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PROVISIONAL EMERGENCY MEASURES AND EXPEDITIOUS PROCEDURES

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Justice wages a constant war against time, whose inevitable passage prior to any verdict is the gift which necessity makes to wrong. A tardy decision is often unjust, increasingly irrelevant, and sometimes derisory. Although it is said that, due to the very nature of the trial, even more than to the abundance of cases, no verdict can be instantaneous.

These observations take on a different relevance, but remain none the less true, with regard to justice in its dealings with the State.

This is why the Vth IASAJ Conference has set itself the task of studying some of the means adopted by the participating countries to reduce the duration of the legal process in state jurisdiction.

The means in question are provisional emergency measures and expeditious procedures.

The first of these provide for the immediate interests of the parties to a dispute, while awaiting the final verdict, and are based on the notion of fairness, applied case by case, and the likely final outcome of the trial. Sometimes, the aim is to prevent the evidence from expiring before it has been brought to the the judge's attention.

The second allow for the precedence of certain trials over others, on the basis of their subject matter and urgent nature, and the means of obtaining this precedence.

The question of provisional emergency measures is more complex than that of expeditious procedures. For this reason, the discussion devoted to it is divided into two sections. The first concerns the parties to the dispute, the various types of provisional emergency measures available and their consequences. The second is related to the admissibility of the request and the various phases of the procedure.

While writing the preparatory report for the Conference, I decided that it would be too time-consuming to try to provide, for each item of the agenda drawn up by the permanent committee, all the replies contained in each national report. Instead, I have used the statistics provided in the latter to find, for each item of discussion, a range of possible legal solutions.

To this end, I felt it would be useful to quote some of the replies as examples. I hope I have interpreted them at least partially correctly, and that this will give the members of the three Commissions a more detailed basis for a live discussion and a means to sum up the consequences of the solutions chosen in the various countries. And I apologize for the inevitable differences in the way the various national reports have been treated.

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PROVISIONAL EMERGENCY MEASURES

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COMMISSION I
THE POWERS OF THE JUDGE

1. THE PARTIES TO THE DISPUTE

In many countries, the length of time required to make an appeal against a state decision, or even to apply to a judge for appeal, does not generally interfere with the efficacity of the decision. In such cases, provisional emergency procedures would normally be requested by the claimant or the party preparing to appeal. It is, however, conceivable that another person, who although favoured by the state decision, if the latter is upheld, might not wish to renounce his current position in order to adopt the one attributed to him by the state decision, for fear that the latter should be annulled, and that as a result, he should lose both. For example, he may not wish to leave the public office he currently holds, in order to occupy another, of a higher grade, which is the subject of a dispute. He therefore requests a stay of execution of the state decision contested by his adversary, even though the latter is in his favour (in the countries where this is allowed, some of the considerations outlined in item I, 3 should be enlarged upon).

Conversely, in countries where the option to appeal or to apply for appeal might interfere with the efficacity of certain state decisions, the use of emergency procedures at the request of the State is also conceivable. This could result in state appeals in which the State is the claimant. This would appear to be an exception to the common rule for these appeals, and one which merits further investigation (and which is treated in item I, 3)

For all requests presented to the judge, the governing principal is that of audiatur et altera pars . And if there are parties for whom the implementation of the requested measure would be harmful, it is only fair that they should be heard too. (Finland, p.1). For example, where a request has been made by a neighbour to defer the implementation of a building permit, the holder of this permit should also be heard.

In any case, the fastest counter-hearings are always those involving the State. The means of identifying the parties who might gain from the state decision can vary greatly. Furthermore, it is questionable whether the parties to the main dispute can be the same as those to the provisional request.

The means of summoning the opposing parties thus identified to appear in court can also vary. The appeal can be registered with the judge, who will then identify the opposing parties and may call them to appear at the trial as a matter of course (Turkey, p.1). Alternatively, the individual concerned can be obliged to identify them and notify them of his request. If the provisional emergency measure is seen as a contentious act, relating

to a decision about a dispute, it is more natural that a full hearing of all the parties should take place. If it is seen as a purely administrative measure, exceptionally submitted the judge, it would perhaps be understandable if the counter-hearing were more limited or not requested at all.

This argument has nothing to do with the provisional emergency measures (cf. II, 10): There, the counter-hearing can sometimes be excluded at the outset, but then be brought into play during the validation of the measures taken, so to speak, "in extremis", inaudita altera parte. Here, it is totally excluded, except from the final verdict.

2. INVESTIGATIVE MEASURES

We will now begin to examine the provisional emergency measures which can be administered by the judge.

These measures fall into two categories: Firstly, the anticipation of the final outcome of the main dispute, or in any case the guaranteeing of the latter, in order to at least maintain the status quo. This will be dealt with in the next section; And secondly, the immediate gathering of the facts necessary to find a fair solution to the main dispute. This is what we will look at now.

The arguments to be examined by the investigation committee in order to decide upon the request for provisional emergency measures, will be considered in ° II, 3.

What now interests us is that a person can be seriously ill, a piece of land can be subject to rapid modifications, ora piece of furniture can be taken away. In these cases, it is important for the judge to order the examination of the witnesses, a visit to the scene of the dispute, or the hearing of an expert witness, even before he has had time to initiate the main trial in which this evidence will serve; or that these measures take place in the course of the latter, during the investigative phase.

Not all states have this type of provisional emergency measure, which is in fact more useful in countries where state process has full jurisdiction across a broad spectrum, and less useful when only or mainly appeals concerning abuse of power are treated. The latter are conducted, in fact, on the basis of readily available public documents and evidence which has already been collected by the State, and of facts existing before the trial and the contested state verdict. If, therefore, the evidence has not been correctly taken up, within the due time limits, this can be sufficient to pass a verdict on the State's behaviour.

The provisional emergency measures now under consideration can be defined as emergency statements (France, p.1; Mali, p.1) or investigative summary procedure (France, p.4) or administrative summary procedure (Mali, p. 2) or simply examination of the witnesses, expert witness, emergency visitation of the scene of the dispute (Portugal, p. 11).

Once obtained, they cannot be eliminated, even in the absence of a main appeal, and must be evaluated in the course of the latter.

3. PURE AND SIMPLE STAY OF EXECUTION, OR POSITIVE MEASURES ADMINISTERED BY THE JUDGE, POWERS OF INJUNCTION

Provisional emergency measures aimed at guaranteeing or anticipating in some way the effects of a future verdict in favour of the claimant, can be defined as stay of execution or other positive measures administered by the judge, in particular, injunction.

Stay of execution is useful to the parties to the main dispute whose interest consists in annulling the state decision and maintaining the status quo as it was prior to the State's intervention.

Positive measures administered by the judge are, on the other hand, useful to the parties to the main dispute aiming to provoke state intervention in their favour.

The first measures are the oldest and the simplest. Their result imitates (provisionally and sometimes only partially) a final verdict of annulment. The second measures are newer and more controversial. First of all they contradict the principal common to all states, according to which a state judge should not place an injunction order on the State. Furthermore, they obtain, in effect, a much more significant result than the abrogation of the State's silence or than a negative decision by the latter. They in fact anticipate a favourable decision for the claimant, which the State might have wished, or been obliged, not to adopt until after the pronouncement of the verdict of annulment.

Where it is considered that this system impinges too much on the State's jurisdiction, any provisional emergency measure administered in the dispute relating to negative decisions (stay of execution, for example) or negligent behaviour on the part of the State, can be excluded. Alternatively, in these cases, the measure can replace simple stay of execution, on the understanding that the latter would only demonstrate to the State that the judge has found the original appeal to be well founded, whereby the State itself could perhaps automatically revise its own behaviour.

As for positive provisional measures, it is possible to imagine an injunction order placed on the State by the judge, which comes into effect between the parties to the dispute when the State issues its final verdict, or a provisional verdict pronounced by the judge with immediate effect between the parties.

In the latter case, the provisional emergency measure will immediately and directly bring about a situation favorable to the claimant. For example, if a candidate were contesting his exclusion from a public

competition, including written tests carried out simultaneously by all candidates on the same subject, the state judge could either order the State to admit him to the competition, issuing a reserve on the outcome of the main appeal, or admit the claimant himself, rendering a provisional verdict with immediate effect between the parties.

4. THE POWER TO COMBINE THE PROVISIONAL AND THE MAIN PROCEEDINGS

Once the claimant has requested a provisional emergency measure from the judge, this request can obviously be accepted or rejected. But now we must determine whether the request of the claimant obliges the judge to make a decision in any case, or whether he could for some reason, refuse to make a pronouncement, until he has reached a decision on the main dispute.

This problem differs from the other with regard to the length of time allowed for the verdict. (cf II, 8).In one case, it is a question of the time allowed by the law to decide on the the request for provisional emergency measures. In the other, it is a question of the judge's power not make a decision on a given request, either for a given period of time or indefinitely.

In some countries, the judge effectively has the power to join the provisional measures and the main proceedings (Burundi, p. 2; Sweden, p. 6). This can be understood in two ways:

- either that the judge does not want to make a decision at all because he prefers to set the date immediately for the discussion of the main dispute (Luxembourg, p. 4) or because the request seems unfounded and it is not worth conducting a hearing of all the parties and adoptiong a provisional decision;
- or that, in some states, during the main trial, weeks or even months can pass between the public hearing of the appeal and the publication of the verdict. And in such cases, there would be situations in which the judge would more readily administer the provisional emergency measure after the verbal hearing and the verdict regarding the outcome of the main dispute (but still several weeks before the publication of the final verdict). Here, a provisional emergency measure which would probably be refused when the judge is not yet sure of the outcome of the main dispute, would be granted when the main appeal has almost been decided. To the extent that, all things considered, it would be in the interest of the claimant to join the provisional to the main proceedings.

It is however probable that in the majority of states, the judge would not be able to refuse to make a decision about the request for provisional emergency measures.Other possibilities are that the party who originally requested the measure might subsequently request the deferment of the judge's decision, without the agreement of the other parties. Or that a deferment be requested simultaneously by all parties. In such different cases, the judge's powers can vary from country to country.

5. THE EFFECTIVE DURATION OF THE PROVISIONAL MEASURE

The effects of the measure in question are temporary. Ideally, it should not render inapplicable the implementation of any future decision about the main dispute. However, even a provisional measure must compromise the case to a certain extent.

In many countries, the stay of execution is effective ex nunc; it serves to paralyse the future execution of the contested measure, but it does not legitimise a withdrawal in pristino.

It is however conceivable and sometimes practical that the stay of execution begin ex tunc, like the annulment, and that it differ from the latter only in that it is conditional to the outcome of the final verdict. For example, if an emergency occupancy which has just begun is suspended, it can be more useful to return the occupied premises to the owner.

Moreover, positive provisional measures produce very significant modifications to the real situation.

As a general rule, the stay of execution lasts until the issue of the final verdict. If the main trial is divided into two instances, with a possibility of appeal, and the stay of execution is granted in the first instance, the stay of execution is valid until the the final verdict in that instance. In other countries, (Indonesia, p.11) it appears to be the general rule for all instances. When the emergency measure is granted in one instance and then there is an appeal against the final verdict, a new emergency measure can be requested by the State against the annulment order, or, in the case of the rejection of the appeal, by the private individual against the state decision.

Sometimes, before the appeal to the state judge, there is an obligatory or voluntary appeal to the State; and during this phase, that is before the verdict, a stay of the execution of the state decision can be requested and obtained from the judge. (Holland, p. 3). Even in this case, there is a question as to how long the stay of execution should last.

The judge can always set a shorter duration than the normal one. For example, until the final verdict, or for one school year; or, if the stay of execution is granted at the same time as the submission of a legal question to another judge (constitutional or supra-national), until some kind of verdict has been issued by the latter (Belgium, p.13).

6. THE POSSIBILITY OF WITHDRAWAL

The situation can arise where the provisional emergency measure applied by judge of the first instance is subject to appeal .
It can also be subject to other legal remedies, of the type applicable to final verdicts.

Also, the measure is administered by a judge: it concludes a phase (however incidental) of the trial; and it must adhere to the principal common to all legal acts, according to which any question, once decided, cannot be freely re-submitted by the claimant to the judge. Several reports observe, in fact, that provisional emergency measures are liable to be considered as res judicata.

However, due to their complementary nature with respect to the main appeal, and for the reasons which justify them, provisional emergency measures are administered, in many countries, rebus sic stantibus: if the actual and legal situation changes, the concerned party can ask the judge to change the measure (Germany, p.9; Austria, p.8; Belgium, p.14; Burundi, p. 3; Finland, p.3; Indonesia, p.13; Holland, p. 4; Sweden p.6; Turkey, p.3).

In some countires, the ultimate result of this is that the same judge can withdraw them, as a matter of course, in the event of new facts becoming available. It is not clear whether, before doing this, he must summon and hear the interested parties. (Germany, p.9; Finland, p.5; Holland, p.4 & 5).

7. EXECUTION OF THE PROVISIONAL MEASURE (EG: CONSTRAINT)

The interested parties must execute the emergency measures. Where this does not happen, in some countries, the only recourse comes from general rules, such as third party liability for damage for the defaulting parties, and disciplinary or penal rules for public agents.

The laws on state justice, however, often dispose of specific sanctions to ensure that such provisional verdicts are respected quickly and safely.

In this domain, several states have indicated the existence of constraints, financial sanctions payable by the defaulting party, often to special public funds, proportional to the duration of the default. (Germany, p. 11; Belgium, p. 17; France, p.7; Roumania, p.10). In France, a distinction is made between provisional and definitive constraints. In Holland, (p. 4) the imposition of the constraint is applied, where justified, starting with the first provisional measure, or otherwise with successive measures.

Elsewhere, the same judge nominates a commissary ad acta, who acts as a substitute for the State in ensuring the required behaviour. Alternatively, the "MÚdiateur de la RÚpublique" (Senegal p; 7) intervenes, or special local authorities are given the task of enforcing the stay of execution adopted by the Supreme Court (Finland, p.3).

8. CONSEQUENCES OF A CONTRADICTION BETWEEN THE PROVISIONAL AND THE FINAL MEASURES

National relations are in agreement that the effects of the provisional emergency measure should cease if the final verdict is different. In Senegal, it is specified (p.5) that this cessation should take place at the moment the final verdict is communicated to the party who had obtained the measure.

In some states, it can happen that during the provisional emergency measure, a final verdict is passed on some question of competence or custom regarding the main dispute.(Egypt, p.11). But in general, nothing decided in a state of emergency can prejudice the final verdict.

In any case, a final verdict against a claimant who had previously obtained a favourable provisional measure cannot neutralize any effect, in fact favorable to him, of this measure. For example, the rejection of an appeal against therevocation of cinema's operating permit cannot neutralize the months or years during which the latter stayed open following a stay of execution. Or a final verdict in favour of the claimant who had not obtained a building permit, might arrive too late.

A few national reports give practical examples. For the Dutch (p.5), the effects of the contradiction can be resolved through civil law. If, for example, a building has been completed, and then the building permit is cancelled, the State will pay the damages (to the neighbour who appealed?).

Without doubt, much depends on substantive state law. In the previous example, some countries might decree that a building constructed on the basis of a building permit which is then revoked should be demolished. The damages due to the neighbour who had appealed and not obtained the stay of execution in sufficient time would be minimal in such a case.

According to the German report, (p.9) if the state decision is not suspended and is then subsequently cancelled, at the request of another party, the judge will indicate to the State the means of undoing the effects of this.

But the question remains, in general, whether after a final verdict in favour of the claimant who had obtained a provisional emergency measure, the latter should expire ex tunc or ex nunc.

COMMISSION II

ADMISSIBILITY OF THE REQUEST AND PROCEDURE

1. WITH REGARD TO THE SUBJECT OF THE REQUEST

Commission I, items 2 & 3, concern the type of provisional emergency measures available. Now, however, we will look more closely at the situations in which the claimant's requests can be granted.

The various national reports set out the following considerations on this matter:

- where certain types of state decisions cannot be annulled by the judge, these same decisions cannot be suspended (Turkey, p.4 & 5), and no other provisional emergency measures are conceivable;
- at other times, the law expressly forbids the suspension of certain acts which are, however, annullable (Burundi, p. 3; Turkey, p. 5-6), or limits, for certain others, the duration of the stay of execution (unless the judge orders a further stay of execution) whether or not the final verdict has been published (Italy), or limits, for others again, the possibility of appeal to requests to a higher legal authority (for the regulations on this, see Germany, p. 17).

With respect to these arguments, certain Constitutional questions arise, in countries which have a written Constitution not subject to common law:

- if common law can exclude, with respect to certain types of state decision, appeals regarding abuse of power, or limit it to certain means of appeal;
- if, when it is possible to request an appeal for abuse of power, common law can exclude or limit the judge's adoption of provisional emergency measures (Portugal, p.8).

The distinction between subjects eligible or not for provisional emergency measures must therefore allow for broader categories.

It is evident that stays of execution can be requested for executable decisions. These are decisions which impose a certain behaviour on someone, and therefore necessitate a material change in the situation, for example state decrees. Or which permit a certain behaviour and thus make such a change possible, for example state authorisations. Even decisions which themselves automatically produce an ideal change in the situation, and are thus called self-executing. For example, the revocation of a prior decision or the attribution to someone of a legal quality: here, the material changes to the situation will follow, if at all, later and indirectly.

As for decisions which must be executed with regard to a change in the situation, a distinction can be made as to whether this change has never been carried out, has been started or has already been completed. (Indonesia, p.22). For example, after a demolition order, the building can have been destroyed, or the inhabitants can simply have beenevacuated, and the area cordoned off.

It is clear, for example, that a stay of execution cannot be applied to an expulsion order if the foreigner has already left the national territory.

In general, for decisions which have already been entirely carried out, it would only be of interest to obtain an annulment with a view to restitution or an award for damages, but not a stay of execution (Senegal, p;12).

Inversely, the German report (p.9) observes that even when a measure has been implemented, in some situations the judge can suspend it, and decree that the status quo be re-instated.

Then there are decisions which refuse a claimant's request. And non-reponsive behaviour on the part of the State, which does not reply or does nothing about a matter on which, according to the claimant, it should be automatically obliged to make a decision.

As for the interest of the individual who requests the provisional emergency measure, the distinction made above must be remembered. (I, 3): there are individuals whose interest it is to maintain the status quo prior to the state decision, and who therefore request a stay of execution on the latter; and other individuals whose aim is to bring about, through the main trial, a future state decision which will modify the situation in their favour, and who therefore request a positive provisional measure, either an injunction order, or a favourable change to the situation through the intermediary of the same judge, a measure which in the latter case will alone suffice to obtain an advantage, in the short term.

With respect to the conditions of admissibility of the requests for emergency investigative measures, there is nothing to add to the explanation in I, 2.

2. WITH REGARD TO ITS INTRODUCTION INTO THE MAIN DISPUTE

The various state reports set out a wide range of solutions.

For some, provisional emergency measures can be requested before the submission of the appeal to the judge, or at the time of the submission (Belgium, p.13, 21 and 35; Portugal, p. 20). It is not clear if there are countries in which such measures can be requested either before, simultaneously or after the submission (perhaps Germany, p.8 and 16).

When appeals to the State are obligatory or possible, before the appeal to the judge, the advantage in allowing the parties to request the provisional emergency measures immediately is evident (Holland, p.2, 5 and 6; but only if a claim is effectively pending with the State).

When, on the other hand, the appeal to the judge can be submitted immediately, but there is not yet a pending state appeal, the judge can accept the provisional emergency measure, on the condition that the claimant opens the main proceedings before a certain date (Germany, p.16).

In other countries, the request for provisional measures, as accessories to the main trial, must be presented at the same time as the latter (Egypt, p.3-4).

In yet other countries, it can be presented at the same time and afterwards (Finland, p.5; Indonesia, p.12; Turkey, p. 6).

We do not know of any states where the request in question must be submitted during the main trial, but after it has started.

It is natural that the provisional emergency measure be considered as an accessory to the main trial; thus it can be neither submitted, nor granted, after the close of this trial.

3. WITH REGARD TO THE PROOF OF THE CLAIMANT'S INTEREST

This argument would appear to differ from the two successive ones on the following manner.

In order to apply for an appeal, it is necessary to have an interest in its outcome. And a particular interest is required in order to request, with regard to this appeal, an emergency measure.

But having an interest in the appeal is one thing, and the conditions for action are another: it is not enough to have an economic or moral interest, however strong, to obtain the judges approval automatically.

A stay of execution or a positive emergency measure can be accorded when, without the obtention of the measure, the damage suffered by the claimant, if he were subsequently to win the case, would be irreparable.

The comparison with irreparable damage to the parties to the dispute in the case of a difference between the provisional and the definitive measures (periculum in mora, or eventus damni), will be studied in item 4.

The justification for the main appeal, and therefore the means administered (fumus boni iuris) are discussed in item 5.

The particular advantage in requesting the emergency measure from the point of view of the claimant alone will now be considered.

It would seem, however, that where emergency measures are concerned, the difference between items 3 and 5 diminishes.

The request must be related to a decision likely to be implemented during the instance to be annulled (Belgium p.22), or to a situation which could become irreparable during the course of the main trial.

There is not sufficient justification if the decision is not executable or if its suspension has already been ordered by the regulatory authority (Belgium idem).

In general, if a stay of execution is not possible at the time it is requested, the justification for requesting this type of emergency measure is insufficient.

The question then arises as to whether the refusal of the measure for these reasons prohibits its re-submission during the instance of the trial following the execution of the state decision, or at least before the potential damage has become imminent.

In countries where the request can be re-submitted, the judge will perhaps consider it superfluous to wait for a new request, when, until that time, it has been probable that the execution of the state decision will come about in the course of the trial.

In Holland (p.6), if the potential damage results from a series of state decisions, only the latest one can be suspended. And the emergency measure alone must be able to prevent the damage. In Belgium (p.26) the decision to be suspended must be the direct cause of the damaging effects.

In the present item, as in the following one, it is a question not only of the requisite qualities for the admissibility of the provisional emergency measure, but also the means of establishing - and, for the judge, of gathering - the main evidence.

The following observations are therefore also valid for the next item.

Obviously, the problem of evidence arises not only with regard to the main trial, but also to the provisional emergency verdict. However, the very nature of the latter means that the evidence must be gathered quickly and therefore summarily. The Portugese report (p. 21) specifies this.

The judge will normally base his decision on the documents produced and the facts put forward by one party, and contested by the others; on the principals of common knowledge, and quod plerumque accidit and might ask relevant questions of both parties during the verbal discussion. If need be, he can ask for further documents, perhaps adopting a provisional emergency measure until the date of the hearing following the presentation of these documents (Belgium, p.8; The same is true in Italy).

The evidence gathered for the provisional measure remains valid for the main appeal.

4. WITH REGARD TO THE PROOF OF THE NECESSITY OF THE MEASURE

Once it has been established that the party has a sufficient interest in requesting the provisional measure, the interests of all concerned should be compared. Beyond - as we will see in the next item - studying how much chance the claimant has of winning the main case.

Certainly, the interests of the public go first, especially in certain matters. If the danger for the latter is significant, the provisional measure will no doubt be refused (Indonesia, p.7).

But normally, the appropriate solution is to find a balance between the various parties' interests (Finland, p.5; Sweden,p.7).

All the reports stress that the measure should not be granted if the damage risked by the claimant is not serious and irreparable, or difficult to undo.

In this regard, there are areas in which the above-mentioned requisites are more frequently recognized. In Spain, they are almost automatically recognized in cases concerning the protection of fundamental rights, or the State or autonomous regions' recourse against acts carried out by local authorities, where there is a conflict of competence.

So we can conclude that, on the question of provisional emergency measures, the state judge has remarkable discretionary powers; and the decision as to whether to accept or reject the requested measure, and sometimes as to the terms on which to accept it, is generally entrusted to his considered judgement.

5. WITH REGARD TO THE MEANS ADMINISTERED

It would appear that some countries accord more importance, others less, to a study of the probability of a favorable outcome to the main appeal.

But it also appears that all consider this point important in some way for the outcome of the request for provisional emergency measures.

Its importance is probably minimal or nil in the case of a request for emergency investigations.

With other provisional measures, it is probable that the need to justify the means is greater when the outcome of the main appeal seems clear. It is only fair, on the other hand, for the study of the means to be administered to take on less importance when the outcome of the main appeal seems, for a variety of reasons to be unpredictable. In Belgium (p. 14), if the emergency measure is given with regard to certain particular means of appeal, the final verdict on these same means will be very quick; but if these means are not granted, the provisional measure will be

revoked and other means will be considered according to the normal procedure. In the same country (p. 35), it is up to the state authority to justify the legality of its decision. The judge will take into consideration the absence of a sufficient dossier. He will also take into consideration the absence of the State from the hearing or that of the claimant, who will thus be considered to have withdrawn his claim.

6. WITH REGARD TO THE FORM AND TIME ALLOWED FOR THE APPEAL

It is only logical that the request for provisional measures should never be submitted to more stringent rules than those governing the main appeal. Therefore, if the latter can be presented without the services of a lawyer, this would also be true for the afore-mentioned request, if it is submitted separately.

It would however be relevant to verify whether in some countries, less formal criteria would be permitted for the provisional request than for the main appeal. For example, whether this request could be submitted without the help of a lawyer or verbally. And in any case, if a tax has to be paid which is so high as to discourage poorer claimants.

The country in which the formalities seem to be the least stringent is Germany (p.12). There is no tax to be paid, the request can be made by the claimant himself and, although it must be written, the judge's assistant will help the claimant to formulate it.

Other cases of a loosening in formalities are indicated in the French report (p.11): In contrast to the main trial, here there is no need for a conclusion by a government commissary and normally, there is no public hearing.

There is little in the national reports about the time allowed for appeal, apart from the items referred to in II, 2.

Where the request for emergency measures can be submitted during - and not only at the beginning - of the main appeal, it goes without saying that it should not be submitted so late that it cannot be decided before the verdict on the main dispute.

7. THE STRUCTURE OF THE FORMING OF THE VERDICT

In many countries, the verdict concerning the request for emergency measures is adopted by the same committee which decides on the final verdict (for example Burundi, p. 4; Egypt, p.11 and 13; Mali, p.4; Turkey, p.7).

Some make a distinction between the first instance of the trial, in which only one member of the committee decides, and appeal, in which, as a general rule, the whole committee decides (Portugal, p.22).

In other countries, this varies from case to case, from the entire committee to a single member, generally the president (Germany, p.12; Indonesia, p.24).

In France, (p.7) a committee structure is required for positive measures, and a single magistrate is sufficient for a refusal. The Belgian system (p. 42-43) is fairly similar: If the committee considers a request to be manifestly unjustified, it can refer it to the president, who can then summon the parties and reject the request on his own. Furthermore, he can immediately settle the final verdict.

Otherwise, the number of members in the committee can be reduced, as in Finland, for the Supreme Court (items 3 to 5, p.5), or in Germany where lay judges are excluded when the committee decides (p.13).

Interesting and probably unique is the Belgian practice (p.37), which ensures that the committee which decides on the final verdict is made up of different judges from the ones who looked after the emergency measure.

8. THE TIME ALLOWED FOR THE VERDICT

Provisional emergency measures are, of course, always decided urgently.

The most important requirement can be the gathering of the evidence.

In these cases, Mali (p.3) provides for a single time limit of 3 to 5 days before the hearing. At the end of II, 3 we saw how, for example, Belgium and Italy allow a provisional emergency verdict until the next hearing. Alternatively, the same claimant can demand a deferment of the decision he himself requested, which would in this case be granted (in Indonesia, p. 20-1). Otherwise, the hearing and the verdict take place within a few days (Portugal, p.23; Burundi, p.4).

It can happen that the time allowed to call the case to hearing is not generally defined by the law, except in special cases. In Finland (p.6) for example, the limit is set to 30 days, for the particular case of tax disputes.

It can be that the main aim is to await the State defence (Turkey, p.7). Once the case has been discussed, the decision about the request for emergency measures will generally be published immediately. Sometimes, the news of the outcome is given by telephone, before the publication of the written pronouncement (Holland, p.12). If the verdict has to be, however summarily, justified, its publication in entirety can follow that of the pronouncement and be delayed for several weeks (Holland, idem).

9. IN FIRST AND LAST RESORT

The verdict on the request for provisional emergency measures is not subject to appeal in countries where state matters are judged in only one instance. Or where the request has been advanced on appeal, and there is no successive instance (and therefore also in respect to disputes concerning a judge's verdict: Finland, p.7; France, p.16; Turkey, p.8). Or if the law excludes the appeal for provisional measures in the first instance (Republic of Czechoslovakia, p.10 Belgium, p.37 : the latter report specifies that not even opposition or third party opposition is allowed).

There can be no recourse against provisional verdicts returned by a single member of the committee of the first instance (Holland, p.7, to a certain extent, to the president of state jurisdiction division of the State Council), nor any appeal to the committee or the appeal committee president.

Otherwise, the appeal will be granted; and other remedies applicable to first instance final verdicts can generally be admitted (ex. Egypt, p.11 and 15).

In Germany (p. 13) appeal is submitted to the a quo Court, which can - instead of transmitting it to the higher legal authority - modify its provisional verdict according to the latter. In France, (p. 9) appeal is possible to the state court of appeal, generally within a two week period, and then appeal to the State Council within a further two week period.

In some countries, the provisional measures are administered rebus sic stantibus: if new evidence turns up, they can be revised (I, 6). In Indonesia (p.25), the emergency measure can be revoked in accordance with the counter claimant who agrees not to pursue the proceedings.

It should be asked in which countries (as in Burundi, p.4), provisional emergency measures are immediately executable, in spite of any means of appeal.

It remains certain that in many countries, all provisional measures granted during the first instance of the main appeal, are valid only for that instance of the trial, and become ineffective after the related final verdict.

10. URGENT OR EXTREMELY URGENT VERDICTS; VERDICTS WITHOUT COUNTER-HEARINGS, EXCEPT FOR CONFIRMATION, OR WITH A COUNTER-HEARINGS; MODIFICATION OF THE REQUEST

It can be reliably stated that in all countries certain requests for provisional measures are treated, because of their subject, with particular urgency.

In many states, but not in all, it is possible for the judge to administer, in cases of extreme urgency, a measure inaudita altera parte (Holland, p.3; Portugal, p.23- 24; Turkey, p.8).

Thereafter, the systems differ. In many countries, such measures must by necessity entail a full hearing of all the parties: normally, they are adopted by a single magistrate, often the president of the committee, and reviewed by the entire committee (Belgium, p. 13; Indonesia, p.13).

But in Finland, (p.7) the hearing of all the parties is not always necessary: if the absent party, who has lost, submits new information to the judge, or the judge obtains it himself as a matter of course, the latter can revoke the measure.

In Belgium (p. 39) the choice to petition for extreme urgency entails a risk: if the judge decides that the extreme urgency is unjustified, he might reject the request for emergency measures for this reason alone.

As for the possible modifications of the request for provisional measures, the renunciation of a single charge will be considered as a partial withdrawal.

The request on the part of the claimant, that the verdict on the provisional measure be deferred, will perhaps be submitted to the discretion of the judge (it would appear, on the other hand, that in Indonesia, it is possible to obtain the deferment as a matter of course). For example, in countries where a long period of time passes between the hearing on the main dispute and the related verdict, it can be justified to request the deferment of the provisional measure on the day of the audience (cf. I, 4). Wherever it is reasonable to wait, then - in view of particular circumstances - other intermediate dates.

11. WRITTEN OR ORAL PROCEDURES

According to national relations, it would appear that there are no countries in which the provisional measure can be requested only verbally before the judge. A written request is always necessary. We know, moreover, that the latter is generally brought to the attention of the State and of other possible interested parties, in order to allow them to put forward their case.

It remains to be asked whether there are countries in which the claimant is not allowed to illustrate his request verbally to the judge. While it is clear that if such a faculty is granted to him, it will naturally also be granted - except in cases of extreme urgency - to his adversaries.

It can happen that the verbal debate must be explicitly requested by one of the parties, or specially proposed by the judge (Turkey, p.8). Or, that be standard procedure, but that the judge can explicitly exclude it, or the parties agree to dispense with it (Germany, p.18).

As we have seen, it can happen (Belgium, p.42-7) that, if the verbal phase takes place, the absence of the claimantis equivalent to withdrawal. If such an absence is not punishable, the claimant can renew the request.

12. WITHDRAWAL

In some countries, the party which has obtained the provisional measure is free to renounce it, and the measure then becomes ineffective (Portugal, p.24; Turkey, p.8). The renunciation, of course, must take place after the measure has been granted by the judge.

But the question then arises as to whether, in such cases, the ineffectiveness of the measure should automatically follow from the wish of the party who obtained it, or from an agreement between the parties or whether the judge should declare it with a special (if related) verdict.

Another possibility is that the other party presents new evidence, as a result of which the judge might modify his previous provisional emergency measure, after hearing all the interested parties.

A compromise seems to have been found in Finland (p.7), where the same party which obtained the measure can go before the judge to request its revocation; but the Court (which - if you remember - could in this country adopt the measure automatically) is not obliged to grant the revocation.

Other reasons for the termination of the measure do not fall into the category of withdrawal: the renunciation of the request before the judge has granted the provisional measure, or the renunciation of the main appeal, or the non-commencement of this appeal, all of which would bring about in different ways the termination of a provisional measure which had already been granted, but which was by necessity linked to the existence of the main dispute.

13. COSTS

It is conceivable that the costs incurred by the party who obtained the provisional measure should not be reimbursed by the party against whom these measures have been administered. This seems to be the case in Belgium (p.43): each party pays his own expenses.

Furthermore, these expenses can be minimal (as in the Republic of Czechoslovakia, p.10).

On the other hand, it is also conceivable that even for these costs, the general principal whereby the losing party must reimburse the winner, by order of the judge, might apply. At times, this will automatically be true, unless the discretionary powers of the judge to decree that each party pay

his own costs is applied. Or at other times, except for matters in which the latter system is the norm, be it discretionary or absolute.

When the judge must or can order the reimbursement of the costs of the provisional measure, in some states this will be included in the verdict which settles the main dispute: only then will account be taken of the costs incurred in requesting the measure in question, (Finland, p.7, although sometimes in this country, no account is taken of the fact that there is an opposing party to the appeal; Indonesia, p.25, and here the costs of the provisional measure are expressly calculated separately; Turkey, p.9).

In other cases (Germany, p.14) the State includes the question of related expenses in the same provisional verdict. But there are disputes in which the order to pay costs is not provided for. This is the case for disputes concerning social services, student aid, war pensions or benefits for the disabled. The German report also mentions legal aid.

In Senegal (p.16), the judge decides case by case whether to order payment of costs in the verdict relating to the provisional measure, or whether to await the final verdict. The latter system saves making a judgement on the main dispute right from the start.

Where costs in general are concerned, there can be a principal by which the State is never ordered to pay costs incurred by the claimant, but the latter can risk having to reimburse the State (Portugal, p.25). Or the opposite system might be conceivable, whereby only the State, if it loses, might be ordered to reimburse costs.

This is not related to the judge's order to reimburse costs, but to the financial cost of the provisional measures, in which case they can be granted on the condition that a deposit is payed (Turkey, p.6: this is not true, however, inmatters concerning public sector employment or functions).

COMMISSION III

EXPEDITIOUS PROCEDURES

1. THE VARIOUS CASES

In simple terms, the handling of trials can be compared to a taxi rank: as the taxis arrive, they line up and the first to arrive is called first.

Where trials are concerned, however, the system is a little less uniform.

There are some trials which the judge has the discretionary power to examine more quickly. The legislators in the various countries can request that, where the case is obviously not known in the matter, or

obviously founded, or obviously unfounded, it be called immediately: there is no reason to keep the parties waiting, when the solution is, so to speak, round the corner. In other cases, the situation of the concerned parties, especially where the interests of the public are concerned, make the possibility of damage caused by the uncertainty of the outcome unacceptable: and the legislators in the various countries give the judge the power to single out such cases and bring them forward. For example, in Sweden, (p.10), precedence is given to cases whose outcome is awaited by other judges in order to decide on other cases. Or to cases currently at the end of the queue, which are similar to others which will have to be decided by judges on the same or a lower level.

Finally, it is possible that the same legislators might be able to choose certain subjects or hypotheses in which disputes could be liable for expeditious treatment.

The national reports sometimes mention the existence in their country of all these cases (esp. Belgium, p. 44); or mention the existence of some. They then report on the existence of provisions for ex lege expeditious procedures, and list such possible cases (Spain, p.4-7; Finland, p.8; France, p.17; Italy, p. 3; Luxemburg, p.15; Mali, p.5; Portugal, p.25; Republic of Czechoslovakia, p.11; Spain, p.4-7; Turkey, p.9). The most common of these relate to electoral matters, to which different criteria apply. It is notable that in Columbia (p.1), the loss of the status of Member of Congress (Senate and Chamber of Representatives) is decided upon by the State Council.

At times, the ex lege emergency procedure depends on its special request by one of the parties to the trial (Iceland p.2; Italy, p.3). At others, it depends on whether a provisional emergency measure has been granted.

Sometimes, the emergency measure takes the form of the removal of a trial from a tribunal which has not concluded the affair within a certain time limit. This is true in France, for electoral disputes and for state authorisations regarding redundancies (p. 17-18). And similarly in Senegal in the matter of elections (p.20); once a certain length of time has passed, it is possible to appeal to a higher authority.

2. GENERAL PROCEDURES AND/OR SPECIFIC PROCEDURES

Given that in certain cases an expeditious procedure must be adopted, it can happen that this simply takes the form of the setting of an earlier date for the hearing, general procedure applying to the rest of the trial; or alternatively, that even for the trial itself, certain specific norms apply. The second option would appear to be the rule. Conversely, when the option to handle certain cases before others is left to the discretion of the judge, it may happen that the only procedural innovation consists in the setting of an earlier the date for the audience. Where the emergency measure differs

in its development from the normal one, the law may designates a single type of expeditious procedure (as in Holland, p.7). Alternatively, within the same state, several types may exist (France, p.17; Italy, p.4).

While it is clear that the variations can apply to each and any of the phases of the trial, this means that any attempts at classification are not easy.

For example, when the solution to the case is already obvious, the president can decide that there is no need for aninvestigation (Mali, p.5). Or he can eliminate the public hearing, sending the disputing parties to debate more soberly in the judge's council chamber (Italy, p.5).

A description of the various types of expeditious procedure can be seen, for example, in the Portugese report, p.25 and onwards.

3. TIME LIMITS

In general, emergency procedures affect the time limits set throughout the proceedings, for the parties to the dispute and for the judge, reducing them in varying degrees.

This can affect the time allowed for lodging an appeal, for preparing the defence, for requesting investigative measures and so on.

Even the judge can have a time limit imposed on him for the lodging of the appeal to set the date for the hearing under discussion, and another quite short one for the debating of the case in order to publish his decision.

As for possible further instances within the trial, other modifications or time limits are conceivable, and the time allowed for the lodging of the appeal is reduced compared with normal procedure.

4. POWERS OF INVESTIGATION

With regard to the judge's ability to leave out the investigation, see item 2.

The Dutch report (p.8), states that, apart from a few details, the normal rules on the gathering of evidence also apply to emergency measures. And that the criteria for evaluating the evidence must remain the same for all trials. Thus, if the results of an investigation are inadequate, it would be appropriate to turn to normal procedure. The Luxemburg report (p.16) observes nevertheless that, in practice, the urgency which governs expeditious procedure makes a lengthy investigation impossible. According to the Finnish report (p.8), the judge has significant powers of initiative. According to the Italian report (p.7), the powers of investigation remain unchanged, even if, for electoral matters, they take into account the need for great speed. Only when the judge has to decide within a few days, having gathered summary information (p.5,

case 5.4) is the situation completely changed. But in this case, it is a question of a summary verdict, likely to become definitive if the losing party does not appeal; and the same party can apply for appeal before the same tribunal, thus obtaining a new verdict based on a normal investigation.

For very rapid investigations, with regard to preliminary actions preceding legislative elections, see France, p.19.

5. THE FORM OF THE DECISION

Some countries observe that the form of the decision remains the same (Luxemburg, p.11; Holland, p.8; Portugal, p. 32; Sweden, p.11). The urgency of the case alone can lead the judges to write less, in order to publish the verdict more quickly: therefore the latter will be shorter than usual (Finland, p.8).

In Italy (p.5), only in the case referred to in the previous item will the justification be contained in a particularly brief written act, to be published immediately; and in the matter of elections, the outcome of the verdict must be read before the president, normally on the same day as the verbal debate (p.7).

In France (p.18), where the expulsion of illegal aliens is concerned, the decision is given to the president of the regional tribunal or to his delegate, with appeal to the president of contentious department of the State Council, or tohis delegate.

6. POSSIBLE CHARACTERISTICS OF ITS EFFECTS

It can occur that verdict on the first instance be immediately executable, even if an appeal can be lodged against it, and remain so even after the appeal has been lodged, while sometimes this only comes about as a result of decisions passed under normal state justice. Naturally, a stay of execution can be requested to a higher judge against such a decision.

We saw earlier (III, 4) a particular case in which, in Italy, the state issued, within the space of a few days, an immediately executable summary verdict, which was nevertheless liable to appeal before the same tribunal.

According to all the national reports, however, it does not appear that, as a general rule, the effects of verdicts concerning expeditious procedures differ from those concerning normal verdicts.