A PRIMER ON FRENCH CONSTITUTIONAL LAW AND THE FRENCH COURT SYSTEM

I. INTRODUCTION 367
II. COMPARISON OF THE FRENCH AND AMERICAN CONSTITUTIONS AND CONSTITUTIONAL LAW 368
III. CONSTITUTIONAL LAW, COMMON MARKET LAW, AND THE EUROPEAN HUMAN RIGHTS CONVENTION 374
IV. OUTLINE, STRUCTURE, AND FUNCTIONING OF THE FRENCH COURT SYSTEM AND COMPARISON OF THE FRENCH AND UNITED STATES CRIMINAL PROCEDURES 380
V. THE FRENCH RÉFÉRÉ PROCEDURE—A LEGAL MIRACLE? 385

I. INTRODUCTION

The four Essays reprinted below are derived from talks given on October 7, 1996, in the *Grande Chambre* of the French Supreme Court (*Cour de Cassation*) to the members of the International Academy of Trial Judges. The purpose of the talks was to give the visiting judges background on the French constitutional system by comparing it to the U.S. constitutional system. The program was arranged with the aid of Patrick de Fontbressin. Mr. de Fontbressin is a leading practitioner who also teaches law in France, as well as the assistant manager of the *Gazette du Palais*, a premier publisher of French legal materials.

The first talk was given by Professor Roger Pinto, who has had a life-long interest in U.S. constitutional matters. As a young man he visited the United States Supreme Court while it was in session with Justice Holmes on the Court. He wrote his thesis on the dissenting opinions of the U.S. Supreme Court, "*Des juges qui ne gouvernent pas, opinions dissidentes à la Cour Suprême des Etats-Unis (1900-1933).*" He has had a distinguished career in France as a teacher and practitioner. Included among his notable litigation experience is the case of the Temple of Preah-Vihear (1959-1962) before the International Court of Justice with former Secretary of State Dean Acheson. The case involved a Khmero-Thai boundary dispute which determined the ownership of the Temple.

The second talk was planned to show how basic normative rules similar to those found in the United States Constitution have been

supplied in Europe by European Union Law and the European Rights Convention. This talk was given by Professor Elizabeth Zoller who, in addition to teaching international and constitutional law in France, has taught at Cornell, Rutgers, Tulane, and Indiana Law Schools. She has published widely and is the author of an important book entitled *Peacetime Unilateral Remedies—An Analysis of Counter Measures*.

The third talk was given by former head of the Paris Bar Association, Bâtonnier Henri Ader. The purpose of this talk was to discuss the lower court structure in France and make certain comparisons with the U.S. court system, including the criminal courts. Henri Ader, in addition to being a leading practicing lawyer in the firm of Ader Jolibois et Associés, served as President of the Paris Bar Association from 1990 to 1991, one of the most important periods in the history of the French Bar—when the professions of Conseil Juridique and Avocat were merged into the unified profession of Avocat. Bâtonnier Henri Ader specializes in intellectual property law.

The fourth talk was given by Wallace R. Baker, a senior partner in Baker & McKenzie, a member of the Paris Bar and the Bar of the State of Illinois. His talk on the *référé* procedure was designed to illustrate that judge-made law, later incorporated into legislation, has also found an important place in the civil law system. In a time when the court procedures take so long, it is refreshing to examine the rapid, efficient procedure which the *référé* procedure purports to be.

II. COMPARISON OF THE FRENCH AND AMERICAN CONSTITUTIONS AND CONSTITUTIONAL LAW*

The French Supreme Court judges sit in this elegant, ornate, and quite sumptuous chamber. This is perhaps intended to make up for their lack of power. In France, except in the early stage of its constitutional history, the "judicial power" has not been vested in a Supreme Court nor in the other courts below.

The French monarchical Constitution of 1791, possibly under the influence of Article III, Section 1 of the U.S. Constitution adopted in

---

* Roger Pinto, Member of the Paris Bar 1930, Professor of Public and International Law 1936-84 Hanoi, and member of the Saigon Bar, 1939-46; 1937-41; Lille, 1946-55; Michigan, 1950 (visiting professor); University of Washington 1961-62 (visiting professor); Paris I, 1955-84; Professor Emeritus, Paris I, 1984-present). Member, then President, of the U.N. Administrative Tribunal 1982-91. Professor Pinto has authored many books and articles including LA LIBERTE D'OPINION ET D'INFORMATION EN DROIT INTERNATIONAL (Economica 1984).

1787, used language similar to the U.S. Constitution.[1] In Article 5 of Title III, "On Public Powers," the French Constitution provided: "The Judicial Power is delegated to judges elected . . . by the People." In addition, in Chapter V it is stated that: "Judicial Power shall, in no case, be exercised by the legislative body nor by the King."[2] But immediately after the demise of the monarchy, the first republican Constitution (1793) did not even mention the existence of a judicial power. However, the next Constitution (1795) contained a Title VIII, on "The Judicial Power."[3] From 1795 on, judicial power is mentioned only in the monarchical Constitutional of April 6, 1814;[4] then in the short lived imperial Constitution of April 22, 1815;[5] and much later in the Republican Constitution of 1848.[6] In the intervals, the judiciary is simply described as "The Courts" or "The Judicial Order" (e.g., in the Constitutions of 1799 and of 1802 and the constitutional Charters of June 1814 and of August 1830.)[7]

There is no mention of a judicial power in the Constitutions of the Second Empire (1852 and 1870).[8] The Third Republic (1870-1940) follows this example.[9] It is not actually a constitutional code, but the assemblage of a few laws having constitutional force, relating to the legislative and executive powers and their interrelations.

The Vichy Regime, a sort of Protectorate, under the final authority of the Nazi State did not, of course, recognize a judicial power.[10] After its fall, France returned for the first time after seventy-five

---

1. *See* CONSTITUTION DU 3 SEPTEMBRE 1791, *reprinted in* STEPHANE RIALS, TEXTES CONSTITUTIONNELS FRANÇAIS 6 (1982).

2. *See id.* tit. III, art. V, ch.. V.

3. *See* CONSTITUTION DU 5 FRUCTIDOR an III tit. VIII, *reprinted in* RIALS, *supra* note 1, at 24.

4. *See* Constitution du 6 Avril, 1814, *reprinted in* LES CONSTITUTIONS ET LES PRINCIPALES LOIS POLITIQUES DE LA FRANCE DEPUIS 1789, at 164 (L. Duguit et al. eds., 1952). Article 17 states, "the independence of the judicial power is guaranteed." *Id.* at 179.

5. *Id.* at 196 (Title V is entitled "Judicial Power.").

6. *See* CONSTITUTION DU 4 NOVEMBRE 1848, *reprinted in* RIALS, *supra* note 1, at 57.

7. *See* CHARTES CONSTITUTIONNELLES DU 4 JUIN 1814 ET DU 14 AOUT 1830, *reprinted in* RIALS, *supra* note 1, at 49.

8. *See* CONST. OF 1875, *reprinted in* MILTON H. ANDREW, TWELVE LEADING CONSTITUTIONS 48 (1931).

9. Post-Revolutionary France is usually divided into five sections: The First Republic (Sept. 22, 1792-May 18, 1804); the Second Republic (Feb. 26, 1848-Nov. 7, 1852); the Third Republic (Sept. 4, 1870-June 16, 1940); the Fourth Republic (Oct. 27, 1946-Oct. 4, 1958); and the Fifth Republic, which is where we are at present.

10. *See* CONST. OF 1946, *reprinted in* 2 AMOS J. PEASLEE, CONSTITUTIONS OF NATIONS 8 (1950); *see* CONST. OF 1958 [hereinafter CONST.], *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1996).

years to a written constitution in 1946, and then in 1958 to constitutional codes.[11] But these constitutional codes do not mention the Judiciary as a Power of the Republic. It is simply mentioned in weak language as a "Judicial Authority."

This summary shows a primary difference between American and French constitutional law. The American Constitution of 1787, though many times amended, is still in force. In the same period of time, France has had some twelve constitutions. This reveals a second important difference: in France, the Judiciary, except for a very short period of time, was not considered to be part of the state powers, as are the Executive and Legislative branches of the government. This is still the case under the French Constitution. However, the question is whether this difference from the U.S. Constitution is as significant as it appears to be at first sight. My answer is "no." It is well known that the U.S. Constitution has greatly changed since the days of the Founding Fathers. They would not recognize their baby! But the question remains, should they be able to?

It would be unrealistic to say that the same words written in the U.S. Constitution, more than 200 years ago, or even after the U.S. Civil War, are always read and construed today as they have been in the past. A Constitution is not a dead body. Even the reading of the French Constitution of 1958 has changed over the nearly forty years it has been in force. Strangely enough, the same debate rages now and again in France, as it does in the United States. On one side there are the strict constitutionalists who claim that the Constitution should be applied according to the intent of the founding fathers and according to the meaning of the language at the time the Constitution was enacted. Others point out that social and economic factors, and differing views of ethics necessarily govern the interpretation of laws in different periods of time.[12] Personally, I believe these views are most interesting from a philosophical and political point of view. But I would call them "red herrings." They are red herrings because they hide the true debate, which is how judges come to their decisions at a given point in time. As the case law of the U.S. Supreme Court shows, justices have been wont to apply one or the other methods of constructions when it suited the decisions they had to make.

---

11. *See* CONST. tit. VIII.

12. *See, e.g.*, ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 11-12 (1990) (unpublished Ph.D. Phil. Dissertation, University of Washington).

This is where our constitutional practices meet. France now has a constitutional institution, the "Constitutional Council," that may be called upon to determine the constitutionality of the acts of parliament. It is not part of the judiciary. The Constitutional Council applies methods of construction for interpreting the Constitution similar to those used by the U.S. Supreme Court.

Another difference between the French and the U.S. Constitutions is that the U.S. Constitution creates a federal state. Even though the U.S. Supreme Court may alter the balance of power between the States and the Union, it cannot abolish them nor destroy their fundamental powers. In France, no local entity has the constitutional status of U.S. states. The status of French local entities is governed by ordinary law.[13] On the other hand, no ordinary law may change the constitutional status of the State, i.e., to enter into a federal system or to allow a local entity to obtain the status of a member state of a federal union. To do so would require a change in the French Constitution. Thus, when a law was passed in 1991 that recognized the Corsican people as a living and cultural community, part and parcel of the French people, the Constitutional Council decided this part of the law was unconstitutional, even though this decision had no effect on the operative provisions of the law itself. Also, the operative provisions of the Corsica law were not deemed to infringe other articles of the Constitution. As the Constitution now stands, France could not join one or more states to form a federal government as in the United States. A revision of the Constitution would be necessary.[14]

As mentioned above, the judiciary in France is not considered to be a branch of the government.[15] But nevertheless, judges are to be, according to the Constitution, "independent" from the executive and legislative branches.[16] This has been a very slow process. Even now, when gradual changes have increased the independence of judges, there are still political pressures on them. When they persist, as seems to be the case now, they are accused of taking more power than the Constitution allows.

---

13. *See, e.g.*, Law No. 91-428 of May 13, 1991, J.O., May 14, 1991, 6318 (Portant statut de la collectivité territoriale de Corse); CONS. CONST. 1991, Dec. No. 91-290.

14. *See, e.g.*, THOMAS H. REYNOLDS & ARTURO A. FLORES, 2 FOREIGN LAW: CURRENT SOURCES OF CODES AND BASIC LEGISLATION IN JURISDICTIONS OF THE WORLD 6-8 (1996) (explaining the legislation and judicial system of France).

15. *See* CONST. tit. VIII, art. 64.

16. *See id.* tit. VII, arts. 61, 62.

Under the Constitution of 1958, which is still in effect, the courts are not given the power to pass upon the constitutional validity of laws.[17] Such power was given to a specific body, the Constitutional Council. The nine members of the Council are political appointees—three are appointed by the President of the Republic, three by the President of the Assembly, and three by the President of the National Assembly—for only one period of nine years.[18]

Even though the Constitutional Council is not part of the judiciary, its decisions bind the courts as well as the executive and legislative branches.[19] The Constitutional Council studies the constitutionality of laws before they are promulgated and published by the President of the Republic. Within a short period—fifteen days from the date the law adopted by the Parliament has been officially communicated to the President of the Republic—a request may be submitted to the Constitutional Council either by the President of the Republic, the President of the National Assembly, or by a total of sixty members of Parliament.[20] If the law is declared unconstitutional by the Council, it cannot be promulgated and published except within the limitations decided by the Council.[21] This *a priori* procedure has its advantages. The constitutionality of the law is determined before it is made enforceable. Therefore, there is more security in legal relationships.

On the other hand, if no request is made to the Constitutional Council within the time limit allowed, the law is deemed to be constitutional. Thus, at least for the time being, no court of law may refuse to enforce it on the grounds of unconstitutionality except if it is contrary to France's treaty obligations.[22] Strangely enough, the constitutionality of presidential executive orders are not within the jurisdiction of the Constitutional Council. Ordinary courts of law have jurisdiction to decide whether presidential orders conform to the Constitution.[23]

The French President of the Republic is elected by universal vote—direct vote of the citizens.[24] Accordingly, it is quite possible for

17. *See id.* tit. VII, art. 56.
18. *See id.* tit. VII, art. 62.
19. Article 62 mentions no requirements that would deny an ordinary citizen from being appointed.
20. *See* CONST. tit. VII, art. 61.
21. *See id.* tit. VII, art. 62.
22. *See id.* tit. VI, arts. 55, 62.
23. *See id.* tit. VII, art. 61.
24. *See id.* tit. II, art. 6.

the President of the Republic to be elected by a political majority different from that prevailing in the Senate and National Assembly. This situation is familiar to Americans. It is not uncommon in the United States for the President and Congress to be of different political parties. For example, for more than two years, President Clinton, a Democrat, has worked with a Republican Congress. In the United States, both branches continue to act under their constitutional power whether or not the President is of the same party as the majority of Congress. In France it is different. When the political party of the President is also the party of the National Assembly and of the Senate, things may or may not go smoothly. At the moment, the General Assembly and the Senate are of the same political tendency as the President, but they do not always agree. However, when the President has a majority in Parliament he generally has the last word. He can dismiss the Assembly and call for new elections. But what happens when the President and the Assemblies belong to different parties? In that case, the French President defers to the majority in Parliament. That is to say, he exercises his powers insofar they are written in the Constitution, but he must appoint a Prime Minister who governs in accordance with the wishes of the majority in Parliament. So the system is quite different from the one in the United States. The French President exercises such powers which are expressly given to him alone in the Constitution, and the parliamentary majority governs through the Cabinet.[25] On the other hand, the President has the power to dismiss the assembly and to call for an election, while the Assembly cannot dismiss the President.[26] This is a system which has not given such bad results in recent years. At least twice there was a President of one party and an Assembly of the opposition party. They managed to work together amicably.

The French system is neither a presidential system like the U.S. system, nor a parliamentary system, like in the U.K. Nevertheless, it is a workable system which has not given rise to too many problems regardless of whether the President has a majority in the assembly. According to the Constitution, decisions of the President must be countersigned by a minister.[27] Of course, if the minister belongs to a different party, this can cause problems or delays. However, there are

25. *See id.* tit. V, art. 49.
26. *See id.* tit. II, art. 12.
27. *See id.* tit. II, art. 19.

certain areas where the President can make decisions alone.[28] For example, there is an article in the Constitution which allows the President to put constitutional changes to a popular vote without the assent of a minister.[29]

Another article gives the President absolute power in a period of extreme urgency.[30] This allows the President to govern the country by presidential orders. These orders do not require the consent of the Prime Minister nor of Parliament during the period of urgency. In addition, during this period, the President may also act without taking existing laws into account.[31]

III. CONSTITUTIONAL LAW, COMMON MARKET LAW, AND THE EUROPEAN HUMAN RIGHTS CONVENTION†

Two approaches can be made to this subject because it is very broad.

First, one may ask whether common market law and the European Human Rights Convention (Convention) are part of a European constitutional law. If they are, then they would stand above national constitutions. Interestingly enough, this is rather unlikely as there are no supremacy clauses in the community treaties or in the European Convention.[32] However, in 1986, the Court of Justice of the European

---

28. *See, e.g., id.* arts. 15 (commander of the armed forces), 17 (right of pardon), 52 (negotiate and ratify treaties).

29. *See id.* tit. II, art. 11.

30. *See id.* tit. II, art. 16.

31. *See id.*

† Professor Elizabeth Zoller received her Doctorate in Law from the University of Paris II. Her thesis *La bonne foi en droit international public* (Good Faith in Public International Law) was published in 1977 with a grant from the French Ministry for National Education. In 1980 she earned her *Agrégation de droit*. In France, she taught at the Universities of Angers, Nantes, and Strasbourg before joining the University of Paris II in 1995. In the United States, she visited Cornell Law School (1984-1985), Rutgers University Law School (1986-1988), Tulane University Law School in 1994, and Indiana University Law School at Bloomington (1995 and 1996).

Elizabeth Zoller has authored five books and over thirty articles addressing various issues in international and comparative law, foreign relations law, and European law and human rights. Among her publications in English are the books *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984) and *Enforcing International Law Through United States Legislation* (1985).

Currently, Ms. Zoller is Professor of International and Comparative Law and the University of Paris II. She is the Director of the American Law Center (*Centre de droit américain*). She teaches and researches in the field of comparative constitutional law.

32. *See, e.g.*, STEPHEN WEATHERILL, CASES AND MATERIALS ON EEC LAW 45 (1992). "Nowhere in the [EEC] Treaty is it possible to find an explicit commitment to the idea that Community law shall be supreme, nor to the notion that it shall be directly effective." *Id.*; *see also*

Community referred to the 1957 Rome Treaty, which created the common market, as a "basic constitutional charter."[33]

True, in some respects, the European Community Treaty and the Convention provide norms like a Constitution does. In addition, the terms of reference used by the Court of Justice are interesting because they show the evolution of the nature of the European treaties. However, one should be cautious with this approach, whether it is the Rome Treaty or the Convention, because they are treaties and not constitutions. Despite the vocabulary used by the Court of Justice, these laws are made by the signatory states,[34] not by the people, and thus the treaties are not constitutional law.

The second approach is the classical approach, where one studies the impact of European law on national constitutional law and, in particular, on French constitutional law. European law is not constitutional law in the sense that one may not refer to it as the federal constitution. For example, the Convention has no effect on constitutional law in France—it has not modified or affected the French Constitution at all. However, French Constitutional law gives effect to the Convention in the domestic legal order by virtue of Article 55 of the Constitution, which provides that "treaties or agreements properly ratified or approved have from the date of their publication superior authority to law provided that the agreement or treaty in question is applied by the other party."[35] On the basis of this article, the Convention is part of French law and is given superior authority over national law. However, the Convention's status is below the Constitution; it does not have constitutional status in the French legal order. To illustrate this point, let us examine the case relating to law on the voluntary termination of pregnancy.[36] This case was decided by

---

JOSEPHINE STEINER, TEXTBOOK ON EEC LAW 54-56 (3d ed. 1992) (discussing the incorporation of human rights into Community law and the primacy of EEC law over national constitutions).

33. *See, e.g.*, Case 294/83, Partie Ecologiste 'Les Verts' v. European Parliament, [1986] E.C.R. 1339, 2 C.M.L.R. 343 (1987); JOHN T. LANG, THE COMMON MARKET AND COMMON LAW 34-35 (1966). "The EEC Treaty is a framework or constitution rather than a set of rules." *Id*. at 34.

34. The Preamble of the Treaty Establishing the European Economic Community states:

> His Majesty The King of the Belgians, the President of the Federal Republic of Germany, the President of the French Republic, the President of the Italian Republic, Her Royal Highness of Grand Duchess of Luxembourg, Her Majesty The Queen of the Netherlands . . . [h]ave decided to create the European Economic Community . . . .

EEC TREATY, *reprinted in* WEATHERILL, *supra* note 32, at 14.

35. CONST. art. 55.

36. Judgment of May 24, 1975, Cass. ch. mixte, [1975] D.S. 497. The Cour de Cassation held that all judges of France must refuse application of a regularly promulgated French law which conflicts with the law of the EEC. *Id.*

the Constitutional Council of the European Community in 1975. Here, the Council declared that treaties, no matter how important they were with regard to their substance and human rights, were not part of a nation's constitutional law.[37] The Council reasoned that Article 55 of the French Constitution,[38] which gives superior authority of treaties over laws, "is limited to the field of application of the treaty and dependent on a condition of reciprocity which vary according to the conduct of the signatory state to the treaty and the moment when respect of this condition is to be determined."[39] So the Convention is not really a part of constitutional law with respect to the issue of abortion.

Let us address the effect of Common Market law on French constitutional law. In community law and, in particular, in the Rome Treaty, we do not have a supremacy clause as in the United States Constitution.[40] From the very beginning, the question of the authority of the Rome Treaty over domestic law has been subject to great controversy in France. However, in *Costa v. E.N.E.L.*,[41] the Court of Justice clearly asserted the supremacy of European law over national law.[42] Of course this decision caused great difficulties because national courts and states were not ready to accept the superiority of European law over national statutes. In this landmark case, the Court of Justice held that European law, i.e., the Treaty law, plus the regulations made in pursuance of the treaty, were to be given a superior effect to domestic laws and would prevail over national statutes. The Court decided that "community law cannot, because of its special original nature be overruled by domestic legal provisions, however framed, without being deprived of its character as community law."[43]

That reasoning in *Costa v. E.N.E.L.* is interesting because the Court of Justice of the European Communities found the superior effect of community law in community law itself.[44] The Court thus gave the impression that, because of the special and original nature of community law it prevails over domestic statutes and domestic law.

---

37. *See id.*
38. *See* CONST. art. 55.
39. *See id.*
40. U.S. CONST. art. VI, § 2.
41. Case 6/64, Costa v. Ente Nazionale per l'Energia Elettrica (E.N.E.L.), 1964 E.C.R. 585, 1964 C.M.L.R. 425. *See also* WEATHERILL, *supra* note 32, at 45.
42. *See, e.g.*, STEINER, *supra* note 32, at 45-46. "[A]s far as the Court of Justice is concerned *all* EEC law, whatever its nature, must take priority over *all* conflicting domestic law, whether it be prior or subsequent to Community law." *Id.* at 45.
43. *See Costa*, 1964 E.C.R. at 585.
44. *See id.* (referring to art. 189 of the EC Treaty).

The supremacy problem arose in the French national context in the 1970s. In 1975, the court held in the *Cafe Jacques Vabre* case[45] that community law was superior to national statutes. Procureur General Touffait argued that community law should be superior in effect to domestic law in France by virtue of the special and original nature of community law. But the *Cour de Cassation* refused to follow him as to the legal basis of the authority of community law in the French legal system, and decided that community law was to be given superior effect over national state law by virtue of Article 55.[46] So this gave a French constitutional basis, not a European community law basis, for the superior authority of community law over French law.

Another interesting factor relating to the integration of community law in French national law and the resulting impact on French constitutional law is the Maastricht Treaty. The Rome Treaty was adopted in 1967,[47] and the Maastricht Treaty in 1992.[48] The Maastricht Treaty enlarged considerably the competence of the European Community and actually transformed it into a European Union. It also added to the Common Market (now called the internal market) the ambitious goals of the Economic and Monetary Union (the EMU) and political union of the member states. So the powers of the European Union became greater, and of course, this involved more transfers of sovereignty from the national states to the union. All member states in the European Union encountered constitutional nightmares regarding the compatibility of the Maastricht Treaty with their national constitutions.

In Germany, for instance, there was great concern about democracy, especially whether democracy would be practiced by the European Union. In Great Britain, the predominant concern was the effect of the Treaty on parliamentary sovereignty. In Denmark, where the Maastricht Treaty was first voted upon, the concern was about the rights of the citizens. In France, because of its constitutional traditions, because of what the French people have been fighting for since the French Revolution in 1789, the concern was national sovereignty.

---

45. Administration des Douanes v. Société "Cafes Jacques Vabre," Judgment of May 24, 1975, Cass. ch. Mixte, 1975, 6 Cour de cassation, 1975 2 C.M.L.R. 336.

46. *See id.*

47. *See, e.g.*, JÜRGEN SCHWARZE, THE ROLE OF THE EUROPEAN COURT OF JUSTICE IN THE INTERPRETATION OF UNIFORM LAW AMONG THE MEMBER STATES OF THE EUROPEAN COMMUNITIES 9 (1988). "The EEC and Euratom Treaties were signed on 25 March 1957 in Rome and came into force on 1 January 1958." *Id.*

48. *See, e.g.*, RICHARD CORBETT, THE TREATY OF MAASTRICHT xxi (1993) (detailing chronological events leading up to the signing of the Treaty on European Union in Maastricht).

I do not wish to enter into a complicated explanation about national sovereignty because it is one of the most complex, one of the most obscure, and one of the most controversial constitutional concepts in French law. Initially, national sovereignty concerns made it impossible for France to enter the European Union and to accept a common foreign and security policy. The political debate became very acute among politicians; eventually, the President of the Republic, at that time François Mitterand, submitted to the Constitutional Council the question of the constitutionality of the Maastricht Treaty.

Article 54 of the Constitution provides that "if the Constitutional Council shall declare that an international commitment contains a clause contrary to the Constitution, the authorization to ratify or approve this commitment may be given only after amendment of the Constitution."[49] The Constitutional Council decided that there were some clauses in the Maastricht Treaty that were unconstitutional.[50] Therefore, France revised and amended the Constitution in order to be able to ratify the Treaty in 1992.[51] Subsequently, the Treaty was ratified and came into force.[52] Meanwhile, the Constitution was also amended to add a new title, Title XIV: "The European Communities and the European Union,"[53] in which Article 88 was inserted to provide that "France agrees to the transfer of powers necessary for the establishment of the European economic and monetary union as well as for the fixing of rules concerning the crossing of external frontiers of the member states of the European Community."[54]

The Constitutional Council found that there were three provisions in the Maastricht Treaty that were unconstitutional: The first was the provision relating to the monetary union because it was a transfer of monetary sovereignty.[55]

The second was the provisions enabling non-French citizens to participate in local European elections.[56] In France there is not yet dual

---

49. CONST. art. 54.

50. *See* Decisions of Apr. 9, 1992, Sept. 2, 1992, Sept. 23, 1992, D. 1995, 775, CONS. CONST. (Fr.), *in* Les grandes décisions du Conseil constitutionnel (8th ed. Dalloz 1995), paras. 26-27, 43, 45, 49-50; *see also* Decision No. 92-308, Decision by the Constitutional Council of April 9, 1992 *Re:* Treaty on European Union, 93 I.L.R. 337 (CONS. CONST. 1993).

51. *See* Law of June 25, 1992, O.J. June 26, 1992 (Fr.). The legislation passed on June 25, 1992, reported in the *Journal Officiel de la République Française*, amended the French Constitution in order to bring it into accordance with provisions of Community law. *See id.*

52. *See* Decision of Apr. 9, 1992, *supra* note 50, at 779, art. 1.

53. *See* Law of June 25, 1992, *supra* note 51, art. 5.

54. *See id.*

55. *See* Decision of Apr. 9, 1992, *supra* note 50, at 779, paras. 43, 45.

56. *See id.* at 778, paras. 26-27.

citizenship as it exists in the United States.[57] Community citizenship exists under community law. This is a rather empty concept at the moment, but it means that community citizens may vote in the European and local elections, but not in the national elections. For example, a German citizen living in France may exercise voting privileges as a community citizen. As a community citizen, this German citizen may vote for the European Parliament, and may also vote for the district; however, this German citizen may not vote for the French national constitutional body. The Constitutional Council found this provision unconstitutional.[58]

Third, the Council found unconstitutional the provisions regarding common policy on visas because the abandonment of the rule of unanimity from January 1996, with the introduction of qualified majority voting, could affect national sovereignty.[59] In order to avoid conflict with community law, France revised its Constitution on these three points.[60]

Now that the French Constitution has been revised, the major question is whether these provisions of the Maastricht Treaty form a part of French constitutional law. The question for the moment is not completely solved in the eyes of many constitutional scholars. I think that this will certainly give rise to litigation and constitutional debates in the forthcoming years.

To conclude, I would like to emphasize the rather awkward situation of French constitution law. France is in an ongoing process of constitutional transition. Obviously, France is increasingly moving towards more European integration. There are still some very nationalistic trends in France that want to keep this process under control and not give full effect to the Maastricht Treaty. The continuing evolution towards a unified Europe will require further adjustments and other elements will need to be taken into consideration.

---

57. In the United States an individual is both a citizen of a state and a citizen of the Federal Union.

58. *See* Decision of Apr. 9, 1992, *supra* note 50, at 778, para. 27.

59. *See id.* at 779, paras. 49-50.

60. *See* Decision No. 92-30, 93 I.L.R. 337, 352 (CONS. CONST. 1993) (implementing the text of the new Article 88 to the Constitution).

IV. OUTLINE, STRUCTURE, AND FUNCTIONING OF THE FRENCH COURT SYSTEM AND COMPARISON OF THE FRENCH AND UNITED STATES CRIMINAL PROCEDURES**

One of the main differences between the U.S. legal system and the French legal system, whether it be the federal or state courts, is that France has two kinds of courts. One court is reserved for litigation where one party is the State, a region (*province*), or a district (*department*).[61] In such a case, the ordinary judge is not competent. He has no jurisdiction. These cases are sent to a judicial hierarchy of administrative judges which in the lowest court is called the Tribunal Administratif (Administrative Court); the middle, or the Court of Appeals (Cour Administrative d'Appel); and then the Administrative Supreme Court (Conseil d'État or the Council of State).[62]

The second type of court is made up of judges of the judicial order who make decisions in civil and criminal matters where the government is not a party.[63] In addition, in France there is a third type of jurisdiction. The Constitutional Council is not composed of judges of the "judicial order."[64] It has nine members; three of them appointed by the President of the Republic, three by the President of the Senate, and three by the President of the National Assembly.[65]

Judges in the judicial order in France are divided in two groups. After law school, one may decide not to become a lawyer but a judge.[66] There is a competitive examination to enter the school for judges, which is located in Bordeaux. The course of study for judges lasts two or three years. At the end of these studies, the State appoints the graduates as judges. Thereafter there are two choices. If the candidate wishes to

---

** Henri Ader, Diplômes d'études supérieurs de Droit Privé et de Droit public, Faculté de Droit de l'Université de Paris 1949; Institut d'Etudes politiques de Paris 1950; LL.M. Harvard University 1951. Mr. Ader was the Chairman of the Paris Bar Association in 1990-91 and is a Senior Partner at Ader Jolibois et associés in Paris, founded in 1959. In the past, Mr. Ader has served as a member of the Paris Bar Council, the National Council of the French Bars (Chairman of the Ethical Committee, 1993-94), and the Deontology Commission of the Federation of European Bars. He also serves as Vice President of L'Association Française pour l'Histoire de la Justice and L'Association du Palais Littéraire et Musical, as well as teaching "Rules and Ethics of the Legal Profession" at École de Formation du Barreau in Paris. In 1993 and 1994, he served as President of the French Bars' funds (President de l'Union Nationale des Caisses D'avocats).

61. *See, e.g.*, CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 49 (1993).
62. *See, e.g.*, RENE DAVID, ENGLISH LAW AND FRENCH LAW 96-98 (1980).
63. *See, e.g.*, DADOMO & FARRAN, *supra* note 61, at 49.
64. *See, e.g.*, DAVID, *supra* note 62, at 75.
65. *See id.*
66. *See id*. at 50.

render judgments the candidate may become a "sitting" judge, or the candidate can decide to become an attorney for the State. Unlike their counterparts in the United States, French lawyers do not represent both public entities and private persons. In France, the attorneys for the state are called Procureurs de la Republique and, at the higher level, Procureur General.[67] These attorneys are judges but not ones that render judgments. Instead, they are responsible for defending the public policy in French courts, both civil and criminal.[68] There is a great difference between those two, although some may move from one category to the other. At the beginning of his career, the present Procureur General at the Cour de Cassation (the highest court) was a judge rendering judgment. Then he changed, to become a Procureur General.

There is a great difference in the independence of the judiciary authority in France and in the United States. Once you have been appointed as a judge in France, the State cannot remove you, as in the U.K. or Germany. If you have been appointed Chief Justice of the Court of Appeals, you remain there until the age of retirement unless you agree to be appointed to a higher court. However, the attorney for the State, the Procureur de la Republique, can be moved by the Ministry of Justice. A question currently being asked in France now is: whether these judges should be so dependent on executive power.

The basic court in the system, the Lower Court, is called the Tribunal de Grande Instance.[69] This is where everything starts. The decision in that court can be appealed to the Court of Appeals, which has the same kind of judges. There are twenty-two Courts of Appeals in France, including Courts of Appeals in the Pacific Ocean, the Caribbean, and the Mascareignes.[70] Then there is the Cour de Cassation, which is a very peculiar aspect of the French system. This is not really a court where you can make appeals from the Court of Appeals' judgments.[71] Instead, the Cour de Cassation decides if the law has been respected by the Court of Appeals. If the Cour de Cassation determines that the law has not been respected, it does not judge the case again, but it breaks (*casser*) the judgment of the Court of Appeals. The Cour de Cassation sends the parties back to a different Court of Appeals, which renders a new

67. *See id.* at 51.
68. *See id.*
69. *See id.*
70. *See id.* at 46.
71. *See, e.g.*, DADOMO & FARRAN, *supra* note 61, at 83.

judgment on the case.[72] Then, after the decision in the second Court of Appeals, one may still retake the case to the Cour de Cassation. If this is so, the Cour de Cassation decides, with all chambers sitting together. This decision is final.[73]

France also has, like other European countries, special courts for matters not within the jurisdiction of the Tribunal de Grande Instance. The most important of the special courts are Commercial Courts. The judges in the Commercial Courts need not be lawyers; they are usually persons elected by the business community. No judge from the judicial order sits in these courts.[74] Such judgments may be appealed to the Court of Appeals.[75]

Another kind of special court is the labor court. There, elected persons serve as judges—one half of them elected by employees' unions and the other half by employers' organizations.[76] With two judges of each type, there is sometimes a deadlock. In such a case, a judge comes from the Lower Court and decides with them. Since they are then five judges, there is always a majority.

Besides these courts, there are the lowest courts, the Tribunals d'Instance. These deal with day-to-day disputes, such as those between a tenant and the owner of an apartment.[77] These disputes were formerly referred to as *Juge de Paix*.[78] Judges in these courts are judicial order judges who sometimes move up to higher courts.

There are also the French criminal courts. For these courts, what is generally referred to in the United States as "criminal matters" is divided into three categories. The smaller one, which we call "contravention," is equivalent to a misdemeanor. The Tribunal de Police (Police Court) has jurisdiction of these matters. These penal actions are punishable by fines under 20,000 francs. They are argued before the Judge of the Police Court.[79]

---

72. *See id.* at 86.
73. *See id.*
74. *See, e.g.*, DAVID, *supra* note 62, at 145.
75. *See id.*
76. *See, e.g.*, CHARLES SZLADITS & CLAIRE M. GERMAIN, GUIDE TO FOREIGN LEGAL MATERIALS: FRENCH 19 n.60 (2d rev. ed. 1985).
77. *See id.* at 18 n.60.
78. *See id.*
79. *See, e.g.*, CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 521 (Fr.), *reprinted in* GEORGE A. BERMANN ET AL., FRENCH LAW: CONSTITUTION AND SELECTIVE LEGISLATION 9-110 (Transnational Juris Publications, Inc. ed., 1994).

According to Article 381, the courts handling penal matters at the next level, the Tribunal Correctionnel, have three judges.[80] One president and two others decide the case which is being argued. The French call that type of penal infraction which is halfway between serious and small ones, *delits correctionnels*. These offenses can be punished by either jail or a fine equal to or higher than 20,000 francs.[81]

Finally the court which has jurisdiction over more serious crimes, such as murder, is the Cour d'Assises. This court is composed of three judges from the Court of Appeals and a jury, as in the United States. The jury in France is composed of nine laypersons elected by the electors. The Cour d'Assises makes decisions by a majority vote of the twelve.[82] It is very important to understand the difference between the United States system and the French system. The case is pleaded in the Cour d'Assises like it is pleaded before a judge and a jury in the United States. But in France, the jury does not concern itself with the Law. Once it is finished, the jury and the judges decide together.[83]

When this system was first put in place, many were skeptical about having the three judges and the jury deliberating over the case together. Today, the criticism has faded because the influence of the professional judge in the discussion has proved to be a good thing. This system of joint deliberation was introduced in World War II. Before World War II the jury deliberated alone, as in the United States, and would decide whether or not the accused was guilty. If the jury returned a guilty verdict, the three judges would then decide what the punishment would be. After World War II, when the law was changed so they would deliberate together, many lawyers from all over France were against it. They argued that it was unfair because once the attorney for the defendant (who may end up on death row, because at that time the death penalty still existed) had finished his pleadings, there would be an additional oral argument in secrecy, in the judges' chambers. Defense attorneys feared that the three professional judges would try to impress the jury. The last fifty years have shown that distrust of this system is not well founded. The secrecy of deliberation, of course, should never be breached. However, jurors have revealed that the judges generally influence the jury to follow the law, and that the judges are generally more lenient than the jurors.

---

80. *See id.* art. 381.
81. *See id.*
82. *See id.* art. 359.
83. *See id.* art. 356.

The second great difference is that in the United States victims may not claim damages in a criminal trial.[84] This is not so in France. In fact, the French people were surprised to see that O.J. Simpson was not liable for damages in the criminal trial. In France, there are three active parties, not only two like in the United States. They are: the state's attorney, the lawyer(s) for the defendant, and the lawyers for the victims—who are there not to ask for punishment, but to recover monetary damages.[85]

The same court, the *tribunaux correctionnels*, hears the three parties and determines (1) the issue of guilt, (2) punishment, and (3) the amount of money to be allotted to the victims.[86] Until 1982, defendants risked their neck. Now they risk going to jail for life, since France no longer allows capital punishment. Nevertheless, the lawyer for the defendant has two adversaries.

As the lawyer for the victim or the family of the victim, it is quite difficult not to step outside the proposed scope of your case. You hope that the jury will find the defendant guilty and you also try to prove him guilty. This same system applies before the Cour d'Assises, where the victim can also recover damages.

Another great difference between the French system and the U.S. system is that, according to Article 312 of the code of penal procedure, the accused must answer questions.[87] Witnesses, accused parties, and victims can be asked questions which they are obliged to answer.[88] French people were surprised to see that O.J. Simpson or Jack Ruby (the man who killed Lee Oswald) were not obliged to answer questions.[89] It may be a democratic way, but it is not possible in France. In France, Mr. Simpson would have been obliged to answer the questions posed by three lawyers: his lawyer, the State's Attorney, and the victims' lawyer seeking civil damages. (Of course, in America the victims' lawyers are not present during the criminal trial.)

The presiding judge can suggest that the parties, the jurors, or one of the two other judges ask questions through him. Only the presiding

84. *See id.* art. 3.
85. *See id.* art. 424.
86. *See* C. PR. PÉN., art. 460.
87. *See id.* art. 312.
88. *See id.*
89. *See* U.S. CONST. amend. V.

judge can interrogate the witnesses, the victims, or the parents of the victim.[90]

Then, the jury decides whether or not the defendant is guilty. If the jury returns a guilty verdict, the victim's lawyer may express an opinion on the judgment and request damages.[91] In the event that the defendant is not convicted, the victim may still argue for damages. In this case, the court must decide without the jury. The jury leaves, and the three judges start a new trial to decide if the defendant should be required to pay damages even though the person has not been found guilty.

There is an important debate going on in France about self-defense (*legitime defense*). This debate centers around whether people are entitled to use deadly force to defend themselves. Under the present rule, these cases are heard before the Cour d'Assises and the jury decides the issue. In Normandy and Lorraine, jury's have shown a tendency towards not guilty verdicts for defendants charged with killing a burglar. In a recent case from Verdun involving a homeowner who killed a burglar, the defendant (the homeowner) was declared "not guilty" and released. The courtroom was overflowing with spectators that agreed with the jury because they could see this situation happening to them. In fact, when the parents of the victim (the burglar) asked the judge for damages the crowd was so offended that they started to shout and abuse the victim's lawyer. Finally, it reached a point that the defense lawyer had to protect the victim's lawyer from being jostled by the crowd.

Another interesting difference between the French and United States systems is that in France a defendant cannot plead guilty. If he does, the trial simply goes forward as usual.[92]

V. THE FRENCH RÉFÉRÉ PROCEDURE—A LEGAL MIRACLE?††

In this Essay, I will attempt to indicate why some observers think the French Référé Procedure should be considered a legal miracle. A référé decision is a provisional order by a judge entered within a short

90. *See id.*

91. *See id.* art. 371.

92. *See* RICHARD VOGLER, FRANCE—A GUIDE TO THE FRENCH CRIMINAL JUSTICE SYSTEM 73 (1989).

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

period of time after a written complaint and, usually, a written answer.[93] The judgment is subject to immediate execution and only a short time period (fifteen days) is allowed for appeal.[94] Articles in the Code of Civil Procedure provide four major areas where the general référé procedure applies.[95] By general, I mean not one of the specific cases where recourse to the référé judge is provided in the law.[96] Reference in laws providing for recourse to a référé procedure has happened more and more often[97] because it is probably the most efficient path to get rapid justice in the French system.

The référé procedure applies in four situations. The first is urgent matters.[98] The second is for the purpose of conserving situations and conserving and investigating facts.[99] The third is in cases of disturbances of public order.[100] The last is the legal obligations which are not subject

93. For those interested in a more detailed study of this procedure and a comparison with similar procedures in European and International courts, see Wallace Baker & Patrick de Fontbressin, *The French Référé Procedure—A Legal Miracle?*, 2 U. MIAMI Y.B. INT'L L. 1 (1993). For a description of French civil procedure before the reforms of the Code of Civil Procedure in the 1970s, see PETER E. HERZOG & MARTHA WESER, CIVIL PROCEDURE IN FRANCE 238-39 (1967). "[P]arties may make an application for provisional relief to a single judge sitting *en référé*." *Id*. at 238. "A party making an application must summon his opponent to the hearing by a regular *ajournement* (summons), indicating the date when the hearing is to be had, and, in summary fashion, the grounds on which the application is based." *Id*. at 238-39.

94. HERZOG & WESER, *supra* note 93, at 239. "The decision of the judge in a *référé* case is called *ordonnance* (order). Its execution is not stayed by an appeal." *Id*. "Time to appeal is only two weeks." *Id*.; *see also* NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 490(3) (8th ed. Petits Codes Dalloz 1995) (Fr.).

95. The four major areas are respectively: (1) urgent matters, N.C.P.C., *supra* note 94, arts. 808, 848, 872; (2) conserving situations and investigating facts, *id.* arts. 809(1), 849(1), 873(1); (3) disturbance of public order, *id.* arts. 809(1), 849(1), 873(1); (4) *référé* provisional payment, *id.* arts. 809(2), 849(2), 873(2). *See also* MARGREET B. DE BOER ET AL., ACCESS TO CIVIL PROCEDURE ABROAD 162 (Henk J. Snijders ed. & Benjamin Ruijsenaars trans., The Netherlands, Kluwar Law International 1996) (noting that the four areas of *référé* application each have three separate articles that denote the different tribunals that are able to grant relief).

96. *See, e.g.*, HERZOG & WESER, *supra* note 93, at 229. "In some cases—including disputes concerning the execution of judgments, certain disputes concerning the *compulsoire* procedure by which the production of notarial documents may be compelled, and several other instances—use of this *référé* procedure is specifically prescribed by law." *Id*.; *see* CODE CIVIL [C. CIV.] art. 1244 (93d ed. Petits Codes Dalloz 1993) (Fr.) (French law specifically provides for the use of the *référé* procedure in the stay of proceedings against the debtor). *See generally* 2 DALLOZ, REPERTOIRE DE PROCEDURE CIVILE ET COMMERCIALE 616 (1956).

97. *See, e.g.*, HERZOG & WESER, *supra* note 93, at 230. "The *référé* procedure is used in so many situations and its scope is so constantly expanded by French practitioners that no complete list can be given." *Id*.

98. *See id.* at 238-39; *see also* DE BOER ET AL., *supra* note 95, at 162; N.C.P.C., *supra* note 94, arts. 808, 848, 872.

99. *See* N.C.P.C., *supra* note 94, arts. 809(1), 849(1), 873(1).

100. *See id.* arts. 809(2), 849(2), 873(2).

to serious dispute,[101] also known as the *référé provision* (provisional payment).[102] A very common use of the procedure is to secure the nomination of a court-appointed expert to investigate facts where litigation is likely.[103] This occurs prior to actual litigation on the merits, but results in a finding of the facts by the expert whose report is usually accepted by the judge when the litigation on the merits occurs later. It is sort of a trial of the facts in advance of the litigation to see if litigation is worthwhile. Such a procedure often results in settlement. In France, there is no jury in civil cases, so the expert performs the same role that the jury performs in the U.S. That is, the expert is a factfinder and a neutral expert for the court where special expertise is considered necessary.

Another common situation lies in this fourth category—cases where obligations are not subject to serious dispute. In this situation, former Chief Justice Pierre Bellet wrote "that it is not widely known how much the référé provision is the creation of recently retired Chief Justice Pierre Drai of the Court de Cassation."[104] Articles 809 and 873 of the Code of Civil Procedure[105] illustrate this provision; in addition, it has been described as the "star of the show" by a leading scholar, Professor Perrot.[106] It is the star because of the increased use of this procedure from the 1980s to date. In recent years, three-quarters of the référé procedures in the commercial court, and nearly two-thirds of the référé proceedings of all commercial courts were référé provisions. Moreover, this procedure has been used often in construction disputes because this type of litigation takes so long. The référé procedure has also been extended to contracts and torts cases.

Urgency is not a condition for this type of application. The primary use of the référé procedure is to secure a provisional payment, thus overcoming delaying tactics by defendants who have no serious defense.[107] The référé judge in such a case orders a provisional payment. Sometimes, if appropriate, he can require the plaintiff to guarantee that he will pay it back if the litigation on the merits reverses the result of the

---

101. *See id*.

102. *See id*.; HERZOG & WESER, *supra* note 93, at 229. Herzog indicates that the "*tribunal de grande instance* [may] grant provisional relief in *référé* proceedings." *Id*.

103. *See, e.g.*, HERZOG & WESER, *supra* note 93, at 230.

104. Pierre Bellet, *Preface* to P. BERTIN , LES RÉFÉRÉS DES ANNÉES 1980 (Gazette du Palais 1980).

105. N.C.P.C., *supra* note 94, arts. 809, 873.

106. Roger Perrot, *Introduction* to LES INCIDENTS DE PROVISION 314 (Gazette du Palais 1980).

107. *See id.* (discussing the use of the provisional payment option by an accident victim to overcome the defendant's delaying tactics).

initial référé procedure. As you can see, the key element of the référé procedure is speed. One of the greatest criticisms of the legal system is its slowness. It may be that slowness in certain cases has advantages, in that it lets the parties cool off and relax so that settlement may become easier later. This was the case when Saint-Louis inaugurated a forty-day cooling off period before a new private war could be started to avenge a killing.[108] On the other hand, there are many situations where speed is of the essence, and as Gladstone said, justice delayed is justice denied.

A condition for getting a rapid decision is, of course, having a judge rapidly available. This is a characteristic of the référé procedure. However, there is a limit to the speed of the proceeding: sufficient notice must be given to the other side and reasonable time granted to prepare a defense.[109] In addition, the référé judge should, of course, be careful not to intervene in a case of great complexity because a quick decision could be arbitrary.

Besides speed, another advantage of the référé proceeding, if it works correctly, is that it is less costly. It is a shortcut. Often by securing a provisional order, the parties see which way the wind is blowing and they will settle. Former Chief Justice Grandjean of the Paris Commercial Court claims that in all the years he sat in the commercial court, it was seldom if ever that a suit on the merits was filed after an initial référé decision was granted.

The third characteristic of the référé procedure is that the most experienced and able judge is responsible for entering these orders; generally, either the Chief Justice of the court or his delegate is involved. Often a provisional order of the référé judge succeeds in circumscribing and limiting the litigation. Justice Drai has characterized litigation as a "pathological breakdown in the social relations."[110]

Lastly, the référé procedure has another feature in that it gives the judge in the French legal system more power. Judge Bellet wrote "he is a dynamic judge who always goes to the absolute limits of his potential. He creates law without ever saying so and he is forever exploring new solutions. In a word he saves the honor of the legal system."[111]

---

108. *See* GEORGES BORDONOVE, LES ROIS QUI ON FAIT LA FRANCE, LES CAPETIENS SAINT LOUIS 246 (Editions Pygmalion 1984).

109. *See* N.C.P.C., *supra* note 94, art. 486.

110. Pierre Drai, *Introduction* to Baker & de Fontbressin, *supra* note 93.

111. *Id.*