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THE SPANISH *"JURASSIC"* CRIMINAL PROCEDURE LAW

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ABSTRACT

The present Spanish Criminal Procedure Law was enacted by Royal Decree of 14 September 1882, and even though some important amendments have been introduced within the many years that have passed, it is in fact, today, a "*Jurassic*" piece of criminal procedure, based on the "*Inquisitive System*", remarkably so at the investigation stage ("*instrucción*"), which constantly confronts and strikes against the modern principles of the "*Adversarial System*" adopted, almost unanimously, by the rest of the European criminal procedures, as well as against international Treaties, Conventions and jurisprudence based on the cornerstone of Human Rights.

The above is singularly worrisome, when Spain, through its special judicial body called *"Audiencia Nacional"* (National Court), has been a leading pioneer in the application of the so called "*Universal Justice*", directed and aimed to fight crimes against humanity wherever they are produced and/or found, with disregard to the old jurisdictional principle of "*locus regit actum*" and jurisdictions where crimes were really committed. Let's remember, for example, the cases brought by the Spanish Audiencia Nacional against *General Pinochet of Chile and Argentina's Generals* for mass murders, among other cases[1].

HIGHLIGHTS OF GREAT CONCERN

*** SPAIN still keeps a very strong "*inquisitive procedure*" of criminal investigation, whereby the rights of the Defence could be diminished to almost nil, during months and months, and even years, of secret investigations while the Investigating Judge (*"Juez de Instrucción"*) works in complete alliance only with the Public Prosecutor (*Ministerio Fiscal"*), and backwards to the Defence.**

*** SPAIN does not appear to care at all for reiterated incriminatory resolutions from the UN and EC Courts of Human Rights regarding the preservations of the rights of the Defence to actively participate in all stages of criminal investigations, avoiding prolong "secrecy", when**

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[1] Vide: The excellent recent book by Spanish Law Professor and Madrid Lawyer, MANUEL OLLÉ SESÉ entitled: "Justicia Universal para Crímenes Internacionales", published by La Ley, Madrid, 2008

even the Spanish Criminal Procedure Law (*Ley de Enjuiciamiento Criminal, article 302)* limits it to *one month* only. Nevertheless, using and reiterating, again and again, the same arguments in an abusive interpretation of the Law against defendant, the "secrecy" of the investigations (typical of the "Inquisitive System") **is renovated and extended to the infinite, with the only exception of the Public Prosecutor, even though the aforementioned article of the Criminal Procedure Law specifically states that should the Investigating Judge (*"Juez de Instrucción"*) declares the case "*totally or partially secret, said resolution would affect all parties*". This dreadful discriminatory practice --also applied in certain cases by Germany-- has been highlighted, for instance, in the Sentence dated 13 December 2007 of the European Court of Human Rights at Strasbourg, case of *Mooren vs. Germany*, which due to its keen interest we will summarily quote as follows:**

a.Relevant principles

91.The Court reiterates that in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial as guaranteed by Article 6 of the Convention (see, inter alia, Schöps v. ***Germany, no. 25116/94, § 44, ECHR 2001-I; Lietzow v.Germany, no. 24479/94, § 44, ECHR 2001-I; Garcia Alva v. Germany, no. 23541/94, § 39, 13 February 2001; Shishkov v. Bulgaria, no. 38822/97, § 77, ECHR 2003-I; and Svipsta v. Latvia, no. 66820/01, § 129, ECHR 2006-...). The proceedings before the court examining an appeal against detention must thus be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person. While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to***

comment thereon (see, in particular, Schöps, cited above, § 44; Lietzow, cited above, § 44; Garcia Alva, cited above, § 39; and Svipsta, cited above, § 129).

92. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention (see, among other authorities, **Lamy v. Belgium***, judgment of 30 March 1989, Series A no. 151, pp. 16-17, § 29;* **Nikolova v. Bulgaria** *[GC], no. 31195/96, § 58, ECHR 1999-II;* **Schöps***, cited above, § 44;* **Shishkov***, cited above, § 77; and* **Svipsta***, cited above, § 129). The Court acknowledges the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer (compare* **Lietzow***, cited above, § 47;* **Garcia Alva***, cited above, § 42;* **Shishkov***, cited above, § 77; and* **Svipsta***, cited above, § 137).*

b.Application of those principles to the present case

93.The Court therefore needs to determine whether, in the present case, information which was essential for the assessment of the lawfulness of the applicant's detention was not made available in an appropriate manner to the applicant's lawyer. It observes that the domestic courts reached their conclusion that there was a strong suspicion of the applicant having committed tax evasion by reference to the contents of the voluminous case files before them. The files included business records seized at the applicant's home, but also witness statements made by the proprietors of firms the applicant had been working for, as well as contracts of employment and wage slips and commission statements. The content of the investigation files thus appears to have played a key role in the courts' decisions to prolong the applicant's pre-trial detention.

94.The Court further notes that, while the Public Prosecutor's Office and the courts were familiar with the files, their precise content was not initially brought to the knowledge of the applicant's counsel. The Public Prosecutor's Office repeatedly dismissed counsel's request for access to the case files on the ground that consultation of these documents would endanger the purpose of the investigations.

95.It was only after the Court of Appeal's decision of 14 October 2002 (see paragraphs 23-29 above) that the applicant's counsel was provided with copies of four pages of the voluminous case files containing an overview by the Düsseldorf Tax Fraud Office on the amount of the applicant's income and the taxes he was suspected of having evaded. However, these documents only gave an account of the facts as construed by the prosecution authorities on the basis of all the information available to them. It is virtually impossible for an accused, even if assisted by counsel, properly to challenge the reliability of such an account without being aware of the evidence on which it is based. Even in a case such as the present one in which the detention order was partly based on evidence seized at the defendant's home which, in principle, he would have been familiar with, his defence counsel must be given sufficient opportunity to acquaint himself personally with the underlying statements and other pieces of evidence.

96.For the same reasons, the proposal by the prosecution, which was endorsed by the courts, to give the applicant's counsel merely an oral account of the facts and evidence in the case files (compare also **Garcia Alva**, *cited above, §§ 18, 43) was not sufficient. The suspicion against the applicant was grounded not only on business documents seized at the applicant's home, but also on documentary evidence obtained from his employers and on witness statements made by them, in other words on a large quantity of material which was only referred to in general terms in the detention orders. The Court does not lose sight of the fact that the refusal to grant the applicant's counsel access to the case files was based on a risk of compromising the success of the ongoing investigations. However, as reiterated above (at paragraph 92), this legitimate goal may not be pursued at the expense of substantial restrictions on the rights of the defence. Counsel must therefore be given access to those parts of*

the case files on which the suspicion against the applicant was essentially based. It follows that the applicant, assisted by counsel, did not, at that stage of the proceedings, have an opportunity adequately to challenge the findings referred to by the Public Prosecutor or the courts as required by the principle of "equality of arms".

97.The Court further observes that, in its decision of 14 October 2002, the Court of Appeal quashed the decisions taken by the District Court and the Regional Court in the proceedings for judicial review of the detention order. It found that the detention order was defective because the facts and evidence on which the suspicion that an offence had been committed and the reasons for the applicant's detention were based were not described in such detail as to enable him to comment and defend himself effectively. According to the Court of Appeal, these defects amounted to a denial of the right of the accused to be heard in view of the fact that counsel for the defence had been refused access to the case files under section 147 § 2 of the Code of Criminal Procedure.

98.The Court notes that the Court of Appeal thus acknowledged that the applicant's procedural rights were curtailed by the failure to grant the applicant's counsel access to the case files. However, as is clear from the wording of paragraphs 3 and 4 of Article 5, the protection of the rights under that Article, in view of the fact that the person concerned is being deprived of his or her liberty, can only be effective if its, guarantees are applied speedily (compare also **Lamy** *cited above, pp. 16-17, § 29). In the present case, not only, as found above, were the proceedings reviewing the lawfulness of the applicant's detention as such unduly delayed, contrary to Article 5 § 4, his counsel was not granted access to the case files until after the applicant's conditional release from prison. In these circumstances, the fact that the domestic authorities allowed the applicant's counsel to inspect the case files at a later stage of the proceedings could no longer remedy in an effective manner the procedural shortcomings in the earlier stages of the proceedings.*

99.It follows that the proceedings for a review of the applicant's detention pending trial cannot be considered to have complied with the guarantees afforded by Article 5 § 4 in this respect. There has accordingly been a violation of this provision.

- **SPAIN does not appear, either, to care at all regarding the fact that, as it presently stands, the Public Prosecutor (*"Ministerio Fiscal"*) is a clear and the most significant *"Primus interpares"*, or, in more simple and clear words, a keen privileged party within the criminal procedure, breaking down the fundamental principles of the *"adversarial system"*.**

- **SPAIN has also remained deft to the many demands made by several rulings from the UN Court of Human Rights to implement, without further delays, the full appeal review (*"doble instancia penal"*), provided for by article 14,5 of the International Convention of Civil and Political Rights of 19 December 1966; a complete review of criminal judgments only provided for in the very few cases judged in Spain by Jury Trials, due to the *Jury Law* published in May 1995, finally developing, with great delay, article 125 of the Spanish democratic Constitution of 1978, which underlined the *right of the Spanish citizens to participate in the administration of criminal Justice as Jurors*.**

CONCLUSION

In view of all the above –-which, by the way, is only the "*tip of the iceberg*" of what could be subject to criticism under the present Spanish Criminal Procedure— it cannot be well understood how come SPAIN --which also is a quite newly born country to democracy-- wants to command and perform the leading role of "*Universal Justice*", without firstly introducing at home the *adversarial system with equality of arms between Prosecution and Defense, as well as the full Appeal review of criminal judgments,* precisely when Justice in Spain is by all standards the most inefficient and faulty public service in the sense of the great majority of the Spanish people.

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