Effective Remedies for the Violation of the Right to Trial Within a Reasonable Time in Criminal Proceedings

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I. Introduction

Concerns about the excessive length of proceedings, especially in criminal cases, are not new, although they are still, unfortunately, very current. Already in the Roman law of Justinian, a two-year limit for the duration of criminal cases was established[1]. However, it was not until the mid-twentieth century when trial within a reasonable time was established as a fundamental right in Europe. As is well-known, Article 6.1 of the European Convention on Human Rights (ECHR) enshrined the right to trial within a reasonable time as part of the right to a "fair trial" and, according to Article 13, Member States are obliged to provide an effective remedy for anyone with an arguable complaint of a Convention violation, including the aforementioned right. However, the violation of the right to trial within a reasonable time and the lack of an effective remedy for it at the domestic level have generated thousands of applications to the European Court of Human Rights (ECtHR). These contribute, together with other reasons, to a massive volume of applications which reduce the Court's efficiency in fulfilling its task to protect human rights within a reasonable time.

The problem has nowadays become an absolute priority for the Council of Europe, as shown by the initiatives taken to tackle the problem[2]. On 24 February 2010, the Committee of Ministers adopted a Recommendation on effective remedies for excessive length of proceedings which gives guidance to Member States in order to guarantee the right to a trial in a reasonable time and to offer effective remedies in cases of violation. The Recommendation proposes specific forms of non-monetary redress for undue delays in criminal proceedings, such as the discontinuance of proceedings or the reduction of sanctions.

This last remedy, particularly important in criminal proceedings, has been implemented by the Spanish Criminal Code Reform Act, adopted on 23 June 2010, which stipulates that “the fact of undue delays in the proceedings is now considered as a mitigating factor of the penalty” (Article 21.6 Penal Code (CP). It is therefore interesting to examine to what extent the Spanish law and this new legal provision to compensate for delays in particular reflect the Recommendation of the Council of Europe of 24 February 2010.

Finally, at a time when the European Union is developing minimum standards as set out in Article 6 ECHR for the rights of individuals in criminal procedures as a prerequisite for the implementation of the principle of mutual recognition of judicial decisions in criminal matters[3], it may be convenient to think about the development of the right to trial within a reasonable time as a procedural guarantee since different standards of protection by Member States may make the mutual recognition of criminal judgments in the European Union difficult.

II. The Assessment of a Reasonable Time

The ECtHR constantly states in its case law that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities, and what is at stake for the applicant[4]. In criminal proceedings, the last criterion is of particular importance because of the special values affected when a person is submitted to a criminal trial.

When determining the relevant period for assessing the overall duration of criminal proceedings, the Court has established a “material criteria”, stating that criminal proceedings commence not only at the moment that a formal charge is brought against the applicant but also when the person has been substantially affected by actions taken by the prosecuting authorities as a result of the suspicion towards him (this includes pre-trial proceedings)[5]. In the case of an appeal against a conviction or a sentence, criminal proceedings are terminated upon judgment given in the final instance.

The jurisprudence of the ECtHR has been followed by state constitutional courts. In particular, the Spanish Constitutional Court has fully integrated the criteria of the Strasbourg Court on what is a “reasonable time” into its case law concerning Article 24.2 of the Spanish Constitution. Although the term "right to trial without undue delay" used by Article 24.2 may give the idea that it is enshrining a right more stringent than that covered by the ECHR, the Constitutional Court has said that this expression is not to be interpreted as ensuring the observation of deadlines established by the rules that organise the procedure, but as the right of everyone to have their case resolved within a reasonable time within the meaning of Article 6.1 of the ECHR[6].

III. Compensatory Remedies for Violations of the Right in Criminal Proceedings

The Court has often stressed that effective remedies must be provided against excessively lengthy proceedings. These remedies can be either preventive (to avoid the undue prolongation of proceedings) or compensatory (to seek redress, if possible, for the consequences of undue delay).[7]

The Court has constantly indicated that “the most effective solution” is a remedy designed to expedite the proceedings. In criminal proceedings, especially at a pre-trial stage, this may be done by allowing complaints or requests of acceleration to be lodged with the superior prosecution or judicial authority[8]. However, where remedies to expedite proceedings do not exist or have failed, the only effective remedy is to provide the litigant with adequate redress for delays that have already occurred. The remedies to offer redress for excessive length of proceedings may be “compensatory redress” or other forms of non-monetary redress. The Recommendation of the Council of Ministers considers two kinds of compensatory remedies: monetary redress and non-monetary redress.

1. Monetary Compensation

Financial reparation is, obviously, an appropriate redress for damage (pecuniary and non pecuniary) suffered due to the excess length of the proceeding. Therefore, an action to establish non-contractual liability of the state may be sufficient. However, the ECtHR has declared that an effective remedy for delays in criminal proceedings must, inter alia, operate without excessive delay and provide an adequate level of compensation[9].

In Spain, financial reparation is provided for by the Constitution, which establishes the liability of the state for the abnormal functioning of the Administration of Justice (Article 121 Spanish Constitution). The procedure for claiming this compensation is to submit a request to the Ministry of Justice combined with an appeal against refusal before the administrative courts.[10]

Although this compensation mechanism has been considered to be an effective remedy for undue delays by the ECtHR[11], there may be more effective remedies that allow for immediate non-monetary compensation for the harm suffered without having to go through a long administrative process before the Ministry of Justice which bears the risk of further delays.

2. Non-Monetary Redress: Discontinuance of Proceedings or Reduction of Sanction

In criminal proceedings, other non-monetary remedial measures taken by the Court itself is of special relevance. These measures may be the completion of the trial or the reduction of the sentence. The Commit-

tee of Ministers expressly recommends that both measures should be considered by the Member States as appropriate in criminal proceedings that have been excessively lengthy[12].

As to the discontinuance of the proceeding, the effects of the compensation can be anticipated by discontinuing the proceedings on the grounds of delay before the case is brought to the court that decides on its merits[13]. In fact, rather than compensation, it would be adequate if a violation of the right to trial within a reasonable time would constitute a procedural bar for continuing the process. It might be considered to include a presupposition in procedural law that is based on not holding the trial when there has been too long a delay, which in fact would be a procedural requirement[14]. However, following the considerations of the Venice Commission, this remedy should be used very cautiously in view of the public interests at stake in criminal proceedings[15]. It could be seen as an exceptional remedy in cases of proceedings on minor offences, since suspension of the sentence is generally foreseen for these offences and discontinuing the case before it is brought before the court can be considered as a way of anticipating this decision. Of course, a specific legal basis should be provided for it.

As to the mitigation of the sentence, the ECtHR has considered it to be an effective remedy within the meaning of Article 13 on several occasions after the judgment in the *Eckle* case[16]. In order to be seen as an effective remedy, the national authorities must have either expressly or in substance acknowledged and then offer redress for the breach of the Convention[17]. Therefore, this remedy must complete two criteria: the acknowledgement of a violation of the Convention and sufficient redress

In some countries, this remedy has been implemented into legislation whereas in others, it has been set or developed through case-law[18]. In Spain, the recent Criminal Code Reform of June 2010 has introduced a specific legal basis for the mitigation of the sentence.

IV. The New "Mitigating Circumstance" of "Undue Delays" in Spain (Article 21.6 Spanish Criminal Code)

1. The Situation Before the Reform of 2010

The Spanish Penal Code of 1995 contained no explicit provision regarding the effects of undue delays on punishment. It merely alluded to the problem with respect to the option of a pardon, stating that if the reason for the pardon request was the existence of undue delay, the execution of the sentence will be suspended pending the outcome of the request (Article 4.4 CP). In the absence of an explicit legal provision, the answers given by the Spanish Supreme Court to the question of whether the existence of an undue delay in criminal proceedings must have any impact on the punishment has varied:

a) The non-jurisdictional Agreement for the unification of doctrine of 29 April 1997 stated that the answer to the allegation of an undue delay should be to file a petition for clemency and a deferment from the execution of the sentence pending the issue of a pardon, as provided for in Article 4.4 CP. The possibility of accepting delays as an analogous mitigating factor was again ruled out for a lack of legal grounds. According to Article 66 CP, the judges or courts must impose the penalty within the lower or upper half within the legal framework of punishment, a decision which depends on the Court's assessment of circumstances related to the individual's responsibility as listed in Article 21 CP (mitigating circumstances) and 22 CP (aggravating circumstances). Article 21 CP did not include undue delay in the list of mitigating factors, although in the sixth and final section, it allowed for consideration of "any other circumstance that is analogous to the above." The moot question was whether undue delay was similar to the other mitigating circumstances (especially compared to repentance and lessening or repairing the damage caused) and therefore could be analogously

included in the list of attenuating circumstances. At that time, the Supreme Court denied the possibility of considering it as a mitigating factor by analogy.

b) A new non-jurisdictional agreement of 21 May 1999 found that the solution of requesting pardon meant transferring the function of imposing the penalty from the courts to the government and that the criminal courts should be responsible for compensating the person affected by an undue delay by reducing the sentence since "by the damage caused to the condemned person by the excessive length of proceedings, he has, in part, been punished." The Supreme Court now considered the undue delays as being part of the "analogous mitigation" under Article 21.6 CP. The decision gave reasons for discussions within the Spanish criminal doctrine. On the one hand, it established a suitable way to provide a substantive solution for the courts to acknowledge the existence of an undue delay. On the other hand, this interpretation had no legal basis because the undue delay suffered by the accused does not bear any analogy with the other mitigating circumstances listed in Article 21 CP[19].

This jurisprudential solution for undue delays has been applied very often in the courts, which shows the frequency with which a violation of the right to trial without undue delay is judged and condemned[20].

2. The Situation After the Criminal Code Reform Law 5 / 2010

With the Criminal Code Reform Law 5 / 2010 of 23 June 2010, a new mitigating circumstance has been envisaged in the reformed Article 21.6 CP: "*Extraordinary and undue delay in processing the procedure, provided that it is not attributable to the defendant and that it has no relation to the complexity of the case*"

The new section must necessarily be interpreted as taking into account the Spanish Constitutional Court's jurisprudence on the concept of "undue delay" which, as mentioned, is considered to be equivalent to "reasonable time" and in so far follows the ECtHR's jurisprudence on the right to trial within a reasonable time.

Nevertheless, the possibilities for the judge to reduce the sentence taking into account the delays in the trial are limited. Due to the Spanish system for the assessment of the punishment, the judges are not allowed to impose a penalty below the legal range of punishment foreseen for the crime concerned (except when they acknowledge two or more mitigating circumstances or a highly qualified mitigating circumstance without the presence of any aggravating circumstance, according to Article 66.1 CP). The acknowledgement of the mitigating circumstance implies that the punishment must be assessed as being within the "lower half" of the legal range or that an aggravating circumstance can be compensated for.

In my opinion, the mitigation of the penalty for having suffered undue delay is an appropriate and effective remedy to compensate for the breach of fundamental rights. It is not that the existence of the delay diminishes the guilt of the accused, as also stated in the Spanish Supreme Court cases, nor that the delay in any way affects the criminal responsibility of the individual for the crime committed. It is because of the need to compensate the convicted person for the harm done due to the excessive length of proceedings. The new Article 21.6 CP is based on the state's obligation to provide an effective remedy for a violation of fundamental right to a trial in a reasonable time.

V. Other Possible Effects of Undue Delays in Criminal Proceedings: Non-Execution of the Sentence

Following the argument used to justify the reduction of the sentence in cases of undue delay, one might argue that, if the duration of the process has been so excessive that it is a "pena naturalis" of the same

severity as the penalty imposed in the sentence, the sentence might as well not be executed at all. In this case, the sentence can be regarded as already been served by the defendant and that therefore the judicial sentence should not be executed. This approach has already been taken in several appeal proceedings in Spain. After declaring the breach of the right to fair trial without undue delay, the Constitutional Court has been asked to order the non-execution of the sentence imposed in the criminal proceedings. The Court has forcefully denied the feasibility of this proposal, saying that the delay in concluding the trial in no way influences any of the grounds on which the sentence has been based and therefore cannot determine the non-execution of the sentence[21] .

In my opinion, the Constitutional Court is correct in stating that there is no connection between the undue delay and the grounds on which the conviction has been founded. Indeed, the validity of the sentence, in terms of a decision based on law, cannot be affected by the excessive length of proceedings. A breach of the right to a trial within a reasonable time does not "pollute" the legitimacy of the sentence as the violations of certain procedural guarantees do (right to trial, defence, etc). However, it is also true that an excessive length of criminal proceedings can make the penalty imposed on the offender disproportionate in comparison to the seriousness of the crime by adding the penalty to the harm already caused by the breach of his right to a trial without undue delay. Also, if the sentence is imposed many years after the crime was committed, it may lack any preventive purpose and be a needless punishment[22]. Hence, in some cases, the only effective remedy for a violation of the right to trial without undue delay is the non-execution of the sentence and states should provide legal mechanisms that allow for it.

VI. Relevance of the Question for the Principle of Mutual Recognition in the European Union

The principle of mutual recognition of judicial decisions is the cornerstone of judicial cooperation within the European Union. The implementation of that principle presupposes that Member States have trust in each other's legal systems, which relies on common minimum standards. Therefore, strengthening mutual trust which allows for the recognition of judicial criminal proceedings requires a more consistent implementation of the rights and guarantees set out in Article 6 ECHR. Procedural rights are crucial for ensuring mutual confidence in judicial cooperation among the Member States and the right to a trial within a reasonable time is one of these rights.

Section 82 (2) of the Treaty on the Functioning of the EU refers to “the rights of individuals in criminal procedures as one of the areas in which minimum rules may be established”. It would be appropriate to establish such minimum rules with respect to the right to trial without undue delays and the remedies for its violation. Currently, the roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings, approved by Council Resolution of 30 November 2009[23], does not mention this right. The roadmap has a non-exhaustive character though. Therefore, it may be considered to lay down rules concerning the right to a trial within a reasonable time as a presupposition of the fairness of the proceedings and as a necessary step for a harmonisation of the remedies for unreasonable procedural delays provided by Member States within the EU. It would be of high relevance to establish minimum rules regarding the effects of undue delays in the assessment of the penalty.

Within the Council of Europe, a large diversity of remedies for undue delays can exist as long as they are considered to be effective according to Article 13 of the Convention. However, this diversity may difficult the development of the principle of mutual recognition within the EU because the violation of this right in a criminal proceeding may be a ground for non-recognition and non-enforcement of a judgment imposing a sentence. Also, the authority of the executing state may find the sentence to be incompatible with its

law because it has been passed without taking into account the existence of undue delays in the proceedings. It may also decide that the sentence needs to be adapted to the law of the executing state. If, for instance, the criminal law of the executing state envisages a reduction of the penalty for cases of undue delays, as is now the case of Spain, but the issuing state gave no effect to it, the sentence may need to be adapted to the law of the executing state[24].

VII. Conclusion

The provision covering the mitigation of the sentence for undue delay set out in the new Article 21.6 of the Spanish Criminal Code is in line with the Recommendation of the Committee of Ministers of the Council of Europe when it comes to providing a remedy for the breach of concluding a trial within a reasonable time. However, it should not be forgotten that, as the Committee itself has stressed, "the creation of new domestic remedies does not in any way relieve states from their general obligation to solve the structural problems underlying violations"[25] .

In the case of Spain, where cases of undue delays are all too frequent, the emphasis put on a compensatory mechanism can have the counterproductive effect of making the state slowing down on its obligation to adopt the necessary measures to ensure that criminal proceedings are carried out within a reasonable time[26]. It must be kept in mind that the best way for states to do this is to organise the judicial system in such a way that proceedings are processed in the optimum time[27] and to take measures for expediting cases that risk becoming excessively lengthy or have already become so. As the ECtHR has declared: the best solution in absolute terms is indisputably, as in many spheres, prevention"[28].

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1. See these historical references in D. R. Pastor, El plazo razonable en el proceso del Estado de Derecho, Buenos Aires, 2002, pp. 49-50.↩
2. See European Commission for Democracy through Law (Venice Commission), Can excessive length of proceedings be remedied?, Council of Europe, Strasbourg, 2007. In this publication, the Venice Commission compiled an up-to-date inventory of the existing legislation of 47 states, a guide to the relevant case law of the European Court of Human Rights, and its own assessment of as well as its far-reaching conclusions as to what would effectively remedy breaches of the reasonable length requirement.↩
3. As a first result of that work, see the very recent approval of the Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 219, 26.10.2010.↩
4. See, recently McFarlane v. Ireland judgment of 10 September 2010 [GC], par. 142.↩
5. Lavents v. Latvia judgment of 28 November 2002, par. 85.↩
6. Spanish Constitutional Court, Judgments 82/2006, of 13 March 2006 and 4/2007, of 15 January 2007.↩
7. Jurisprudence of the ECtHR. See, recently, McFarlane v. Ireland (cit.), par. 142.↩
8. One of those remedies to expedite the proceedings may be a constitutional complaint. The Strasbourg Court has admitted it as an effective remedy. In Spain, the Constitutional Court admits complaints about undue delays in criminal proceedings which have not been concluded in order to declare the violation of the right and to order the competent court to expedite the proceedings.↩
9. See Martins Castro and Alves Correia de Castro v. Portugal, judgment of 10 June 2008; McFarlane v. Ireland (cit), where the Court considered that the government had not demonstrated that the remedies proposed by them, including an action for damages for a breach of the constitutional right to reasonable expedition, constituted effective remedies available to the applicant in theory and in practice at the relevant time (par. 128).↩
10. The procedure is established in Article 192 Ley Orgánica del Poder Judicial (LO 6/1985 of 1. July 2005).↩
11. The Court has found the Spanish compensatory remedy to be effective: see Caldas Ramírez de Arellano v. Spain, judgment of 28 February 2003.↩
12. Recommendation n.10.↩
13. For example in Belgium, the decision of discontinuing the proceedings can be taken by the "Chambre du Conseil" or the "Chambre de Mises en Accusation" before the investigative phase is concluded. Example cited in the Venice Commission´s Report on the effectiveness of national remedies in respect of excessive length of proceedings, CDL-AD(2006)036rev, para. 85.↩
14. In this sense, J.L. Gómez Colomer, Constitución y Proceso Penal, Tecnos, Madrid, 1996, p.237.↩
15. See the Venice Commission's Report on the effectiveness of national remedies in respect of excessive length of proceedings (cit), par. 169.↩
16. See Eckle v. Germany judgment of 15 July 1982, Beck v. Norway judgment of 26 June 2001, Ohlen v. Denmark judgment of 24 May 2005 and Menelaou v. Cyprus judgment of 12 June 2008.↩
17. In Menelaou v. Cyprus (cit), the Court accepted that the applicant's sentence had been adequately reduced by the Assize Court because, having established the applicant's guilt, it proceeded to pass a total sentence of ten months imprisonment while the Criminal Code provided for a maximum sentence of seven years' imprisonment for each of the relevant counts "although the sentencing court did not specify the exact reduction of the sentence on account of the length of the proceedings".↩
18. See European Commission for Democracy through Law, Can excessive length of proceedings be remedied? pp. 33-34.↩

19. For the debate on this matter, see A. Manjón-Cabeza Olmeda, La atenuante analógica de dilaciones indebidas, Madrid, 2007, pp. 327-340 and S. Huerta Tocildo, "La singularidad de la atenuante de dilaciones indebidas en la causa" in: Estudios Penales en Homenaje a Enrique Gimbernat, Vol. I, Madrid, 2008, pp. 1033-1059, who takes a firm position against the doctrine of the Supreme Court.↩
20. In 2010, there have already been three cases where the Supreme Court, on occasion of appeals, has held that there has been a violation of the right and has newly determined the sentence , taking into account undue delay as analogous mitigation (see SSTS 28/2020, 28 January, 269/2010, 30 March, and 522/2010 of 1June).↩
21. See the study of constitutional jurisprudence in J. Díaz-Maroto y Villarejo, La doctrina del Tribunal Constitucional sobre el derecho a un proceso sin dilaciones indebidas y su repercusión en el ámbito penal, Repertorio Aranzadi del Tribunal Constitucional n. 8/2008.↩
22. See arguments defending the non-execution of the sentence as a means of redressing the negative consequences of undue delay, P. Fernández-Viagas Bartolomé, "Las dilaciones indebidas en el proceso y su incidencia sobre la orientación de las penas hacia la reeducación y reinserción social", Poder Judicial, nº 24, 1991, pp 37 y ss.9.).↩
23. OJ C 295, 4.12.2009.↩
24. Such a mechanism of adaptation has been foreseen in the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. Article 8.2. allows the executing state, where the sentence is incompatible with its law in terms of its duration, to decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law.↩
25. See the Guide to Good Practice accompanying the Recommendation (2010)3, par. 40.↩
26. In this sense, S. Huerta Tocildo (cit), pp. 1058-1059. Also the European Commission for Efficiency of Justice (CEPEJ) has noted that "mechanisms which are limited to compensation are too weak and do not adequately incite the states to modify their operational process (…) and find a solution for the fundamental problem of excessive delays. See doc CEPEJ (2004) 19rev2, "A new objective for judicial systems: the processing of each case within an optimum and foreseeable timeframe-Framework Programme", available at www.coe.int/cepej, p. 3.↩
27. See, in this sense, Recommendation No. R (87) 18 concerning the simplification of criminal justice and Recommendation No. R (95) 12 on management of criminal justice.↩
28. See Scordino v. Italy judgment of 29 March 2006 [GC], par.183.↩

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