Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from the Right to Effective Court Protection. A Comparative Approach

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Abstract: Interim protection in remedies against the public administration has proved to be one of the key issues in today’s justice. In effect, the slowness of judicial proceedings means that final judicial decisions cannot guarantee the rights and interests of the litigants any more, because those decisions arrive too late. Thus, effective judicial protection is at stake. On the other hand, public administrations have traditionally disposed of privileges, one of the most important of them being the so-called executive character of administrative acts. The national debate on the equilibrium between both principles—effective judicial protection and the executive character of administrative acts—needs to be exported to the Community law context. Community law should therefore learn from national experiences, as other legal orders, such as the Spanish one, have done, turning to comparative law in order to improve their own model of interim protection.

I Introduction

The different legal mechanisms available to mitigate the effects of the most serious problem faced by legal systems today—the slowness of justice—are collectively referred to by the term interim protection (‘summary proceedings’, ‘provisional orders’). ‘Instant’ responses need to be found to the problem of the slowness of judicial proceedings, which has particularly negative ramifications from an economic, political and social perspective. In administrative disputes, as we already know, the issue has come to a head rather late in the day, because the public authorities have always enjoyed a privileged position in traditional litigation (the privilege of executory decisions). Nonetheless, the development of social rights, the increasing importance of fundamental rights (particularly in relation to procedural rights), and sociological issues relating to the acceleration of time in life have brought about the development of such instruments in the majority of national and international legal systems. Moreover, the use of interim measures has changed significantly since they were first introduced, partly because they have had to adapt to changes to the very notion of administrative

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law, and more particularly, as a result of the evolution of the concept of the State. In
the new State model, which embodies the effects of industrialisation, as well as the more
recent restructuring of public authorities, public interest suffers from an inability to
identify precisely what makes disputes between the State and the individual strongly
casuistic and their classification complicated. This evolution has also taken place in the
European Community since its establishment.

The question of the presence of interim measures in a European system of justice is
of particular relevance to the case law of the Court of Justice of the European Com-
munities, which began with the Factortame\(^1\) case, and was followed by the Zuckerfab-
rik\(^2\) and Atlanta\(^3\) cases. Several research inquiries have been conducted into this case
law: our inquiry focuses in particular on the demands made by the Court of Justice on
domestic judges in their role as Community judges actively enforcing the interim pro-
tection framework developed by the Court of Justice and Court of First Instance, in
cases where appeals are admitted directly. This model must be compared with national
systems, in order to become more familiar with the elements that could be used for the
creation of a ‘European administrative law’ on this subject. If we consider adminis-
trative law as the body of law that gives effect to constitutional law, then the starting
point for our inquiry lies in the determination of the constitutional basis of this estab-
lished practice itself.\(^4\) As is the case with domestic law, this basis in Europe corresponds
to the conflict arising between goods, interests, or different values: in current debate
focusing on the future of Europe, mention should be made of the fact that the interim
measures come into play in the conflict arising between the need to guarantee the effec-
tiveness of law (especially in administrative law, of which a very considerable part today
derives from Community law) and the effectiveness of rights, in other words, the rela-
tionship between the power of public authorities and the rights of citizens.\(^5\)

This inquiry therefore seeks to contribute to the determination of the constitutional
status of interim measures in a European context, by comparing different legal systems:
the French, German, and Spanish legal systems, as well as Community law and the law
of the Council of Europe. We shall commence with several introductory comments relat-
ing to terminology and methodology. Thereafter, we shall focus on the central tenet of
our thesis: identifying the constitutional basis of interim measures deriving from the
right to effective judicial protection. Lastly, we shall present the model for interim

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\(^1\) Decision of 19 June 1990, The Queen v Secretary of State for Transport, ex parte Factortame Ltd et al.,

\(^2\) Decision of 21 February 1991, Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest/Hauptzollamt

\(^3\) Decision of 9 November 1995, Atlanta Fruchthandelsgesellschaft mbH et al. (I) v Bundesamt für Ernährung

\(^4\) As Professor S. Flogaitis wrote in 1996, ‘today, the most important issue to be taken into consideration,
is to know whether the constitutional requirement, to the extent that it exists in a considerable number of
States, and is imposed by the case law deriving from the Factortame case before the European Court of
Justice, whereby legal protection is available for everybody, has been totally satisfied’. See S. Flogaitis,
Mesures conservatoires et effet suspensif dans la procédure administrative, in K. Kerameus (ed.), General
reports presented at the XIVth International Conference on Comparative Law (Athens, 31 July–6 August

\(^5\) This statement must be qualified in the light of what has already been stated at the outset. In fact, author-
ities do not only have police powers at their disposal, they are also in charge, as is well known, of the poli-
cies required by the principle developing social rights. This perspective, in which public interest and private
interests are sometimes difficult to separate, and where public interests often have competing aims, is one of
the elements that will be taken into consideration in more detail later in our research.
measures developed in the Spanish legal system, as an example of the *paradigm for the gradual evolution of legislative texts*, or rather, comparative law’s contribution to the evolution of law.

II The Notion of ‘Interim Measures’: Consequences for the Legal Nature of the Institution

In comparative law, the first question asked of any legal mechanism is related to its legal nature. In fact, it is important to find out what is hiding behind the terminology in order to determine its legal consequences and only then can we really make comparisons with equivalent mechanisms in other systems. By comparing legal systems, it can be deduced that there is a common link between them: the concern over the slowness of the justice system. Nonetheless, it should be remembered that, at times, divergent responses have been considered as having been reached by equivalent methods in academic writing, whereas at others, ‘urgently’ required actions and time-frames for procedures, have been discarded. In the following paragraphs, we shall attempt to define the legal categories of interim measures available, in order to determine precisely the object of this inquiry, and which of these elements are fundamental to creating a common system in this field.

In this inquiry, the term ‘interim measures’ is used to refer to instrumental measures that may be granted by judges during proceedings to protect the goods or interests of parties, and to avoid final decisions being reached too late. Such measures are therefore characterised by their instrumental and provisional nature, and in certain cases, their homogeneity with the executory measures determined by a judgment. However, the terminology used in the different national legislations to define these procedures varies from country to country. In international or supranational law—including Community law and the law of the Council of Europe—the terms used are based on formulae imported from national legal systems. It would also be interesting to examine the extent to which the terms imported are accompanied by the national dogma surrounding the concepts employed.

In France, for example, as is well-known, the expressions used to refer to interim measures referred to, prior to the new Administrative Justice Code that took effect in January 2001, are terms such as ‘procédures d’urgence’ (‘summary proceedings’)—including ‘référé’ (provisional order)—and ‘sursis à execution’ (‘stay of execution’). Today the concept that encompasses all other measures, and can be adopted to overcome problems of time-consuming proceedings, is that of the ‘référé’. Unfortunately, here we run immediately into our first technical problem, in that the term ‘référé’, by contrast to interim measures applied in other legal systems, includes genuine accelerated or summary procedures, and as such, they are not merely instrumental, as was

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7 Hence, we are following the approach adopted by the classical research in Italian academic circles, which currently represents the generally accepted view of interim measures, as was pointed out by Advocate General Tesauro in his submissions in the Factortame case. See, in particular, P. Calamandrei, *Introduzione allo studio sistematico dei provvedimenti cautelari* (CEDAM, 1936).
8 For all these terms, see R. Chapus, *Droit du contentieux administratif* (8th edn) (Montchrestien, 1999) at 1510.
mentioned above. We must therefore ask ourselves whether or not we can really speak
of a veritable common concept of provisional orders, or alternatively, would it be
preferable to create distinctions between different legal systems, between true interim
measures and summary procedures?

In German law, there are two types of interim measures, notably, stays of execution,
known as ‘aufschiebende Wirkung’ and provisional orders, known as ‘einstweilige Anord-
nung’.\footnote{In relation to the German framework for the treatment of administrative disputes, including interim
measures, through a comparison with the French system, see M. Fromont, La justice administrative française
er rapproche de la justice administrative allemande, in Gedächtnisschrift für Alexander Lüderitz (C. H.
Beck, 2000) at 173 et seq.} In both cases, the Statute of the Administrative Courts (Verwaltungsgerichtsor-
dnung)\footnote{Act of 21 January 1960, most recently amended in 2001 (law of 13 July 2001).} foresees two distinct legal frameworks, which have been distanced even further
from one another by case law. Differences also exist in relation to their scope of appli-
cation, which means that we can comfortably refer to the existence of a whole range
of parallel legal frameworks that are considerably divergent from one another. More-
over, by virtue of the different treatment afforded by the condition ‘fumus boni iuris’ or
‘moyens sérieux’ (serious grounds), one could even argue that the distinction is identi-
cal to the one found in French law between interim measures that are strictly instru-
mental, and summary proceedings, which entail shorter deadlines. Finally, by virtue
of the influence exerted by the Constitutional Court \[Bundesverfassungsgericht\], which
has been criticised by some authors because of its interventionist policies in this area,\footnote{J. Berkemann, ‘Das “verdeckte” summarische Verfahren der einstweiligen Anordnung des Bundesverfassungsgerichtes’, (1993) JZ at 161; by the same author, ‘Das Bundesverfassungsgericht und “seine” Fachgerichtsbarkeiten. Auf der Suche nach Funktion und Methodik’ (1996) DVBl at 1028. For a more
general opinion see J. Schmidt, ‘Der Einfluss des Bundesverfassungsgerichts auf das Verwaltungsprozess-
recht’, (2001) 92 Verwaltungs-Archiv, at 443.} interim measures in administrative law have rather burdensomely undergone a trans-
formation into the establishment of veritable summary procedures. As in French law,
we should ask whether or not the instruments developed in fact correspond to the
definition of interim measures as such, because only the latter conform to the legal
framework developed for them.

In Spanish law, the Administrative Jurisdiction Act of 1998\footnote{Act 29/1998, of 13 July.} refers solely to ‘interim
measures’ (‘medidas cautelares’), and as such, it follows the approach proposed by aca-
demic thought and case law. Previously, the Act of 1956\footnote{Act of 26 December 1956.} only took account of stays
of execution (‘suspension’), but in practice, the growing complexity of its application
meant that judges increasingly relied on the subsidiarity principle, thus relying on civil
procedure legislation and Community law, in order to supplement a system that proved
to be inadequate.\footnote{This activity has received varied consideration by academics. Certain authors such as Eduardo García de Enterría welcomed this evolution of case law derived from an anachronistic law, which was developed in a political context that was far from democratic. See E. García de Enterría, La batalla por las medidas cautelares, 2nd edn (Civitas, 1995). Others, such as Requena López point out that the former system was never declared unconstitutional by the Constitutional Court, and that it is not the judge’s role to substi-
tute itself for the legislator. T. Requena López, ‘Sobre una tendencia (iuspublicista) “minimalista” del
poder de la Administración’, (1997) 32 Revista Andaluza de Administración Pública, at 11.} Now, the general term ‘medidas cautelares’ lays down two distinct
legal procedures depending on the type of claim presented by the applicant, which to
a certain extent resembles the German regulation. In practice, it would seem apposite to talk of genuine interim measures in the first case, whereas, in the second, it is more appropriate to talk of summary procedures. Lastly, the proliferation of frameworks for interim measures through special legislation without their being related as such by a common doctrinal link, would tend to confirm this thesis.

Under Community law, the ECSC Treaty set up a framework for interim measures, which is contained in a single provision (as is commonplace in international jurisdictions). The 1957 Treaties contained two different articles (today, these are Articles 242 and 243 of the EC Treaty), distinguishing between stays of execution and other interim measures. According to certain authors, this twofold system remained faithful to the distinction between public and private cases, which the Court of Justice has been obliged to take on board. For the purposes of comparison, in order to gain a better understanding of the legal nature of these measures, it is enough to simply take into consideration the literal value of the Treaties, the Statute of the Court of Justice and the Procedural Rules governing the Court and Tribunal of First Instance, on account of the fact that the official languages of the Treaties differ from each other. Even if the procedures before the Court of Justice, in particular those relating to interim measures, seem to have been imported from French law, this is obviously not accompanied by an obligation to assume the content of the French institution. From a national perspective, the interim measures of each State have been constructed according to the linguistic requirements of that State, although, in all probability, the so-called ‘metropolitan’ laws impose their outlook on things. The difficulties of attempting to

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15 Article 136 of the Act foresees a specific framework for interim protection in relation to the administrative judge's power to grant an injunction and in cases of battery (these powers of the administrative judge are granted by virtue of Arts 29 and 30, in relation to which the petitioner's claims are governed by Art 32). Here, the interim measures applied for are granted automatically, unless there are serious grounds to deny their adoption, or for reasons of public interest, or where such a measure would seriously perturb third parties. Nonetheless, the general rule for interim measures established by Art 130 is that a measure should not be adopted unless the necessary conditions foreseen by this article (particularly if its adoption would cause irreparable damage, accompanied by an assessment of the interests at issue) are met (according to the law, the interim measures shall be adopted ‘solely’ in these circumstances). This rule is applied, a contrario, to the framework set forth by Art 136, to appeals foreseen under Art 31: appeals as a result of abuse of powers, declaratory actions, and those ordering repayment of the damage caused, including disputes relating to liability.

16 Article 39 ECSC Treaty ‘Actions brought before the Court shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested decision be suspended. The Court may prescribe any other necessary interim measures’.

17 See M. Slusny, ‘Les mesures provisoires dans la jurisprudence de la Cour de Justice des Communautés européennes’, (1967) 1 Revue Belge de Droit International, at 127, especially pp. 131 and 132. However, the evolution of Community law could also be a reflection of the evolution of national law. During the post-war period, Germany was in the process of establishing its own legal system, including a statute relating to its administrative jurisdiction, which included a framework for interim measures. The statute, which took effect in 1960, made a distinction between stay of execution and other interim measures, as has been explained. On the other hand, France was also in the process of changing its own system for administrative disputes, and in particular interim measures. In 1955, the Act of 28 November invested the Administrative Courts of First Instance the competence to adopt provisional orders (a power previously enjoyed only by the Conseil d’Etat (Council of State), which were different from the traditional stays of execution, which today however, apply to a completely different legal framework. This distinction was incorporated into the 1957 Treaties, perhaps thanks to the very active involvement of the Dean Vedel in the Commission responsible for the drafting of the Treaties.

18 For a discussion of this claim, see J. A. Carrillo Salcedo, La recepción del recurso contencioso-administrativo francés en la Comunidad Europea del Carbón y del Acero (Instituto García Oviedo, Universidad de Sevilla, 1958).
understand and compare these measures commence with the diverse cultural heritage underlying the different linguistic constructions.  

The Council of Europe does not pose the same set of problems as Community law, because there are only two official languages, English and French. Article 39 of the European Court of Human Rights Regulation refers to ‘mesures provisoires’ in French and ‘interim measures’ in English. The Committee of Ministers’ Recommendation No. R (89) 8, 13 September 1989, relates precisely to ‘protection juridictionnelle provisoire’ (in French) and ‘provisional court protection’ in English. As such, the difficulties in this sphere relate more to ontological questions, because the legal effects of the interim measures in the law of the Council of Europe still need to be clarified. In fact, there are three types of interim measures in this legal system. First, there are those that can be taken by organs for the protection of human rights within the framework of the Convention (the Court of Human Rights and, formerly, the Commission). There are still a number of grey areas surrounding the use of this power, which has been the subject of research, in particular since Soering20 and Cruz Varas21 cases. In marked contrast to the legal framework applicable under Community law, this system is not in principle binding upon Member States, although it could become a controversial issue.22 Second, there are interim measures, which form part of the right to effective protection by the courts themselves, in accordance with the rights acknowledged by the Convention. Here, a further comment must be made. According to traditional practice of certain Member States, provisional court protection falls within the remit of the right to an effective remedy before a national authority, in other words, that the Court of Human Rights could develop into a ‘constitutional statute’ (linked to human rights, and thus to the very foundations of social and political organisation in societies) for interim measures based on Articles 6 and 13 of the Convention. Although Article 6, as stated above, only makes express reference to criminal and private law, the Court of Justice has extended its application to administrative law in certain cases.23 Third, the Council of Ministers of the Council of Europe, as has already been stated, has developed a

19 However, as has already been stated ‘although Community law uses legal concepts created by national laws, the meaning of these concepts is not necessarily the one given by its transposition into domestic law’. See A. Calot Escobar, ‘Ordenamiento jurídico comunitario y mecanismos de tutela judicial efectiva. La necesaria desconfianza ante la falsa claridad de las normas comunitarias (los malos entendidos de un derecho plurilingüe)’, in Ordenamiento jurídico comunitario y mecanismos de tutela judicial efectiva, (Consejo General del Poder Judicial/Gobierno Vasco, 1995) at 278.


21 Decision of the European Commission of Human Rights, of 7 December 1989; Decision of the European Court of Human Rights of 20 March 1991, which does not follow the criteria laid down by the Commission.

22 In relation to the legal effect of these provisional orders adopted by the institutions of the European Convention on Human Rights, as well as the connection with the right to an effective remedy by a national authority, see R. St. J. MacDonald, ‘Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights’, (1992) 52 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, at 703. Mention should be made of MacDonald’s introductory comments, which state that: ‘The question of the scope of the interim measures power of the organs established by the European Convention on Human Rights has an important impact on the degree to which the guaranteed rights can effectively be protected’. Also, in relation to effective remedies before a national authority, see G. Cohen-Jonathan, ‘De l’effet juridique des “mesures provisoires” dans certaines circonstances de l’efficacité du droit de recours individuel: a propos de l’arrêt Cruz Varas de la CourEDH’, (1991) 3 RUDH, at 205.

23 The application of Article 6 exclusively to criminal and civil law has been widely criticised, particularly since this limitation was due to an equivocal linguistic interpretation. See, recently, R. Streinz, ‘Primär- und Sekundärrechtsschutz im Öffentlichen Recht’, (2001) 16 Deutsches Verwaltungsblatt.
recommendation aimed at Member States, in which it proposes a model for interim protection in administrative disputes, even if ‘none of the provisions can be interpreted as preventing a State from going beyond the minimum standards, or implying that a limitation to the guarantee has already been recognised by a member State’. Even if this recommendation is not binding, the fact that this instrument exists, indicates at any rate that it is accepted that there is common nucleus to the legal mechanism that is the object of our inquiry.

The terminological comments that have just been made introduce the legal instrument that is the object of our research. We have identified the plurality of urgent measures amongst different legal systems, although it cannot be maintained that all of them can be considered as interim measures strictly speaking. At this stage we are not in a position to provide a detailed classification of those legal instruments: for the time being, at any rate, these comments will provide a sufficient basis with which to understand the magnitude of the problem and its effects on our inquiry.

III The Constitutional Status of Interim Measures in Europe

The starting point for a comparative study of interim measures in Europe is to define their constitutional basis, by which we mean their fundamental legal basis, whether they are embodied by ‘Constitutions’ as such, or foreseen by other legal instruments that create fundamental norms for a certain political community of law, or again present in so-called constitutional traditions or unwritten constitutions. The ultimate (and initial) justification for interim measures must be drawn from this source, which is either permitted or required by a fundamental norm of political society.

This status cannot be identified in Europe on an a priori basis. However, a comparative study of the existing status in each legal system, whether national or supranational, may be useful in defining such an instrument. After conducting this comparative inquiry, we shall attempt to demonstrate that a constitutional basis for interim measures already exists in Europe, albeit in a rather embryonic form, before making a number of lege ferenda proposals for the future. By so doing, we shall propose a model, which will hopefully contribute in a certain way to the current debate surrounding the definition of a European Constitution.

A The Right to Effective Court Protection

The right to effective court protection is a central tenet for the development of interim measures. In fact, a brief survey of the legal systems examined in this inquiry reveals

24 See point n. 10 of the Preamble.
25 We prefer to use the term ‘effective court protection’ as opposed to ‘access to justice’. This choice is based on the omni-comprehensive character of the former in relation to the latter, as well as the fact that the concept of ‘access to justice’ is open to many interpretations. In fact, in certain texts, the term, ‘access to justice’ refers to one of the rights that can be deduced from the right to an effective court remedy, whereas, in others, it seems synonymous with the latter. See, in particular, Volume 13, number 1 of the Revue Européenne de Droit Public, which deals with access to justice in an exhaustive manner. On the basis of the different national reports and final comparison, it becomes apparent that the term is perceived in a pluralistic manner. Also M. Cappelletti and B. Garth raise the issue of the terminological problems in the introduction to the book, M. Cappelletti (ed.), Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report, vol. 1, (Giuffrè, 1978) at 3s. These authors use the term ‘access to justice’ synonymously with the term ‘effective court protection’ in the sense we stated previously (see op. cit. at 6).
that several of them have recognised it expressly, whilst others have done so tacitly. The results of the comparison will be set out in the following paragraphs, but we will first explain precisely what we mean by the expression ‘the right to effective court protection’, even if this can only be done in an instrumental manner.\textsuperscript{26}

The right to effective court protection is expressly recognised in Germany and Spain by similarly defined constitutional provisions, Article 19.4 Grundgesetz\textsuperscript{27} and Article 24 Constitución Española, respectively. In Spain, Article 24 of the Constitution is subdivided into two paragraphs, whereby the first refers to the right of appeal or right to access to justice, and the second embodies the principle of the right to a fair trial, in other words, a trial with all the necessary procedural guarantees.\textsuperscript{28} The application and development of the above-mentioned general principles have taken place through the constitutional courts of the respective States, the Bundesverfassungsgericht in Germany, and the Tribunal Constitucional in Spain.\textsuperscript{29}

In France, the situation is more complex from a doctrinal perspective, since the right to effective court protection is not expressly recognised by the Constitution.\textsuperscript{30} Although judges have made decisions on subjects relating to these legal issues,\textsuperscript{31} the question of the right to effective court protection has still not been treated as a whole.\textsuperscript{32} On the one hand, judges have cleared up ambiguity concerning the interpretation of certain principles—the fundamental principles recognised by the laws of the Republic [principes fondamentaux reconnus par les lois de la République] and general principles of law [principes généraux du droit], whose hierarchy and legal value vary from case to case.
case. On the other hand, there is still a distinction between the right of access to justice and the right to defence, without, as such, any clear indication of the differences between their legal status.

The framework offered by French law for the constitutive rights of effective court protection is similar to that of the European Convention on Human Rights. In fact, the Convention sets forth the right of appeal in Article 13, and the right to a fair trial in Article 6(1). Both are constitutive elements of the right to effective court protection, even if the institutions of the Convention—the Court of Human Rights, and formerly the Commission—had considered that the requirements of Article 13 should be interpreted less strictly than those of Article 6, and therefore they have been absorbed by the latter. Article 6(1) exercises a sort of *vis attrattiva*, which includes all the procedural guarantees, both in relation to the initial question of access to justice and at subsequent times during the proceedings.

In Community law, however, there is a tendency to limit the analysis of the right to effective court protection to specific instances. This analysis relates to the direct effect of directives, or to theories concerning effective court protection from an organic perspective, where individual elements are of little or no importance.

Only in a number of specific cases the question has been treated strictly from the point of view of the protection of individuals. We advocate an eclectic position, where organisational aspects of the State (in particular in relation to the development of social rights), and the rightful protection of individual rights must be taken into consideration. Striking a balance between the two tendencies would be achieved using a mechanism that strives to ensure that the right decision will be taken in relation to each set of circumstances. This technique, as well as the assessment of the interests involved, is therefore based on the necessity of striking a balance between the competing constitutional principles concerned.

### B The Constitutionalisation of Urgency

Time has always been considered a crucial factor in the organisation of society, and one that is of fundamental importance to the basic institutions of every legal system. Cultural divergence relating to the conception of time is considerable, as is reflected in the everyday relations amongst citizens, as well as between citizens and the State. Lastly,

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34 See P. M. Mabaka, *op. cit.* note 30 supra, at 343.

35 In this respect, references are abundant. See, for example, D. Curtin, ‘Directives: The effectiveness of judicial protection of individual rights’, (1990) 27 CMLR at 709s.

36 This is particularly the case of interim measures, above all in the first stage of development of a European model, following the *Factortame* decision, where this subject contributed to consolidating the Community’s legal system.


38 This was the argument advanced by the Council of Europe in its Recommendation on interim protection, cited above.
the different interpretations attributed to the concept of ‘time’ further contribute to and colour the arguments surrounding this topical issue.39

The effect of time is widely known to judicial procedure: the establishment of deadlines for the performance of specific acts (which at times are not respected), nullity and prescription and time limits, delayed judgments, the need to retain the object of procedures, and the impatience generated by appeals systems, etc. Even if, generally speaking, guarantees are granted to protect the parties to a legal action, the law must nevertheless be able to offer rapid solutions, particularly where they prove to be indispensable. The democratisation of procedures is undoubtedly a favourable development (thanks to common instruments such as free legal aid, insurance to cover the costs of legal action, which exists in certain countries, the removal of certain procedural obstacles, etc.). However, legislators should also consider the problems generated by these situations if they are going develop to genuine responses to counter such detrimental effects.

The situation created by the acceleration of time and the growing importance of provisional remedies during proceedings has lead to certain authors in a number of Member States to assert that urgency has become, both in law and fact, a constitutional necessity.40 In other legal systems, such as France, urgency is not in itself considered to be a constitutional necessity, but it nevertheless constitutes one of the pivotal aspects of recent reforms to administrative jurisdictions.41 In Spain, although there are no clear ‘principles’ in this respect, there are certainly a number of interesting references, both in the text of the constitution42 and in certain laws43 relating to the public authorities or administrative jurisdiction.

The previous considerations are necessary to identify a normative context for interim measures, which is in turn based on a social and economic context. It should be remembered that the urgency, and the way it is manifested, have a ‘special’ position reserved

39 In this context, a lot of research and work still remains to be done, as commented G. Dupuis in 1987, in the introduction to P.-L. Frier’s book, L’urgence (LGDJ, 1987), where he stated that ‘as regards time, on the other hand, we should turn the clocks back to zero—and pull up our socks, if I can use such an expression. Admittedly, administrative time merits attention and the IFSA has even envisaged organising a conference on this issue, but legal thought still ignores this fundamental theme’ (at II). On the subject of the importance of ‘space’ and ‘time’ in the context of an eventual harmonisation of procedural rights in Europe, see M Storme, Le droit judiciaire: e diversitate unitas?, (1997) Justices, at 69 et seq. On the slightly more specific subject of time in procedural law, see J.-M. Coulon and M.-A. Frison-Roche, Le temps dans la procédure. Actes du colloque organisé le 5 décembre 1995 par le Tribunal de Nanterre et l’Association française de philosophie du droit (Dalloz, 1996).

40 This is the case, for example, in Germany. See K. Finkenburg and K. P. Jank, Vorläufiger Rechtsschutz im Verwaltungsstreitverfahren, 4th edn (C. H. Beck, 1998) at 3 and 5.

41 In this respect, we have already stated our position in an earlier inquiry. See S. de la Sierra, ‘En busca del tiempo perdido. Breves apuntes sobre la reciente reforma de la justicia administrativa en Francia’, 2002(116) Revista Española de Derecho Administrativo, at 557.

42 The constitutional pillars that form the basis of administrative law in Spain are Arts 103 and 106 of the 1978 Constitution. Article 103 lays down the criteria governing the activities of public authorities, and Art 106 subjects this activity to the jurisdiction of the courts. One of the principles governing the activities of the public authorities under Art 103, and which must also be respected through the control of this activity, is effectiveness. Here, mention should be made of the fact that certain authors approximate the time phenomenon by departing from the principle of effectiveness. F. Jullien, Traité de l’efficacité (Grasset & Fasquelle, 1996).

43 The public administrations Act (Act 30/92, of 26 November; as amended by law 4/99, of 13 January) reiterates in Art 3, the constitutional principles contained in Art 103 of the Constitution. The administrative jurisdiction Act (Act 29/98, of 13 July) includes in its preamble a paragraph that explains the reforms made in relation to the preceding law of 1956, which were adopted because of the problems caused by the time in the procedures.
in the legal system, even if it is not absolute. This means that a certain degree of balancing must always take place between the effects of the ‘time’ principle and other considerations. This reflection becomes more complicated in cases where the ‘time’ principle manifests itself in different ways, such as efficiency of public authorities or the effectiveness of the protection afforded to individuals.

C Interim Measures and the Right to Effective Court Protection

The consolidation of interim measures as a necessary legal instrument in guaranteeing effective court protection took place (in Europe) in the second half of the twentieth century, particularly thanks to the case law of its Constitutional Courts. Although this mechanism turned out to be necessary to mitigate the negative effects of the privileged position of executory decisions, and despite the fact that appeals against administrative acts did not have suspensory effect, it was applied rarely in countries such as France and Spain, because of the weight of tradition, which prevented it from evolving. Moreover, from the perspective of social rights, the development of policies that were particular to this type of institution required a mechanism that provided rapid intervention but at the same time without unjustified suspensory effects. Finally, although an analysis of the historical origins of effective protection does not fall within the scope of this inquiry, it is obvious that its relevance has changed quite significantly since World War II. In fact, as is widely known, in the post-war period, a movement emerged to create a new model for the protection of human rights, by establishing national supervisory mechanisms (this is how constitutional jurisdictions arose with direct competences in this area), but also international ones (in particular, the European Convention on Human Rights). In this sense, the right to effective court remedies fell on fertile ground, and was thus able to develop.

The legal systems analysed in this inquiry vary significantly from one state to another, in relation to the extent to which they consider interim measures as an integral part of the right to have effective court protection. As such, only the German and Spanish legal systems have established an organ for constitutional control with direct competence to scrutinise the protection of individual rights. In France, as is widely known, the constitutional control of statutes is generic and a priori in nature, and there is no such mechanism as the Verfassungsbeschwerde or the recurso de amparo, in other words, a specific system for the protection of fundamental rights before a constitutional jurisdiction.

Undoubtedly, however, certain aspects of the French system have lead to ordinary jurisdictions (in this context, understood as non-constitutional jurisdictions) ‘identifying’ constitutional principles. On the other hand, situating interim measures within the context of right to effective court protection presents a number of problems from a doctrinal perspective, even if, in practice, its consequences are similar. In fact, we reiterate that, in France, there is no such notion as the unified treatment of the right to effective court protection. Rather, several of its ‘manifestations’ have been identified from norms that have differing values in terms of the hierarchy of norms. Interim measures, and more precisely, stays of execution, have been accepted by the Constitutional Council (Conseil Constitutionnel) as part of the right of defence.\textsuperscript{44} If we treat the right of defence as part of the ‘effective court protection’ supra-concept, as we have already

\textsuperscript{44} Décision n° 86-224 DC, of 23 January 1987, Conseil de la Concurrence.
suggested, then the stay of execution (its existence, and probably certain of its elements) would form part of this right. Moreover, on account of the increasing importance of other interim measures throughout the whole scenario of administrative litigation, we feel that the Constitutional Council should be given the opportunity to make its own evaluation on this subject, and thereby reiterate that interim measures belong to the right to effective court protection. The French legislator, for its part, did not feel that there was any need to create a link amongst these institutions, in its reform of interim measures that has been in force since January 2001, yet European commentators, and even French ones for that matter, would have congratulated them, had they done so.

Elsewhere, in Spain and Germany, interim measures have existed since case law was first instituted before their Constitutional Courts, in the form of a right to effective court protection. It should be noted, however, there is one particular area of divergence between the systems that could affect the uniformity of a future common constitutional law in Europe. In Germany, as stated above, according to the interpretation given by constitutional case law, Article 19.4 grants an unequivocal right to effective court protection, regardless of the multifarious manifestations of this right. In Spain, on the other hand, Article 24, paragraph 1, foresees the right of appeal or access to justice, whereas paragraph 2 of the said provision includes the right to a fair trial, including all its related procedural guarantees, or to use French terminology, the right of defence. Whereas, in France, the Constitutional Council were to declare that stays of execution (and perhaps even all interim measures) are constitutive of the right of defence, the Spanish Constitutional Court understands that interim measures form part of the first of the rights recognised under the umbrella of Article 24, in other words, the right of appeal. Even if, from a doctrinal perspective, the right to effective court protection can be considered as a fully-fledged right in itself, it is also true that certain jurisdictions have developed a varied approach through case law, depending on each of its manifestations. This is precisely the case of the European Convention on Human Rights, the one that is relevant for this inquiry. In this international Treaty, the right of appeal, and right to defence or right to a fair trial, are set forth in separate articles, standing apart from one another, and each of which has also undergone a rather different evolution through case law. Such difficulties could be overcome, however, if we were to take account of the Court’s dicta, as stated above, according to which Article 6 could be exercised as sort of *vis attrattiva* in relation to Article 13.

In Community law, we must differentiate between two distinct spheres. On the one hand, there are the interim measures adopted by the Court of Justice or the Court of First Instance in relation to direct appeals. This model has specific characteristics, the nature of which has evolved in similar fashion to the court jurisdictions of the

45 We are obliged to share the opinion of J.-M. Février, in this respect, who in his excellent book, *Recherches sur le contentieux administratif du sursis à exécution* (L’Harmattan, 2000), asserts that ‘it can be seen that the right to effective court protection is henceforth widely acknowledged by the Constitutional Council, which does not necessarily mean that this includes the procedure for stay of execution’ (p. 141).

46 In relation to the constitutional status of interim measures in France, see, in addition to the earlier cited works by J.-M. Fervier and H. Labayle, S. Tsiklitiras, ‘Le statut constitutionnel du sursis à exécution devant le juge administratif’, (1992) 3 RDP, at 679. In Spain, a great deal of energy has been devoted to the evolution of French law on this subject and several attempts have been made to incorporate certain techniques or institutions of French law into the Spanish legal system. Eduardo García de Enterría took account of these new developments, especially in his book *La batalla por las medidas cautelares. Derecho Comunitario Europeo y proceso contencioso-administrativo español*, op. cit. note 14 supra.
Communities themselves. On the other hand, as is well known, the Court of Justice has developed its case law within the context of the referral of preliminary questions by domestic judges in order to protect the rights derived from Community law. This case law commenced with the Factortame case in 1990, when the Court was called upon to determine the extent of application of the Simmenthal case to the litigation in hand. Hence, whereas Simmenthal meant that domestic judges were obliged not to apply norms or practices that were contrary to Community law, Factortame extended the scope of its application to determine that the domestic judge was obliged to refrain from applying the United Kingdom rule, whereby under domestic law the judge was not competent to determine a request for injunction against the Crown. Consequently, the constitutional prohibition on adopting interim measures could not be applied if Community law came into the equation.

These two distinct spheres have found common ground since 1991, by virtue of the Court of Justice’s decision on the Zuckerfabrik case. In this case, the judge set forth the conditions in which interim measures could be adopted by domestic judges, when called on to judge matters falling within the ambit of Community law. After having set forth these conditions, the Court of Justice obliged domestic judges to follow the model used for interim measures by the Court of Justice and the Court of First Instance to bridge any gaps that might exist in the system. The Court of Justice reiterated its conditions in the Atlanta case, albeit in the context of so-called ‘positive’ interim measures, and not just in relation to stays of execution.

A thorough analysis of the pre-requisites required by the Court, and a comparison of the Community model with national systems is the object of treatment in our doctoral research. Now, although these questions penetrate to the very heart of the issue of the constitutional basis of interim measures, they go beyond the scope of this contribution itself. For present purposes, it should be remembered that, in the Factortame case, the Court of Justice failed to state anywhere in the reasons for its decision that the link between interim measures and the right to effective court protection already existed, although the Advocate General proposed its inclusion in his submissions. The reasoning simply considers the effectiveness of Community law, without as such taking account of its ramifications on the rights of individuals. Nevertheless, in the Zuckerfabrik case in 1991, reference was made to the right to effective court protection already existing, although the Advocate General proposed its inclusion in his submissions. The reasoning simply considers the effectiveness of Community law, without as such taking account of its ramifications on the rights of individuals. Nevertheless, in the Zuckerfabrik case in 1991, reference was made to the right to effective court protection already existing, although the Advocate General proposed its inclusion in his submissions. The reasoning simply considers the effectiveness of Community law, without as such taking account of its ramifications on the rights of individuals. Nevertheless, in the Zuckerfabrik case in 1991, reference was made to the right to effective court protection already existing, although the Advocate General proposed its inclusion in his submissions. The reasoning simply considers the effectiveness of Community law, without as such taking account of its ramifications on the rights of individuals. Nevertheless, in the Zuckerfabrik case in 1991, reference was made to the right to effective court protection already existing, although the Advocate General proposed its inclusion in his submissions. The reasoning simply considers the effectiveness of Community law, without as such taking account of its ramifications on the rights of individuals. Nevertheless, in the Zuckerfabrik case in 1991, reference was made to the right to effective court protection already existing, although the Advocate General proposed its inclusion in his submissions. The reasoning simply considers the effectiveness of Community law, without as such taking account of its ramifications on the rights of individuals.

47 Several inquiries have been carried out on this subject. See, amongst others, P. Christian (ed.), Référe et droit communautaire (Université Jean Moulin-Lyon 3, 1999); S. Lehr, Einstweiliger Rechtsschutz und Europäische Union: nationaler einstweiliger Verwaltungsrechtsschutz im Widerstreit von Gemeinschaftsrecht und nationalen Verfassungsrecht (Springer, 1997); B. Pastor Borgoño and E. van Ginderachter, El Procedimiento de Medidas Cautelares ante el Tribunal de Justicia y el Tribunal de Primera Instancia de las Comunidades Europeas (Cuadernos de Estudios Europeos, Civitas, 1993); G. C. Rodriguez Iglesias, ‘La tutela cautelar en el Derecho comunitario’, in G. C. Rodriguez Iglesias and D. Liñán Nogueras (eds), El Derecho comunitario europeo y su aplicación judicial (Civitas, 1993), at 635. For a traditional but interesting approach, see Slusny, op. cit. note 17 supra. From the same period, see also a doctoral thesis at University of Montpellier: P. N. Schwaiger, Le référé dans la procédure de la Cour de Justice des trois Communautés européennes, 1965.


49 More recently, in the same sense, and quoting the Zuckerfabrik case, see the stay of execution order made by the President of the Court of Justice of 23 February 2001, in the case, C-445/00R, République d’Autriche v Conseil de l’Union Européenne, Rec. 2001, at I-01461.
had asserted that there was a degree of parallelism between Article 19.4 of the German Constitution, which we have already mentioned, and the protection afforded by Community law to its citizens through the relative decision-making organs. The Court of Justice went on to sustain that, in fact, the Community legal system dispensed of such protection, where interim protection was expressly provided for.\(^{50}\) Thus, the basis still remains the uniform application of Community law, both in relation to the interim measures granted against national acts and national norms conflicting with Community law, and in relation to interim measures granted against secondary legislation or national acts based on that legislation, in cases where appeals are based on the derived law's incompatibility with the Treaties.\(^{51}\)

There have been many subsequent developments to the Court’s affirmation in the Zuckerfabrik decision. On the one hand, it has contributed to the definition of the right to effective court protection in Europe.\(^{52}\) Thus, it has consolidated a sort of ‘institutional guarantee’,\(^{53}\) insofar as a system of interim protection must exist if there is going to be a genuine right to effective court protection. On the other hand, this assertion alone is not enough. We also have to determine what are the prerequisites of such a constitutional statute for interim measures in Europe. This would require a comparative study of the most important norms and case law of the Member States, in order to gain a deeper understanding of the developments that have taken place in this sphere, as well as determine the current status quo.\(^{54}\) Moreover, the conclusions drawn from this inquiry must be compared and contrasted with the Community model, in order to understand where the latter is incomplete.\(^{55}\) As we have already stated, such a comparison is a question that should be treated in another area of our research. This is why we limit ourselves simply to mentioning it here.

\(^{50}\) See para 17. 
\(^{51}\) See para 20. 
\(^{52}\) This definition would affect the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000, which foresee the right to an effective remedy in Art 47. 
\(^{53}\) As has been stated, this reference is based on the dogmatic approach of German doctrine, by which the legislator cannot eliminate or fundamentally modify certain mechanisms that are recognised by the Constitution. The origins of these theories can be found in the works of Martin Wolff and Carl Schmitt: M Wolff, ‘Reichsverfassung und Eigentum’, in Festgabe für W. Kahl (Tübingen, 1923) at 5; C. Schmitt, ‘Freiheitsrechte und institutionelle Garantien der Reichsverfassung’, in Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954. Materialien zu einer Verfassungslehre, 2nd edn (Duncker of Humblot, 1973) at 160. After R. Alexy, Theorie der Grundrechte (Suhrkamp, 1994) (first edition in ‘Nomos’ in 1985), at 221. 
\(^{54}\) On the importance of comparative law for research into the remedies available at Community law, see J. Ziller, ‘La dialectique du contentieux européen: le cas des recours contre les actes normatifs’, in Les droits individuels et le juge en Europe. Mélange en l’honneur de Michel Fromont (Presses Universitaires de Strasbourg, 2001) at 443. 
\(^{55}\) The Community system for interim measures is based on the criteria of ‘urgency’ and ‘serious grounds’. Nonetheless, the content of these two criteria must still be clarified. For the present purposes, it should be noted that the Court of Justice only considers pecuniary damage as irreparable damage in exceptional circumstances (see in particular para 24 of the order of 18 October 1991, C-213/91R, Abertal et al. v Commission, Rec. 1991, p. I-5109). This could have very negative effects on the right to an effective court remedy. Moreover, the Court weighs up the interests at issue, and in a sense exercises a very broad margin of discretion (see para 63 of the order of 11 April 2002, NDC Health Corporation/NDC Health GmbH & Co. KG v. IMS Health Inc./Commission/AzyX Deutschland GmbH Geopharma Information Services, C-481/01 P(R), Rec. 2002, p. I-3401). This assessment also includes an analysis of the relationship between the measures requested and the damage that could be caused to the party’s rights or interests: the statement should result in a setting-off of one against the other (see order of 27 February 2002, Commerzbank AG v Commission, C-480/01 P (R), Rec. 2002, p. I-2129), which indicates that there is a certain link with the principle of proportionality.
After having stated the problems relating to the legal nature of interim measures, which was the starting point for our inquiry (the constitutional status of interim protection), we shall conclude by describing the evolution of Spanish law on this subject, because it demonstrates how comparative law can be used to contribute to legal developments. This following section can be considered as complementary to the preceding paragraphs and it will serve as an introduction to elements that we will deal with in the comparison of interim protections systems in a strict sense.

IV The Spanish Model and Interim Measures

In Spain, as in other Member States of the European Union, interim measures have been widely dealt with in academic writing, particularly since the second half of the 1980s. Several factors have contributed to this: the perpetuation of laws promulgated during the dictatorship (1939–1975), transition towards democracy, enthusiasm for Community law and comparative law, and lastly, the new model for interim measures, although this is not completely satisfactory.

Before 1998, the law in force relating to the administrative jurisdiction dated back to 1956. Although it was a technical law considered to be of a high quality and very advanced for the political context in which it was developed, one cannot ignore the fact that it was the legislative product of a dictatorship, which culminated in the death of the dictator himself, Francisco Franco, in 1975. The lacunae or shortcomings of this law in relation to interim measures have already been mentioned. In fact, the 1956 law only had one provision, Article 122, which contained a general clause admitting stays of execution against administrative decisions on exceptional grounds provided they were taken by the competent judge. It was criticised for several reasons: the reduced number of measures that could be adopted (only stay of execution), the exceptional

56 The bibliography on this subject is too vast to cite all the relevant titles. However, mention should be made of the works published by Professor Eduardo García de Enterría, who has made important contributions to the academic, legal, and case-law debate in this area. His book, cited above, merits particular attention. Moreover, mention should also be made of the following titles, which cover different periods, and which testify to the developments of the issues and problems raised by academic thought on the subject of interim measures. See, in chronological order, C. Martín-Retortillo González, Suspensión de los actos administrativos por los tribunales de lo contencioso (Montecorvo, 1963) (the author was both doctor at law and practising State lawyer, which means that the book is a theoretical work with a strong practical interest, and in particular, from the perspective of protecting the public interest); J. Rodríguez-Arana Muñoz, La suspensión del acto administrativo (en vía de recurso) (Montecorvo, 1986) (as with the previous work, this inquiry deals with the question of the suspension of administrative decisions. On the one hand, mention should be made of how interest in distinct interim measures with suspensory effect is relatively recent. On the other hand, the author explains that the suspension of administrative decisions is merely a drop in the ocean of the more general context of suspension in administrative law. Research into this line of thought has not yet been completed); C. Chinchilla Marín, La tutela cautelar en la nueva justicia administrativa (Civitas, 1991) (in addition to the works by Professor García de Enterría, Carmen Chinchilla began her research into interim measures by considering them as a whole, by presenting other national models in Europe, in particular the French system—albeit in a very embryonic way—and the Italian one); M. Baci galupo Saggese, La nueva tutela cautelar en el contencioso-administrativo (Marcial Pons, 1999) (this book adds a new dimension, the one of an in depth knowledge of the German system, which the author makes use of to analyse the system of interim measures after the reform of 1998, and proposes certain changes, which had never been discussed previously); F. J. Rodríguez Pontón, Pluralidad de Intereses en la Tutela Cautelar del Proceso Contencioso-Administrativo (Cedecs, 1999) (this young Professor has made pioneering research into reflection on interim measures in the context of the development of social rights, where the relationship between public and private interests presents a new way of conceiving administrative law).
character of its application, the limitations to the conditions for the adoption of measures (as a rule, the administrative judge could only consider issues where ‘serious or irreparable damage’ was caused, without taking into consideration arguments such as ‘serious grounds’), the impossibility of taking out interim measures against refusals, etc.

Immediately after the fall of the régime, during the transition towards democracy, and until the drafting of a new law for the administrative jurisdiction in 1998, numerous proposals were made relating to interim measures. It is interesting to consider the contributions made by Community law and comparative law to this debate.57

On the one hand, there was a favourable climate towards the reception of the Court of Justice’s case law in the matters already mentioned above, in marked contrast to what happened in other countries. Whereas in Germany people went to a lot of trouble to criticise the activism of the Court of Justice in this sphere, Spain initially welcomed the changes brought about by the advent of Community law.58 Subsequently, however, opinions became more diversified. Although it can be asserted, generally speaking, that there was a favourable sentiment towards the activity of the Court of Justice, this was not the case in every domain: debates surrounding specific issues relating to interim protection (such as *fumus boni iuris* and the balancing of interests involved) even gave rise to opposition in some respects.59

On the one hand, comparative law has been a constant source of ideas and reflection in injecting the necessary impetus for reform in Spanish law.60 Under the Spanish legal tradition, the French, Italian, and German legal systems were considered as ‘model’ systems.61 French law has permeated into the Spanish system through different

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58 This is clearly stated in the works of Professor García de Enterría, particularly as regards the gradual inclusion of the principle of *fumus boni iuris* in the conditions for the adoption of interim measures. These proposals have been accompanied by several orders of the Tribunal Supremo (the court of last instance in Spanish law for administrative issues) and other Spanish jurisdictions (particularly the order of the Tribunal Supremo of 20 December 1990, where the Court made express reference to Community case law). However, judges have generally preferred to maintain the previously existing *status quo* and only apply the principle of *fumus boni iuris* in specific cases, following the criteria laid down by the case law of the higher courts.

59 In particular, the question of *fumus boni iuris* is highly controversial. The law of 1998 only includes this criterion in very specific cases, yet interpretation of these provisions have proliferated. As regards the ‘battle’ on the *fumus boni iuris*, the parties and the outcome, see M. Bacigalupo, *op. cit.* note 56 supra, at 115.

60 In fact, even the preamble to the administrative jurisdiction law of 1998 alludes (albeit generally) to other legal systems as regards the explanation and incorporation of certain legal instruments, such as the administrative judge’s powers of injunction.

61 The question of interim protection in the United Kingdom was the subject of a book in 1997, yet the author himself states that it was not intended as a comparative study, rather as a presentation, in a strict sense of a foreign legal system. I. Del Guayo Castiella, *Judicial review y justicia cautelar* (Marcial Pons, 1997), at 15. Del Guayo also explains that the legal system that he is describing is situated ‘further’ from the Spanish law ‘further, at any rate, than the French or German systems’ (at 17).
channels, at times it has been imposed because of French employment in Iberian territories, and at others, it has happened in a voluntary manner. On the subject of interim measures, allusions are constantly being made to French law by Spanish legal writing. From as early as 1963, the State Lawyer, Martín-Retortillo, was astounded by the progress made by the case law of the French Council of State concerning the ‘myth of executory decision’ and the need to renew the vision of judge-made law in this respect. Later, Eduardo García de Enterría, began a series of studies, which we have referred to already, advocating the adoption of similar instruments to the French provisional orders, which would be autonomous and rapid, and he also vehemently championed the cause for the inclusion of a provisional orders clause in Spanish law. In 1991, Carmen Chinchilla also presented her findings on the French summary proceedings, comparing the civil law stay of execution with the one available under administrative law, concluding that it was regrettable that there was a dearth of remedies available in the latter framework compared with the former. Finally, in 1999, Mariano Bacigalupo developed his critical vision of the model, laying bare the divergence in France between the Constitutional Council and the Council of State. In fact, the tendency towards openness in the Constitutional Council has contrasted with the more traditional approach of the Council of State, as such, following the position adopted by other Constitutional Courts in Europe. Lastly, it has become evident that the legal system importing the new measures has taken advantage of criticisms made in relation to its own model, in order to develop it further and, perhaps in turn, even export its achievements.

German law has been influential throughout the twentieth century, particularly since World War II. As has already been mentioned on several occasions, the Fundamental Law of Bonn and the framework for the protection of fundamental rights conceived by the latter (which has undoubtedly influenced administrative law) have often been subject to the close scrutiny of the drafters of the constitution. In administrative law, the connections with German law have been increasing, and according to authors on this subject, its influence in recent reforms is undeniable. On the subject of interim

62 This took place thanks to the work accomplished by Spanish jurists who were experts in French law, either because they had lived in the country or because of the interest the law—born out of the Revolution—created in other European and non-European countries.

63 C. Martín-Retortillo González, op. cit. note 56 supra, at 116.

64 E. García De Enterría, op. cit., especially his research, ‘La lucha contra el abuso de los procesos: juicios provisionales y medidas cautelares’, at 335. See also a later article, ‘Hacia una medida cautelar ordinaria de pago anticipado de deudas’ (provisional order). ‘A propósito del auto del Presidente del Tribunal de Justicia de las Comunidades Europeas de 29 de enero de 1997 (asunto Antonissen)’, (1997) 142 Revista de Administración Pública, at 225, where the author describes the Court of Justice of the European Communities’ use of the French technique of provisional orders, by proposing its inclusion in Spanish law as well. Spanish case law adopted this proposal rather timorously, as can be clearly seen from the judgment of the Tribunal Superior de Justicia (the highest court jurisdiction in the legal system for the Spanish Autonomous Regions) of Aragon of 26 February 1998. See commentary by O. Herráiz serrano, ‘El paso firme dado por el Tribunal Superior de Justicia de Aragón en el duro batallar por la tutela cautelar: la aplicación de la técnica francesa del référé-provision (Comentario al auto de su Sala de lo Contencioso-Administrativo de 26 de febrero de 1998)’, (1999) 102 Revista Española de Derecho Administrativo, at 265.

65 C. Chinchilla Marín, op. cit. note 56 supra, at 100.

66 M. Bacigalupo, op. cit. note 56 supra, at 95.

67 For a description of the German approach to administrative litigation and its relationship with Spanish law, see S. González-Varas Ibáñez, La jurisdicción contencioso-administrativa en Alemania (Civitas, 1993).
protection, references to German law abound throughout academic writing on this subject, in particular in the latest works.68

Finally, Italian administrative law has awakened the curiosity of Spanish jurists, on account of, amongst others, their common legal cultures, the basis of which is rooted in Gallic tradition, as well as the linguistic proximity, which facilitates the task of understanding legal issues raised on opposite sides of the Mediterranean.69 The doctrinal classifications, such as the concept of administrative acts, and even interim protection, have been transplanted from Italian into Spanish law. The Italian system of interim measures seems at any rate to have influenced the terminology used in Spanish law.70 This is not surprising if one considers that the general theory of interim measures is derived from Italian legal thinking, both in private and public-law spheres, as was reiterated by the Advocate General Tesauro, in the Factortame case. In fact, the works of authors such as Chiovenda or Calamandrei continue to be used as the basis for all research into so-called interim measures, despite the fact that they date back to the beginning of the twentieth century. Admittedly, it must be added that their direct influence today should not be magnified beyond proportion. Understandably, we have taken into consideration the contributions of several other authors who have studied the Italian system.71 However, on the whole, their treatment is much more ‘neutral’ than in French law: references to Italian law are only made concerning very specific subjects, as for example the constitutional status of interim measures,72 and they are somewhat complementary to other arguments in comparative law.

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69 There are other cultural reasons that can be helpful in understanding the way in which Italian law has influenced the development of Spanish law. Particular mention should be made of the ‘Colegio de España’ in Bologna, which has been attended by Spanish doctoral students since 1364 (generally jurists), considered to be amongst the best students from Spanish universities (However, the college remains closed to women and non-catholics). For further information on this institution, see S. Martín-Retortillo Baquer, ‘Los bolonios y el Colegio de España’, in his book, Fragmentos de Derecho Administrativo (Marcial Pons, 2000) at 261.

70 The terms ‘Provedimenti cautelari’ and ‘misure cautelari’ are the terms used since the beginning of the 20th century (in particular by Chiovenda and Calamandrei), and which were imported by Spanish jurists from the civil law tradition (Carreras Ilansana or Fairén Guillén, for example). Administrative commentators, on the other hand generally referred to stays of execution. Now, in 1963 the Spanish term, ‘medida cautelar’, was introduced (C. Martín-Retortillo, op. cit. note 29 supra, p. 103), as well as its equivalent ‘medida precautori’ (at 110). The supra-concept ‘procedimientos cautelares’ is also referred to in the same text (p. 95). Nevertheless, positive law did not take on this term until 1998, because the administrative jurisdiction laws of 1888 and 1956 only contemplated stays of execution in the ambit of administrative decisions. As regards the debate preceding the drafting of the law of 1888, the question of interim measures was almost non-existent and the regulation of the stay of execution (in Art 100) was not subject to any later amendments during parliamentary debates. In this respect, see L. Martín Rebollo, El proceso de elaboración de la Ley de lo Contencioso-Administrativo de 13 de septiembre de 1888 (Instituto de Estudios Administrativos, 1975) at 206.


72 E. García de Enterría, op. cit. note 56 supra, at 335, 341; C. Chinchilla, op. cit. note 56 supra, at 168; M. Bacigalupo, op. cit. note 56 supra, at 99.
In the preceding paragraphs, we have attempted to explain the way in which Community law and comparative law have influenced the development of interim measures in Spanish law. Such developments can be considered as part of Häberle’s paradigm of the general evolution of texts, in which one of the driving forces of evolution of law is comparative law. The processes of influence are continuous and reciprocal, since it is possible that the ‘importing’ legal system, may in turn find solutions to existing problems that the ‘exporting’ system has not been able to resolve.

V Conclusions

Interim measures have been widely written about from a Community law perspective, particularly since the 1980s. Similarly, comparative jurists have reached their conclusions in this field. However, we feel that both approaches are valid and must be taken into consideration, as we have tried to achieve throughout our inquiry, by comparing the model for interim measures in domestic law with Community law.

Moreover, an inquiry into interim measures requires an analysis of specific questions relating to the instrument itself, and not merely a presentation of the system as a whole without any comparison of material elements within it. The first of these elements (in order of importance) is, in our opinion, to provide a clear definition of the boundaries of the constitutional status of interim measures in Europe. If, in principle, the comparison encompasses Community law and national laws, because interim protection derives from the right to effective court protection, the law of the Council of Europe (in particular the Convention on Human Rights and the case law of the European Court of Human Rights) must also be taken into consideration. Only then can we achieve a genuine ius commune europeum in administrative law (concerning interim measures).

The major problem of comparative law lies, as we have already stated, in clarifying at the outset the legal basis of interim measures. This problem is further complicated by linguistic pluralism. Further still, the differences that exist between legal systems as regards understanding the right to effective court protection can pose problems in identifying the constitutional status we are seeking to attain.

Lastly, we have dedicated several paragraphs to Spanish law, because it constitutes an example of the evolution of law thanks to comparative law and Community law. In fact, these types of argument have often been relied up to reform interim measures in Spanish administrative law, as well as consolidate their constitutionality. Even if this new system cannot be considered to have been achieved purely on the basis of these arguments, the types of changes they have brought about, should not be forgotten. As such, comparative law can be considered as a practical tool, and thus refute the criticism—which is sometimes raised—that it is no more than a theoretical tool of analysis.
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