 1998, n 18 above, at 256). The second argument was, on the contrary, the risk of being criticised by the European institutions for the colonial wars in Indochina and especially in Algeria. The individual right to take a case to the Court was granted by France only in 1981: the fear of the invasive power of the Court was a factor too prohibitive, even in 1974.

II. THE MAJOR ROLE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OF THE STRABOURG CASE LAW FOR FRENCH COURTS

The influence of the ECHR is only recent in France. One major reason is the delay by governments in ratifying the Convention and recognising the right of individual petition to the European Commission (former Article 25). The former happened in 1974, the latter only in 1981. Furthermore, at the beginning, French courts were not very eager to use this new instrument. Thus, 10 years after the ratification, the role of the Convention was still considered to be minor by legal writers.[19] The situation changed from the end of the 1980s and today the importance of the ECHR is no longer contested, although there may still be some resistance, especially against the case law of the European Court of Human Rights (ECoHR). I will first focus on the legal position of the ECHR and of the ECoHR's case law in the French hierarchy of norms before analysing, the effective use of both by French courts.

A. The legal authority of the Convention and of the European Court's decisions

As the ECHR is superior to statutes, it plays a major role in French law as a remedy to the shortcomings of constitutional review. In this regard, one has however to distinguish between the Convention *stricto sensu* and the decisions of the ECoHR whose legal status is much debated.

1. The principle of the supremacy of the ECHR: a substitute for incomplete constitutional review

Since the ratification of the ECHR in 1974, its provisions have been granted direct effect (*effet direct*) by French courts; they are self-executing.[20]

[19] G Cohen-Jonathan *et al* (eds), *Droits de l'homme en France. Dix ans d'application de la CEDH devant les juridictions judiciaires françaises* (Strasbourg: Engel, 1985).

[20] Cf Cass crim 3 June 1975, *Respino*; G Cohen-Jonathan, 'La place de la CEDH dans l'ordre juridique français', in F Sudre (ed), *Le droit français et la Convention européenne des droits de l'homme, 1974–1992* (Kehl: Engel, 1994), at 2 et seq. In the past some judicial decisions refused the direct effect (cf Court of Appeal of Paris, 29 Feb 1980, *Georges Andrieu*, and Court of Appeal of Bordeaux, 27 Mar 1987, *Gaz Pal*, 1987, II, jurisp, at 401); this attitude was however exceptional.

Furthermore, according to Article 55 of the Constitution of the Vth Republic, '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'. Thus the ECHR is superior to any statute adopted by the French Parliament and the courts are empowered to enforce this pre-eminence.[21] In the past, the hypothesis that courts could safeguard human rights against democratically elected representatives was simply inconceivable in the country of Jean-Jacques Rousseau: the distrust of judicial power and the fear of its abuses were still very vivid in French opinion.

This explains why constitutional review has been accepted only since 1958, under very restrictive conditions: (i) only some political authorities can refer Acts of Parliament, before their promulgation, to the newly created *Conseil constitutionnel*;[22] consequently the constitutionality of a certain number of statutes has never been challenged; (ii) some types of statutes such as the statutes adopted by referendum are excluded from review by the *Conseil*;[23] (iii) individuals were, and still are, not allowed to apply to the *Conseil constitutionnel* and they may not claim the unconstitutionality of a statute to be applied to them in a trial; (iv) it was only in 1971[24] that the *Conseil* agreed to check the compliance of Acts of Parliament with human rights proclaimed in the Declaration of 1789 and the preamble of the 1946 Constitution. These shortcomings of constitutional review in France explain the crucial importance of the judicial enforcement of the primacy of international law.

The role of international law as a safeguard for human rights is accepted only by the ordinary courts. In its famous decision on the abortion case in 1975, the *Conseil constitutionell* considered that its jurisdiction as constitutional judge, set out in Article 61 of the Constitution, did not include the right to rule whether a statute was compatible with a treaty and, specifically, with the ECHR.[25] Thus, contrary to other constitutional courts in Spain, Austria, Germany, etc, the French *Conseil constitutionnel* refuses to apply or to use the ECHR as a guide for interpretation. At least it does not do so officially.

[21] In regard of domestic law, international treaties are however inferior to the Constitution. Cf CE ass 30 Oct 1998, *Sarran*, concl. C Magüé, *RFDA*, 1998, at 1081 et seq; Cass plen ass 2 June 2000, *Mlle Pauline Fraisse*, *Revue du droit public*, 2000, 1050; D Alland, 'Consécration d'un paradoxe: primauté du droit interne sur le droit international', *RFDA*, 1998, at 1094 et seq.

[22] Art 61 § 2 of the Constitution of 1958: the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate and, since an amendment in 1974, 60 deputies or senators.

[23] CC 6 Nov 1962, *Election du président de la République*, *R*, at 27; CC 23 Sept 1992, *Maastricht III*, R, at 94.

[24] CC 16 July 1971, *Liberté d'association*, *R*, at 29.

[25] CC 15 Jan 1975, *Interruption volontaire de grossesse*, *R*, 19. As a practical result, the Council could evade the question whether abortion was prohibited or not by Art 2 § 1 ECHR.

In contrast, the ordinary courts have progressively accepted the application of Article 55: the *Cour de cassation* was the first to use this new prerogative in its seminal decision *Café Jacques Vabre* in 1975;[26] the *Conseil constitutionnel*, in its function as electoral judge, did so in 1988;[27] and, finally, even the *Conseil d'Etat*, which had been the champion of the doctrine of sovereignty of Parliament, changed its mind in 1989 in its famous decision *Nicolo*.[28] In this case, the *Conseil d'Etat* held that treaties prevailed not only over earlier statutes (this point had always been accepted in regard to the rule lex posterior) but also over later ones. Thus every ordinary tribunal, from the lowest to the highest, is entitled, on the occasion of any trial, to protect human rights either by interpreting or by setting aside a statute in conflict with the ECHR.

On the one hand, this review exercised a posteriori by the ordinary courts forms a new and major bulwark of the Rule of law.[29] On the other hand, it is also a serious challenge to the constitutional review reserved exclusively to the *Conseil constitutionnel*.[30] In fact, both reviews are very similar in their content as the ECHR and the French Constitution contain approximately the same fundamental rights. The review of the supremacy of the ECHR may fill in the gaps of constitutional review;[31] but it may also serve to jeopardise the authority of the *Conseil constitutionnel* which could be contested by national courts and/or the Strasbourg Court. In 1990, the *Conseil d'Etat* had to resolve whether the French legislation on abortion, whose conformity to the Constitution had already been approved by the *Conseil constitutionnel* in 1975, was compatible with the right to life enshrined in Article 2 § 1 of the ECHR.[32] In that case, the *Conseil d'Etat*

[26] Cass ch mixte, 24 May 1975, *D.*, 1975, at 497, concl Touffait.

[27] CC 21 Oct 1988, *Elections AN, 5e circonscription Val d'Oise*, *R.*, 183. In this second function, the Council's powers are those of an ordinary judge.

[28] CE ass 20 Oct 1989, *Lebon*, at 190, concl P Frydman.

[29] So far the *Conseil d'Etat* has not yet declared a statute to be incompatible with the ECHR; on the contrary civil courts are less timid. For a survey of the case law, cf R de Gouttes, 'La CEDH et le juge français', RIDC, 1999, 14 et seq; S Guinchard, 'L'application de la CEDH par le juge judiciaire', Europe, n° spécial, 1999, 18 et seq; J-F Burgelin and A. Lalardrie n 14 above, at 151; J-P Markus, 'Le contrôle de conventionnalité des lois par le Conseil d'Etat', *AJDA* (1999), 99 et seq G. Braibant, 'Le contrôle de constitutionnalité des lois par le Conseil d'Etat', *Mélanges G Conac*, (Paris: Economica, 2001), at 190 et seq.

[30] Cf 'Protection constitutionnelle et protection internationale des droits de l'homme: concurrence ou complémentarité? Rapport présenté par la délégation française à la IXe conférence des Cours constitutionnelles européennes', RFDA, 1993, at 849 et seq; D de Béchillon, 'De quelques incidences du contrôle de la conventionnalité internationale des lois par le juge ordinaire (Malaise dans la Constitution)', RFDA, 1998, 225 et seq; P Gaïa, 'Les interactions entre les jurisprudences de la Cour européenne des droits de l'homme et du Conseil constitutionnel', RFDC, 1996, 725 et seq.

[31] Thus, statutes adopted by referendum could be scrutinised regarding their compatibility to the ECHR. Cf the opinion of the *commissaire du gouvernement* C Magüe in the case CE ass. 30 Oct 1998, *Sarran*, RFDA, 1998, at 1087.

[32] CE ass 21 Dec 1990, *Confédération nationale des associations familiales catholiques*, and

reached the same conclusion as the *Conseil constitutionnel*. The hypothesis of a dissonance between the jurisprudence of the various courts occurred first in 1999 when the ECoHR condemned, in its decision *Zielinski, Pradal & Gonzales v France* of 28 October 1999, the use by French government of the so-called *lois de validations*. These statutes adopted by Parliament in order to legalise retrospectively existing practices, whose validity had been successfully challenged before the courts, were held by the Strasbourg Court to infringe Article 6 ECHR. Thus, the ECoHR openly disapproved the position of the *Conseil constitutionnel*: the latter had considered the impugned Act of Parliament to comply with the requirements of the French Constitution, especially the principle of independence of justice set out in Article 16 of the 1789 Declaration of human rights.[33] Given the fact that both the national and the European judges had to interpret one and the same principle, it was quite difficult to admit a conflict between their decisions.

This is one of the reasons why the *Conseil constitutionnel* is implicitly obliged to take into account the provisions of the ECHR when construing the provisions of the Constitution. It has to do so if it wants to prevent a clash with the French ordinary courts and/or the ECoHR. This indirect, disguised and still feeble influence of the ECHR has been shown so far in at least three cases when the *Conseil* copied, almost literally, the definition given by the Strasbourg Court to the freedom of expression, the rights of defence and the fundamental principles of criminal law and procedure.[34]

2. *The legal authority of the ECoHR: the distinction between French cases and non-French cases*

The question is whether the principles developed by the Strasbourg Court in its case law enjoy the same legal status in France as the Convention stricto sensu. This is most important as the criticisms of national law are often founded not so much on the text of the Convention as on the innovative reading given to it by the European Court.[35] The abstract and vague

the same day *Association pour l'objection de conscience à toute forme de participation à l'avortement*, *Lebon*, at 369, concl B. Stirn, *RFDA*, 1990, at 1965 et seq.

[33] Cf B Mathieu, 'Les validations législatives devant le juge de Strasbourg: une réaction rapide du Conseil constitutionnel mais une décision lourde de menaces pour l'avenir de la juridiction constitutionnelle', RFDA, 2000, at 289 et seq. The ECoHR also disapproved the attitude of the *Cour de cassation* which had confirmed the validity of the contested statute in regard to Art 6 ECHR.

[34] Cf P Gaïa, n 30 above at 742. More recently see, B Mathieu, 'Du quelques examples récents de l'influence des drois européens sur le juge constitutionnel francais', *Dalloz*, 2002, at 1439 et seq.

[35] E Garaud, in J-P. Marguénaud (ed), *CEDH et droit privé. L'influence de la jurisprudence de la Cour européenne des droits de l'homme sur le droit privé français* (Paris: La documentation française, 2001), 145.

nature of some of the Convention's provisions leave much discretion to its interpreter. Therefore, unsurprisingly, the definition of the exact limits of the legal authority of the Strasbourg case law has given rise to a wide theoretical debate which may appear to British lawyers (but not only to them) a little too theoretical. One has to distinguish between the cases tried by the European Court in which France is one of the parties and those in which France is not party (non-French cases).[36]

In the so-called French cases, the final decision of the European Court is binding on both parties, but only on them. According to Article 46 (former Article 53) ECHR, 'the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'. The decision is vested only with a relative legal authority or resjudicata (*autorité relative de la chose jugée*); it is not obligatory *erga omnes*. A contrario, does that mean that non-French cases are totally irrelevant to France and specifically to French Courts? The answer is certainly no, but the whole debate concerns the nature of the authority of these cases: is it a *de jure* authority, which would legally bind national courts, or is it simply a *de facto* constraint which courts are free to ignore if they so wish?

In the eyes of one part of legal science, the decisions of the ECoHR in non-French cases have a specific legal authority *erga omnes* called '*autorité de la chose interpreté*' or '*autorité interprétative* (interpretative authority)'.[37] It would be founded on Article 1 and more specifically on Article 32 ECHR which confers to the ECoHR a general mission to interpret the Convention. Besides, in its decision of 18 January 1978 (*Ireland v UK*), the Strasbourg Court held that its 'judgements in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention'.[38] According to this view, a decision of the ECoHR is constituted of two elements: (i) the concrete analysis of a State behaviour which is claimed to be a breach of the ECHR; the Court's decision regarding this aspect is vested with the *autorité relative de la chose jugée*'; (ii) the general interpretation of the Convention's provision which would create a kind of precedent for the future; concerning this aspect, the Court's decision would be vested with the '*autorité de la chose interprétée*'.[39]

[36] Cf J-P Marguénaud, *La Cour européenne des droits de l'homme* (Paris, Dalloz, 1997), at 119 et seq; J-P Marguénaud (ed), n 35 above ch 1. F Sudre, *Droit international et européen des droits de l'homme*, 4th edn (Paris: PUF, 1999), at 407 et seq; J-F Renucci, *Droit européen des droits de l'homme*, 2nd edn (Paris: LGDJ, 2001), at 537 et seq.

[37] Cf Marguénaud, n 36 above, at 129 et seq.

[38] *Series A*, vol 25, § 154.

[39] In its judgment from 22 Apr 1993, *Modinos*, the ECoHR criticised Cyprus for not having decriminalised homosexual relations between consenting adults after its decision *Dudgeon* from 22 Oct 1981 condemning UK for similar reasons.

This view is strongly contested by the *Conseil d'Etat* who, at least in the past, had the reputation to be the most euro-sceptical amongst French courts. In his famous conclusions on the case *Debout* from 1978, the *commissaire du gouvernement* Daniel Labetoulle (the current president of the *section du contentieux*) held that 'in purely legal terms' the *Conseil d'Etat* had, in regard of the ECHR, 'an autonomous and sovereign power of interpretation entirely comparable to the interpretation power of domestic rules'.[40] He conceded however that for reasons of 'convenience and political realism', a radical conflict with the ECoHR would not be 'appropriate'.[41] The *Conseil* should therefore adopt a prudent strategy consisting of preventing (i) any radical clash with the European Court and (ii) any caesura with national traditions.[42] So the administrative judge is invited to handle the case law of the Strasbourg Court as if it were simple factual data[43] or constraint[44] whose weight may be calculated according to various factors like the reaction of the press and public opinion, national and international; the probability of a complaint by a French citizen to the Strasbourg Court; the possibility that the ECoHR changes its mind etc.

The reluctant acceptance of the legal authority of the Strasbourg case law at a theoretical level explains the variety of reactions of French courts when implementing the ECHR.

B. *The effective use of the ECHR and its case law by French courts*

The attitudes of French courts towards the ECHR and particularly the ECoHR are of a disconcerting variety and incoherence.[45] The range of reactions goes from over-zealousness to open resistance to the Strasbourg Court. The reactions may even vary from court to court and, sometimes,

[40] Concl D Labetoulle on CE sect 27 Oct. 1978, *Lebon*, at 403.

[41] Ibid. In its conclusions on CE ass 11 July 1984, *Subrini, D*, 1984, at 183, the *commissaire du gouvernement* Bruno Genevois referred to the 'necessity of judicial disciplin *(impératif de discipline juridictionnelle)*' in order to safeguard the unity of the Convention's interpretation. It is true that since 1981 French citizens have the right to apply to the European authorities.

[42] Concl D Labetoulle on CE sect 27 Oct 1978, *Lebon*, at 403.

[43] This thesis has been confirmed recently by the *commissaire du gouvernement* G Bachelier in his conclusions on CE 24 Nov 1997, *Soc Amibu, Droit fiscal*, 1998, n° 8, at 280: 'Certainly, when you apply the provisions of the Convention, you attach a lot of importance to the latest interpretation given by the European Court, but you can not consider yourself as being legally bound by this interpretation.' Cf concl R Abraham on CE sect 3 July 1998, *Bitouzet, Lebon*, at 292.

[44] If the ECHR is mainly a constraint for the *Conseil d'Etat*, it is also (one should not forget) a source of new prerogatives. Cf B Pacteau, n 18 above, at 270; J-F Flauss, 'L'application de la CEDH par le juge administratif', *Europe*, n° spécial, 1999, 25 et seq.

[45] E Garaud, M-C Meyeaud-Garaud, B Moutel, and J-M Plazy, 'La prise en compte de la jurisprudence de la Cour européenne des droits de l'homme par les juridictions judiciaires françaises', in J-P Marguénaud (ed), *CEDH et droit privé*, n 35 above at 103. Marguénaud, *La Cour européenne . . .*, n 36 above, at 124 et seq and 130 et seq.

from chamber to chamber of one and the same court. Thus the *Conseil d'Etat* has a more euro-sceptical reputation in contrast to the *Cour de cassation* which, in some recent cases, has proved to be more European than the European Court.[46] Yet, on other occasions, the same *Cour de cassation* may be totally impervious to arguments based on the ECHR. Although in general French judges accept to apply, with more or less enthusiasm, the principles of the ECHR as expounded by the ECoHR, they are very attached to the preservation of their own authority and legitimacy. This ambivalent attitude may be summed up by two opposite dynamics, which command the French courts' decisions.[47]

1. *A general attitude of 'openness' (R de Gouttes)*

Referring to the ECHR during a trial has become commonplace today for French lawyers and judges. Parties even tend to abuse, giving rise to a *'European logorrhoea'*;[48] as a result judges simply ignore claims which are visibly irrelevant or too vague. In general however, French judges are quite cooperative in the implementation of the Convention. Various paradigms may be taken into account here.

First of all, some judges, especially the criminal chamber of the *Cour de cassation*, refer *de officio* to the ECHR in case the parties have omitted to do so.[49] This attitude is however not shared by all judges as shown by the reluctance of the civil chambers of the *Cour de cassation*[50] and of the *Conseil d'Etat*.[51]

Another criterion proving the degree of openness of the courts, consists in their interpretation of the ECHR in the absence of any case law of the Strasbourg Court. In this regard French courts construe the Convention's provisions according to the creative method used by the EcoHR.[52] Thus, via the construction of French courts, the ECHR is becoming a living instrument for the effective protection of human rights. This occurred, for example, in the *Kloeckner* case of 1996: the *Cour de cassation* ruled, in advance

[46] Flauss, n 44 above at 24. J-P Costa, 'L'application par le Conseil d'Etat français de la CEDH', RTDH, 1997, 393 et seq; Pacteau, n 18 above at 251 et seq; J-C Bonichot, 'L'application de la CEDH par le juge administratif', *Europe*, n° spécial, 1999, 21 et seq.

[47] R de Gouttes, 'Le juge français et la CEDH: avancées et résistances . . .', RTDH, 1995, at 605 et seq; id, 'La CEDH et le juge français', RIDC, 1999, at 7 et seq; id, 'L'application de la CEDH par le juge judiciaire', *Europe*, n° spécial, 1999, at 19 et seq.

[48] Marguénaud, 'Le juge judiciaire et l'interprétation européenne', in Sudre (ed), n 36 above, at 233.

[49] Gouttes, 'Le juge francais . . .' n 47 above, at 609.

[50] Cf Garaud *et al*, n 45 above, at 118.

[51] Flauss, n 44 above, at 23.

[52] Cf Marguénaud, 'Le juge judiciaire et l'interprétation européenne', in Sude (ed), n 48 above at 243 et seq; J Costa, n 46 above, at 399.

of the ECoHR, that Article 6 § 1 ECHR was applicable to all fiscal disputes before civil courts.[53]

The most important sign of the European spirit of French courts is their compliance with the principles enunciated by the Strasbourg Court in its case law.

This happens first of all in French cases in which France has been found liable for an infringement of the ECHR. Three examples may illustrate here the will of French authorities to execute as promptly as possible the decisions of the ECoHR. The case of the telephone tapping offers a paradigm: the French practice has been ruled by the ECoHR to be incompatible with Article 8 ECHR in its judgment of 24 April 1990 (*Krüslin and Huvig v France*); only three weeks later,[54] the *Cour de cassation* took notice of it and changed its case law, whereas Parliament adopted new legislation only on 10 July 1991. Another famous case concerned the legal status of transsexual persons. French courts dismissed requests by transsexuals to change their first name and their sexual identity on their identity cards and on the records of the registry office. After some hesitation, the European Court ruled this position to infringe the right to privacy in its decision *B v France* of 25 March 1992.[55] A few months later, the Plenary Assembly of the *Cour de cassation* accepted this point of view in its seminal decision of 11 December 1992 (*Marc X et René X*) which was considered to be a historic event. The *Cour* departed indeed from one of the most fundamental principles of French civil law, ie the principle of inalienability of the status of individuals (*indisponibilité de l'état des personnes*). On various occasions, the *Conseil d'Etat* has also accepted the authority of the European Court's decisions: thus, after the decision *Bozano* (18 December 1986) and *Beldjoudi* (26 March 1992) of the Strasbourg Court, the judges at the *Palais Royal* extended the scope of judicial review of expulsion decisions; more specifically they agreed to scrutinise the administration's choice concerning the country to which the person should be deported[56] and to safeguard the foreigners' right to family life protected by Article 8 ECHR.[57]

The authority of the ECoHR has also been recognised by French courts in numerous non-French cases. Two examples can be mentioned here: the first concerns the *Cour de cassation* which, in its decision of 10 January 1984, *Renneman*, held Article 6 of the ECHR to be applicable to disciplinary courts established by professional associations (*ordres professionnels*). The *Cour* referred explicitly—which is quite unusual for French courts—to

[53] Cass plen ass 14 June 1996, *JCP*, 1996, II, 22 692. For an example from administrative case law, cf CE 27 Feb 1987, *Fidan*, *Lebon*, 81 preceding the decision *Soering v UK* (1989) from the ECoHR.

[54] Cass crim 15 May 1990, *Bacha Baroudé*.

[55] *Series A*, vol 232.

[56] CE ass 6 Nov 1987, *Buayi*, *Lebon*, 348.

[57] CE ass 19 Apr 1991, *Belgacem*, *Lebon*, 152.

the decision of the European Court of 23 June 1981, *Le Compte, van Leuven and de Meyere*,[58] which involved Belgium. The second example is the decisions *Marie* and *Hardouin*[59] of the *Conseil d'Etat*: the *Conseil* extended its review to the so-called internal measures (*mesures d'ordre interne*) in relation to prisoners and soldiers which before were considered to be not justicable. The decision of the *Conseil* refers neither to the ECHR (which would be unusual today, but was not at the time) nor to the ECoHR (which is never quoted by the *Conseil*, not even today); however the *commissaire du gouvernement* emphasised in his conclusions on the legal impact of various European decisions.[60]

But, beside these decisions recognising the authority of the ECHR and of the ECoHR, there are a certain number of cases where French courts are much more nationalistic.

2. *The strategies of 'containment' (R de Gouttes)*

French judges are not all enthusiastic about the increasing influence of European law.[61] On various occasions courts have expressed reservations and shown signs of reluctance to submit to the latest case law of the Strasbourg Court. Sometimes they have simply ignored it. The highest courts in France, the *Conseil d'Etat* and the *Cour de cassation*, have even openly resisted decisions of the ECoHR given either in non-French cases or in French cases. As a matter of fact, French courts have refused to accept a unilateral relationship of strict subordination with the ECoHR; instead they tried to establish a '*dialogue*' with the European judges.[62]

The reasons for the divergence between French courts and the ECoHR are numerous. To a certain extent it is due to a misunderstanding or ignorance of the ECHR and its case law. Do French judges really read the decisions of the ECoHR? Some legal writers doubt this.[63] According to the Advocate General at the *Cour de cassation* the French judges' knowledge of the ECHR is still insufficient, notwithstanding the improvement of their professional training in European law.[64] Other major factors are the conservatism of judges and their national pride in front of a new instrument,

[58] *Series A*, vol 43.

[59] CE 17 Feb 1995, *Lebon*, 82 et seq.

[60] Concl P Frydman, *Lebon*, 85 et seq quoting the judgments of the ECoHR, 18 June 1976, *Engel v Netherlands*and 28 June 1984, *Campbell and Fell v UK*.

[61] Cf the interviews with various French judges in J. Vailhé, *La France face aux exigences de la CEDH* (Paris: La documentation française, 2001), 96 et seq.

[62] Pacteau, n 18 above at 281 et seq; Bonichot, n 46 above, at 21.

[63] Cf J-P Marguénaud, 'Le juge judiciaire et l'interprétation européenne', n 48 above, at 234.

[64] J-F Burgelin and A Lalardrie, n 14 above, at 159. J Vailhé, n 61 above. On the importance of the training of the lawyers, cf S. Guinchard, n 29 above, at 11.

which is supposed to be dominated by English legal conceptions.[65] But, above all, one has to underline a certain distrust of the Strasbourg Court by some French judges: its composition with foreign judges, coming from very different legal cultures and traditions, is the object of doubts and sarcasm.[66] With respect to its very creative construction of the ECHR, the ECoHR has been accused of infringing the proper limits of its judicial function.[67] Similarly, it has been criticised for not respecting the legal autonomy of each nation in the implementation of the ECHR, and for attacking, unnecessarily, some fundamental traditions of French law, which have sufficiently proved the French liberal spirit.[68]

The politics of containment deployed by French courts have taken various forms: Judges try to limit as much as possible the use of the ECHR and prefer to find a solution in national law.[69] Although this practice conforms to the principle of subsidiarity of the ECHR, it has however led to artificial solutions: thus, a human right, which is recognised explicitly by the ECHR, is nonetheless deduced from national law although the latter is much more ambiguous.[70] Another form of containment consists in the declaration *ex abrupto* by French courts of the compatibility of national law with the ECHR; yet in several cases the declaration of compatibility of national law was questionable if not to say erroneous.[71]

Thus French courts have ignored the decisions of the ECoHR on several occasions. First of all they refused to take into account the principles enunciated by the Strasbourg judges in non-French cases. Two examples have particularly shocked legal observers. In its decision of 25 June 1996 (*Mazurek*), the 1st Civil Chamber of the *Cour de cassation* refused to apply the principle of non-discrimination towards illegitimate children (*enfants naturels*) as set out by the ECoHR in its famous decision *Marckx*.[72] Another example concerned the question of the applicability of Article 6 ECHR to disputes in disciplinary matters. Whereas the *Cour de cassation* accepted the view of the European Court on the applicability of Article 6,

[65] Gouttes, 'Le juge français . . .' n 47 above, at 606. The argument of the English influence is also used against the case law of the ECoHR. Cf J-F Burgelin and A Lalardrie, n 14 above, at 160.

[66] J Vailhé, n 61 above, at 103; J-F Flauss, n 44 above, at 25–6.

[67] Cf E Picard, 'Démocraties nationales et justice supranationale: l'exemple européen', in S Brondel, N Foulquier, and L Heuschling (eds), *Gouvernement des juges et démocratie* (Paris: Publications de la Sorbonne, 2001), 212 et seq.

[68] Cf the discussion on the cases *Poitrimol*, *Kress*, *Procola*, etc.

[69] Cf B Pacteau, n 18 above, at 278; E Garaud *et al*, n 45 above, at 109 et seq.

[70] Cf J-F Flauss, n 44 above, at 23 n 22 in regard of the citizen's right to leave their own country. Although this right is clearly stated in Art 2 of the Protocol n° 4 to the ECHR, the *Conseil d'Etat* preferred to deduce it from the French Declaration of 1789 (CE 8 Apr 1987, *Peltier*, *Lebon*, 128).

[71] E Garaud *et al*, n 45 above, at 115 et seq and 127.

[72] EcoHR 13 June 1979, *Series A*, vol 31.

the *Conseil d'Etat* refused obstinately.[73] It is only after France had been directly condemned by the ECoHR in 1995,[74] and after resistance for almost 20 years, that the *Conseil* changed its mind in its *Maubleu* decision of 1996.[75]

Even, in some French cases, the courts have refused to yield to the ECoHR's legal authority. On the question of the long delays of judicial procedures, which are at the origin of more than 60 per cent of the complaints brought against France to Strasbourg, the French judges' reaction was, until recently, a mixture of fatalism and indifference.[76] A very serious and highly symbolic conflict arose between the *Cour de cassation* and the ECoHR in the famous *Poitrimol* case. According to an old tradition from the nineteenth century, criminal courts declare inadmissible the appeal of a convicted person who has not surrendered to a warrant issued for his arrest; the person is not entitled to instruct counsel to represent him and lodge an appeal on his behalf against his conviction. This solution was held to be incompatible with Article 6 of the ECHR by the EcoHR.[77] This decision was harshly criticised by French judges who considered it be an affront to national sovereignty. In their eyes, this rule of procedure expressed most fundamentally the French conception of the respect due to courts. To some it was even part of the Constitution. Most authors insisted on the dissenting opinion of the French judge at the European Court and some expressed the hope that the Court would change its view as the decision had been adopted by a very narrow majority (5 against 4).[78] Yet the ECoHR confirmed its point of view and finally the *Cour de cassation* had to give up its resistance. The latest conflicts are even more explosive: in the decisions *Reinhardt and Slimane Kaid v France* (31 March 1998) and *Kress v France* (7 June 2001), the ECoHR has ruled that the specific French institutions of the *Avocat général* and of the *commissaire du gouvernement* are partially incompatible with the requirements of Article 6 of the ECHR. So far, both the *Cour de cassation* and the *Conseil d'Etat* have refused to take notice of this ruling.

[73] CE sect 27 Oct 1978, *Debout*, *Lebon*, 395; CE sect 11 July 1984, *Subrini*, *Lebon*, 259.

[74] ECoHR, 26 Sept 1995.

[75] CE ass 14 Feb 1996, *Maubleu*, *Lebon*, 34.

[76] J-P Marguénaud, *La Cour européenne des droits de l'homme*, n 36 above, at 126 et seq. On a recent, but yet timid reaction of the French courts, cf J Vailhé, *La France face aux exigences de la CEDH*, op cit, 98.

[77] ECoHR, 23 Nov 1993, *Poitrimol v France*, *Series A*, vol 277-A.

[78] It once happened that the ECoHR modified its earlier case law under the pressure of French courts. Cf S Guinchard, n 29 above, at 12 et seq concerning the principle *non bis in idem*.

III. THE UNCERTAIN ROLE OF COMPARATIVE LAW: BETWEEN DECORATIVE DETAIL AND SOURCE OF UNIVERSAL REASON

It is not easy to determine the exact influence of comparative law stricto sensu[79] on human rights cases in France. Although French legal writers have focused on the role of comparative law in various branches of law, such as civil law, public law, international law, etc,[80] there does not exist any similar study on the specific issue of human rights. Such a study would raise some very serious methodological problems concerning both its content and its limits. What legal disputes are to be included in the category of 'human rights cases'? What is the exact nature of the 'influence' one has to look for? In any case it would require, if done systematically, an empirical research too huge to be accomplished in the present study. The aim here is more modest: it is simply to offer an introduction to this vast field of research. Thus, I will first analyse the theoretical and practical context before proposing a somewhat impressionist view of the effective use of comparative law by courts in some major human rights cases.

A. *The context: towards a new era of comparativism in human rights cases?*

Legal writers are unanimous in saying that, in comparison to other countries such as the United Kingdom, comparative law has played only a minor role in French courts.[81] Most of them however, expect this situation to evolve, given the general context which is more favourable to the inclusion of external influences. This new phenomenon would be especially visible in the field of human rights.

[79] In this section, I consider only the hypothesis of a voluntary recourse to foreign law. I exclude the cases where courts are bound by national law to rely on foreign sources (eg conflicts of law, extradition, etc). On this distinction, cf U Drobnig, 'General Report', in id and S van Erp (ed), n 2 above, at 6 et seq; R Legeais, 'L'utilisation du droit comparé par les tribunaux', n 2 above.

[80] Further to the contemporary literature (above n 2), cf R David, *Traité élémentaire du droit civil comparé* (Paris, LGDJ, 1950), 122 et seq; R David, 'Droit comparé et practiciens du droit', in id, *Le droit comparé. Droits d'hier, droits de demain* (Paris: Economica, 1982), 75 et seq; R David and C Jauffret-Spinosi, *Les grands systèmes de droit contemporains* (Paris: Dalloz, 1992), 5 et seq; *Livre cententaire de la société de législation comparée*, vol I: *Un siècle de droit comparé en France (1869–1969). Les apports du droit comparé au droit positif français* (Paris: LGDJ/Numéro spécial de la RIDC, 1969), 382 (a vast survey of the impact of comparative law on all branches of law: legal theory, legal sociology, private law, public law, criminal law, legal practice, etc.); L-J Constantinesco, *Traité de droit comparé*, vol II: *La méthode comparative* (Paris: LGDJ, 1974), 332 et seq.

[81] Cf inter alia Constantinesco, n 80 above, at 335; R David and C Jauffret-Spinosi, n 80 above, at 6; E Picard, 'Le rôle de la doctrine et du droit comparé . . .', n 2 above, at 225.

1. *Empirical conditions: knowledge of foreign legal systems*

Today French courts operate in an atmosphere which is very favourable to the use of experiences from abroad. Several factors can be mentioned here.

First of all French legal science has profoundly changed its position concerning the importance of comparative law studies. Whereas at the end of the 1980s, Ronny Abraham complained about the lack of interest in comparative law in France,[82] Etienne Picard reached a completely different conclusion 10 years later. Comparative law is considered to be a major tool for understanding law, and its legitimacy is no longer contested even by those who are either unwilling or unable to study foreign law systems.[83] Thus, some legal textbooks contain important developments on comparative law.[84]

Secondly, a certain number of judges, in high-ranking positions, are very active in comparative law research. Their various writings contribute to a wider diffusion of the knowledge on foreign law; moreover, they hold key positions within courts to encourage the transposition of foreign solutions.[85]

Thirdly, the professional training of French judges pays more attention to European and comparative law.[86]

In addition, one has to stress the indirect inclusion of foreign legal influences via formal legal sources. Due to globalisation, courts are confronted with an increasing number of situations where they are legally bound to apply foreign legislation (eg conflicts of law, extradition, etc).[87] Similarly European legislation conveys elements taken from foreign national systems and the comparative method plays a major role in the case law of the European Court of Justice in Luxembourg and the ECoHR in Strasbourg.

Finally the use of comparative law is made easier by the important network of institutional links established between French courts and foreign courts. The highest courts in France—the *Conseil constitutionnel*, the *Cour de cassation*, and the *Conseil d'Etat*—but also, to a lesser extent, the lower courts have developed international relationships via regular attendance at conferences, exchanges, informal meetings and the creation of

[82] R Abraham, *Droit international, droit communautaire et droit français* (Paris: Hachette, 1989), 191 ('*En France on ne fait pas assez de droit comparé*').

[83] E Picard, 'L'état du droit comparé en France en 1999', n 7 above, at 150.

[84] Cf inter alia L Favoreu, P Gaïa, R Ghevontian, F Mélin-Soucramanien, O Pfersmann, J Pini, A Roux, G Scoffoni, and J Trémeau, *Droit des libertés fondamentales*, 1st edn (Paris: Dalloz, 2000). On each point the authors present comparative law before analysing national law.

[85] Cf, eg, the commitment for comparativism of the current President of the *Cour de cassation*, Guy Canivet, and of the former deputy President of the *section du contentieux* of the *Conseil d'Etat*, Bruno Genevois.

[86] Legeais, 'L'utilisation du droit comparé par les tribunaux', n 2 above, at 355.

[87] Ibid, at 354.

international associations.[88] Publications edited by the courts, such as annual reports or periodical reviews, also contain important comparative law studies.[89] Furthermore, the courts—and this is particularly true for the *Conseil constitutionnel*[90]—pay special attention to the evolution of the case law of foreign courts which are culturally close.

Thus, given all these elements, one may assert that French courts are increasingly in contact with foreign law. The data should however be put in perspective: it is not because a judge is aware of the situation abroad that he/she will necessarily use this information when adjudicating a case. After all, comparative law could simply be an object of intellectual curiosity. Its influence on the judges' reasoning could be very vague. To understand the active use of foreign legal solutions in national cases one must take into account other elements.

2. *Normative conditions: a certain theory of legal sources*

The question of the use of comparative law by courts only makes sense if three conditions are fulfilled: (i) there is a gap in national law; (ii) there is a good reason why the judge should look abroad to fill in the gap, instead of looking at other (national) sources; (iii) there is something interesting to look at, meaning that foreign law is able to present valuable solutions. The first and third conditions are currently satisfied in France: since the end of the nineteenth century, most authors no longer believe that statutes adopted by Parliament are complete and absolutely clear. In the field of civil law, the works of François Gény and of the great comparatist Edouard Lambert have sufficiently proven the existence of the judges' normative power.[91] Concerning the third condition, the influence of the nationalist spirit which was dominant in the nineteenth century has declined and the myth of

[88] The *Conseil constitutionnel* was one of the leading founders of the *Association des Cours constitutionnelles ayant en partage l'usage du français* (ACCPUF; see the official web site: <http://www.accpuf.org>); it attends regularly the *Conferences of the European Constitutional Courts*. In 2001 the *Cour de cassation* stimulated the creation of the *Association des Hautes juridictions de cassation des pays ayant en partage l'usage du français* (AHJUCAF; see: <http://www.ahjucaf.org>). The *Conseil d'Etat* has played a major role in the foundation in 1981 of the *International Association of Supreme Administrative Jurisdictions* (IASAJ or, in French, AIHJA; see: <http://www.iasaj.org> or <http://www.aihja.org>). It also participates in the *Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union* (see: <http://www.raadvst-consetat.be>).

[89] Cf, eg, the annual reports of the *Conseil d'Etat* and the *Etudes et documents du Conseil d'Etat*. The *Cahiers du Conseil constitutionnel* present each time a constitutional court from a different country.

[90] Cf the speech of R Badinter, at the time President of the *Conseil constitutionnel*, quoted by Legeais, n 2 above, at 352. See also D Rousseau, *Sur le Consesil constitutionnel: la doctrine Badinter et la démocratie* (Paris: Descartes & Cie, 1997).

[91] R David, *Traité élémentaire de droit civil comparé*, n 80 above at 123 et seq; id, 'Droit comparé et praticiens du droit', n 80 above, at 77.

France being the birthplace and champion of human rights has been seriously challenged. Most people would agree today that there is much to learn from looking at the legal systems of highly developed and civilised countries such as the other Western democracies.[92]

The real problem is to know why judges should have recourse to comparative law when interpreting an ambiguous or vague legal provision? What is the legitimacy of this method in comparison to others?

In France, contrary to other countries, there is no legal provision or judicial decision asserting the general relevance of the comparative method as one of the interpretation tools to be used by courts.[93] Legal science, whose essential task is to define the various legal sources, has also remained silent. The major textbooks in private and public law do not mention at all comparative law's function as a guide for interpretation.[94] However, the idea has been put forward since the beginning of the twentieth century by a number of comparatists. In the golden age of comparativism just after the meeting of the Congress of 1900, Raymond Saleilles, as many other authors like Edouard Lambert et Henri Lévy-Ullmann, considered comparative law to be the new natural law or 'the common law of the civilised humanity'.[95] According to him, comparative law was expected to become the 'normal guide for interpretation of positive law'.[96] Yet, at the time, French courts refused to adopt his opinion. Later René David defended a similar thesis

[92] Cf M Letourneur, 'L'influence du droit comparé sur la jurisprudence du Conseil d'Etat français', in *Livre centenaire de la société de législation comparée*, vol I, n 80 above at 212 et seq. The author underlined that at the middle of the twentieth century the English case law on the principle *audi alteram partem* (ie the principles of natural justice) was in advance to the French legal tradition, especially the 1789 Declaration which ignored the rights of defence. For a hostile reaction cf however the attitude of Prof. Georges Vedel during the debate on the existence of material limits to constitutional amendments: '*One has to get rid of the idea that any particular idea or practice that has been adopted by a foreign Constitutional Court in a sometimes juvenile democracy is a must as if it were the latest fashion of the women's collection of spring (Il faut se défaire de l'idée que telle ou telle théorie, telle ou telle pratique adoptée par une Cour constitutionnelle étrangère dans une démocratie parfois juvénile s'impose comme le dernier cri de la mode féminine lancé dans les collections de printemps)*' (G Vedel, 'Souveraineté et supraconstitutionnalité', *Pouvoirs*, n° 67, 1993, 96).

[93] Legeais, n 2 above, at 354.

[94] Cf the classical textbooks on administrative law (G Vedel and P Delvolvé; A de Laubadère, J-C Venezia, and Y Gaudement; J Rivero and J Waline, J Morand-Deviller, etc), the general introductions to private law (J Ghestin, F Terré, Mazeaud, J-L Aubert, etc) and E Agostini, *Droit comparé* (Paris: PUF, 1988), at 23. Jean Carbonnier (*Droit civil. Introduction*, 26th edn (Paris: PUF, 1999), at 68) is one of the rare authors to advance this idea, but he concedes immediately that the function of comparative law as guide for interpretation is 'very contested'.

[95] R Saleilles, in *Revue trimistrielle de droit civil*, 1902, 112. Cf R David, *Traité . . .*, n 80 above at 127 et seq; L-J Constantinesco, *Traité de droit comparé*, vol I, n 80 above at 132 et seq and vol II, at 332.

[96] R Saleilles, 'Conception et objet de la science juridique du droit comparé', in *Congrès international de droit comparé tenu à Paris du 31 juillet au 4 août 1900. Procès-verbaux des séances et documents*, vol I (Paris: LGDJ, 1905), 187.

arguing that, although statutes were national, the law and the legal science were essentially transnational.[97] As far as a country had similar legal structures and traditions, he said, it was possible and desirable to have regard to its legal solutions in order to improve domestic law.

An ambitious theory concerning the role of comparative law, especially in human rights cases, has been defended recently by Etienne Picard.[98] According to him, the conception of law in France and more generally in Europe has changed fundamentally during the last quarter of the century. The traditional theory of the *légicentrisme*, according to which law expresses the national sovereign's will, has declined. It has been replaced progressively by a more substantial, objective and universal theory. Today citizens, whose acceptance of legal rules is considered by Etienne Picard to be an essential criterion of the concept of law, evaluate the legitimacy of public authority in regard of the Rule of law and its core idea of the human rights. Given the universal nature of these rights, law is no longer to be found exclusively in national sources, but also in foreign legal experiences.

This theory however, raises two major questions. First of all, comparative law has only an instrumental function in this theoretical model. In the eyes of Etienne Picard, law is essentially based on Reason or on certain ethical values such as human rights. Comparative law is only a means or path to discover the rational foundations of law. Moreover, it is only one path among several:[99] philosophical or moral theories, sociological enquiries, a long-standing historical tradition could indeed perform the same function.[100] The second question deals with the definition of comparative law. Which national legal systems are to be considered by courts: all countries in the world or only a selection such as liberal democracies? Furthermore, should one refer only to western democratic states or also to democracies with a different cultural background such as, for example, Japan? Finally, is this rationality to be deduced from the average practice of the selected countries or should one take into account the minority's position which could be thought to be in advance in matters of human rights? All these theoretical doubts are reflected in judicial practice.

[97] R David and C Jauffret-Spinosi, n 80 above, at 6.

[98] E Picard, 'Le rôle de la doctrine . . .', n 2 above esp, at 218 et seq; id, 'L'état du droit comparé . . .', n 27 above esp, at 173 et seq id, 'L'émergence des droits fondamentaux en France', *AJDA*, numéro spécial, 1998, 6 et seq.

[99] E Picard, '*L'état du droit comparé* . . .', n 7 above, at 176.

[100] This would explain why newly established democracies are more inclined than others to accept the influence of comparative and/or international law in the field of human rights (cf the examples of the Spanish and South-African constitution).

B. The variety of uses of comparative law by courts

Comparative law arguments have exercised real influence on human rights cases in France.[101] One may even assert that their influence is increasing today. Yet the impact of foreign law is not always visible due to the imperatoria brevitas of the French Courts' decisions. In contrast to the judicial culture of England, Germany, Switzerland, etc, the decisions of the French courts are very succinct; their style is deductive and not discursive; dissenting opinions are prohibited and the decisions almost never contain any explicit reference to foreign law solutions.[102] Comparative law arguments may appear in the conclusions of the *commissaire du gouvernement* at the *Conseil d'Etat* or of the *avocat général* at the *Cour de cassation*. However these preliminary opinions, which the court is free to follow or to reject, are not always published.[103] It is upon the study of the conclusions in some major human rights cases that I will try to establish a classification of the various influences of comparative law.

The persuasive authority of comparative law depends on a number of important parameters specific to each case. The rhetorical talents of its presenter,[104] the prestige of the legal systems cited, cultural similarities, the soundness of the argument, etc., are only a few factors amongst several. This explains the large variety of uses of comparative law in French human rights cases. At the bottom of the scale, one still finds an important number of cases tried without any foreign reference. This silence becomes audible when the question to be resolved is as universal as, for example, the legal definition of death.[105] In the cases examined where the *commissaire du gouvernement* or the *avocat général* did rely on foreign legal material, comparative law assumed successively four different functions: decorative, cognitive, legitimation; and inspiration.

1. A decorative function

In the first situation, comparative law serves simply as a decorative detail. In the seminal decision *Commune de Morsang* from 1995, the *Conseil d'Etat* considered the spectacle called the dwarf-throwing ('*lancers de*

[101] Cf the examples given by M Letourneur, n 92 above.

[102] Cf however the two decisions in criminal law quoted by Legeais, 'Le rôle de la doctrine et du droit comparé . . .', n 2 above, at 265 and 272. The situation is of course different in the cases where courts are legally obliged to have regard to foreign law (conflict of laws etc).

[103] There does not exist any similar institution in the Conseil constitutional. Thus its deliberation is totally secret.

[104] Cf the brilliant argumentation based on comparative law by Patrick Frydman in his conclusions on CE ass 17 Feb 1995, *Marie* and *Hardouin*, *Lebon*, 85 et seq, esp at 91 and 94.

[105] Cf concl D Kessler on CE ass 2 July 1993, *Milhaud*, *RFDA*, 1993, 1002 et seq.

nains') to infringe the principle of human dignity.[106] In his conclusions,[107] the *commissaire du gouvernement* Patrick Frydman defended an objective conception of human dignity as a value so essential to humanity that no one, not even the dwarf himself, could willingly abandon it. In order to justify this solution, which is quite problematic, Patrick Frydman referred mainly to national law; yet, at the end, he added, very briefly, that the governor of the State of New York had also prohibited dwarf-throwing on the same ground.[108] From a scientific point of view, the argument appears however to be too imprecise and incomplete to be of any value;[109] it proves simply a certain erudition of its author.

2. *A cognitive function*

Comparativism is taken much more seriously in the second hypothesis where comparative law plays a cognitive function. This occurred in the decision of the Administrative Court of Appeal of Paris concerning the lawfulness of blood transfusions executed, against their will, on Jehovah's witnesses during an emergency operation.[110] The debate turned around the question of whether the principle of individual autonomy also includes the right to choose behaviour which is completely unreasonable according to common sense and science, and which may provoke one's own death. The case is most interesting for our issue for two reasons. First, due to the insistence of the applicants, who relied heavily on American legal material, the *commissaire du gouvernement* Mireille Heers was obliged to take notice of comparative law. She devoted a major part of her conclusions to analysing systematically American and English legal solutions in this field. Her conclusion however—and this the second point—was that France and the USA diverge in their conception of individual freedom due to different philosophical influences and cultural traditions. Although the American influence has been finally rejected by the *commissaire* and by the court, the confrontation of both systems allowed them to understand more thoroughly the nature of domestic law. Comparativism played here simply a

[106] It was a sort of 'game' performed in discos by a dwarf inviting members of the audience to fling him over the furthest distance possible. For more details, cf S Millns, 'Dwarf-Throwing and Human Dignity: a French Perspective', *Journal of Social Welfare and Family Law* (1996), vol 18, at 375 et seq.

[107] Concl P Frydman on CE ass 27 Oct 1995, *Commune de Morsang-sur-Orge* and *Ville d'Aix-en-Provence*, *RFDA*, 1995, 1204 et seq.

[108] Ibid, at 1208.

[109] He does not mention either the date or the source of the quoted decision. No bibliographical reference is made.

[110] Administrative Court of Appeal of Paris, 9 June 1998, *Mme Donyoh* and *Mme Senanayake*, concl M Heers, *RFDA*, 1998, 1231 et seq.

cognitive function; the difference of the national traditions prevented any transposition from one system to another.[111]

3. *A legitimation function*

In the third category of cases comparative law is used as a strategic argument to convince the court of the validity of a reasoning based fundamentally on national law arguments. Its main role is to justify and confirm *a posteriori* a decision reached by traditional reasoning. A brilliant example of this situation occurred in the case *Marie* and *Hardouin*. In his conclusions,[112] Patrick Frydman deployed six arguments in favour of the solution proposed, ie the extension of the judicial review of the *Conseil d'Etat* to internal measures relating to prisoners and soldiers. The first two arguments relied on French administrative law, the third on the ECHR, the fourth on comparative law, the fifth on sociology and the sixth on French private law. Yet, if one reads carefully the conclusion, it appears that Patrick Frydman had already made up his mind after the two first arguments.[113] The following arguments were only used to support the previously reached conclusion. His use of foreign legal elements (taken exclusively from western European law systems) is particularly interesting as he completely subverted the traditional discourse on France being the birthplace of human rights. According to Frydman, if it is the natural vocation of France to be the champion of human rights—and in his eyes this point is beyond all doubt,[114] then it is contrary to the honour of France to stay behind others in matters of human rights. In the present case, even Greece and Portugal did better than France concerning the legal status of prisoners.[115] Frydman even asserted that, in regard to the honour of France, it would be 'inappropriate' for French courts to rely on the legal reservations made by the French government when ratifying the ECHR in 1974 (Article 57 ECHR).[116] Thus, in the eyes of the *commissaire du gouvernement*, the French national commitment for human rights should prevent France from using a formally recognised derogation.[117] In its decision, the *Conseil*

[111] Comp N Lenoir, 'Elements de réflexion sur le droit comparé: les juges constitutionnels et la biothèque, entre audace et prudence', *Mélanges Jacques Robert* (Paris: Montchrestien, 1998), at 380 and 388 (concerning the difference of attitude of the French and German constitutional judge on the question of a child's right to know the identity of his/her biological parents).

[112] Concl P Frydman on CE ass 17 Feb 1995, *Marie* and *Hardouin*, *Lebon*, 85 et seq.

[113] Ibid, at 90. Having presented the two first arguments, he concludes already by saying '*eventually (en définitive), the solution we propose you today conforms to a trend largely initiated in the last years*'. He continues by saying that '*besides (d'ailleurs)*' this solution would be requested by the ECHR, etc.

[114] Ibid, at 91. [115] Ibid, at 92. [116] Ibid, at 91.

[117] See also the use of comparative law in the concl. of the *avocat général* Sainte-Rose in the famous case concerning the lawfulness of action for wrongful life (Cass plen ass 17 Nov 2000, *Perruche*).

approved totally the solution proposed by Frydman without however making any reference either to comparative law or even to the ECHR.

4. *An inspiration function*

The last category of cases includes the very rare situation in which comparative law is the direct source of inspiration of the solution. In this hypothesis, comparative law is not simply an additional argument serving to confirm *a posteriori* a national reasoning. Comparative law is in itself an essential point of the rational foundation of the decision: it serves to find a solution to a new problem.[118] This situation appears in the conclusions of Bernard Stirn, *commissaire du gouvernement*, in the abortion case tried by the *Conseil d'Etat* in 1990.[119] The question was whether the French 1975 legislation on abortion was compatible or not with the right to life proclaimed by Article 2 of the ECHR. Bernard Stirn's argumentation relied very heavily on comparative law, both from a quantitative and qualitative point of view. Once he had defined the terms of the question, he immediately proceeded to a comparison of foreign courts decisions. Presenting briefly the situation in the USA, Germany, Austria, Norway, Spain, Italy, Portugal, and Canada, he concluded that, in 'all'[120] countries, the acceptance of abortion under certain conditions was considered not to violate the right to life, protected either by national constitutions or by the ECHR. It is mainly[121] on this ground that he proposed to the *Conseil* to dismiss the appeals of the applicants. Yet, the *Conseil* made no reference at all to comparative law, although it confirmed the validity of the Abortion Act. The *Conseil* held that the national legislator had adopted a balanced solution and had taken sufficiently into account the right to life by imposing conditions on interruption of pregnancy.

IV. CONCLUSION

I would like to conclude with some general remarks on the role of comparative law.

First, comparative law has nourished to an increasing extent the reflections of the courts, or at least of the *commissaires du gouvernement* and the *avocat généreaux*. Yet, in the absence of any systematic enquiry, it is quite difficult to discern its exact influence both from a quantitative and qualitative point of view. My intuitive hypothesis would be to say that comparative law assumes mainly a legitimation function.

Secondly, concerning the definition of comparative law, French judges have recourse almost exclusively to western, and more specifically to European legal sources. Examples from liberal democracies with a different cultural background are either ignored or rejected.

Thirdly, one should not forget the major role of the indirect influence of comparative law via the use of foreign concepts and theories by the members of national legal science.[122]

Fourthly, comparative law and the ECHR have brought about a fundamental change in the perception by French lawyers of the courts' functions in a democracy. They have contributed to a large extent to the decline of the 1789 tradition of distrust of the judiciary and to the success of the new theory of the *Etat de droit* according to which human rights and judicial review are necessarily linked.

[118] Cf the distinction made by Koopmans, n 2 above at 550.

[119] CE ass 21 Dec 1990, *Confédération nationale des associations familiales catholiques et autres*, concl B Stirn, *RFDA*, 1990, 1065 et seq.

[120] Ibid, at 1073. One should notice however the (conscious or unconscious?) omission by Bernard Stirn of the example of Ireland which is one of the rare member States of the European Union (with Portugal) to prohibit abortion.

[121] In addition Stirn mentioned also the necessity to respect the autonomy and the will of Parliament, and to prevent as much as possible a divergence with the 1975 decision from the *Conseil constitutionnel*.

[122] In France cf the examples of the reception of the German concept of *Rechtsstaat* (in French *Etat de droit*), the theory of material limits on constitutional amendments (as developed by the constitutional courts in Germany, Italy, etc), the principle of *'legal security (sécurité juridique)'*, etc. On the two first examples, cf L Heuschling, *Etat de droit, Rechtsstaat, Rule of Law* (Paris: Dalloz Nouvelle bibliothèque de thèses vol 16, 2002).