BUT FASTER IS NOT ALWAYS BETTER ... (ON LAW` S DELAY)

RÝCHLEJŠIE VŠAK NEZNAMENÁ VŽDY AJ LEPŠIE ... (O PRIEŤAHOCH V KONANÍ)

Alexander Bröstl
Univerzita Pavla Jozefa Šafárika v Košiciach, Právnická fakulta

ABSTRACT

The article in brief deals with the right to a trial without undue delay, which is secured by every Constitution/ Charter, as well as by the European Convention on Human Rights and Fundamental Freedoms. It is criteria for a reasonable time in civil cases set up in the jurisprudence of ordinary, respectively constitutional courts. Examples are chosen from the history of the Court of the Chancery, nowadays from the Federal Republic of Germany, New Zealand and Slovak Republic.

ABSTRAKT

Článok sa v skratke zaoberá právom na súdne konanie bez zbytočných prieťahov, ktoré je chránené každou ústavou/ listinou, Európskym dohovorom o ľudských právach a základných slobodách. Kritériá na určenie rozumnej doby v civilných prípadoch ustanovené v rozhodovacej činnosti všeobecných súdov či ústavných súdov. Vybrané príklady pochádzajú z dejín Kancelárskeho súdu, novšie zo Spolkovej republiky Nemecko, z Nového Zélandu, ako aj zo Slovenskej republiky.

I. ONCE UPON A TIME...

Law`s Delay is an old problem. It is said that civil procedure and delay are twins or that they were born together. No lawsuit can be decided fairly without at least some minimum period of time between the filing of an action and its ultimate decision by the court.[1]

During the 16th century the Court of Chancery[2] was criticised heavily for its practice. It was overworked. Francis Bacon (1561-1626) wrote of 2000 orders being made a year; Sir Edward Coke (1552-1638) estimated the backlog to be around 16 000 cases. Looking for reasons we could probably say it was due to the incompetence of the judges, due to the procedure used, re-hearing of evidence, orders issued and overruled ("what was ordered one day, was contradicted the next so as in some cases there had been five hundred orders and faire more as some affirmed").[3]

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1 van RHEE, C. H.: The Law's Delay. Essays on Undue delay in Civil Litigation. Antwerp-Oxford-New York 2004, p. 1.

2 The Court of the Chancery originated in the 11th century. The Chancery started as a personal staff of the Lord Chancellor, described as a great secretarial bureau, a home Office, a foreign Office and a ministry of justice. By 1345 the Lord Chancellor began to be seen as the leader of the Court of Chancery. In the 15th century it became almost entirely a judicial body. Later, beginning from the time of Elisabeth I (Queen from 1558-1603) the Court was mainly criticised for its **slow pace, large backlog and high costs**, all problems which persisted until the 19th century, when it has been fused with the common law courts. Finally, the higher court system which had existed since the Middle Ages was reorganized in 1873 and 1875, by the Supreme Court of Judicature Acts. See also: WILSON, A.: Supreme Court of Judicature Acts of 1873 and 1875. Schedule of Rules and Forms, and Other Rules and Orders. London 1875.

3 KERLY, D.: A Historical Sketch of the Equitable Jurisdiction of the Court of Chancery. Cambridge 1890, p. 154.

II. CHARLES DICKENS ON LAW`S DELAY IN THE VICTORIAN ERA

The early 19th century saw the beginning of an exponential growth in legal business, which marked changes in society. In 1850s a new set of rules (Chancery orders) was produced by the Chancellor. The Master of Chancery Abolition Act 1852 abolished the Masters in Chancery and allowing all cases to be heard directly by judges. The court became more efficient and the backlog decreased. In the 1860s an average of 3207 cases were submitted each year, while the Court heard and dismissed 3833, many of them from the previous backlog.

Charles Dickens (1812 - 1870) was for a quite long part of his life and of his writing career a law student.[4] All the time he was writing *Bleak House* he was a member of the Middle Temple. He mentioned what he observed: "*At the present moment (August 1853) there is a suit before the court, which was commenced nearly twenty years and which is (I am assured) no nearer to its termination now then when it was begun.*"

Jarndyce and Jarndyce, which "was squeezed dry years upon years" is not only a fictive case concerning a large inheritance, mentioned by Charles Dickens:

"Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless."[5]

III. ÜBERLANGE VERFAHRENSDAUER: FEDERAL REPUBLIC OF GERMANY

There is no serious problem with undue delays in Germany – this is a general impression, when speaking about the judiciary in this country. Just to dig a bit deeper, in comparison with other countries there are maybe some signs...

Who is challenging German courts in civil cases can hope to get a decision from the first-instance court in average within five months. If the case is continuing at the Court of Appeal a litigant should count with some another eight months. In administrative courts it is said the procedure may last about two years of time. Sometimes it may also happen that Mrs. Justice is working clearly slow, e. g., in the case of the enterpriser G. from Saarbrücken who was fighting for a building permission for a supermarket about 30 years, when he finally brought his case to the European Court of Human Rights in Strasbourg.[6] This Court sentenced the Federal Republic of Germany in 2006 to pay the compliant a financial satisfaction of 45 000 Euro for violation of his rights of a fair trial.

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4 PARKER, D.: Dickens, the Inns of Court, and the Inns of Chancery. In: Literary London (conference, paper presentation London Department of English, Queen Mary University of London, 9-10 July2009.

5 DICKENS, Ch.: Bleak House. Chapter 1 In Chancery. Release Date: August 1, 1997 (eBook # 1023) Updated: February 21, 2012, p. 5.

6 Rechtssache G. gegen Deutschland (Individualbeschwerde) Nr. 66431/01. Here the Court was deciding whether the decisive period of time from August 23, 1984 (application at Landesgericht Saarbrücken) and August 4, 2003 (decision of the Bundesverfassungsgericht) was "reasonable time."

It is not so far away since the German legislation has reacted for the first time by amending and changing some important statutes by passing a new Law on Legal Protection in Case of Undue Delays in Court Proceedings and Criminal Investigation Proceedings on 24. November 2011.[7]

IV. COMMON LAW COUNTRIES: AN EXAMPLE OF NEW ZEALAND

Civil court systems in the United Kingdom and Canada are perceived to involve unnecessary delays. Significant legal reforms have been implemented in 1999. They were based on Lord Woolf's Report from 1996 and on his approach that "The civil justice system in this country urgently needs reform", concluding that the system was "too slow to bringing cases to a solution."[8] In Canada, Ontario, a research focusing on civil trials in 2001 states "there is a generally accepted view that many long trials take too long."[9] The civil justice system in order to ensure access to justice should "deal with cases with reasonable speed."

As an other country in this respect, not linked very much with undue delays, probably New Zealand could be mentioned here. But especially at the end of the first decade after 2000 in New Zealand there have been "increasing concerns about the time it takes for civil cases as progress through the system." [10] In the survey carried out by the Ministry of Justice about 59% of respondents disagreed (partly strongly) with the statement that "Courts provide services without unnecessary delay." Some basics: in District Courts in 2010 the bulk of cases are resolved in an average of 307 days, which means about ten months…

And what about criminal procedure? Section 25 (b) of the New Zealand Bill of Rights Act 1990 guarantees minimum standards of criminal procedure: Everyone who is charged with an offence has, in relation to the determination of the charge, has also the right to be tried without undue delay.

What it means will be demonstrated here by the example of the judgment in R. v. Williams v. New Zealand of 15 May 2009.[11]

Mr. Williams appeals against his conviction on a charge of conspiracy to manufacture metamphetamine. He contends that there was undue delay in bringing him to trial, that his trial should have been stayed and that his conviction should therefore be set aside. Nearly five years elapsed between the arrest of Mr. W. in November 2002 and his conviction, following a fourth trial, in October 2007. Much of this delay was clearly unavoidable. The first trial could not proceed, initially because a co-accused did not appear, and when he was located, insufficient jurors were available. The second trial was aborted, after seven weeks, when a co-accused was approached by jurors. The third trial was aborted, after two weeks, when the admissibility of the Crown evidence was successfully challenged.

The respective doctrine states: whether delay can said to be undue despite not affecting the fairness of a trial therefore falls to be determined on a case by case assessment of particular circumstances. The length and the causes of delay must be considered.

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[7] Compare the newly adopted Gesetz über Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren of November 24, 2011. A quite new phenomenon is introducing a complaint on delay (Verzögerungsbeschwerde) in the proceedings before the Federal Constitutional Court (Bundesverfassungsgericht) via amendment of the § 97 of the respective law.

[8] The Right Honourable the Lord Woolf, Masters of: Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales. July1996.

[9] DINOVITZER, R. – LEON, J. S.: When Long Becomes Too Long: Legal Culture and Litigators′ Views on Long Civil Trials. (2001) 19 Windsor Yearbook on Access to Justice. 106-107.

[10] LAING, R. – RIGHARDTS, S. – HENAGHAN, M.: A Preliminary Study on Civil Case Progression Times in New Zealand. A Report by the University of Otago Legal Issues Centre, Faculty of Law. 15 April 2011, p. 5.

[11] Shane Edward Williams v. The Queen [2009] NZSC 41; [2009] 2 NZLR 750, Judgment of 15 May 2009.

The Supreme Court concluded that the delay in its totality cannot be justified and was therefore undue. Mr. W. was entitled to a remedy for this undue delay to bringing him to trial.

Finally the Supreme Court closed by the opinion that there was undue delay in bringing the applicant to trial, but that delay did not justify a stay and was more than adequately recognized in the reduction in sentence. The appeal was therefore dismissed.

I could imagine the same kind of argumentation used in a similar case in the Slovak Republic.

V. ZBYTOČNÉ PRIEŤAHY V KONANÍ MADE IN SLOVAKIA

Criteria for a reasonable time in civil cases have been set up in the jurisprudence of the Constitutional Court of the Slovak Republic (further as "Constitutional Court") by the Finding No. II. ÚS 26/95, which has dealt with a pending paternity case.[12]

The complainant (originally a minor) challenged his case at the Constitutional Court in 1995. The case was pending at the City Court, respectively at the District Court since 1977. During this time of more than 18 years only one meritorious judgment was passed in 1987, which was overruled by the Regional Court in 1988 and returned to the Court of the first instance.

The District Court in charge with the case failed to make relevant evidence (the person of a father in charge was a citizen of Belgium, who refused to undergo blood tests). In 1993 finally there was evidence sent by a medicine doctor from India, dated by 1983 concerning an operation he has allegedly undergone in India in 1971, which had caused his infertility. This fact interpreted makes it impossible for him to be the father of the boy (complainant), and he represented this document as the crucial piece of evidence.

The Constitutional Court stated that a the proceedings of a duration of 18 years and 8 months is a violation of Article 48 Section 2 of the Constitution of the Slovak Republic and the same time of Article 6 Section 1 of the European Convention of Human Rights and Fundamental Freedoms, on account of serious delays and lacks in the procedure, linked with semiplena probatio and not making a proper use of the legal aid between contracting parties of two states.

How justice may vary during the time and how it may be considered from different perspectives shows the Finding No. II. ÚS 32/03 of the Constitutional Court. It concerns justice in the form of compensation or financial satisfaction because of undue delay from the view of a group of persons charged with rape and murder of a girl student in a criminal procedure. But the main point focusing on here is undue delay again.

Seven people have been charged in 1981 and sentenced as being guilty of serious crimes including murder in 1983 by a long-time imprisonment. Until 1990 three of them have fully performed their sentences and four of them have performed them partially.

In 1990 the sentenced people have raised a complaint on violation of law brought by the Prosecutor General to the Supreme Court of the Czech and Slovak Federative Republic. In a result the judgment of the Supreme Court of the Slovak Republic was dissolved and the case returned to the Regional Court for a new procedure and decision.

[12] Zbierka rozhodnutí a uznesení Ústavného súdu Slovenskej republiky 1995 (The Collection of Findings and Resolutions of the Constitutional Court of the Slovak Republic of 1995). Košice 1996, pp.52-67. A part of this article concerning Slovakia was already presented during the international conference in Taipei (25.-27 May 2009) and published in: BRŐSTL, A.: On Faces and Traces of Justice. In: SHING-I LIU – NEUMANN, U. (Hrsg.): Gerechtigkeit – Theorie und Praxis. Justice - Theory and Practice. Baden Baden 2011 pp.25-27.

After another 12 years the respective Regional Court was not able to decide the case. Paradoxically, the sentence of one of the complainants has been blotted out by the District Court in 1989, and after 13 years he faced another accusation.

The seven people still on trial have lodged a complaint in 2002 at the Constitutional Court on undue delay because of the lack of a valid decision bringing and safeguarding legal certainty. The Regional Court tried to excuse the length of the proceedings by the factual complexity of the case and the changes occurred more times in the persons of lawful judges. The Constitutional Court finally stated that: *"No factual complexity of a case may excuse a state of affairs, when there is no decision after more than 12 years since the decision about an extraordinary remedy has been made: the complainants are permanently facing legal uncertainty, which negatively infects their lives"*.[13]

The Finding of November 12, 2003 on the violation of the right to a trial without reasonable delays in the respective court proceedings and so far the right to a fair trial contained also a decision on a proportional financial satisfaction (according to the principle of corrective justice). In this case it was from 300 000 to 500 000 Slovak crowns (approximately an equivalent from 10 000 to 16 666 €), the highest financial satisfaction the Constitutional Court has ever granted until this moment, with the aim to compensate the injury caused to the accused persons through this denial of a just (lawful) court decision within a reasonable time. This applies to the cases when the accused have not only been lawfully convicted, but they have partly also served they sentence imposed on them by the quashed judgment. Especially the statement on the financial compensation within the decision made by the Constitutional Court evoked disagreeing reactions in the public; especially the "unfairness as such" and the respective form of corrective justice "for criminals" became the target of its criticism.

There is probably a true general conclusion that the perception that cases take longer than necessary to proceed through the system[14] has a negative impact on public confidence in the justice.

KĽÚČOVÉ SLOVÁ
Súd kancelárie, prieťahy v konaní, finančné zadosťučinenie, porušenie práva na spravodlivý proces.

KEY WORDS
Court of Chancery, undue delay, financial satisfaction, violation of the right to a fair trial.

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[13] Zbierka rozhodnutí a uznesení Ústavného súdu Slovenskej republiky 2003. II. polrok (The Collection of Findings and Resolutions of the Constitutional Court of the Slovak Republic of 2003. 2nd half-year). Košice 2004, pp.2329-2350 and p.2928.

[14] The Constitutional Court of the Slovak Republic is from the point of view of the officially announced statistical data successfully dealing with the overload within the last years. In 2012, e. g. there were 13 986 motions delivered to it; the average length of the proceedings before the Court was less than three and half months (the majority of cases have dealt with undue delays before general courts).

8. The Right Honourable the Lord Woolf, Masters of: Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales. July1996.
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CONTACT DETAILS OF AUTHOR

Prof. JUDr. Alexander Bröstl, CSc.
Head of Department of Theory of Law
Univerzita Pavla Jozefa Šafárika v Košiciach, Právnická fakulta
Kováčska 26, Košice, Slovenská republika
E-mail: alexander.brostl@upjs.sk