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The issue of time in the administration of criminal Justice

by Marc Molins Raich

Preface and acknowledgements

This essay seeks to provide an introduction to the issue of timing in the administration of criminal justice from three points of view: the Scots criminal system, the Spanish one and the provisions of the European Convention of Human Rights.

The idea of writing an essay about treatment of delay from a comparative point of view came as a response to the tremendous impression that caused me, as a practitioner, the statutory imposition of such an strong time limits for bringing a case before the court in the Scots legal system. This limitation makes the Scottish Criminal courts even more guarantee that the average, increasing –with the corroboration requirement and the not proven verdict- the fame of the system as one of the most fair an reliable for the defendant in the world.

Nowadays, with the general regression that some criminal systems have experimented due to the over-lodge of the courts and the specialisation of the criminality, this fact becomes even more interesting.

While not seeking to provide specific knowledge about any three of the legal sources –rather than 5.000 words it would need almost 5.000 pages!- and not also seeking to a be a guide even of substantive Spanish law, this essay tries to provide a briefly introduction for the interested reader to undertake further study on specialised areas.

Actually, its fair to say that the most interested in the issue might be the Spanish practitioners who are facing a renovation of the procedural criminal legislation –which has been working since 1885- and hopefully moving to a limited time system that may finish forever the endemic problem of delay in the Spanish legal tradition.

In that sense, it is also fair to note how difficult is trying to establish comparisons based on such different systems. Although the Scots criminal Law somehow seems to be inspired in the Roman tradition, the role of the parties, especially the Prosecution, and the

ancient tradition obliges the lector to take an especial care when solutions based on analogy are suggested.

The lector will note that where possible, Spanish terminology has been retained because of the difficulties of an accurate translation; when this has been done, the legal concept behind the term has been explained by way of a footnote. In particular, the Spanish way of citing sources of law has been retained.

Before going on with the main corpus of the essay, I would like to acknowledge all the people that have entrusted me, giving me the chance to spend six juridical months in Scotland and placing this seat in my career that is actually fructifying in form of a new focusing of my Doctoral Thesis, a new and better approach to the court and a renewed point of view of the aims and purposes of the criminal system of administration of justice.

I am mainly grateful to the British Council in Barcelona and Madrid as well as to the organisation in general for such a generous scholarship and amazing programme, to the Edinburgh University (lecturers, with special recall to Joëlle Godard, and staff), to McCourts Criminal Solicitors, to the Crown Office and the Prosecution Service in Edinburgh and Linlithgow, to "Stevenson & Marshall, Solicitors" in Dunfermline, to the Edinburgh Advocate's Faculty, to the Advocates James Peoples QC, Chris Shead and to Lord Bonomy, for all their patience and tireless effort in the tuition of law and generous behave.

Last but not the least, I would like to express my gratitude to my colleagues, known as "Eurodevils", from all around Europe for their patience with my delays and especially to my flat mates for my horrendous cooking.

To all of them, for their sympathy, example of hard work and perseverance.

Thank you very much.

Marc Molins Raich.

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INTRODUCTION

After having examined some books about the topic, its fair to note that the ancient Scottish legal tradition has shown for a very long time a big concern in the matter of delay on bringing a criminal case before the court.

Some cases of prisoners released on bail on the basis of unduly delay are known since mid 17th century1[1]. Since 1.701, the Scots criminal Courts have to observe a certain time limits in the prosecution and punishment of the crimes committed under their jurisdiction2[2].

One of the main authors in the Scottish legal tradition, considered as well as an Institutional Writer and one of the "fathers" of the modern criminal law, David Hume, made a big effort on the commentary of the consequences and remedies against delay. Most of his points of view, of his critics and suggestions could be re-written today, almost two hundred years after their original formulation, appearing as absolutely updated commentaries3[3].

Cesare Beccaria, considered for some authors as the main interpreter of the consequences of the French Revolution towards the criminal law, was also especially concerned on denouncing delay as one of the endemic enemies of the criminal law4[4].

Most of the legislative changes in the criminal procedures all over the world pursue, as an evident target, a prompt administration of justice…

Commentaries and examples like this could be made until the satiety because the appropriate timing of the administration of justice is critical, still nowadays, to a fair hearing and a just outcome of a criminal procedure.

"Justice delayed is justice denied" and "justice is sweetest when it is freshest"5[5] are currently being recited by practitioners before of the jurors, so often that they are on

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1[1] Richmond, Janet, April 1659 and July 1661. Note as well the case of Martin, Bessie, January 1673. Both from "Hume on crimes" second volume, page 98 (see footnote number 3).

2[2] According to the statutory provisions of the "Habeas Corpus Act of Charles II".

3[3] HUME, David: "Commentaries on the Law of Scotland, respecting Crimes". Bell &Bradfute, Edinburgh 1844. Volume II pages 98 and following.

4[4] BECCARIA, Cesare: "An essay on Crimes and Punishments" First edition, 1819. In that sense, pages 75 and following.

danger of becoming trite and meaningless. Its important that they do not. Once accused, a person has the natural6[6] right to be notified of the charge against him, to be brought as quickly as possible before a tribunal to hear the case against him, to be heard in his own defence and to a decision by an unbiased judge on the merits. In other words, the rules of natural justice apply.

Delaying the steps of this process has the effect of keeping an accused person under prolonged suspicion of guilt, unable to clear himself of the charges being made against him. In addition, it is possible that an extended period before the trial may affect the quality of the evidence and the thoroughness of the eventual hearing.

That is why we can sustain that the longer it takes for a criminal charge to be determined, the less certain it becomes that a just and a fair trial outcome will result.

On the other hand, justice will rarely result if the criminal case is too speedy.

The "*audi alterem partem*" rule insists that notice a criminal charge must be adequate in its terms, so that the accused knows the essence of the case he has to meet and can prepare his answer properly. That is why sufficient time must be given for representations to be made. To be fare with the accused, time is needed for the emotions aroused by a criminal behave to subside, to allow both sides to prepare their case and to enable the courts to come to a reasoned decision based on its knowledge of the facts, the Law and the circumstances of the case.

Next to the effort to avoid unduly delay, caution is needed to ensure that the measures arisen do not mean that the meaningful formalities of the law are turned into ceremonial symbols of a society's impatience with crime and it progeny.

As it is wisely warned by most of the authors7[7] engaged in the topic, is not delay per se which is objectionable, but excessive or unduly delay. As the lector may note, the distinction between fare (or tolerable) and unduly delay is going to be one of the main questions that will concern the Judges of every jurisdiction.

5[5] Lord Bacon quoted in "Kenny's outlines of criminal Law", (17th Edition. London 1958 para. 745)

6[6] The adjective "natural" has been used in purpose to distinguish the right to an speedy trial as an immanent one rather than a juridical convention or a right recognised by an Act or an Statute.

7[7] In that sense, note especially T. Prime and G.P. Scanlan in "The modern Law of limitation". Butterworths. London, Dublin, Edinburgh 1993.

For all that reasons, trying to determinate which is the appropriate timing of the disposition of criminal cases before the court is not an easy business but on this effort, while seeking more justice for the defendant, some conclusion can be reached.

CONSEQUENCES OF DELAY

Following the suggestions of the Commonwealth Secretariat8[8], at this stage of the essay I would like to introduce briefly which are commonly considered the consequences of the delay. This asseverations not only may encourage the fight against this situations but give as well a certain criteria to the Judges in order to determinate what constitutes unduly delay and what should be understood as unavoidable expense of time.

A.- DELAY AND THE DEFENDANT

At the outset it must be stated that, for the defendant, the impact of delay may not be always be negative. Arguably an accused may benefit from delays in two significant ways: by the postponement of the unpleasant consequences which follow an unfavourable outcome and by the improved chances of a better result because of the passage of time. In some cases, this leads to manipulation of the system which demeans the administration of justice.

Nevertheless, even in this respect, the effects of delay upon defendants vary considerably according to their pre-trial custody status. The effects of a criminal charge do not commence with conviction. Being under suspicion has it own stigma9[9]. The presumption of innocence exists in the courtroom in a theoretical plane, by placing the onus of proof to the prosecution, but among the society at large, wouldn't be wrong to say that being charged with a criminal offence often gives rise to a presumption of guilty. There is a natural human tendency to think "he wouldn't be in that position if there was not any truth in the allegation"10[10]. That is why we must accept that once someone is been charged, even if he is not kept in custody, the accused may face suspension from employment, disruptions in his social relationships and suffer emotional anguish. The

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8[8] OSBORNE, Judith (on behalf of the Commonwealth Developments and Experience): "Delay in the Administration of Criminal Justice". London, November 1980.

9[9] In that sense, seems to be especially interesting the decision of the Tribunal Supremo (the Spanish Highest Court) in their decision in the "Caso Marey", dated on the 14th of November 1.996. Judge Ilustrísimo Sr. Cándido Conde Pumpido.

10[10] From my short experience in the Scots courts, I have noted in that sense that quite often the Judge in a Jury Trial does a commentary on this regard when charging the jurors.

longer he or she has to wait for the trial, the more severe this effects will become and we should never forget that

"…without a trial, or a threat of a trial, there can be no justice, only unproved accusations hanging over the defendant's head" 11[11].

The consequences of long delay before trial are undeniably severe for an accused who has to wait in custody. At any case, that custody has to be considered as a punishment before conviction of someone who may never be convicted12[12]. Apart from the disruptive effect that this measure will sure have upon the defendant's work, family, social relations and employment –upon others- some studies have shown how this situation will carry certain disadvantages for the defendant's trial13[13].

Over the past three decades, several studies have purported to show that pre-trial detention has adverse effects on the outcome of a trial. The report of the Bail Review Committee of the New South Wales Parliament14[14], indicated that people who have been held in custody between arrest and trial are:

1. More likely to plead guilty.

2. More likely to be convicted if they plead not guilty, and

3. More likely to be sentenced to a term of imprisonment if convicted.

The apparent correlation between pre-trial detention and sentence may, however, be a result of the fact that the Judge, in granting bail, takes into consideration very similar factors to those which would be taken into account in the sentencing decision.

From the last asseverations, I wouldn't like the lector to infer that is my suggestion that the pre-trial custody should be abolished. Nothing as far.

11[11] KATZ, Lewis: "Justice is the crime: Petrial delay in felony cases". Cleveland and London, 1972. Pages 59 and 60.

12[12] This consideration is been developed by Cesare BECCARIA in his magisterial work "Essay on Crimes and Punishments". See footnote number 4.

13[13] Following "Delay in the Administration of Criminal Justice" (see footnote number 6) KING, M.: "Bail or Custody". London, 1973. Home Office Research Unit: "Time spent awaiting Trial". London, 1960.

14[14] Parliament of New South Wales: "Report of the Bail review Committee"(1976), page 46.

My position, however, is that considering this legal and social necessity such as a disruptive and negative for the defendant, the time limits have to be applied and observed in a carefully and severe way in order to avoid that an unduly delay increase –even more- the harm and pain that the defendant may be suffering without heaving found him/her guilty.

B.- DELAY AND THE PRESERVATION OF THE EVIDENCE

Its a matter of fact, asseverated by the logic of the criminal procedure, that the most of the production brought by the prosecution service before the Court will consist of the oral testimony of the witnesses, based in their account of facts and their recollection about them. In view of the fragility of the human memory, it is essential that the trial should follow within a reasonable period of the occurrence in question.

The longer the period before trial, the more likely the witnesses testimony will become less reliable. Due to an unduly delay in the hearing, an accused could be wrongly convicted on unreliable evidence. That would be manifestly unjust. Is as well a matter of fact that this delay may cause an acquaintance. The knowledge of this possibility may actually encourage the defendant or his counsel to delay the trial in the hope that the evidence will deteriorate. In that case, once again, we should relay in the Judge's criteria in order to avoid an abusive extension of the time limits that may operate in all criminal procedures.

C.- DELAY AND THE DISPOSAL OF CASES

As is known for all of us, the criminal courts of many jurisdictions are under extreme pressure due to the enormous quantity of work that is being generated and the ever-increasing caseloads that almost everywhere exist. In the absence of any alternative measure, the courts have come to depend to an increasing extent on the guilty plea to keep cases moving through the criminal justice system. In fact, the asseveration that the implementation of measures to reduce delay has got an effect upon the plea conviction rate, is been recently shown by an evaluative study held by the Home Office15[15].

This is not to say that the plea negotiation is purely a product of delay however, the argument that case pressures can be removed and plea negotiation remain does not mean that case pressure is without any effect on the bargaining processes. Once again, it's a matter of fact, that when the volume of work increases and resources remain constant, changes in the negotiation process may become manifest. The prosecutor may abandon the marginal case that he might have pursued earlier; he may offer to reduce more charges in order to avoid long and uncertain procedures.

15[15] ERNST and YOUNG on behave of the Research, Development and Statistics Directorate, Home Office: "Reducing delay in the Criminal Justice System: evaluation of the indictable only initiative". London, June 2000.

For that reason I think that could be asseverate that the delay has got a real influence in the court cases disposition, increasing or improving the plea bargaining as the only solution to make the cases run and discharge the overloaded shelves of the Crown and court premises. However, I must tell that I have not found any statistic or survey in that sense where to rely.

D.- DELAY AND THE AIMS OF THE CRIMINAL JUSTICE SYSTEM

Despite of the related consequences of delay, my main concern is the fact that excessive delay breaks the ends and means of the administration of justice. If this asseveration can be considered almost as a dogma in most of the jurisdictions, in the criminal one seems that an excessive delay aggravates even more the imperfections of our present system.

In that sense and once again using Beccaria's words,

"…it is then, of the greatest importance that the punishment should succeed the crime as immediately as possible, if we intend that, in the rude minds of the multitude, the seducing picture of the advantage arising from the crime should instantly awaken the attendant idea of punishment. Delaying the punishment serves only to separate these two ideas and thus affects the minds of the spectators rather as being a terrible sight that the horror of which should contribute to heighten the idea of punishment."16[16]

E.- ECONOMIC REPERCUSION OF DELAY

But delay has not only undesirable consequences towards the general purpose of the criminal justice administration system, it also affects the human and economic resources that make it possible. In other words, the delay in the administration of criminal justice has got as well an economic impact that devaluates even more it own capacity to beat such an strong enemy.

Without bearing in mind a pretension of exhaustively in that point, which belongs purely to economists, I would like to refer a recent study produced by the research of Development and Statistics Directorate (belonging to the Home Office)17[17] that shows the potential outgoing cost and saving of national founds by the implementation of measures that tend to reduce delay in the administration of criminal justice.

16[16] See footnote number 4.

17[17] ERNST and YOUNG on behave of the Research, Development and Statistics Directorate, Home Office: "Reducing delay in the Criminal Justice System: evaluation of the indictable only initiative". London, June 2000.

DEALING WITH DELAY

The preceding briefly discussion of the consequences of delay in the criminal justice system pretends only to give a roughly indication of the nature and the size of the problem that the delay in the administration of criminal justice involves. However, just as there is no a clear cause of such delay18[18], there won't be probably a single or even an easy solution against it.

Combative measures can be pursued on various levels and certainly from different points of view.

One of the main concerns of this essay is try to show how different and radical approach can be taken for the same issue in the different criminal systems. Roughly speaking, my small known about Scot's law have showed me that the fight against delay can be held from two different points of view: establishing a fixed time limit according to the kind of offence (statutory time limits) or just fixing the criteria to distinguish between proper and delayed administration of criminal justice.

The first system, which I will cal the "external limits system", has been mainly adopted in Scotland and some other jurisdictions under the Commonwealth. The second way, which I will call the "casuistic or internal time limits", has been mainly adopted by the Roman traditional systems and the European Convention of Human Rights.

Since 1995, when has been promulgated of the Scotland's Criminal Act, the Scots criminal procedure includes certain time limits for the prosecution to put a case before a Court, that increase even more the burden of guarantees that surround the accused in the judicial examination of his behaviour. That system based upon an external temporal limit is, as far as I know, only one in the world. Certainly, the matter of time has been one of the main concern in the most of the Commonwealth jurisdictions, but the Scots option seems to be the most radical and guarantee in that sense.

Most of the European modern jurisdictions have no such time limits that limit the maintenance of the accused status until the hearing is been settled. Once in that point, I would like to introduce the way how the matter of time is considered in Spain according to our present *Ley de Enjuiciamiento Criminal19[19]* to allow, afterwards a comparative analysis based in the Scots Law.

18[18] Plenty of Scientific Literature tried to guess which are the main reasons of delay in the administration of criminal justice. Summing up the uncertainties about it, I would suggest: BRIDGES and JACOBS, Lee and Marc: "Reducing Delay in the Criminal Justice System. The view of defence Lawyers" University of Warwick. Research Series, number 4/99. Warwick, March 1999.

19[19] Since 1885 is working the actual and only Act on regard of criminal Procedure. This Act has been used for more than one hundred years with a very few amendments.

THE SPANISH APPROACH TO THE TIME ISSUE: AN EXTENSION OF THE PROVISION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

THE SYSTEM BASED ON THE CASUISTIC LIMITS

In Spain, once the criminal proceedings have been formally started, the first stage of the proceedings, the *instrucción20[20]*, begins. This stage has the object of ascertaining the facts and the perpetrator of the crime in order to formalise the request for the punishment, served through the *escrito de acusación21[21]*. In this respect this is a preparatory stage for the oral public hearing –*juicio oral*- during which the new sitting Judge will definitely establish the innocence or the culpability of the accused.

The instrucción is clearly inquisitorial and sometimes secret, with a Judge that controls the proceedings, orders investigations and has wide powers concerning the imposition of any urgent measures considered necessary for the clarification of the facts or the identification of the presumptive culprit. In the course of this investigation and always based on statutory provisions, the Judge can order a pre-trial custody situation.

The article 504 and following of the *Ley the Enjuiciamiento Criminal*, provides the maximum limit to the pre-trial custody. Although the maximum length of this limit is normally never reached, the statute allows to the Judge to keep the defendant in custody for the half of the period that the possible conviction could last. However, all the custody statutes have been denounced before the *Tribunal Constitucional*, because has been considered that such a long period waiting for the trial could be an attempt to the

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However, due to the over-lodge of the courts, the specialisation of the criminality and the social and technological developments, since a few years ago, a few doctrinal have ask for a new procedural Act. Recently, the 28th May 2001, the main political parties in Spain: Partido Socialista Obrero Español (PSOE) and Partido Popular (PP) have riche an agreement to renew the whole procedural structures according to the facts that have been stated. In regard of the Agreement, a new procedural Act for criminal law should be approved in the next few years.

20[20]In ancient Spanish, the word *instrucción* could be translated as “investigation”.

21[21] The “*escrito de acusación*” could be considered as the indictment. However, note that the main difference may be that due to the fact that the Public Prosecution Service is supposed to be interested in the length of the supposed conviction, they must ask to the Judge for a certain duration of the detention if they are interested in such consequence.

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fundamental rights foreseen in the supreme law as well as in the international treaties that Spain has signed22[22].

Apart from the recent agreement23[23] reached by the main political parties in Spain, according to draft and approve a new Procedure Act, no answer has been given yet by the Tribunal Constitucional in that sense.

Whilst the Judge has the power to conduct any investigation he thinks appropriate, the parties –both prosecutor and defendant- can request the judge to undertake further investigations. The aim of this stage is prepare the file and the whole papers for the hearing before the competent court.

During this stage, most of the delays are caused and sometimes while the defendant is on custody.

Very general provisions do operate in order to avoid unduly delays.

The second paragraph of the 24th article of our *Constitución* 24[24] establishes in the same terms as had been used in the International Agreement of New York about Civil and Politics Rights25[25], the right to an speedy trial26[26].

This way to legislate trough general and indeterminate clauses, opens the door to the Tribunal Supremo27[27] as well as to the Tribunal Constitucional28[28] to define the

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22[22] Auto del Tribunal Constitucional 17/2000.

23[23] See footnote

24[24] The Constitution, approved in the 6th of December 1978, is considered the Supreme Law of the Spanish Acts and the highest in the legal hierarchy. The Fundamental Rights of the Citizens are contemplated in the articles 14 to 24, plus 29.

25[25] Section 14.1.c of the Agreement of New York about Civil and Political Rights. New York, 30 of April 1977.

26[26] In that sense, notice the difference in the way to announce the right. While the International agreement of New York and the Spanish Constitution provide the right to a trial without unduly delay, the ECHR and most of the legislation developed after it, provide “the right to a trial in a reasonable time”.

27[27] The equivalent to the House of Lords in the United Kingdom. The Supreme Court is the main Court of Justice in Spain. Occupies the highest position in the jurisdictional hierarchy.

28[28] The Constitutional Court is the one engaged in the whole matters involving the fundamental rights provided in the Spanish Constitution (articles 14 to 24 plus 29).

difference between a delay and an unduly delay and mainly, which are the criteria taken in account to differentiate a reasonable time to an unreasonable one.

However, the main concern for this essay is to determinate when or in which stage do the Tribunal Constitutional and the Supreme Court consider that there has been an unduly delay.

The expression "unduly delay" (literal from the second paragraph of the article 24 of the Spanish Constitution) has been defined by the Constitutional Court as an indeterminate juridical concept that can only be determinate therefore, needs, therefore, a casuistic examination (in that sense, Sentences of the Constitutional Court number 36/1984, 43/1985, 133 and 223/1988, 28 and 81/1989).

As it has been already said, it is my suggestion that this is the greatest difference between the Scots and the Spanish criminal system. While the first provides a fix term or a rigid time limit to bring the case before the court with certain and very limited options to extend it, the second lives an open door to the parties and to the Judge to extend the investigation, under the aware that unduly delay may quash the whole procedure.

According to this casuistic system, when the practitioners have required to the Constitutional Court to establish which is the criteria to distinguish the acceptable delay from the unduly one.

On doing this work, the Constitutional Tribunal has appealed to the previous decisions of the Strasbourg Court concerning the idea of "reasonable time", assuming this doctrine as a real "corpus iuris" about the subject (in that sense, once again, the important decision of the Tribunal Constitucional number 81/1989).

For that reason, event thought the final results may be quite different, the interpretation and fixation of the time limits criteria in the Spanish legal system, are identical to the ones used by the European Court of Human Rights. According to those systems, the length of proceedings must be assessed in each case taking into account all the circumstances including29[29]:

1. THE COMPLEXITY OF THE CASE, including matters such as the quantity of witnesses30[30], the intervention of other parties31[31] or the need to obtain expert evidence32[32].

29[29] See in that sense, Yagci and Sargin v. Turkey 20 EHRR 505 paras 59-70.

30[30] See Andreucci v. Italy (1992) Series A nº 228 – G.

31[31] See Manieri v. Italy (1992) Series A nº 229 – D.

32[32] See Wemhoff v. Germany (1968) 1 EHRR 55.

In that sense, the Spanish Courts have developed this principle in both Constitutional and Supreme courts, giving to the practitioners a pattern to measure the legality of the delay. The Constitutional court has established that not the whole delays are unduly. In some occasions, the complexity of the case will allow certain delays in order to know certainly if the behaviour of the defendant may be brought before the court33[33].

The Supreme Court has established that one of the main criteria allowed to measure the length of the procedure is the comparison with similar procedures for the same offences34[34]. In the same decision, this Tribunal set the doctrine that establishes that the proper use of the whole procedural steps by the parties –even though may require a long time- cannot constitute a basis for an unduly delay because the whole tools foreseen in the criminal procedure Act seek the main purpose of the administration of justice.

2. THE CONDUCT OF THE APPLICANT AND THE CONDUCT OF THE JUDICIAL AUTHORITIES, Although an accused person is not required to cooperate with the aim of the criminal proceedings and is entitled to make full use of his remedies, delay resulting from such conduct is not attributable to the state. Procedural rules that provide for the parties to take the initiative with regard to the progress of the civil proceedings does not excuse the courts from ensuring compliance with the requirements of Article 6 in relation to time35[35].

Exactly in the same terms expresses the Constitutional Court it point of view about the issue in plenty of Sentences36[36].

3. THE CONDUCT OF THE RELEVANT AUTHORITIES37[37], including matters such as delays in commencing proceedings38[38] or in transferring proceedings39[39].

33[33] Sentence of the Constitutional Court dated on the 14th of December 1991.

34[34] Sentence of the Supreme Court of the 20th of September 1993.

35[35] In that sense, see Scopelliti v. Italy (1993) 17 EHRR 493 para 25 and Unión Alimentaria Sanders SA v. Spain (1989) 12 EHRR 24.

36[36] See for all of them the Sentences of the Constitutional Court of the 14th of February 1991 and the Sentence of 23rd of January 1985.

37[37] König v. Germany (1978) 2 EHRR 170.

38[38] Eckle v. Germany (1982) 5 EHRR 1.

39[39] Foti v. Italy (1982) 5 EHRR para 61.

The mere fact that the state does not comply with the time limits which are laid down is not, in itself, contrary to Article 640[40].

4. THE CONDUCT OF THE DEFFENDANT, is also taken in account –specially by the Spanish authorities- in order to exclude any kind of compensation or mitigation effect for the defendant if his unfair or unduly behaviour has caused such delay.

The certain benefit that the defendant can take from the time spent in handling the procedure cannot be beneficent if it has been spent with unlawful purposes41[41].

The fact that a defendant in a criminal case is detained in custody is a factor to be considered in assessing reasonableness42[42]. In the same sense, the personal circumstances of an applicant may be taken in account. Thus, claims for compensation by HIV infected haemophiliacs that required "exceptional diligence" on the part of the authorities43[43].

Factors such as the workload of the court and a shortage of resources are not a sufficient justification for delays in a trial because Contracting States are under a duty "to organise their legal systems so as to allow the courts to comply with requirements of Article 6 (1)"44[44]. However, the state is not liable for delays resulting from a backlog caused by an exceptional situation when reasonably prompt remedial action has been taken45[45].

40[40] G v. Italy (1992) Series A nº 228 – F.

41[41] In that sense, article 295 of the Ley Orgánica del Poder Judicial, and the Sentence of the Supreme Court of the 7th of February 1991.

42[42] Abodella v. Netherlands. (1992) 20 EHRR 585.

43[43] X v. France. (1992) 14 EHRR 483.

44[44] Zimmerman and Steiner v. Switzerland (1983) 6 EHRR 17 para 29. Muti v. Italy (1994) Series A nº 281 - C para 15.

45[45] Buchholz v. Germany. (1981) 3 EHRR 597, para 51.

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Nevertheless, note that none of these criteria obliges to any of the practitioner to accelerate the procedural steps for bringing the case before the court. Most of the accusations of delay will have the chance to be refused in terms of those provisions. In that sense, from my point of view, the absence of an external time limit to start the hearing has got an undesirable effect on allowing delays in the previous steps before the hearing.

No general guidelines have been laid down for what constitutes a "reasonable time" in either civil or criminal proceedings. It is submitted that the proper approach is to decide whether the overall delay is "unreasonable" and then to consider whether the state is able to justify each period of delay.

In order to bear in mind the Strasbourg Court criteria, note that for the criminal proceedings, violations have included the following periods of delay: 16 years in complex proceedings46[46] and five years for relatively simple proceedings47[47].

Certainly, the violation of this right to a quick answer from the public bodies about a criminal behaviour may carry some kind of internal responsibilities as well as any consequences for the accused, who may see as his/her conviction won't have to be served or will be reduced48[48].

46[46] Ferranteli and Santangelo v. Italy (1996) 23 EHRR 33, and also Mitap and Muftuoglu v. Turkey (1996) 22 EHRR 209. 16 years in complex criminal proceedings.

47[47] Philis v. Greece. Nº 2. (1997) 25 EHRR 417. 5 years for relatively simple proceedings.

48[48] Although the remedies to unduly delay in the Spanish legal system could be the subject of a different essay (as well as a doctoral thesis!), note that the Spanish Court have traditionally adopted three different solutions once has been proved that the case has been heard within a reasonable time:

1. Reduce of the length of the conviction.
2. Exemption to serve the conviction.
3. Drop the case due to the prescription of the crime.

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In other words, is my position to understand that the great difference between the external or the casuistic time systems is that while the Scots Criminal system seems to conceive the time issue as a right for the defendant, making him know which is it length and remedies to its transgression, the Spanish legal system (based as I told in the ECHR) seems to consider the length of the procedure as a duty of the Court, no entitling therefore to the defendant to protect himself from the delay.

From my point of view, the modern criminal law has to be based in the limitation of the discretional powers of the Public bodies, being for that reason more fair and reliable the Scots criminal system (on it approach to the time issue) than the interpretation made by the European Court and implemented by the Spanish Courts.

According to this understanding, its my submission, that unduly delay must be considered not only as a fault from should be arisen responsibilities for the responsible but mainly, as a right for the defendant who may be entitled to see how the charges are dropped because of the fault to hear them in front of a court in a reasonable time.

TIME LIMITS IN THE SCOTS LAW

As has been told recently, for many years49[49] the prosecution of crime in Scotland under solemn procedure has been governed by strict time limits. These are intended, primarily, to prevent an accused being detained for unnecessarily long periods without receiving an indictment or being brought to trial. These time limits are now contained in section 65 of the 1995 Act, which also includes a general time limit on the prosecution of cases on indictment even if the accused has been not in custody.

THE TWELVE-MONTH RULE

A jury trial of an accused must be commenced50[50] within twelve months of the accused's first appearance on petition51[51]. If the trial does not begin within that period, the accused shall be discharged forthwith from any indictment as respects the offence and shall not at any time be proceeded against on indictment as respects the offence. The time limits does not apply to an accused for whose arrest a warrant has been granted in respect

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49[49] Algunos autores dicen que se remonta al siglo 18!! DAC

50[50] A trial commences for the purposes of this section, when the jury is sworn: 1995 Act, s 65 (9).

51[51] 1995 Act, s 65 (1) (as amended by the Criminal Procedure and Investigation Act 1996, s 73). If the charge is reduced to summary proceedings, the twelve-month limit does not the apply. According to STEWART, the 1996 amendment has the effect of negating the decision in Gardener v. Lees 1996 SCCR 168, 1996 SLT 342.

of his failure to appear at a diet of the case52[52]. The circumstances leading to the granting of the warrant are irrelevant53[53].

The Court has power "on case shown" to extend the twelve-month period54[54]. An application for extension is normally made to the sheriff, but, if the accused has already been served with a High Court indictment, the application must be made to a High Court Judge55[55].

The leading case on extension of the twelve-month limit is Her Majesty's Advocate vs. Swift56[56]. In that case the High Court, on appeal, refused to grant an extension and laid down the following principles:

1. An extension is to be granted only if sufficient reason for it is shown and the Judge is prepared to exercise his discretion in favour of the Court.

2. Fault on the part of the Crown is not an absolute bar to the extension being granted, but the nature and degree of that fault are relevant factors in assessing sufficient reason and in the exercise of discretion under the principle one.

3. The gravity of the charge or charges, is not itself a sufficient reason for granting an extension.

4. The shortness of the extension sought and the fact that the accused is not being prejudiced are not relevant in assessing the sufficiency of the reason for granting the extension, but they may be relevant factors in the question for exercising discretion when sufficient reason has been demonstrated.

It has been emphasised that the mere pressure of business is not enough to justify an extension57[57], but pressure of business has been somewhat narrowly interpreted in latter cases58[58]. However, both the accused and the Crown have a right to appeal to the

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52[52] 1995 Act, s 65 (2)

53[53] HMA v. Taylor 1996 SCCR 510, 1996 SLT 836, this is a case where a warrant was granted even though he accused was in the court building but not in the actual courtroom when the case was called.

54[54] 1995 Act, s 65 (3)

55[55] Ferguson v. HMA 1992 JC 133, 1992 SCCR 480.

56[56] HMA v. Swift 1984 JC 83, 1984 SCCR 216, 1985 SLT 26.

57[57] McGInty v. HMA 1984 SCCR 176, 1985 SLT 25.

58[58] Dobbie v HMA 1986 SCCR 72, 1986 SLT 648.

High Court against the sheriff's or Judge's decision on an extension of the twelve-month limit59[59].

THE 80 DAYS RULE

An accused who has been committed for a trial in custody may not be detained for a total period of more than 80 days from full committal without having been served with an indictment60[60]. If no indictment has been served within that period, the accused must be liberated forthwith. This does not mean that he cannot thereafter be served with an indictment, but simply that he may no longer be detained in custody pending his trial.

If an indictment is served within that period of 80 days but then falls because the accused is not called to answer it in court on the specified date, he should be released unless a new indictment is served before the 80 day period that does not render incompetent any indictment then served on him61[61].

The Crown may apply to a single judge of the High Court for an extension of the 80 day time limit, and the Judge may extend it if considers that there's sufficient cause62[62] but should not do so if he ins satisfied that, "for some fault on the part of the prosecutor", the indictment could have been served within that period.

As well as happened with the twelve-month rule, both parties have as well the right to appeal the Sheriff or either the Judge's decision63[63].

THE 110 DAY RULE

An accused who has been committed for a trial in custody must be brought to trial and the trial commenced within 110 days from full committal64[64]. If the trial is not begun within that period, then the accused must be liberated forthwith, and he is thereafter "for ever free form all question or process for that offence"65[65]. The time limit applies

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59[59] 1995 Act, s 65 (8). Procedures are provided by the 1996 Rules, r 8.I.

60[60] 1995 Act, s 65 (4) (a)

61[61] McCluskey v. HMA 1992 SCCR 920, 1993 SL 897. The court expressed the opinion that the accused's remedy for illegal detention lay with the civil courts.

62[62] 1995 Act, s 65 (5)

63[63] 1995 Act, s 65 (8)

64[64] 1995 Act, s 65 (4) (b)

65[65] 1995 Act, s 65 (4) (b)

equally where an accused is granted bail with a condition of remaining at home except for necessary court appearances doe not have the same effect; the test is whether there is intervention by a custodial agency.

The Crown may apply to a single Judge of the High Court to extend the period on the following grounds:

1. The illness of the accused or of a Judge.

2. The absence or illness of nay necessary witness.

3. Any other sufficient cause which is not attributable to any fault on the part of the Prosecutor66[66].

Clearly that last ground lives a great deal to the discretion of the Judge, but as is agreed, the Court is required to adopt a more exacting test in deciding whether to grant an extension to the 110 days than the test which is should apply in deciding whether to extend the twelve-month period.67[67]

THE TIME LIMITS IN STATUTARY OFFENCES

Some statutes provide for the commencement of proceedings within a certain time after the commission of the alleged offence68[68], or after information sufficient to justify proceedings has come to the knowledge of the prosecutor or some other person69[69].

66[66] 1995 Act, s 65 (7). For an exceptional case where two extensions were granted (making the total period 186 days), see Young v. HMA 1990 SCCR 315.

67[67] Beattie v. HMA 1995 SCCR 606, 1995 SLT 946.

68[68] See, for instance:

- Firearms Act 1968 section 51 (4): four years.
- Misuse of Drugs Act 1971, section 25 (5): twelve months.
- Criminal Law (Consolidation) (Scotland) Act 1995, section 5 (3). Unlawful sexual intercourse with girl aged over 13 but under 16: one year.

69[69] See e.g., Road Traffic Offenders Act of 1988, section 6 (six months from the date when evidence sufficient to warrant proceedings comes to the knowledge of the prosecutor); Social Security Act 1986, section 56 (5) (a) (three months from the date on which evidence sufficient in the opinion of the Lord Advocate to justify proceedings comes to his knowledge, or twelve months from the commission of the offence, whichever is latter)

If is there no time limit imposed by the statute creating the offence for a statuary offence triable only summarily, a general time limit applies of six months after the date of the contravention concerned, or, in the case of a continuous contravention, within six months after the last date of such a contravention70[70].

In the case of a continuous contravention, if proceedings are commenced within six months after the last date, then the whole period of the offence may be included in the prosecution71[71].

For the purpose of the six-month time limit proceedings are deemed to commence on the date when a warrant to apprehend "or to cite an accused" is granted, provided that the warrant is executed without undue delay72[72].

What constitutes "undue delay" in executing a warrant is a question of fact, circumstances and degree, which is very much within the province of the court of first instance.

CONCLUSIONS

As we have roughly seen, there are mainly two systems to control the timing of the criminal procedure. Roughly speaking, we can distinguish between the systems based in a "numerus clausus" or external time limits for bringing a case before the Court and those systems without any temporal limit beyond the own necessity of each case.

For the purpose of this essay, I have called the first kind of procedural time limits as "external time limits" due to the fact that they are statutory imposed and can only be extended in a certain cases and the "casuistic time limits" which allow to the parties to extend the procedure as long as its required.

The Scots criminal system is the main example of the criminal systems based in such an external limit and the Spanish system, mainly based in the previous decisions of the European Court, is another example of the "casuistic time limits".

From my point of view, both systems have undesirable and beneficial effects, relaying all of them in the good faith and ACIERTO in the investigation of each case.

70[70] 1995 Act defines which offences are triable only summarily. Generally speaking, and following STEWART, an offence is triable only summarily if the only penalty provided by the statute is on summary conviction.

71[71] 1995 Act, s 136 (1)

72[72] 1995 Act, s 136 (3)

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By one hand, we could criticise the "casuistic time limit" system on the basis that the extension of time relies mainly in the person that is handling with the case. This discretional decision, based in the personal criteria of the Judge that is involved in the investigation, rarely will be appealed before superior courts because of the uncertain outcome of the procedure and the great expenses involved on arising such question to the Strasbourg Court, although must be told that a high rate of the cases heard before this court have recognised the appellant's reason.

In the same sense, the casuistic approach to the time issue, gives a major flexibility to the parties who will be able to handle the investigation previous to the hearing with the only target of reaching the truth avoiding the necessity of rejecting any kind of rush in the certainly important job of preparing the evidence that must be shown to the court.

By the other case, the existence of external and independent time limits, ensure the guarantee that delay will be avoided and surround the procedure of a high standard of prerogatives and guarantees to the defendant.

At the end of the day, the legislator power must opt for one of both options: the most guarantistic one will rely on external time limits very rarely extendable. The one with the highest compromise with the aim of the procedure will never allow that an external circumstance avoids to reach the truth of what actually is involved n the procedure.

For that reason is my suggestion that we are, once again, in the old junction that ask you to choose between guarantees or reliability.

Although I am not able yet to give my personal point of view, because I am still under the great impression that the Scots criminal system has caused me, my position would suggest that the ideal point is just in the half way of both systems.

Unable to reject the flexibility that the proper investigation of the supposed crime requires but conscious that the credibility and proper use of the procedure must limit its duration, either a radical approach of both systems would suit my point of view.

For that reason, from my point of view, the "million dollar question" should be if time limits are able to guarantee both interests.

Is my suggestion that once again, beyond the position that the legislative body take in that point, only the professionally and the tireless effort of the practitioners will ensure a proper administration of justice.

About the Author:

Marc is a fully qualified Advocate in Spain. From January to July 2001 he spent six months in Scotland as a member of the Scheme of the Young European Lawyers, granted by the British Council.

Marc Molins Raich
2001 SLSJ