Communication to the

United Nations Human Rights Council

Universal Periodic Review of Spain (2020)

Abuse of pretrial imprisonment in Spain

COLLABORATION OF LAWYERS AGAINST **A**BUSE OF PRETRIAL IM**P**RISONMENT IN **S**PAIN – **UPR2019**

(**CAPS-UPR2019**)

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A. Introduction and background

1. Attention has been drawn in the past to the excessive duration of pretrial imprisonment in Spain[i], the system of secrecy of the pre-trial investigation[ii] (*secreto de sumario*) and incommunicado detention[iii].

2. In the first cycle of the Universal Periodic Review, the United Kingdom[iv], Slovenia[v], Germany[vi] and the Netherlands[vii] asked Spain in advance about the duration of pretrial imprisonment, the secrecy of the pre-trial investigation and incommunicado detention.

3. According to A/HRC/WG.6/8/ESP/2 of 22 February, 2010:

   "63. The HR Committee indicated that Spain should provide, within one year, relevant information on the implementation of its recommendations in paragraphs 13 (national mechanism for the prevention of torture), ***15 (length of pretrial detention)*** *and 16 (matters of detention and expulsion of foreigners).* ***No response has been received."***

4. There is also no record of Spain responding to the concerns expressed with respect to the regime of secrecy of the pre-trial investigation.

5. The Human Rights Committee of the Council of Europe[viii] and the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment (CPT)[ix] has expressed its concern regarding the prison regime known as the *Fichero de Internos de Especial Seguimiento* (FIES) (Registry of Specially Monitored Prisoners).

6. Long-term pretrial imprisonment, the incommunicado detention regime, the FIES registry and the secrecy of the pre-trial investigation are measures that have a notable impact in restricting fundamental rights and involve a significantly high risk of violating other fundamental rights, above all when more than one of these measures are applied at the same time.

7. These measures were designed and incorporated into the Spanish legal system as a response to serious and real threats faced by society and the State. The risks that they could represent were recognized, but it was determined that they mitigated a greater evil.

8. The circumstances that initially justified some of these measures, in particular the FIES registry or incommunicado detention, no longer exist.

9. Moreover, these measures and the reasons for incorporating them into the legal system have had perverse and unexpected effects on the situation of human rights in Spain as a whole.

10. These effects have been manifested in two ways:

    (i) First, despite having been conceived as exceptional measures, some of them have become *normal practice*:

        - The secrecy of the pre-trial investigation, sometimes lasting a number of years and applied at the same time as pretrial imprisonment, has come to be applied systematically to all types of cases.

        - Pretrial imprisonment has become the preferred personal preventive measure over other alternatives, and instances of its excessive duration have increased.

        - The FIES registry (initially created for members of terrorist organizations, and subsequently extended to other organized criminal and particularly violent groups) has come to be applied to people who have not been sentenced, without a criminal history who are being investigated for crimes that do not form part of the hard core of criminal law.

    (ii) The use of these measures had led to the tacit acceptance of pretrial imprisonment by the public authorities and society as a whole as an effective instrument for facilitating the criminal investigation and future sentence.

11. In recent years some cases of pretrial imprisonment have received extensive media coverage both in Spain and abroad. They are cases in which it appears clear that there was an abuse of pretrial imprisonment for purposes that are not related to the risks that this measure is designed to avert.

B. Recent cases of abusive pretrial imprisonment in Spain

I. <u>"Operation Pozzaro"</u>

12. On 18 and 19 October 2011 the news appeared in dozens of media outlets that a money-laundering network of the Italian mafia had been broken up (*"Detenidos en Tenerife trece miembros en la mafia italiana*[x] (Thirteen members of the Italian Mafia arrested in Tenerife)).

13. On 11 May 2016 the National Court issued a judgment finding all those accused of the crime of money laundering not guilty. It only convicted one of the 20 individuals accused for a crime of illegal possession of firearms ("*Absueltos los 20 acusados del blanquear fondos del clan mafioso Polverino*"[xi] (The 20 individuals accused of money laundering from the Polverino Mafia clan acquitted)).

14. Some of those accused individuals spent more than three and a half years in pretrial prison[xii], even though in the trial it was determined that "*there is neither a structured group with a hierarchical dependence on a person that is clearly differentiated from the individuals who make it up, it has not been proved that the purpose was to benefit from money laundering, no organized planning and execution have been demonstrated in the different operations,*

with the goods being acquired from legal sources, nor has any criminal agreement been revealed to create an organization with a certain stable and lasting infrastructure designed for the commission of crime."[xiii]

II. "Operation Mongomo" / "Kokorev Case"

15. On 7 and 8 September 2015 three members of the same family, Vladimir Kokorev, his wife Yulia and son Igor, were detained for money laundering under an international arrest warrant issued by a Criminal Investigation Court in Las Palmas de Gran Canaria (*"Detienen en Panamá a tres presuntos testaferros rusos del presidente Obiang"*[xiv] (Three alleged Russian agents of President Obiang arrested in Panama)).

16. In Panama, they voluntarily accepted extradition and were released on bail. In Spain they were remanded to prison without the possibility of bail, where they remained for more than two years, for most of this time with the pre-trial investigation being conducted in absolute secrecy. They were included in the FIES-V registry, even though they had no criminal record. They began to be released without bail as the appeal court considered that their continued imprisonment could represent an anticipated punishment (*"El juez que llamó "mafiosos" a los rusos deja en libertad a Vladimir Kokorev, presunto testaferro del dictador Obiang"*[xv] (The judge who called the Russians "Mafiosi" releases Vladimir Kokorev, the alleged agent of the dictator Obiang).

17. Mr Kokorev's health deteriorated seriously due to his years in prison (*"Kokorev: La vulneración de mis derechos es salvaje"*[xvi] (Kokorev: A savage violation of my rights).

18. The defence counsels asked for the proceedings be stayed, claiming there was exculpatory evidence and irregularities in the investigation, including manufactured or manipulated evidence (*"El abogado de los Kokorev acusa a la Policía de manipular pruebas y pide el archivo de la causa"*[xvii] (Kokorev's lawyer accuses the police of manipulating evidence and asks for the proceedings to be closed)). The proceedings, which started in 2004 and reached the courts in 2009, have so far been extended to February 2020. No trial is expected before 2024.

III. "Operation Soule"

19. The arrest of Sandro Rosell took place on 23 May 2017 (*"Detenido Sandro Rosell por lavar 15 millones de la venta de derechos del fútbol brasileño"*[xviii] (Sandro Rosell arrested for laundering 15 million from the sale of rights to Brazilian football)).

20. Mr Rosell remained in pre-trial prison without bail for 21 months. He was released after appearing in the hearing, in which he was declared not guilty (*"Sandro Rosell, absuelto tras pasar 643 días en prisión preventiva"*[xix] (Sandro Rosell, declared not guilty after spending 643 days in pretrial imprisonment)).

21. He appealed for release on bail more than twenty times, once offering all his assets that had been seized (35 million euros) as a guarantee that he would appear at the hearing, but his request was rejected (*"Rosell insinúa que comenzaron a investigarle por el Barça"*[xx] (Rosell suggests that they began to investigate him because of Barcelona football club)).

22. The National Court acquitted him on 24 April 2019, and this was confirmed on appeal by

the Appeal Division of the National Court on 3 July 2019. However, in entering its acquittal the National Court denied that Mr Rosell's pretrial imprisonment had been abusive or unjustified.

IV. "Operation Erial"

23. Arrest of Eduardo Zaplana on 22 May 2018 (*"Detenido Eduardo Zaplana por blanqueo de capitales y malversación"*[xxi] (Eduardo Zaplana arrested for money laundering and misappropriation of funds)).

24. Mr Zaplana remained in pretrial imprisonment for 9 months (*"El ex ministro Zaplana sale de la cárcel"*[xxii] (Former minister Zaplana leaves prison)), despite suffering from acute leukaemia and symptoms of *"profound immunodeficiency"* which led to *"opportunistic infections (...) that may cause complications seriously aggravating his medical condition, and even endangering his life"* (*"Zaplana empeora su estado de salud en la cárcel"*[xxiii] (Zaplana's condition worsens in prison)).

25. The secrecy of the pretrial investigation did not prevent leaks to the press from sources close to the investigation in order to justify his detention (*"Zaplana ocultó durante años en Panamá 10,5 millones en sobornos"*[xxiv] (Zaplana hid 10.5 million in bribes for years in Panama)).

26. Despite his delicate health and numerous public requests asking for him to be released on humanitarian grounds (*"Aznar pide a una solución "humanitaria y compasiva" para Zaplana en un deslucido acto"*[xxv] (Aznar asks for a "humanitarian and compassionate" solution for Zaplana at a lacklustre event)), he remained in prison. Among the arguments used were that there are also hospitals in tax havens (*"La juez a Zaplana: "También hay hospitales en paraísos fiscales""*[xxvi] (The judge tells Zaplana that there are also hospitals in tax havens)) and that Mr Zaplana was responsible for being in prison, as he was alleged to have committed a crime (*"La jueza rechaza que Zaplana salga de prisión por motivos de salud"*[xxvii] (The judge refuses to release Zaplana from prison on health grounds)).

27. Unfortunately, these are not isolated cases; they form part of a trend. The aim of this document is to offer an explanation of the circumstances that have provoked or led to this trend and suggest recommendations for correcting it.

C. The circumstances leading to abuse of pretrial imprisonment in Spain

28. The Spanish criminal system combines elements of the inquisitorial and accusatory system, with the inquisitorial system predominating in the first phase of the criminal proceedings (the investigation) and the accusatory in the second (the trial); although aspects of both systems coexist in the two phases. The investigating judge has a dual mandate: he is responsible for moving the investigation forward and determining the facts at issue (in other words, discovering the truth); and he is a "guarantor judge": in other words, he must preserve the fundamental rights that may be affected by the investigation, in particular the rights of suspects or those under investigation.

29. The investigating judge may adopt a number of cautionary measures to guarantee that justice is served; one of them is pretrial imprisonment, which is the measure that has the biggest impact on the fundamental rights of those under investigation.

30. Pretrial imprisonment may affect other fundamental rights apart from the right to freedom, such as the presumption of innocence, the right to a defence, the right to remain silent and the right not to incriminate oneself. When pretrial imprisonment is applied together with other measures such as the secrecy of the pretrial investigation or the FIES registry, the impact on these rights increases exponentially.

31. The entry into prison of itself erodes the presumption of innocence and the effect increases as time passes. The damage to the reputation of persons imprisoned before trial is irreversible, particularly with regard to their career (having to communicate that they may not go to work because they are in prison), and even more so when imprisonment is given extensive media coverage, as in the cases cited above.

32. All prisoners being imprisoned before trial in Spain are treated for all intents and purposes as persons who have been found guilty, except with respect to what may benefit them (such as prison leave permits and improvement in their custody level, or access to the system of day parole or full parole). In most prisons remand and convicted prisoners are housed in the same modules and share cells. Prison officials and other prisoners see remand prisoners who are entered in the FIES registry as worthy of special supervision and thus, of special censure.

33. Imprisonment also limits the right to a defence and, depending on the nature of the case, it may even deny it: a prisoner in the ordinary regime (not incommunicado or included in the FIES registry) can make a maximum of 10 five-minute calls every week from a public phone booth. This is the only way of communicating with the outside world, apart from ordinary mail; and they may only communicate with their lawyers through a glass barrier. They do not have access to a computer, may not review documents or e-mails that could constitute exculpatory evidence.

34. Many people give up their right to remain silent and not to incriminate themselves in order to leave prison. Pretrial imprisonment not only leads to confessions or denunciations; those under investigation may also anticipate the accusation and contribute what they consider is exculpatory evidence or explanations to weaken the grounds on which the cautionary measure is based. This is particularly common in the case of pre-trial investigative proceedings that are subject to secrecy, in which those under investigation may know little or nothing about the evidence against them and try to discover what acts they are being investigated for.

35. The reverse aspect of these risks for fundamental rights is that they are opportunities for the investigation; it is no surprise that police slang calls pre-trial imprisonment “soaking”: a necessary prior step for difficult cases.

36. It is the investigating judge who, being aware that pre-trial imprisonment may facilitate his investigative work enormously, must decide whether the resulting sacrifice of the fundamental rights of those under investigation is justified. The judge is thus placed in a dilemma, as he has to decide whether he is investigating the facts at the cost of sacrificing fundamental rights.

37. The risk to fundamental rights that this involves would be mitigated by appeals to the appeal courts and the Constitutional Court. However, this form of mitigation is not always effective. Due to the predominantly inquisitorial nature of the investigation process, appeal

courts are reluctant to question the decisions of investigating judges with respect to the existence of grounds for pretrial imprisonment, in order to avoid compromising the accusatory examination of the evidence carried out during the trial. Furthermore, it would be ingenuous to ignore the importance of personal relationships between judges (who in Spain form part of the same body of civil servants) and of institutional cronyism in the exercise of the judicial function.

38. Only a tiny fraction of the appeals for *amparo* (judicial protection of constitutional rights) filed are admitted for examination by the Constitutional Court.

39. Cases of abusive pretrial imprisonment do not normally have consequences for the State or the investigating judge who orders them. In practice, damages for undue pretrial detention are not paid if the criminal procedure ends in a conviction. In practice, damages are only paid for pretrial detention in the case of judicial recognition of the absence of a criminal act, but not in cases of stay of the proceedings or acquittal due to lack of evidence.

40. An example can be seen in the case of the murder of the young woman Rocío Wanninkhof, aged 19, on 9 October 1999, known as the "Wanninkhof case", the details of which are in the public domain[xxviii].

41. Dolores Vázquez, from Betanzos in Galicia, the former partner of the mother of the young woman murdered, was charged and convicted at the initial trial. She was held in pretrial imprisonment for 16 months (from September 2000) in this case, and there were numerous police and judicial errors -in fact, it was a particularly serious example of judicial error in Spain.

42. Ms Vázquez was finally acquitted by the High Court of Justice of Andalusia when Tony Alexander King, a British national, was discovered and identified as the real murderer.

43. In 2015 (nearly 15 years after the start of the pretrial imprisonment) the Supreme Court rejected the claim for damages against the Spanish State presented by Dolores Vázquez for undue pretrial detention. The court argued that she was not acquitted due to the absence of a criminal act, but because she did not participate in the act; so her claim had to be made through a different procedural channel, one which she could no longer access when the judgment was entered.

44. This procedural channel required that before applying for damages from the Ministry of Justice, an application to be made to the Supreme Court within a maximum period of 3 months for a ruling that there had been a judicial error in the criminal procedure initiated against her; despite the fact that it was clear that a very serious judicial error had been committed in this case.

45. The requirements and nature of this mechanism for obtaining compensation for undue pretrial detention, which involves obtaining a declaration of judicial error from the Supreme Court, is obviously dissuasive in nature and aims to limit the liability of the State to damages.

D. Conclusions and valuations of recent rulings by the Constitutional Court

46. To sum up, this trend of abusing pretrial imprisonment results from (a) the characteristics of

the Spanish criminal procedure, with an investigating judge; (b) the opportunities for investigation offered by pretrial imprisonment, in particular when applied together with other measures in the Spanish legal system, such as the secrecy of the pre-trial investigation and the FIES registry; and (c) the conditioning of the right to compensation for pretrial imprisonment to innocence (even going so far as to distinguish different classes of innocence for this purpose).

47. Very recently there have been two rulings by the Constitutional Court that are particularly relevant for determining whether this trend towards an abuse of pretrial imprisonment is declining or will decline in the future.

I. The Constitutional Court ruling on the secrecy of the pre-trial investigation and pretrial imprisonment

48. On 17 June 2019 the Constitutional Court granted its support for constitutional rights (*amparo*) on the grounds of violation of the fundamental right to personal freedom (Article 17 of the Spanish Constitution), in relation with the right to due process without denying the right to a defence (Article 24.1 of the Spanish Constitution).

49. The matter considered by the Constitutional Court was "*the constitutional scope of the rights to be informed and to access those elements of the proceedings that are essential for challenging the legality of imprisonment, when the case is subject to secrecy of the investigation (Article 302 of the Criminal Procedure Act) and the accused has been brought before the court and his or her personal situation must be decided in the hearing stipulated in Article 505 of the Criminal Procedure Act.*"

50. In other words, what it is that the person under investigation must know at the time of the hearing before the investigating judge in which the judge decides he must be sent to prison on remand and the case is subject to the secrecy of pre-trial investigation.

51. The *amparo* was granted because "*the situation of denying the accused a defence is related to the very fact of impeding at the start of proceedings every direct or indirect contact with the case documents, preventing the accused from gaining knowledge of what is included in the record of proceedings and is essential for challenging his imprisonment*".

52. It therefore appears that in this case, the person under investigation had been denied all knowledge with respect to the content of the documentary material at the time the entry into pretrial imprisonment was ordered. As we mentioned at the start, this has become normal.

53. We consider it positive that the Constitutional Court recognizes that the secrecy of the preliminary criminal investigation may not be absolute, but the interpretative scope of this decision is reduced to this initial procedural period linked to the determination of the adoption of cautionary measures that deprive a person of freedom and to "*the right of the appellant to receive at that time* ***details of what is essential in the record of the proceedings to challenge the cautionary measure of pretrial detention****, and which the Public Prosecutor's Office had knowledge of earlier, as no access was given to those details of the investigation which, without prejudice to due respect for the secrecy of the initial investigation, could be used to rebut arguments presented to the contrary (Articles 17.1 and 24.1 of the Spanish Constitution)*."

54. The ruling does not deal with how these fundamental rights should be protected subsequently when the measure of unconditional pretrial detention has been adopted against the accused, and the case continues to be secret, often practically until the end of the investigation phase; and it also does not allow any access to the details of the investigation, which due to the passage of time had obviously made progress. This prolongs the prisoner's situation of not being able to defend himself because he cannot provide the grounds to challenge his imprisonment.

55. It is also not satisfactory to limit what the affected person knows to "*what is essential in the proceedings to challenge the cautionary measure of pretrial imprisonment,*" as it leaves a margin that is too broad for the interpretation of what is "essential". It should be recalled that this interpretation will be made by the very judge who has decided on the imprisonment.

56. Unfortunately, we must conclude that this Constitutional Court judgement will not reverse the abusive practice of applying both the secrecy of the pretrial investigation and pretrial imprisonment at the same time to gain opportunities or advantages for the investigation.

II. Constitutional Court judgment on compensation for pretrial imprisonment

57. On 19 June 2019 the Constitutional Court announced its decision to declare unconstitutional the differentiation between innocence due to lack of evidence and innocence due to the objective absence of the criminal act for the purpose of the right to compensation for pretrial imprisonment. However, it left in the hands of the lawmakers the decision on the specific requirements to obtain compensation for undue pretrial imprisonment.

58. We do not expect that it will be possible to obtain compensation for pretrial imprisonment whenever it is undue, regardless of the result of the proceedings; on the contrary, formulas will be found to limit the cases in which this compensation may be obtained, even in cases where the result is acquittal.

E. Recommendations

59. 1) Make the nature of the cautionary measure of pretrial imprisonment more exceptional, by including a number of alternative measures in the Criminal Procedure Act, such as house arrest or GPS tracking through electronic means (for example, a remote controlled bracelet, which is already employed as a matter of course as a security measure for convicted prisoners on day parole).

60. 2) Prevent pretrial imprisonment from being decreed based on evidence or other elements covered by the secrecy of the pre-trial investigation; what those under investigation do not know about the investigation because of this secrecy should not be held against them.

61. 3) No longer include remand prisoners in the FIES registry if they do not have a criminal record.

62. 4) Design and implement protocols to preserve the presumption of innocence of remand prisoners (for example, excusing them from activities designed for their resocialization) and guarantee their right to the defence, providing spaces for meetings with lawyers without physical separation and access to evidentiary material, including any stored on electronic devices or remotely on the Internet.

63. 5) Implement the legal modifications needed so that individuals being held in prison before trial do not have fewer rights than those who have been convicted; and limit the maximum duration of pretrial imprisonment in each case to a quarter of the prison sentence that could be handed down in case of a conviction (given that serving a quarter of the sentence is the normal requirement for convicted prisoners to request ordinary prison leave permits). The calculations of this duration should be based on the minimum possible sentence under the penal guidelines.

64. 6) Implement the legislative modifications and make the necessary mechanisms available so that all undue pretrial imprisonment or undue periods of such imprisonment are compensated. The innocence of the person affected should not be a condition for the right to compensation for abusive pretrial imprisonment. In the last resort, the only way of preventing the exploitation of pretrial imprisonment is to uncouple its nature from the result of the criminal proceedings. Abusive pretrial imprisonment is still abusive even if the person is found guilty. This is also what is required by Article 5 of the European Convention on Human Rights, to which Spain is party.

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[i] CCPR/C/ESP/CO/5 of 5 January 2009, p. 15; A/HRC/WG.6/8/ESP/2 of 22 February 2010, p. 32.

[ii] Idem, p. 18; Idem, p. 34.

[iii] Idem, p. 14.

[iv] https://lib.ohchr.org/HRBodies/UPR/Documents/Session8/ES/spain.pdf

[v] Idem.

[vi] https://lib.ohchr.org/HRBodies/UPR/Documents/Session8/ES/spainAdd.1.pdf

[vii] https://lib.ohchr.org/HRBodies/UPR/Documents/Session8/ES/spainAdd.2.pdf

[viii] CommDH(2005)8, p. 42-43 https://www.refworld.org/docid/43a1986f4.html

[ix] CPT/Inf (2017) 34, p. 67 https://rm.coe.int/pdf/168076696b

[x] https://www.antena3.com/noticias/sociedad/detenidos-tenerife-trece-miembros-mafia-italiana_201110195747588f4beb287180ba1bb2.html

[xi] https://elpais.com/politica/2016/05/11/actualidad/1462975886_532367.html

[xii] https://arcanamundinews.blogspot.com/2017/01/nos-destrozaron-la-vida-y-no-nos-han.html

[xiii] Judgment of the National Court of 11 May 2016

[xiv] https://www.abc.es/internacional/20150918/abci-detenidos-testaferros-obiang-201509180740.html

[xv]https://www.eldiario.es/canariasahora/tribunales/mafiosos-Vladimir-Kokorev-testaferro-Obiang_0_734927114.html

[xvi] https://www.canarias7.es/sociedad/tribunales/la-vulneracion-de-mis-derechos-es-salvaje-IA6424028

[xvii] https://confilegal.com/20180718-el-abogado-de-los-kokorev-acusa-a-la-policia-de-manipular-pruebas-y-pide-el-archivo-de-la-causa/

[xviii] https://www.elconfidencial.com/espana/2017-05-23/la-udef-detiene-al-expresidente-del-barca-sandro-rosell- por-blanqueo-de-capitales_1386883/

[xix] https://www.lavanguardia.com/deportes/20190424/461839066473/sandro-rosell-absuelto.html

[xx] https://www.elconfidencial.com/espana/2019-02-26/sandro-rosell-juicio-fiscalia-carcel-declaracion_1848238/

[xxi] https://www.publico.es/politica/detenido-eduardo-zaplana-blanqueo-capitales-malversacion.html

[xxii] https://murciaeconomia.com/art/61311/el-ex-ministro-zaplana-sale-de-la-carcel

[xxiii] https://www.elplural.com/politica/zaplana-empeora-su-estado-de-salud-en-la-carcel_200279102

[xxiv] https://elpais.com/politica/2018/05/22/actualidad/1526972696_240900.html

[xxv] https://www.elmundo.es/comunidad-valenciana/2018/11/26/5bfc167522601dfd658b459b.html

[xxvi] https://www.elimparcial.es/noticia/197054/nacional/la-juez-a-zaplana:-tambien-hay-hospitales-en-paraisos-fiscales.html

[xxvii] https://www.eldiario.es/cv/corrupcion/rechaza-Zaplana-salga-prision-motivos_0_778672301.html

[xxviii] https://es.wikipedia.org/wiki/Caso_Wanninkhof