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Table of Contents

Chapter 5

Military Law in France

Jörg Gerkrath[1]

Table of Contents

I. The Historical and Political Background of the French Military Law System

The historical and political circumstances which have influenced the French military law system were very different from those in Germany. Therefore, issues such as democratic accountability of the armed forces or the dignified role of the individual soldier did not unfold in the same way. Obviously, France is not only a nation with a long history, but also a nation with an old and strong military tradition. The institution of a standing army was decided upon in 1439 by a royal ordinance decreed by Charles VII, called "*les compagnies d'ordonnance*".

1. The Dignified Role of the Individual Soldier

The link between the French nation and its armed forces has traditionally been very close, at least since the French Revolution. Article 12 of the Declaration of 1789 declares that: "The guarantee of the rights of humans and citizens requires a public force: this force is therefore established for the advantage of all, and not for the particular utility of those to whom it is attributed". Furthermore, according to the Constitution from 1848, "The public force is in essence obedient, no armed corps may deliberate". The principle of the subordination of the army to the civilian authorities was indeed considered to be fundamental. Restrictions on the rights of political expression of soldiers in the field have consequently been accepted as necessary. The armed forces are meant to exercise their profession without discussion, therefore, they are commonly known in France as "*la grande muette*".

But, as the army is also considered to be an emanation of the nation, the individual soldier is presently considered to be a "citizen serving under the flag".[2] The 1972 General Statute of the Military indicates, furthermore, that "military status requires under all circumstances discipline, loyalty and a spirit of sacrifice". As a result, the duties which come with this status therefore "merit the respect of all citizens and the consideration of the nation". The strongest link between the nation and its armed forces has been conscription, which was established in 1905 and ended effectively on 30 November 2001.[3] The transformation of the French armed forces into a fully professional army and the redefinition of its role was initiated by the "*Livre blanc sur la défense*" of 1994. That White Paper also implies important changes with regard to the link between the nation and its armed forces. The need for better communication from "*la grande muette*" appears to be decisive in this context,[4] and the need to recognise a broader right of expression for the military is underlined by an increasing number of observers.[5]

As the military of a former colonial power which retains strong political interests, especially throughout "*la francophonie*" and on the African continent, the French armed forces have developed what may be called a certain "culture of external intervention". This "culture of French intervention" abroad is still maintained and facilitates to some extent French participation within multinational operations.[6]

Until very recently, the role of the French army abroad has not been a subject of broad and critical public discussion. The "*affaire Aussaresses*" which occurred in spring 2001, changed this situation to some extent. This affair concerned a high ranking general who recognised in a book that the French armed forces used torture in a generalised manner during the Algerian war. Hence, French newspapers discussed the need for stronger control over the armed forces. The generalised use of torture by members of the armed forces during the military operations in Algeria might also bring about a broader discussion

[2] See *Règlement général de discipline dans les armées*, Arts. 1–3: "Cette discipline repose sur l'adhésion consciente du citoyen servant sous les drapeaux et le respect de sa dignité et de ses droits."

[3] The statute from 28 October 1997, which puts an end to conscription, specifies, however, that it could be reestablished if the circumstances so required.

[4] Regarding this point, see B. Mignot, Lien armée-nation et expression des militaires, (1998) *Défense nationale*, p. 82.

[5] See in particular Assemblée Nationale, *Rapport d'information No. 2490 du 22 juin 2000*, présenté par Bernard Grasset et Charles Cova sur les actions destinés à renforcer le lien entre la Nation et son Armée.

[6] See T. Paulmier, *L'armée française et les opérations de maintien de la Paix* (Paris, 1997).

about the role of the armed forces and the individual soldier. A recently published PhD thesis (in History), which deals in detail with this period of recent French history, has contributed to the deepening of this public debate.[7] However, no specific political proposal has been issued, and a majority within the population and the Parliament seems to consider these events as being linked to a very exceptional context.

2. Democratic Control and Rights and Duties of Soldiers

a. The French Constitution

Unlike the German Constitution, the French Constitution from 1958 does not deal with the role of the armed forces either in terms of democratic legitimacy or in terms of soldiers' rights. With regard to external operations, French constitutional law might even be considered simply non-existent.[8]

French constitutional law does, however, refer to a very traditional (and somewhat anachronistic) vision of national sovereignty which still exercises a strong influence on French politics, law, and thinking. This dogma, which may appear to external observers as being obsolete, also affects the question of military co-operation in the broadest sense and should therefore be kept in mind.

Many French scholars stick to the concept of sovereignty as it was articulated by Jean Bodin in the 16th century, and developed by Jean-Jacques Rousseau about two hundred years later as a principle of democratic government. Presently, French constitutional law still contains strong references to the principle of national sovereignty. These references result from Article 3 of the Declaration of 1789, from Section 15 of the preamble of the Constitution of 1946,[9] from the preamble of the Constitution of 1958,[10] and finally from Article 3 of the Constitution of 1958 which says: "National sovereignty shall belong to the people who shall exercise it through their representatives and by means of referendum. No section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof".

[7] See R. Branche, *La torture de l'armée pendant la guerre d'Algérie* (Paris, 2001), p. 474.

[8] See O. Gohin, Constitution et défense en droit français, (2002) 202 *Revue de la Gendarmerie nationale*, pp. 43–48.

[9] France consents to limitations of sovereignty necessary for the organisation and the defence of peace.

[10] The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946".

This conception of sovereignty naturally influences the French position with regard to any kind of international co-operation and the question of transferral of sovereign rights to international institutions. It also plays an important function in the case law of the French *Conseil constitutionnel*.

In one of its earlier decisions, the *Conseil constitutionnel* made a distinction between "limitations of sovereignty", which it considered to be allowed, and "transfer of sovereignty" which it held to be contrary to the Constitution.[11] Strongly criticised, this distinction was decisively abandoned by a decision in April 1992, known as "Maastricht 1".[12] In this decision, the *Conseil constitutionnel* inaugurated a new approach based on "transfer of competences". Since then, it has considered that: "the respect of national sovereignty does not prevent France from concluding, on the basis of the dispositions of the preamble from 1946 and subject to reciprocity, international agreements in order to participate in the creation or in the development of a permanent international organisation having legal personality and being invested with decisional powers by virtue of transfer of competences consented to by the Member States".

When it is called to verify, according to Article 54 of the Constitution, whether "an international commitment contains a clause contrary to the Constitution", the *Conseil constitutionnel* now applies a three-step test. An agreement will indeed be to be held contrary to the Constitution not only if it contains a clause which is incompatible with the Constitution, but also if it affects the constitutionally guaranteed rights or freedoms, or if it infringes on the "essential conditions of the exercise of national sovereignty".[13] The sense of this apparently rogue concept has been explained by the *Conseil*: it refers to the duty of the state to "ensure respect for the institutions of the Republic, the continuity of the nation's existence, and the guarantee of the citizens' rights and freedoms".[14] The *Conseil* also indicated that the transferral of competences may affect the "essential conditions of the exercise of national sovereignty" either by their "nature" or because of the "modalities" which are chosen to accomplish them.[15]

[11] Décision No. 76-71 DC, 29 et 30 décembre 1976.

[12] Décision No. 92-308 DC, Traité sur l'Union européenne.

[13] See the most recent Décision No. 89-408 DC from 22 January 1999, Traité portant statut de la Cour pénale internationale. See also J.-F. Flauss, "Rapport français", in J. Schwarze (ed.), *The Birth of a European Constitutional Order. The Interaction of National and European Constitutional Law* (Baden-Baden, 2001), at p. 48.

[14] See décision No. 91-294 DC, 25 July 1991.

[15] Décision No. 97-394 DC, 31 December 1997, Treaty of Amsterdam.

Thus, the respect of national sovereignty may imply a certain number of requirements, e.g. with regard to participation within multinational units or to the presence of foreign soldiers on French territory.

Unlike the German Constitution, the French Constitution does not contain provisions dealing directly with the role of the armed forces, their mission, or the rights and duties of the soldiers. The French concept of defence is defined in the ordinance of 7 January 1959 "*portant organisation générale de la défense*" which is an act adopted by the executive, but which has legislative value because of its ratification by Parliament (according to former Article 92 of the Constitution). This ordinance determines the basic principles of organisation of defence, leaving the determination of any more detailed description of the role of the armed forces to the executive power.

According to a policy definition from the Ministry of Foreign Affairs, the French conception of defence is a comprehensive one, setting three goals for the country's defence:

1) To defend France's vital interests, which are defined by the President of the Republic and include particularly its people, its territory, and the freedom to exercise its sovereignty. In this regard, the 1958 Constitution assigns the role of guarantor of territorial integrity to the President of the Republic (Article 5) and makes him Commander-in-Chief of the armed forces (Article 15). At the same time, France must also protect its strategic interests at the international level whilst contributing to conflict prevention, keeping and restoring peace, and ensuring respect for international law and democratic values in the world. In these areas, France's status as a permanent member of the United Nations Security Council gives it both prerogatives and responsibilities.

2) To work for the development of the European enterprise and the stability of the European continent. France opted for this policy at the end of World War II by choosing to participate actively in the Western European Union (WEU), the North Atlantic Treaty Organisation (NATO), and the Conference on Security and Cooperation in Europe (CSCE), which in December 1994 became the Organisation for Security and Cooperation in Europe (OSCE).

3) To implement a comprehensive concept of defence which is not limited to military concerns. Indeed, a country's security and stability are dependent not only on its armed forces and police, but also on its social organisation, educational system, and social cohesion. The concept of defence is, *de facto*, inextricably linked with that of the nation. The *sécurité civile* (emergency services dealing with national disasters, bomb disposal, etc.) protect the population and maintain public order and thus the continuity of the state. They are also responsible for preventing and dealing with major natural and technological hazards and the security of sensitive installations and networks. Lastly, they ensure the proper distribution of resources in times of crisis.

b. The Government of the Fifth Republic

With regard to the government of the V. Republic, one has to distinguish between four periods (1958 to 1962, 1962 to 1986, 1986 to 2002 and after 2002) and two political situations which have occurred in practice since 1986 (concordance of political majorities and "*cohabitation*").

Before 1962, the President of the Republic was not directly elected. The principle of direct and universal elections of the President was introduced by a strongly criticised constitution-amending referendum of 28 October 1962, which had been held at de Gaulle's request (according to the procedure of Article 11 which normally applies only to statutes). This change of course altered the nature of the political system established by the Constitution in 1958. The ambiguity introduced by the 1962 amendment has often been underlined by legal experts. Georges Vedel, an outstanding specialist of French constitutional law, contended that there are now two (incompatible) constitutions: one from 1958 and the second from 1962.[16] The referendum of 1962 could be considered as the first step away from a parliamentary system (according to the wording of the Constitution) and towards a presidential system (in practice).

From 1962 to 1986, there were always concordant political majorities. Hence, the President, whose position had been strengthened by the strong sense of democratic legitimacy conferred upon him by direct election, also received political support from "his" majority in Parliament. This situation affected the function of the Prime Minister who was degraded to play the role of a "*fuse*" which the President could replace whenever he wanted. It also altered the distribution of competences in practice. In 1981 there was the first "*alternance*" with the socialist François Mitterand succeeding the conservative Valéry Giscard d'Estaing. This event did not, however, alter the political practice.

Since 1986, the V. Republic has experienced a very different political situation. During three periods, a new configuration has appeared. This has been called "*cohabitation*", because a President and a Prime Minister, who have been elected by opposite political majorities, will have to live together ("*cohabiter*"). The first instances appeared to be exceptional (1986-1988, President Mitterand with Jacques Chirac and 1993–1995 with Edouard Balladur), occurring only for a short period at the end of the presidential mandate of seven years. However, the situation occurred again in 1997 when President Chirac decided to dissolve the National Assembly after only two years in office. Since then, "*cohabitation*" seems to have become a more normal situation. As a result, during periods of *cohabitation* the Constitution is interpreted in a way which puts the accent on its parliamentary elements. Accordingly, the French political system cannot

[16] See G. Vedel, Les deux constitutions, *Le Monde* 10 January 1978.

really be qualified as "presidential". It is more or less "parliamentary", and at the most "semi-presidential".

Thus, French defence policy partially depends on whether there is political "*cohabitation*" or a situation of concordant majorities. In 1995, political change occurred when fourteen years of socialist rule came to an end with the Presidential victory of centre-right RPR leader Jacques Chirac. With President and Government once more of the same political party, Chirac and his defence minister Charles Millon established a Strategic Committee in July 1995 to undertake a second major review of defence policy (the first was in 1972). The review was completed and its findings made public in February 1996, when Chirac unveiled *Une Défense Nouvelle 1997–2015*, which some considered the most radical shake-up of defence policy since de Gaulle. The package included the phased ending of conscription by 2002, ending more than 200 years of policy continuity, and a far-reaching restructuring and down-sizing of the French armed forces. It included also the reorganisation of the armed forces around a "new model army," centred on four missions: *dissuasion* – based on the nuclear deterrent; *prevention* – the avoidance and defusing of threats to national interests through intelligence and force prepositioning, *power projection* – the capacity to project forces of up to 50 60,000 personnel into theatres around the world for purposes from Gulf War-type scenarios to peace-keeping and humanitarian intervention, and *protection* – the defence of France against terrorism, drugs, and so forth.

After an initial honeymoon, Chirac's presidency fell into rapid decline, and in the spring of 1997 a new socialist government under Lionel Jospin was elected opening the Fifth Republic's third term of "*cohabitation*". Ordinarily, Presidential dominance would be expected in defence matters, but the weakness and drift of Chirac (resulting *inter alia* from the disintegration of his personal power base, divisions in his political party, political scandals, and low public approval ratings) ceded considerable latitude in defence matters to Jospin's Government and Alain Richard, Minister of Defence. Accordingly, the annual defence budget in 1997 trimmed the spending projected by the 1997–2002 *Loi de programmation militaire*. There was only a minimal consensus on important military issues, which made it difficult to implement the reform projects which had already been decided upon.[17]

Thus, a project of a new programmatic military statute (*loi de programmation militaire*) for the period 2003–2008 which had been prepared by the govern-

[17] Compare F. Lafaille, Défense nationale et cohabitation (juin – août 1997), (1997) *Revue de Défense*, p. 37.

ment of Lionel Jospin, was adopted within the Council of Ministers on 31 July 2001, but not immediately presented to the Parliament.[18]

The Constitution of 1958 having been modified by referendum of 24 September 2000, the duration of the presidential mandate was shortened from 7 ("*septennat*") to 5 years ("*quinquennat*") in order to make it correspond with the mandate of the National Assembly. The first test of this new system, which certain observers already call the "VI. Republic", have been the elections (presidential and parliamentary) in spring 2002. After long discussion, the timetable for these elections had been modified so that the election of the President (April–May 2002) preceded (as it usually did) the election of the National Assembly (June 2002), in order to maintain the supremacy of the presidential election.

c. *French Public Opinion*

There is a broad consensus among French citizens of all political inclinations about the role of the armed forces. This defence "consensus" flows from structural elements such as France's geography and from French history – particularly the French Revolution and its aftermath, which forged a close bond between the army and the people, the French Empire, which 'globalised' French interests, and the pattern of invasion between 1814 and 1940 which seared a highly 'realist' and state-centred concept of defence into the national strategic culture. It flows also from the decisive intervention of General Charles de Gaulle who, through the Constitution of the Fifth Republic and through the force of his ideas, established from the late 1950s a "Gaullist" framework of thinking about defence, around which the "consensus" has subsequently accreted.[19]

One can still observe the adherence to Gaullism in contemporary defence policy – for example in the maintenance of an independent nuclear deterrent, non-integration with and distance from NATO, a global military role commensurate with French *rang* and *grandeur*, and near self-sufficiency in arms procurement.

[18] See J. Isnard, Déception et amertume dans les armées françaises, *Le Monde*, 8 February 2002, p. 14. The preparation of this project continues now, after the re-election of Jacques Chirac, under the supervision of the new Minister of Defence, Michèle Alliot-Marie, see J. Isnard, La programmation militaire remise en chantier, *Le Monde*, 4 June 2002, p. 17.

[19] See S. Gregory, Vers une défense nouvelle: Defence Policy Planning and Review in France, (1998) 29 *Disarmament Diplomacy*, <www.acronym.org.uk/29french.htm>.

Recent developments, especially the transition to a fully professional army will certainly influence the public opinion of the French armed forces, although no sharp break seems perceptible yet.[20] A survey illustrates the position of French public opinion. 59% of the French have pronounced themselves in favour of a common European defence. 74% of the French approve of the French military engagement in external operations in general. The support is even stronger when the objective is to assist a population in danger (90%), or to react to an aggression directed against a NATO or EU member state (76%). The same survey also shows, however, that 48% of the French believe that such an engagement should result only from a vote of Parliament, against 42% in favour of the Presidential prerogative. Finally, the survey shows that there is a lack of information on the exact role of the French Parliament. 51% of French citizens simply do not know whether the Parliament must be consulted or not.[21]

II. Basic Rules Concerning the Use of Armed Force

1. The Mission of the Armed Forces

Compared to the German Constitution from 1949, the French Constitution from 4 October 1958, appears rather laconic with regard to the role or the missions of the armed forces. The text of the Constitution adopted in 1958 does not contain the slightest mention of this subject. One has to go back to the "*Declation des droits de l'homme et du citoyen*" from 1789 and to the preamble of the Constitution of 1946 in order to find references to the role of the armed forces.

As the preamble of 1958 refers explicitly to these two texts, they are still part of positive French constitutional law. Together with a number of unwritten principles recognised by Acts of Parliament since 1905 ("*Les principes fondamentaux reconnus par les Lois de la République*"), and the written text from 1958, they form what is known in France as the "*bloc de constitutionnalité*." This "*bloc*" contains all rules of constitutional value (written and unwritten) to which the *Conseil constitutionnel* refers when exercising its competence of judicial review.

A first mention of the role of the armed forces is to be found in Article 12 of the 1789 Declaration, which says that the protection of individual rights re-

[20] B. Boene & M.-L. Martin, France: In the Throes of Epoch-Making Change, in C. C. Moskos (ed.), *The Postmodern Military* (Oxford, 2000), pp. 51 *et seqq.*

[21] Compare Assemblée Nationale, *Rapport d'information No. 2185 du 22 février 2000*, présenté par Paul Quilès sur "les Français, la Défense nationale et le rôle du Parlement".

quires a "public force," and that this force is "established for the advantage of all and not for the utility of those to whom it is attributed." This was of course an important change brought about by the French Revolution to establish a close link between the nation and its army. A decree from 6 December 1790, defined the public force as being "the junction of the forces of all the citizens".[22]

A second indication derives from Section 15 of the preamble from 1946. The second sentence of Section 15 establishes that the "French Republic shall not enter into war for reasons of conquest, and shall never use its armed forces against the freedom of any people." This Section 15 is the only constitutional rule which limits the use of the French armed forces. In practice, however, it has never been referred to. In any case, there is no possibility of judicial review of a decision to engage the armed forces abroad. The *Conseil constitutionnel* has indeed only a very limited jurisdiction compared to the German *Bundesverfassungsgericht*.

Besides these two rules, which do not fix precise limits for the use of the armed forces nor put obligations on the institutions in charge of defence policy, the French Constitution contains some other articles dealing with the allocation of powers and the responsibility for defence policy.

The ordinance No. 59-147 from 7 January 1959 (Article 1), defines the "objective" of defence in very general terms: "to ensure at all times, under any circumstances, and against any form of aggression, the security and the integrity of the territory as well as the life of the population". Further principles of defence are determined by the authorities as invested by the Constitution.

The missions of the French armed forces as defined by the French Ministry of Defence according to the 1994 White Paper[23] are the following:

To protect the vital interests of France against all forms of aggression: by guaranteeing France's territorial integrity, the freedom of its citizens, and the Nation's sovereignty and means of development, and maintaining the credibility of deterrence through the interplay of nuclear and conventional resources; by contributing to the maintenance of the continuity and freedom of action of institutions and the government under all circumstances, faced with all direct or indirect threats; by defending and protecting the national territory, airspace, and waters from a variety of threats including terrorism.

To contribute to the security and defence of Europe and the Mediterranean, with the prospect of the ultimate implementation of a common European defence policy: by preventing the development of any threat, and by contributing to stability in Europe and its surroundings, particularly in the Mediterranean and Middle East; by helping to prevent or solve crises, particularly by participating in military actions, of varied nature, intensity, and duration; by encouraging the development of a European defence identity, and by strengthening cooperation and exchange with our partners in the Western European Union, in all fields; by participating in the defence of Europe, within the North Atlantic Alliance, in the event of aggression.

To contribute to actions conducive to peace and the respect of international law: by asserting France's presence in the world, by ensuring that its sovereignty is respected wherever it is exercised, and by protecting its citizens and its interests, particularly its sources of supply; by honouring its defence and cooperation agreements; by being ready to participate in peace-keeping and law enforcement operations, whether under the auspices of the United Nations or other competent international organisations; by participating in humanitarian actions as requested by international organisations or at the request of the states and countries concerned.

To carry out public service tasks, particularly by strengthening means and organisations normally responsible for the civil defence of the country: by participating in the protection of civilian organisations, installations, or facilities necessary for maintaining activities essential to the life and defence of the population; by taking preventive measures for civil protection and rescue operations at the request of competent authorities, in order to protect the population under all circumstances (natural or technological disasters, major risks); by participating in the protection of public authorities and public services when necessary; by participating in action taken by the State at sea, whether it be prevention, policing, or lifesaving; by participating in assistance, search and lifesaving operations for aircraft in distress."

2 Permissible Operations

Under the French Constitution and more generally under French military law, there is a very wide range of operations which can be carried out legally by the armed forces. There are virtually no general or special prohibitions expressed by law but rather rules of competence and formal requirements to satisfy in order to have such operations conducted by the armed forces.

[22] See also the 1791 Constitution, Art. 107: "The general armed forces of the Republic are composed of the entire people."

[23] In March 1994 the Government of Balladur published the second *Livre Blanc sur la Défense* of the Fifth Republic (the first was published in 1972). The *Livre Blanc* is a detailed and extensive document which describes at length the French view of the new geostrategic context and the threats therein, the objectives of French defence policy, French defence resources, and the relationship between defence and society. It is addressed primarily to the French people and is a descriptive rather than prescriptive document. See *Livre blanc sur la défense*, La documentation française March 1994.

a. Crisis Management Abroad

Crisis management abroad is certainly permissible under French law. There are even special "pre-positioned forces" on the territory of foreign states such as Djibouti (3013 soldiers), Senegal (1163), Chad (971), Gabon (583), and Ivory Coast (572), which can carry out such operations. There are also, of course, units of the Foreign Legion stationed abroad.

b. Humanitarian Aid at Home and Abroad

Within the context of external operations the French armed forces carry out what they call "*actions civilo-militaires*" (ACM). According to a directive from 11 July 1997, these ACM are actions carried out by the armed forces engaged in a theatre. They make it possible to take into account the interaction between these forces and their civilian environment and to facilitate the realisation of civilian and military objectives. These actions may consist of three types of missions: missions to the benefit of the forces, missions to the benefit of the civilian environment, and humanitarian missions. In Kosovo, for instance, these ACM consist of delivering medical supplies to a hospital in Kumanovo or renovating schools in Pazoma and Vucitrn.[24]

c. Combined Operations with Civilian Aid Organisations

The above mentioned ACM can be carried out in co-operation with civilian aid organisations.

d. Cooperation between the Armed Forces and Other Governmental Authorities

The French armed forces include three traditional components (Army, Navy and Air Force) and the National *Gendarmerie*, which is a constituent part of the armed forces (Article 1 of Decree No. 91-673, from 14 July 1991). In peace time, the *gendarmerie* fulfils police tasks (especially in rural regions) and maintenance of public order. It can, however, also take part in the military defence of the territory.

Co-operation between the armed forces and other governmental authorities is possible in the field of "civil defence" as defined by the ordinance of 1959, reaction to natural catastrophes, or the preservation of public order. Co-operation between the armed forces and the civilian authorities falls under the responsibility of the *Préfets* (formerly called *Commissaires de la République*). They represent the state on the level of the defence zones, regions, and departments. *Decree* No. 83–321 of 20 April 1983 "*relatif aux pouvoirs des commissaires de la République en matière de défense de caractère non militaire*" determines the powers of the *Préfets*.

One particular field of co-operation concerns the fight against terrorism. A ministerial instruction from 7 February 1978, elaborated by the SGDN (*Secrétariat général de la défense nationale*) on the basis of the ordinance of 7 January 1959, established the "*plan Vigipirate*" in order to prevent terrorist attacks. The plan is classified as confidential and was updated in 1995 and 2000. The decision on whether to implement this "*plan Vigipirate*" belongs to the Prime Minister. Its implementation is based on instructions delivered by the Minister of Home Affairs to the *Préfets* of the seven defence zones and to the "*Préfets de région*" and the "*Préfets de département*". In practice, the armed forces would be closely associated with the police in order to strengthen the surveillance of all public establishments.

e. States of Emergency at Home

Concerning states of emergency at home, three main situations must be distinguished in France:

According to Article 16 of the Constitution: "Where the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted, the President of the Republic shall take the measures required by these circumstances, after formally consulting the Prime Minister, the Presidents of the Assemblies, and the Constitutional Council." This article was applied once, for 5 months in 1961, following the Algeria crisis. It gave rise to a kind of constitutional dictatorship and is therefore strongly criticised.

Article 36 of the Constitution declares that "Martial law (*état de siège*) shall be decreed in the Council of Ministers. Its extension beyond twelve days may be authorised only by Parliament." The proclamation of such an "*état de siège*" is governed by three statutes (9 August 1849, 3 April 1878, and 27 April 1916). It has effects that the powers of the civilian authorities in the field of police and public order will be transferred to the military authorities. The legality of the declaration of "*état de siège*" and the measures taken by the military authorities are controlled by the administrative courts. There must be "an imminent peril resulting from a foreign war or an armed rebellion" (Article 1 Statute from 9 April 1878).

[24] A complete list is available on the website of the armed forces headquarters (EMA). See <www.defense.gouv.fr/ema/forces/acm.>

The State of Urgency (*état d'urgence*) is regulated by a statute from 3 April 1955, modified by ordinance No. 60-372 from 15 April 1960. Like the "*état de siège*," it is established by a decree taken in the Council of Ministers, and its prorogation extension 12 days requires authorisation by Parliament. There is no general transfer of powers to the military authorities, but delegations are possible.

These three different situations, which are governed by the constitution or by statutes, can be placed within the wider theory of "*circonstances exceptionnelles*". The existence of such exceptional circumstances is determined by the judge. In the case of exceptional circumstances, the normal rules on competence as well as the requirements on form and substance of administrative acts are modified.[25] The existence of any of these exceptional situations does not imply, however, the authorisation to use the armed forces. The decision on this question is still separate, but can be easier to push through under exceptional circumstances than under normal circumstances.

f. Natural Disasters or Humanitarian Catastrophes at Home

These situations are certainly part of the concept of "civil defence" defined by ordinance No. 59-147, Article 17. The armed forces are for instance permanently involved in the plan POLMAR, executing control missions in order to prevent pollution on the French coast line. After the shipwreck of the *Erika*, an oil tanker which sank at the end of 1999 near to the coast of Bretagne, the French armed forces engaged over 2000 soldiers on the sea and on the beach in order to assist the population.

g. Evacuation of a State's Nationals

French troops have conducted several OPEX (*opérations extérieures*) in the past in order to rescue or evacuate foreign nationals, either on their own (Chad in January 1992, Central African Republic in January 1997), or together with Belgian troops for instance in Zaire (September 1991, January 1993 and April 1997), in Rwanda and Burundi (April 1994), and in Côte d'Ivoire (2002)[26].

[25] See Conseil d' État, 28 June 1918; Heyriès, *Les grands arrêts administratifs* (Paris, 1999), p. 193.

[26] For a list of such operations, see Moskos, "The Postmodern Military" *supra* n. 20, pp. 279 *et seqq.*

h. Use of the Armed Forces in Other Cases

According to Article 17 of the ordinance of 7 January 1959: the Minister of Home Affairs receives – for the development and the engagement of his means the support of the services and the infrastructure of the armed forces and, especially in order to preserve the public order, if necessary the assistance of the military forces. Thus, in France, the armed forces may contribute to what the ordinance from 1959 calls "civil defence".

The armed forces will be engaged on the basis of a simple demand emanating from the civilian authorities for any provision of services which do not concern the maintenance of public order (*e.g.* in the case of natural disasters). In this case, general plans on the organisation of rescue (ORSEC) will apply, and these demands for assistance are governed by a simple inter-ministerial instruction from 18 January 1984.[27]

In the field of upkeep of public order, there are stronger requirements to fulfil. The armed forces may intervene only upon a formal requisition following the rules laid down by a statute from 1791 and Decree No. 95-573 from 2 May 1995, and explained by an inter-ministerial instruction from 9 May 1995.[28] According to Article 2 of this decree, the armed forces may take part in the maintenance of public order only if legally requested to do so. A requisition for this purpose may be general, particular, or complementary, depending on whether the use of coercion or weapons is requested. Use of heavy weapons requires a special authorisation by the Prime Minister, an exception being made for the weapons of the *Gendarmerie*.

An inter-ministerial instruction No. 500/SGDN/MTS/OTP of 9 May 1995 "*relative à la participation des forces armées au maintien de l'ordre*" governs the use of arms by the armed forces in the field of upkeep of public order (Articles 41–44). In the case of "*attroupements*" (riots or turmoil) according to Article 431-3 NCP, the armed forces may exercise a kind of "collective" right of legitimate defence. The lawfulness of the use of force is governed by the ordinary penal law (Articles 122-4 to 122-7 NCP).

[27] For a more recent issue see M. Watin-Augouard, Sécurité intérieure: pluralité et complémentarité des forces (1997) 4 *Droit et Défense*, p. 15.

[28] Instruction interministerielle No. 500/SGDN/MPS/OTP du 9 mai 1995 relative à la participation des forces armées au maintien de l'ordre.

3. Limitations on Operations Undertaken Jointly with the Armed Forces of Another Country

There are no specific legal limitations in this field, as long as such operations are not carried out with an intention of conquest or against the freedom of any people (Section 15 of the Preamble of the Constitution of 1946).

4. Constitutional Powers

Though one might consider French constitutional law about the armed forces to be rather cursory, there are several constitutional rules concerning the distribution of competences among the organs of the state with regard to the regulation of defence. The distribution of competences among Parliament, the President, and the Prime Minister in the field of defence is not organised in a fully satisfying manner by the constitution. Especially the division of powers between the two main actors in the Government depends in practice on the political situation (*cohabitation* or not). Furthermore, the French Parliament appears to play a secondary role, being merely consulted by the Prime Minister without having the possibility to vote formally on the engagement of French armed forces in most of the cases.

a. The Position of the Head of State

According to the Constitution, "[t]he President of the Republic (...) shall be the guarantor of national independence, territorial integrity, and observance of treaties" (Article 5). He shall make appointments to the civil and military posts of the State (Article 13), and he "shall be Commander-in-Chief of the Armed Forces. He shall preside over the higher national defence councils and committees" (Article 15).

Thus, according to the text, the President of the Republic is to be considered as the supreme head of defence policy. He is responsible, furthermore, for ensuring that national independence and the country's integrity are maintained, and that treaties are respected. He is the Commander-in-Chief of the Armed Forces, and is the only person empowered to give the order to engage nuclear forces (*Decree No. 96-520 du 12 June 1996 portant détermination des responsabilités concernant les forces nucléaires*). The main defence decisions are made by the President of the Republic in councils chaired by him (Council of Ministers, Council of Defence, and Restricted Defence Committee).

His competences defined by Articles 5, 13 and 15 do not belong, however, to his "competences proper". According to Article 19 of the Constitution they are

submitted to countersignature by the Prime Minister and, eventually, the responsible ministers. In fact, the question whether the President, as chief of the armed forces, could decide alone on their engagement depends more on the political situation than on the Constitution. The powers defined by Article 16 and the engagement of nuclear forces are special cases.

b. The Powers of the Government

The Government implements measures decided upon in councils and committees chaired by the President of the Republic. Thus, its role seems to be subordinate. However, Article 20 provides that "The Government shall determine and conduct the policy of the Nation. It shall have at its disposal the civil service and the armed forces."

The Prime Minister, responsible for National Defence (Article 21 of the Constitution), controls how defence measures are implemented; he does this through the SGDN (Secretariat-General for National Defence). The SGDN is placed under the authority of the Prime Minister, but its main function is to ensure a permanent and close link between the President and the Government. Each minister is responsible for the preparation and execution of defence measures to be carried out by his department; a senior defence civil servant assists him in this, and it is laid down in Article 21 that the Prime Minister shall direct the operation of the Government. He shall be responsible for national defence. Subject to Article 13, he shall have power to make regulations and shall make appointments to civil and military posts."

Hence, the division of competencies between the President and the Prime Minister, as it is organised by the Constitution, appears to be rather ambiguous. According to the wording of the Constitution, both, the President and the Prime Minister hold important prerogatives in the field of defence policy. Article 9 of the ordinance from 7 January 1959 even seems to attribute the leading role to the Prime Minister.[29] Originally, in application of Article 21 of the Constitution, the Prime Minister was meant to hold the main responsibility in the field of defence. This original scheme has, however, been altered by more than forty years of practice. During this period, the competences of the Presi-

[29] Le Premier ministre responsable de la défense nationale exerce la direction générale et la direction militaire de la défense. A ce titre, il formule les directives générales pour les négociations concernant la défense et suit le développement de ces négociations. Il coordonne la préparation et la conduite supérieure des opérations et assure la coordination de l'activité en matière de défense de l'ensemble des départements minis-

dent have become more and more substantial, while the prerogatives of the Prime Minister have been shown to be merely formal.[30]

The reasons for this evolution are numerous. The influence exercised by General de Gaulle as first President of the Fifth Republic and the 1962 amendment of the Constitution, which introduced the direct election of the President, are only two of them. In 1993, the "*Comité Vedel*" made the proposal to amend Article 21 of the Constitution in order to coordinate the text with the practice. According to this (abandoned) proposal, the Prime Minister would have become "responsible for the organisation of the national defence".[31]

c. *The Participation of Parliament in the Decision to Deploy the Armed Forces*

The French Parliament (National Assembly and Senate) does not have an important role to play in this field. The decision on the deployment of the armed forces can be taken without any participation of the Parliament. Only in the case of a declaration of war is an act of Parliament required. The deployment of the armed forces, abroad or at home, is an executive prerogative in France. The consultation or informing of the Parliament is left up to the goodwill of the Government, which acts as the circumstances direct.[32]

Article 35 of the Constitution provides that "A declaration of war shall be authorised by Parliament", but since 1945, no such authorisation has ever been required. It is not even known whether this authorisation must be given in the form of a statute and according to the legislative procedure, or if it could result from a simple resolution. As Article 35 is placed under Title 5 of the Constitution (on the relations between Parliament and the Government), it seems to be the Government which would be authorised to declare war, but such an interpretation is in conflict with the practice of the V. Republic (presidential supremacy). In the case of application of Article 16 by the President, Article 35 would become meaningless.[33] In 1993, the Vedel Committee made the proposal to add a second phrase to Article 35 providing that every intervention of the armed forces abroad obliges the Government to issue a declaration which is

[30] Regarding this topic see O. Gohin, Les fondements juridiques de la défense nationale, (1993) 1 *Droit et Défense*, p. 4.

[31] See Propositions pour une révision de la Constitution, Comité consultatif pour la révision de la Constitution présidé par le doyen Georges Vedel, 15 février 1993, La documentation française 1993, p. 39.

[32] Compare C. Kieffer, L'engagement des forces armées à l'extérieur du territoire, (1994) 1 *Droit et Défense*, pp. 14 et seqq. and M. Conan, Cadre juridique des forces en opérations extérieures, (2002) 202 *Revue de la Gendarmerie nationale*, pp. 66–70.

[33] Compare T. Renoux et M. de Villiers, *Code constitutionnel*, (Paris, 1994), pp. 365–366.

followed by a debate in Parliament. This proposal did not give rise to an amendment of Article 35.

Furthermore, Parliament has the competence to authorise martial law (*état de siège* and *état d'urgence*). This state is decreed in the Council of Ministers, but its extension beyond twelve days must be authorised by Parliament (Article 36).

In the field of external military operations, the role of the Parliament is very limited.[34] The procedure of oral questions or motion of censure may be used as in any field of action of the Government. The Government may also ask for approval for a military operation, as it did in the case of the Gulf War, and more recently in the case of operations in Kosovo, but there is no legal obligation to do so.

Nevertheless, French armed forces have taken part very actively in many UN peace-keeping missions. In 1995, France provided the most "blue helmets", and participated in 8 out of 17 operations in 2002 with a total of almost 700 persons sent abroad.[35] The most important military participation (with 250 soldiers) concerns the FINUL (Lebanon). French troops have also conducted several OPEX (*opérations extérieures*) in order to rescue or evacuate foreign nationals (see above, 2.g.).[36]

Furthermore, and besides the participation in the Second Gulf War (with 19 000 soldiers at the peak), France has taken part in operations of peace enforcement under international auspices: *e.g.* operation "Southern Watch" (flight control over the territory of Iraq, since 1992), IFOR (Implementation Force, December 1995 to December 1996, Bosnia), and "SANTAL" (East Timor, until 15 January 2000).[37]

In 2002, French troops were engaged in three important multinational military operations: SFOR (with approximately 3,100 French military personnel in the Multinational Division Southeast), KFOR (about 5,200 French military

[34] See Assemblée nationale, *Rapport d'information No. 2237 sur le contrôle parlementaire des opérations extérieures*, présenté par F. Lamy, 8 March 2000.

[35] According to the Minister of Foreign Affairs and the Minister of Defence, French troops or gendarmes are participating in the following operations: ONUST (13 observers, Palestine), MONUIK (9 observers, Iraq – Kuwait), MONUA (Angola), MINURSO (Western observers, Sahara), MINUBH (125 gendarmes, Bosnia), MIPONUH (24 gendarmes, Haiti), MINURCA (Central Africa), and MONUG (5 observers, Georgia).

[36] For a list of such operations, compare Moskos, 'The Postmodern Military' *supra* n. 20, p. 7.

[37] For an overview of approximately 30 French OPEX in 1999 see: Assemblée Nationale, *Rapport d'information No. 2237 du 8 mars 2000*, présenté par François Lamy sur le contrôle parlementaire des operations extérieures, pp. 18 et seqq.

personnel since June 1999; from 1 October 2001, KFOR has been under the command of the French General Marcel Valentin), and "Task Force Harvest" (since September 2001 in Macedonia (FYROM), 550 French military have taken part in a multinational battalion under French command together with 400 German and 150 Spanish soldiers).

Even in 1991, when strong French armed forces took part in the Second Gulf War, the government considered there to be no need for a declaration of war because it was merely participating in an operation of collective security.

There are, however, at least two other procedures which make it possible to give the French Parliament a role in the decision on the employment of the armed forces. The first is based on Article 49 (1) of the Constitution, and was used by then-Prime Minister, Michel Rocard, on 16 January 1991. Article 49 (1) authorises the Prime Minister "after deliberation by the Council of Ministers", to "make the Government's programme or possibly a statement of its general policy an issue of its responsibility before the National Assembly". The statement of general policy made by Michel Rocard on the issue of the engagement of French armed forces in the Gulf was approved by a large majority (523 votes against 43).

The second procedure results from Article 132 of the "*Règlement intérieur*" of the National Assembly which allows the Government to present a declaration to the Assembly (followed by a debate or not). Such a declaration must not be followed by a vote of any kind. This procedure was used in spring 1999 by Prime Minister Lionel Jospin to present the government's decision to participate in the air strikes against Serbia. More recently (on 3 October 2001), Jospin used the same procedure in order to organise a debate on an engagement of French armed forces in military operations against Al Qaida and the Taliban regime in Afghanistan.[38]

d. The Functions of the Minister of Defence

The Minister of Defence is not mentioned by the Constitution, but there has always been a minister in charge of the armed forces or more generally of the defence. The ordinance of 7 January 1959, defines his role in Article 16.

The Minister of Defence implements the military defence policy (organisation and training of the armed forces, recruitment and management of personnel, armaments and infrastructure procurement). He is assisted by the Chief of Staff of the Armed Forces (use of forces, preparing for the future, military

[38] Cp. A.-S. Firion, Le fondement juridique de l'intervention armée en Afghanistan, (2001) 4 *Droit et Défense*, pp. 31–41.

international relations), the General Delegate for Armament (studies, research, and production), the Secretary-General for Administration (DSF – Financial Services Directorate, DFP – Personnel Function Directorate, DAG – General Administration Directorate), the Chiefs of Staff for the Army, the Navy, and the Air Force, the Director of the *Gendarmerie Nationale*, and the Director responsible for Strategic Affairs.

The Minister of Defence combines the tasks delegated to him by the Prime Minister with those attributions which are defined as his by decree (Decree No. 62–811 from 18 July 1962, as modified). He is clearly placed under the authority of the Prime Minister and is responsible for the implementation of the defence policy which is determined by the Council of Ministers. He assists the Prime Minister in the field of the organisation of the armed forces. He is a political authority as well as the chief of the administration of his Ministry.[39]

e. The Role of the Military Leadership

The military leadership is under the direction of a Chief of the Armies' Headquarters or Chief of the Defence Staff (*chef d'état major des armées*, CEMA). He assists the Minister of Defence in his attributions relative to the employment of the armed forces and their organisation; he exercises the commandment of the military operations, and he may suggest military measures to the Government.

The Chief of the Defence Staff (CEMA), who is military adviser to the government, has three primary fields of responsibility: 1. *force deployment*: he defines the concept and commands all military operations; 2. *preparing for the future*: he proposes, primarily to the Minister of Defence, the measures needed to ensure coherence in planning and programming activities; 3. *international relations*: he is responsible for relations with foreign armies, and directs the activities of the armed forces in this area. The attributions of the CEMA are defined in detail by a decree of 8 February 1982.[40]

In the exercise of his functions, the Chief of the Defence Staff (CEMA) has the following principal organisations at his disposal: the Central Defence Staffs (EMA), which give him staff support across his entire range of responsibilities, and within which can be found the Joint Operations Centre (COIA) which is responsible for with the conduct of operations, the Defence Intelligence Directorate (DRM), which is also directly responsible to the Minister of Defence, the

[39] For details see B. Cruzet, Le ministre de la défense, (1998) 1 *Droit et défense*, p. 4.

[40] Décret No. 82–138 du 8 février 1982, fixant les attributions des chefs d'état-major (JORF 9 février 1982).

Joint Planning Staffs (EMIA) which prepare operational plans, and the Special Operations Command (COS), a command structure of overseas representatives, both within and outside French territory. French forces engaged in an operation, regardless of the service to which they belong, come under the command of CEMA.

The most obvious pattern of the French system is the constitutional centralisation of defence policy in Presidential hands, which results (even in periods of *cohabitation*) in power being exercised through the *Secrétariat Général de la Défense Nationale*, subject to little oversight or external influence even from Parliament, as will be clarified below. This appears to be anachronistic and unworthy of a State with profoundly democratic traditions. Thus, it has been suggested that "France could usefully open up its processes in at least three ways: first, it could empower the checks and balances within the political system to exercise tougher oversight and accountability in defence matters, secondly, it could provide greater transparency with respect to defence programmes and expenditure, to facilitate oversight and accountability; and third, it could widen the base of those involved in debating defence matters at the highest levels".[41]

5. Parliamentary Control

a. The Parliament's Powers to Control the Armed Forces

The powers of the French Parliament to control the armed forces are very few. Parliament makes laws to define how defence is organised, the means dedicated to it, constraints imposed on citizens (*e.g.* the National Service code), finance laws (annual budget for the armed forces), and military programming laws, in which it periodically makes statements about the main orientation of France's military policy (equipment for the armed forces over several years).

The division between the competence of the Parliament to enact legislation and the power of the executive to regulate by decree results from Articles 34 and 37 of the French Constitution. These two articles limit the areas of parliamentary legislation to the matters listed in Article 34, while all the rest is open to regulation by the executive power. The French situation is thus almost opposite to the principle of "*Gesetzesvorbehalt*" known in Germany.

Article 34 of the Constitution places several fields within the realm of statutory law. There are essentially three domains which have to be governed by acts

[41] See S. Gregory, Vers Une Défense Nouvelle: Defence Policy Planning and Review in France, (1998) 29 *Disarmament Diplomacy*, <www.acronym.org.uk/29french.htm>.

of Parliament. Thus: "Statutes passed by Parliament shall determine the rules concerning: the obligations imposed for the purposes of national defence upon citizens in respect of their persons and their property; the fundamental guarantees granted to civil and military personnel employed by the State; Statutes also shall determine the fundamental principles of the general organisation of national defence."

It should be noted, however, that especially with regard to the "general organisation of national defence" the real role of the Parliament of the Fifth Republic has been rather small. One of the most important texts, the Ordinance No. 59-147 of 7 January 1959 ("*portant organisation générale de la défense*"), is indeed a text which has the force of an Act of Parliament, but which has been adopted by the executive according to Article 92 of the Constitution.[42] Furthermore, several important decrees, which go far beyond the purpose of simple measures of application, have been adopted in this field.[43]

Both houses have created permanent parliamentary commissions in order to handle the functions of information and parliamentary control. The commissions may also create special "missions of information" to collect information on a particular situation. In practice, however, these commissions have never exercised strong control over the government.[44]

The general procedures of censure and questioning according to Articles 48 to 50 of the Constitution also apply in the field of defence policy.

Finally, Parliament has to authorise the ratification of different kinds of international treaties, which might concern the field of defence policy. According to Article 53, peace treaties and treaties or agreements relating to international organisation, or exchange or addition of territory, may be ratified or approved only by Parliament.

In fact, the only possible way for the French Parliament to exercise effective control over the armed forces would be to cut defence expenditures. Thus, especially in the field of external operations, Parliament is confined to exercise its control *a posteriori*. The *Conseil constitutionnel* has recently corroborated this view in a decision on the reform of the special funds considering that the Par-

Les mesures législatives nécessaires à la mise en place des institutions et, jusqu'à cette mise en place, au fonctionnement des pouvoirs publics seront prises en Conseil des ministres, après avis du Conseil d'État, par ordonnances ayant force de loi". This transitory disposition has been repealed by an amendment of the Constitution in 1995.

[43] Le décret No. 96-520 du 12 juin 1996 "portant détermination des responsabilités concernant les forces nucléaires".

[44] See L. Laffaille, La mission d'information parlementaire et le contrôle de l'action gouvernementale, (1998) 2 *Droit et Défense*, p. 34; www.defense.gouv.fr/def_natio/defense&.html

liament cannot "intervene in the realisation of ongoing operations" because it must respect the prerogatives of the executive in the field of national defence.[45]

b. Special Forms of Parliamentary Control over the Military, Ombudspersons

The general "ombudsperson" in France (*le Médiateur de la République*) does not have competence in the field of conflicts which may occur between the administrations and their staffs (Statute No. 73-6 of 3 January 1973, Article 8). In 1977, there was a proposition to establish a special military ombudsperson, but it was unsuccessful and has never been formally reintroduced. The *Médiateur de la République* is not a parliamentary ombudsperson, but an independent administrative authority (*autorité administrative indépendante*). He is nominated for 6 years by the Council of Ministers. Since May 1998, this function has been exercised by Bernard Stasi. An informational report presented recently by two members of the parliamentary commission for national defence and the armed forces reintroduced a suggestion to institute a special *Médiateur* for the military.[46]

c. Court of Auditors and Comparable Institutions

The French Court of Auditors (*Cour des comptes*) has a general competence to control the budget of the State (central administration, public establishments, territorial units, etc.) and their expenditures. In June 1997, a special report on the budgetary management and the program of the Defence Ministry pointed out several fields of misadministration and formulated a severe critique.[47]

III. The Structure of the Armed Forces

1. The Armed Forces and their Administration

The whole military administration is organised under the responsibility of the Minister of Defence. The Ministry is divided into different structures, such as the General Staff, the Procurement Agency, the General Staffs of the Army, Navy, Air Force, and *Gendarmerie*, and the General Secretariats for Administration, Health Services, and Petrol Services.

There are about 99,000 civilians working in the Ministry of Defence. They work in all sectors of the Ministry, such as central administration, armies and common services, and general arms delegation. Today, most of them are recruited as civil servants (including those who have the status of "military workers").

2. Involvement of the Civilian Administration in the Process of Procurement of Material and Supplies

This task is fulfilled by the general arms delegation (procurement agency), which is part of the Ministry of Defence, without any involvement of the civilian administration.

IV. Soldiers' Rights and Duties

1. Restrictions on Fundamental Rights of Soldiers

a. General Aspects

In France, fundamental rights do not enjoy the same level of protection as in Germany. The protection of "fundamental rights" – or "human rights and public liberties", which is the term more commonly used in France – does not always derive from the Constitution. Not all public liberties have constitutional value in France. However, the case law of the *Conseil Constitutionnel* has widened the scope of a number of rights and liberties guaranteed by the Declaration of 1789 or the preamble of the Constitution of 1946, or rights recognised as unwritten principles.

According to Article 34 of the Constitution, "Statutes shall determine the rules concerning civic rights and the fundamental guarantees granted to citizens for the exercise of their public liberties". Therefore, while the "fundamental guarantees" can only be determined by Parliament, any other rule which does not concern these fundamental guarantees may be established by simple decree, e.g. the RDGA (General Regulation on Discipline in the Armed Forces, Decree No. 75-675 of 28 July 1975).

According to Article 6 of the General Statute of the Military (Statute of 13 July 1972 – SGM), soldiers enjoy all the rights and liberties granted to citizens, but the same article adds: "the exercise of some of them is either forbidden or restrained under the conditions of this law." The question whether this statute,

[45] Décision No. 2001-456 DC du 27 décembre 2001, "loi de finances pour 2002", point 45.

[46] See Assemblée Nationale, *Rapport d'information No. 2490 du 22 juin 2000*, présenté par Bernard Grasset et Charles Cova sur les actions destinés à renforcer le lien entre la Nation et son Armée, p. 25 *et seq.*

[47] Compare <http://www.ccomptes.fr/Cour-des-comptes/publications/rapports/defense>.

which imposes important restraints on the exercise of several rights or liberties, is fully consistent with the Constitution might be discussed. But as the question has not been submitted to the *Conseil Constitutionnel* within the period of time allowed for disputing statutes, its conformity with the Constitution can not be challenged anymore.[48]

The statutory position of soldiers in France is therefore often qualified as "*cantonnement juridique*", which may be translated as "legal containment".[49] This expression means that soldiers who serve as volunteers (whether on a career or a contract basis) agree to be submitted to special duties and service obligations which come with their status. Article 1 SGM puts it this way: "Military status requires under all circumstances discipline, loyalty, and a spirit of sacrifice. The duties which it involves and the submissions which it implies deserve the respect of the citizens and the consideration of the nation".[50] This article signifies furthermore that soldiers' rights and freedoms may be restricted by law.[51]

There has not been any noteworthy public discussion or criticism with regard to the restriction of soldiers' rights. The only issue which seems to raise some discussion is the soldiers' right to free expression. A number of recent publications concern this very question.[52]

b. Political Neutrality of Soldiers

From 1872 to 1945,[53] French soldiers were deprived of the exercise of their political rights (to vote and to stand as a candidate). Since 1972, French soldiers have again been able to exercise their political rights, but several constraints persist, which make the effective exercise of these rights difficult. Soldiers in active service are not allowed to enrol in political parties, or indeed

[48] Regarding this issue, see J. Robert, Libertés publiques et défense, (1977) *RDP*, p. 951.

[49] See F. Dieu, Le cantonnement juridique, (2002) 202 *Revue de la Gendarmerie nationale*, pp. 116–121.

[50] "L'état militaire exige en toute circonstance discipline, loyalisme et esprit de sacrifice. Les devoirs qu'il comporte et les sujétions qu'il implique méritent le respect des citoyens et la considération de la nation."

[51] See J. Duffar, Le "soldat-citoyen", (1995) 2 *Droit et Défense*, p.18 and J. Robert, Libertés publiques et défense, (1977) *RDP*, p. 936.

[52] See M. Jacob, Le besoin d'expression collective des militaires est-il satisfait par les institutions actuelles?, (1998) *Revue administrative*, p. 285; Assemblée Nationale, *Rapport d'information No. 2490 du 22 juin 2000*, présenté par Bernard Grasset et Charles Cova sur les actions destinés à renforcer le lien entre la Nation et son Armée, p. 25; B. Mignot, Lien armée-nation et expression des militaires, (1998) *Défense nationale*, p. 82.

[53] Act of Parliament, 27 July 1872, ordinance of 17 August 1945.

in any association of political character (Article 9 SGM). If they want to stand as a candidate in an election, this prohibition is simply suspended during the campaign. This does not make it impossible to be elected in local elections, but certainly in national ones, because the list of candidates are determined by decisions within the political parties long before the beginning of the official campaign. Individual candidates do not have a real chance to be elected on the national level without being supported by a political party.

Article 10 of the General Regulation on Discipline in the Armed Forces (RDGA) further adds a general duty of the military not to compromise the neutrality of the armed forces in the philosophical, religious, political, and professional (trade union) fields.[54] Furthermore, within all military establishments, it is forbidden to organise or to participate in any demonstrations or propaganda actions in these fields (Article 10 (3)).

Article 19 RDGA, which grants a right for special leave in order to take part in religious ceremonies, does not mention political meetings and no other disposition guarantees such a right. Military personnel may attend political meetings as long as they are in civilian dress and their military status is not mentioned.[55]

The distribution of political leaflets would fall under the very general prohibition of Article 10 RDGA (prohibition of demonstrations or propaganda in the political field). Publications which are intended to damage morality or discipline in the armed forces may be prohibited (Article 23 RDGA).

Finally, there are cases of incompatibility and ineligibility. Soldiers who want to become, for example, a Member of Parliament, or of a local council (municipal, departmental, or regional), will be placed in the position of "release", which means that they will lose pay. This has the effect of preventing the soldier from accepting a local political mandate, because these do not carry sufficient remuneration.

Restrictions on the eligibility of soldiers also derive from the general legal texts (*Code électoral*) according to which an officer of the army may not be elected for any political position within the boundaries of the district which fall(s) (or fell within the past 6 months) under his command.[56]

Article 10 Respect de la neutralité des armées. – Conformément à la loi, le militaire a le devoir de ne pas porter atteinte à la neutralité des armées dans les domaines philosophique, religieux, politique ou syndical. (...)".

Article 10-1: "Le militaire en activité de service ne doit pas s'affilier à des groupements ou associations à caractère politique ou syndical. Il peut, par contre, en tenue civile, participer à des réunions publiques ou privées ayant un caractère politique, sous réserve qu'il ne soit pas fait état de sa qualité de militaire".

[56] Code electoral Articles L.O. 133-5, 296, L. 195-5, 231-3 and 340. D. Dutrieux, La non participation des militaires à la democratie locale, (1998) 1 *Droit et Défense*, p. 37.

Article 7 SGM guarantees the freedom of opinion and belief.[57] The soldier's file must not contain any reference to such opinions and the grades assigned to him by his superiors must not refer to his opinions (Article 26 SGM).

Though guaranteed by Article 7 of the General Statute, freedom of expression is restricted. Opinions and beliefs may be expressed only when off-duty ("*en dehors du service*"), and with the self-restraint required by military status. An exception is the freedom of religion. Article 7 SGM states explicitly that the freedom to attend religious services is guaranteed. This includes the right to stay away from official religious ceremonies. Furthermore, Article 19 RDGA grants a right for special leave in order to take part in religious ceremonies. In some cases, preliminary authorisation is necessary if a soldier wants to express himself in public on political questions (Article 7 (2) SGM).

c. *Freedom of Association*

The right of association is strictly limited within the French armed forces. Article 10 SGM prohibits the existence of "professional groupings with trade union character", and holds the membership of soldiers in such unions as being "incompatible with military discipline." This general interdiction seems to be anachronistic and contrary to Article 11 of the ECHR as well as to the French Constitution.[58] Recently, during a EUROMIL meeting, members of the French Parliament seemed to be interested in the German experience and the DBwV.[59]

In practice there have been transgressions of the interdictions formulated by Article 10 SGM. On 13 April 2001, for example, the First Association for the Defence of Soldiers' Rights (ADEFDROMIL) was created by an officer on active duty.[60]

Article 10 RDGA furthermore strongly restricts the right of free assembly. Within all military establishments, it is forbidden to organise or to participate in any demonstration or propaganda action in the abovementioned fields (Article 10 (3)). Concerning the right to complain against disciplinary measures, Article 13 (8) RDGA prohibits any kind of collective demonstration, petition or complaint.[61]

Finally, according to Article 11 SGM, the right to strike is incompatible with military status.

[57] "Les opinions ou croyances philosophiques, religieuses ou politiques sont libres".

[58] See Syndicat national de la magistrature, (2001) 164 *Justice*, p. 21.

[59] EUROMIL, the European Organisation of Military Associations, is a union of free democratic associations representing the interests of military personnel. Any association that represents the interests of citizens employed in the defence sector, their dependants, or surviving dependants can become a member of EUROMIL. Until very recently, there was only an association of former servicemen in France: Association Nationale et Fédérale d'Anciens Sous-Officiers de Carrière de l'Armée Française (ANFASOCAF).

[60] See La Tribune des Sous-Officiers, No. 155, 2001.

d. *Conscientious Objection*

There is no right of conscientious objection for French soldiers.[62] If a service member desires to leave the armed forces altogether, he or she will have to be dismissed. Dismissal is governed by Articles 80 *et seqq.* SGM. An officer's demand to be dismissed has to be accepted by decree and can be rejected by the Minister of Defence. In some cases dismissal will be accepted only for "exceptional considerations". This is the case, for instance, if the service member has received a specialised education during the period of service he engaged for. As the *Conseil d'État* recently decided, a refusal to dismiss needs simply to be motivated by a legitimate service need, and does not place the military in a situation of "forced labour" according to Article 4 ECHR.[63] In any case the rights to a pension might be lost.

If a soldier desires not to take part in one particular operation for reasons of conscience, he may ask to be excused from service concerning that particular operation, but there is no right not to be sent to a theatre of combat. Refusal to obey an order to go would expose the soldier to disciplinary sanctions.

e. *Equal Treatment*

The preamble of the French Constitution of 1946 contains in its Section 3 a general principle of equal treatment of men and women in any field, which must be ensured by the law. Accordingly, the General Statute of 1972 does not contain any restriction on women joining the armed forces. However, until recently, such restrictions resulted in practice from a number of decrees which determine the status of the different corps of officers. These decrees used to limit women's access by fixing a maximum percentage of women to be recruited each year.[64]

[61] Les manifestations, pétitions ou réclamations collectives sont interdites.

[62] Regarding the right of objection of young men who have submitted to conscription in the past, see J. Duffar, L'objection de conscience en droit français, (1991) *RDP*, p. 657.

[63] See C.E., 7 February 2001; M. Béranger, (2001) 203 *Cahiers de la fonction publique*, p. 31.

[64] See e.g. Decree No. 75-1206 of 22 December 1975 (portant statut particulier du corps des officiers des armées de l'armée de terre) Article 2. A ministerial decision determined which positions could be held by women.

This situation was altered by Decree No. 98-86 of 16 February 1998, which modified the 17 decrees fixing the status of the different corps of officers. All remaining quantitative limitations on the employment of women have been removed from these decrees.[65] Exceptionally, women may still be excluded from some forms of military employment if their exclusion is justified by the particular nature or the specific requirements of these employments. Exceptions are determined by decision of the Minister of Defence enumerating these employments. Thus, the French law appears now to be fully compatible with the EC directive of 9 February 1976, and the case law of the ECJ in Johnston, Sirdar, and Kreil.

In spite of the legal situation, it is obvious that in the French army, women are not equal to men. This was underlined in a recent report put together by a mixed working group of officers called "G2S" ("*Groupe deux sexes*").[66] One might add that it is significant that a woman is exercising the function of the Minister of Defence for the first time in May 2002, and the French armed forces are still comprised of only 8.5% women.

There is no special legal text regulating the situation of homosexuals in the French armed forces. As long as the general duties are respected, they do not suffer discrimination. The introduction of gay or lesbian magazines could fall under the prohibition of Article 23 RDGA (protection of morality and discipline) if they had pornographic character, but that would also be the case concerning any heterosexual publication of such kind. According to the Chief of the Army's public relations officer, General Revel, "homosexuals have their place within the army", and the first association of gay and lesbian soldiers was founded in 2001.[67]

f. Other Fundamental Rights and their Restrictions

– *Free movement (Articles 12 and 13 SGM):*

Soldiers may be called to serve "anytime and anywhere". They may need official permission before leaving the national territory for a destination outside the EU, or one in certain foreign countries listed by the Ministry of Defence. Frequent changing of residence is part of their job and may therefore justify special subsidies in case of particular difficulties with regard to personal

[65] Compare S. Le Gall-Sampaio, L'accès des femmes à la fonction publique militaire, (1998) 2 *Droit et Défense*, p. 21.

[66] See J. Isnard, Dans les armées françaises, la femme n'est l'égale de l'homme, *Le Monde*, 25 May 2002, p. 1.

[67] See *Le Monde*, 4 May 2000 and 27 January 2001, p. 8.

accommodation. The military commander may restrict soldiers' freedom of movement if necessary (Article 18 RDGA). He may also oblige the service member to reside within certain geographical limits or inside of the military domain (Article 20 RDGA).

Marriage (Article 14 SGM):

Before 1972, French soldiers had to request an authorisation from the Minister in order to get married. This obligation has been removed by the General Statute from 1972. An authorisation is, however, still necessary in two cases: when the future spouse does not have French nationality, or when the soldier who wishes to marry is a Foreigner serving in the French armed forces. The *Conseil d'État* has recently indicated that only interests of national defence could be invoked by the minister as motivation to refuse the authorisation to get married.[68]

Education (Article 30 (1) and 30 (2) SGM):

Career soldiers may benefit from measures of professional orientation (Article 30 (1)) or from special leave for instruction in order to prepare for re entry into civilian life (Article 30 (2), "*congés de reconversion*").

2. Legal Obligations of Soldiers

Soldier's duties and obligations are determined on the one hand by the General Statute of the Military of 1972, and on the other hand by the General Regulation on Discipline in the Armed Forces of 1975.

According to Article 1 SGM, "military status requires in all circumstances discipline, loyalty, and a spirit of sacrifice. The duties which it involves and the submissions which it implies deserve the respect of the citizens and the consideration of the nation".[69] The following specific duties are defined by the General Statute of 13 July 1972: obligation of loyalty and self-restraint (Articles 7 and 8 SGM), and a duty to serve at all times and in all places (Article 12 SGM). Furthermore, soldiers must obey the orders of their superiors, and are responsible for the execution of missions assigned to them (Article 15 SGM). They must not be ordered to do and they must not carry out acts which are contrary to the

[68] CE, 15 December 2000, Nerzig.

[69] "L'état militaire exige en toute circonstance discipline, loyalisme et esprit de sacrifice. Les devoirs qu'il comporte et les sujétions qu'il implique méritent le respect des citoyens et la considération de la nation."

law and customs of war or international agreements, or which constitute crimes or infractions ("*délits*"), especially against the safety and the integrity of the state.

They also have to respect secrecy and the duty of discretion (Article 18 SGM), and must observe a prohibition on the exercise of any profitable private activity or the holding of any interest in companies which are under their control or surveillance, or with which they negotiate contracts. There is also a duty to declare any professional activity exercised by their spouses (Article 35 SGM).

The dispositions of the General Regulation on Discipline in the Armed Forces (RDGA) define the special duties and responsibilities of soldiers in a more detailed manner. The RDGA distinguishes principles (Article 1), duties and responsibilities (Articles 6–10) and service rules (Articles 21–25). Article 1 defines the principles of military discipline. Discipline is founded on the principle of obedience to orders (Article 1 (2)) and is exercised in the framework of strict neutrality (Article 1 (4)). Chapter II of the RDGA ("*Devoirs et responsabilités du militaire*") specifies four categories of duties and responsibilities: general duties, duties of the superior, duties of the subordinate, and duties in combat.

The general duties are enumerated by Article 6 RDGA. They comprise the duties of the soldier to obey legal orders, to behave uprightly and with dignity, to observe military regulations and accept the restraints issuing from them, to respect the rules on secrecy and express himself with due reserve, especially when concerning military subjects, to take care of materials and installations belonging to the armed forces, to provide assistance to the public forces if they legally request aid, to instruct himself in order to hold his post with competence, to train himself in order to be efficient in action, and to prepare himself physically and morally for combat.

Further special duties are described in detail by Articles 7–10 RDGA, such as the duties of the superior, duties of the subordinate, and duties in combat. Duties of the superior and duties of the subordinate will be described below. Duties in combat result mainly from Article 9, which concerns the duty to participate in action, even at the risk of life, until the mission has been accomplished, and the duty to respect the rules of international law which apply during armed conflicts (Article 9 (1), introduced by Decree No. 82-598, from 12 July 1982).

The General Regulation on Discipline in the Armed Forces also outlines a number of special duties which fall under the heading of "Service Regulations" (Chapter IV, "*Règles de service*"). These service regulations may be further detailed according to the special needs of the unit or the corps. Article 21 concerns the wearing of the uniform (duty of strict correctness) and hair or beard cut (duty to respect the requirements of hygiene and security). Article 22 concerns the military salutation which is owed to superiors. Article 23 relates to the

protection of morality and discipline. It prohibits the introduction into military establishments of publications which damage the morality and/or discipline of the troops, the organisation of games or lotteries, and the introduction of alcohol, drugs, or explosives without authorisation. Article 24 governs the duty of discretion. Article 25 concerns detention and the carrying of weapons. Finally, Article 34 establishes the right and the duty to report faults committed by direct subordinates or personnel of a lower rank, and to request their punishment.

There are no special duties concerning the behaviour of soldiers abroad. There is also no duty of comradeship comparable to that which exists in Germany. Such a duty could be included, however, under the general duty of discipline. The same is true concerning the issue of becoming intoxicated during service and for absence without leave.

3. The Power of Command and the Duty to Obey

The obligation to obey is understood very strictly in French military law. The authority of the superior and his power to command depend purely on hierarchical position and come with it automatically. The duality of order-obeisance cannot be easily disrupted.

The General Statute from 1972 states in Article 15 (2) that soldiers must obey orders given by their superiors and are responsible for the execution of missions entrusted to them. Nevertheless, acts which are contrary to the law (*lois*), customary law of war, or international treaties, or which constitute crimes or infringements, especially against the security and the integrity of the state, must not be commanded and must be disobeyed.

Article 8 (3) RDGA adds that the subordinate shall not execute any order which is manifestly illegal or contrary to the rules of international law which apply during armed conflicts, or to international treaties which have been properly ratified or approved. If the plea of illegality is, however, presented merely to avoid the execution of the order, the subordinate exposes himself to disciplinary and penal sanctions for refusal to obey a lawful order. French penal law distinguishes three types of unlawful behaviour: crimes, infractions ("*délits*"), and contraventions. According to Article 15 SGM and 8 (3) RDGA, any illegal order must therefore be considered as forbidden and the subordinate must not obey in that case. In any case, the subordinate is required to provide proof of reflected initiative ("*il cherche à faire preuve d'initiative réfléchie*", Article 8 (1) RDGA).

According to the General Criminal Law (*code pénal*, Article 122 (4)) the person accomplishing an act under the command of the legitimate authority is

not responsible (in the penal sense) for that act unless the act is manifestly illegal.[70]

4. Social Rights of Soldiers and their Families

Articles 20 to 24 of the General Statute from 1972 describe the social rights of soldiers. Besides the coverage of certain types of insurance for special risks encountered by soldiers (Article 21 SGM), the main social advantage is the right to receive treatment by the health services of the armed forces (*service de santé des armées*),[71] and to receive assistance from the Social Action Service of the Armed Forces (Article 22 SGM).

Soldiers fall under the general social security plan for French civil servants and benefit from special pension regulations (Article 20 SGM).

Soldiers also receive special protection by the state with regard to any kind of danger or attacks in the exercise of their functions (Article 24 SGM). The state is obliged to repair any damage caused by such dangers or attacks. The state is furthermore obliged to grant support in legal proceedings if a service member is the subject of penal proceedings because of facts which do not have the character of a personal fault (Article 24 *in fine* SGM).

There is no regulation which establishes a general right to education for soldiers, but a right to education prior re-entering civil life does exist.

Pastoral care is organised within the armed forces on the basis of a statute dating from 8 July 1880, in spite of the dispositions of the Statute of 9 December 1905, which recognises the separation of Church and State, and which indicates that the State neither recognises nor finances any religious service. The General Statute of 1972 only declares in Article 7 that the freedom of thought and belief does not hinder the free exercise of religion within military enclosures or on ships of the navy. A decree of 1 June 1964, determines the statutory situation of the military ministers ("*aumôniers militaires*"). Three religions – Catholic Christianity, Protestant Christianity, and Judaism – are represented by ministers who can have either military or civilian status. In the three departments where the Concordat of 1801 still applies, the ministers have a special status determined by the Concordat.[72]

[70] "N'est pas pénalement responsable la personne qui accomplit un acte commandé par l'autorité légitime, sauf si cet acte est manifestement illégal".

[71] See Decree No. 78-194 of 24 February 1978.

[72] See B. Cruzet, L'exercice des cultes dans les armées, (1995) 4 *Droit et Défense*, pp. 28 *et seq.*

Leisure activities fall under service regulations which are proper for each army and each establishment (*règlement intérieur*). There is only a general regulation on service from 1967 (*Decree No. 67-1268 du 26 décembre 1967 "portant règlement du service de garnison"*) which mentions in Article 12 the use of common installations like the mess, library, hotels, club, lobby, and gym.

With regard to soldiers on missions abroad, there seems to be a lacuna. Soldiers sent abroad on OPEX are indeed covered by the protection granted by the social security scheme of the armed forces, but only "during service". In order to avoid problems occurring from the exact delimitation of what is to be understood by the terms "in service" during a mission abroad, the administration encourages soldiers to contract personal insurance, like any ordinary tourist.[73] The CSFM has recently deliberated on this question, and the Minister of Defence has agreed to create a working group which will make suggestions. He has also ensured that these kinds of situations will be examined with the closest attention.[74]

With respect to the soldiers' families, Article 23 of the General Statute simply mentions that this question is regulated by decree. This has been done as far as the health service is concerned (Decree No. 78-194 from 24 February 1978). In fact, this decree distinguishes two kinds of beneficiaries: those who have priority – like the soldiers themselves – and those who will be treated without priority – like family members of soldiers (but also civilians working for the Ministry of Defence). In practice, all civilians asking for medical attention are treated by the SSA.

According to Article 22 of the General Statute from 1972, "the military are entitled to receive treatment by the army's health service".[75] A decree of 24 February 1978 determines the conditions and the beneficiaries of treatment by the "*service de santé des armées*" (SSA). Details are ruled by instructions given by the Minister of Defence.[76] The decree from 1978 distinguishes between beneficiaries who must be treated with priority (Article 3), and other beneficiaries (Article 5). Soldiers not only have the right to be treated by the SSA, they are actually required to approach the SSA for all medical treatment. Only in case of absolute necessity ("*force majeur*"), and if their condition so requires may they be treated by civilian medical services (Article 4).

[73] On this point refer to E.-J. Duval, Protection sociale des militaires et banalisation des risques, (1999) 2 *Droit et Défense*, p. 56.

[74] Compte rendu synthétique de la 62ème session du CSFM du 27 novembre au 1er décembre 2000.

[75] "Les militaires ont droit aux soins du service de santé des armées."

[76] Le décret 78-194 du 24 février 1978 relatif aux soins assurés par le service de santé des armées.

According to the Decree from 1978, soldiers' families (spouses and children which are supported by the household) may benefit from the "SSA" subject to the prior satisfaction of the needs of the persons falling within the category of Article 3. In practice, the treatment of family members is always ensured.

The military medical system (SSA) is permitted to treat civilians. In fact, the military hospitals receive more civilians then military personnel. Collaboration between the military hospitals, which belong to the SSA and the civilian medical system is organised by the Decree No. 74-431 of 14 May 1974. Military personnel must use the facilities of the SSA (Article 4, *Décret 78-194 du 24 Février 1978 relatif aux soins assurés par le service de santé des armées*). An instruction of the Minister of Defence determines the conditions of collaboration if a service member has to receive treatment from a civilian establishment.[77]

Military doctors are subordinate to the general rules governing the exercise of the medical professions (*Code de la santé publique*). Some differences exist however. According to the *décret 81-60 du 16 janvier 1981 "fixant les règles de déontologie applicables aux médecins et aux pharmaciens chimistes des armées"*, for example, they do not need to register as civilian doctors in order to exercise their profession.

5. Rules Governing Working Time

a. Working Time and Compensation for Overtime

The general texts (SGM and RDGA) do not contain any regulation concerning working hours or overtime. As the service member may be asked to serve at any time (Article 12 SGM), the idea of overtime does not make any sense. They may benefit from special leave if this is compatible with the needs of the service (Article 19 RDGA).

During OPEX, the French military receive higher wages (*indemnité de service en campagne, ISC* or *indemnité de sujétions de service à l'étranger, ISSE*), consisting of 150% of their normal pay. They also acquire the right to special rest at the end of campaign.

Confronted with a crisis among the personnel of the *Gendarmerie* which led several hundreds of *gendarmes* to manifest their dissatisfaction by parading in public and in uniform, the government adopted special measures in December

[77] Les conditions dans lesquelles le service de santé des armées prend en charge les militaires et personnes indiqués ci-dessus, qui, pour des raisons de force majeure, ont dû recevoir les soins que nécessitait leur état en dehors de toute intervention de ce service, sont fixées par une instruction du ministre chargé des armées.

2001 in order to satisfy their requests for equity with the situation of the national police forces. Following this, the Minister of Defence entered into a wider discussion with all the armed forces and adopted, in February 2002, a "*plan de développement de la condition militaire*".[78] A series of the measures laid out in this plan have been adopted since April 2002, in order to improve the "military condition".[79] These texts aim to compensate some of the special constraints on military personnel by granting higher supplements to the basic salaries.

b. Holidays and Special Leave

Holidays (official leave or permitted leave) are regulated by Articles 53 SGM and 14 *et seqq.* RDGA. Article 53 SGM distinguishes 5 types of official leave ("*congés*"): sickness rest (up to 6 months in a year with pay), maternity leave or adoption leave (under the same conditions as for any other employee), leave in the interest of service (*e.g.* for education or for personal convenience, with pay in the first case, without pay in the second case), and leave at the end of service or at the end of a campaign (maximum 6 months).

The RDGA provides for long term specially permitted leave and for specially permitted leave for family events. In any case, these permissions must take into account the needs of the service. If the circumstances so require, the military authority may recall soldiers on leave (Article 14 RDGA). During campaigns or OPEX, the regulation of permitted leave is determined by the Minister of Defence.

Permission of long duration can be taken for 45 days per annum. The right to leave a military installation on permission is acquired in slices of 4 days per month of service, which means that after 1 month of service in the military the soldier may take 4 days off. Short-term permissions for family events are governed by special instructions (Article 16 RDGA).

6. Legal Remedies, in Particular Rights to File a Complaint

According to Article 13 of the Decree No. 75-675 of 28 July 1975 (General Regulation on Discipline in the Armed Forces, modified by Decree No. 85-914 of 21 August 1985, and Decree No. 2001-537 of 28 July 2001), soldiers have a

[78] See J. Isnard, Pour la première fois, les gendarmes en colère manifestent en tenue, *Le Monde*, 6 December 2001, p. 11; J. Isnard, La fronde des gendarmes oblige le gouvernement à rouvrir le dialogue, *Le Monde* 8 December 2001, p. 11.

[79] Four decrees and thirteen arrêtés were adopted on 24 April 2002 and published in the JORF of 2 May 2002.

general right to file a complaint against disciplinary measures which affect them.

Furthermore, according to Article 13 (1) RDGA (introduced by Decree No. 85-914 of 21 August 1985), soldiers may apply to the general inspectors with any question concerning their personal situation, the conditions of the exercise of service, or the life within the military community.

Besides these internal rights of complaint, soldiers can use the general legal remedies in order to contest administrative measures which affect them. The *Conseil d'État* has indeed progressively accepted its competence to decide on measures which, until several judgements in 1995, it used to consider internal measures.[80]

Since 1 September 2001, a new procedure applies in the field of military litigation.[81] This procedure is governed by a decree of 7 May 2001,[82] which implements Article 23 of a statute of 30 June 2001.[83] According to this decree the new procedure requires the exercise of a preliminary administrative complaint ("*recours administratif préalable*") against all acts which affect the personal situation of the service member, except those matters concerning their recruitment, the exercise of disciplinary power, or measures taken on the basis of the "*code relatif aux pensions militaires d'invalidité*". The new rules thus apply to litigation in the fields of promotion, grading, transferral, etc.

Before bringing a claim into court, the service member must go to a commission which will examine the complaint. The commission is constituted of officers, and will issue a simple recommendation to the Minister of Defence, who has the competence to reject or to admit the complaint. Any action brought directly to the administrative courts would have to be declared inadmissible.

Finally, Article 13 (8) RDGA prohibits any kind of collective petition or complaint. This disposition is part of the rules concerning complaint against disciplinary measures. Its formulation, however, seems to indicate that it applies generally.

[80] See X. Latour, L'évolution de la jurisprudence du *Conseil d'État* sur les mesures d'ordre intérieur en matière de défense: les arrêts Marie et Hardouin, (1995) 2 *Droit et Défense*, p. 31.

[81] See R. Rialland, Réforme de la procédure des recours contentieux militaires et création de la commission d'examen préalable des recours, *Gazette du Palais*, 18 August 2001, p. 28.

[82] Décret No. 2001-407 du 7 mai 2001 "organisant la procédure de recours administratif préalable aux recours contentieux formés à l'encontre d'actes relatifs à la situation personnelle des militaires".

[83] Loi No. 2000-597 du 30 juin 2000 relative au référé devant les juridictions administratives.

7. Rights of Institutional Representation

In France, there is nothing similar to the "*Deutscher Bundeswehrverband*," but members of the French National Assembly seem to be interested in the right of association as it is practised in Germany. During a EUROMIL meeting, they were particularly interested in the relationship of the "*Deutscher Bundeswehrverband*" with the German Government and the Ministry of Defence.

The right of association is not granted to active servicemen in France. However, the armed forces were restructed into a professional army in 2001–2002 and due to this development the right of asscoiation is now being discussed by French politicians. As it has been stated, "The way is probably still a long one before the French public will get used to the idea of the right of association for military personnel".[84]

There is nothing similar to the German spokesman in the French armed forces either. The only institutional representation is realised through category presidents ("*présidents de catégories*"), participating commissions ("*commissions participatives*"), and the councils of the military function ("*conseils de la fonction militaire*", CFM) proper to each corps of the armed forces (army, navy, air force and *gendarmerie*), and, at the top, the "*Conseil Supérieur de la Fonction Militaire*", (CSFM) which has been in existence since 1969.[85]

Since October 2001, Category President – those inside each unit who represent the three categories of soldiers (officers, sub-officers, and private soldiers) has been an elected office.[86] The conditions of the election of these Category Presidents and participating commissions result from an "*arrêté*" and an instruction adopted in April 2001.[87] This "*aggiornamento*" within the French armed forces had been strongly desired by the members of an army "whose morale had been affected" according to President Chirac himself.[88] This reform remains however quite modest, as the lists of candidates are subject to approval

[84] See EUROMIL meeting in April 2000, http://www.hod.dk/Euromil/Today/APR2000.htm.

[85] See Loi No. 69-1044, du 21 Novembre 1969.

[86] See J. Isnard, Les armées seront appelées à élire des représentants dans chaque formation locale, *Le Monde*, 7 May 2001.

[87] Compare Arrêté du 12 avril 2001, relatif à la désignation des présidents de catégorie et des membres des commissions participatives; Instruction No. 201400/DEF/SGA/DFP/LM1 du 6 septembre 2001, relative à l'élection des présidents de catégories et des membres des commissions participatives.

[88] See J. Isnard, Des "soviets" dans l'armée de terre française, *Le Monde*, 16 October 2001.

by the colonel at the head of each regiment. The members of the seven CFM and the CSFM continue to be selected by drawing lots.[89]

The CSFM is to be consulted in order to give advice on questions concerning the military function.[90] According to a judgement of the *Conseil d'État*, it must be consulted on any question of general nature concerning either the military function or the condition and the status of the military.[91]

The 74 members of the CSFM represent the different military ranks and the different components of the armed forces. The CSFM has a purely consultative function; its function is determined by an "*arrêté*" of 20 January 2000, "*portant règlement intérieur du CSFM et des CFM*".

V. The Relationship of the Superior to Subordinate Personnel

1. Legal Rules Concerning the Relationship between Superior and Subordinate

The relationship between superior and subordinate is very strictly defined by the relevant text: the Decree No. 75-675 – General Regulation on Discipline in the Armed Forces. The organisation of the armed forces is based on hierarchy and authority, which are functional imperatives (Articles 3 and 4 RDGA). Article 3 defines the military hierarchy and Article 4 determines the conditions for the exercise of authority. Hierarchy of grades is determined by the General Statute of the Military of 1972. The particular hierarchies which may exist in each corps and its correspondence with general hierarchy is determined by the particular status of the corps (e.g. for officers of the army Decree No. 75-1206 of 22 December 1975).[92] The exercise of authority normally comes with rank, and respects the hierarchical order unless it is exercised by the holder of a "service letter" or a "command letter", or if special instructions have been issued (Article 4 RDGA).

The duties of the chief and the subordinates are determined by Articles 7 and 8 RDGA. Article 7 indicates that the superior makes decisions and expresses them by orders. He assumes the entire responsibility for the orders and

[89] See B. Cruzet, Le Conseil supérieur de la fonction militaire, (1995) 2 *Droit et Défense*, p. 23; M. Jacob, Le besoin d'expression collective des militaires est-il satisfait par les institutions actuelles ?, (1998) 302 *Revue administrative*, p. 285.

[90] See General Statute of the Military, Article 3 and Decree No. 99-1228, 30 December 1999.

[91] CE 27 October 1978, Lamende, Rec. CE, p. 394.

[92] Compare Code pratique de la fonction publique, Tome VIII, Fonction militaire, Statuts particuliers des corps militaires, (Paris, 1990).

their execution. He must not deliver orders contrary to the law. He must respect the rights of the subordinates.

Article 8 RDGA affects the duties of the subordinates. Subordinates must loyally execute the orders received and are responsible for their execution. If it turns out to be impossible to execute a given order, the subordinate will report as soon as possible to the superior.

2. Subordination of Soldiers to the Command of a Superior of Foreign Armed Forces

The question whether soldiers may be placed under the command of a foreign superior does not seem to create serious legal problems under French military law. Any command power derives finally from the powers of the President of the Republic – who is Chief of the Armed Forces – and is exercised in his name by the entitled commander. Thus, a simple decision of the President may accomplish this objective.

In practice, however, and up to now, French soldiers have not been placed directly under the command of a foreign officer. There is always an intermediate French command in the operations theatre (*Commandement des éléments francais*, COMELEF). Only the French (commanding) officer will thus be placed directly under foreign command. He will receive an instruction to co-operate from the French CEMA. Only operational command will be transferred.

Article 5 of the RDGA, as modified by Decree No. 2001-537, now explicitly indicates that for each OPEX, three levels of command authorities must be determined.[93] As far as simple measures of administrative and technical surveillance are concerned, an "*arrêté*" of the Minister of Defence of 11 May 2000, indicates "*Les commandants organiques des éléments francais de force multinationale*" as the only competent authorities.

Disciplinary power, as well as the power to give grades ("*pouvoir de notation*") will in any case remain with national authorities. The *Conseil d'État* has indeed decided, that "the state can not cede the power to accord a rank to one of its agents to a third country or to a foreign organisation".[94] There can be no doubt that the position of the *Conseil d'État* would be very similar with regard to the power to take disciplinary measures.

[93] "Au sein de chaque armée, formation rattachée et organisme interarmées, y compris en opérations extérieures, sont en outre déterminées les fonctions comportant pour leur titulaire les prérogatives d'autorité militaire de premier, de deuxième et, éventuellement, de troisième niveau définies par le présent règlement."

[94] Compare CE 11 October 1999, M. Calleja.

For each multinational operation, the rules of engagement and the SOFA or a special executive agreement will determine the details. There are no other special rules (constitutional or simple statutory rules) for the relationship of superior to subordinate, or for the right to command soldiers of other forces in one's own country.

3. Service Regulations and their Legal Nature

There is a general regulation on service from 1967 (*Decree No. 67-1268 du 26 décembre 1967 "portant règlement du service de garnison"*, RSG). Further service regulations are specific to each army and each establishment (*règlement intérieur*). The general regulation from 1967 determines, for example, the organisation of service within a garnison, security measures, control measures, military ceremonials and military honours, etc.

Interministerial instructions (prepared by the SGDN), instructions of the Minister of Defence or the EMA determine the details and "*circulaires*" indicate how to apply these rules. With respect to the legal nature of these regulations one should bear in mind that decrees and instructions are binding, while "*circulaires*" are not.

VI. Sanctions

1. Disciplinary Law

a. Disciplinary Power

Disciplinary power and measures are regulated by three main texts: the General Statute of the Military from 1972, the Decree No. 75-675 of 28 July 1975 – Regulation of General Discipline in the Armed Forces (RDGA),[95] and the Code of Military Justice (details are regulated by a long list of secondary decrees applying in the different corps of the armed forces).

Article 27 SGM indicates that "without prejudice of penal sanctions which they can engender, faults committed by soldiers expose them to: 1. disciplinary punishments, 2. professional sanctions, and 3. statutory sanctions.

Disciplinary punishments can be taken only by the Minister of Defence or the military authorities specially nominated in every unit for that purpose.[96]

[95] Which has recently been modified by Decree No. 2001-537 of 20 June 2001.

[96] Compare C. Ben Amor, L'exercice du pouvoir disciplinaire au sein des armées, (1999) 2 *Droit et Défense*, p. 43.

According to Article 34 RDGA, there are three levels of command which are invested with disciplinary powers: the military authority of the first level (formerly the chief of corps), the military authority of the second level, and the Minister "in charge of the armies" or the military authority of the third level. The disciplinary powers of the Minister of Defence are in practice operated by eight authorities of the central administration: the three Chiefs of Staff of the Armed Forces, the Director General of the National Gendarmerie, the Delegate General of Armament, the Director of Legal Affairs, and the Central Directors of the Health and Petrol Services. Each of them exercises the power of the Minister within his own field of competency.

Professional sanctions (Article 27 (2) SGM) and the conditions under which they can be pronounced are determined by decree. They can consist in a partial or total, temporary or permanent withdrawal of a professional qualification. Only personnel having such qualifications and exercising specific activities *e.g.* on board of submarines, linked to the moving of aeroplanes, or in the medical field can be subject to these professional sanctions.[97]

Statutory sanctions are enumerated by Articles 48 SGM (for career soldiers) and 91 SGM (for non-career soldiers). According to Article 48 SGM, they can be pronounced for professional insufficiency, habitual misbehaviour, serious fault in service or against discipline, fault against honour or condemnation to imprisonment. The *Conseil d'État* has recently decided that a soldier who by negligence exposes the men placed under his authority to danger commits a serious fault which justifies a statutory sanction.[98]

b. Criminal Law and Disciplinary Law

According to Article 27 SGM, military personnel fall under the common penal law as well as under the dispositions of the "*Code de justice militaire*". Without prejudice to penal sanctions, faults committed by soldiers expose them to disciplinary punishments, professional sanctions and statutory sanctions.

Article 30 RDGA establishes the same principle: the same fault may engender cumulatively a disciplinary punishment, a professional sanction, a statutory sanction, and/or a penal sanction.

Disciplinary action is independent from penal action, which means that a penal sanction does not necessarily provoke a disciplinary sanction, but the absence of penal proceedings does not prevent a disciplinary punishment. Disciplinary arrest is not subtracted from imprisonment under penal law.

[97] See B. Thomas-Tual, Statut des militaires, (1996) 195 *Juris-Classeur administratif*, p. 15.

[98] Compare CE, 7 February 2001, Thomas.

c. The Purpose of Disciplinary Law

The declared purpose of French military disciplinary law is to punish negligence or failures in duties (Article 30 (1) RDGA).[99] The *Conseil d'Etat* decided that in order to come under disciplinary law, a fault must have been committed in service or must be likely to have an influence on the service.[100]

d. Disciplinary Measures

According to Article 31 RDGA, there are two lists of disciplinary punishments, according to military rank. For officers, four different measures are available: warning, reprimand, arrest, and blame. For ordinary soldiers ("*militaires du rang*"), the available measures are: warning, confinement, and arrest. Article 32 RDGA adds furthermore the withdrawal of "first class" distinction and reduction of rank, which can be pronounced in addition to the disciplinary punishments in the case of very serious faults committed by ordinary soldiers.

The duration of the arrest which may be applied depends on the level of authority taking the decision (see Article 34 RDGA). Arrest may last up to 40 days (if decided by the Minister of Defence himself), and can be doubled by isolation for half of the arrest time if the fault was very serious and falls under penal law, or if the service member constitutes a danger to his comrades (Decree No. 85-914 of 21 August 1985).

Besides these disciplinary punishments, there are also statutory sanctions which may be pronounced, according to Article 48 SGM, for professional insufficiency, recurrent misbehaviour, serious fault in service or against discipline, fault against honour or in case of a sentence of imprisonment not implying the loss of grade. Three types of such statutory sanctions are defined by Article 48 SGM for career soldiers: removal from the promotion scheme, withdrawal of occupation by placing in the situation of forced leave (for a maximum of three years, see Article 49 SGM), and removal from the cadres by disciplinary measure (Article 50 SGM). In case of serious fault by a career soldier, he can be immediately suspended (Article 51 SGM).

Slightly different sanctions apply to volunteers (Article 91 SGM). They can de degraded or even dismissed. A career soldier sentenced for a crime will automatically lose his rank (Article 79 SGM and Article 384 *Code de justice militaire*).

[99] "Le manquement au devoir ou la négligence entraînent des punitions disciplinaires".

[100] CE, 21 January 1994, M. Hotte.

e. Disciplinary Law and the European Convention on Human Rights

France has issued a reservation to Articles 5 and 6 ECHR concerning the disciplinary regime within the armed forces. This reservation indicates that Articles 5 and 6 shall not be understood as preventing France from applying Article 27 SGM and Article 375 *Code de justice militaire*.

f. The Disciplinary Procedure and Legal Remedies

The main elements of the disciplinary procedure are fixed by Articles 33 to 39 of Decree No. 75-675 of 28 July 1975 – General Regulation on Discipline in the Armed Forces, which has recently been modified.[101] Several guarantees are given to soldiers by Article 33 RDGA.[102]

The disciplinary procedure starts with the discovery of a fault. Every soldier has the right and even the duty to point out faults committed by his subordinates or by soldiers placed below him in the ranking and to request their punishment. There is no right to point out wrongdoings of peers in rank or superiors. The demand of punishment is sent to the Chief of Corps of the person who committed the fault. After hearing the soldier, the Chief of Corps will verify the accuracy of the facts and determine the ground for the accusation. He can decide for himself on the punishment, within the limits of his disciplinary powers, or submit a demand of punishment to a superior military authority.

The soldier has the right to defend himself before any punishment is applied. This right to defence may be exercised orally, or in written form if the disciplinary measure is taken by an authority placed above the Chief of Corps. Punishments may be applied only according to a chart fixed by edict. The soldier has a right to complain (*droit de recours*), which is established by Article 13 RDGA and constitutes the procedure of appeal in the field of disciplinary measures. There is also the possibility of hierarchical control of the disciplinary measure.

According to the case law of the administrative courts, soldiers also have a right to bring an action against disciplinary measures which are registered in their individual file.[103] Measures which are not registered, however, like a simple warning, cannot be challenged by such a claim.[104]

[101] Compare Decree No. 2001-537 of 20 June 2001, JORF 23 June 2001, p. 9999.

[102] Cp. S. Salon, Militaires: nouvelles garanties, (2001) 205 *Cahiers de la Fonction publique*, pp. 24–25.

[103] See CE Ass. 17 February 1995, Hardouin, CE 12 July 1995, Mauffroy.

[104] CE 8 February 1999, M. Etienne.

This is due to an important change in the case law of the *Conseil d'État*. Until 1994, the CE considered disciplinary punishment as "internal measures" ("*mesures d'ordre intérieur*"). It recently abandoned this position, however, taking into account the fact that disciplinary punishments may affect a soldier's rights to a significant extent. Article 13 of the ECHR also played an important role in the argumentation developed by the *Commissaire de gouvernement* Patrick Frydman in order to convince the *Conseil d'État* to change its jurisprudence. The change introduced by a judgement in the Hardouin case of 17 January 1995, concerned a soldier in the navy who had been submitted to 10 days of arrest for having been drunk.

The complaint must be lodged with the administrative courts (*Tribunal administratif*) and directed against the decision of punishment. The administrative courts will then apply their usual criteria of legality of administrative acts ("*recours pour excès de pouvoir*"). The judge may annul the act for being illegal (lack of competence, violation of procedure, etc.) or for manifest error of appreciation ("*erreur manifeste d'appréciation*").[105]

Since 1 September 2001, the situation has however been modified. Now, the service member must address his complaint first to a "*commission préalable des recours*" before he can bring a complaint to the administrative court. The commission has no power to decide, but will give a recommendation to the Minister of Defence, who may either reject the complaint or agree to it completely or partially.[106]

g. Representation of the Armed Forces during Disciplinary Proceedings

Disciplinary punishments are normally taken directly by the military authorities without the intervention of any council or commission. The General Regulation on Discipline in the Armed Forces, however, imposes the obligation to consult a disciplinary council ("*conseil de discipline*") if the military authority invested with the disciplinary power wants to apply a reduction in rank or the withdrawal of first class distinction (Article 32 RDGA). The consultation of a disciplinary council is also necessary if a non-career soldier desires to be released from service before the end of the contractual period due to disciplinary punishment *e.g.* in the case of one or several periods of arrest (Article 38 RDGA). The composition of the disciplinary council depends on the rank of the soldier (Article 39 RDGA). It always comprises five members and is chaired by an officer.

[105] Compare N. Belloubet-Frier, Contrôle par le *Conseil d'État* de la légalité des sanctions disciplinaires dans les armées, (1995) *Recueil Dalloz*, Jurisprudence, p. 381.

[106] See Decree No. 2001-407 of 7 May 2001, JORF 11 May 2001, p. 7486.

According to Article 28 RDGA, statutory sanctions always require the intervention of a council of enquiry ("*conseil d'enquête*") and professional sanctions must be preceded by the consultation of a particular commission ("*commission particulière*"). The organisation and the functioning of these councils and commissions are governed by special decrees.[107]

h. Measures of Commendation

There is a long list of measures of commendation which may be awarded according to Articles 26 to 29 RDGA: decoration, citation, congratulation, diverse diplomas or insignia, nomination to the first class of the soldier's corps, certificates etc.

2. Military Criminal Law

a. General Issues

French military criminal law traditionally oscillated between two inclinations: to ensure that the law is the same for everybody, and to take into account the distinctiveness of the military function with its particular constraints and risks. Napoleon Bonaparte referred to the first tendency, saying: "There is only one justice in France; you are a French citizen first, and then a soldier".[108] Nevertheless, military distinctiveness served for a long time as the basis for a particular regime of military justice which inspired Georges Clémenceau (1841–1929) to make the famous remark "Military justice is to justice what military music is to music".

There still is a special "*Code de la justice militaire*" (Code of Military Justice) which is appended to the "*Code de procédure pénale*". This Code has, however, undergone several important reforms since 1965 in order to assimilate the soldier to the citizen (at least in peace-time) without harming the interests of the armed forces. The latest reform was realised by a statute on 10 November 1999.[109] This statute has a triple objective: to align the procedure which applies in the military jurisdictions to the one which applies in ordinary courts, to group at one single court the different procedures related to infractions committed by members of the armed forces abroad, and to respect the

[107] See Decree No. 74-385 of 22 April 1974 (modified by Decree No. 78-716 of 28 June 1978) and Decree No. 79-1088 of 7 December 1979.

[108] "La justice est une en France; on est citoyen français avant d'être soldat".

[109] Loi No. 99-969, 10 November 1999, JORF 11 November 1999.

minimal dispositions destined to guarantee the distinctiveness of the armed forces.

There is now one single court ("*le Tribunal aux armées de Paris*") competent for all infractions committed by a member of the armed forces abroad. The rights of defence in the military have been strengthened. The right to appeal is exercised before the "*cour d'appel de Paris*" which is a civilian court.

b. Relation to General Criminal Law

Soldiers must comply with the ordinary penal law and the Code of Military Justice, which contains a number of special crimes and infractions of military nature, e.g. desertion, insubordination, treason, etc. (Articles 397–476). Soldiers must comply with both, but the dispositions of the Code of Military Justice apply only to military personnel and to those persons mentioned by Articles 59 to 66 of the Code. These are in particular civilian members of the staff of the armed forces (Article 60), or those who are enlisted on the roll of a ship or aircraft of the armed forces (Article 63), and prisoners of war (Article 63). Furthermore, Article 65 enlarges the competence of the military court to culprits or accomplices of infractions directed against the armed forces (Article 65).

c. Military Criminal Courts

Since November 1999, there is only one special military court in Paris (*Tribunal aux armées de Paris*) which is competent only to try transgressions committed abroad by members of the armed forces.

For the rest, 37 specialised chambers have been created within the ordinary courts in order to judge soldiers in peace-time for infractions committed in the execution of their duties and for military infractions as defined by the Code of Military Justice.

In time of war, special courts may be created (Article 1 Code of Military Justice). There have been two special military courts created in the past, both linked to the Algerian Crisis in 1961–1962. The first military court was created by a decision of General de Gaulle on the basis of Article 16 of the Constitution in order to judge the culprits and accomplices of crimes and infractions against the safety of the state and the military discipline. The second one was instituted by an ordinance of 1 June 1962, in order to judge "certain infractions committed in relation with the events in Algeria".[110]

[110] See CE, 2 mars 1962; Rubin de Servens, and CE, 19 October 1962; Canal, Robin et Godot, *Grands arrêts de la jurisprudence administrative*, (Paris, 1999), pp. 586 *et seq.*

d. Relationship between Civilian and Military Courts

In peace-time, the military court in Paris is only competent to try infractions committed abroad. Ordinary civilian courts judge all common infractions committed by soldiers on French territory. Military infractions or infractions committed in the execution of service fall under the competence of the specialised chambers which have been created (*Code de procédure pénale*, Articles 697 *et seqq.*).

e. Special Rules with respect to the Legal Procedure and the Sanctions System

Since the two main reforms of July 1982 and November 1999, most of the formerly existing special rules have been abolished. Three major differences persist: an active soldier cannot be put under judicial control (the military authority is considered to be able to exercise sufficient control over the soldiers in order to make sure they will appear in court on the day of trial), the public may be excluded from judicial debates, and the popular jury in the *Cour d'assises* may be put aside if there is a risk that a secret relevant to the national defence may be compromised.

Articles 383 to 396 Code of Military Justice determine the sanctions which can be applied by the military courts. There are only two types of special sanctions: discharge ("*destitution*") and loss of rank (Article 385).

f. The Military Prosecutor

The civilian prosecutors (*procureurs de la République*) can exercise their function with regard to both civilians and soldiers. There is no special category of military prosecutors. However, the prosecutor, his or her substitute, and the instructing judge at the "*Tribunal aux armées de Paris*" are detached from the judiciary in order to exercise their military judicial functions. Their attribution depends on the Minister of Defence alone. At the difference to the ordinary jurisdictions, the prosecutor in charge of the military prosecuting office does also exercise the attributions of the chief of the military tribunal.[111]

g. Justification by Superior Orders

This question is governed by Article 122-4 NCP (*Nouveau Code Pénal*).[112]

[111] See J. Stern, Le Tribunal aux armées de Paris, (2002) 202 *Revue de la Gendarmerie nationale*, p. 59.

[112] "N'est pas pénalement responsable la personne qui accomplit un acte prescrit ou autorisé par des dispositions législatives ou réglementaires. N'est pas pénalement res-

h. Sanctions for Non-Compliance with International Humanitarian Law

Non-compliance with international humanitarian law is sanctioned by ordinary penal law (*Nouveau Code Pénal*) and by the General Regulation of Discipline in the Armed Forces. The *Code Pénal* contains references to most of the crimes and infractions defined by the international conventions on international humanitarian law, but not always by using the same terms or definitions (cf. *e.g.* Articles 211 (1) on genocide, 212 (1) on deportation and slavery, 222 (1) on torture, 224 (1) on taking of hostages, etc.). An important lacunae still exists, however. The French criminal law does not recognise the notion of war crimes as defined by the statute of the ICC and up until now has sanctioned such crimes according to common criminal law.[113] Article 9 (1) RDGA refers to respect of the rules of public international law applying to armed conflicts, defining in detail the different prohibitions. Since January 2001, a "*Manuel de droit des conflits armés*" has been distributed to the military. This handbook is written like a dictionary, giving definitions of all the war crimes and infractions with direct references to the pertinent conventions (Geneva, The Hague, etc.).

i. Ratification of the Rome Statute of the International Criminal Court

In order to ratify the Rome Statute of the ICC, the French Constitution had to be amended according to a decision of the French *Conseil Constitutionnel* of 22 January 1999 (Decision No. 98-408 DC). The *Conseil* found Article 27 of the Statute contrary to the particular rules of responsibility laid down by Articles 26, 68, and 68 (1) of the French Constitution for the President, Members of the Government, and Members of Parliament.

The amendment was introduced in July 1999 in the form of a new Article 53 (2) of the Constitution, allowing the Republic to recognise the jurisdiction of the ICC under the conditions laid down by the Rome Statute. An act of Parliament, adopted on 30 March 2000, formally authorised the ratification of the Rome Statute, and this was effected on 9 June 2000.[114]

ponsable la personne qui accomplit un acte commandé par l'autorité légitime, sauf si cet acte est manifestement illégal."

[113] Senator Robert Badinter announced on 16 December 2002 his intention to give in a proposal for a statute in order to introduce the definition of war crimes into the French "Code Pénal". See *Le Monde*, 18 December 2002.

[114] France filed the following declarations:
I. Interpretive Declarations:
1. The provisions of the Statute of the International Criminal Court do not preclude France from exercising its inherent right of self-defence in conformity with Article 51 of the UN-Charter.

VII. Regulations Governing Guard Duties

The regulation of guard duties creates a number of legal problems in France. Some of the special military regulations appear to be (at least partly) contrary to the general penal law. At present, the rules are determined by the following sources: the "*Nouveau Code Pénal*" Articles 122 (4) to 122 (7), the General Regulation of Discipline in the Armed Forces Article 25, Decree No. 67-1268 (modified) "*portant règlement du service de garnison*" (*RSG*), *an instruction of the EMA No. 999/DEF/EMA/OL/2* of 14 May 1985 "*relative aux gardes et*

2. The provisions of Article 8 of the Statute, in particular paragraph 2 (b) thereof, relate solely to conventional weapons and can neither regulate nor prohibit the possible use of nuclear weapons nor impair the other rules of international law applicable to other weapons necessary to the exercise by France of its inherent right of self-defence, unless nuclear weapons or the other weapons referred to herein become subject in the future to a comprehensive ban and are specified in an annex to the Statute by means of an amendment adopted in accordance with the provisions of Articles 121 and 123.
3. The Government of the French Republic considers that the term 'armed conflict' in Article 8, paragraphs 2 (b) and (c), in and of itself and in its context, refers to a situation of a kind which does not include the commission of ordinary crimes, including acts of terrorism, whether collective or isolated.
4. The situation referred to in Article 8, paragraph 2 (b) (xxiii), of the Statute does not preclude France from directing attacks against objectives considered as military objectives under international humanitarian law.
5. The Government of the French Republic declares that the term "military advantage" in Article 8, paragraph 2 (b) (iv), refers to the advantage anticipated from the attack as a whole and not from isolated or specific elements thereof.
6. The Government of the French Republic declares that a specific area may be considered a "military objective" as referred to in Article 8, paragraph 2 (b) as a whole if, by reason of its situation, nature, use, location, total or partial destruction, capture, or neutralization, taking into account the circumstances of the moment, it offers a decisive military advantage. The Government of the French Republic considers that the provisions of Article 8, paragraph 2 (b) (ii) and (v), do not refer to possible collateral damage resulting from attacks directed against military objectives.
7. The Government of the French Republic declares that the risk of damage to the natural environment as a result of the use of methods and means of warfare, as envisaged in Article 8, paragraph 2 (b) (iv), must be weighed objectively on the basis of the information available at the time of its assessment."
II. Declaration Pursuant to Article 87, paragraph 2
"Pursuant to Article 87, paragraph 2, of the Statute, the French Republic declares that requests for cooperation, and any documents supporting the request, addressed to it by the Court must be in the French language."
III. Declaration under Article 124
"Pursuant to Article 124 of the Statute of the International Criminal Court, the French Republic declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory."

patrouilles dans les zones militaires en temps de paix", and finally in the field of upkeep of public order, an inter-ministerial instruction No. 500/SGDN/MTS/OTP of 09 May 1995 "*relative à la participation des forces armées au maintien de l'ordre*".

1. Powers of Guards towards Military Personnel as well as towards Civilians

Military guards exercise their competences according to the instruction of the EMA of 14 May 1985 "*relative aux gardes et patrouilles dans les zones militaires en temps de paix*". This instruction concerns especially conduct vis-à-vis intruders (Article 10 (4)), and the control at the entrances of military establishments (Article 14). The use of arms is allowed in the case of aggression which cannot be contained by other means. Within "sensitive military zones", the competences are different (Article 25). In this case, guards are entitled to deny access whether they are themselves inside or outside of the military zone. In any case, the rules of the *Code Pénal* concerning legitimate defence will apply.

The question whether foreign soldiers may exercise guard duties on French territory towards French civilians is not easy to answer. The situation under the Schengen Agreement might be considered as being comparable. Article 41 of the Implementation Convention of 19 June 1990, provides for policemen to continue "hot pursuit" into the territory of another member state as long as certain conditions are respected. However, this action is subject to modalities determined by declarations issued by the member states on the basis of Article 41 (9). The French declaration and the bilateral agreements concluded with neighbour states do not allow foreign police officers to arrest individuals on French territory in any case, nor to enter private residences or places which are not open to the public. Thus, the *Conseil constitutionnel* could, in its decision of 25 July 1991, consider the Schengen agreement not to have introduced any transfer of sovereignty.[115] To allow foreign police officers or foreign military to arrest individuals would require a constitutional amendment.

Service regulations of guard duties are determined by the internal regulations of each military site (*Règlement intérieur de garnison*) as well as the instruction of the EMA No. 999/DEF/EMA/OL/2 of 14 May 1985 "*relative aux gardes et patrouilles dans les zones militaires en temps de paix*".

[115] See Décision No. 91-294 DC du 25 juillet 1991.

2. Performance of Guard Duties by Soldiers of Foreign Armed Forces

Within the Eurocorps, guard duties are exercised by all participating armed forces. Their competences as well as the question of carrying and use of arms are governed by French law as far as their national law is not more restrictive (e.g. rules on legitimate defence).

3. The Rules Concerning the Carrying and Use of Arms and other Military Equipment

The carrying of arms (personal or official) is governed by Article 25 RDGA. Weapons are normally carried only when wearing uniform, unless there is a special instruction. The carrying of personal arms during service is forbidden, and subject to the general law out of service.

The question is whether the use of arms by soldiers carrying out guard duties in peace-time is governed by the general penal law (*Nouveau Code Pénal*), or by special rules like Decree No. 67-1268 (RSG) and the instruction of 14 May 1985. These special rules might have become simply illegal as far as they differ from the general penal law (Articles 122-5 NCP).

The power of guards to use arms is governed by Article 13 of the RSG and Articles 10 (4) and 25 (1) of the instruction. The rules are different whether the guard is protecting a normal military zone or a "*zone militaire sensible*" (ZMS). In the normal situation, the guard is entitled to give alert only if an intruder does not comply with his instructions. In case of attack, the guard has the duty to respond in a proportionate manner. The guard may use his firearm without pronouncing the usual warnings in case of serious and immediate aggression which can not be contained by other means (Article 10 (4), instruction).

Within a ZMS, Article 13 (3) of the Decree of 1967 (as well as Article 25 (1) of the instruction) contains rules which must be considered as illegal. These dispositions entitle the guard (*sentinelle*) to open fire within a sensitive military zone if an intruder does not stop after he was asked to three times ("*Halte! Ou je fais feu!*"). Legitimate defence according to the NCP requires, however, that either aggression or a crime be in progress, that the use of a firearm must be necessary, and the force and means used must be proportional.

Within these "*Zones militaires sensibles*" the use of arms is thus governed by rules which are partly inconsistent with the general penal law. As long as no special statute has been adopted, the general penal law must apply. Hence, the defence action – especially in order to not prevent a crime or infraction against a good – must not be disproportional and it can not be an intentional homicide (Article 122-5 NCP).

At night, within an inhabited place, legitimate defence is however presumed (Article 122-6, NCP).

VIII. Legal Reforms with Respect to Multinational Operations and Structures

1. Pertinent Legislation

France has not enacted any special legislation dealing either with multinational units or multinational operations since 1990. According to the Ministry of Defence and the Ministry of Foreign Affairs, there seems to be no awareness of a need for such special legislation.

There is only one particular point which has been modified recently (June 2001) in the context of a more general modification of the General Regulation on Discipline in the Armed Forces (RDGA from 1975).[116] One of the modifications concerns the designation of the military authorities entitled to exercise disciplinary power "including during external operations" (Article 5). This change does not have, however, a direct consequence on the relationship between French soldiers and foreign commanders, because French military are always placed under French command (COMELEF, "*commandement des éléments francais*"). A ministerial edict (*arrêté ministériel*) may define for each OPEX (*opération extérieure*) the authorities invested with disciplinary power. For the moment, only one such edict has been published. It determines the authorities of the highest level (*troisième niveau*) and mentions amongst them the commander of French forces located abroad (Article 1).[117]

It clearly results from the dispositions of the RDGA, as modified in June 2001, that foreign commanders may do no more than request the punishment of a French soldier. The disciplinary sanction will always be decided upon and applied by French officers according to the rules laid down by the General Regulation on Discipline in the Armed Forces of 1975.

This situation has apparently been confirmed (at least indirectly) by a recent judgement of the *Conseil d'État*, the highest administrative court in France. The *Conseil d'État* decided that "the state cannot cede the power to grade one of its agents to a third country or to a foreign organisation".[118] There can be no doubt, that the position of the *Conseil d'État* would be very similar with regard to the power to take disciplinary measures.

[116] See décret No. 2001-537 du 20 juin 2001 modifiant le décret no 75-675 du 28 juillet 1975 portant règlement de discipline générale dans les armées, JORF du 23 juin 2001, p. 9999.

[117] Arrêté du 17 juillet 2001 pris en application de l'article 34 du décret No. 75-675 du 28 juillet 1975 portant règlement de discipline générale dans les armées et fixant la liste des autorités militaires de troisième niveau.

2. Probability of Future Reforms

Neither the Government nor the Parliament seem to have projects or proposals in preparation in order to enact special legislation on the participation of French armed forces within multinational units or operations. The French Government and Parliament do not share the German point of view requiring such specific legislation.

Nevertheless, the French army underwent an important reform process in 2001–2002, making the transition from a (partly) conscript army to a fully professional army. This reform was also meant to adapt the French armed forces to new requirements in the field of international peace-keeping and participation in multinational units.

During a meeting of the "*Conseil Supérieur de la Fonction Militaire*" (CSFM) from 27 November to 1 December 2000, the situation of the military abroad (*Le militaire à l'étranger*) was discussed, and several proposals were made for the improvement of the material and legal situation of French soldiers sent abroad.[119] These proposals concern in particular the conditions of payment of a special financial compensation for service abroad, called "*indemnité de sujétions de service à l'étranger*" (ISSE), the definition of which means "in service" during an OPEX, and finally the obligation of French soldiers to contract a supplementary insurance during missions abroad. These proposals do not concern, however, the specific question of participation within multinational operations or units and, up to now, they have not given rise to any change of the law. The CSFM discussed this topic regardless of the type of mission (short term, permanent stationing, OPEX, etc.).

Furthermore, a recent parliamentary report underlines the need for stronger parliamentary control over external military operations. The report did how-

[118] Compare CE, 11 October 1999, M. Calleja. The judgement concerned an officer of the French army who had been posted to the UN in order to serve within APRONUC (Cambodia). He challenged the grades given to him by his French superiors because they were much less laudatory than the grading he was given by a representative of the UN. The C.E. indicates, however, that the grading by the French authorities must take into account the elements of information provided by the foreign institution.

[119] See Compte rendu synthétique de la 62ème session du CSFM du 27 novembre au 1er décembre 2000.

ever suggest an amendment of the Constitution (Article 35 on the declaration of war) rather than a legal reform in order to improve the situation.

3. Academic Discussion

There is no significant academic discussion regarding the participation of French armed forces within multinational units or operations.

There is, however, some discussion about the role of Parliament with regard to external operations of the armed forces. A recent report, presented by Francois Lamy on behalf of the "*Commission de la défense nationale et des forces armées*" of the National Assembly, claims that the existing parliamentary control over the participation of French troops within external operations is insufficient.[120] External operations are indeed a field in which the French Parliament is almost absent. The Lamy report, referring to the situation in Germany, Italy, the USA, the United Kingdom, and Spain, strongly suggested the establishment of a serious control mechanism for the Parliament on external operations. Accordingly, Article 35 of the Constitution, on the declaration of war, should be adapted to the new context of engagement of forces. This report did not, however, receive widespread support, nor did it stimulate academic discussion.

IX. Select Bibliography

1. Pertinent Legislation

a. Main Statutes

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- Loi No. 72-662 du 13 juillet 1972, Portant statut général des militaires
- Code des pensions civiles et militaires de retraite, Loi No. 64-1339 du 26 décembre 1964, modifiée
- Code de justice militaire, Loi No. 82-621 du 21 juillet 1982, modifiée
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[120] Rapport d'information No. 2237 sur le contrôle parlementaire des opérations extérieures présenté par F. Lamy, 8 March 2000, pp. 15 *et seq.*

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