Why is There No Statute of Limitations for Criminal Cases in England and Wales?

di Richard Vogler

Abstract: This article discusses the reasons why, in contrast to most other western countries, there is no general statute of limitations in England and Wales. It reviews different approaches to the relationship between the elapse of time and criminal culpability and considers the arguments for and against general statutes of limitation. The particular historical and procedural reasons for the adoption of the "nullum tempus occurrit regit" principle in England and Wales are examined, before the two major exceptions: for minor (summary) offences and in the case of abuse of process, are explained. The article concludes that general rules of limitation in criminal cases have become increasingly problematic. Reasons for delay can be complex and are often justifiable and the use of digital evidence and new forms of proof can now make a fair trial possible, irrespective of the passage of time. In these circumstances, the approach of England and Wales provides an interesting alternative for consideration.

Keywords: Statutes of limitation, prescription, England and Wales, time, abuse of process.

Introduction

"The extraordinary discrepancy between time on the clock and time in the mind is less known than it should be, and deserves fuller investigation." Virginia Woolf, *Orlando.*

The arguments in favour of statutes of limitation are now so well established that for many authors they have become almost incontestable, and the opportunity to challenge them has long since passed.[1] Over 140 years ago, the United States Supreme Court put the matter succinctly:

"Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence."[2]

[1] S. Lonati, *A Comparative Study of the Relationship Between Time and Criminal Justice: the New Face of Criminal Statutes of Limitations in Italy*, in 3 *European Criminal Law Review* (2019), 301.

[2] Wood v. Carpenter, 101 U.S. 135, 139 (1879).

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It seems very odd, therefore that England and Wales, which presumably would like to be considered jurisprudentially "enlightened", have no general statutes of limitation in criminal cases whatsoever! This short article explores this paradox. Does the absence of any general statute of limitations or universal rules on prescription [3] in these countries, actually disadvantage defendants, destabilise criminal justice and threaten public confidence in the basic fairness of procedure, as suggested above? Or should the interests of the victims of crime and the public dislike of any automatic grant of impunity, whether deserved or not, require that the obligation to do justice should never be extinguished? In order to answer these questions, this article will first briefly review the main arguments for the use of general statutes of limitations, before considering why England and Wales (as well as some sister jurisdictions such as Canada, Australia and New Zealand) have rejected them. It will then examine in detail the approach adopted in England and Wales towards time limitations on prosecutions and compare it with the more widely adopted methodologies of continental European jurisdictions.

Time and Magic. Justifications for the Continued Use of Statutes of Limitations

Restrictions on the length of time after an offence in which a criminal case can be prosecuted have, on the face of it, very little to recommend them. Jankélévitch has noted the absurdity of the proposition that time, which is a natural process lacking any normative value whatsoever, should regulate the moral and legal questions of guilt and responsibility. As he put it, writing in respect of war crimes:

"(t)wenty years are enough, it would seem, for the unpardonable to become miraculously pardonable: by right and from one day to the next the unforgettable is forgotten. A crime that had been unpardonable until May 1965 thus suddenly ceases to be so in June - as if by magic."[4]

Some scholars have contrasted the concept of linear, chronological time with that of moral time, a process of analysis which reflects Virginia Woolf's interest in the dichotomy between clock time and "time in the mind" mentioned above and described by Bergson as "*La Durée*". The idea of time in this context is experiential and qualitative[5] rather than chronological and quantitative, and is manifested in the very real and continuing anguish "endured" by both victims and wider society in response to crime. This anguish does not cease automatically at the expiry of certain set periods of time.

[3] In this article, "prescription" is given the meaning of any restriction on the length of time after the commission of an offence in which a prosecution must be completed.
[4] See V. Jankélévitch and A. Hobart, *Should We Pardon Them?*, in 22 *Critical Inquiry* (1996), 553.
[5] S. Linstead and J. Mullarkey, *Time, Creativity and Culture: Introducing Bergson*, in 9 *Culture and Organization* (2003).

Chronological time which constantly erases itself in favour of a relentless inflection towards the future, contains the seeds of oppression and impunity and represents a denial of history as an ethical space. As Fareld has argued:

"The idea of a statute of limitations rests heavily upon a conception of linear time in which the past is seen as automatically disappearing into the present and which makes societies administration of justice less and less urgent as time goes by. Time sweeps everything away in its relentless onward march and the statute of limitations is thus simply an acceptance of its omnipotence."[6]

In this context, contemporary statutes of limitation can be seen as a characteristic feature of modernity which disconnects the present from any moral obligation to do justice to the past.[7]

There are four central arguments advanced in favour of rules limiting prosecutions after specified periods of time. The first relates to the requirements of due process and the second to procedural efficiency, whereas the third and fourth address wider, psycho-social and penological concerns. Almost all discussions in this area start with the proposition that time degrades evidence, as the memories of witnesses fail and the difficulties of locating them or finding the documents to support a defence case become increasingly intractable. In short, a fair trial becomes more and more unlikely as the events on which it would be based, recede into the past.[8] However, if that is the case, the longer limitations periods accorded to more serious offences seem difficult to justify and the same disadvantages of fading memories may well apply with equal force to the prosecution case. Moreover, new technologies used in the recording and storage of evidence and testimony are likely to diminish the cogency of this argument.[9] As the English jurisprudence discussed below rightly concludes, whether or not a fair trial can be held after a lapse of time is surely a matter of fact to be determined in each case, and circumstances can differ widely.

The second argument in favour of statutes of limitation, is the pragmatic, efficiency-related purpose mentioned by the 1879 Supreme Court judgement referred to above, that "(t)hey stimulate (prosecutors) to activity and punish negligence". Some commentators have even suggested that prescription is an aspect of the right to a trial within a reasonable time guaranteed by Article 6(1) of the European Convention on Human Rights

[6] V. Fareld, *History, Justice and the Time of the Imprescriptible* in: Helgesson, S. and Svenungsson, J. (Eds.), *The Ethos of History: Time and Responsibility*, New York, 2018
[7] J.-P. Deranty and A. Dunstall, *Doing Justice to the Past*, in 43 *Philosophy & Social Criticism* (2017)
[8] L. Powell, *Unraveling Criminal Statutes of Limitations*, in 45 *American Criminal Law Review* (2008), 129ff; R. Kitai-Sangero, *Between Due Process and Forgiveness: Revisiting Criminal Statutes of Limitations*, in 61 *Drake Law Review* (2012), 425ff.
[9] P. H. Robinson and M. T. Cahill, *Law Without Justice: Why Criminal Law Doesn't Give People What They Deserve*, Oxford, 2005, 58; E. Vergès, *Procédure Pénale. La Prescription De L'Action Publique Rénovée*, in *Revue de Science Criminelle et de Droit Pénal Comparé* (2017), 92.

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(ECHR). However, this is clearly not the cases, since speedy trial guarantees relate specifically to the process of trial itself and not to any period which precedes the issue of proceedings.[10] Moreover, statutes of limitation may actually encourage defendants to undertake delaying strategies at trial in order to run down the clock! Equally, it seems anomalous that the negligence or dilatory action of the prosecutor should be sanctioned by a grant of impunity to the perpetrator of the offence, rather than, for example, disciplinary action against the prosecutor or even a reduction in the defendant's sentence.

These process-based arguments are often supplemented by psycho-sociological ones relating to the perpetrator's "right to repose" after a certain period of time, and freedom from the Damoclean threat of retribution, with its associated psychological harms and risks of blackmail. The argument parallels the growing international demands for the establishment of a "right to be forgotten", protecting internet users from the consequences of past mistakes or indiscretions, which otherwise remain linked perpetually and inextricably to them in the digital record.[11] Individuals, so it is argued, should always be permitted to make a fresh start and the absence of prescription undermines the great ideals of forgiveness, repentance and rehabilitation.

Again it is possible to wonder why such forgiveness should be available automatically on the expiry of a certain period of time, without any necessity for repentance or restoration and why the "repose" of the perpetrator should be preferred over that of the victim? In recent years the so called "discovery of the victim" has produced changes in all aspects of the criminal justice system[12] and it is no longer acceptable to ignore or to diminish their interests in favour of those of alleged perpetrators.

Much of the debate over statutes of limitation and the right to "repose" of perpetrators has centred on so-called "unforgivable" offences, which are often exempted from prescription entirely. The controversy over West German attempts in the 1960s and 1970s to apply rules of prescription in order to grant impunity to the perpetrators of the Holocaust, provoked almost universal condemnation[13] and Article 29 of the Rome Statute of the International Criminal Court now makes it very clear that "(t)he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations." Similarly, the controversy over attempts to apply a time limit

[10] Lonati (fn1), 306.
[11] A. Neville, *Is It a Human Right to Be Forgotten: Conceptualizing the World View*, in 15 *Santa Clara Journal of International Law* (2017).
[12] J. Doak, *Victims' Rights, Human Rights and Criminal Justice. Reconceiving the Role of Third Parties*., Oxford, 2008.
[13] M. Clausnitzer, *The Statute of Limitations for Murder in the Federal Republic of Germany*, in 29 *International and Comparative Law Quarterly*, (1980); R. A. Monson, *The West German Statute of Limitations on Murder: A Political, Legal, and Historical Exposition*, in 30 *The American Journal of Comparative Law* (1982).

to the prosecution of military veterans involved in crimes committed during the Northern Ireland "Troubles" has merely awoken old resentments and controversies.[14] War, it is suggested simply "overwhelms" the arguments for statutes of limitation.[15]

Another area of great concern in this context is in relation to offences committed against children, who may not be able to come forward with evidence until many years after the events took place. Shinton made the point forcefully in a 2017 article entitled *Pedophiles Don't Retire: Why the Statute of Limitations on Sex Crimes Against Children Must Be Abolished*[16] and Gallen has argued that the protection offered by the Irish statute of limitations to the perpetrators of child sexual abuse in the Magdalene laundries cases, may in itself constitute a breach of the ECHR.[17] Others have argued for exemption from limitations in human trafficking[18] and a range of other offences. The growing list of proposed exceptions suggests that a universalist approach to time limitations has severe drawbacks, particularly in a period where more is known about the reasons why victims may not want to come forward with their complaint until many years after the event.[19] New forms of scientific evidence are also now shedding light on historic crimes, which was simply unavailable at the time.[20]

The fourth line of argument commonly advanced in favour of statutes of limitation is a penological one, which suggests that time diminishes the need for punishment. This is possibly true for any theory of punishment based on deterrence, as the impact of such punishment and the community outrage at crime, may potentially fade over time.[21] However, the situation is clearly more complicated with regard to retributivist justifications for punishment. Enlightenment theorists such as Kant stressed the unlimited power (and duty) of the state to sanction those guilty of breaking the social contract.[22] In this context, an individual deserving of punishment remains

[14] C. K. M. Chung, *Twenty Years after: Statute of Limitations and the Asymmetric Burdens of Justice in Northern Ireland and Post-war Germany*, in *Parliamentary Affairs* (2020).
[15] P. D. Swanson, *Limitless Limitations: How War Overwhelms Criminal Statutes of Limitations*, in 97 *Cornell Law Review* (2011).
[16] S. Shinton, *Pedophiles Don't Retire: Why the Statute of Limitations on Sex Crimes Against Children Must Be Abolished*, in 92 *Chicago Kent Law Review* (2017).
[17] J. Gallen, *Historical Abuse and the Statute of Limitations*, in 39 *Statute Law Review* (2018).
[18] M. Barraco, *Is Human Trafficking a Crime That Should Not Be Subject to Any Statute of Limitations?*, in 24 *Human Rights Brief* (2020).
[19] R. R. Zoltek-Jick, *Repressed Memory and Challenges for the Law Getting Beyond the Statute of Limitations* in: Appelbaum, P., Uyehara, L. and Elin, M. (Eds.), *Trauma and Memory: Clinical and Legal Controversies*, Oxford, 1997; S. L. Malone, *Just How Reliable Is the Human Memory: The Admissibility of Recovered Repressed Memories in Criminal Proceedings*, in 35 *Touro Law Review* (2019).
[20] J. A. Hughes and M. Jonas, *Time and Crime: Which Cold-case Investigations Should Be Reheated?*, in 34 *Criminal Justice Ethics* (2015).
[21] C. Flanders, *Time, Death, and Retribution*, in 19 *University of Pennsylvania Journal of Constitutional Law* (2016), 434.
[22] Monson, (fn 13), 606.

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so until actually punished, irrespective of the passage of time. For Kant, the principle of punishment was a categorical imperative, which could not be evaded on grounds of mere convenience or compassion.[23] More recent scholarship has identified different varieties of retributivism[24], some of which, such as Cottingham's "denunciation theory"[25] or Flanders' "community outrage" approach[26] will clearly be diminished by the passage of time. However, another view of retributivism, characterised by Tomlin as the "brute time view" suggests that continued non-punishment of an offender itself constitutes an offence:

"..the badness of non-punishment is to be calculated by the moral importance of punishing the person, and the time that elapses between the punishment-worthy act (when they become deserving of punishment) and the deserved punishment, such that, as long as the person remains unpunished, things keep getting worse."[27]

Ultimately the passage of time will erode only some of the justifications for punishment and it is hard to see why these should be invariably preferred over more essentialist versions of "just deserts" theory.

According to Vergès, the traditional arguments in support of Statutes of Limitation have run out of steam ("*essoufflés*")[28] and in 2007 the French Senate was told that the French law on prescription was in "crisis".[29] Although these views may not be universal, they do reveal a certain unease regarding the ambiguities in many of the arguments expressed above and the supposedly "magical" properties of a statute of limitations to eradicate guilt. They have also led to an increasing interest in the ways that it is possible to achieve fairness in relation to long delayed prosecutions, without universal regimes of limitation.

England and Wales and the Absence of a General Statute of Limitations

Given the problems of justification discussed above, only a very specific set of circumstances should have combined to establish the dominant position

[23] N. T. Potter, *The Principle of Punishment is a Categorical Imperative* in: Kneller, J. and Axinn, S. (Eds.), *Autonomy and Community: Readings in Contemporary Kantian Social Philosophy*, Albany, 1998.
[24] J. Cottingham, *Varieties of Retribution*, in 29 *The Philosophical Quarterly* (1979); N. Walker, *Even More Varieties of Retribution*, in 74 *Philosophy* (1999)
[25] Cottingham, (fn.24), 245.
[26] C. Flanders, *Time, Death, and Retribution*, in 19 *University of Pennsylvania Journal of Constitutional Law* (2016).
[27] P. Tomlin, *Time and Retribution*, in 33 *Law and Philosophy* (2014), 666.
[28] E. Vergès, *Procédure Pénale. La Prescription De L'Action Publique Rénovée*, in *Revue de Science Criminelle et de Droit Pénal Comparé* (2017), 92.
[29] Hyest, J.-J., Portelli, H. & Yung, R. *Pour un Droit de la Prescription Moderne et Cohérent (Rapport d'Information au Nom de la Commission des Lois et de la Mission d'Information de la Commission des Lois*), 20 June 2007, available at https://www.senat.fr/rap/r06-338/r06-338.html

of rules on limitations in European jurisprudence. The history is a long one and time-based restrictions on criminal prosecutions in continental Europe owe their origins to similar provisions in Roman Law.[30] Subsequent adoption of the Roman Law concept was not uncontroversial however, and as discussed above, Enlightenment scholars adopting a classical Kantian approach, had little time for any attempts to limit the operation of punishment in such an apparently arbitrary fashion. As Beccaria put it "when opposed to truth … prescription is urged in vain".[31] However, the development of European Positivism and Liberalism in the mid to late nineteenth century saw a revival of interest in prescription as a defence against the kind of unending pursuit of former offenders typified by the activities of the relentless and merciless Inspector Javert in Victor Hugo's influential *Les Misérables*, published in 1862.

Two factors, neither of which applied in England and Wales, combined to ensure that prescription would become a necessary and indispensable feature of most continental criminal justice systems. The first was the adoption in some European jurisdictions of *Legalitätsprinzip* (the legality principle), which obliged prosecutors to proceed in all cases of provable criminal liability. This represents a very different approach to that employed by the Prosecutor in England and Wales, who is required to consider the social utility of a prosecution and who cannot proceed unless there is a clear public interest in doing so.[32] The second factor is the obligation imposed on many continental European judges to determine and manifest the "factual truth" in their judgements[33], irrespective of issues such as compassion, or the lack of social utility. Many European actors in criminal justice are therefore locked into a system which permits of very little discretion either in the initiation or the conclusion of criminal proceedings. Only formalistic solutions such as a time-related rule on limitations can relieve such actors of the intolerable burden of making judgements which, although jurisprudentially correct, are manifestly unfair.

The multiple layers of discretion embedded in the English and Welsh system of criminal procedure makes the imposition of such solutions unnecessary. Any judge who forms the view that it would be unconscionable to pursue a prosecution against an individual arising from events which occurred long in the past, can simply stay (conclude) those proceedings on the basis of his or her inherent jurisdiction to prevent any "abuse of process". A jury could take a similar view and simply dismiss a prosecution in these circumstances, irrespective of the weight of factual evidence presented to

[30] Clausenitzer, (fn 13), p.474; P. Stein, *Roman Law in European History*, Cambridge, 2000
[31] C. Beccaria, *An Essay on Crimes and Punishments by the Marquis Beccaria of Milan*, Albany, 1872, 54. See also Beccaria's proposals "Prescription and Prosecution" 57ff..
[32] Code for Crown Prosecutors, s.4, available at https://www.cps.gov.uk/publication/code-crown-prosecutors
[33] For example, see Art. 310 of the French *Code de Procédure Pénale.*

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them and without the need to explain their reasons. As a result, the issue of limitations in criminal procedure is entirely uncontroversial in England and Wales and academic literature on the subject is almost non-existent.[34]

The Relevance of Lapse of Time to Prosecutions in England and Wales

The general principle of the English common law is that, in the absence of specific statutory provisions to the contrary, there are no formal time-limiting restrictions whatsoever on the commencement of a prosecution. This approach is founded on the long-established equitable doctrine *nullum tempus occurrit regit*, which maintains that, as an aspect of sovereign immunity, time does not run against the Crown. According to the leading common law authority, William Blackstone, writing, somewhat obsequiously in 1765, the *nullum tempus* principle is the standing maxim upon all occasions:

"…: for the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects"[35]

Neither *Magna Carta* nor the writ of *Habeas Corpus* provide any effective remedy against unreasonable delay in bringing a prosecution.[36] Part of the explanation for this historical rejection of the limitation principle must come from the fact that, until the establishment of public prosecution authorities in the 19th and 20th centuries, the prosecutor was generally a private individual, usually the victim or complainant.[37] Moreover the character of the trial process in England was extraordinarily rapid compared to the drawn out procedure operated in countries governed by the Civil Law. Reliance on a single, determinative courtroom event provided a powerful sense of synchronicity, which contrasts strongly with the continental diachronicity or cumulative method of decision-making.[38]

There are, however, two important exceptions to this general approach, which will be examined in turn. The first is in respect of relatively minor ("summary") offences where a general time-limitations rule applies. And the second is in respect of all offences, in specific cases where the lapse of time since the events complained of, makes a fair trial impossible. In these circumstances, as indicated above, the prosecution must be stayed as an "abuse of process".

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[34] In contrast to the situation in the United States where the operation of general statutes of limitations provide a very fruitful source of academic debate.
[35] W. Blackstone, *Commentaries on the Laws of England. Book the First.*, Oxford, 1765, 240.
[36] B. Doherty and S. O'Keefe, *Justice Denied: Delay in Criminal Cases*, in 49 *Northern Ireland Legal Quarterly* (1998), p.387.
[37] M. Yue, *Exploring the Origins of Public Prosecution*, in 18 *International Criminal Justice Review* (2008), 191ff.
[38] R. K. Vogler, *The Principle of Immediacy in English Criminal Procedural Law*, in 126 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2014).

Time Limitations on the Prosecution of Summary Offences in England and Wales

The major exception to the *nullum tempus* principle in England and Wales is in respect of relatively minor offences ("summary offences") which are triable by a Magistrates' Court and not before a judge and jury. Such offences constitute the vast majority of criminal cases and include motoring, licensing, regulatory and less serious crimes. These are usually subject to a limitation period of six months from the date of the offence, under the provisions of s.127(1) of the Magistrates' Courts Act 1980.[39] This legislation holds that, except as otherwise expressly provided, a magistrates' court may not try a summary offence unless the procedure was initiated within six months from the time when the offence was committed. Outside that time limit, proceedings will be statute-barred and a prosecution cannot proceed. Two obvious problems arise in respect of these time limitations. The first relates to the calculation of the moment at which the time limitation period begins to run and the second relates to when it is concluded and any prosecution becomes statute-barred.

With respect to the first problem, it is now well settled that time begins to run from the "discovery" of an offence by the authorities rather than from its actual commission. "Discovery" indicates the first time at which the offence was reported or identified and does not require that an investigation should be completed with all possible lines of defence explored, still less that a firm decision should have been taken to prosecute. Therefore, in a 2003 case involving the sale of contaminated food by a supermarket in contravention of the Food Safety Act 1990, the prosecution had argued that the quality of the initial information was poor and it wasn't until it had been confirmed by a reliable technical report and a formal statement from the complainant, that the offence could be said to have been "discovered". Newman J disagreed emphatically and ruled that the justices deciding this issue should simply ask themselves:

"… whether the facts disclosed, objectively considered, would have led a prosecuting authority to have reasonable grounds to believe that an offence may have been committed by some person who has been identified to it?"[40]

Prosecutors should therefore understand that for these purposes the time begins to run as soon as the duty to investigate arises and the concept of "discovery of an offence" should not be confused with the subsequent completion of a full investigation of it or the eventual decision to prosecute it. Therefore, "knowledge of the facts" was quite sufficient to set the clock running and the start of the limitation period should not be delayed until written confirmation of those facts had been obtained.[41] The problem is

[39] See also See also the Criminal Procedure Rules 2020, SI 2020/759, r 7.2(11).
[40] *Tesco Stores Ltd. v. Harrow LBC* [2003] EWHC 2919.
[41] *R. v. Beaconsfield Justices, ex parte Johnson & Sons Ltd* (1985) 149 JP 535.

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particularly acute in relation to computer offences where it may take some considerable time to download and analyse digital evidence within the time limits. However it has long been established that even where the limitation period set by statute is expressed as starting only when evidence "sufficient in the opinion of the prosecutor to warrant proceedings" had been collected[42], these words were merely descriptive of the evidence and did not require the prosecutor to actually form such an opinion before time began to run.[43] Moreover, the period did not start only when the particular prosecutor entitled to make a decision to prosecute had received the information. Knowledge of an offence acquired by any investigator was sufficient to start the clock.[44]

It is inevitable that, since the date of the "discovery of an offence" is likely to be an internal matter to the prosecution agency, it may be difficult for a defendant to obtain the necessary information on which to launch a challenge based on the limitation period. The issue of a summons constitutes a judicial act, so a magistrate, or justices' clerk, must satisfy themselves that a prosecution is not statute-barred before proceeding. Since evidence is not called at this stage, it is usual for the prosecution to provide a "conclusive certificate" indicating the precise date on which knowledge of the facts on which the prosecution is based, came to the attention of the prosecution agency or the police. Although described as "conclusive" to the extent that the justices can rely on it to issue a summons if it is not challenged, such a certificate is, in reality, no more than evidence about the date of the first knowledge of the alleged offence. The position was complicated by a decision of Lord Justice Auld in the case of *Amvrosiou* in 1996.[45] In his view the issue of a "conclusive certificate" was intended to provide certainty for the prosecution and defence and to avoid the necessity for the prosecution to disclose extensive details about their evidential or decision-making procedures in a particular case. "Conclusive" in his view, implied that:

"no contrary evidence will be effective to displace it, unless the so-called conclusive evidence is inaccurate on its face, or fraud can be shown."

This approach has been widely criticised[46] and seems to undermine the principle that it is for the prosecution to prove their case in all its aspects, including that it is within the jurisdiction of the court. As Howe puts it:

" … any challenge to a certificate is rendered ineffective, leaving a defendant in a "catch-22" situation. It is also difficult to see how certainty is achieved if a prosecutor can retrospectively and unilaterally fix time limits."[47]

[42] S.11(2) of the Computer Misuse Act 1990.
[43] *Morgans v. DPP* [1999] 1 WLR 968.
[44] *Donnachie v. Cardiff Magistrates Court* [2007] 1 WLR 3085.
[45] [1996] EWHC Admin 14.
[46] S.-L. Howe, *Prosecution Time Limits — Part 1*, in 181 *Criminal Law and Justice Weekly* (2017).
[47] Howe, (fn 46), 180.

It is submitted that, in the event of any challenge, it is for the prosecution to establish to the usual standard of criminal proof, that they obtained knowledge of the alleged offence within the limitation period and that proceedings are not statute-barred.

The inherent difficulties of allowing the prosecutor to self-certify compliance with the limitation requirements by a "conclusive certificate" are further complicated by the fact that the Crown Prosecution Service does not enjoy a monopoly on prosecution in England and Wales. Cases of animal cruelty, for example, are prosecuted by animal welfare charities such as the Royal Society for the Protection of Animals (RSPCA), and individuals whose cases have been rejected by public prosecution authorities as unviable can nevertheless launch a private prosecution under certain circumstances.[48] This raises the question of whether such private agencies, charities or individuals should be allowed to self-certify compliance with limitation requirements, notwithstanding that they are not public authorities (such as the Crown Prosecution Service) and therefore not subject to judicial review by a higher court? The answer, according to the court in the 2009 case of *RSPCA v. Johnson*[49] appears to be in the affirmative, a state of affairs which has again been criticised by Howe.[50]

The second problem referred to above, which relates to the exact time when the proceedings are initiated and the limitation period is concluded, presents fewer difficulties. The initiation of proceedings is a formal, procedural event which can be much more easily identified than the initial knowledge of an alleged offence by a prosecution agency. There are two ways in which proceedings are considered to be initiated for the purposes of this rule and either of them can mark the temporal point at which the limitation requirement is satisfied. These are respectively "charging" and "laying an information". The first occurs when an authorised prosecutor issues a written charge to a person, which is accompanied by a requisition to appear before the court. The second is marked by "the laying of an information" with the court, giving formal notice that an offence is alleged to have been committed by the named individual. Where such an information is laid, the justices may issue a summons requiring the person named to attend before the court or alternatively, they may grant a warrant for his or her arrest.[51]

The precise moment of initiation, by reference to which the calculation can be made as to whether or not it falls within the limitation period, is indicated by the time the information or the charge is received at the office of the clerk to the justices (magistrates) by a staff member authorised to do

[48] F. Stark, *The Demise of the Private Prosecution*, in 72 *Cambridge Law Journal* (2013)
[49] [2009] EWHC 2702. See also *Chesterfield Poultry Ltd v Sheffield Magistrates Court* [2020] 1 WLR 499.
[50] S.-L. Howe, *Prosecution Time Limits — Part 2*, in 181 *Criminal Law and Justice Weekly* (2017).
[51] See s.1 of the Magistrates' Courts Act 1980.

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so.[52] Defects in the completion of the form do not invalidate the initiation.[53] The courts have repeatedly warned prosecutors not to leave the initiation of proceedings until the last minute[54] and if the timing of the initiation is questioned, it is for the prosecution to satisfy the court that the information was actually laid or the charge was actually issued within the time limits.[55] In cases of electronic transmission of an information, it is the date-stamped time indicating receipt of the data by the court, which is the operative time.[56] The fact that no-one at the court had not in fact looked at the fax or electronic message is immaterial.[57] Laying an information or charging an individual as a precaution merely in order to comply with the time limits when in fact no final decision to proceed had in reality been made, is potentially an unlawful abuse of process.[58]

Although these provisions do afford some incentive for the prosecution authorities to act expeditiously when dealing with minor offences, the self-certification procedure does seem to provide them with considerable flexibility and to make it difficult for a defendant to challenge a prosecution as out of time. However, by restricting automatic limitation rules to minor offences in this way, it is open for more serious matters to be reviewed individually on a case by case basis. under the rules on "abuse of process".

Abuse of Process Arising from Delay in Prosecution in England and Wales

The absence of any universal regime of time-restricting limitations for all offences in England and Wales does not mean that delays in the prosecution of serious offences are always disregarded. The mechanism for addressing them is simply a different one, albeit more complex and sometimes requiring the defendant to undertake potentially expensive and time-consuming litigation. An aggrieved defendant who feels that delay has damaged his or her opportunity for a fair trial can ask the trial court to stay the proceedings as a result of an alleged "abuse of process".[59] This is a discretionary remedy and if the court refuses to act, it is open for the defendant to ask for Judicial Review by a higher court. It is well established that "if criminal proceedings were brought a sufficiently long time after an alleged offence, the delay could render such proceedings vexatious and an abuse."[60] Each case will depend on the circumstances and the only issue is whether on the balance of

[52] *R v Manchester Stipendiary Magistrate, ex parte Hill* [1983] 1 AC 328.
[53] *R v Kennet Justices, ex parte Humphrey and Wyatt* [1993] Crim LR 787, DC.
[54] *R v Blackburn Justices, ex parte Holmes* (1999) 164 JP 163.
[55] *Lloyd v Young* [1963] Crim LR 703, DC.
[56] *R v Pontypridd Juvenile Court, ex parte B* (1988) 153 JP 213, DC.
[57] *Rockall v Department for Environment, Food and Rural* [2007] 1 WLR 2666.
[58] *R v Brentford Justices, ex parte Wong* [1981] 1 All ER 884, DC.
[59] A. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings*, Oxford, 2008.
[60] *R v Grays Justices, ex parte Graham* [1982] QB 1239.

probabilities a fair trial of the defendant was impossible because of the lapse of time. If so, the proceedings must be stayed. The factors relevant to the judge's decision include delay in the prosecution, the reasons for the delay, the attitude of the defendant, the prejudice to the defendant and the public interest in the prosecution of offenders.[61] Anxiety, uncertainty and distress, caused to the defendant by the delay are simply not considered relevant in the context of this decision.[62]

One example of the use of a stay on the grounds of unreasonable delay occurred in a Privy Council case referred from the Jamaican Courts, where a defendant who had been convicted of firearms offences in 1977, but had had his case quashed in 1981 for technical reasons, was arrested for the same offences in 1982.[63] This delay was clearly unreasonable and the proceedings were ended. In another case where, solely as a result of administrative inefficiency on the part of the prosecuting authorities, proceedings were issued over two years after the alleged offence, this delay was unjustified and unconscionable and so prejudicial to the defence that the case had to be stayed and could not proceed.[64]

However, it is only when delay gives rise to genuine prejudice and unfairness that there can be an abuse of process resulting in a stay of proceedings, although such prejudice and unfairness can be presumed in cases of substantial delay. It would then be for the prosecution to rebut the presumption and even where there was no such presumption, they would have to justify the delay, where it was substantial.[65] Some of the most difficult questions have arisen in relation to allegations of historic child sexual abuse where for perfectly understandable reasons. the victim has not been able to report the offence until much later. Here the courts have given a fairly robust response to attempts by defendants to claim an abuse of process. In the case of *R v LPB* in 1990, for example, the court explained:

In cases of serious crime, no limitation period is provided by statute, however long the delay, and, therefore, in law, a criminal is liable to be prosecuted for a serious crime committed many years previously. … (R)eticence by the alleged victim in reporting (a sexual abuse) allegation, was not uncommon and wholly understandable... It was difficult to envisage any circumstances in which it would be right for the court to conclude, in advance of hearing the complainant's evidence at trial, that a trial based on

[61] *Bell v DPP* [1985] AC 937, *sub nom Bell v DPP of Jamaica* [1985] 2 All ER 585, PC.
[62] Although it could become so, for example in relation to sentencing. See *Daventry District Council v Olins* (1990) 154 JP 478.
[63] *Daventry District Council v Olins* (fn 62).
[64] *R v Oxford City Justices, ex parte Smith* (1982) 75 Cr App Rep 200, DC
[65] *R v Bow Street Stipendiary Magistrate, ex parte DPP, R v Bow Street Stipendiary Magistrate, ex parte Cherry* (1989) 91 Cr App Rep 283, 154 JP 237, DC.

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a delayed, even a very long-delayed complaint, by an alleged victim of sexual abuse within the home would amount to an abuse of the court's process.[66]

However, it was reasonable in these circumstances to expect the trial judge not only to warn the jury about the impact of delay on the case[67] but equally to ensure fairness to the complainant should the defence try to undermine his or her credibility because of the delay.[68] In cases where the delay has been caused partly by the activities of the defendant (for example by concealing the crime) this must be taken into account when considering whether a fair trial is possible, but it doesn't operate as a complete bar on a successful application for a stay.[69]

It is very clear from even this brief review of the caselaw that the remedy of staying proceedings is used very sparingly by the courts.[70] According to Lord Lane, in a leading judgement on this subject in 1992, even where the delay could be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. It would be even more rare in the absence of any fault on the part of the complainant or the prosecution. Moreover, delay which arose merely due to the complexity of the case or was contributed to by the actions of the defendant should not generally be the foundation for a stay.[71] In short, a stay should never be granted unless the defendant could show on the balance of probabilities that owing to the delay, he or she would suffer serious prejudice to the extent that no fair trial could be held. Lord Lane further pointed out that any prejudice to the defendant's case caused by the delay could in most circumstances be compensated for at trial. This could be done, first by the judge (both at common law and under the Police and Criminal Evidence Act 1984) regulating the admissibility of evidence, and second by the judge ensuring that all relevant factual issues arising from delay were placed before the jury as part of the evidence for their consideration. Appropriate directions and warnings relating to the delay could be given to the jury before they considered their verdict.[72] The recommendations and safeguards were emphasised again in a more systematic manner in the 2006 case of *R v S* where the court underlined the point that if, having considered all the factors mentioned above, the judge concluded that a fair trial would still be possible, a stay should not be granted.[73]

These principles were applied in the case of *R v Makreth* in 2009. Here, the defendant had been convicted of a large number of rapes and indecent

[66] *R v LPB* (1990) 91 Cr App Rep 359.
[67] *R v B* [1996] Crim LR 406, CA; *R v Wilkinson* [1996] 1 Cr App Rep 81, CA.
[68] *R v Doody* [2009] EWCA Crim 2557.
[69] *Attorney-General of Hong Kong v Cheung Wai-bun* [1994] 1 AC 1, [1993] 2 All ER 510, PC.
[70] *R v Oxford City Justices, ex parte Smith, op cit.*
[71] *Attorney-General's Reference (No 1 of 1990)* [1992] QB 630 at 643–644, at 643, 302–303.
[72] *Attorney-General's Reference (No 1 of 1990)* (fn 71) at 644, 303.
[73] [2006] EWCA Crim 756.

assaults against young people which had occurred over 22 years before, while he was the housemaster at a juvenile remand centre. Evidence regarding previous complaints and an unsuccessful prosecution against him had unfortunately been destroyed and in these circumstances and because of the elapse of time since the offences, the defendant contended that the trial could not possibly be fair. It was also suggested that the law had changed significantly since that period. The court had little sympathy with these arguments and decided that the delay and/or the loss of the documents did not create such a prejudice for the defendant as to make his trial unfair. The existing body of evidence against the defendant remained formidable and convincing and developments in jurisprudence were not relevant to this case.[74]

Even the elapse of a period of 57 years was not excessive where the court considered that a fair trial was still possible. In *R v Sawoniuk* the Appellant had been convicted in 1999 of the murder of two Jewish women in Domachevo in Belorussia, during the German occupation in 1942. He argued that the lapse of time made it impossible for him to obtain witnesses to support his innocence and in any event, the memories of prosecution witnesses could not be relied on after such a lengthy period of time. However, his application for the conviction to be overturned because of an alleged abuse of process was rejected. The court felt that it was entirely speculative whether the unavailability of other witnesses represented a detriment to the appellant or a bonus and, applying the principles set out by Lord Lane above, a fair trial was still possible.[75]

Conclusion

These cases demonstrate very clearly that the law in England and Wales is concerned almost exclusively with the first justification outlined above; the availability of a fair trial after a lapse of time. The efficiency, psycho-sociological and penological justifications are not considered at all, in sharp contrast to the approach taken in most continental European jurisdictions. As already suggested, the discretionary principles embedded in English and Welsh criminal justice process allows difficult cases of delay involving serious offences to be dealt with individually and not by way of a universal statute bar. Such an approach would be unthinkable in a more closely regulated sytem of decision-making.

The English and Welsh model also makes a much more radical division between minor and serious offences than is considered appropriate in Civil Law jurisdictions, where such offences merely attract different periods of prescription. General statutes of limitation simply do not apply at all to more serious cases in England and Wales. Even where a regime more

[74] [2009] EWCA Crim 1849.
[75] [2000] 2 Cr App Rep 220.

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closely ressembling the European continental approach is operated for minor offences, the time periods taken into account are significantly contracted. On the one hand the starting point of the period of limitation is the discovery of the offence rather than its commission and on the other, the finishing point is the issue of proceedings rather than the conclusion of them. Clearly, using the point of discovery of an offence as a reference point prevents offenders manipulating the time limits by concealing their activities for as long as possible, but at the same time, fixing the exact time of institutional "discovery" has proved extremely problematic. The use of a "conclusive certificate" is hardly a satisfactory solution. However, the use of the issue of proceedings as an end point has a great deal to recommend it, particularly in the context of the well-developed ECtHR jurisprudence on the Article 6(1) right to a hearing within a reasonable time.[76] This serves to mark a clear distinction between issues relating to the failure to initiate proceedings within a reasonable time and and the very different problems associated with the efficient management and timely conclusion of those proceedings, once initiated.

It is certainly arguable that the operation of the *nullus tempus* rule in England and Wales, notwithstanding the exceptions outlined above, does allow a closer alignment of "clock time" and Virginia Woolf's "time in the mind", by permitting a more flexible approach towards delayed cases, with no automatic allocation of impunity. It avoids, above all the complexities of "tolling" and interruption of time periods as well as the problems of young offenders and continuing offences. Statutes of limitation are obviously a compromise solution which can lead to some profoundly uncomfortable outcomes in certain cases. They are also undermined by modern developments in technology which can provide evidence of historic offences in a way which was not possible at the time of commission and also permit the more efficient recording and preservation of evidence. As a result it is probably time to consider whether there are more effective ways of mediating the relationship between the contemporary need for resolution and certainty and the moral obligation towards past wrongs. The approach adopted by England and Wales, notwithstanding the deficiencies discussed above, does at least provide an interesting alternative approach for such consideration.

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[76] M. Kuijer, *The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings*, in 13 *Human Rights Law Review* (2013).