La Plataforma Cívica por la Independencia Judicial presentó el cinco de enero de 2014 una queja ante la relatora de Naciones Unidas, doña Gabriela Knaul, para denunciar la politización de la justicia española y, con ella, el riesgo de violación de los derechos humanos en nuestro país.

Gracias al trabajo de doña Ángela Harper, experta traductora de la Plataforma, contamos ahora con una versión de la denuncia en inglés. A continuación se transcribe su texto íntegro:

## COMPLAINT TO THE SPECIAL RAPPORTEUR FOR JUDICIAL INDEPENDENCE OF THE UNITED NATIONS

### GUARANTEE OF JUDICAL INDEPENDENCE

### Introduction

Since the beginning of Special Rapporteur, the principle of independence of judges and lawyers has been identified as an international custom and a general principle of law recognised in terms of Article 38 1) b) of the Statutes of the International Court of Justice. It has also constituted an obligation contracted by virtue of treaties, such as the requirement for the independence of courts established in paragraph 1 and article 14 of the International Agreement on Civil and Political Rights which, as stated by the committee of Human Rights in its General Observation No.32[1], is an absolute right which is not subject to any exceptions.

In addition, more than 20 years ago, in a report which was presented to what was then the Sub-Commission for the Prevention of Discrimination and Protection of Minorities, the following was emphasised: “The principles of impartiality[2] and independence constitute in all States the distinctive features of the basis and legitimacy of the judicial function … Their non-existence leads to a denial of justice and reduces the credibility of the judicial process”[3]. As stated in the Bangalore Principles on judicial conduct, “judicial independence

is a prerequisite for the principle of legality and a fundamental guarantee of the existence of a fair trial (Report of the Rapporteur A/HRC/11/41 24th March 2009).

In recent declarations the current Special Rapporteur, Gabriela Knaul, has indicated that it is impossible for a democratic state of law to exist without a separation of powers; that there is no separation of powers without judicial independence, and neither is there independence of the judicial power if it is not made up by independent and impartial magistrates and judges.

She recalled that the Universal Declaration of Human Rights and the International Treaty on Civil and Political Rights guarantee the right of everyone to be judged with justice by an independent, competent and impartial tribunal.

“I also wish to recall that, according to the fundamental principles of the independence of the judiciary, the judges should resolve the matters they hear with impartially, basing their decisions on the facts in accordance with the law with no restriction nor influence, incentive, pressure, threats or  inappropriate conditions whether direct or indirect from whatever sector for whatever reason”, stated Knaul.

She also stated that judicial independence, more than a guarantee to the judicial powers and the judges is a human right, because on it depends the independence as an essential mechanism to guarantee the transparency and smooth functioning of justice.

Dear Mrs.

We are writing concerning the serious events occurring in our country (Spain) which damage judicial independence and do not respect the appropriate separation of powers, flouting the fundamental principles of judicial independence adopted by the Seventh United Nations

Congress On Crime Prevention and Treatment of Criminals held in Milan from 26th August to 6th September 1985, and confirmed by the General Assembly in its resolutions 40/32 of 29th November 1985 and 40/146 of 13th December 1985.

The Civic Platform for Judicial Independence ("Plataforma Cívica por la Independenca Judicial") is composed of judges, prosecutors, lawyers, university professors, notaries, state lawyers, reporters and many citizens from all walks of life concerned about the progressive deterioration affecting judicial independence and the rule of law.

We are driven to present this this complaint after attending yet another process which adds to this decline, marked by a strong political influence, that was the election of a new General Council of Judicial Power ("Consejo General del Poder Judicial", "CGPJ") widely contested by many sectors of society, not only from the area of the judiciary (as is shown by the nearly 1500 judges signing the Petition for the Depoliticisation of Justice (http://pcij.es/?wpdmact=process&did=My5ob3RsaW5) and recently in the alternative elections developed and led by the judges themselves, as certified by notaries (http://pcij.es/elecciones-alternativas/-) and in other judicial sectors, but also from society in general, as is shown by the news reports in the media (links shown at the end) and editorial articles.

This process of renewal of the "CGPJ" is not free of controversy and has caused a scandal throughout the country, even provoking strong reactions among members of parliament who elected the spokesperson, including the exit of a deputy of the selection committee faced with the shameful spectacle he was witnessing, and the resignation of a senator from his post.

Now a political party with parliamentary representation which has not taken part in this process has presented a case against the nominations to the Supreme Tribunal (http://t.co/NHYKfE1ncV) denouncing the farce and the political interference, and another (the opposition, an active participant in the process) has introduced another claim in the Constitutional Tribunal against the law of reform of the CGJP, but does not refer to the election system.

This process is one more in the colonisation by the political parties of institutions and organisms, both national and regional, many of them called independent (as is explained in this article “Assault on the institutions” by a state lawyer http://www.iustel.com/diario_del_derecho/noticia.asp?ref_iustel=1121643).

The two major parties have been taking turns in power for more than 30 years, using large majorities to give out many posts in the organs of power and the institutions.

The history and difficulties of the Spanish “CGPJ” can de read in this article by a professor of constitutional law (http://www.iustel.com/diario_del_derecho/noticia.asp?ref_iustel=1115003&titulo=gobierno de los jueces&texto=):

*So that in Spain democracy ceases to be a hollow concept at least two conditions are indispensable: that the parties be truly democratic in their functioning and that the judiciary be totally independent. Without both conditions, democracy is not possible. As a consequence, so that the “CGPJ” can exercise its primary functions it is necessary to guarantee the independence of the judges and magistrates from the other powers because*

*their only dependence, which should be total, is only on the constitution and the law. This makes it impossible to speak of an authentic judicial power, if that has been contaminated by party politics. That idea is what led the founders to identify the judicial power as the only power recognised in the Fundamental Norm. During the founding process in 1978 the method of selection of "CGPJ" members was discussed and it was finally decided to include it in the Constitution, leaving its subsequent development to an organic law. In this way. The first "CGPJ" as elected according to article 122.3 CE, with the point developed by an ad hoc organic law. Despite this, years later the formulation of a wider ad hoc organic law to regulate the overall Judicial Power was used to deform the Constitution by means of what the new law established. The fact is that instead of judges and magistrates electing 12 members and eight by Parliament, as the Constitution says, it was established that all 20 would be elected by the courts, that is to say, by the parties. From this moment on, the independence of the judges and magistrates would end, because the nomination of all the members of the governing body of the Judicial Power was in the hands of the politicians. It was desired to minimise the power of the parties by accepting that the nominations of the members of the "CGPJ" would be drawn from names previously selected by their colleagues. But this was no more than an attempt to hide the huge power which had been conceded to the parties, in terms of the promotion of judges and magistrates. Since that time many would follow, in spite of everything, depending just on the law, but many more would depend from that moment on the slogans or interests of the parties, because there is a sociological law which tells us that everyone is the "slave" of whoever give him a post. With this reform of the LOPJ the bases had been built for the politicisation of our Justice, but with the act of the Constitutional Tribunal, once the PP presented the mentioned claim it became clear that the politicisation affected not only the judges and magistrates but also the Constitutional Tribunal itself. Certainly its sentence of 29th July 1986 denied the claim of the PP, but showed a clear guilt complex, because the magistrates of the Constitutional Tribunal didn't forget that the interpretation which was now being given to Article 122.3 of the CE stated that there existed a possibility that the procedure for the election of the members of the Council could lead to an interpretation opposed to the letter and spirit of the Constitution. But, protecting itself, the*

*sentence added: "Although it is not grounds to declare it invalid, because it is a constant doctrine of this Tribunal that the validity of the law must be preserved when its text does not impede an appropriate interpretation of the Constitution". In other words, the Constitutional Tribunal put on the bandage before the wound. But the wound was still produced, and the bandage was useless.*

*The PP did not resolve this situation – because it wasn't convenient – while it governed (1996 to 2004), and in opposition the party didn't stop criticising the form of election of the "CGPJ" and promised that when it won the elections it would re-impose the original meaning of Article 122.3 of the CE. It is not strange then that as soon as he assumed his post, the Minister of Justice Alberto Ruiz-Gallardon should make a declaration in which he sustained that the LOPJ would be reformed immediately in the manner indicated..".*

He finishes by stating that instead of replacing the government of the judges, which would preserve its independence, the Ministry of Justice wishes to establish "the judges of the government". That is, as is already heard, the government body of the judges has been converted into a sub-delegation of the judicial government.

In fact, the Popular Party entered the general elections with the promise to give direct election of the judicial spokesmen to the judges and started the process to carry it out, but in the end changed to retake the system of parliamentary election of all the representatives. In this task it was helped by a commission of experts chosen by the government, one of whom was finally named president of the "CGPJ" and TS.

On page 169 of its election manifesto, point 11, it states: "We will promote a reform of the system of election of the representatives of the "Consejo General del Poder Judicial" so that,

in accordance with the Constitution, twelve of its twenty members will be elected from the judges and magistrates of all categories".

This electoral promise was in accordance with a system that had been revealed as totally politicised. The Constitutional Tribunal, in spite of declaring that the system of the first law was better and more compatible with the Constitution, approved the 1985 reform, with "that the Houses, when making their proposals, pay attention not only to the division of forces and distribute the posts to be filled among the different parties in proportion to their parliamentary forces".

After the commission of experts had elaborated its first report giving the election of the judicial representatives directly to the judges, the government changed its opinion and the Commission prepared a second report maintaining the parliamentary system of choosing representatives.

The reasons given by the Government for the change were the necessity to reach agreement with the main opposition party. But agreement was not reached. The law was approved by just  the votes of the government party, and the opposition went to the Constitutional Tribunal. In spite of this, it took part in the process of renewal of the Council, negotiating the quotas with the government.

But it is not only that it failed to fulfil its own electoral promises, defrauding the voters, but also that it went openly against its own words spoken in the Senate by the current Minister of Justice when years ago, as a senator for his own party, although in opposition, he defended the suppression of the Ministry of Justice ( http://www.eldiario.es/rastreador/Hemeroteca-Gallardon-defendia-Ministerio-Justicia_6_13759

6266.html). He stated in strong terms that “whilst the Ministry of Justice does not disappear, it is very difficult to carry out a work of an independent Administration of Justice”. “There exists a legal way” he added. “Number 117 of the Constitution states that justice comes from the people and is administered in the name of the King by judges and magistrates members of the Judicial Power.” “Why does the Executive Power have to administer justice in Spain? Article 122.2 states that the “Consejo General del Poder Judicial” is the government body for this . . .” (act of the Senate, 27 Sep 1988 p.3981 http://www.congreso.es/public_oficiales/L3/SEN/DS/PL/PS0089.PDF).

Neither the promises nor the words have been fulfilled. Neither has the spirit and the objective of the CE, nor the interpretation made by the Constitutional Tribunal in the sentence quoted which warned of the risk that the election of the spokesmen of the “CGPJ” by parliament would lead to the politicisation of this body, nor the most basic and essential international principles of judicial independence.

We draw the attention of the Rapporteur to **the main points which affect judicial independence and the separation of powers:**

**First** – Selection of the members of the “CGPJ” and its president

The Consejo General del Poder Judicial (General Council of Judicial Power) is, in Spain, the independent body charged with overseeing judicial independence, exercising disciplinary power over judges, the selection of judges and the election of the higher levels of magistrates. It is recognised by the Spanish Constitution, but it is not enough if the laws which develop it and the acts do not fulfil this objective and function.

As we know, its acts are not limited to itself, but transcend affect the magistrates.

Following the latest legal reforms, the composition, the method of election and the functions of this body has been modified.

To start with, following the preparation of the mentioned reports, the Government prepared a legal reform to suspend the process of renewal of the "CGPJ" and, in this way, to be able to apply the new norms, once the period of renewal had started, and this was widely criticised. This became the Organic Law 1/2013 of 12th April.

Prior to this, the two biggest parties (the government at the time is today's opposition, and vice versa) again had agreed as a last resort to modify the Organic Law of Judicial Power, by means of LO 12/11 of 22nd September (the last of the socialist government), in order to permit those judges who had entered politics could consider political service as professional service. The 'revolving door' had been created. This reform freed many judge-politicians to re-enter the circle of senior judicial posts and others of a similar level (Constitutional Tribunal and recognised institutions) which demanded many years of jurisdictional practice. The reform was applied retroactively. Thanks to this, judges who had passed into politics were able to reach posts which in any other way would have been impossible, as can be seen in the BOE (the official state bulletin), relegating in this way the judges who had always practised law without leaving the application of correct and impartial justice.

a) System of election

In recent days, the renewal process has been completed in the following way:

1. The two large Spanish political parties have intervened directly and improperly in choosing the new members of the “CGPJ” who took possession of their posts on 4th December.
2. The process of selecting the candidates has been a mere formality because, with respect to the non-judicial members, only those who were going to be named have been examined by the parliamentary commission convened for the task. The judicial members have been directly appointed without any selection process. Only some insignificant endorsements were required (just 25), which were obtained with limited reference to the judicial career, but the result has demonstrated that it serves no purpose, not even the most-endorsed has been appointed. Everything had already been decided.
3. The law does not sufficiently guarantee that the election of the representatives is based on criteria of merit and ability.

It is not known what are the qualities by which non-judicial members (two parliamentarians, two judicial secretaries, a state lawyer, a civil law professor and two lawyers) have been considered as jurists of recognised prestige, as the Spanish constitution demands.

1. Judges have not been allowed to intervene directly in the election of the judicial members of the body, because the legislation does not allow it.
2. Finally, the President of the “Consejo General del Poder Judicial” who should have been freely elected by means of voting amongst the representatives, has also been selected by a prior agreement between the two political parties and the name had already been publicised before the voting.

The election took place without real involvement of the candidates (in spite of there being 80 magistrates in the Supreme Tribunal) and, because of that, without any analysis of the suitability of the person selected because the name had already been decided beforehand.

It happens that the person selected, Mr Carlos Lesmes, formed part of the mentioned Committee of seven experts named by the Government on 8th March 2012 to modify the law which regulates the "CGPJ", the body of which he has now been chosen president. That committee prepared two different reports at the request of the government. And this is despite the judges being prohibited, by their organic Statute, from giving legal advice whether remunerated or not. The mentioned president was also awarded the Gran Cruz (Grand Cross, honour for judges) for the preparation of the two reports, together with the other "experts" by the government following a proposal of the Ministry of Justice (as can be read in the BOE of 24th June 2013). Now as the President of that body he must prepare reports on proposed laws of the very same government which chose him.

The president is a person trusted by the government (he has worked for 8 years in important posts for the political party which in the end has elected him, such as Director of Relations with the Administration of Justice and Director of Conscientious Objection, dependent on the Ministry of Justice) which puts in doubt the image of independence and impartiality of all Spanish justice at a time when important cases of corruption must be tried which affect members of the political parties of the government and the opposition.

b) Opposition

The representatives selected are, by a large majority, people with direct or indirect links to the political parties and with the other two state powers (legislative and executive).

Some of those elected form part of the Legislative Power, even being politically active, and others are officials dependent on the Executive Power (such as state lawyers and judicial

secretaries).

Nearly all the judicial representatives selected, except for three, held posts which in turn were discretionary appointments, and many of them are magistrates who occupied institutional posts, among them presidents of the Tribunal Superior de Justicia and of the Audiencia Provincial and director of the Escuela Judicial. This last was not even a practising magistrate when the selection process was initiated, an essential prerequisite to be elected, as the Electoral Board stated, for which as a matter of urgency the "CGPJ" accepted the resignation as director of the Escuela Judicial (*Judicial School,* training centre for young judges*)* and allowed him to return to active service in the middle of the process.

None of the selected judicial representatives belong to the category of judge, in contravention of the the C.E. Article 122.3 which requires that judges and magistrates of all levels be members. One is missing (see the link at the end on the over and under-representation of the categories).

Compatibility  As a consequence of the mentioned reform, only six members of the institution will be full-time. The remaining fifteen will continue with their activities or professions, such as state lawyers, judicial secretaries, judges or lawyers, resulting in an improper interference and permeability, giving cases where, for example, the representatives who are judges or magistrates will be, in turn, governors and governed; in the case of the judicial secretaries, although they have some functions of their own, are in charge of carrying out the judges' decisions, so they can occupy a situation of governed, as a representative, of the same judge whose decisions must be carried out, even being able to order an inspection; the representatives who are lawyers can continue to practise, acting in trials before judges who are governed by them.

All these situations can affect the judges' decisions, as they are subject to improper and unnecessary conflicts of interest.

c) Functions

This body has the very important function, among others, of selecting the judges to occupy the highest posts and who will try the cases of political corruption because of parliamentary privilege, given the circumstances where the two big political parties currently have important corruption cases in the Tribunals. There are currently two vacant posts in the Sala de lo Penal of the Tribunal Superior, and it is foreseen that during the term of this new "CGPJ" hundreds of new senior posts in the judiciary will be filled using the system of free appointment.

It is not just important that the "Sala Segunda" (Second Court in the Supreme Tribunal, empowered to try criminal cases) being the one to try cases against members of the government and parliamentarians among others, as well as those covered by parliamentary privilege in the autonomous (regional) Tribunales Superiores, but also because it resolves issues in the lower tribunals and sets guidelines, the same as in the other Salas of the higher tribunals and the corresponding Tribunales Superiores de Justicia in their respective areas.

The Salas de Tribunales in the contentious-administrative jurisdiction are also important because they are in charge of trials of acts of both central and regional government and, definitively, the conformity of all public administration to the law. From there the necessary separation of powers, and that the politicians and governors do not interfere in its work, in order to guarantee that the tribunals can carry out their function of submitting all the public

powers to the rule of law.

Neither must it be forgotten that all the judges must examine and, by this, control that all the laws (coming from the executive power) and other norms conform to the Spanish Constitution, community directives and international standards.

The reform makes it possible for a simple majority to elect to the mentioned judicial posts. The previous Organic Law demanded a majority of 3/5ths for all the important appointments; but the current one (article 599) only keeps this qualified majority for proposals to appointment of the two magistrates of the Constitutional Tribunal which correspond to the Council. In this way, the majority party achieves the nomination of all those that interest it.

This is made possible, in addition, by another two mechanisms: 1 – the absence of set objective criteria for the appointments; and 2 – the change to the internal structure of the "CGPJ", so that the Permanent Commission is where the nucleus  of judicial power resides, other previously existing commissions (such as the Selection Commission) disappearing. This Commission is formed by the President and five representatives (three judicial and two non-judicial). Only these will be full-time. Among the members of the Commission are two parliamentarians.

The figure of the vice-president of the Supreme Tribunal has been created and is configured as a substitute for the president in cases of absence or incapacity. The need for the specific creation of this post added to the 20 representatives is not foreseen, because as has been happening previously, a representative has been carrying out these functions. The fact is that, in addition, this figure forms part of the Sala de Gobierno of the Supreme Tribunal gives rise to the suspicion that it could be a transmission belt to the "CGPJ" of what happens in the Supreme Tribunal and, vice versa, of instructions from the former to the latter.

The figure of the Promoter of Disciplinary Action is also created, previously unknown. It is set up in a peculiar way because it is said not to form part of the “CGPJ” but it is subordinate to it, and the “CGPJ” chooses it, again in a discretionary way. The duration of its term coincides with that of the “CGPJ” which appoints it, and can order the initiation or continuation of a case against its decision.

Until now the disciplinary cases were handled by the “CGPJ” through its Disciplinary Commission, which named a magistrate to investigate them, given independence in the work and appointed from a rota, who after carrying out the investigations considered relevant would decide to sanction or file, according to the facts discovered and the applicable law, preparing a proposal which was taken to the “CGPJ”.

The figure of the Promoter, because of the way it is appointed and its subordination to such a politicised body as the “CGPJ” and being the only one for the term, can result in an considerable decease in judicial independence.

Precisely, the idea of the creation of an entity independent of the other state powers is to remove these from the Judicial Power, and the disciplinary responsibility is one of the most sensitive areas which can affect judges in their work. Little can be guaranteed if it is the Executive and Legislative Powers which appoint the members of the Consejo del Poder Judicial if the people appointed have strong links with them, some even having served under it in the recent past, and all the judicial, except three have been from judicial posts of discretionary appointments. Many of them haven’t sentenced for years, or have sentenced very little.

If we apply the theory of removing the veil, we will see that, underneath, are the very same politicians.

In practice, the President of the Government and the leader of the opposition have reached an agreement by means of which there will be no vetoes from the parties. That is to say that each one will choose its own freely, without interference from the others, as has been happening always in all the process of reform because both parties alternate in the tasks of the government. Once this principle is made clear, the rest is very easy, it only remains to approve the names for the Chambers demonstrating once more the ease with which the political elites reach "agreements" when they are concerned with sharing Judicial Power. This practice has continued with this system and the previous ones during the life of this important constitutional body, as also happened with the previous "CGPJ" and, in the same way, the two big parties agreed to appoint the person who would be president (and it was published in the press on 22nd September 2008 before the election).

Finally, in this section, it is necessary to emphasise that the mentioned reform has reduced the functions that the "CGPJ" had been carrying out. Under the pretext of guaranteeing the independence of the judges and magistrates, it has transferred to the Executive and the judiciary functions which previously corresponded to the "CGPJ". For example, the regulatory power concerning the Statute of Judges and Magistrates, matters which affect not only the judicial associations but also external action.

**REGULATIONS**

The report of the UN Special Rapporteur on the Independence of the Judiciary in 2009 stated that "The principal of separation of powers, together with the state of law are the key to an

administration of justice with a guarantee of independence, impartiality and transparency …, in its General Observation no.32 the Committee of Human Rights emphasised that any situation in which the functions and roles of the judicial power and the executive power were not clearly differentiated or in which the latter could control or direct the former was incompatible with the concept of an independent tribunal. For this reason, the Committee has expressed concerns in several of its final recommendations and has urged the establishment of a clear difference between the bodies of the different branches of power"; in another section, that "the participation of the legislative power in the appointment of judges brings a risk of the politicisation of the process, … the political appointments are not an appropriate method. It is crucial that the population acquires confidence in a judicial system which administers justice in an independent and impartial way free of political considerations". It recommends the establishment an independent body in charge of the selection of judges, an entity independent of the government and the administration, and formed in large part by judges, with a view to avoiding external interference of a political or other nature. In the view of the Special Rapporteur, if the body is composed primarily of political representatives there will always be a risk that it can become merely a formal entity or a judicial dependency in whose shadow the Government can exercise its influence indirectly. In order to avoid this situation, the judiciary should select the members of that independent body.

In the case of Spain, the system has become corrupted so that the independent body is merely formal. It is a disguise.

In the same way the report of the Venice Commission of the Council of Europe (CDL-AD (2007) 028) of 12th and 13th March 2010 on the independence of judges recommended the existence of independent judicial councils in charge of the appointment and promotion of judges "in which the judges represent an important part, if not the majority of the members. Except for the *ex oficio* members, these judges should be elected and appointed by their

colleagues.”

The recommendations of the Consultative Council of European Judges are not met either, indicating that  the independent body should be formed exclusively, or in a majority by judges who are elected by their peers, that the members of the Judicial Council, whether judges or magistrates or not, should not be politically active, members of parliament, of the executive or the administration. The CCEJ does not recommend systems which involve political authorities, such as parliament or the executive at any stage of the selection process. All forms of appointment should exclude the internal and external authorities of the judiciary. It is necessary to ensure that the President of the Judicial Council is in the hands of an impartial person who is not close to the political parties.”

None of this happens.

**SECOND** – CAREER, PROMOTION AND ADVANCEMENT

The system of a professional career provides judicial security.

Traditionally in Spain the advancement and promotion of the judges is determined by the scale, so that each knew beforehand when he or she was due to be promoted. This eliminated disputes and conflict.

In the past few years, this objective system has been replaced, because now more judicial posts are discretionary appointments. Before, only the presidents of the Justice Tribunals (including the regional ones) were elected by this means, the remainder were determined by

the scale, but the number of discretionary posts has been increasing to all the members of the Supreme Tribunal, all the presidents of the Salas del Tribunal Supremo, the regional Tribunals and the Audiencia Nacional. At present, there are hundreds of judicial posts which are selected by this means.

At the same time, a parallel career has been developed which is made up of service commissions, and each time more generalised. There are hundreds of judges and magistrates who compete, change path and rise by this means.

And these temporary posts are decided by the “CGPJ”.

It can happen that magistrates who do not fulfil the prerequisites to rise to the higher posts may reach those posts by this means, and stay in these posts until they acquire the prerequisites, and in this way they can aspire to keep the post. The same happens with changes in geographical area.

All these situations can be a factor which affects judicial independence and cause abuse and discrimination.

Together with the revolving door they are causing a fracture in the Judicial Career. The Career is divided by a horizontal line, imaginary but evident, which functions as a glass ceiling between those above and below, resulting in dissatisfaction and a lack of motivation in the judges and magistrates who see themselves excluded from senior posts in spite of their dedication and effort in the correct exercise of their judicial functions.

The higher the post, the less work, less pressure from inspection, better conditions (better benefits and expenses, assistants, etc.)

Basic international principles establish that the promotion of judges should be based on objective factors, especially in professional capacity, integrity and experience. The Committee of Human Rights recommended that states should establish clear procedures and objective criteria. They emphasise that if these decisions are left to the discretion of the administrative authorities it could expose the judges to political pressure and compromise their independence and impartiality.

The Special Rapporteur stresses that these decisions should preferably be taken by an independent body, or at least by a majority of judges.

The Rapporteur states in her annual report for 2012 that the nomination of judges can easily be the object of manipulation by executive or legislative powers or by the private sector with vested interests, which can give rise to a selection of judges which lacks independence, or of judges predisposed in favour of determined political or economic interests; for this reason, it is considered essential that the method of selection guarantee that they are not nominated for the wrong reasons and that a body takes charge of the selection of judges, acting independently of the legislative and executive powers, contributing in this way to avoid the politicisation of the nominations and inappropriate loyalty to interests other than the impartial justice.

Without doubt, the election of senior judicial posts by the “CGPJ” is not governed by predetermined objective criteria, but is discretionary which lends itself to arbitrariness, consideration of ideological stance or pure nepotism, which contributes blur even more the

image of integrity and impartiality of the chosen magistrates and, by extension, the rest of the judges and the judicial system overall, breaking the citizens' confidence.

The citizens are unhappy, and the decisions of the judges are seen in a political light; that is, they consider that the decisions are taken in one way or another depending on who has been appointed. Such is the image projected from the government body by the election system, which it is urgent to correct.

The Rapporteur recommends that the selection and promotion for judicial posts be governed by objective criteria, predetermined, and even that it should be the judges themselves who choose the Presidents of the Tribunals, in order to avoid that the internal judicial hierarchy goes against the judicial independence. The judges must work in an environment which aids the adoption of decisions in an independent manner.

**THIRD** – Breach of the principle of irremovability established as another guarantee of judicial independence.

The position and the irremovability of the judges is one of the basic pillars of judicial independence.

The Rapporteur considers that provisional appointments, short-term posts an re-election weaken the judicial system and affect judicial independence. She recommends that states pay special attention to the question of permanence in the post for judges.

And that, if judges are subject to a trial period, specific safeguards are in place to avoid that

the situation endanger judicial independence. Once this period has terminated (and it should be short and not subject to extension), the appointment should be conceded automatically. A requirement to confirm the appointment after this trial period could go against the principle of independence of the judges.

In Spain the following situations exist which show clearly the breaches of the basic principles:

a) The presidents of the Supreme Tribunal, of the Tribunales Superiores de Justicia, the presidents of the Salas of those tribunals and of the Audiencias Provinciales are subject to re-election

b) There are many service commissions, temporary judicial posts given under criteria which are not clearly objective, and in some cases subject to renewal and periodic extensions

c) The practising judges are called to work without yet being judges and still being subject to evaluation by the Judicial School, and are subject to the corresponding President of the Tribunal Superior de Justicia, who must prepare a report on the dedication and performance in the role for evaluation by the Judicial School. In such a situation, they carry out the full range of functions without supervision by a tutor, with the salary of a trainee functionary of around 1,000 euros, placing them in a precarious situation.

d) There is a cohort of judges waiting for vacancies. This is incomprehensible, given the lack of judges in Spain, which has one of the lowest proportion of judges in Europe, even worse considering the excessive litigation in the Spanish judicial system.

This situation is maintained by a lack of interest, or perhaps interest, of the Executive Power in the creation of judicial posts.

e) Further reforms are coming, such as that of the Tribunales de Instancia, which seeks

to concentrate all the judges in a single provincial seat under a president, because the presidency – also appointed at the discretion of the "CGPJ" – is given wide powers so that it handles the most important decisions, including the allocation of cases.

f) This reform will allow the movability of judges, because they can be called to serve in other courts.

g) In this way the reform discontinue the only remaining posts democratically elected by the judges themselves, which are the current Deacons which at the moment exist in all the Judicial Parties.

**FOURTH** – INSUFFICIENT RESOURCES

The basic principles establish that all member states are obliged to provide sufficient resources for the judiciary fulfil its functions properly, … the Beijing Declaration even specifically foresees that the role of the executive which could affect the resources of the judges should not be used to threaten or pressure a specific judge or judges. In one of the reports, the Rapporteur indicates that between 2% and 6% of the national budget should be assigned to the judiciary … , even in the context of important national economic restrictions, high priority should be given to the assignment of resources to cover the needs of the judiciary and the judicial system. And the Judiciary should participate fully in formulating the budget. The Rapporteur emphasises that, when there is an independent body, it should be in charge of receiving the proposals from tribunals, preparing a proposed budget for the judicial power and presenting It to the legislative power.

In the case of Spain, the Spanish judges cannot participate in any way in the assignment of the resources they need, and they must be satisfied with the means and the resources that the executive power gives them. Indeed, they must request it from the Executive Power

(nationally and regionally), which tend to ignore their requests, both for the personnel they need and the materials. Many of the judicial dependencies are obsolete and the information systems do not function well, many of them being mutually incompatible.

The judicial power in Spain lacks its own overall budget.

Only the “CGPJ” has its own budget, but for its own functioning and maintenance. The “CGPJ” is outside the preparation of the budget to administer justice.

The Special Rapporteur stresses that there is a higher probability of the independence of the judicial power being reinforced if the administration of funds is entrusted directly to the judicial power or an independent body of the judiciary. And she underlines that a reduction in the tribunals’ budget hinders considerably the administration of justice, causing backlogs of cases and unjustified delays in the appointment of judges.

In Spain, budgetary constraints are causing considering delays in the resolution of litigation, with judgements being reached several years after the initiation.

Spanish justice has been suffering a high level of litigation for years and is immersed in an infinity of corruption cases which affect political groups, trades unions, financial entities and large companies, so the lack of resources produces an impression of impunity.

In other cases, where police or economics experts helping the judges are required, these must be requested from the executive power, which places serious obstacles, as the communications media are showing, such as the firing and changes in the leadership of the

Special Units of economic crimes, in the command of the anti-corruption unit of the police and in the Public Finances, whose director has issued a regulation to keep for himself the appointment of the official who should help the judge and that the reports prepared by the officials should be reviewed first by the leadership before the presentation to the judges who had commissioned them. There is a risk that the information presented to the judge is compromised (links at the end of the text).

All this arises through the lack of a Technical Section and Judicial Police assigned to the Tribunals or depending on them, impartial and independent of the other powers of the state.

The budgetary restrictions have brought the loss of about one thousand “jueces sustitutos” (interim and non-professional judges, so far provided in intermittent support of incumbent judges), without at the same time having created sufficient posts to compensate such a significant loss. In addition, there is a cohort of judges who have no post. This has resulted in the suspension of trials, and judges having to substitute for their colleagues in cases of illness, vacancies and other reasons, increasing their already high workload.

This means that the principles of a fair trial in a reasonable time cannot be attained.

The commencement of courts and associated posts for judges have been suspended, for instance:

http://www.boe.es/boe/dias/2011/06/25/pdfs/BOE-A-2011-10971.pdf

There is news (at the end of this text) about continual frequent suspensions of trials for lack of judges and for breakdowns and faults in infrastructure and services.

To this is added the internal organisation in which the judge carries out the duties, the judicial office, which provides the support necessary for the exercise of the role, but over which, notwithstanding, the judge lacks organising capacity, although he or she is not exempt from responsibility for all matters concerned with it.

The allocation of work to the officers (clerks of the court) is another source of co-ordination problems, and definitely obstructs and hinders the delivery of an effective justice. All the officers depend hierarchically on the executive power, but some to the state and some to regional executives, the former are the functional managers of the second but it is the executive centrally or regionally which gives them holidays, leave, changes etc . . . ; the same happens with the provision of material and information systems, so that each regional executive creates its own.

The lack of resources reaches such a point that it affects the essential principles and guarantees, such as the principal of immediacy, because the judges, in the submissions and trials, must take notes of what the participants say with which to justify their reasoning in their written decisions, but in the absence of a system of transcription of judicial acts in such a way that they cannot carry out fully the policy on submissions and direct contact through gestures, attitudes, indications and other behaviour of the participants is such a key act of the process. It is necessary for the judge be alert, with all five senses, to what happens in the mentioned act.

**FIVE** – Freedom of association and expression

In accordance with basic international principles, judges will enjoy the right to form

associations of judges and other organisations and become members of them. The objective of these is to represent their interests and defend the judicial independence.

In Spain, the “CGPJ” has denied this right to some magistrates, refusing to let them form part of the board of a platform to defend judicial independence. The Tribunal Supremo has overturned the decision of the “CGPJ”, in ST 6/11/2013 arguing that the body infringed the fundamental rights of the judges to associate and equality.

The Special Rapporteur also emphasised the importance of participation of the judges in the debates about their functions and conditions, as well as in the judicial debate in general.

The reform of the Organic Law of Judicial Power foresaw a curtailment of this right, prohibiting the judges and judicial associations from expressing opinions in the communications media on matters pending before the Tribunals and on judicial resolutions, although they could make comments on matters of doctrine or science in publications or specialised forums.

**SIX** – The allocation of cases to judges

The method of allocation of cases is fundamental to guaranteeing that decisions can be reached in an independent fashion. The basic principles establish that the allocation is an internal matter for the judicial administration, there should not be any external interference. The Rapporteur underlines that the discretion of the tribunal president to assign cases to judges can give rise to the more sensitive cases being assigned to specific judges and excluding the rest; the ability, in some countries, of the presidents to assign or withdraw

cases from judges can give rise to serious abuse. She recommends objective mechanisms in the allocation of cases (by lottery, alphabetic order or similar).

Contrary to the recommendations, the reform of the Organic Law of Judicial Power foresees the most important decisions and the allocation of work remaining in the hands of the president of the Tribunal de Instancia chosen by the “CGPJ”.

And it is proposed that the only figure democratically elected by the judges, the Deacon, be eliminated.

**SEVEN** – THE RESPONSIBILITY OF THE JUDGES: DISCIPLINARY ACTION

The basic principles establish that judges will enjoy personal immunity from civil action for loss and damage arising from undue actions or omissions in the exercise of their judicial functions and, in accordance with the principles and directives on the right to a fair trial and judicial assistance in Africa, neither do they have criminal responsibility for such acts or omissions.

The Committee of Human Rights stresses the judges should not be subjected to criminal responsibility for passing “unjust” sentences or committing errors in their decisions.

With the objective of protecting judges from unjustified judicial action, the Special Rapporteur considers it essential that  judges be given a certain level of criminal immunity. But at the same time it is necessary to ensure that the exemption of judges from responsibility is not abused.

In Spain the judges have civil, criminal and disciplinary responsibility.

Civil responsibility does not occur in other countries: criminal responsibility for the specific crime of judicial prevarication only applies to judges; the conduct described by the penal code does not apply to any other officer or authority, not even for those who serve in the administration of justice such as prosecutors and judicial secretaries, in spite of them both taking decisions and resolutions. And criminal prevarication is unknown in other areas.

In Spain, the introduction of complaints and lawsuits in order to remove judges from the cases they handle is not unusual. So, for example, in the Community of Madrid during 2012 there were actions against 90 judges and magistrates (see page 29 of the Prosecutor's Report http://www.fiscal.es/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Content
disposition&blobheadervalue1=attachment%3B+filename%3DMemoria+FS+Madrid+2013.pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1246969806379&ssbinary=true).

In Spain, judges are not only liable for "intentional prevarication" (*prevaricación dolosa*: wilful wrong-doing) but also for "negligent prevarication" (*prevaricación culposa*: non-intentional mistakes) in their verdicts. According to international principles of law, those judges condemned on the grounds of negligent prevarication should have been acquitted.

The disciplinary responsibility of judges is one of the most sensitive matters which can affect their independence.

The law identifies around 40 type of disciplinary infractions for judges.

In Spain hundreds of disciplinary charges are laid each year against judges, in the majority for delays not always attributable to them but due, in general, to structural faults. Spanish judges are under an excessive workload and are subject to modules approved by the “CGPJ” which, particularly  in the case of base judges, are excessive, these being the most targetted for this reason in spite of their being the most overloaded and delivering most decisions and being the least paid (this point also being a special concern of the Special Rapporteur). As you rise in professional category, fewer disciplinary charges are laid, and at the very top (Supreme Tribunal) they are unknown in spite of the delays, and there are no established modules.

As an example, the number of cases which the “CGPJ” considers acceptable for a judge at the lowest level is 8,000 cases per year. This high workload, under the threat of a disciplinary charge, can make the judge eager to move the case along and finish it soon, rather than resolve it in an independent manner.

In spite of Spain having a level of litigation amongst the highest in the OECD, it has a worse average duration in the processes than countries such as France and the United Kingdom (data from the latest report of the World Bank).

It is difficult for a tired, stressed judge to find the optimal conditions for developing his or her important functions; another factor contributing to error is the constant flow of legislation and the reduced clarity of the laws, many of them entering into force on the day following their official publication,  not with 20 days of *vacatio* as is generally the norm, the numerous

corrections to the laws, modifications to the norms etc. hindering their work, even at times the norms which apply at a given moment are unknown, or at least make the application of the law a hard task.

The judges' performance modules were annulled by the Supreme Tribunal because it was decided that they did not conform to the law, despite which they continue to function as though that sentence did not exist. Judges continue to be rewarded (with a small sum) and punished by the "CGPJ" through the modules.

Finally in this matter we should mention that recently the "CGPJ" and the General State Prosecutor have signed an agreement to inspect the Tribunals and the Prosecutors' Offices:

https://www3.poderjudicial.es/CGPJ/es/Poder_Judicial/Consejo_General_del_Poder_Judicial/Actividad_del_CGPJ/Convenios/Convenio_de_colaboracion_entre_el_Consejo_General_del_Poder_Judicial_y_la_Fiscalia_General_del_Estado_sobre_inspeccion_coordinada_de_organos_jurisdiccionales_y_fiscalias

The union of both bodies causes concern because it will make joint inspections of the judges possible when, precisely, in this matter the independent body should act with total independence from all others, and more so when the State Prosecutor is a body so strongly hierarchical and dependent on the executive power. It is another instance of the lack of respect for the division of powers and could constitute a cause for concern among the judges that can affect their independence, because it cannot be ignored that the prosecutor forms part of all the criminal judicial processes.

In addition to this, there is the inspection by the Executive Power of the judicial offices, where the judges carry out their work.

In these circumstances and the context of the country (full of cases against politicians at every level), the suspicion can arise that inspections are activated selectively, against judges handling such cases.

Nearly all the judges who investigate corruption have been denounced and/or subject to inspection.

The number of disciplinary cases started against judges is notably higher than against officers fo the Ministry of Justice who serve in the administration of justice, such as prosecutors and judicial secretaries, against whom there are very few disciplinary cases, and even fewer for delays.

**EIGHT** – PROTECTION FOR THE JUDGES

The CGPJ  ha refused protection from the start for judges who feel concerned and worried, to the extent that it approved in the regulatory norms (Reglamento de la Carrera Judicial 2011) that it should be the judge that requests it though a procedure similar to a simple administrative process, after an initial examination, delivered to participants, which makes it clumsy and ineffective, apart from lacking in priority and preference.

The essential function of the “CGPJ” is to ensure judicial independence and, as a consequence, protect the judges from the attacks they receive. It tends to happen that these verbal and at times physical attacks come from the participants – and/or their spheres of influence – affected by the processes handled by the judges targets of these attacks, so that

involving the judge in requesting protection from the “CGPJ” means additional work, with an uncertain result which could blur the image of impartiality in the trial (by converting the judge into the accuser of those attacking his or her independence), which could give rise to a challenge and the judge leaving the case. In this way they achieve their goal.

It is not strange that almost no judge requests protection from the “CGPJ”.

Protection should be an instrument applied by the “CGPJ” itself. The ruling of the Supreme Tribunal of 13 June 2008 explains it clearly:

“The guarantee nevertheless acquires meaning when certain specific acts outside the process attempt to influence public opinion, disqualifying the judge or tribunal, doubting their impartiality or pressuring them to resolve current litigation in a specific way, measuring the relevance of those who offer or promote them and the context and manner in which they are spread. The necessary impartiality of the judge means that he or she cannot personally contradict or challenge information around a process or litigation whose resolution he or she is handling, because of the danger of breaching the secrecy of the actions and even losing the impartiality, from the subjective point of view of the participants. In these circumstances, it is reasonable that whoever has the constitutional mandate to ensure the independence of the judicial power, should supply whatever defence which the judge on his or her own cannot provide, with no need to examine the litigation.”

The intense criticism from the press and other media, which might be connected to political parties, trades unions and specific economic, banking or other groups against the judges handling the cases of corruption in which they are implicated can undermine judicial independence.

Recently a magistrate who was handling one of the biggest cases of corruption of a trade union was verbally abused in the street when he was walking to work. The “CGPJ” has not protected him. It has remained silent.

Another judge has suffered attacks from participants and their associates who, although the judge did not register a complaint, achieved their objective of disqualification because the judge was considered a victim, and such a position could affect her image of impartiality. There has been no statement from the “CGPJ” in this case either.

All this is happening because of the lack of an efficient plan to offer judges effective protection, which should also be extended to their families.

The judges, except in a few senior positions, do not have an official vehicle and police protection. Many reach their professional offices on public transport. In their private lives they are part of society, they have children, a family which also suffers, in their own circles the public and media responses to the judges.

In these situations, together with those already described, such as the excessive workload, it is not an exaggeration to affirm that some judges are carrying out their functions heroically.

We do not wish to finish this complaint without mentioning  the factors which affect the impartiality of the prosecutors in Spain, such as the appointment and political dependence of the State General Prosecutor and the strong hierarchical dependence of the prosecutors, as well as the proliferation of posts with free appointment and others which undermine the

principles of irremovability, which can affect their important functions and tarnish the image of impartial and independence justice.

The government prepares a reform to attribute the handling of crimes to the Public Prosecutor, without modifying its internal structure.

The Public Prosecutor in its current configuration is subject to rigid dispositions which guarantee the unity and hierarchical dependence (22 to 27 in the EOMF). In this way, at any moment the superior of a prosecutor can take any case for himself or appoint another prosecutor before or after allocation. The State General Prosecutor can call any prosecutor to his office, give general and particular instructions for a specific case and appoint a prosecutor for a particular case. Disobeying orders given is sanctioned by  expulsion, as occurred with one prosecutor (for not following the instructions of the Chief Prosecutor and not having delivered a figure). The sanction of expulsion from the service was appealed to the Audiencia Nacional, which agreed to the appeal in a decision of 1st October 2013 “because the case had violated the principle of legality, which the Prosecutor is obliged to promote”. The prosecutor has been re-admitted to the organisation and the Chief Prosecutor, who formed part of the Prosecuting Council which decided the expulsion, has been promoted. It is a clear example of what can happen when the Public Prosecutor is assigned to investigate crimes.

Until now the investigation of crimes has been carried out in the majority of cases by independent judges, by virtue of strict norms of allocation and subject exclusively to the law, and to whom cannot be given an order or any direct or indirect hint, which would be a crime.

With this reform the right of citizens to an independent investigation of crimes is removed, and this will undoubtedly affect the many cases of political corruption existing in Spain.

The lack of confidence in the judicial system is prejudicial for democracy and encourages corruption to continue. For the credibility of any judicial system, it is especially important that the public consider that it is independent and impartial. In addition a lack of confidence in justice discourages people from using the justice system which can divert conflict resolution into other modes or informal systems which , in general, do not respect the basic principles of impartiality, equality, non-discrimination and due guarantees (as affirmed by the Special Rapporteur in a report of 13 August 2012).

The matters dealt with in this complaint are some (there are more) of those which affect judicial independence the the image projected to the citizens. Faced with the panorama described, the lack of confidence of the Spanish people in their judicial system is not surprising.

It starts with the lack of resources and the excessive workload, such that the judges cannot carry out their work in appropriate conditions, making them easy targets for any actions for delays without them being able to do anything to avoid it, the “CGPJ” collaborating in establishing an excessive workload and excessive use of its disciplinary powers, at the same time keeping silent about the attacks of all types which many judges are suffering, continues with the maintenance of an inspection system led by a person appointed by members of the “CGPJ” and subordinate to them, the inspection shared with the State General Prosecutor and the Ministry of Justice itself; and continues with the appointment by political parties of the body independent of them; introducing into it people linked directly or indirectly with members of the executive and legislative powers, when not they themselves, such as the deputies selected. All this means that judges cannot judge their cases with total independence, subject only to the law itself and a reasonable duration.

If it weren't because the politicians attempt to influence the decisions of the judges, there would be no reason to expend so much energy on the "CGPJ" – which brings with it the preparation of reports, modification of laws, even the suspension of its application, right in the start of the reform – and would have so much interest in appointing its members. The Special Rapporteur has already warned that for judicial independence internal interference must also be avoided, those that arise from the internal structures.

There is nothing easier for politicians than to introduce themselves, by means of third parties, in that independent body to exercise their influence, hoping that it is not seen as an external influence and limiting, in turn, the direct opposition or resistance which the judges could raise, being "colleagues" those who "formally" send them.

For everything described here, we request your urgent intervention, that you review and check all these complaints and take action in consequence, because it is not possible in the current conditions to guarantee the independence of the judges, nor is the necessary separation of powers respected. We ask for your help given the clear inability of the authorities and internal institutions to end this situation.

LINKS:

http://www.europapress.es/nacional/noticia-dos-asociaciones-judiciales-muestran-indignacion-vergonzoso-paripe-eleccion-presidente-CGPJ-20131210142042.html

http://www.europapress.es/nacional/noticia-upyd-obligara-miercoles-rajoy-pronunciarse-reparto-cuotas-tarta-nuevo-cgpj-20131205165733.html

http://www.europapress.es/nacional/noticia-expertos-gobierno-dicen-ahora-parlamento-elija-todos-vocales-cgpj-20121103114513.html

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[1] Committee of Human Rights, Article 14: the right to a fair trial and to equality before tribunals and courts of justice (CCPR/C/GC/32, para.19); see also communication No.263/1987, Gónzalez del Río c. el Perú, para.5.2

[2] If by independence of the judiciary is understood the absence of inappropriate interference in judicial matters, impartiality normally denotes the absence of prejudice or partiality, see the Inter American Court of Human Rights, Apitz Barbera y otros c. Venezuela, 5th August 2008, para.5, and European Tribunal of Human Rights, Piersack c. Bélgica, 1st October 1982, para.30

[3]