

THE FRENCH RÉFÉRÉ PROCEDURE AND CONFLICTS OF HUMAN RIGHTS*

Wallace R. Baker† and Patrick de Fontbressin‡

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† Wallace R. Baker - Avocat à la Cour (member of the Paris Bar), Licence en Droit Paris (1971), Docteur en Droit Bruxelles (1962), L.L.B. Harvard 1952, Member of Illinois Bar, Partner Baker & McKenzie, Paris.

‡ Patrick de Fontbressin - Avocat à la Cour (member of the Paris Bar), Maître de Conférences, University of Paris XI, Directeur adjoint de la Gazette du Palais.

I. INTRODUCTION

Pierre Drai, the former Chief Justice of the French Supreme Court, in a speech he gave in the spring of 1992, predicted that the French *Référé* procedure would come more and more to the forefront in human rights cases.¹ In his talk, he referred to the *référé* judge as the "Protector of Human Rights" and stated he was confident that in light of the rapid changes in the last twenty years, that the *référé* procedure will not disappoint the hopes of those who treasure the respect of "democratic values and fundamental human rights."²

The purpose of this article will be to ascertain to what extent Pierre Drai's prediction has been realized. We examine cases where the *référé* procedure has been used in private human rights disputes where one party seeks to limit the right of freedom of the press or expression by claiming such right has been used illegally or in an abusive way. We will not deal with human rights violations by member states.

We will begin by outlining the main characteristics of the *référé* procedure (Part II). We will then review *référé* cases dealing with human rights in different contexts to illustrate how the procedure has worked in practice (Part III). In a fourth part we will discuss the sources of human rights law and its present and potential relationship to the *référé* procedure (Part IV). In the last part we will draw conclusions and suggest possible future developments.

II. GENERAL CHARACTERISTICS OF THE RÉFÉRÉ PROCEDURE

1. Role of the *Référé* Judge

The French *référé* procedure goes back at least to January 16, 1685 when the French king issued an edict authorizing a judge to grant a quick hearing and the same day issue a provisional order. Although the French *référé* procedure was completed by decrees from time to time, it

1. P. Drai, Problems of Human Rights in an Enlarged Europe, speech given at a colloquium in Strasbourg sponsored by the Association Libre Justice (1992), in *Gazette du Palais* [Gaz. Pal.] 1992, June 26-27, p. 12-15.

2. The Labor Party in the U.K. is considering the incorporation of the European Human Rights Convention on Human Rights into domestic legislation to reinforce compliance in the U.K. by the state. It is an open question whether such legislation would cover violations between individuals. A fast track route to upper courts for unusually difficult or controversial cases is also proposed. J. Wadham, *Bringing Rights Home: Labors Plans to Incorporate the European Convention on Human Rights into U.K. Law*, in *PUB. L.*, (Sweet & Maxwell et al. contris., 1997). One distinguished English lawyer has suggested that the Human Rights Convention seems to express a desire to entrench concepts well-recognized in, or at any rate natural elements in English common law. He notes that English judges use the Convention as a guide to interpretation of legislation seeking to find an interpretation that is not in conflict. They have also been in the forefront in asking for the direct incorporation of the Convention into English law.

was essentially judge made procedural law. It was a procedure where urgency was required and formalities kept to a minimum.

Some have found its more ancient roots as far back as St. Louis when he dispensed immediate justice in the shade of the large oak tree at Vincennes. Then, no clear distinction between the executive and the judicial branch of the government existed.

Use of the *référé* procedure in France has literally exploded over the last several decades as court calendars have become overloaded and lawsuits on the merits often move very slowly to conclusion. Litigants have become hungrier and hungrier for quick justice. The characteristics of the *référé* procedure are speed, reasonable cost, and a just settlement of the dispute by a judge who usually is one of the most qualified judges, i.e. the chief justice of the court concerned or a special *référé* judge appointed by him.³

A distinguished judge has described the *référé* judge as follows:

If the Law is not a simple technique for deciding upon and interpreting norms of life in society and if the jurist is not the oracle of a dull and neutral legal science, then in the difficult daily battle for the defense and enforcement of rights and liberties, we are in need of a man or woman close at hand to play an essential role in society, to translate the abstract laws and rules into real life and infuse his/her actions with a human soul - that of Peace through Law, or "judicial peace."

For the judge has not performed his duty if his decision, by its cutting edge and brutality, does not enable yesterday's adversaries to become tomorrow's friends, to enable them to have a greater understanding of each other in the future.

The judge is a man or woman of action and the judgment should be an efficient tool producing a specific and humane action.

To live under the "rule of law" is to be able, in any circumstances, to know that there is a judge who is an actor in everyday life, who is accessible and with whom a free and easy discussion is possible, and who is determined to avoid the "delicious complexities of law" because his job is to judge and to decide.

French Law offers such a judge: the *référé* judge. . .

Without going so far as to compare him to an English *référé* in a game of soccer or rugby, it is fitting to see in this important person who is a French judicial institution, the star whom the legislator has in mind when modernizing judicial procedures or protecting new rights.

3. The nature of the *référé* procedure prior to the 1970 reforms is described by P. Herzog and M. Wesser's remarkable treatise, *Civil Procedure in France*: P. HERZOG & M. WESSER, *CIVIL PROCEDURE IN FRANCE* 229-30, 238-239 (1967).

Always accessible to those seeking justice and always to be found at his post, he can hear cases without special formalities, whether in his chambers, in a hearing room, or even, if necessary, wherever the dispute is taking place. Sometimes even in his own home.

At any hour of the day or night, he will receive the opposing parties, either unrepresented or accompanied by lawyers, in order to hear each side's arguments and confront them.

He pronounces short, simple decisions similar to orders or injunctions, always paying attention to the one requirement with which he must comply, which is to ensure that the defendant has enough time to prepare his defense.

He adopts measures which are more comparable to those emanating from the imperial power of the Roman praetor than those of the Roman judge rendering judicial decisions since his orders are subject to immediate execution by public force.

Confronted with the audacious or impudent person who intends to impose his own will or view of the dispute by cunning or violent means, the *référé* judge takes any action necessary to "put a stop to disturbances which are manifestly illegal or to prevent imminent damage" (Article 809 of the new Civil Procedure Code).

He must therefore act, and act quickly, as it is certainly true that "justice delayed is justice denied," in the words of Gladstone.

More than any other judge, the *référé* judge is fundamentally convinced that all legal proceedings are somewhat pathological, and that they should be immediately limited in all their manifestations and effects.

As a judge of what is obvious and indisputable, the *référé* judge grants compensation to victims when necessary, restores situations that have been unlawfully disturbed, eases suffering which has been caused by attacks on convictions and beliefs, takes a firm stand against unlawful violence by the preachers of racial hatred or discriminatory ideology."⁴

Others have written:

This so very special judge, which is the *référé* judge, nevertheless constitutes a model. In fact lawyers arguments before the *référé* judge are not so much arguments on the law but more and more a discussion of the facts. The judge reaches his decision without being limited by the pleadings or written documents; but he is informed by oral arguments of the parties and their counsel. He participates in a concertation tending as often as possible to find common ground upon which agreement is possible. It is no longer a court before which one makes formal

4. P. Draï, *Preface* to W. Baker & P. de Fontbressin, *The French Référé Procedure - A Legal Miracle?*, 2 U. MIAMI Y.B. INT'L L. 1 (1993).

arguments, but rather it is a judge who is requested to find an instant solution to calm the dispute which is more or less acute. It is true that this procedure follows the general tendency to establish in our courts alternative means of conflict resolution.⁵

2. Scope of Action of the Référé Judge

Articles 808, 809, 872, 873, 848 and 849 of the New Code of Civil Procedure provide four major areas of general référé procedures in which the référé judge is authorized to take action:

1. Urgent matters
2. Conserving situations and conserving and investigating facts
3. Disturbances of public order
4. Obligations not subject to serious dispute.

For example, in the basic lower French court (Tribunal de Grande Instance) articles 808 and 809 provide:

Article 808 - In case of urgency, the chief justice of the court can order in a référé proceeding all necessary measures which do not involve a real dispute (*aucune contestation sérieuse*) or a substantive question at issue (*l'existence d'un différend*).

Article 809 - The chief justice can, even if there is a real dispute (*contestation sérieuse*) prescribe in the référé procedure conservatory measures or require action to restore a prior situation (*remise en état*) in order to prevent an immanent danger or to stop a disturbance which is clearly illegal (*trouble manifestement illicite*).

Article 810 - Powers of the référé judge apply to all matters even where a référé procedure is not provided for by law.

With regard to the general référé proceedings, we have identified four major areas to which they apply:

- Urgent matters which were traditionally the most common occasion where recourse was granted to a référé proceeding. In a situation where there is an imminent danger or of a miscarriage of justice, the référé judge can apply conservatory measures or require action to restore a situation to its prior state in order to prevent imminent damage or to stop a situation from developing or continuing which is clearly illegal (*trouble manifestement illicite*).

- A référé procedure can also be invoked where it is necessary to investigate facts, particularly where the evidence might disappear if the

5. See J. F. Burgelin, J.M. Coulon & M.A. Frison-Roche, *Le Juge des Référés au Regard des Principes Procéduraux*, 10e Cahier, Dalloz-Sirey [D.] 1995, p. 67-73.

judge did not take rapid action. Article 145 of the French Civil Code provides as follows:

"If before litigation on the merits there exists a legitimate reason to conserve or establish facts upon which a solution of a dispute may depend, investigatory measures which are legally admissible can be ordered at the request of any interested party in *ex-parte* (*requête*) or *référé* proceeding."

- The third general situation where a *référé* procedure may lie is in cases of disturbances of public order. This situation includes abusive administrative action (*voie de fait*) where exceptionally the judge in a civil court has jurisdiction over the French administration which is usually subject to the jurisdiction of the administrative courts.

It is also been utilized in labor conflicts and where press or audio visual communication touched on subject matters which were considered too shocking to certain segments of the population or disrespectful of their religion.

- The fourth and in some respects at present the most important use of this procedure, are cases where the judge finds there is no serious dispute. In these cases a *référé* judge can order provisional payment or in certain cases order that certain actions be taken subject to fine in case of non-performance.

In addition to the foregoing general *référé* procedures, there are numerous specific *référé* procedures provided by law. The legislator is impressed with the efficiency of this procedure to enforce rights so he often calls for the *référé* judges intervention in the laws he enacts. Examples of these special proceedings are:

- to cancel an *ex-parte* order (*ordonnance sur requête*)
- injunctions for the protections of consumers
- in arbitration where there are problems in appointing arbitrators
- the appointment of an expert in an ICC arbitration.

Article 9 of the Civil Code specifically provides for relief by a *référé* judge in cases of invasion of privacy.

The *référé* procedures are also seen in labor disputes. In unfair competition cases this procedure is widely used because urgent remedies are necessary.⁶

An appeal can be taken to the appellate court if it is made rapidly, i.e. within 15 days and sometimes decisions are taken to the Supreme Court for review when one of the parties believes there is an error of

6. For more details on general and special *référé* procedures see Baker & Fontbressin, *supra* note 4, at p. 15-48.

law. Appeals generally do not delay the enforcement of judgments since référé judgments are generally subject to immediate execution. Therefore, there are no long delays before judgments are executed.

It is important to note that the general référé procedure is a procedure which is of general application or described by Chief Justice Drai as "universal" since there need be no specific legislative authorization to make application to a référé judge. Therefore, human rights actions are subject to enforcement through référé procedure even though there is no specific legislative authority except for Article 9 of the Civil Code relating the rights of privacy.

Because the procedure is extremely rapid it is important to have counsel with experience in référé cases who is knowledgeable and capable of anticipating situations and not be surprised by what can happen in such a procedure.

III. THE RÉFÉRÉ JUDGE IN HUMAN RIGHTS CONFLICTS

1. *Sources of the Law Guaranteeing Freedom of Expression*

An early statement of the right of freedom of expression is found in Article 11 of the Declaration of Rights of Man and the Citizen of 1789 as follows: "The free communication of thoughts is one of the most precious rights of man; every citizen can speak, write, print freely, subject to being responsible for abusing this liberty in the cases set forth by the law."

In the course of the 19th Century the combat for liberty of expression and communication was expressed in the Law of 29 July 1881 relating to the liberty of the Press in which Article 1 states as follows: "Printing and Libraries are free." The same principle was reaffirmed as the technological revolution developed with the affirmation of freedom of audiovisual communication in the Law of 29 July 1982 and later in the Law of 30 September 1986 modified by the Law of 17 January 1989 which in its first article provides:

Article 1 (Law No. 89-25 of 17 January 1989):

Audiovisual communication is free. The exercise of this liberty cannot be limited except to the extent required on the one hand by the respect of the dignity of the individual, the liberty and property of others, the pluralistic character of expression of the current opinions, and on the other hand by safeguarding public order, for national purposes of defense, by requirements of public service, by technical requirements inherent in the means of communication, and as well as by necessity of developing a national industry producing audiovisual products.

By a decision on July 27, 1982, the Constitutional Council affirmed the constitutional value of the liberty of communication, by reference to Article 11 of the Declaration of the Rights of Man of 1789 in emphasizing that:

The legislator should conciliate the present techniques and their control, the exercise of freedom of communication which results from Article 11 of the Declaration of Human Rights, on the one hand, with the limitations of the means of audio visual communications and, on the other hand, the objectives which have constitutional values which safeguard the public order, the respect of freedom for others and the preservation of the pluralist character of socio-cultural currents of opinion to which these means of communication, by their very considerable influence are susceptible to threaten.

The principle of pluralism was the subject of decisions of October 10 and 11, 1984 and July 28, 1986 of the Constitutional Council. These decisions stated:

The liberty of the written press is a fundamental liberty which is so precious because its exercise is one of the essential guaranties of the respect of other rights and liberties and the national sovereignty. The law can only regulate its activities in order to render the law more effective and to conciliate it with the other rules and principles of constitutional value. The pluralism of political and general daily papers is itself an objective of constitutional value.

With regard to pluralism, the decision of July 29, 1986 provides:

"The pluralism of currents of socio-cultural expression is itself an objective of constitutional value; the respect of this pluralism is one objective of constitutional value."⁷

2. *What Types of Expression Are Free?*

Included in freedom of expression is freedom of professional journalists who exercise their profession, audio visual freedom, advertising for commercial purposes, freedom to produce films shown in public theaters, and other forms of expression relating to the arts such as paintings, sculpture, etc.

It should be noted that the publication of false information is prohibited by Article 27 of the Law of 29 July 1881 and Article 411-10 and 322-14 of the New Penal Code. False messages are not subject to protection. The right to inform oneself and the right to seek out ideas and

7. See also J. Chevallier. *Constitution et Communication*, 37e Cahier, D. 1991, p. 252-253.

information imposes an ethical obligation to be sure the information is reliable.⁸

French case law has denied protection when statements by journalists were imprudent, unreasonable or not objective or fair. Court decisions have progressively defined what is meant by these terms in granting protection to appropriate information.⁹ The right to be informed supposes that a citizen has access to information that is pluralistic, true and complete.¹⁰

This freedom of the press is not protected if the facts given are untrue, or a false mixture of facts (amalgame) or perfidious allusions.¹¹ In other words, the right to be informed is directly related to the propagation of the truth with regard to facts. The expression of political opinions is subject to the limitation that it not unduly damages the rights of others.¹²

The primary duty of a journalist to inform consists in his being prudent, circumspect, objective and sincere, a principle reaffirmed by the French Supreme Court¹³ which lists the principal decisions in support of this duty.

As seen above there are limitations on the right to free expression of the press. The référé judge has been called upon to intervene immediately in such cases to find an equilibrium between the various human rights where there is a situation which is manifestly illegal or there is an abuse of freedom of the press.

8. See P. de Fontbressin, note on the Goodwin Case, *Le Devoir de se taire corrolaire du Droit d'informer*, 1996 Rev. Trim. Dr. H. 444.

9. See Carton Jaune, July 5, 1994, *Juris-Classeur Périodique [JCP]* 1996, II, 22562, note C. Mecary & F. Gras (relating to a press conference of Fidel Castro falsely presented as an interview).

10. See T. Massis, *Le Droit du Citoyen à l'Information dans la Jurisprudence Française*, *Gaz. Pal.* 1996, p. 139-143; See also J.Y. Dupeux, *Le Droit du Citoyen à l'Information dans la Jurisprudence de la Cour Eur. Dr. H.*, *Gaz. Pal.* 1996, I, 144-151.

11. An example of false information which was refused the right of free expression was the publication of an article, The myth of extermination of Jews, denying the existence of the destruction of Jews in World War II. See CA Paris, Oct. 31, 1990, *Gaz. Pal.* 1990, p. 139-43. See P. Lambert, *Liberté de la Presse, La Protection de la Réputation d'Autrui et la Convention Européenne des Droits de l'Homme*, in LIBER AMICORUM, MARC-ANDRE EISSEN 273, (Bruylant Bruxelles LGDJ Paris 1995). See also La Vérité et le Droit, *Travaux de l'Association*, CH. Capitain 1987, Tome 38, *Journées Canadiennes*, Report of Me François Sarda, at 169 et seq. (Economica ed. 1987).

12. *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) P 42 (1986); *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A)(1994), reprinted in V. BERGER, *JURISPRUDENCE DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME* 404, 418 (Sirey ed. 1996).

13. Cass., Feb. 4, 1992, *Gaz. Pal.* 1992, p. 529; See also Cass. crim., Nov. 26, 1991, *Gaz. Pal.* 1992, p. 164 Chron., II-3 (discussing the duty of journalists to loyally inform the public).

Significant cases in French courts illustrate how the *référé* judge reacts to protecting freedom while at the same time he or she strikes down abusive freedom of expression.

3. *The Référé Judge and Freedom of Expression*

A *référé* judge's order prohibited the public display of posters relating to a movie called "Ave Marie" which showed the crucifixion of a woman with bare breasts. The advertisement was visible from a public street where persons with religious convictions were certain to be shocked.¹⁴

Another film entitled "Je Vous Salue Marie," the name of a Catholic prayer, told the story of a young woman, gas station attendant, who became pregnant, although she resisted the advances of a taxi driver named Joseph. The Supreme Court reversed the appellate court's decisions which had refused to stop the showing of the film because the film did not constitute a disturbance of such exceptional gravity that it justified restricting liberty of expression. The Supreme Court explained that in accordance with the first paragraph of Article 809 of the Code of Civil Procedure, the *référé* judge could always prescribe conservatory or other measures to prevent immanent damages or a manifestly illegal disturbance even if it was not of exceptional gravity. The case was sent back to the appellate court of Dijon which found that the plaintiffs failed to prove that a manifestly illegal trouble existed.¹⁵

The same rule applied to another film, "The Last Temptation of Christ," produced by Martin Scorsese, based on the novel of Nikos Kazantzakis, which portrayed Christ as "completely human." The appeals court required a warning on the advertising relating to the film to the effect that it "was not an adaptation of the Bible."¹⁶

A similar result occurred in the more recent case relating to advertisements for a film about Larry Flint, an editor of an American pornographic magazine. These large advertisements about 12 feet by 9 feet were posted in crowded public passages in Paris representing a naked man hung on a cross like crucified Jesus on the background of a female

14. T.G.I. Paris, Oct. 23, 1984, Gaz. Pal. 1984, II, 727; CA Paris, Oct. 26, 1984, Gaz. Pal. 1984, p. 5-7, note Bertin, *Le Juge des Référés, Protecteur des Croyants* 2, 3.

15. T.G.I. Paris, Jan. 28, 1985, Gaz. Pal. 1985, p. 122-123, note P. Bertin, *Mère Intègre, Nu Intégral et Remous Intégristes*; CA Paris, May 13, 1985, Gaz. Pal. 1985, p. 1, 342; Cass., July 21, 1987, Gaz. Pal. 1987, p. 8, note P. Bertin, *En Saluant Marie . . . La Cour de Cassation Précise les Pouvoirs du Juge des Référé Face à la Liberté d'Expression*; CA Dijon, Mar. 22, 1988, Gaz. Pal. 1988, p. 379, 382, note P. Bertin; T. Hassler, *Droit de L'Audiovisuel*, 25e Cahier, D. 1989, p. 250-51.

16. CA Paris, Sept. 27, 1988, Gaz. Pal., II, 735, note P. Bertin.

body undressed and photographed from the knees up to the navel. The plaintiffs alleged this constituted an intellectual assault or an illegal act (*voie de fait*) since it caused great anguish to Christian believers. The référé judge refused to intervene on the grounds that Larry Flint did not resemble Jesus, and taking into account social evolution it was not proved that this incongruous poster, even if shocking, was a flagrant outrage to religious sentiments sufficient to constitute manifestly illegal trouble required by Article 809 of the New Code of Civil Procedure. The court noted that even the Church had not reacted.¹⁷

4. *The Référé Judge and Protection of Privacy*

In French law, at the beginning of the 19th Century the utilization of civil responsibility or tort law provided the basis for the protection of privacy. A Law of 11 May 1868 prohibited any publication "relating to a fact of a person's private life." This law was replaced by the Law of 21 July 1881 which, however, does not have much of anything on the protection of privacy.

The protection was spelled out by court decisions and in particular by référé judges.

The Law of July 17, 1970 inserted an Article 9 into the Civil Code and Article 226-1,-2,-3,-5,-8 of the new Penal Code. These were texts that organized the protection of private life against aggression, in particular by the press. One author has attempted a definition of the domain of privacy as relating to the:

- identity of the person, address and domicile,
- intimate physical characteristics (pictures of the body, revelations of operations such as beautifying surgery, etc.)
- health,
- sentimental and married life which would include publicizing marriage, revelation of pregnancy, information about divorce, or other personal information from the past,
- religious convictions, even if expressed publicly in certain cases,
- patrimony, although this question is not settled.¹⁸

Article 9, the Civil Code specifically authorizes intervention by the référé judge. This article provides:

Each person has the right to the respect of his private life. Judges can without prejudice to the recovery of damage suffered, prescribe all

17. T.G.I. Paris, Feb. 20, 1997, Gaz. Pal. 1997, p. 328-332, critical note of Eric Morain.

18. J.P. Ancel, La Protection de la vie Privée et le Droit à l'Image en France, Actes du Colloque de IFC (Conference of Mar. 22-23, 1991).

measures such as escrows, seizures, and others necessary to avoid or stop an invasion of private life; these measures if there is urgency may be ordered by the *référé* judge.

Along with the protection of freedom of expression, goes the protection of privacy.

The European Human Rights Convention clearly expresses the intention of the member states to recognize for all persons under their jurisdiction the rights and liberties defined in this treaty. In addition, the rights in the European Human Rights Convention can be enforced in court.

One example is the recent case relating to violation of rights of privacy: the Gubler case. Dr. Gubler was the personal doctor of President Mitterrand. He wrote a book which revealed that the President had cancer in 1982, shortly after his inauguration. See part IV 4.c. below.

Other examples include taking unauthorized photographs, violating secrecy in private correspondence (Brigitte Bardot's steamy love letters to the man who became her first husband) and listening illegally to telephone conversations.

5. *The Référé Judge and Presumption of Innocence*

The purpose of Article 9-1 of the Civil Code is to protect the presumption of Innocence.

A recent example is the case of Guy Lux vs. Société EDI 7.¹⁹ In this case, *Ici Paris* magazine published a picture of Guy Lux on the cover along with the phrase "Guy Lux, prison" which gave the impression that he was already found guilty, which was not the case.

The court found that this untrue statement was an unlawful attack on the presumption of innocence because he was presented as guilty prior to any court decision. The court also found that it was defamatory because it damaged Mr. Lux's honor and consideration. The *référé* judge ordered the sale of the publication to be stopped, the return of all copies in the hands of retailers, and payment of provisional damages of 180,000 FF. The writer of the note to this case adds that this case completes the case law based on Article 9-1 of the Civil Code and the damages imposed should make the Press which has almost daily violated the protection of presumption of innocence think twice about continuing this unlawful practice.

19. T.G.I. Nanterre (*référés*), June 22, 1996, *Gaz. Pal.* 1996, p. 6-7.

In 1986, in an important criminal case of that decade,²⁰ a three judge référé panel of the Court of Appeals reversed a decision of the Tribunal de Grande Instance of Paris prohibiting the sale of a surprisingly well written book with a preface by her lawyer, written by Christine Villemin who was indicted by the investigating judge for murdering her son. This book proclaimed her innocence. It implied Bernard Laroche, her brother-in-law, resented her and his mother-in-law covered up his guilt. The complaint alleged the book contained defamatory accusations against Bernard Laroche which obviously damaged the honor and consideration of members of the Laroche family. The lower court found for the plaintiffs. The Appellate court reversed the lower court judgment and the book was published. The Appellate Court reasoned that Christine Villemin had a right to write and publish a book claiming her innocence.

This case illustrates the great difficulty in balancing the various human rights in issue, i.e. freedom of expression, protection against invasion of privacy, presumption of innocence, and protection against defamation. The Appellate Court judges found freedom of the press and free expression and indirectly the presumption of innocence was more important than the danger of defamation in this celebrated murder case.

6. *The Référé Judge and Defamation*

In 1990, Jean-Christophe Mitterand was attacked in the *l'Événement du Jeudi* in an article entitled "Les tribulations du fils du Tonton-Afrique: La faillite de la politique française" (the bankruptcy of France's African policy) which was a violent criticism of African policy in which the President's son was blamed as his counselor on African policy. The complaint in a référé proceeding resulted in a judgment on June 11, 1990 finding there were seriously defamatory accusations made attacking his integrity, which were intolerable.²¹ Provisional damages were granted in the amount of 80,000 FRF. This judgment was confirmed on June 12, 1990 in the appellate court, but reversed in the Supreme Court in February, 1991.²² The Supreme Court cited article 35 and 55 of the laws of 29 July 1881 on Freedom of the Press and Articles 6-1 and 10 of the European Convention on Human Rights.

The High Court noted with reference to the law of 29 July 1881, with certain exceptions, the defendant should be given the opportunity to

20. Judgment of June 11, 1986, 2ème Sem., Gaz. Pal. 1986, p. 462-64, note P. Bertin, *Fallait-il étouffer le cri?* Gaz. Pal., 2, Doctr. 2, 3.

21. Judgment of June 11, 1990, 2e Sem., Gaz. Pal 1990, p. 378.

22. Judgment of Feb. 5, 1991, 5e Cahier Juris., D. 1993, p. 53-56, note Wachsman.

prove the truth of allegations within 10 days after a complaint is filed. Since the lower and appellate courts failed to follow this rule, the latter decision to this case was reversed and sent back to the Court of Appeals of Versailles for a final judgment.

In P. Wachsmann's note, citing R. Perrot's statement that the history of the *référé* procedure is one of constant extensions he notes this case extended the procedure to defamation cases as well.

IV. THE RÉFÉRÉ JUDGE AND THE EUROPEAN HUMAN RIGHTS CONVENTION

1. *The Sources of Inspiration*

The European Convention relating to the rights of man and fundamental liberties was signed in Rome on November 4, 1950 by the member countries of the Council of Europe. This Convention was inspired by the Universal Declaration of Rights of Man proclaimed on 10 December 1948 by the General Assembly of the United Nations.

The idea of a European Convention was born at the same time as the Council of Europe was created, therefore close bonds exist between this institution and the Convention.²³ It is not appropriate in this article to recount all the different steps in the preparation of the drafting of this treaty.²⁴ Some authors have suggested that this treaty should be the common denominator of Western democracies and define what criteria political regimes should fulfill in order to be considered democracies.

The sources of inspiration of the European Convention on Human Rights are the Universal Declaration of Human Rights and the United Nations Pact on Civil and Political Rights.²⁵ René Cassin in his statement "Protect all men and protect the rights of all men," well expressed the common philosophy of western democracies. The signature of the European Convention on Human Rights constituted a fundamental step in the efforts to reach a united Europe and the protection of the values shared by the members of the Council of Europe guaranteed by the pre-eminence of law.

To better understand the background which led to the convention it is instructive to refer to the Preamble which sets forth the objectives of Council of Europe. It reads as follows:

23. G. Cohen-Jonathan, *Droit Public Positif*, in LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 10. (Economica ed. 1989).

24. See E. Decaux, *Les Etats Parties et Leurs Engagements*, in LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME - COMMENTAIRE ARTICLE PAR ARTICLE (Economica ed. 1989)(under the supervision of batonnier L.-E. Pettiti).

25. See *supra* note 21, at 15 ss.

The Governments signatory hereto, Members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on December 10, 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which the aim is to be pursued is the maintenance and realization of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in these fundamental liberties which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy, on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the Governments of the European countries which are like-minded, animated by the same spirit and have a common heritage of political traditions, ideals, freedom and the rule of law to take the steps for the collective enforcement of certain of the Rights listed in the Universal Declaration.

2. *Negative and Positive Obligations of the Member States*

As Judge Louis-Edmond Pettiti emphasized in his important book, *Les Réflexions sur les Principes et les Mécanismes de la Convention*, "the notion of a collective guarantee is at the heart of the Convention which breaks with the traditional conception of diplomatic protection."²⁶

The objective of the Conventions is to protect the individual. To do so, the contracting states must abstain from wrongful actions in accordance with the classical theory of individual liberties and, as the court has had the occasion to emphasize on numerous occasions, it also has obligations which are positive and require action.

In *Airey v. Ireland*, decided on October 9, 1979, the court had occasion to recall that "The execution of an obligation pursued by virtue of the Convention sometimes calls for a positive measure by the state. In such case, this state cannot merely remain passive and it is not necessary to distinguish between 'act' and 'omission.'"²⁷

26. See L.-E. Pettiti, *Les Réflexions Sur les Principes et les Mécanismes de la Convention*, in LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME: COMMENTAIRE ARTICLE PAR ARTICLE 27 (Economica ed. 1995).

27. Cf. examples in LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME: COMMENTAIRE ARTICLE PAR ARTICLE, *supra* note 24, at 55 § 10.

It is equally essential for understanding the developments that follow, to note that the field of application of the Convention is not limited to an obligation of the states with reference to individuals (a vertical dimension) but there has also been progressively developed obligations of individuals and legal entities to other individuals and legal entities (a horizontal dimension) which arose from the recognition of the risks of violations which emanate no longer from the State but from private persons in relations to other private persons.

3. Enumeration of Rights Guaranteed

The enumeration of the rights guaranteed appear in the basic text of the Convention as well as in the additional protocols. Professor Cohen-Jonathan distinguishes the different types of rights as follows:

- A. Liberties of the physical person
 - Right to life (Article 2)
 - Right not to be submitted to torture or punishment or tree that is inhuman or degrading (Article 3)
 - Right to liberty and to security (Article 5)
- B. The right to the respect of privacy or family life, of the domicile and of correspondence (Article 8). (Compare also Article 12 relating to the right of marriage).
- C. The right to due process of law (*un procès équitable*) (Article 6)
- D. The freedom of expression and information (Article 10)
- E. Respect of Property rights (Article 1 of Protocol No. 1).²⁸

Judge Pettiti emphasizes that the case law of the court, considered as a whole, permits one to think of a “central core” of human rights guaranteed by the Convention.

To explain this emergence of a “central core,” Judge Pettiti states, “It is not that the Court adds a hierarchy of rights or articles where it establishes a hierarchy of norms to the Convention but it underlines their diversity and their differing levels in democratic societies, taking into account the evolution of behavior in those societies.”²⁹

28. G. COHEN-JONATHAN, *ASPECTS EUROPÉENS DES DROITS FONDAMENTAUX*, (Monchrestien ed. 1996).

29. See Draï, *supra* note 1, at 33 (citing *Le Noyau Intangible des Droits de l'Homme*, which discusses the concept of “central core”).

4. *The Method of Enforcing Rights Guaranteed by the Convention*
 a. *The Role of the European Court of Human Rights*

The protection of human rights by the Convention is organized in such a way that there is no discrimination between persons who are protected as a result of their legal status or their nationality. In this regard, Article 1 of the Convention provides that, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

The Convention therefore applies, regardless of the nationality of the victim, within the jurisdiction of a state in question whether or not such person is a citizen of that state or a stateless person.

Professor Jean-Claude Soyer and Michel de Salvia have rightly underlined that it is the individual right of action that makes the European Convention the only really effective mechanism for protection of human rights.³⁰

The supernational right of action provided for in Article 25 has up to the present constituted one of the most important mechanisms of the Convention because it permits individuals to sue in this international jurisdiction for the purpose of punishing a state for failure to fulfill its obligations.

Up to the present, this procedural mechanism depended upon a prior complaint to the European Commission of Human Rights, an organization composed of as many members as contracting parties, only after all appeals and recourse had been terminated in a contracting state and within a period of 6 months thereafter (compare Article 26 and 27 of the Convention).

After examination of whether the complaint was admissible and in absence of a settlement with the country concerned the Commission proceeded with an examination on the merits. It then prepared a report giving its opinion whether there had been a violation of the Convention prior to its referral of the matter to the Court.

It appears that Protocol 11 of the European Human Rights Convention will become effective in the near future. This protocol reforms the mechanism of control established by the European Convention on Human Rights. It does away with the Commission and institutes a right to file a case directly with the Court by an individual.³¹ In the future

30. See JEAN-CLAUDE SOYER & MICHEL DE SALVIA, CONVENTION EUROPÉENNE DES DROITS DE L'HOMME: LE RECOURS INDIVIDUEL: MODE D'EMPLOI, (Litec ed. 1997).

31. See Protocol no. 11 of the European Convention on Human Rights, in 15 DROIT ET JUSTICE (Bruylant ed. 1995)(especially the contribution of Maître Pierre Lambert, President of the Institut des Droits de l'Homme du Barreau de Bruxelles).

with regard to court procedure, the prerogatives of individuals and member states are the same.

Even if it is true that the application of Protocol no. 11 may result in some practical difficulties, due to the absence of the Commission's review of the complaints, which some considered very important,³² the Convention has been referred to as "the most perfect model of international protection of human rights."³³

b. The Method of Interpretation

During the course of the elaboration of the case law, the European Court of Human Rights had recourse to a dynamic and evolutionary teleological method of interpretation of the Convention, in order to insure the efficient protection of human rights in conformity with the principle of "useful effect" (*l'effet utile*). It also emphasized that the Convention should be interpreted in light of the evolution of science and society with the objective "to protect the rights which are no longer theoretical and illusory but concrete and effective."³⁴ By this method, it progressively formulated the directing principles of a European public order based upon common values through the emergence of the principles of proportionality, legal security, legitimate confidence and good faith.³⁵

The Convention did not only proclaim rights but instituted practical means of making them enforceable.³⁶ The decisions of the European Court of Human Rights are not directly executory but are only declaratory in effect vis a vis the member states.

Nevertheless, the agreement of the countries to the terms of Article 53 to follow the decisions of the court in litigation in which they are parties as well as the agreement to change their internal order to arrive at "the effective application of all the dispositions of the Convention (Arti-

32. See Draï, *supra* note 29.

33. See F. SUDRE, LA RÉFORME DU MÉCANISME DU CONTRÔLE DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME: LE PROTOCOLE NO. 11 ADDITIONAL A LA CONVENTION, JCP 1995 éd. gen., I, 3849; see also PROFESSOR J.-F. FLAUSS & PROFESSOR COHEN-JONATHAN, LE PROTOCOLE NO. 11 A LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME.

34. See Jacot-Guillarmod, *Règles et Méthodes d'Interpretation de la Convention Européenne des Droits de l'Homme*, in LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME: COMMENTAIRE ARTICLE PAR ARTICLE; Cohen-Jonathan, *supra* note 24, at 62.

35. See P. de Fontbressin, *Le Juge Européen, Déchiffreur de Valeurs*, in LE JUGE EUROPÉEN: UN PHILOSOPHE DE L'ACTION, JCP 1997, 4049.

36. Cf. J.C. Soyer & M. de Salvia, LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME: ARTICLE PAR ARTICLE, *supra* note 23, at 240.

cle 57), "constitute an important means of pressure on the contacting states."³⁷

This impact of the Convention on the member countries is also exercised more and more in the litigation within these countries before their national judges.

c. Application of the Convention by the French Référé Judge

Since its ratification by France in 1974, and even more so after the declaration of acceptance of the individual recourse provided in Article 25 of the Convention by France in 1981, the Convention has been a real motor in protecting human rights with regard to French judges in various domaines.

The application of the European Convention on Human Rights by the national judge flows from the principle of primacy (*primauté*) and direct application (*applicabilité directe*) of the Convention.

As Professor Cohen-Jonathan emphasizes, in the international order and before the European court, the convention has primacy over all internal acts, regardless of their nature or the organization which adopted them even if they are of a constitutional nature.³⁸

It follows that the dispositions of the Convention take precedent over national laws whether or not they became effective prior to or after the country signed the Convention as well as acts at the infra legislative level: decrees and regulations (*décrets et règlements*).

The direct application of the Convention means that it is automatically applicable and it creates property rights and obligations of private persons. More importantly, the Convention becomes an integral part of the legal system that the national judge must enforce. He or she can apply these rules directly on a horizontal basis in disputes between individuals.³⁹ As a consequence the national judge has been given an important role in the execution of the principles consecrated by the Convention.

During a colloquium organized by the French Supreme Court, under the chairmanship of the Chief Justice Draï on December 10-11, 1993, in Paris, a Government lawyer (l'avocat général) explained how "the Convention can furnish to the Supreme Court and to the national

37. See G. Cohen-Jonathan, *Quelques Considérations Sur l'Autorité des Arrêts de la Cour Européenne des Droits de l'Homme*, in LIBER AMICORUM MARC-ANDRÉ EISSEN (Bruylant, LGDJ ed. 1995).

38. See G. COHEN-JONATHAN, ASPECTS EUROPÉENS DES DROITS FONDAMENTAUX 59 (Monchrestien ed. 1996).

39. *Id.*

judge a means to complete the national law where it appears incomplete or has a gap."⁴⁰ In the same way he emphasized how "Even where there is no disparity between the French law and the European Convention, this Convention can have a revealing effect on national law (*effet révélateur de la loi nationale*) and permit the Supreme Court and the National Judges to enrich it, make it live, and to release all of its potential, in particular in the domain of fundamental rights."⁴¹

The references to the Convention of Human Rights in the French *référé* cases to protect the intimacy of private life, the reputation of the individual or a religious belief, have been the subject of abundant case law which is evidence of the efficiency of the *référé* judge to guarantee the rights of the Convention within France.

In addition to certain cases relating to the application of Article 8 of the Convention by the *référé* judges the decisions in two recent cases are important to illustrate the development of the case law.

In the case of a book, *Le Grand Secret*, written by Dr. Gubler, the personal physician of President François Mitterrand, distribution was prohibited by a *référé* judge's order which was confirmed by the Court of Appeals.⁴² The Appellate Court held that Article 10-1 of the European Convention safeguarding human rights and individual liberties guaranties that everyone has the right to freedom of expression.

Article 10-2 provides, "That the exercise of freedom of expression, carrying with it duties and responsibilities, may be subject to such penalties prescribed by and which constitute necessary measures in a democratic society to prevent the disclosure of confidential information."

Such was the purpose of the sanction which constituted in the terms of Article 10-2, a conservatory measure prescribed by the lower court judge.

Therefore, this conservatory measure did not violate the requirements of the dispositions of the Convention related to the right of free expression. The author, editor and the other intervening parties in this case were not well founded in arguing that the decision of the lower court judge violated the principle of the presumption of innocence since the order of the *référé* judge is a provisional decision which does not have a binding effect on the case on the merits. The court noted that

40. See *L'IMAGE DOCTRINALE DE LA COUR DE CASSATION* 46-47 (La Documentation française ed. 1994); cf. R. de Gouttes, *Le Juge Judiciaire Français et la Convention Européenne des Droits de l'Homme avancées et reticences*, in *QUELLE EUROPE POUR LES DROITS DE L'HOMME* 217 (Bruylant Bruxelles ed. 1997).

41. *Id.*

42. Judgment of Mar. 13, 1996, *Gaz. Pal.* 1996, p. 162-63, *Obs. B. Gizardin.*

stopping the distribution of a book is a remedy of a very exceptional character.

With regard to the length of the passages cited in *Le Grand Secret*, which revealed facts that were subject to the medical secret which also bound the co-author of this book, they cannot be disassociated with the other passages of the book without making them meaningless and as a consequence completely transformed.

Thus, the first judge's prohibition of the distribution of *Le Grand Secret* by Editions Plon and Mr. Gubler was held to be an exercise of proper discretion in choosing a conservatory measure appropriate to stop the manifestly illegal situation resulting from the revelations in the book.

Even if the first edition of the book in question was sold before the judge's decision, which was appealed, and even if after this decision the information contained in this book was disclosed by other media the situation which resulted did not make the manifestly illegal situation disappear, which would necessarily reoccur by a re-distribution of the book. As a consequence it was held proper to maintain the conservatory measure ordered by the first judge.

More recently, a case was decided on the occasion of the publication of a book which indirectly but clearly accused François Leotard, a former Defense Minister and the leader of a French political party, of having ordered the murder of a deputy. Because of its importance, a panel of three référé judges in the Tribunal de Grande Instance of Paris participated in the judgment.⁴³ They cited Article 10 of the European Convention on Human Rights. The court's decision can be summarized as follows:

Although Article 10 of the European Convention, in its paragraph 1 recognizes that each person has the right to freedom of expression, and that such right includes specifically the right to receive or communicate information, this text provides in paragraph 2 that the exercise of this liberty implies obligations and responsibilities which can be subject to certain formalities, conditions, restrictions, or sanctions, provided by the law, which constitute necessary measures in a democratic society, in particular the protection of reputation or rights of others.

In addition, by virtue of the constitutional principles applicable in all courts, the free communication of ideas and opinions consecrated as one of the most precious human rights is subject to limitations by the necessity of responding to abuses of this liberty in the cases determined by law.

43. T.G.I., Oct. 13, 1997, *Gaz. Pal.* 1997, p. 18-22; T.G.I., Oct. 28 1997, *Gaz. Pal.* 1997, p. 19-22.

From these rules it can be concluded that the principle of liberty of expression and that of the respect of the reputation of the person are of equal value and the judges duty to respect a necessary equilibrium between these two rights and to adopt appropriate measures.

Founded on tort principles (civil responsibility) of one who by his fault causes damage to another, the abuse of the rights of freedom of expression implies not only an obligation to pay damages but also the possibility for the victim to obtain by an urgent procedure the cessation of the trouble and the measures necessary to re-establish a previous situation where required.

In responding to this legitimate objective, the référé procedure, which the court found had a legal justification, satisfies the requirements of predictability and the necessity of a restrictive norm on the freedom of expression when the author of the statements in issue has a reasonable time to submit to the judge all elements tending to prove the truth of this statements. Since the judges' order found that there was a serious enough aggression or extreme violence, which is insupportable and irreparable by means of damages, the court ruled the référé procedure was compatible with the European Human Rights Convention.

The immediate action of the référé judge makes the référé procedure a privileged instrument of effective application of the rule of law providing rapid access to the judge - a right that was recognized in the celebrated cases of *Golder v. United Kingdom* and *Airey v. Ireland* in the European Court of Human Rights.⁴⁴ Vast possibilities are offered by the efficiency of the référé judge in the protection of the human rights with an application of the horizontal dimension of the Convention.

Certainly, as is underlined in an excellent article of Dean Spielmann, "The application to relations between individuals of norms inscribed in the European Convention to safeguard the rights of man and of fundamental liberties has not failed to raise violent controversies which are far from being ended."⁴⁵ Nevertheless, Judge Pettiti rightly notes that, the Convention is an instrument of generalized protection and does not only take a position against the cold monster, the Leviathan de Hobbes.⁴⁶

From this perspective, the theory of the horizontal effect appears to be a key concept in conformity with the perception of the rights and

44. See F. SUDRE, LES GRANDS ARRÊTS DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME (PUF ed. 1997); V. BERGER, JURISPRUDENCE DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME (Sirey ed. 1996).

45. See D. Spielman, *L'Effet potentiel de la Convention Européenne des Droits de l'Homme entre Personnes privées*, 14 DROIT ET JUSTICE, (Bruylant Brussels ed. 1995).

46. See Pettiti, *supra* note 24, at 33.

obligations of human beings, one towards the other, advocated by René Cassin.⁴⁷

V. CONCLUSION

Protocol no. 11 of the European Convention of Human Rights will be coming into effect, with the perspective of a Europe made up of forty members, including a number of countries which were yesterday's victims of communist totalitarianism, destructive nationalisms or those subject to aggression fed by religious fundamentalism, racial or ethnic hatred. In this decade dedicated by the United Nations to human rights education, it is therefore, indispensable to reinforce human rights education and enforcement in order to increase civicism and to resist the assault of false prophets and those who preach intolerance. It is urgent to move forward and take action to insure the founding values of democratic life are the moving spirit and have a larger and larger place in Europe and other countries.⁴⁸

The immediate availability of the référé judge to victims of human right abuses combined with the horizontal effect of the Convention should provide a potent law enforcement weapon to extend the rule of law where it does not exist where unlawful action or violence is likely. The référé procedure and the human rights guaranteed in the Convention make a useful partnership in working toward "judicial peace".⁴⁹ The speed of action of the référé procedure brings the immediate remedy necessary in many human rights cases before the violations become the rule and as suggested earlier in this article, the référé procedure, despite its ancient roots, is a modern alternative dispute resolution system that helps avoid long and costly litigation and facilitates solutions which are acceptable to the parties which take into account the best interests of each party and the community. One can hope the universal nature of the

47. See R. Cassin, *De la Place Faite aux Devoirs de l'Individu Dans la Déclaration Universelle des Droits de l'Homme*, in *MÉLANGES OFFERTS A POLYS MODINOS*, (Pédone ed. 1968).

48. See P. DE FONTBRESSIN, *LA DÉMOCRATIE-DÉPASSEMENT* (Bruylant - Nemesis ed., Bruxelles 1997); PRIX JEAN FINOT, DE L'ACADEMIE DES SCIENCES MORALES ET POLITIQUES (1997). The theme of this book is reflected in its title - the need to surpass the shortcomings in the western democratic civil society by a return to fundamental human rights values. Roger Pinto, a leading scholar has described the author's message as follows: "The author brings to the reader profound philosophic and moral reflections, which are topical and original, on the weaknesses of our democracies. These weaknesses are due, paradoxically, to a lack of communication. Our western civilization has so many sophisticated technical means to transmit messages. But the content of these messages remains tragically incoherent, empty and without values. They do not effectively deliver new ideas necessary to rejuvenate the law and the obligations of men and the citizen. To overcome the incoherence of the present world, the author calls with fervor and realism to reestablish a consensual order for the rule of law."

49. See Draï, *preface*, *supra* note 4, at 5.

référé procedure will allow lawyers and judges to expand its field of action to all violations of human rights in France and in those other countries which may wish to incorporate this or a similar procedures into their legal system. Is it possible that the scope of the jurisdiction of the European Human Rights Court itself could be interpreted to apply or be expressly expanded to include procedures similar to the French référé procedures in cases of disputes between individuals?⁵⁰ Such developments, if they occur, should help avoid the feeling that law is violated everywhere and does not provide useful tool to reach a higher level of civilization, a sentiment often used by enemies of democracy to destabilize democratic societies.

The application by the référé judge of the European Convention on Human Rights, in the framework of relationships between individuals (horizontal effect) will hopefully provide important lessons in protecting human rights for everyone. By applying the Convention a référé judge can sanction an abuse where there is conflict of liberties and strengthen consciousness of the necessity of respecting the duties owed among human beings. The référé judge, the most efficient judge, can reinforce the conviction in citizens that law provides a path to reach the highest objectives in a democratic society.⁵¹

In a world searching for hope, and ideals in which to believe, like the judges of the European Human Rights Court in Strasbourg, the référé judge, the judge closest to human rights disputes has the power to rapidly find acceptable solutions to disputes, to reinforce morality in public and private life and to encourage civicism and voluntary action of citizens who believe in the necessity of reciprocal obligations between human beings necessary to guaranty their dignity.⁵²

50. See Baker & Fontbressin, *supra* note 4, at 52 which refers to the situation prior to the adoption of protocol n° 11. Although provisional measures were non-binding recommendations, they were in practice often effective.

51. See P. de Fontbressin, *l'Effet Horizontal de la Convention Européenne des Droits de l'Homme et l'Avenir du Droit des Obligations*, in LIBER AMICORUM MARC ANDRE EISSEN 157.

52. See *supra* note 47.